

PUBLICATION

SEC Proposed Pay-Versus-Performance Disclosure Rules [Ober|Kaler]

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A periodic bulletin keeping small businesses informed about current developments in securities law and related matters.

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Securities and Exchange Commission (SEC) has proposed amendments to its executive compensation disclosure rules requiring SEC reporting companies to disclose the relationship between compensation "actually paid" to their named executive officers and the company's financial performance, measured as total shareholder return (TSR).

The proposed disclosure would consist of two parts – a table showing compensation and TSR amounts and a discussion of the relationship between performance and executive pay.

Tabular Disclosure – Compensation Amounts and TSR

The table would include (i) the year for which the relevant information is being presented, (ii) the total compensation of the company's principal executive officer (PEO) as presented in the summary compensation table, (iii) the compensation actually paid to the PEO, (iv) the average of the total compensation of the company's other named executive officers as set forth in the summary compensation table, (v) the average total compensation actually paid to the other named executive officers, (vi) the company's TSR, and (vii) for other than smaller reporting companies, peer group TSR. TSR would be calculated in the same manner that SEC reporting companies use to prepare their stock performance graph pursuant to Item 201(e) of Regulation S-K, and the peer group used would be the group used for preparing the stock performance graph or in the company's compensation discussion and analysis for disclosing the company's compensation benchmarking practices.

Under the proposal, compensation "actually paid" to the company's PEO and other named executive officers is calculated by adjusting the total compensation disclosed in the summary compensation table as follows: (i) for other than smaller reporting companies, deducting the change in the actuarial present value of defined benefit and pension plans and adding back the actuarially determined service costs under such plans attributable to services rendered by the executive during the applicable year (smaller reporting companies are not required to include this figure in the summary compensation table); (ii) deducting the grant date fair value of equity awards as disclosed in the summary compensation table and adding instead the fair value of such awards on the date of vesting; and (iii) adding the incremental fair value for modifications to options or stock appreciation rights, including a change to the exercise price. Companies would be required to disclose the assumptions used to value equity awards if they differ in a material way from those disclosed in the financial statements for the assumptions used for the grant date fair value. Footnotes to the table disclosing the amounts deducted from and added to the total compensation set forth in the summary compensation table in order to calculate compensation actually paid would also be required.

Under the proposed amendments, the disclosure in the table, including the footnotes, would be provided in interactive data format using eXtensive Business Reporting Language (XBRL).

Narrative or Graphic Discussion of "Performance"

The proposed amendments would require SEC reporting companies, using the information in the table, to describe the relationship between the executive compensation actually paid the company's CEO and the average compensation actually paid to the other named executive officers, and the cumulative TSR for the last three years in the case of smaller reporting companies and last five years for all other SEC reporting companies. SEC reporting companies other than smaller reporting companies would also have to provide a comparison of the cumulative TSR of the company and the TSR of the selected peer group over the same period.

The proposed amendments do not dictate how such disclosure would be provided, rather leaving this up to the discretion of the individual company. As proposed the discussion could be presented "as a narrative, graphically, or a combination of the two." This discussion would, however, also have to be provided in XBRL.

Applicability and Transition Provisions

As proposed, only foreign private issuers, registered investment companies and emerging growth companies would be exempt from the proposed disclosure requirement. As proposed, the new disclosure would be required in any proxy or information statement in which executive compensation information pursuant to Item 402 of Regulation S-K was required to be included.

As proposed, the amendments would be phased in so that smaller reporting companies start with two years of disclosure in the first year and all others three, adding a year of disclosure in subsequent years until companies are reporting five years of data, or three years for smaller reporting companies. Companies would be required to provide the proposed disclosure only for years that they were an SEC reporting company. In addition, smaller reporting companies would not be required to present the information in XBRL until the third filing in which it presents the new pay-versus-performance disclosure.

The adopting release for the proposed pay-versus-performance disclosure requirement is available [here \[PDF\]](#).