

The SEC (Finally) Adopts Pay-for-Performance Rules: 5 Things to Know

Twelve years in the making, the SEC adopted pay-for-performance (P4P) disclosure rules last week in the form of new Item 402(v) of Regulation S-K. Here's the [234-page adopting release](#). And here's the [press release](#) and [fact sheet](#).

In 2010, as part of the Dodd-Frank Act, the SEC was directed to adopt pay-for-performance rules. The SEC didn't get around to proposing something until five years later. Then seven years after that, in January 2022, the [SEC re-opened the comment period](#). So it's been quite a journey, culminating in the SEC surprisingly adopting rules in seriatim last week, without an open Commission meeting.

Here are five things to know about these new rules:

1. **The compliance date is already upon us!** Perhaps most surprising is the speed with which these new rules will need to be addressed in the proxy. The new rules become effective 30 days following publication of the adopting release in the Federal Register.

Other than for those exempt from the new rules (i.e., emerging growth companies, registered investment companies, foreign private issuers), companies will need to comply for proxy statements and information statements that are required to include Item 402 executive compensation disclosure for fiscal years ending on or after December 16, 2022. Which means this new disclosure is required for the proxy statements filed next year for the 2023 proxy season.

2. **Three years of P4P disclosure to start (then adding a year for the next two years).** Companies will need to provide three years' worth of P4P disclosure in their first proxy statement that includes this disclosure. Then, in each of the two subsequent proxy statements that require the Item 402(v) disclosure, they will need to add another year of disclosure. Companies will eventually wind up with five years of P4P disclosure. And all the P4P disclosure must be provided in XBRL.

Smaller reporting companies (SRCs) get a break, as usual, initially being required to provide only two years' worth of information, and then adding one additional year of disclosure in the subsequent proxy that requires this disclosure, and will eventually wind up with three years of P4P disclosure in their proxy (but don't need to provide it in XBRL until the third proxy that includes P4P disclosure).

3. **The new P4P table.** The heart of the new P4P disclosure will be a new table reporting the P4P disclosure for the principal executive officer and, as an average, for the other named executive officers (NEOs). The table will be required to include "total compensation" — as reflected in the Summary Compensation Table — as well as a measure reflecting "executive compensation actually paid," which is calculated as dictated by new Item 402(v).

The table will also include four items as financial performance measures: "total shareholder return" (TSR) for both the company and its peer group; the company's net income; and another financial performance measure selected by, and specific to, the company that the company believes "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."

If the company selects a financial performance measure that is non-GAAP, the disclosure gets the same relief from Regulation G as CD&A disclosure.

4. Narrative and/or graphical description of P4P relationships. The new table will be accompanied by a clear description of the relationships between each of the financial performance measures included in the table and the executive compensation actually paid to the principal executive officer and, on average, to the other named executive officers over the five years, and of the relationship between the company's TSR and its peer group TSR. These descriptions may be presented in narrative and/or graphical format.

5. Plus 3 - 7 most important performance measures. The new P4P table must also be accompanied by a list of three to seven performance measures — that doesn't need to be ranked — that the company determines to be its most important measures (identified using the same approach as for the company-selected measure). SRCs don't have to provide this additional disclosure.

Companies can present separate lists for the principal executive officer vs. other named executive officers (or for each NEO separately), or present a combined list that applies to all of them.

Companies can also opt to disclose the additional performance measures as additional columns in the P4P table, instead of providing a separate list.

Although not required, companies are permitted to include non-financial measures in the list if they consider those non-financial measures to be among their three to seven "most important" measures as long as they list at least three financial measures (or as many financial measures that they use).

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