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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 240, and 249

[Release No. 34-94074; File No. S7-07-15]

RIN 3235-AL00

Reopening of Comment Period for Pay Versus Performance

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Securities and Exchange Commission ("Commission") is reopening the comment period for its proposal to implement Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). The proposed rule would amend the current executive compensation disclosure rule to require a description of how executive compensation actually paid by a registrant related to the financial performance of that company ("proposed rules"). The proposed rules were first set forth in a release published in the *Federal Register* on May 7, 2015 (Release No. 34-74835) ("Proposing Release"), and the related comment period ended on July 6, 2015. The reopening of this comment period is intended to allow interested persons further opportunity to analyze and comment upon the proposed pules in light of developments since the publication of the Proposing Release and our further consideration of the Section 953(a) mandate, including by responding to the additional requests for comment included in this release.

DATES: The comment period for the proposed rule published May 7, 2015, at 80 FR 26329, is reopened. Comments should be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's internet comment form

(https://www.sec.gov/rules/submitcomments.htm).

Paper comments:

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-07-15. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (http://www.sec.gov/rules/proposed.shtml). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549-1090 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: John Byrne, Special Counsel, in the Office of Small Business Policy, at (202) 551-3460, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Section 953(a) of the Dodd-Frank Act added Section 14(i) to the Securities Exchange Act of 1934[1] ("Exchange Act"). Section 14(i) requires that the Commission adopt rules requiring issuers to disclose in any proxy or consent solicitation material for an annual meeting of shareholders a clear description of any compensation required to be disclosed under 17 CFR 229.402 ("Item 402 of Regulation S-K"), including 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. Section 14(i) further provides that the disclosure may include a graphic representation of the information required to be disclosed.

As described more fully in the Proposing Release,[2] the proposed rules would add new 17 CFR 229.402(v) ("Item 402(v) of Regulation S-K"), which would require registrants to describe how the executive compensation actually paid by the registrant related to the financial performance of the registrant over the time horizon of the disclosure. The proposed rules would use cumulative total shareholder return ("TSR"), as defined in 17 CFR 229.201(e) ("Item 201(e) of Regulation S-K"),[3] as the measure of financial performance. Under the proposed rules, the

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[1] 15 U.S.C. 78a *et seq*.

[2] *See Pay Versus Performance*, Release No. 34-74835 (Apr. 29, 2015) [80 FR 26329 (May 7, 2015)].

[3] Item 201(e) of Regulation S-K sets forth the specific disclosure requirements for the issuer's stock performance graph, which is required to be included in the annual report to security holders required by 17 CFR 240.14a-3 and 240.14c-3. The Item provides that cumulative total shareholder return is calculated by "dividing the sum of the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and the difference between the registrant's share price at the end and the beginning of the measurement period; by the share price at the beginning of the measurement period."

following tabular disclosures would be required, with the asterisked items indicating portions of the proposed rules from which smaller reporting companies ("SRCs")[4] would be exempt:[5]

Year	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO NEO	Average Compensation Actually Paid to non-PEO NEO	Total Shareholder Return	Peer Group Total Shareholder Return*
(a)	(b)	(c)	(d)	(e)	(f)	(g)
Y1						
Y2						
Y3						
Y4*						
Y5*						

Specifically, the proposed rules would:

- Apply to a registrant's "named executive officers" ("NEOs") as defined in 17 CFR 229.402(a)(3);[6]
- Address the Section 953(a) of the Dodd-Frank Act required measure of "executive compensation *actually paid*" (emphasis added) by using, as a starting point, the total compensation that is already required to be disclosed in the Summary Compensation

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4 A "smaller reporting company" means an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) had a public float of less than $250 million (as of the last business day of the issuer's most recently completed second fiscal quarter); or (2) had annual revenues of less than $100 million (as of the most recently completed fiscal year for which audited financial statements are available) and either: (i) no public float (as of the last business day of the issuer's most recently completed second fiscal quarter); or (ii) a public float of less than $700 million (as of the last business day of the issuer's most recently completed second fiscal quarter). 17 CFR 240.12b-2. Business development companies, which are a type of closed-end investment company that is not registered under the Investment Company Act, do not fall within the SRC definition.

5 The Commission amended the SRC definition effective September 2018. *See* Amendments to the Smaller Reporting Company Definition, Release No. 33-10513 (June 28, 2018) [83 FR 31992 (July 10, 2018)]. Based on staff analysis of filings in 2019, approximately 45 percent of registrants subject to the Proposed Rules would be SRCs and thus would be exempt from the asterisked disclosure, compared to approximately 40 percent at the time of publication of the Proposed Rules. Estimates based on 2020 filings would reflect a more modest change in the proportion of SRCs, but may undercount SRCs due to a greater number of registrants, particularly small ones, being late to file than in prior years.

6 17 CFR 229.402(a)(3) defines the NEOs for whom Item 402 of Regulation S-K executive compensation is required as 1) all individuals serving as the registrant's principal executive officer ("PEO") or acting in a similar capacity during the last completed fiscal year, regardless of compensation level, 2) all individuals serving as the registrant's principal financial officer ("PFO") or acting in a similar capacity during the last completed fiscal year, regardless of compensation level, 3) the registrant's three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year, and 4) up to two additional individuals for whom Item 402 of Regulation S-K disclosure would have been provided but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year. For SRCs, the Proposed Rules would apply to the scaled number of NEOs included in 17 CFR 229.402(m)(2).

