

## SEC Proposes “Pay Versus Performance” Rule

May 1, 2015

On April 29, 2015, a divided Securities and Exchange Commission proposed requiring U.S. public companies to disclose the relationship between executive compensation and the company’s financial performance.<sup>1</sup> The proposed “pay versus performance” rule, one of the last Dodd-Frank Act rulemaking responsibilities for the SEC, mandates that a company provide, in any proxy or information statement:

- A new table, covering up to five years, that shows:
  - compensation “actually paid” to the CEO, and total compensation paid to the CEO as reported in the Summary Compensation Table;
  - average compensation “actually paid” to other named executive officers, and average compensation paid to such officers as reported in the Summary Compensation Table; and
  - cumulative total shareholder return (TSR) of the company and its peer group; and
- Disclosure of the relationship between:
  - executive compensation “actually paid” and company TSR; and
  - company TSR and peer group TSR.

The proposed rule (attached to this memo as Appendix A) would provide flexibility in some areas, such as permitting companies to select their peer groups. In other respects, however, the proposed rule would be highly prescriptive in ways not mandated by the Dodd-Frank Act — for example, in creating a new measure of compensation “actually paid,” as well as requiring the use of cumulative TSR as the metric by which to compare the company’s performance to its executives’ pay and to the performance of its peers.

The Q&A below addresses some of the issues raised by the proposed rule.

### Background

Section 953(a) of the Dodd-Frank Act amended Section 14 of the Securities Exchange Act of 1934 to direct the SEC to implement rules requiring each registrant to disclose, in proxy or information statements in which Item 402 executive compensation disclosure is required, a clear description of the relationship between compensation actually paid to the registrant’s “named executive officers” and the financial performance of the registrant, taking into account any change in the value of the registrant’s shares and any dividends and distributions.

The proposed pay versus performance rule implements Section 953(a) by adding a new Item 402(v) to Regulation S-K.

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<sup>1</sup> The full text of the release is available [here](#); the SEC’s factsheet is available [here](#); and the Commissioners’ statements are available here: [Chair White](#), [Commissioner Aguilar](#), [Commissioner Gallagher](#), [Commissioner Piwowar](#), [Commissioner Stein](#).

## Timing

### **Q: When will pay-versus-performance disclosure first be required?**

*A: In the first proxy or information statement filed after the final rule becomes effective.*

Pay-versus-performance disclosure must be provided in the first proxy or information statement filed after the final rule becomes effective. Because it is possible that the rule will be finalized in 2015, calendar year companies may be required to provide this disclosure in the 2016 proxy season.

### **Q: Which filings must include pay-versus-performance disclosure?**

*A: Any proxy or information statement in which Item 402 compensation disclosure is required.*

Pay-versus-performance disclosure would be required in proxy statements for annual and special shareholder meetings filed on Schedule 14A and information statements filed on Schedule 14C. The disclosure is not required in Form S-1 registration statements or Form 10-K annual reports, regardless of whether such forms include Item 402 compensation disclosure.

Because the disclosure will be provided pursuant to Item 402, it will be covered by the advisory (non-binding) say-on-pay vote.

The disclosure will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the company specifically incorporates it by reference.

### **Q: Which companies are subject to pay-versus-performance disclosure?**

*A: Most companies that file proxy and information statements.*

The following types of companies are *exempted* from compliance with the proposed rule:

- emerging growth companies, or EGCs;<sup>2</sup>
- foreign private issuers (even those filing on U.S. periodic disclosure forms); and
- registered investment companies.

Smaller reporting companies are subject to the proposed rule, but with more limited disclosure requirements that are phased in over time, as discussed below.

### **Q: Do any transition rules apply to new companies?**

*A: Yes. Pay-versus-performance disclosure is not required in an IPO. In addition, a newly public company that does not otherwise qualify for EGC relief need not provide disclosure for fiscal years prior to the most recently completed fiscal year if the company was not an Exchange Act filer during those years.*

*Example.* A non-EGC closes its IPO in 2016 and files its first annual proxy statement in 2017. The company was not an Exchange Act filer prior to 2016. The company is not required to provide pay-versus-performance disclosure in its IPO registration statement. In its 2017 proxy statement, the company is required to provide disclosure only for 2016. In its 2018 proxy statement, the company is required to provide disclosure only for 2016 and 2017.

