



GOODWIN

Public Company

ADVISORY PRACTICE

# Frequently Asked Questions: Pay Versus Performance Final Rules

September 15, 2022

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## Companies Subject to the Final Rules

### What companies are subject to the final rules?

All reporting companies are subject to the final rules, with the following exceptions:

- Emerging growth companies;
- Registered investment companies; and
- Foreign private issuers.

### How do the final rules apply to smaller reporting companies?

The final rules include disclosure accommodations for smaller reporting companies that, when fully phased in, will permit smaller reporting companies to disclose information for three fiscal years rather than five, and permit smaller reporting companies to exclude some of the financial performance measures from their disclosure. These are described in more detail below. The final rules also permit smaller reporting companies to defer compliance with the Inline XBRL tagging and exhibit filing requirements.

### How do the final rules apply to new reporting companies?

The final rules do not require a company to provide pay versus performance disclosure for fiscal years prior to the last completed fiscal year if the company was not required to report pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 at any time during that year.

## Effective Dates and Compliance/Transition Phase-In Dates

### When will the final rules become effective?

The final rules will be effective on October 11, 2022. The final rules do not provide for voluntary early adoption.

### What is the first filing that must include the new pay versus performance disclosure?

Companies must comply with the final rules in proxy and information statements that are required to include the executive compensation disclosure required by Item 402 of Regulation S-K for fiscal years ending on or after December 16, 2022. For most companies that have a December 31 fiscal year end, the first filing that will be subject to the final rules will be the proxy or information statement filed in 2023 for the company's annual meeting of shareholders.

### How many years must be included in the new pay versus performance disclosure?

The Pay Versus Performance Table and the related "clear description" of pay versus performance relationships cover the five most recently completed fiscal years, subject to the phase-in periods described below. Smaller reporting companies can elect to provide disclosure for only the three most recently completed fiscal years, subject to the phase-in periods described below.

### Is there a disclosure phase-in or disclosure transition provision?

Yes, the final rules require information for only the three most recently completed fiscal years in the first filing that is subject to the final rules. In each of the next two annual filings that are subject to the final rules, the company must include an additional year. Smaller reporting companies are initially required to present information for only the two most recently completed fiscal years, and

are required to include an additional year in the next filing that is subject to the final rules. See Instruction 1 to Item 402(v).

## Filings Subject to the Final Rules

### **What filings are subject to the final rules?**

The final rules apply to proxy and information statements that are required to include the executive compensation disclosure required by Item 402 of Regulation S-K.

### **Do the final rules apply to a proxy statement for a special meeting at which shareholders will vote only on approval of a compensation plan?**

Yes, the final rules apply to any proxy or information statement that is required to include executive compensation disclosure. SEC rules, in most cases, require Item 402 executive compensation disclosure in proxy and information statements if action will be or has been taken to approve a compensation plan, regardless of whether any directors will be elected.

### **Do the final rules require pay versus performance disclosure to be included with the disclosure required by Item 11, Executive Compensation, in Part III of Form 10-K?**

No, the final rules apply only to proxy and information statements that are required to include the executive compensation disclosure required by Item 402 of Regulation S-K.

### **Do the final rules apply to registration statements filed under the Securities Act of 1933?**

No, the final rules apply only to proxy and information statements that are required to include the executive compensation disclosure required by Item 402 of Regulation S-K.

## Inline XBRL

### **Do SEC Inline XBRL requirements apply to the new pay versus performance disclosure required by the final rules?**

Yes. The company must separately tag the values disclosed in the Pay Versus Performance Table in Inline XBRL, block-text tag the footnote and relationship disclosure and the Tabular List in Inline XBRL, and tag specific data points (such as quantitative amounts) within footnote disclosures in Inline XBRL.

The company must also provide the interactive data as an exhibit to the definitive proxy or information statement filed with the SEC, in addition to the Inline XBRL tagging in the proxy or information statement.

### **Do the final rules require smaller reporting companies to comply with SEC Inline XBRL requirements when they file the new pay versus performance disclosure?**

Yes, but smaller reporting companies are not required to comply with the Inline XBRL requirements until the third filing in which the company provides the pay versus performance disclosure required by the final rules.