Table.[7] For the PEO, the total PEO compensation from the Summary Compensation Table would be disclosed in column (b) of the new table; and, for NEOs, the average of their total compensation from the Summary Compensation Table would be disclosed in column (d) of the new table. The following two adjustments to the disclosure in the Summary Compensation Table would be made to determine the executive compensation amounts "actually paid" (columns (c) and (e) of the new table):

1. Exclude changes in actuarial present value of benefits under defined benefit and actuarial pension plans that are not attributable to the applicable year of service[8]; and
2. Include the value of equity awards at vesting rather than when granted.

- Require the executive compensation amounts actually paid to be presented separately for the PEO, and as an average for the remaining NEOs;
- Require a registrant's TSR, as defined in Item 201(e) of Regulation S-K, and the TSR of the registrant's peer group as measures of financial performance (columns (f) and (g) of the new table);
- Require a registrant to use the information in the above table to provide a clear description of (1) the relationship between executive compensation actually paid to the registrant's NEOs and the cumulative TSR of the registrant, and (2) the relationship between the registrant's TSR and the TSR of a peer group chosen by the registrant, in each case over the registrant's five most recently completed fiscal years;
- For SRCs, require the disclosure of the relationship between executive compensation actually paid and TSR over the registrant's three most recently completed fiscal

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[7] 17 CFR 229.402(c). SRCs would provide the scaled Summary Compensation Table disclosure in 17 CFR 229.402(n).

[8] As proposed, SRCs would not be required to disclose and exclude amounts related to pensions for purposes of disclosing executive compensation actually paid because they are subject to scaled compensation disclosure that does not include pension plans.

years, without requiring these registrants to provide disclosure of peer group TSR; and

- Require that the disclosure be provided in a structured data language using the Inline eXtensible Business Reporting Language ("Inline XBRL").[9]

Registrants would also be permitted to provide supplemental measures of compensation and/or financial performance, or other supplemental disclosures, so long as any additional disclosure is clearly identified, not misleading and not presented with greater prominence than the required disclosure.

The Commission proposed applying the rule to all reporting companies except foreign private issuers, registered investment companies, and Emerging Growth Companies ("EGCs").[10]

II. REOPENING OF COMMENT PERIOD

Section 953(a) of the Dodd-Frank Act was enacted in 2010 and the proposed rules were published in 2015. Since the proposed rules were published, executive compensation practices related to company performance have continued to develop and evolve,[11] to the point that we

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[9] In 2015, the Commission proposed requiring the structured, machine-readable eXtensible Business Reporting Language ("XBRL") for the tagging requirements in the Proposed Rule. The Commission subsequently adopted rules replacing XBRL tagging requirements for registrant financial statements with Inline XBRL tagging requirements. As a result of those changes, we are considering using Inline XBRL, rather than XBRL, for the proposed tagging requirements. *See infra* footnote 25.

[10] "Emerging growth company" means an issuer that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of: (i) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1.07 billion or more; (ii) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933 [15 U.S.C. 77a *et seq*.]; (iii) the date on which such issuer has, during the previous three year period, issued more than $1 billion in non-convertible debt; or (iv) the date on which such issuer is deemed to be a large accelerated filer. 17 CFR 240.12b-2. Section 102(a)(2) of the Jumpstart Our Business Startups Act amended Exchange Act Section 14(i) to exclude registrants that are EGCs from the pay-versus-performance disclosure requirements. Pub. L. No. 112-106, 126 Stat. 306 (2012). In accordance with this provision, the Commission did not propose to require EGCs to provide pay-versus-performance disclosure. As proposed, business development companies would be treated in the same manner as issuers other than registered investment companies and, therefore, would be subject to the disclosure requirement of proposed new Item 402(v) of Regulation S-K.

[11] For example, there has been a continued increase in the prevalence of performance-contingent share plans and a decrease in the use of stock options to compensate CEOs among S&P 500 and Russell 3000 companies. *See, e.g.*, Pay Governance (Jan. 2021), *S&P 500 CEO Compensation Increase Trends*, *available at* www.paygovernance.com/viewpoints/s-p-500-ceo-compensation-increase-trends-4; and Gallagher (February 2021), *CEO and Executive Compensation Practices Report: 2020 Edition*, *available at* www.ajg.com/us/news-

believe interested persons should be given a further opportunity to analyze and comment upon the proposed rules. In addition, as described below, we are considering whether additional requirements would better implement the Section 953(a) mandate by providing investors with additional decision-relevant data.

Section 953(a) of the Dodd-Frank Act does not specify how to measure an issuer's "financial performance." However, the statutory language requires that "financial performance … [take] into account any change in the value of the shares of stock and dividends of the issuer and any distributions." Consistent with this language, the Commission proposed requiring TSR (as defined in Item 201(e) of Regulation S-K) as the measure of "financial performance" of the registrant. The Commission also proposed TSR because, among other reasons, it is:

- Consistently calculated and should increase comparability across registrants;
- Objectively determinable and not open to subjective determinations of performance; and
- A measure for which disclosure is already required and with which shareholders are familiar, so its use was intended to mitigate the burdens both to registrants to provide the disclosure and to investors to analyze the new disclosure.