<sup>2</sup> EGCs include issuers that completed their IPOs after December 8, 2011, and that have less than \$1 billion in total annual gross revenues during their most recently completed fiscal year. An issuer remains an emerging growth company until the earliest of (i) the last day of the fiscal year in which it has total annual gross revenues in excess of \$1 billion, (ii) the last day of the fiscal year following the fifth anniversary of its IPO, (iii) the date on which it has issued more than \$1 billion in non-convertible debt in the last three-year period and (iv) the date on which it becomes a "large accelerated filer."

**Details**

**Q: Whose compensation is covered?**

*A: The CEO, individually, and the other named executive officers as a group.*

If more than one person served as CEO in any fiscal year, the aggregate compensation actually paid to those persons is required to be disclosed for that year as the compensation actually paid to the CEO.

Compensation for the other named executive officers is required to be disclosed as an average, which the SEC indicates is because the numbers and identities of these officers can vary over the requisite five-year period. Absent clarification to the contrary by the SEC, this would include all CFOs for each year in which a registrant has more than one CFO. This would also include the up to two additional individuals for each year who would have been one of the three named executive officers (other than the CEO and CFO) based on their total compensation, if they were serving as executive officers at the end of such year (including any separation payments made to such additional individuals that were required to be disclosed under Item 402).

**Q: For what period is pay-versus-performance disclosure required to be provided?**

*A: After a transition period, companies other than smaller reporting companies must provide the information for five years, and smaller reporting companies must provide the information for three years.*

Registrants are required to provide pay-versus-performance disclosure for the following number of years prior to the year in which the proxy or information statement is filed:

<b>Year of Filing</b>	<b>Companies Generally</b>	<b>Smaller Reporting Companies</b>
<b>First year</b>	3 years	2 years
<b>Second year</b>	4 years	3 years
<b>Third year and thereafter</b>	5 years	3 years

This differs from the Summary Compensation Table, which requires reporting compensation for only three years (or two years, for smaller reporting companies).

**Q: How is the amount of executive compensation “actually paid” determined?**

*A: By starting with the total amount of compensation disclosed in the Summary Compensation Table and then adjusting that amount by including equity awards that vested (rather than awards that were granted) and the service cost relating to pension benefits (rather than the change in pension value).*

The amount of compensation “actually paid” for a fiscal year equals the amount reported in the “Total” column of the Summary Compensation Table for such fiscal year, as decreased and increased as follows:

- Equity awards:
  - Subtract the grant date fair values of the equity awards reported in the “Stock Awards” and “Option Awards” columns of the Summary Compensation Table for such fiscal year; and
  - Add the vesting date fair values of the equity awards that vested during such fiscal year.
- Pensions:
  - Subtract the aggregate change in the actuarial present value of the accumulated benefit under all defined benefit and actuarial pension plans reported in the “Change in

Pension Value and Nonqualified Deferred Compensation Earnings” column of the Summary Compensation Table for such fiscal year; and

- Add the actuarially determined service cost for services rendered by the executive during the applicable year under all such defined benefit and actuarial pension plans (consistent with “service cost” as defined in FASB ASC Topic 715).

The vesting date fair values of the equity awards are required to be computed in a manner consistent with FASB ASC Topic 718. Footnote disclosure is required if any assumption used for the vesting date valuation differs materially from the grant date assumptions used for the grant date valuations, as disclosed in the footnotes to the Summary Compensation Table.

Requiring the vesting date value of a stock option to be reported at fair value, rather than intrinsic value (i.e., the excess, if any, of the aggregate value of the shares underlying the option minus the aggregate exercise price of the option), typically results in more compensation actually paid, because an option’s fair value almost always exceeds its intrinsic value and an “out-of-the-money” option has some fair value (but no intrinsic value).

The vesting date fair value of an option is required to be included in the amount of compensation actually paid, even if the option is not exercised (or even exercisable) on the vesting date. The vesting date fair value of restricted stock units is also required to be included, even if the underlying shares are not delivered until a later date (so, for example, if the executive is retirement-eligible on the grant date, the units presumably are deemed to be vested at grant for purposes of the proposed rule).

The SEC explains that it believes that pension service cost is a better measure of pension benefits actually paid because pension value is subject to significant volatility (e.g., due to changes in interest rates). Smaller reporting companies are not required to include the service cost under pension plans (as they are not required to report changes in pension value in the Summary Compensation Table).