## EGC and SRC Matters

### **Do the final rules apply to emerging growth companies or smaller reporting companies?**

The final rules exempt emerging growth companies from the new pay versus performance disclosure. Smaller reporting companies are subject to the final rules, but can elect to take advantage of disclosure accommodations provided in the final rules, and can also elect to rely on different phase-in arrangements, both of which are discussed below.

### **What are the disclosure accommodations for smaller reporting companies?**

The disclosure accommodations for smaller reporting companies are contained in Item 402(v)(8) and described in this [Goodwin client alert](#). Smaller reporting companies are required to provide three, rather than five, years of information in the Pay Versus Performance Table. In addition, the final rules permit smaller reporting companies to omit the following disclosure:

- The peer group total shareholder return (TSR) and the Company-Selected Measure in the Pay Versus Performance Table;
- The "clear description" of the relationships between executive compensation actually paid and (1) the peer group TSR and (2) the Company-Selected Measure; and
- The Tabular List of the three to seven most important financial performance measures used by the company to link executive compensation actually paid to company performance.

In addition, smaller reporting companies can elect to use an alternative calculation of executive compensation actually paid in the Pay Versus Performance Table.

Smaller reporting companies can also elect to take advantage of the transition provisions available for smaller reporting companies for the pay versus performance disclosure and the Inline XBRL tagging and exhibit requirements.

### **Will a company that will lose emerging growth company status at the end of 2023 be required to comply with the final rules in the company's 2024 proxy statement?**

Yes. A company that is not exempt from the final rules (because it is not an emerging growth company, a registered investment company or a foreign private issuer) must comply with the final rules. If a company that has a December 31 fiscal year end will no longer be an emerging growth company after December 31, 2023, the company must comply with the final rules in its 2024 proxy statement. If the company qualifies as a smaller reporting company after losing emerging growth company status, it may elect to rely on the disclosure accommodations provided in the final rules.

### **What steps can an emerging growth company take now if it will be required to comply with the final rules when it files its 2024 proxy statement but does not know whether it will qualify as a smaller reporting company?**

A disclosure mock-up is likely to be useful for many companies, whether or not the company is a smaller reporting company. Preparing a disclosure mock-up should assist the company to identify new disclosure data, sources, and controls and procedures that will be required by the final rules.

Another important step that a company should take if it has included any pay versus performance disclosure in its previously filed proxy statements is to identify and reconcile any pay versus performance disclosure in recent proxy statements to the pay versus performance disclosure required by the final rules. This could include the following steps:

- Identify all pay versus performance disclosures included in recent proxy statements;
- Compare those disclosures to the disclosure that the company anticipates including in compliance with the final rules; and
- Identify and reconcile or resolve any potential ambiguities or conflicts as a result of the pay versus performance disclosure required by the final rules.

As discussed in a separate section, companies should note that the adopting release states that although companies that have been providing pay versus performance disclosure in their proxy statements may generally continue to provide these disclosures in their existing format, the placement and presentation of the company's existing disclosures relative to the disclosure required by the final rules must not obscure the required disclosures, place the required disclosures in a less prominent position, or otherwise mislead or confuse investors.

## General Questions

### **Is the pay versus performance disclosure required by the final rules covered by the Compensation Committee Report?**

The Compensation Committee report covers the executive compensation disclosure contained in the Compensation Discussion and Analysis. To the extent that companies include pay versus performance disclosure, including the disclosure required by Item 402(v), in the Compensation Discussion and Analysis, the Compensation Committee Report will cover this disclosure.

### **Is the new pay versus performance disclosure incorporated by reference into the company's registration statements under the Securities Act of 1933 or other SEC filings?**

No. The final rules provide that the Item 402(v) pay versus performance disclosure will not be deemed to be incorporated by reference into any filing under the Securities Act of 1933 or the Securities Exchange Act of 1934, except to the extent that the company specifically incorporates it by reference.

### **If a company uses a peer group for purposes of its executive compensation disclosure, including for pay versus performance purposes, that differs from the peer group used in the stock performance graph, can the company use that peer group in the disclosures required by the final rules?**

Yes. The final rules permit companies to use either the peer group used in the company's stock performance graph required by Item 201(e) of Regulation S-K or, if the company uses a different peer group for compensation benchmarking, the peer group it uses for purposes of such benchmarking as disclosed in the company's Compensation Discussion and Analysis under Item 402(b) of Regulation S-K, for purposes of the peer group TSR shown in the Pay Versus Performance Table and the description of the relationship between executive compensation actually paid and the peer group TSR shown in the Pay Versus Performance Table.