We are considering requiring registrants to disclose, in addition to their TSR and the TSR of their peer group, certain other measures of performance, which could provide additional clarity to investors as to the relation between executive compensation and financial performance. Specifically, we are considering requiring disclosure in tabular form of the following three

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and-insights/2021/feb/ceo-executive-compensation-practices-report-2020/. *See also*, Meridian Compensation Partners, LLC, *2020 Trends and Developments in Executive Compensation* (April 30, 2020), *available at* https://www.meridiancp.com/wp-content/uploads/Meridian-2020-Trends-and-Developments-Survey-Final.pdf (summarizing responses to a survey from 108 companies, and discussing, among other developments, a decline in the use of TSR as the sole performance metric in long-term incentive plans, from 47% in 2016 to 30% in 2020, and the recent use by some companies of TSR as a modifier to results initially determined by one or more other financial metrics). Also, the COVID-19 pandemic has affected both how and the extent to which companies recently have tied executive compensation to company performance. *See, e.g.*, A. Batish, et al., *Sharing the Pain: How Did Boards Adjust CEO Pay in Response to COVID-19?*, Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-86 (Sep. 1, 2020), *available at* https://ssrn.com/abstract=3682766 (analyzing compensation disclosure from all Russell 3000 companies between January 1 and June 30, 2020, and finding "502 companies (17 percent) made adjustments to CEO salary, bonus, or long-term incentive programs (LTIPs), or director fees during this measurement period," with 92 companies making adjustments to annual bonus programs and 33 companies making changes to their long-term incentive programs).

additional measures: pre-tax net income, net income, and a measure specific to a particular registrant, chosen by said registrant (the "Company-Selected Measure"). As noted in the Proposing Release, registrants would be required to provide a clear description of the relationship among the measures provided in the tabular form (including these three additional measures we are considering requiring), but would be allowed to choose the format used to present the relationship, such as a graph or narrative description.

The first two additional measures of financial performance under consideration – pre-tax net income and net income – are already provided for under U.S. Generally Accepted Accounting Principles ("U.S. GAAP")[12] and, accordingly, are familiar to investors and registrants. We are considering whether to require registrants to disclose these measures in two additional columns to the table described in the Proposing Release and shown above. Because these measures reflect a registrant's overall profits and are net of costs and expenses, we believe they are additional important measures of company financial performance that may be relevant to investors in evaluating executive compensation. We believe using a company's pre-tax net income and net income could complement the market-based performance measure required in the Proposing Release by also providing accounting-based measures of financial performance. To the extent that these measures would otherwise be considered by investors when evaluating the alignment of pay with performance, including pre-tax net income and net income as additional measures of performance in the proposed table may lower the burden of analysis for those investors by presenting this existing information together in a way that could make it easier to understand how pay relates to performance.

We are also considering whether to require registrants to disclose, as an additional column to the above table, a third new measure – the Company-Selected Measure – that in the

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[12] Net income is required to be disclosed in financial statements. While some registrants are not explicitly required to present pre-tax net income in their financial statements, U.S. GAAP includes presentation and disclosure requirements that result in information sufficient to calculate pre-tax net income, and these registrants often do present pre-tax net income.

registrant's assessment represents the most important performance measure (that is not already included in the table)[13] used by the registrant to link compensation actually paid during the fiscal year to company performance, over the time horizon of the disclosure. We believe that requiring registrants to select their own measure rather than mandating a further specific measure may elicit additional useful disclosure while reducing the risk, identified by commenters on the Proposing Release,[14] of misrepresenting or providing an incomplete picture of how pay relates to performance given the differences across companies in terms of performance measures that companies or investors care about and the questions about whether a "one size fits all" benchmark is appropriate for all companies.

For reference, the three additional measures we are considering requiring would be part of the table in the proposed rules as follows:[15]

Year	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO NEOs	Average Compensation Actually Paid to non-PEO NEOs	Total Shareholder Return	Peer Group Total Shareholder Return*	Pre-Tax Net Income (Loss)	Net Income (Loss)	[Company-Selected Measure]*
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
Y1									
Y2									
Y3									
Y4*									
Y5*									

[13] If the registrant's most important performance measure were already included in the table, the registrant would disclose its next-most important measure as its Company-Selected Measure. For example, if the registrant's most important measure were TSR, its second most important measure were pre-tax net income, and its third most important measure were EBITDA, the registrant would include EBITDA as its Company-Selected Measure. If a registrant did not use any measures other than those already included in the table, it would indicate that fact in its disclosure.

[14] *See, e.g.,* letters from Business Roundtable dated July 6, 2015, Celanese Corp. dated June 12, 2015, Steven Hall & Partners dated July 6, 2015, Hyster-Yale Materials Handling, Inc. dated June 10, 2015, PNC Financial Services Group, Inc. dated July 6, 2015, and Simpson Thacher & Bartlett LLP dated July 6, 2015 (each opposing the use of TSR as the sole measure of financial performance and suggesting providing registrants the ability to choose their own performance measure). Comment letters received in response to the Proposing Release are available at https://www.sec.gov/comments/s7-07-15/s70715.shtml. In addition, in a review of the CD&As of around 20 of the largest Fortune 500 companies, the staff noted that, among these companies, there were over 100 unique performance measures, almost all of which were company-specific or adjusted measures.

[15] The title of column (j) of the table, "Company-Selected Measure," would be replaced with the name of the registrant's most important measure, and that column would include the numerically quantifiable performance of the issuer under such measure for each covered fiscal year. For example, if the Company Selected Measure for the most recent fiscal year was EBITDA, the company would disclose its quantified EBITDA performance in each covered fiscal year. The asterisked items indicate disclosures we are considering not requiring SRCs to provide. See below for a discussion of our considerations with respect to SRC disclosure requirements.