Computing the compensation “actually paid” will require calculating historical values for equity and pension benefits that were not previously required to be calculated for purposes of Item 402 disclosure.

*Example:* For 2015, the compensation reported for a company’s CEO in the Summary Compensation Table totals \$4,000,000, consisting of \$700,000 in salary, \$1,000,000 in annual cash bonus, \$2,000,000 in stock awards granted in 2015, \$200,000 in change in pension value and \$100,000 in all other compensation. In 2015, the fair value of the CEO’s equity awards that vested is \$3,000,000 and the pension service cost is \$100,000. The compensation actually paid to the CEO for 2015 is \$4,900,000 ( $\$4,000,000 - \$2,000,000 + \$3,000,000 - \$200,000 + \$100,000$ ).

**Q: How is the company’s peer group determined?**

*A: By using the same index or peers that the company uses either for purposes of the stock performance graph required under Item 201(e)(1)(ii) of Regulation S-K or in the CD&A for purposes of disclosing compensation benchmarking practices.*

Item 201(e)(1)(ii) requires companies to provide a line graph comparing the yearly percentage change in their cumulative TSR with that of any of the following:

- A published industry or line-of-business index;
- Peer companies selected in good faith by the company; or
- Companies with similar market capitalizations (but only if the company does not use a published industry or line-of-business index and does not believe it can reasonably identify a peer group).

Alternatively, if the company uses a different peer group in the CD&A for purposes of describing compensation benchmarking practices, it may use that peer group for purposes of the proposed rule.

If the peer group is not a published industry or line-of-business index, the company must identify the companies comprising the group. If the company disclosed the companies in its peer group in prior filings, it may incorporate those filings by reference.

The proposed rule does not prohibit a company from changing its peer group from year to year or require disclosing the reason for any changes (unlike Item 201(e), which requires disclosing changes to the peer group for the stock performance graph).

Regardless of which peer group a company selects, proxy advisory firms may select different peer groups for their analyses of the link between executive pay and the company's performance.

Smaller reporting companies are not required to disclose peer group TSR, as they are not otherwise required to present the TSR of a peer group or to disclose peers used for compensation benchmarking.

### **Q: How is cumulative TSR calculated?**

*A: In the same manner, and over the same measurement period, as under Item 201(e).*

Consistent with Item 201(e), the proposed pay-versus-performance rule requires cumulative TSR for each year to be calculated as follows:

- the sum of (1) the cumulative amount of dividends for such year, assuming dividend reinvestment, *plus* (2) the difference between the company's share price at the end and the beginning of such year; *divided by*
- the share price at the beginning of such year.

The share price at the beginning of each year is the market closing price on the last trading day of the year preceding such year, and the share price at the end of such year is the market closing price on the last trading day of such year.

The returns of each company in the peer group must be weighted according to their respective stock market capitalizations at the beginning of each period for which a return is indicated. The same methodology must be used in calculating both the company's TSR and that of the peer group.

Note that TSR, as calculated for purposes of the proposed rule, may differ from TSR as calculated by a company for other compensation purposes. For example, a company may grant restricted stock units that vest based on attainment of a TSR goal, with TSR measured using the average closing price over a 30-day trailing period (rather than the spot closing price), and with the returns of each company in the peer group not weighted according to their respective stock market capitalizations.

There is some ambiguity as to whether cumulative TSR is required to be disclosed for each year on an annual basis (i.e., only for such year), rather than on a multi-year basis (i.e., for such year and all years prior to such year that are required to be disclosed). Given that the proposed rule requires compensation to be reported on an annual basis, it would seem inconsistent with one of the SEC's stated goals that the rule promote comparability if cumulative TSR were reported on a multi-year basis. We also note that Commissioner Piwowar described TSR as a single-year metric.

*Example:* In its 2016 annual proxy statement, a company that does not pay dividends is required to disclose its TSR for 2013 through 2015. At the market close on December 31 of 2012, 2013, 2014 and 2015, the company's share price is \$20, \$30, \$24 and \$27, respectively. The company's cumulative TSR for 2013 is 50% ( $(\$30 - \$20) / \$20$ ), for 2014 is -20% ( $(\$24 - \$30) / \$30$ ) and for 2015 is 12.5% ( $(\$27 - \$24) / \$24$ ).