### **If the peer group used by the company for purposes of the Pay Versus Performance Table changes from the peer group used in the immediately preceding year, what disclosure is required by the final rules?**

If the company selects or otherwise uses a peer group that is different from the peer group used for the immediately preceding fiscal year, the final rules require the company to explain, in a footnote

to the Pay Versus Performance Table, the reason(s) for the change, and to compare the company's cumulative TSR with the TSR of both the newly-selected peer group and the peer group used in the immediately preceding fiscal year.

## Disclosure Changes and Transition Challenges

### **What new disclosure metrics do the final rules require that companies have not previously been required to calculate or disclose?**

The final rules require at least one disclosure metric that is likely to be new for companies covered by the final rules. "Executive compensation actually paid" is derived from total compensation as reported in the Summary Compensation Table, but includes a variety of adjustments that are unlikely to have been made for internal purposes or disclosed publicly. Companies should review the adjustments required by the final rules and ensure that they understand how "executive compensation actually paid" will be calculated.

Most of the other disclosure metrics required by the final rules should require relatively little new work to produce for the Pay Versus Performance Table. These include:

- Summary Compensation Table total compensation for the principal executive officer (PEO) and the average of these amounts for the other named executive officers (NEOs), as reported in the Summary Compensation Table in the company's proxy or information statement;
- The company's net income, as shown in its audited financial statements;
- The company's cumulative TSR, calculated in the same manner as for the stock performance graph in the company's annual report to shareholders; and
- The cumulative TSR for the peer group or index shown either in the stock performance graph or, alternatively, the peer group disclosed in the Compensation Discussion and Analysis in the company's proxy or information statement.

### **What other significant new disclosures do the final rules require?**

The final rules require disclosure about financial performance measures that companies use to link company performance to executive compensation actually paid, which will be new for many companies. This disclosure may require attention at various levels within a company, especially in the first year that the company is subject to the final rules. This disclosure may also require a company to review and modify the internal procedures related to the creation, review and approval of company disclosure. Disclosure of company financial performance measures is required by two parts of the final rules.

First, the final rules require companies to disclose in the column for the "Company-Selected Measure" in the Pay Versus Performance Table the financial performance metric that, in the company's assessment, is "the most important" financial performance measure used by the company to link executive compensation actually paid to company performance.

Second, the Company-Selected Measure must be selected by the company from a tabular list, which the final rules refer to simply as the "Tabular List," of not less than three and not more than seven financial performance measures that are (again, in the company's assessment) the most important financial performance measures used by the company to link executive compensation actually paid to company performance.

Disclosing a list of three to seven performance measures as the "most important" pay versus performance financial performance measures, and selecting one of these measures as the company's most important pay versus performance financial performance measure, will be new for many companies.

Performing the assessment required to identify these metrics as required by the final rules will require action by the company's compensation committee. Other participants in this process may include senior executive officers, the full board of directors and the company's outside compensation consultant and legal counsel.

Potential issues related to the requirement of the final rules that the Tabular List and the Company-Selected Measure be selected because the company uses these metrics to link company performance to executive compensation actually paid are discussed below.

### **Is there a suggested framework for approaching the disclosure required by the final rules?**

The following general principles may be helpful when drafting or reviewing a company's pay versus performance disclosure generally and the disclosure required by the final rules. As with many of the issues presented by the final rules, the procedures and disclosures that a company adopts should reflect its compensation policies and practices, as well as its internal reporting structures and disclosure controls and procedures.