In addition to potentially including the Company-Selected Measure in the table described in the Proposing Release, we are considering whether to separately require registrants to provide a list of their five most important performance measures used by the registrant to link compensation actually paid during the fiscal year to company performance, over the time horizon of the disclosure, in order of importance. If the registrant considers fewer than five performance measures when it links compensation actually paid during the fiscal year to company performance, the registrant would be required to disclose only the number of measures it actually considers.[16] We are considering whether to require this list to be in a tabular format. We note that some commenters to the Proposing Release suggested revising the Proposed Rules to require, in addition to TSR, the quantitative metrics or key performance targets companies actually use to set executive pay.[17] Currently, the Compensation Discussion and Analysis ("CD&A") requirements in Item 402 of Regulation S-K include requiring a registrant to explain all material elements of the compensation paid to its NEOs.[18] The item further specifies that examples of this material information may include how executive compensation relates to company performance such as:

- What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;
- How specific forms of compensation are structured and implemented to reflect these items of corporate performance; and

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[16] Throughout this release, we reference the "five" most important performance measures. If the registrant considers fewer than five performance measures, all references to the "five" most important performance measures should be read as the number of performance measures the registrant considers, if less than five.

[17] *See, e.g.*, letters from the American Federation of Labor and Congress of Industrial Organizations dated June 30, 2015, Council of Institutional Investors dated June 25, 2015, and Public Citizen dated July 6, 2015.

[18] *See* 17 CFR 229.402(b)(1).

- How specific forms of compensation are structured and implemented to reflect the NEOs' individual performance and/or individual contribution to these items of the company's performance.[19]

Generally, discussion of these topics in the CD&A tends to be prospective in nature and focused on the design of the registrant's compensation program. However, there is no existing rule that specifically mandates disclosure of the performance measures that actually determined the level of recent NEO compensation actually paid. Tabular disclosure of a list of the five most important performance measures that drove compensation actually paid may be useful to investors in addition to the more detailed disclosure related to the consideration of the registrant's corporate performance and individual performance in the design of NEO compensation required in the CD&A. This tabular disclosure may enable investors to more easily assess which performance metrics actually have the most impact on compensation actually paid and make their own judgments as to whether compensation appropriately incentivizes management. The disclosure of the five most important performance measures that drove compensation actually paid may also provide investors with context that could be useful in interpreting the remainder of the pay versus performance disclosure.

For reference, we are considering requiring the five performance measures, as applicable, to be disclosed in the following tabular format:

Five Most Important Company Performance Measures for Determining NEO compensation	
1.	Measure 1
2.	Measure 2
3.	Measure 3
4.	Measure 4
5.	Measure 5

In our consideration of such a tabular requirement, we note that registrants would be able to cross-reference to existing disclosures elsewhere in the disclosure document that describe the

[19] These specific examples are set forth in 17 CFR 229.402(b)(2)(v) through (vii).

various processes and calculations that go into determining NEO compensation as it relates to these performance measures, if they elected to do so.

We believe that including a tabular list of those performance measures that drove recent compensation actually paid may help address concerns that using only TSR may mislead investors or provide an incomplete picture of performance. In addition, as referenced above with respect to the Company-Selected Measure, we believe the inclusion of a registrant's five most important performance measures may better reflect the differences across companies.

We believe that the proposed rules, along with the additional disclosures we are considering, as detailed above, may facilitate the analysis of registrants' executive compensation actually paid in relation to company performance. In particular, as discussed above, each of the additional disclosures under consideration may broaden the picture of financial performance presented in the disclosure. This additional detail and context could enhance the usefulness of the disclosure by certain registrants or for certain investors. We recognize that the benefits of such disclosure would depend on the degree to which the elements of the disclosure align with the factors that investors seek to understand when considering pay in relation to performance.

As is the case with the proposed rules, we recognize that it is possible that shareholders may bear information processing costs resulting from any additional elements required to be included in the disclosure, if the new requirements increase the length and complexity of existing disclosures without significantly adding to the ease of interpretation. The additional elements under consideration could also reduce the benefits of the disclosure required by the Proposed Rules if they complicate or obscure the elements of the proposed disclosure that would be most helpful to investors.

We also acknowledge that each additional requirement could increase reporting costs for registrants. However, we believe the costs to registrants of providing the disclosures we are considering in addition to those described in the proposed rules likely would be relatively low. Specifically, pre-tax net income and net income are generally presented in the financial

statements of registrants, and, therefore, we believe there should be minimal additional costs to include those measures in the proposed new table. That said, prescribing additional measures whose relation to compensation must be clearly described increases the cost of producing the disclosure as well as the risk that some of these measures may not be as relevant for some issuers and that these issuers may therefore feel the need to include clarifying disclosures. The Company-Selected Measure and the other four most important performance measures are already considered by registrants in making executive compensation determinations and may already be discussed, in a different form, in the CD&A. While identifying and ranking the Company-Selected Measure and the other four measures may require some incremental consideration and additional computations, we expect that their disclosure should result in limited additional costs, though registrants with more complex compensation packages involving more performance measures may bear relatively greater costs.

As is the case with the proposed rules, we expect the effect of the additional disclosures we are considering to have limited other effects on efficiency, competition and capital formation. If the proposed disclosures were either to facilitate or complicate the task of understanding executive pay policies, they may marginally increase or decrease the informational efficiency of markets, respectively. The proposed amendments and the additional disclosures we are considering could also lead to indirect effects if the disclosures lead to changes in compensation packages. As discussed in the Proposing Release, we believe such changes are unlikely due to the high level of existing attention to pay practices and the limited new information that would be disclosed. Finally, the disclosure of the ranking of the list of the most important performance measures could negatively affect competition if this information is sensitive and has competitive value.

