Tucker Ellis LLP

CLIENT ALERT

SEC PROPOSES NEW PAY-VERSUS-PERFORMANCE DISCLOSURE RULES

MAY 2015

On April 29, 2015, the Securities and Exchange Commission proposed new rules that would require reporting companies to disclose the relationship between compensation "actually paid" to certain executives and the financial performance of the company. The rationale behind these proposed rules is to provide greater transparency so that shareholders are better informed in electing directors and submitting advisory votes related to executive compensation. The proposed rules were promulgated under the requirements of Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DISCLOSURE REQUIREMENTS

The proposed rules would require companies to disclose in their proxy or information statements (where executive compensation disclosure is required) a new summary compensation table that includes the following for the year covered:

- the total compensation of the principal executive officer (PEO) and the average total compensation reported for the remaining named executive officers (NEO);
- the compensation "actually paid" to the PEO and the average compensation "actually paid" to the remaining NEOs; provided, however, if more than one person served as the company's PEO during that year, then the disclosure would include the aggregate compensation "actually paid" to each person that served as PEO; and
- the cumulative total shareholder return (TSR) of the company and peer group, calculated and measured as currently proscribed under Regulation S-K.

The proposed rules provide for a transition period that would require companies, other than small reporting companies, to set forth the disclosures for three years in the first proxy or information statement after the amendment takes effect, adding another year of disclosure in each of the subsequent two annual proxy filings that require disclosure. In contrast, small reporting companies would be required to disclose for the last three years within two years of adoption of the proposed rules.

Companies would also be required to tag the disclosures in an interactive data format using eXtensible Business Reporting Language; however, the proposed rules provide flexibility as to the location of the disclosures within the proxy or information statement and do not require the disclosures to be included within the compensation discussion and analysis.

COMPENSATION "ACTUALLY PAID" TO THE EXECUTIVE

Under the proposed rules, executive compensation "actually paid" would equal the reported compensation in the summary compensation table currently required in the proxy statement for that year, subject to adjustments relating to pension amounts and equity awards according to the following:

- **Pension Amounts**: the executive compensation "actually paid" would be reduced by the change in pension value as reflected on that summary compensation table and increased by the actuarially determined service costs for services by the executive.
- **Equity Awards**: executive compensation "actually paid" would be reduced by the fair value of the equity award granted during the year and increased by the fair value of equity awards that vested during the year. (A company would also be required to include footnote disclosure of any vesting date valuation assumption that is materially different from that disclosed in its financial statements.)

RELATIONSHIP BETWEEN EXECUTIVE COMPENSATION AND THE COMPANY'S PERFORMANCE

Using the information under the proposed disclosures, the company would be required to provide a clear description explaining (i) the relationship between the executive compensation "actually paid" and the company's TSR, and (ii) the company's TSR and the respective TSR of the peer group. The proposed rules provide that the company may describe these relationships through a descriptive narrative, graphically, or a combination of the two.

COVERED COMPANIES

The proposed rules would apply to all reporting companies except for foreign private issuers, registered investment companies (other than business development companies), and emerging growth companies. Smaller reporting companies would be subject to scaled disclosure requirements.

A copy of the SEC's proposing release can be found here.

ADDITIONAL INFORMATION

Our Securities and Capital Markets attorneys will be pleased to meet with you to discuss the potential impact of the proposed rules. Please contact your attorney at Tucker Ellis or any of the following attorneys.

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