- ***The disclosure required by the final rules is based on disclosure requirements that are different from the disclosure requirements for the Compensation Discussion and Analysis.*** As a general matter, companies should note that the specific disclosure required by the final rules may be both separate and different from the company's disclosure in its Compensation Discussion and Analysis. The most fundamental reason for this is that for most companies, the very specific disclosure required by the final rules may not align well with the company's narrative disclosure about its actual executive compensation policies and practices in the Compensation Discussion and Analysis, which are subject to different disclosure requirements.
- ***The final rules do not require the company to adopt or change any existing compensation policies or practices.*** The final rules do not require companies to adopt new compensation policies or modify existing compensation policies. The adopting release clearly indicates that the final rules do not require companies to use pay versus performance policies or practices of any kind. Companies remain free to calculate executive compensation in any way they choose and to use any measures of company performance, or no company performance measures at all, when making executive compensation decisions.
- ***The final rules do require the company to make the disclosures specifically required by Item 402(v).*** On the other hand, the final rules do require companies to disclose compensation paid to the company's CEO and other NEOs using specific calculation methodologies. The final rules do not permit companies to modify the required methodologies or to substitute different methodologies. The fact that a company does not use one or both of the required compensation calculations or one or more of the required company performance measures does not affect the requirement that the company must show these amounts in the Pay Versus Performance Table.
- ***Existing pay versus performance disclosure in the company's proxy or information statement, and any new disclosure that supplements the pay versus performance disclosure required by the final rules, must not obscure the disclosures required by the final rules, place that disclosure in a less prominent position or otherwise mislead or confuse investors.*** "Prominence" includes, but is not limited to, which disclosure comes first in the

proxy or information statement. Companies that retain any existing pay versus performance disclosure, or provide new disclosure that supplements the disclosures required by the final rules, should ensure that this disclosure satisfies the "prominence" requirement and the other requirements described in this paragraph.

- **Consider using the Company-Selected Measure required in the Pay Versus Performance Table, as well as additional measures from the Tabular List, to tell the company's compensation story.** The final rules do not provide any flexibility with respect to how executive compensation is calculated and disclosed in the Pay Versus Performance Table, nor do the final rules provide any flexibility with respect to the disclosure of the company's net income and TSR or the peer group TSR.

The final rules do allow (and require) that the Company-Selected Measure be, in the company's assessment, "the most important" financial performance measure actually used by the company to link company performance to executive compensation actually paid. The final rules also permit companies to include additional financial performance measures from the Tabular List in additional columns in the Pay Versus Performance Table. The Company-Selected measure, as well as any additional company performance measures included in the Pay Versus Performance Table, offer an opportunity to bring the Item 402(v) disclosure into greater alignment with the company's actual compensation policies and practices.

The final rules permit companies to adopt a structure that a company can use to present a more accurate picture of its pay versus performance policies and practices by including additional performance measures in the Pay Versus Performance Table and, as required by the final rules, if the company includes additional performance measures in this table, including these additional measures in the description of the relationships between executive compensation actually paid and the performance measures shown in the Pay Versus Performance Table during the company's five most recently completed fiscal years.

- **Consider including an alternative pay versus performance table.** Subject to any staff guidance that may be published, and if relevant to the specific company, consider including an alternative version of the Pay Versus Performance Table that presents a calculation of executive compensation that reflects how the company actually calculates compensation amounts for purposes of evaluating executive compensation, instead of the total compensation as reported in the Summary Compensation Table and executive compensation actually paid as such amount is calculated under the final rules. If accompanied by appropriate narrative disclosure, an alternative pay versus performance table could assist a company in providing a more accurate picture of the company's compensation policies and practices, especially with respect to pay versus performance matters, and may be useful disclosure to investors.

If a company includes an alternative pay versus performance table, it should review the requirements described in the adopting release for alternative and supplemental pay versus performance disclosures, which are discussed below. Among other things, an alternative table should not be presented with greater prominence than the Pay Versus Performance Table, and should be clearly identified as an alternative or supplemental table.

In the absence of staff guidance to the contrary, we believe that companies can include an alternative pay versus performance table that shows (1) an alternative presentation of executive compensation as calculated by the company when making executive compensation decisions and (2) any alternate financial performance measures shown on the Tabular List that the company selects to supplement the Company-Selected Measure.

If a company includes an alternative pay versus performance table, it would be appropriate to include a description of the relationship between company performance, as measured by the performance measures shown in the alternative table, to executive compensation actually paid, as shown in the alternative table, in a manner consistent with Item 402(v)(5).