To address concerns about burdens on smaller registrants, we are considering whether and how the proposed rules and the potential disclosure of additional measures we are considering would apply to SRCs. Under existing rules, SRCs are subject to abbreviated

executive compensation disclosure requirements.[20] For example, SRCs are not required to provide a CD&A but are instead permitted to produce a more limited, narrative disclosure. To minimize costs for SRCs and consistent with the treatment of SRCs in many other areas, the Commission proposed permitting SRCs to provide scaled disclosure under the proposed rules. For example, and as indicated by the asterisked portions of the table described in the Proposing Release and shown above in Section I of this release, under the Proposed Rules, SRCs would not be required to provide the peer group TSR, as they are exempt from providing this disclosure under existing rules.[21]

With respect to the potential disclosure of additional measures, pre-tax net income and net income are already provided for under U.S. GAAP, and therefore we are considering requiring SRCs to disclose such measures. In contrast, the current abbreviated executive compensation disclosure requirements applicable to SRCs do not require them to provide a CD&A, and thus do not specifically call for disclosure about how executive compensation relates to company performance. Accordingly, and unlike other reporting companies, requiring SRCs to disclose a Company-Selected Measure and a list of their five most important performance measures would be a new disclosure obligation that SRCs would not be able to satisfy by drawing upon or cross-referencing to existing disclosures. We therefore are considering not requiring SRCs to disclose a Company-Selected Measure and a list of their five most important performance measures.

In light of developments in executive compensation practices related to company performance since the publication of the Proposing Release, and our further consideration of how best to implement the mandate of Section 953(a) of the Dodd-Frank Act, we are reopening the comment period for the proposed rules until [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to provide the public with an additional

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[20] *See* 17 CFR 229.402(l) through (r).

[21] *See* Instructions to Item 201(e) of Regulation S-K.

opportunity to analyze and comment on the proposed rules as well as the additional measures we are considering. Commenters may submit, and the Commission will consider, comments on any aspect of the proposed rules or the additional measures we are considering. All comments received to date on the proposed rules will be considered and need not be resubmitted. Comments are particularly helpful if accompanied by quantified estimates or other detailed analysis and supporting data about the issues addressed in those comments. In addition to the requests for comment included in the Proposing Release, the Commission specifically seeks comments on the following:

Request for Comment

1. Should disclosure of additional financial performance measures beyond TSR be required? Specifically, would investors find it useful to have pre-tax net income and net income presented in tabular format alongside the other metrics that would be required by the Proposing Release? Would these two additional metrics help investors to appropriately evaluate the relationship between executive compensation actually paid and the financial performance of the registrant? Would the inclusion of these measures alleviate concerns previously raised by commenters on the proposed rules about including only TSR and peer group TSR in this disclosure? Would their inclusion complicate the disclosure such that its usefulness could be reduced? Should we also require that these measures, if any, be discussed in the required description (which may be, *e.g.*, narrative or graphical) that accompanies the tabular disclosure? Instead of requiring additional financial performance measures, should we instead include pre-tax net income and net income as examples of additional measures registrants could elect to disclose if they believed such disclosure would be beneficial for them? What would the benefits or drawbacks be of that approach?

2. Are there other measures of company performance that we should consider mandating in addition to or in lieu of pre-tax net income and/or net income? If so, which additional or alternative measures should we require and why? How would these additional or alternative

measures be useful for investors in measuring company performance? Should we also require that these measures, if any, be discussed in the required description (which may be, *e.g.*, narrative or graphical) that accompanies the tabular disclosure?

3. How should we define the Company-Selected Measure, if we were to require its disclosure? We are considering defining the Company-Selected Measure as the measure that in the registrant's assessment represents the most important performance measure (that is not already included in the table) used by the registrant to link compensation actually paid during the fiscal year to company performance. Would such a definition provide sufficient clarity to a registrant as to what to disclose? What computations or considerations would be required in determining the Company-Selected Measure and what would be the associated costs for registrants? Should we require registrants to disclose the methodology used to calculate the Company-Selected Measure? Should that consideration depend on whether the measure is already disclosed in the Company's financial statements?

4. Should we require the Company-Selected Measure to be the most important measure used by the registrant in a performance or market condition in the context of an incentive plan as defined in 17 CFR 229.402(a)(6)(iii)?[22] Would including such a measure in the tabular disclosure allow investors to better evaluate the extent to which the total compensation reported as actually paid reflects the performance the company explicitly chose to incentivize, and if so would such an evaluation be useful to investors? Should the Company-Selected Measure instead be the performance measure that is deemed most important by the registrant whether or not it is used in a performance or market condition in the context of an incentive plan (*i.e.*, including the effect of stock price movements on equity incentive plan compensation, even in the absence of a market condition; or measures that affect non-incentive plan compensation, such as the

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[22] *See also* Release No. 33-8732A, *Executive Compensation and Related Person Disclosure* (Aug. 29, 2006) [71 FR 53158] ("2006 Adopting Release") at n. 167 (discussing the use of performance conditions and market conditions in equity incentive plans).

retrospective use of performance measures in determining compensation reportable in the bonus column of the Summary Compensation Table[23])?

