cohen&grigsby® | a culture of performance

SEC Proposes Pay-for-Performance Rules

April 30, 2015

The Securities and Exchange Commission has proposed for comment rules that would implement Section 953(a) of the Dodd-Frank Act. Section 953(a) added Section 14(i)(3) to the Securities Exchange Act of 1934 which directs the SEC to adopt rules requiring companies to disclose in any proxy or consent solicitation for an annual meeting of stockholders information that shows the relationship between executive compensation actually paid and the financial performance of the company, taking into account any change in the value of the shares of stock and dividends of the registrant and any distributions.

Proposed Item 402(v) of Regulation S-K

As proposed new Item 402(v) of Regulation S-K would require companies to describe:

- the relationship between executive compensation actually paid to the company's named executive officers and the company's cumulative total shareholder return; and
- the relationship between the company's total shareholder return and the total shareholder return of a peer group chosen by the company, over each of the company's five most recently completed fiscal years.

The disclosure would be required in any proxy or information statement for which disclosure under Item 402 of Regulation S-K is required, namely, if action is to be taken with respect to the election of directors or compensation plans and arrangements in which directors and/or executive officers participate. The SEC notes that because this disclosure would be provided pursuant to Item 402 of Regulation S-K, it would be subject to the say-on-pay advisory vote under Exchange Act Rule 14a-21(a).

New Item 402(v) would not apply to foreign private issuers, registered investment companies or emerging growth companies.

Compensation Actually Paid

Under the SEC's proposal compensation actually paid is total compensation as disclosed in the Summary Compensation Table modified to (a) exclude changes in actuarial present value of benefits under defined benefit and actuarial pension plans other than the change attributable to the applicable year of service, and (b) include the value of equity awards on the date of vesting rather than when granted.

As proposed, the change in the actuarial present value of all defined benefit and pension plans would be deducted from the Summary Compensation Table total but the actuarially determined service cost for services rendered by the executive during the applicable year would be added back.[1] The effect is to exclude changes that result solely from changes in interest rates, executive's age and other actuarial inputs and assumptions regarding benefits accrued in previous years. The amount included may be viewed to approximate the value that would be set aside currently by the company to fund the pension benefits payable upon retirement for the service provided by the executive during the applicable year.

As proposed, awards are considered actually paid on the date of vesting and valued at fair value on that date rather than on the date of grant as required in the Summary Compensation Table. Accordingly, the fair value of stock awards and option grants that are included in the Summary Compensation Table would be subtracted from total compensation and the following would be added: (i) for stock awards that vest in the applicable year, their fair value at vesting date,; and (ii) for stock options that vest in the applicable year, the fair value at vesting date (in each case, computed in accordance with the fair value guidance in FASB ASC Topic 718).

Measure of Performance

The proposal uses total shareholder return (as defined in Item 201(e) of Regulation S-K) as the measure of financial performance for purposes of pay-versus-performance disclosure.[2] In addition, the proposal require companies (other than smaller reporting companies), to disclose peer group total shareholder return, using 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 the company's compensation benchmarking practices.

Measurement Period

As proposed, the measurement period for the pay-versus-performance disclosure would be the five most recently completed fiscal years (three for smaller reporting companies). The SEC indicates this is a meaningful period over which a relationship between annual measures of pay and performance over time can be evaluated.

Companies other than smaller reporting companies would be required to provide the disclosure for three fiscal years (rather than five), in the first filing after the rules become effective, and provide an additional year of disclosure in each of the two subsequent annual proxy filings. Smaller reporting companies would be required to provide the disclosure for the last two fiscal years in the first applicable filing after the rules become effective, and in subsequent years would be required to provide disclosure for the last three fiscal years.

[1] The Summary Compensation Table measure includes amounts based on changes in interest rates, executive age, and other actuarial inputs and assumptions in addition to the actuarial present value of accrued pension benefits earned by the executive based on an additional year of service.

[2] Item 201(e) measures total shareholder return by dividing the sum of the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and the difference between the share price at the end and the beginning of the measurement period, by the share price at the beginning of the measurement period.

Covered Persons

The SEC is proposing that the pay-for-performance disclosure be provided for the "named executive officers" as defined in Item 402(a)(3) of Regulation S-K and, in the case of smaller reporting companies, for the "named executive officers" required to be disclosed under Item 402(m). For each year, the compensation information would be required to be presented separately for the principal executive officer and as an average for the remaining named executive officers.

Disclosure Format

As proposed, companies must present the required disclosure in a table as follows:

Year (a)	Summary Compensation Table Total For PEO (b)	Compensation Actually Paid to PEO (c)	Average Summary Compensation Table Total for non-PEO Named Executive Officers (d)	Average Compensation Actually Paid to non-PEO Named Executive Officers (e)	Total Shareholder Return (f)	Peer Group Total Shareholder Return (g)

Companies would be required to disclose, for each amount disclosed as actually paid in columns (c) and (e), the amounts deducted from, and added to the Summary Compensation Table totals.

Under the proposal, the amounts disclosed in each column and footnotes must be provided in interactive data format using XBRL as an exhibit to the definitive proxy or information statement filed with the SEC, in addition to being included in the document in the same format as the rest of the disclosure (e.g., in ASCII or HTML).

Disclosure of Relationship between Executive Compensation and Company Performance

Section 14(i) of the Exchange Act requires disclosure in a clear manner of the relationship between executive compensation and registrant performance. It is not sufficient simply to disclose the amount of executive compensation actually paid and the financial performance measure.

As proposed, the disclosure about the relationship would follow the table and would be required to be provided in interactive data format using XBRL. The proposal indicates that the disclosure could be in the form of a graph providing executive compensation actually paid and change in total shareholder return on parallel axes and plotting compensation and total shareholder return over the required time period. Alternatively, a company might disclose the percentage change over each year of the measurement period in executive compensation actually paid and total shareholder return together with a brief discussion of that relationship.

Location of Disclosure

The SEC does not propose a specific location within the proxy statement or information statement for the new disclosure but expects companies to disclose it with the Item 402 executive compensation disclosure.

●□●□●●□●□●

Please contact Paul De Rosa by phone at (412) 297-4821 or by e-mail at pderosa@cohenlaw.com or Christie Tillapaugh by phone at (412) 297-4603 or by e-mail at ctillapaugh@cohenlaw.com for further information or if you have any questions concerning this topic.