- **Consider adding contextual or clarifying disclosure where appropriate.** The final rules are heavily prescriptive, rather than principles-based. In other words, the final rules require companies to provide the specified disclosures in their specified forms. The disclosure requirements of the final rules are not qualified in terms such as "if material" or "if applicable."

This does not preclude a company from providing additional disclosure about the company's compensation policies and practices, especially about how the company uses company financial or other performance measures to link executive compensation to company performance. Even if - or perhaps especially if - the various compensation and performance metrics shown in the Pay Versus Performance Table do not reflect the company's actual policies and practices, it may be beneficial to include additional disclosure that puts the disclosure required by the final rules and the company's actual policies and practices into context.

In some cases, it may also be beneficial to add disclosure to clarify the disclosure required by the final rules. For example, if an event or change affects the comparability of any of the amounts or metrics in the Pay Versus Performance Table from one year to another, the company could note that fact and explain the nature of the event or change and its impact in a footnote to the Pay Versus Performance Table.

As described below, companies should carefully review any additional or supplemental disclosure to ensure that it is not more prominent than the disclosure required by the final rules, does not downplay or minimize the disclosure required by the final rules, and will not confuse or mislead investors.

### **Is there a suggested disclosure template for the new pay versus performance disclosure?**

Other than the format of the Pay Versus Performance Table, which is required by the final rules, and the requirements that apply to the Tabular List, the final rules generally permit a company to present the disclosure required by the final rules in the format and location(s) of the company's choice. We expect that presentation of pay versus performance disclosure under the final rules will vary widely because each company will determine how it can best present this disclosure in light of the company's particular circumstances. In particular, we expect that there will be significant differences in the description of the relationship between company performance and executive compensation actually paid based on factors such as the following:

- Executive compensation policies and practices;
- Their most important financial performance measures used to link company performance to executive compensation actually paid;
- How they present, explain and justify their compensation philosophies and decisions; and
- The broad latitude provided by the final rules that allows companies to present this disclosure in whatever format and location they choose. For example, the final rules specifically provide that the clear description of the relationship between executive compensation actually paid to the various company financial performance metrics may be in narrative or graphical format, or a combination of both. As another example, the final rules permit companies to choose

whether they wish to present this disclosure as part of the Compensation Discussion and Analysis section or separately elsewhere.

**If a company has been including disclosure about its pay versus performance policies and practices in its proxy or information statements, what disclosure issues and concerns should a company give special attention to when preparing its first proxy or information statement that will include the new pay versus performance disclosures required by the final rules?**

A company that has provided pay versus performance disclosure in prior years should not simply insert the Item 402(v) disclosures into its proxy or information statement without first identifying all current pay versus performance disclosures and carefully reviewing how these disclosures will interact with the location and contents of the disclosure required by the final rules. The company should also carefully review any new additional or supplemental pay versus performance disclosure from the same perspective.

The adopting release states that companies must clearly identify any supplemental measures of compensation or financial performance and other supplemental disclosures provided by a company as supplemental. As examples, a company could identify these disclosures by using a heading in the table to indicate that the disclosure is supplemental, or by including language in the text of the proxy or information that states that the disclosure is supplemental.

The adopting release also states that supplemental pay versus performance disclosures, including supplemental compensation and financial performance measures and any prior pay versus performance disclosures that the company includes in a proxy or information statement, must not:

- Obscure the required disclosures;
- Place the required disclosures in a less prominent position than the required disclosures; or
- Otherwise mislead or confuse investors.

Companies should also consider whether existing pay versus performance disclosures would duplicate any of the disclosures required by the final rules, and should consider reducing or eliminating any duplication.

The requirement that the disclosures required by the final rules be more prominent than other pay versus performance disclosures includes ensuring that the required disclosures are placed before other voluntary or supplemental disclosures, but is not limited to location. Companies should review the question of disclosure prominence broadly, including issues such as the wording of titles and captions, type font and color, and how any graphic disclosure elements are designed and used. Narrative disclosure that suggests that the required disclosure may be less relevant or less useful than additional, supplemental or legacy disclosures provided by the company may also be viewed by the staff as making the required disclosures less prominent than the additional, supplemental or legacy disclosures, in addition to raising potential questions about whether such disclosures might obscure the required disclosures or confuse investors.