5. We recognize that there could be varying methods of evaluating which measures are the most important. Should we define "most important" for the purpose of the selection of the Company-Selected Measure, as well as for the ranking of any other measures, if required? If so, how? For example, should the "most important" measure be the one on which the highest aggregate dollars of compensation actually paid were contingent? Or should "importance" be based on the dollar impact of the measure's variation from its initial or expected level on compensation actually paid, whether positive or negative? Instead, should "importance" be weighed based on what considerations drove the registrant's executive compensation decisions rather than its executive compensation outcomes? Alternatively, should we not specify a particular method to use to evaluate the relative importance of a performance measure in driving compensation actually paid or define "most important," and instead allow registrants to determine what they consider to be "important" for this purpose and select the Company-Selected Measure accordingly, with disclosure explaining how they made their choice? Instead of requiring that the "most important" measure be the measure generally used by the registrant to link compensation actually paid to company performance, should we require that the "most important" measure be the measure specifically used by the registrant to link only PEO compensation actually paid to company performance? What would the benefits and drawbacks be of narrowing the definition of "most important" to only PEO compensation?

6. What disclosure should be required if different measures are important in different years or if different measures determine compensation actually paid for the different NEOs? Would aggregating the NEOs for purposes of determining the most important measure be difficult, given that some NEOs may have their compensation linked to industry- or segment-specific

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[23] *See* 2006 Adopting Release at Section II.C.1.f for a discussion of the distinction between compensation reportable as bonuses and compensation reportable as non-equity incentive plan compensation.

performance measures, which are not used for other NEOs? If so, are there ways to mitigate these differences to provide useful disclosures for investors? What if different measures contribute equally to determining compensation actually paid? If the measure deemed most important is already included among the performance measures in the Proposed Rules or among the additional measures we are considering in this release, should the company be permitted to designate that measure as the Company-Selected Measure, or should the company be required to disclose an additional significant measure, such as the next-most important measure not already disclosed, as the Company-Selected Measure? What would the impact of either approach be on the usefulness of disclosure of the Company-Selected Measure? If we permit a registrant to designate TSR, peer group TSR, pre-tax net income, or net income as the Company-Selected Measure, or if a registrant did not use any measures other than those already included in the table, how should it indicate that fact in its disclosure? For example, should the registrant be required to include in the Company-Selected Measure column duplicate disclosure of the measure already included in the table, or should the registrant be required to include a note to the measure already included in the table indicating that measure is also the registrant's Company-Selected Measure?

7. Would mandated disclosure of the Company-Selected Measure be useful to investors when placed alongside the metrics that would be required by the Proposing Release? How would these benefits, if any, compare to those of any supplemental financial performance measures that would voluntarily be disclosed by registrants in the absence of such a mandate? Would there be challenges to registrants to presenting information about the Company-Selected Measure in tabular form? If so, how could we elicit comparable disclosure while also allowing registrants flexibility in presenting this information to accommodate their particular facts and circumstances? Is there another format we should consider for the Company-Selected Measure? Should we specifically limit any Company-Selected Measure only to those measures that relate to the financial performance of the registrant? Or should we allow the Company-Selected

measure to be any measure that could be disclosed under the existing CD&A requirements, including financial performance measures; environmental, social and governance related measures; or any other measures used by the registrant to link compensation actually paid during the fiscal year to company performance?

8. We are considering requiring the one Company-Selected Measure that is the most important measure over the time horizon of the disclosure to be identified in the table, and issuers would provide information about that measure, including the numerically quantifiable performance of the issuer with respect to that measure, for all of the years in the table. Would investors find such a presentation useful? Would there be challenges to registrants to presenting this information for all years? Should we instead allow companies to change their Company-Selected Measure from year to year, such that they would disclose in the table a potentially different Company-Selected Measure for each respective year? Would doing so have any impact on investors' ability to understand how pay relates to performance and compare across different years? If we do require a registrant to disclose one Company-Selected Measure to be identified in the table, and that registrant elects to change what that measure is in consecutive years, should we require that registrant to separately disclose in additional columns, or narratively, the Company-Selected Measures used in the table in prior years? How often do registrants change, from year to year, their primary performance measures used by the registrant to link executive compensation during a fiscal year to company performance?

9. Would a tabular list of a registrant's five most important performance measures used to determine compensation actually paid be useful to investors in addition to existing disclosures? As in the case of the Company-Selected Measure above, how should we define "importance" and how should performance measures be ranked for this purpose, particularly if multiple performance targets apply to the same elements of compensation? Should we require disclosure of the five most important performance measures or some other number of performance measures? Would the inclusion of an additional tabular list of a registrant's five most important

performance measures dilute the impact of, or otherwise lead to confusion regarding, the table that would be required by the Proposing Release? Should we require that the five measures be listed in order of importance? How could we increase the usefulness of the tabular list of a registrant's five most important performance measures for investors? Should there be disclosure of the methodology behind those measures?

10. What would be the cost to registrants of any computations required to identify and rank the five most important performance measures? If registrants do not currently rank their performance measures, would requiring them to list their five most important performance measures in order of importance be unduly burdensome? Would such disclosure contain information that is sensitive or has competitive value to a registrant? Should an exemption from any requirement to disclose the five most important performance measures be available if the disclosure would contain such sensitive or competitive information? If so, how should we specify the scope of any such exemption?

11. What if a registrant's five most important performance measures include measures that are included in the proposed rules or the additional measures we are considering? Should registrants be permitted to disclose fewer than five measures if they deem fewer than five to be important or if they consider fewer than five measures?

12. Would a tabular format help investors locate, use and understand disclosure of the five most important performance measures? Are there practical or other considerations that would make such tabular disclosure challenging or unduly burdensome for registrants? Would this format impede registrants from providing meaningful disclosure about their primary performance measures that factor into determining pay?

