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SEC rule amendments require proxy disclosure of executive pay versus performance

On August 25, the SEC adopted rule amendments that require registrants to disclose, in proxy or information statements in which executive compensation disclosure is required, information showing the relationship between compensation actually paid to their named executive officers and the company's financial performance. Emerging growth companies, foreign private issuers, and registered investment companies are not subject to the new requirements, which apply in scaled form to smaller reporting companies.

Under a new paragraph (v) to Item 402 of Regulation S-K, registrants are required to disclose in a table the compensation actually paid to their named executive officers and specified financial performance measures for five fiscal years (three years in the case of smaller reporting companies), subject to a phase-in period. The tabular presentation must be accompanied by a clear description of the relationships for each fiscal year between such compensation and the financial performance measures. The registrant also must present a tabular list of the most important financial performance measures used to link such compensation to company performance for the most recently completed fiscal year.

The SEC's objective is to make pay-versus-performance information "clear and easy for investors to evaluate" in order "to facilitate investors' consideration of the alignment between pay and performance" when voting on the election of directors or approval of executive compensation or other compensation-related matters, or when making investment decisions. Although the SEC states that Item 402(v) largely requires registrants to "repackage" executive compensation information already disclosed in proxy statements, or information underlying those disclosures, rather than to produce substantial additional information, compliance with

the new mandate will entail significant disclosure judgments.

The pay-versus-performance disclosure is required in filings for fiscal years ending on or after December 16, 2022, which will include 2023 proxy statements filed by registrants with a December 31 fiscal year-end.

The amendments will become effective on October 11, 2022. The SEC's lengthy release (No. 34-95607) can be viewed [here](#) and the related SEC fact sheet [here](#).

Overview

The rule amendments implement Exchange Act Section 14(i), which was added by a provision of the Dodd-Frank Act directing the SEC to require registrants to disclose, in any proxy or consent solicitation material for an annual meeting of shareholders, information that clearly shows the relationship between executive pay and the company's financial performance. Under the amendments, registrants are required to include the pay-versus-performance disclosure in any proxy or information statement for which executive compensation disclosure under Item 402 of Regulation S-K is required. As a result, the new disclosures will be limited to filings relating to shareholder action with respect to an election of directors or executive compensation and will not be required in other filings, such as registration statements, in which executive compensation disclosure is required.

The SEC has prescribed the major elements of the new disclosure in a standardized format to promote consistency in presentation and comparability of disclosures across registrants and within a registrant's filings over time. The requirements are primarily contained in a new paragraph (v) to Item 402 of

Regulation S-K that appears under the caption “Pay versus performance.”

Disclosures. With some exceptions for smaller reporting companies, the registrant is required by Item 402(v) to provide the following disclosures in its proxy or information statement:

- a table presenting, for each of the last five fiscal years (subject to the phase-in periods described below):
 - total compensation paid to the principal executive officer (PEO) and average total compensation paid to the other named executive officers (NEOs) as reported in the registrant’s summary compensation table appearing as part of other executive compensation disclosures;
 - compensation “actually paid” to the PEO and average compensation “actually paid” to the other NEOs, calculated by making specified adjustments to the amounts reflected in the summary compensation table; and
 - specified company performance measures, consisting of (i) the registrant’s cumulative total shareholder return (TSR), (ii) the TSR of its peer group, (iii) the registrant’s net income, and (iv) a measure identified by the registrant as the most important financial performance measure used to link compensation actually paid to its NEOs for its most recently completed fiscal year to company performance (referred to as the “Company-Selected Measure”);
- a clear description, in narrative or graphical form or a combination of such formats, of the relationships for each fiscal year covered by the table between (i) the compensation actually paid to the PEO and other NEOs as presented in the table and (ii) the financial performance measures presented in the table; and
- an unranked tabular list of at least three, and up to seven, of the most important financial performance measures, including the Company-Selected Measure, used by the registrant to link compensation actually paid to its NEOs for its most recently completed fiscal year to company performance.

The registrant is permitted to include supplemental measures of compensation or financial performance and other supplemental information in the table and as part of the other Item 402(v) disclosures, so long as the additional disclosure is clearly marked

as supplemental and satisfies the “Plain English” principles summarized below.

Scaled disclosure for smaller reporting companies.

In addition to being permitted to provide pay-versus-performance disclosure for three fiscal years, instead of five fiscal years as required for all other registrants, smaller reporting companies are not required to disclose a peer group TSR, a Company-Selected Measure, or a tabular list of the most important financial performance measures, or to disclose amounts related to pensions for purposes of disclosing NEO compensation actually paid. A smaller reporting company’s description of the linkage of actual NEO pay to performance will appear in a scaled disclosure that does not refer to those measures unless the registrant includes them as supplemental information.

