

SEC Staff Issues Interpretations on Proxy Disclosure

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As is their customary timing, on Friday afternoon the SEC issued several updated CD&I interpretations of particular interest to the governance community:

–Information About Non-Continuing Directors. The SEC clarified a previous CD&I regarding disclosure of certain biographical information, under Item 401(a) and Item 401(e), about directors whose terms of office will not continue after the annual meeting. Both requirements may be omitted so long as a company provides its Part III of Form 10-K information by incorporating from the proxy statement, and the company files its proxy statement within 120 days after its fiscal year-end. This means most public companies would not have to provide this disclosure. (*116.10 of the Regulation S-K CD&Is*)

–Use of Non-GAAP Information in Proxy Statements. The SEC indicated that non-GAAP financial information that does not relate to pay target levels, but is included in the CD&A or other parts of the proxy statement, are subject to the non-GAAP rules under Regulation G and Item 10(e). The rules provide a specific exemption for disclosure of target levels that are non-GAAP financial measures. As part of the increased effort to demonstrate the connection between pay and performance, companies are more frequently referring to corporate financial data, including non-GAAP financial information, in their discussion of executive compensation.

However, for purposes of pay-related disclosure only, a company can include the required GAAP reconciliation and other information in an annex to the proxy statement, so long as the company includes a prominent cross-reference.

Alternatively, the company can provide a prominent cross-reference to the pages of the Form 10-K that contain the required disclosures, if the non-GAAP financial measures are the same as those included in the Form 10-K, and the Form 10-K incorporates the proxy statement's Item 402 disclosure as part of its Part III information. It appears that an attached annex or Form 10-K are the only options, and it would not be sufficient to instead cite to a website where the reconciliation is posted. (*118.08 of the Regulation S-K CD&Is and Item 108.01 of the Non-GAAP Financial Measures CD&Is*)

–Broker Non-Votes in Frequency Vote Disclosure. The SEC confirmed the disclosure of the number of broker non-votes for the advisory vote on the frequency of say-on-pay is voluntary, not required, under Item 5.07(b) of Form 8-K. (*121A.03 of the Form 8-K CD&Is*)

Relevant links below:

Regulation S-K: <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp>

Exchange Act Form 8-K: <https://www.sec.gov/divisions/corpfin/guidance/8-kinterp>

Non-GAAP Financial Measures: <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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