13. Should we, either in addition to or in lieu of the proposed rules and the disclosure of the additional measures we are considering, revise Item 402 of Regulation S-K to explicitly require registrants to disclose all of the performance measures that actually determine NEO compensation? If registrants are already providing this disclosure, are there ways we could

improve this disclosure? For example, do investors find current disclosures about executive compensation performance measures complicated or difficult to analyze? If so, how could we make these disclosures less complicated or facilitate their analysis while also meeting the requirements of Section 953(a) of the Dodd-Frank Act?

14. To what extent would the ability of registrants to voluntarily supplement the disclosure required by the proposed rules obviate the need for additional mandated elements of disclosure considered in this re-opening release? Should we rely on investor demand and individual registrant circumstances to drive any additional disclosures? Would such voluntary disclosures be more useful than the additional contemplated disclosures? Would such disclosures lack comparability or be overly subjective relative to the additional contemplated disclosures?

15. As noted above, based on staff analysis of filings in 2019, approximately 45 percent of registrants subject to the proposed rules would be SRCs, compared to approximately 40 percent at the time of publication of the proposed rules.[24] In light of this, should we reconsider the scaled requirements for SRCs in the proposed rules and/or the additional measures we are considering?

16. For SRCs, would disclosure of either pre-tax net income or net income be useful to investors when placed alongside the metrics included in the Proposing Release? Are there different measures of financial performance that would be more appropriate for SRCs? Should we require SRCs to disclose a Company-Selected Measure and the list of their five most important performance measures used to set NEO compensation? Why or why not? What would be the burdens on SRCs of providing this additional disclosure and would the benefits of requiring this disclosure for SRCs justify the burdens? Would any such burdens be mitigated by the fact that the Company-Selected Measure and the list of a company's five most important performance measures are by definition measures that the company already uses to link

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[24] *See supra* footnote 5.

compensation actually paid to financial performance? Is there relevant data on the long-term costs from diminished transparency that we should consider in this regard?

17. The Commission proposed to require that registrants use XBRL to tag separately the values disclosed in the required table, and separately block-text tag the disclosure of the relationship among the measures, the footnote disclosure of deductions and additions used to determine executive compensation actually paid, and the footnote disclosure regarding vesting date valuation assumptions. We are considering requiring registrants to also tag specific data points (such as quantitative amounts) within the footnote disclosures that would be block-text tagged. In addition, we are considering requiring registrants to use Inline XBRL rather than XBRL to tag their pay versus performance disclosure.[25] Would additional detail tagging of some or all of those specific data points within the footnote disclosures be valuable to investors? If so, which specific data points within the footnote disclosures should we require registrants to detail tag and why? What would be the incremental costs of such a requirement? Should we require registrants to use Inline XBRL rather than XBRL to tag the proposed new pay versus performance disclosures? Is there an alternative machine-readable language to Inline XBRL that we should consider? Should we enable more flexibility by accommodating other machine-readable languages? If we were to require Inline XBRL detail tagging of the disclosures, should we exempt smaller reporting companies from that requirement?[26] Would the costs be different for smaller reporting companies to comply with such a requirement as compared to other registrants? Should we, as was proposed with respect to the original XBRL tagging requirement,

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[25] Subsequent to the proposal, the Commission adopted rules replacing XBRL tagging requirements for registrant financial statements with Inline XBRL tagging requirements. Inline XBRL embeds the machine-readable tags in the human-readable document itself, rather than in a separate exhibit. *See* Inline XBRL Filing of Tagged Data, Release No. 33-10514 (June 28, 2018) [83 FR 40846 (Aug. 16, 2018)]. The Commission also has subsequently adopted rules requiring structured data reporting using Inline XBRL format for certain business development company disclosures. *See* Securities Offering Reform for Closed-End Investment Companies, Release No. IC-33836 (Apr. 8, 2020) [85 FR 33290 (June 1, 2020)]. As a result of those changes, we are considering using Inline XBRL, rather than XBRL, for the proposed tagging requirements.

[26] Smaller reporting companies are currently subject to the Commission's Inline XBRL tagging requirements, including detail tagging requirements.

provide a phase-in for smaller reporting companies for any Inline XBRL requirement that includes additional detail tagging?

18. Some commenters to the Proposing Release noted that the definition of compensation actually paid may result in some misalignment between the time period to which pay is attributed and the time period in which the associated performance is reported, but they generally disagreed on whether and how to revise the definition to improve such alignment.[27] Is there an alternative approach that would reduce the risk of misalignment of compensation actually paid with the associated financial performance and still provide for appropriate comparability across registrants, including the additional measures of financial performance discussed above? Would the inclusion of additional measures of financial performance as contemplated above affect this potential mismatch?

19. Some commenters to the Proposing Release noted potential challenges with using the pension service cost as defined in FASB ASC Topic 715 to determine the amount attributable to pension plans to be included in compensation actually paid.[28] As discussed in the Proposing Release, the service cost for services rendered by the executive in the applicable year is meant to approximate the value that would be set aside currently by the registrant to fund the pension benefits payable upon retirement for the service provided during the applicable year, and is intended to provide a more meaningful comparison across registrants of the amounts "actually paid" under both defined benefit and defined contribution plans. Is there an alternative measure of the change in pension value attributable to the applicable fiscal year that is better

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[27] *See, e.g.*, letters from Allison Transmission Holdings, Inc. dated July 6, 2015, Celanese Corp. dated June 12, 2015, Center On Executive Compensation dated July 6, 2015, Frederick W. Cook & Co., Inc. dated June 24, 2015, Corporate Governance Coalition for Investor Value dated July 23, 2015, Farient Advisors dated July 6, 2015, Jon Faulkner dated May 4, 2015, Financial Services Roundtable dated July 6, 2015, Honeywell International Inc. dated July 2, 2015, NACCO Industries, Inc. dated June 9, 2015, National Association of Corporate Directors dated July 10, 2015, National Association of Manufacturers dated July 6, 2015, Pearl Meyer & Partners dated July 6, 2015, Ross Stores, Inc. dated June 26, 2015, Shareholder Value Advisors Inc. dated July 6, 2015, State Board of Administration of Florida dated July 6, 2015, Teachers Insurance Annuity Association of America dated July 6, 2015, Technical Compensation Advisors, Inc. dated July 6, 2015, and WorldatWork dated July 6, 2015.

