Akin

SEC Proposes Pay Versus Performance Disclosure Rules

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Summary of Proposed Rules

The proposed rules would add new paragraph (v) to Item 402 of Regulation S-K, which would require the disclosure in annual-or special-meeting proxy or information statements relating to executive compensation details about (a) the relationship between executive compensation **actually** paid to the registrant's named executive officers (NEOs) and the cumulative total shareholder return (TSR) of the registrant, and (b) the relationship between the registrant's TSR and the TSR of a peer group chosen by the registrant, over each of the registrant's five most recently completed fiscal years (or three years for smaller reporting companies). The new disclosure is intended to provide useful information to shareholders when deciding whether to approve the compensation of the NEOs through the say-on-pay advisory vote, as well as when making voting decisions on compensation plans for NEOs and the election of directors.

New Tabular Disclosure. The amendments would require new tabular disclosure (in the format set forth below) showing the following information for each year covered by the table:

- total compensation reported in the Summary Compensation Table (SCT) for the principal executive officer (i.e., the chief financial officer (CEO)) and the average of the reported amounts of total compensation for the remaining NEOs identified in the SCT.
- compensation **actually paid** to the CEO and the average of the compensation **actually paid** to the remaining NEOs. Executive compensation **actually paid**would be

the total compensation for the covered fiscal year for each NEO, as disclosed in the SCT, but adjusted:

    - for pension benefits, to deduct the change in pension value and add back the actuarially determined pension service cost for services rendered during the applicable year
    - for equity awards, to deduct the fair value of equity awards granted during the year and add back the fair value on the vesting date of equity awards that vested during the year.

- the company's TSR, calculated in accordance with the definition of TSR in Item 201(e) of Regulation S-K
- the TSR of the companies in a peer group, using the peer group identified by the company in its stock performance graph or in its Compensation Discussion and Analysis.

Click here to see an example of a Pay versus Performance Table.

New Narrative/Graphic Disclosure. Using the information provided in the table, companies also would be required to describe, for the periods covered by the table, (a) the relationship between the executive compensation actually paid to the CEO and other NEOs and the company's TSR, and (b) the relationship between the company's TSR and the TSR of the company's identified peer group. This information could be presented in narrative form, graphically (such as with plotted lines showing the change in compensation and TSR over the relevant period), in a table or through a combination of methods.

Voluntary Supplemental Disclosure. Companies would be permitted to supplement the disclosure required by proposed Item 402(v) to reflect company-or industry-specific circumstances. Specifically, the proposing release notes that a company may include additional years of data or disclose supplemental measures of compensation other than compensation "actually paid" (e.g., realized pay or realizable pay), provided that any supplemental disclosure is clearly identified, is not misleading and is not presented with greater prominence than the required disclosure.

Companies and Filings Subject to Pay Versus Performance Disclosure. All public companies that file proxy or information statements would be subject to the proposed rule, except (a) emerging growth companies, (b) foreign private issuers and (c) registered investment companies. Smaller reporting companies would be subject to the proposed rule subject to the reduced disclosure and phase-in requirements discussed below.

Pay versus performance disclosure would be required in proxy statements for annual and special shareholder meetings filed on Schedule 14A and information statements filed on Schedule 14C. The disclosure would not be required in registration statements on Form S-1 or annual reports on Form 10-K, regardless of whether such forms include Item 402 compensation disclosure, nor would it be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the company specifically incorporates it by reference.

Because the disclosure will be provided pursuant to Item 402, it will be covered by the advisory say-on-pay vote.

Persons Covered. The compensation actually paid and relationship to TSR must be presented for each of the registrant's NEOs. Pay would be reported separately for the principal executive officer (i.e., the CEO), individually, and as an average for the remaining NEOs listed in the summary compensation table. If more than one person served as CEO in any fiscal year, the aggregate compensation actually paid to those persons would be required to be disclosed for that year as the compensation actually paid to the CEO.

Periods Covered. For companies other than smaller reporting companies, the proposed rule would be phased in over three years, with three years of disclosure initially required and five years of disclosure eventually required. Smaller reporting companies initially would be required to disclose two years of information and three years of information thereafter. Companies would not be required to include periods prior to becoming an SEC-reporting company.

XBRL Requirement. Companies would be required to tag the disclosure in the Pay versus Performance Table using eXtensible Business Reporting Language. Companies would separately tag the values disclosed in the table and separately block-text tag the disclosure of the relationship among the measures, the footnote disclosure of deductions and additions used to determine executive compensation actually paid and the footnote disclosure regarding vesting date valuation assumptions. The interactive data would have to be provided as an exhibit to the definitive proxy or information statement filed with the SEC. This requirement would be phased in for smaller reporting companies so that they would not be required to comply with the tagging requirement until the third annual filing in which the pay versus performance disclosure is provided.

Timing for Implementation and Action Items

The new disclosure requirements regarding pay versus performance will not be effective until the SEC adopts final rules. While the timing of the adoption of the final rules is unclear, companies should plan for the possibility that the new requirements could go into effect as soon as the 2016 proxy season.

Categories

Executive Compensation

Compliance