Although many companies are likely to supplement the company performance measures in the Pay Versus Performance Table, companies should take care that additional performance measures are not more prominent than the required information in this table. Companies should also take care that the narrative and/or graphic disclosure that provides the "clear description" of

the relationships between supplemental company performance measures provided by the company in the Pay Versus Performance Table do not obscure or reduce the prominence of the disclosures about the required company performance measures, and that such disclosure does not "otherwise mislead or confuse investors."

The requirements described above may also require careful review of the relationship between any pay versus performance disclosure contained in the Compensation Discussion and Analysis and the disclosures required by the final rules.

## **The Pay Versus Performance Table (Item 402(v)(2))**

### **Do the final rules specify where the Pay Versus Performance Table and other disclosure required by the final rules must be located in a proxy or information statement?**

No. In the adopting release, the SEC states that the final rules do not require companies to include pay versus performance disclosure in the Compensation Discussion and Analysis section because that would suggest that the company considered the pay versus performance relationship in its compensation decisions, which might or might not be true.

Depending on how the company presents its executive compensation disclosure in its proxy or information statement, it may make sense to locate the disclosures required by the final rules near, or in some cases actually within, the Compensation Discussion and Analysis section.

In cases where a company has not adopted a pay versus performance compensation policy, or where the company's performance factors are not based on the company's financial or operational performance, it may be more appropriate to locate the required Item 402(v) disclosure somewhere other than within the Compensation Discussion and Analysis section, such as at the end of the other executive compensation tables.

### **If a company does not use or calculate one or more of the compensation amounts and/or company performance measures shown in the Pay Versus Performance Table, can the company delete that column or, in the alternative, indicate that the amount in the column is "not applicable"?**

No. Even if a company does not use or calculate one or more of the compensation amounts and/or company performance measures required the Pay Versus Performance Table, those amounts must be included in the Pay Versus Performance Table. The company can, however, use the accompanying discussion required by the final rules to explain that it does not use such amounts or measures in its executive compensation decisions and to provide context as to why that is the case.

### **Can a company include columns for additional company performance measures or rows for additional fiscal years?**

Yes, the adopting release clearly states that the final rules permit a company to add columns for additional company performance measures, and to add rows for additional fiscal years. Companies that chose to add columns or rows for additional information should observe the guidance provided in the adopting release regarding obscuring the required disclosures, the prominence of the required disclosures and confusing or misleading investors.

## The "Clear Description" of How the Company Links Executive Compensation Actually Paid to Company Performance (Item 402(v)(5))

**How many years must be included in the "clear description" of the relationships between executive compensation actually paid and the specified financial performance measures?**

This section must cover the years included in the Pay Versus Performance Table, which is initially three years (two years for smaller reporting companies) and five years (three years for smaller reporting companies) when the final rules are fully phased-in.

**If a company included additional financial performance measures listed in the Tabular List in the Pay Versus Performance Table, is the company required to provide the description of the relationship between executive compensation actually paid and these additional measures?**

Yes. If a company includes additional measures in the table, the company must include a clear description of the relationship between executive compensation actually paid and each additional measure included in the Pay Versus Performance Table over the five most recently completed fiscal years (or such shorter period as is covered by the Pay Versus Performance Table).

**If a company changed from one Company-Selected Measure to a different Company-Selected Measure two years ago, how should the company comply with the requirement to describe the relationship between executive compensation actually paid and the Company-Selected Measure over the five most recently completed fiscal years?**

In the absence of staff guidance, we believe that the description should cover the Company-Selected Measure shown in the Pay Versus Performance Table for the most recent fiscal year over the five most recently completed fiscal years, rather than describing the current Company-Selected Measure for two years and the prior Company-Selected Measure for three years. This approach will require the company to calculate the most recent Company-Selected Measure for earlier years and provide a description that has not previously been publicly filed of the relationship between executive compensation actually paid and that measure for those years.

It is possible that staff guidance will instead require or allow companies to describe the relationship based on the Company-Selected Measures actually shown in the Pay Versus Performance Table for each year.