[28] *See, e.g.*, letters from AON Hewitt dated July 6, 2015, Exxon Mobil Corp. dated June 23, 2015, Towers Watson dated July 6, 2015, and WorldatWork dated July 6, 2015.

representative of the "actually paid" amount of pension benefits for an executive and would reduce the burden of computing compensation actually paid while preserving the benefits of the measure for investors? If so, describe how that amount would be calculated and what assumptions or new or additional data would be necessary for such calculation.

20. Some commenters to the Proposing Release noted potential challenges associated with computing the fair value of options at the vesting date as opposed to the grant date.[29] Are there simplifications or other adjustments that we could permit for this purpose in order to mitigate such challenges? How, if at all, would any such simplifications or adjustments affect the cost of producing the disclosure and the usefulness of the disclosure? For example, are there certain assumptions used in the valuation of options that we should allow to be carried forward from the grant date rather than re-computed as of the vesting date? What is the likelihood that assumptions would vary significantly between grant date and vesting date? To what extent could any new assumptions required for a valuation as of the vesting date be determined based on computations that would be made for another purpose, such as the valuation of new grants made around the same time?

21. Some commenters to the Proposing Release had questions about which time periods should be disclosed in the TSR portions of the table.[30] Should we clarify what time periods should be disclosed? For example, should we require TSR to be a five-year cumulative and rolling average (*i.e.*, the TSR for the first year would be the average TSR over the five years preceding and including the first year, the TSR for the second year would be the average TSR

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[29] *See, e.g.*, letters from Celanese Corp. dated June 12, 2015, Center for Capital Markets Competitiveness dated June 30, 2015, Frederick W. Cook & Co., Inc. dated June 24, 2015, and National Association of Corporate Directors dated July 10, 2015. *But see* letters from American Federation of Labor and Congress of Industrial Organizations dated June 30, 2015, Council of Institutional Investors dated June 25, 2015, Honeywell International Inc. dated July 2, 2015, and Teachers Insurance Annuity Association of America dated July 6, 2015.

[30] *See* letters from Center On Executive Compensation dated July 6, 2015, Frederick W. Cook & Co., Inc. dated June 24, 2015, Steven Hall & Partners dated July 6, 2015, Honeywell International Inc. dated July 2, 2015, Mercer LLC dated July 6, 2015, Pearl Meyer & Partners dated July 6, 2015, and Technical Compensation Advisors, Inc. dated July 6, 2015.

over the five years preceding and including the second year, *etc.*)[31]; should we require TSR to be a cumulative average within the five-year period in the table (*i.e.*, the TSR for the first year would be an average of the TSR over that first year, the TSR for the second year would be an average of the TSR over the first year and the second year, *etc.*)[32]; or should we require TSR to be an annual year-over-year figure (*i.e.*, the TSR for the first year would be the average TSR over the first year, the TSR for the second year would be the average TSR for the second year, *etc.*)[33]? What would the benefits and drawbacks be of each of these approaches?

22. Are there any other developments (including with respect to executive compensation practices) since the Proposing Release that should affect our consideration of the proposed rules or their potential economic effects? How have qualitative measures in executive compensation packages changed and/or developed since the Proposing Release? How should we contemplate such changes in our consideration of the disclosures discussed above and in the Proposing Release? How have environmental, social and governance related metrics changed and/or developed since the Proposing Release? How should we contemplate such changes in our consideration of the disclosures discussed above and in the Proposing Release? Are there changes in market practices with respect to disclosures in the CD&A or voluntary disclosures that should affect our approach or affect our consideration of the economic effects of any rule changes? Are there any changes we should consider in the methodologies and estimates used to analyze the economic effects of the proposed rules in the Proposing Release?

We request and encourage any interested person to submit comments regarding the Proposed Rules, specific issues discussed in this release or the Proposing Release, and other matters that may have an effect on the proposed rules or the additional disclosure requirements we have noted here that we are considering. We request comment from the point of view of

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[31] *See, e.g.*, letter from Honeywell International Inc. dated July 2, 2015.

[32] *See, e.g.*, letter from Pearl Meyer & Partners dated July 6, 2015.

[33] *See, e.g.*, letters from Pearl Meyer & Partners dated July 6, 2015, and Technical Compensation Advisors, Inc. dated July 6, 2015.

registrants, shareholders, directors, executives, investors, other market participants, and anyone else with an interest in this issue. If alternatives to the Proposed Rules are suggested, supporting data and analysis and quantitative information as to the costs and benefits of those alternatives are of particular assistance. Commenters are urged to be as specific as possible; when commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

If any commenters who have already submitted a comment letter wish to provide supplemental or updated comments, we encourage them to do so.

By the Commission.

Dated: January 27, 2022.

Vanessa A. Countryman,

Secretary.

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