**Q: How and where is the disclosure required?**

A: The amount of compensation actually paid and the cumulative TSR of the company and its peers must be presented in tabular format. The relationship between pay and performance may be presented graphically and/or narratively.

The proposed rule mandates use of the following table:

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)

A company must describe the relationship between pay and performance following the table. The company must clearly describe (1) the relationship between executive compensation actually paid and company TSR and (2) the relationship between company TSR and peer group TSR. The description may be presented graphically and/or narratively. The SEC provides the following as examples of ways to present the description:

- a graph providing executive compensation actually paid and change in TSR on parallel axes and plotting compensation and TSR over the requisite period; or
- showing the percentage change over each year of the requisite period in both executive compensation actually paid and TSR, along with a brief description of that relationship.

The proposed rule does not mandate a specific location within the proxy or information statement for the new disclosure, although the SEC indicates that it expects companies to provide the disclosure with the Item 402 executive compensation disclosure.

The disclosure must be electronically formatted using XBRL, in order to increase the comparability and usefulness of the information. The interactive data for the table is also required to be provided as an exhibit to the proxy or information statement. Smaller reporting companies are not required to present the disclosure in XBRL until the third filing in which they provide such disclosure. This is the first time that the SEC plans to require proxy statement disclosure to be formatted using XBRL.

**Q: May companies provide supplemental pay-versus-performance disclosure?**

A: Yes.

A company may provide pay-versus-performance disclosure based on a measure of compensation other than compensation “actually paid” (e.g., realized pay or realizable pay) if the company believes that the alternative measure provides useful information about the relationship between compensation and company performance. However, perhaps borrowing from the SEC’s rules on non-GAAP disclosure and on alternative tables in the CD&A, the supplemental disclosure may not be misleading and may not be presented more prominently than the required disclosure.

**Q: How does the proposed rule apply to smaller reporting companies?**

A: As noted above, the proposed rule applies on a scaled basis to smaller reporting companies.

Specifically, the proposed rule exempts smaller reporting companies from, or phases in, the requirements, as follows:

- Only three years of pay-versus-performance disclosure are required (two years, for the first filing). Other companies are required to provide five years of disclosure (three years for the first filing, and four years for the second filing).
- No requirement to include the service cost under pension plans in calculating compensation actually paid.
- No requirement to disclose peer group TSR.
- The requirement to present the disclosure in XBRL does not apply until the third filing.

## Request for Comments

### **Q: On what aspects of the proposed rule does the SEC request comments?**

*A: The SEC specifically requests comments on 64 questions relating to all aspects of the proposed rule.*

A number of these questions ask whether the final rule should provide companies with more flexibility or reduce the burden of complying with the rule's requirements. Here are a few of such questions:

- Should disclosure be required only for the CEO?
- Should companies be permitted to determine which elements of compensation to include in calculating compensation actually paid, so long as they clearly disclose how the amount is calculated?
- Should companies be allowed flexibility in choosing the relevant measure of performance to disclose?
- Should the five-year disclosure period (for companies other than smaller reporting companies) be shorter (e.g., three years)?

That the SEC has posed such questions might signal that it is open to adopting a more principles-based approach in the final rule, at least as to certain of the rule's requirements. The two Commissioners (Gallagher and Piwowar) who voted against adopting the proposed rule noted that they did so largely because they view it as overly prescriptive.

## Action Items

### **Q: What should companies be doing now?**

*A: Companies may want to prepare.*

Companies should consider taking the following actions now, as developing the new disclosure will require work:

- Model how your company's cumulative TSR may compare to the compensation actually paid to your CEO and to the cumulative TSR of your peers. Consider whether supplemental disclosure and/or alternative performance measures may be useful to address any perceived disconnect between pay and performance that might result from the mandated disclosure.
- Inform your company's board of directors or the relevant committee(s) of the proposed rule and the story that it may tell regarding the relationship between executive pay and company performance.
- Consider commenting on the proposed rule — the SEC pays particular attention to the comments it receives from those directly affected by its rules. Once the proposed rule is filed in the Federal Register (likely within the next week), comments are expected to be due in 60 days.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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2. Amend § 229.402 by:

Adding paragraph (v).