## The Tabular List (Item 402(v)(6))

**What is a "financial performance measure"?**

Item 402(v)(5) defines "financial performance measure" as follows in the adopting release:

For purposes of this paragraph (v) of this section, "financial performance measures" means measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, any measures that are derived wholly or in part from such measures, and stock price and total shareholder return. A financial performance measure need not be presented within the registrant's financial statements or otherwise included in a filing with the Commission to be a Company-Selected Measure.

This definition applies to use of "financial performance measure" throughout Item 402(v).

**If a company uses different groups of financial performance measures for the PEO and the other NEOs, how should the company comply with the Tabular List requirements?**

The final rules permit companies to provide the Tabular List disclosure in a variety of formats, as appropriate:

- A single Tabular List for the PEO and the other NEOs;
- Two separate Tabular Lists, one for the PEO and one for all NEOs other than the PEO; or
- Separate Tabular Lists for each of the NEOs.

**If a company provides more than one Tabular List, how many financial performance measures must each Tabular List include?**

Each Tabular List must include at least three, but not more than seven, financial performance measures that in the company's assessment represent the most important financial performance measures used by the company to link company performance to the executive compensation actually paid to the PEO and/or the specific NEO or NEOs for the most recently completed fiscal year.

However, if the company uses less than three financial performance measures for pay versus performance purposes, the final rules permit the company to include only those measures actually used by the company in the Tabular List, but require that the Tabular List to include all financial performance measures that were used, if any.

**Do the final rules require a company to rank the financial performance measures included in the Tabular List?**

No, the adopting release specifically states that ranking is not required.

**Do the final rules require any additional disclosure about the financial performance measures included in the Tabular List?**

Yes. The final rules require companies to describe how the company calculates any financial performance metric that is not a GAAP financial measure.

The final rules do not require companies to describe why the company selected these financial performance measures, why they are the "most important" pay versus performance metrics used by the company, or how the company applies these measures in making pay versus performance compensation decisions. Although the final rules do not require these disclosures, companies may wish to consider whether any voluntary disclosure of these types might provide a more accurate understanding of the company's pay versus performance policies and practices.

**If a company uses only one or two financial performance measures to link executive compensation actually paid to company performance, how should the company comply with the requirement in the final rules to include not less than three financial performance measures?**

As mentioned above, if the company uses less than three financial performance measures for pay versus performance purposes, the final rules permit the company to include only those measures actually used by the company in the Tabular List, but require that the Tabular List to include all such measures that were used, if any.

In order to avoid confusion in these cases, the company may consider including a statement that it uses only the measures shown in the Tabular List to link executive compensation actually paid to company performance.

Note that final rules address this situation only with respect to financial performance measures used to link *executive compensation actually paid*, as calculated under the final rules, to company performance. The final rules do not refer to calculations of compensation that the company actually uses for pay versus performance purposes. This distinction should be noted and, if necessary, addressed in any statement of this type.

**Can a company include performance measures that are not financial performance measures, such as operational or non-company economic measures, in the Tabular list?**

Yes. The final rules permit companies to include non-financial performance measures in the Tabular List under the following circumstances:

- The company determines that these measures are among its three to seven most important performance measures; and
- The company has disclosed its most important three (or fewer, if the company only uses fewer) financial performance measures.

If a company includes non-financial performance measures in the Tabular List, can the Tabular List include more than seven performance measures?

No. The final rules provide that the Tabular list cannot include more than seven performance measures, regardless of whether the company includes non-financial performance measures in the Tabular List.

## Non-GAAP Financial Measures

**The Company-Selected Measure and any additional financial performance measures included by a company in the Pay Versus Performance Table are non-GAAP financial measures, as are several of the other financial performance measures shown in the Tabular List. Is the company required to comply with Regulation G and/or Item 10(e) of Regulation S-K because the Pay Versus Performance Table and the Tabular List include non-GAAP financial measures?**

The final rules include an exemption for non-GAAP financial measures that are included in a company's Pay Versus Performance Table.

Although the exemption refers only to presentation of a Company-Selected Measure and any additional measures that the company elects to provide in the Pay Versus Performance Table, in the absence of any staff guidance to the contrary, we believe that this exemption would also apply to presentation of non-GAAP financial measures in the description of the relationships between company performance and the Company-Selected Measure and any additional measures shown in the Pay Versus Performance Table because the requirement to describe these pay versus performance relationships arises because these financial performance measures were shown in the Pay Versus Performance Table, which is covered by this exemption.