Supplemental disclosure. Registrants may provide information in addition to the information specifically required by the amendments so long as they observe the “Plain English” principles of Exchange Act Rules 13a-20 and 15d-20. The SEC construes those principles to require that the additional information:

- not be misleading;
- not obscure the required information; and
- not be presented with greater prominence than the required disclosure.

If the registrant elects to include supplemental information, the information must be clearly marked as supplemental in the applicable disclosure, such as by a heading in the table or by a reference in the narrative or graphical text.

Format. Except as expressly specified, Item 402(v) generally permits registrants to choose the format – whether narrative, graphical, tabular, or a combination – in which they believe they can most effectively address the pay-versus-performance relationship. In accordance with the SEC’s 2006 guidance in adopting the current executive compensation rules, the disclosure design must be clear, understandable, consistent with applicable disclosure requirements and any other included information, and not misleading.

Location. Item 402(v) affords registrants the flexibility to determine where in the proxy or information statement to provide the required disclosure. In particular, the SEC notes that the new information is not required to appear in the Compensation Discussion and Analysis (CD&A).

Executives covered. The table will cover compensation for the PEO and the average compensation for the other named executive officers. If more than one individual served as PEO during a covered fiscal year, the registrant must include each PEO and disclose compensation for each such officer separately. The registrant also must identify the other named executive officers in a footnote to the table so that, as the SEC explains, investors can consider the effect on the average total compensation amounts of changes in the composition of such officers from year to year.

Summary compensation table totals for PEO and other NEOs. The new table will show for each fiscal year, as reflected in the “Total” column of the summary compensation table, (i) the total compensation amount for the PEO and (ii) the average (mean) of the total compensation amounts for the other named executive officers.

Compensation actually paid to PEO and other NEOs. The SEC contrasts the mandate of Exchange Act Section 14(i) implemented by Item 402(v), which is to require registrants to disclose the compensation “actually paid” to their named executive officers, with the directive elsewhere in Item 402 for registrants to disclose “compensation awarded to, earned by or paid to” the NEOs. To address Section 14(i)’s focus on actual pay, Item 402(v) requires registrants to adjust certain amounts reflected in the summary compensation table in order to arrive at amounts considered actually paid and more closely aligned with the executive’s performance during the same period.

In accordance with Item 402(v), the registrant is required to adjust the amounts reflected in the summary compensation table for (i) pension benefits and (ii) equity awards.

Pension benefits. For pension benefits, the registrant must adjust the summary compensation table totals by:

- deducting the change in actual present value of all defined benefit and actuarial pension plans, and adding back (i) the actuarially determined service cost for services rendered by the executive during the covered fiscal year and (ii) the entire cost of benefits granted in a plan amendment (or initiation) during the covered fiscal year that are attributed by the benefit formula to services rendered in periods before the plan amendment or initiation; and
- adding to the total compensation reported in the summary compensation table above-market or preferential earnings on deferred compensation that is not tax-qualified.

Equity awards. The adjustments reflect compensation represented by stock and option awards as it is earned rather than upon vesting. For equity awards, the registrant must adjust the summary compensation table totals by deducting the reported equity award amounts from the total compensation reported in the table and:

- adding the year-end fair value of all equity awards granted during the covered fiscal year that are outstanding and unvested as of the end of the covered fiscal year;
- adding the amount equal to the change as of the end of the covered fiscal year (from the end of the prior fiscal year) in fair value (whether positive or negative) of any awards granted in any prior fiscal year that are outstanding and unvested as of the end of the covered fiscal year;
- adding the fair value as of the vesting date of awards that are granted and vest in the same covered fiscal year;
- adding the amount equal to the change as of the vesting date (from the end of the prior fiscal year) in fair value (whether positive or negative) of awards granted in any prior fiscal year that vest in the covered fiscal year;
- subtracting the amount equal to the fair value at the end of the prior fiscal year of awards granted in any prior fiscal year that fail to meet the applicable vesting conditions during the covered fiscal year; and
- adding the dollar value of any dividends or other earnings paid on stock or option awards in the covered fiscal year prior to the vesting date that are not otherwise included in the total compensation for the covered fiscal year.

The registrant is required to describe in footnotes to the table the amounts deducted from, and added to, the total compensation amounts reflected in the summary compensation table to calculate the compensation actually paid to the NEOs. Item 402(v) also requires footnote disclosure of any valuation assumptions with respect to equity awards that materially differ from those disclosed by the registrant at the time of grant.