The addition reads as follows:

**§ 229.402 Executive compensation.**

\* \* \* \* \*

(v) *Pay versus Performance.* (1) Provide the information specified in paragraph (v)(2) of this item for each of the company's last five completed fiscal years in the following tabular format:

PAY VERSUS PERFORMANCE

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)

(2) The Table shall include:

(i) The fiscal year covered (column (a));

(ii) The PEO's total compensation for the covered fiscal year as reported in the Summary Compensation Table pursuant to paragraph (c)(2)(x) of this Item, or paragraph (n)(2)(x) for smaller reporting companies (column (b)), and the average total compensation reported for the remaining named executive officers reported pursuant to those paragraphs (column (d));

(iii) The executive compensation actually paid to the PEO (column (c)) and the average executive compensation actually paid to the remaining named executive officers (column (e)). If more than one person served as the company's PEO during a fiscal year, include in column (c) the aggregate compensation actually paid for the persons who served as PEO. For purposes of columns (c) and (e) of the table required by paragraph (v)(1) of this Item, executive compensation actually paid shall be the total compensation for the covered fiscal year for each named executive officer as provided in paragraph (c)(2)(x) of this Item, or paragraph (n)(2)(x) for smaller reporting companies, adjusted to:

(A) Deduct the aggregate change in the actuarial present value of the named executive officer's accumulated benefit under all defined benefit and actuarial pension plans reported in the Summary Compensation Table in paragraph (c)(2)(viii)(A) of this Item;

(B) Add the service cost under all defined benefit and actuarial pension plans reported in the Summary Compensation Table in paragraph (c)(2)(viii)(A) calculated as the actuarial present value of each named executive officer's benefit under all such plans attributable to services rendered during the covered fiscal year, consistent with "service cost" as defined in FASB ASC Topic 715; and

(C) Deduct the amounts reported in the Summary Compensation Table pursuant to paragraphs (c)(2)(v) and (c)(2)(vi) of this Item and add in their place the fair value on the vesting date of all stock awards, and all options awards, with or without tandem SARs (including awards

that subsequently have been transferred), for which all applicable vesting conditions were satisfied during the covered fiscal year.

(iv) For purposes of columns (f) and (g) of the table required by paragraph (v)(1) of this Item, for each year disclose the cumulative total shareholder return of the company (column (f)) and peer group cumulative total shareholder return (column (g)) calculated in the same manner, and over the same measurement period, as under Item 201(e) of Regulation S-K. The term “measurement period” shall be the period beginning at the “measurement point” established by the market close on the last trading day before the company’s earliest fiscal year in the table, through and including the end of the company’s last completed fiscal year. The closing price of the measurement point must be converted into a fixed investment, stated in dollars, in the company’s stock (or in the stocks represented by the peer group). For each fiscal year, the amount included in the table shall be the cumulative total shareholder return as of the end of that year. The same methodology must be used in calculating both the company’s total shareholder return and that of the peer group.

(3) For each amount disclosed in columns (c) and (e) of the table required by paragraph (v)(1), disclose in a footnote to the table for the PEO and the average remaining named executive officer compensation each of the amounts deducted and added pursuant to paragraph (v)(2)(iii). For disclosure of the executive compensation actually paid to named executive officers other than the PEO, provide the amounts required under this paragraph as averages.

(4) For the value of equity awards added pursuant to paragraph (v)(2)(iii)(C), disclose in a footnote to the table required by paragraph (v)(1) any assumption made in the valuation that differs materially from those disclosed pursuant to Instruction 1 to Item 402(c)(2)(v) and (vi), or for smaller reporting companies, Instruction 1 to Item 402(n)(2)(v) and (vi).

(5) In proxy or information statements in which disclosure is required pursuant to this Item, use the information provided in the table required by paragraph (v)(1) to provide a clear description of the relationship between (i) the executive compensation actually paid by the company to the PEO (column (c)) and the average of the executive compensation actually paid to the named executive officers other than the PEO (column (e)) listed in the Summary Compensation Table, and (ii) the cumulative total shareholder return of the company (column (f)), for each of the company’s last five completed fiscal years. This description shall also include a comparison of the cumulative total shareholder return of the company (column (f)) and cumulative total shareholder return of the company’s peer group (column (g)) over the same period.

