

## SEC Finalizes Pay Versus Performance Disclosure Rules

September 2, 2022

On August 25, 2022, the U.S. Securities and Exchange Commission (SEC) adopted final rules implementing the “pay versus performance” disclosure requirement required by Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC initially issued proposed rules on the pay versus performance disclosure requirement in April 2015 and reopened the comment period for the proposed rules in January 2022. The final rules, which are discussed more fully below, are set forth in Release No. 34-95607 ([Release](#)) and will become effective 30 days following publication of the Release in the *Federal Register*.

### Summary of Final Rules

The final rules add new paragraph (v) to Item 402 of Regulation S-K, which will require registrants to describe the relationship between the compensation actually paid to executives by the registrant and the financial performance of the registrant, in any proxy statements for annual and special shareholder meetings filed on Schedule 14A and in information statements filed on Schedule 14C. The pay versus performance disclosure will not be required in other filings where disclosure under Item 402 of Regulation S-K is required, such as registration statements on Form S-1 and annual reports on Form 10-K.

Commencing with fiscal years ending on or after December 16, 2022, the final rules apply to all reporting companies, except foreign private issuers, registered investment companies and emerging growth companies (ECGs). Smaller Reporting Companies (SRCs) will be permitted to provide scaled-down disclosures.

*Tabular Disclosure.* New Item 402(v) of Regulation S-K will require registrants to provide a table disclosing specified executive compensation and financial performance measures for the registrant’s five most recently completed fiscal years (three years in the case of SRCs). Registrants are required to disclose the following information for each year covered by the table:

- The total principal executive officer (PEO) compensation reported in the Summary Compensation Table (SCT) and the value of the executive compensation “actually paid” to the PEO;

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- *Multiple PEOs.* If a registrant has multiple PEOs in a single year, the final rules require registrants to include separate SCT total compensation and executive compensation actually paid columns for each PEO.
- *Actually Paid.* The final rules set forth a complex methodology for calculating the executive compensation “actually paid.” At a high level, the executive compensation “actually paid” is the total compensation amount reported in the SCT for the covered fiscal year, subject to adjustments for pension benefits, above-market or preferential earnings on nonqualified deferred compensation and the value of equity awards, each as described in detail in the Release. Registrants will be required to provide footnote disclosure describing such adjustments.
- The average total compensation for named executive officers (NEOs) (other than the PEO) reported in the SCT and the value of the average executive compensation “actually paid” to the NEOs (other than the PEO);
  - Registrants are required to identify in footnote disclosure the individual NEOs whose compensation amounts are included in the average for each year so investors can consider whether changes reported from year to year were due to compositional changes in the included NEOs.
- The value of a fixed investment scaled by cumulative total shareholder return (TSR) for the registrant, calculated in accordance with Item 201(e) of Regulation S-K;
- The value of a fixed investment scaled by cumulative TSR for the selected peer group;
  - Registrants may use either the same peer group used for purposes of Item 201(e) of Regulation S-K or a peer group used in the Compensation Discussion and Analysis for purposes of disclosing registrants’ compensation benchmarking practices.
- The registrant’s net income; and
- A financial performance measure chosen by the registrant and specific to the registrant (the “Company-Selected Measure”) that, in the registrant’s assessment, represents the most important financial performance measure the registrant uses to link compensation actually paid to the registrant’s NEOs to company performance for the most recently completed fiscal year.
  - A registrant’s Company-Selected Measure, or additional measures included in the table, may be non-GAAP financial measures. The final rules specify that disclosure of a non-GAAP financial measure will not be subject to Regulation G and Item 10(e) of Regulation S-K; however, disclosure must be provided as to how the number is calculated from the registrant’s audited financial statements.

[Click here to see an example of a Pay versus Performance Table.](#)

*Comparative Relationship Disclosure.* Using the information provided in the table, registrants also will be required to provide clear descriptions of the relationships between (a) the executive compensation “actually paid” to the PEO and (b) the average of the executive compensation “actually paid” to the remaining NEOs, to each of the following measures of financial performance: (i) the TSR of the registrant; (ii) the net income of the registrant; and (iii) the registrant’s Company-Selected Measure, in

each case over the registrant's five most recently completed fiscal years. Registrants are also required to disclose the relationship between the registrant's TSR and its peer group TSR over the registrant's five most recently completed fiscal years. Registrants are provided flexibility as to the format in which to provide these relationship descriptions, whether graphical, narrative or a combination, and whether to group any of these relationship disclosures.

*List of "Most Important" Performance Measures.* In addition, the final rules require registrants to provide an unranked tabular list of three to seven financial performance measures that, in the registrant's assessment, represent the most important performance measures for linking executive compensation actually paid during the fiscal year to company performance. Registrants are permitted, but not required, to include non-financial performance measures in the tabular list if such measures are among their most important performance measures.

*Scaled Disclosure for SRCs.* SRCs are subject to scaled-down disclosure requirements under which they are not required to provide a peer group TSR or a Company-Selected Measure, or any comparative relationship disclosure related to such measures. In addition, SRCs are not required to provide the tabular list of the most important performance measures as described above, or disclose amounts related to pensions in calculating executive compensation actually paid.

*Phase-In for Time Periods Covered.* Registrants, other than SRCs, will be required to provide the pay versus performance disclosure for the last three fiscal years in the first applicable filing after the rules become effective, adding an additional year of disclosure in each of the two subsequent annual proxy filings that require this disclosure, for a total of five years. SRCs will be required to provide the disclosure for the last two fiscal years in the first applicable filing after the rules become effective, adding an additional year of disclosure in the subsequent annual proxy or information statement that requires this disclosure, for a total of three years. Registrants are not required to provide pay versus performance disclosure for years prior to becoming a reporting company pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934.

*Voluntary Supplemental Disclosure.* The final rules permit registrants to provide supplemental measures of compensation or financial performance (in the table or in another disclosure), so long as any such measure or disclosure is clearly identified as supplemental, not misleading and not presented with greater prominence than the required disclosure.

*Interactive Data.* The final rules require registrants to tag the disclosure in interactive data format (XBRL).

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