Registrant total shareholder return. As one of the required company financial performance measures, the registrant is required to present for each fiscal year its total shareholder return calculated on a cumulative basis through the end of that fiscal year. In calculating TSR, the registrant must employ the same methodology it uses to prepare its stock

performance graph in accordance with Item 201(e) of Regulation S-K. To promote comparability with TSR presentations of other registrants, the registrant's TSR, as well as the peer group TSR, must be calculated based on an initial fixed investment of one hundred dollars.

Peer group total shareholder return. As an additional measure of financial performance, Item 402(v) requires the registrant to present for each fiscal year the cumulative TSR of a peer group, weighted according to the stock market capitalizations of the peer companies at the beginning of each period for which a return is indicated. The registrant must use for this measure either the same peer group it uses for its stock performance graph or the peer group it discloses in its CD&A description of its executive compensation benchmarking practices.

Registrant net income. Item 402(v) requires inclusion of the registrant's net income, as presented in its financial statements, for each fiscal year as a standardized financial performance measure to complement the market-based TSR measure.

Company-Selected Measure. Item 402(v) defines the "Company-Selected Measure" as the measure "which in the registrant's assessment represents the most important financial performance measure (that is not otherwise required to be disclosed in the table) used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance." The registrant must identify the Company-Selected Measure from its tabular list of the "most important" financial performance measures discussed below.

If the registrant's "most important" financial performance measure is already included in the table (as TSR or net income), the registrant would be required to select its next most important measure as the Company-Selected Measure. Although the rule obligates the registrant to include only one Company-Selected Measure, it permits the registrant, consistent with the Plain English principles referred to above, to disclose in the table additional performance measures as new columns if it believes the additional measures are "important" measures.

The SEC affirms that a registrant will not be required to disclose a Company-Selected Measure if it only uses financial performance measures already required to be disclosed in the table to link NEO compensation to company performance, or if it does not use any such measures for this purpose.

The reference to "Company-Selected Measure" in the title of column (i) of the table will be replaced by the name of the registrant's most important measure. For example, if the Company-Selected Measure is determined to be total revenue, the data would appear under the title "Total Revenue."

The registrant is required to include its numerically quantifiable performance under the Company-Selected Measure for *each fiscal year* of the period covered by the table. By way of example, the SEC indicates that if the Company-Selected Measure for the most recently completed fiscal year is determined to be total revenue, the registrant would disclose its quantified total revenue performance for each covered fiscal year, not just for the most recently completed fiscal year.

The SEC notes Item 402(v) does not require the registrant to describe the methodology it used to calculate the Company-Selected Measure, but cautions that the registrant should consider whether such a disclosure would be helpful to investors or necessary to prevent the Company-Selected Measure from being confusing or misleading.

Any disclosure of a Company-Selected Measure that is a non-GAAP financial measure is entitled to the same accommodation under SEC rules as disclosure in the CD&A of a non-GAAP financial measure used as a target level of performance. Accordingly, the Item 402(v) non-GAAP disclosure would not be subject to the general rules applicable to disclosure of non-GAAP financial measures. Consistent with Instruction 5 to Item 402(b), however, the registrant would be required to disclose how a non-GAAP Company-Selected Measure is calculated from its audited financial statements.

[Description of relationships between compensation actually paid and company performance](#)

Item 402(v) requires the registrant to use the information presented in the table to provide, over the fiscal years covered by the table, a "clear description" of the "relationships" between (i) the compensation actually paid to the CEO and the average of the compensation actually paid to the other NEOs and (ii) the registrant's TSR, its net income, and the Company-Selected Measure.

If the registrant includes any additional performance measures in the table, such as more than one Company-Selected Measure, its disclosure also must describe the relationships between executive compensation actually paid and the additional

measures. The SEC indicates that the registrant may “group” any of the relationship disclosures so long as the combined description of multiple relationships is “clear.”

The registrant may present the description in narrative or graphical form or a combination of such formats. The SEC encourages registrants “to present this disclosure in the format that most clearly provides information to investors about the relationships, based on the nature of each measure and how it is associated with executive compensation actually paid.” The SEC offers as two examples of potential presentations:

- a graph that shows on parallel axes executive compensation actually paid and change in the financial performance measure or measures (TSR, net income, or Company-Selected Measure) and that plots compensation and the applicable measure or measures over the required time period; and
- narrative or tabular disclosure that shows the percentage change over each fiscal year of the required time period in both executive compensation actually paid and the financial performance measure or measures, together with a brief discussion of how the changes are related.

In addition, the registrant must include as part of the relationship disclosures a comparison of (i) the registrant’s TSR and (ii) the TSR of its peer group over the fiscal years covered by the table. The SEC states that the inclusion of the peer group TSR in the table and discussion of the relationship between the registrant’s TSR and the peer group TSR is intended to provide a basis for assessing the registrant’s pay-for-performance alignment compared to the financial performance of the registrant’s peers over the same time period. The SEC adds that it expects that this disclosure also will “provide investors with more comprehensive information for assessing whether the registrant’s performance was driven by factors common to its peers or instead by the registrant’s own strategy and other factors.”