(6) The disclosure required to be provided pursuant to this paragraph (v) shall appear with, and in the same format as, the rest of the disclosure required to be provided pursuant to paragraph (v) and, in addition, shall be electronically formatted using the eXtensible Business Reporting Language (XBRL) in accordance with the EDGAR Filer Manual (17 CFR 232.11) as an exhibit to definitive Schedule 14A (17 CFR 240.14a-101) or definitive Schedule 14C (17 CFR 240.14c-101). Each amount required to be disclosed in the table pursuant to paragraph (v)(1) must be tagged separately. The disclosure required to be provided pursuant to paragraphs (v)(3), (v)(4) and (v)(5) of this Item must be block-text tagged.

*Instructions to Item 402(v).*

1. *Transitional relief.* A company may provide the disclosure required by paragraph (v) for three years, instead of five years, in the first filing in which it provides this disclosure, and provide disclosure for an additional year in each of the two subsequent annual filings in which this disclosure is required.

2. *Repricings and other modifications.* If at any time during the last completed fiscal year, the company has adjusted or amended the exercise price of previously vested options or SARs held by a named executive officer, whether through amendment, cancellation or replacement grants, or any other means, or otherwise has materially modified such awards, the company shall include in the compensation reported under paragraph (v)(2)(iii)(C) of this Item the incremental fair value, computed as the excess fair value of the modified award over the fair value of the original award upon vesting of the modified award. If the modified award is subject to multiple vesting dates, the company shall include in the compensation reported under paragraph (v)(2)(iii)(C) the pro rata incremental fair value paid at each vesting date.

3. *Fair value.* Fair value amounts shall be computed in a manner consistent with the fair value measurement guidance in FASB ASC Topic 718.
4. *Presentation.* If more than one person served as the PEO of the company during the covered fiscal year, then the compensation for all persons who served as the PEO of the company for that year shall be aggregated.
5. *Exempted companies.* A company is not required to comply with paragraph (v) of this Item if it is an emerging growth company, as defined in Section 3(a) of the Exchange Act (15 U.S.C. 78c(a)).
6. *New companies.* Information for fiscal years prior to the last completed fiscal year will not be required if the company was not required to report pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) at any time during that year.
7. *Peer group.* For purposes of determining the total shareholder return of the company's peer group, the company shall use the same index or issuers used for purposes of Item 201(e)(1)(ii) or, if applicable, the companies it uses as a peer group for purposes of Item 402(b). If the peer group is not a published industry or line-of-business index, the identity of the issuers comprising the group must be disclosed. The returns of each component issuer of the group must be weighted according to the respective issuers' stock market capitalization at the beginning of each period for which a return is indicated.
8. *Smaller reporting companies.* A company that qualifies as a "smaller reporting company," as defined by §229.10(f)(1), may provide the information required by paragraph (v) for three years, instead of five years. A smaller reporting company may provide the disclosure required by paragraph (v) for only two fiscal years in the first filing in which it provides this disclosure, and is not required to provide the disclosure required by paragraph (v)(5) with respect to the total shareholder return of its peer group. For purposes of paragraph (v)(2)(iii) of this Item with respect to smaller reporting companies, executive compensation actually paid shall be the total compensation for the covered fiscal year for each named executive officer as provided in paragraph (n)(2)(x) of this Item, adjusted to deduct the amounts reported in the Summary Compensation Table pursuant to paragraphs (n)(2)(v) and (n)(2)(vi) of this Item, and to add in their place the fair value on the vesting date of the amounts added in paragraph (v)(2)(iii)(C). Disclose in a footnote to the table required pursuant to paragraph (v)(1) for the PEO and average remaining named executive officer compensation the amounts deducted from, and added to, the Summary Compensation Table pursuant to this instruction. A smaller reporting company is required to comply with paragraph (v)(6) in the third filing in which it provides the disclosure required by paragraph (v).
9. *Incorporation by reference.* The information in paragraph (v) of this Item will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the company specifically incorporates it by reference.

\* \* \* \* \*

4. Amend § 240.14a-101 by adding Item 25.

The addition reads as follows:

**§240.14a-101 Schedule 14A. Information required in proxy statement.**

SCHEDULE 14A INFORMATION

\* \* \* \* \*

**Item 25. Exhibits.**

Provide the information required to be disclosed by Item 402(v)(1) of Regulation S-K (17 CFR 229.402(v)(1)) in an exhibit to this Schedule 14A electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard.