

Clients & Friends Memo

New SEC “Pay for Performance” Proxy Disclosure Rules Will Require Significant Advance Planning and Effort

August 31, 2022

More than twelve years ago, the Dodd-Frank legislation directed the SEC to issue a rule that requires issuers to provide, among other things, information that shows “the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions.” On August 25, the SEC (by a 3-2 vote) issued that rule in final form.

To understate, the rule is exceedingly complicated. And it is in play for fiscal years ending on or after December 16, 2022—in other words starting with the 2023 proxy season (though emerging growth companies, foreign private issuers and registered investment companies are exempt, and smaller reporting companies are subject to somewhat relaxed requirements). That the rule is complicated is not surprising given it was promulgated more than seven years after it was first proposed and following a reopening of the comment period earlier this year.

Unlike many pieces being written by law firms, this alert is not about the substance of the rule. There are many such descriptions available, and of course in any event there’s no substitute for reading the SEC release (all 234 pages of it).

Instead, we’re offering some practical and, we think, very important advice for actions that should be taken now (and not in November, December or later):

1. Read and understand what the rule requires.
2. Develop procedures for accurately mining the required data.
3. Draft sample disclosure that complies with the rule based on historical data.
4. Understand the message that your disclosure would send.
5. Extrapolate what the disclosure and message will look like in your 2023 proxy.

And here's the even more important advice: start preparing—**NOW**—CD&A disclosure that will tell a cogent pay for performance story based on that message.

ISS and other proxy advisory firms have long relied on pay for performance evaluations in determining their annual meeting vote recommendations. The new SEC rule doubles down on the importance of that metric and the messaging that surrounds it.

The new rule adds a significant disclosure burden, and indeed it was criticized in statements by the two dissenting SEC Commissioners. Regardless, new Reg. S-K 402(v) is now the law of the land, and the only thing issuers can do about it is to prepare for it (and perhaps clamor for a delayed implementation date).

We are available to discuss your best approach to this new and very visible and sensitive disclosure requirement.

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If you have any questions, please feel free to contact the following Cadwalader attorney.

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