Tabular list of most important financial performance measures

As the final component of the pay-versus-performance disclosure, the registrant is required to provide a tabular list of at least three, and up to seven, financial performance measures which the registrant believes represented the “most important” such measures it used to link compensation actually paid to its named executive officers to company performance for its most recently completed fiscal year. The SEC notes that this

disclosure is intended to supplement information in the registrant’s CD&A, which, although required to address “all material elements of the compensation paid,” is not subject to mandatory disclosure of the measures that determined actual NEO pay.

The SEC confirms that registrants that do not use any financial performance measures to link NEO compensation actually paid to company performance are not required to present such a list.

Number of tabular lists. Item 402(v) states that the registrant may provide the tabular list disclosure as:

- one separate tabular list;
- two separate tabular lists, one for the PEO and one for all other named executive officers; or
- separate tabular lists for the PEO and for each other named executive officer.

Each list must include at least three, and up to seven, of the most important financial performance measures used to link compensation actually paid to the particular NEO or NEOs to company performance.

No ranking of performance measures. Item 402(v) does not require the registrant to rank the measures included in the list.

Number of performance measures listed. The registrant may include in the list fewer than three financial performance measures if fewer than three such measures were linked to compensation actually paid to its named executive officers, but in such an event must include all financial performance measures used.

The list may include a maximum of seven performance measures even if the registrant elects to include non-financial performance measures in the list, as discussed below.

Nature of performance measures listed. Although the only required disclosures in the list are financial performance measures, Item 402(v) provides flexibility for the registrant also to include performance measures that do not fall within the definition of “financial performance measures.” The Item defines financial performance measures to refer to:

- measures that are determined and presented in accordance with the accounting principles used in preparing the registrant’s financial statements;
- any measures that are derived wholly or in part from the above measures;
- stock price; and

- total shareholder return.

The registrant may include non-financial performance measures in the list if it (i) determines that those measures are among its most important performance measures and (ii) has disclosed its three most important financial performance measures (or fewer than three, if the registrant uses fewer than three such measures).

Methodology. The registrant is not required to discuss the methodology it used to calculate the measures included in the list, although the SEC indicates that the registrant should consider doing so if such a discussion would help investors understand the measures or would be necessary to prevent the tabular list disclosure from being confusing or misleading.

Looking ahead

The SEC adopted the rule amendments over the dissenting votes of two Commissioners and after a seven-year rulemaking process that generated a heavy volume of comments on the proposal. The final amendments are more expansive than many had predicted early in the process.

The SEC had discretionary authority to craft the new requirements within the mandate of Exchange Act Section 14(i). In exercising this authority, the SEC, as it acknowledges, “elected not to pursue a principles-based approach,” but instead chose to adopt a number of standardized, prescriptive disclosure elements. The SEC judges that this approach, which attracted critical comment from one of the dissenting Commissioners, will make the Item 402(v) disclosures “significantly more comparable” across time periods and registrants than CD&A disclosures, and will enhance the ability of investors and others to evaluate the pay-versus-performance linkage.

The SEC recognizes that Item 402(v)’s disclosure framework might not present a complete picture of the relationship between executive pay and financial performance in the registrant’s particular circumstances. Item 402(v) provides flexibility for the registrant to present a fuller account of this relationship by adding performance measures and other supplemental information to the mandated disclosures. Although the SEC concedes that this accommodation “does not provide registrants with the full flexibility of a principles-based approach,” it should elicit additional disclosures that will provide a surer guide to the alignment of pay and performance.

Important disclosure-related decisions and actions required to implement the amendments warrant early attention by registrants as the 2023 proxy season draws closer. Among other actions, registrants should identify the personnel and resources that will be enlisted to comply with the new requirements; compile pay-versus-performance information from existing disclosures; compute adjustments to pension benefits and equity award values required to produce the actual pay amounts reflected in the new table; and identify the most important financial performance measures that will be presented in the disclosure. Further, in addressing the centerpiece of Item 402(v) disclosure, registrants will have to develop their description of the linkage between actual NEO pay and company outcomes and consider how the new presentation will relate to disclosures addressing pay and performance presented in the CD&A and elsewhere in the proxy statement.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.

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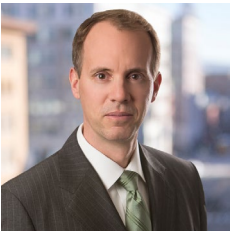
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