

Reopening of the Comment Period for Pay Versus Performance: Additional Disclosures May be on the Way

February 9, 2022

On January 27, 2022, the U.S. Securities and Exchange Commission (“SEC”) issued a release reopening the comment period for the pay-versus-performance rule initially proposed by the SEC in 2015 to implement Section 953(a) of the Dodd-Frank Act.¹ In the reopening release, the SEC seeks comment on the 2015 rule in its entirety, along with comment on the additional disclosure requirements under consideration by the SEC as it finalizes the rule, described below.

2015 Pay-versus-Performance Proposal. The SEC’s 2015 pay-versus-performance proposal would require registrants to disclose in their proxy or information statement a table reporting, for each the five prior fiscal years, (1) the Summary Compensation Table total and the total “executive compensation actually paid” to the CEO, (2) the average Summary Compensation total and the average total “executive compensation actually paid” to the registrant’s other named executive officers, (3) cumulative total shareholder return (“TSR”) for the registrant, and (4) TSR for a peer group (using either the peer group included in the stock performance graph in the registrant’s annual report or the peer group used for compensation benchmarking purposes as disclosed in the Compensation Discussion and Analysis). For purposes of the proposed rule, executive compensation actually paid means the total compensation reflected in the Summary Compensation Table with two adjustments: *first*, to reflect the value of equity awards at vesting rather than when granted, and *second*, to exclude changes in the actuarial present value of pension benefits that are not attributable to the applicable year of service. The table would be supplemented by required footnotes and disclosure of the relationship between (a) executive compensation actually paid and registrant TSR and (b) registrant TSR and peer group TSR, in each case over the five-year period. Smaller reporting companies must include the pay-versus-performance disclosure for only the three most recently completed fiscal years, and are not required to disclose peer group TSR. Our prior Client Update on the 2015 proposed rule can be accessed [here](#).

Additional Disclosures under Consideration. The SEC is seeking comment on its 2015 proposal and on additional disclosure requirements described in the reopening release

¹ The recent reopening release can be accessed [here](#). The 2015 proposing release can be accessed in full [here](#).

that may be incorporated into the final pay-versus-performance rule. Most notably, the SEC is considering whether registrants should be required to disclose additional performance measures beyond TSR, specifically (1) pre-tax net income, (2) net income and (3) a measure selected by the registrant that represents the most important performance measure used to link compensation actually paid during the fiscal year to company performance. The SEC is also considering whether to require another table listing the registrant's top five (or fewer, if applicable) most important performance measures used to link compensation actually paid to company performance. In addition, the reopening release requests comment on the application to smaller reporting companies of the 2015 proposal and the additional disclosure requirements discussed in the reopening release.

The comment period will expire 30 days after publication of the reopening release in the Federal Register. Registrants will be required to include pay-versus-performance disclosure in the first proxy or information statement they file after the final rule becomes effective, with a phase-in for the number of years of data that must be included (starting with two years for smaller reporting companies and three years for other companies subject to the rule).

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Please do not hesitate to contact us with any questions.



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