For the same reason, we also believe that, in the absence of staff guidance to the contrary, the exemption for non-GAAP financial measures would apply to any non-GAAP financial measures

included in the Tabular List because the Company-Selected Measure and any additional measures shown in the Pay Versus Performance Table must be included in the Tabular List.

## **Other Topics: Regulation FD and Potential Impacts on Proxy Advisory Services and Financial Analysts**

### **Could non-public disclosure of the company's pay versus performance metrics be subject to Regulation FD?**

Materiality depends largely on the facts and circumstances of specific situations, so it is difficult to provide a general answer. Companies should be aware that disclosure that includes or suggests non-public information about the company's financial condition or results of operations or the conduct or development of its business could be material. Unless disclosure of material non-public information to the recipient of the information would be exempt under Regulation FD, the company should either disclose the information in a manner that complies with Regulation FD or should abstain from non-public disclosure of the information.

### **Will the pay versus performance disclosure required by the final rules affect how proxy advisory services apply their voting recommendation policies or calculate corporate governance ratings, or how institutional investors with their own voting and governance policies view the company?**

If a company adopts pay versus performance policies for the first time, or materially modifies existing policies and practices, there may be changes in how proxy advisory services apply their voting recommendation policies and score the company's corporate governance. Companies that newly adopt or materially modify existing pay versus performance policies should consider evaluating the potential impact of these changes before adopting new policies or modifying existing policies.

Similarly, these changes could affect how some institutional investors view the company.

In both cases, a company may want to consider highlighting these changes ahead of, or shortly after, the company files a preliminary or definitive proxy statement that includes disclosure of new or materially modified pay versus performance policies. If the company does so before it has filed a preliminary or definitive proxy statement that includes this disclosure, the company should consider the potential application of Regulation FD to any non-public discussion or disclosure. If this information is likely to be viewed as material, the company should consider either limiting its disclosure to information that is either immaterial or already publicly available, or publicly disclose the relevant information in a manner that complies with Regulation FD.

### **How will financial market participants other than institutional investors use the company's pay versus performance disclosure under the final rules?**

It is possible that, in some cases, the disclosures in the Tabular List could affect the metrics that analysts use to evaluate and predict the company's financial performance. The discussion of the relationship between executive compensation actually paid by the company and these company performance measures could also affect how analysts evaluate future company disclosures. Companies may wish to consider the potential impact of the new pay versus performance disclosures on the views of financial analysts when assessing the financial performance measures that the company will include in the Tabular List and in the Pay Versus Performance Table.

## Links to Pay Versus Performance Materials

### What materials have been published by the Securities and Exchange Commission related to the pay versus performance rules?

The following materials are available on the website of the Securities and Exchange Commission:

#### ***Final Rules:***

Final rules: [Pay Versus Performance](#), Release No. 34-95607 (August 25, 2022)

Fact sheet: [Pay Versus Performance](#) (August 25, 2022)

Press release: [SEC Adopts Pay Versus Performance Disclosure Rules](#) (2022-149, August 25, 2022)

#### ***Statements by the Chair and Commissioners:***

[Statement on Final Rule Regarding Pay Versus Performance](#) (Chair Gary Gensler, August 25, 2022)

[Neither Pay nor Performance](#) (Commissioner Hester M. Peirce, August 25, 2022)

[Statement on Pay versus Performance](#) (Commissioner Jaime Lizárraga, August 25, 2022)

#### ***Reopening of Comment Period:***

Reopening of comment period: [Reopening of Comment Period for Pay Versus Performance](#), Release No. 34-94074 (January 27, 2022)

Fact sheet: [Pay Versus Performance: Reopening of Comment Period](#) (January 27, 2022)

Press release: [SEC Reopens Comment Period for Pay Versus Performance](#) (2022-11, January 27, 2022)

#### ***Proposed Rules:***

Proposed rules: [Pay Versus Performance](#), Release No. 34-74835 (April 29, 2015)

Press release: [SEC Proposes Rules to Require Companies to Disclose the Relationship Between Executive Pay and a Company's Financial Performance](#) (2015-78, April 29, 2015)

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