SEC Pay for Performance Rule Adoption – Key Highlights

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On August 25, 2022, the Securities and Exchange Commission ("SEC") adopted final rules that require companies to disclose how their executives' pay aligned with corporate performance over the five most recent fiscal years. The disclosure must be included in 2023 proxies for companies with calendar year-ends.

We note that the new rule enhances, rather than replaces, the current pay for performance disclosure. While the SEC rule will not be applicable to most Canadian firms, the expectation for more fulsome and enhanced disclosure on the linkage between corporate performance (beyond TSR) and pay decisions for a Company's Named Executive Officers ("NEO") is not an unreasonable expectation. Key highlights of the rule are outlined below.

Key Highlights

What companies are impacted?

- All U.S.-listed reporting companies except foreign private issuers, registered investment companies, and Emerging Growth Companies
    - Smaller Reporting Companies are permitted to provide scaled disclosures

Will Canadian companies with a U.S. stock listing be impacted?

- Foreign private issuers and Canadian issuers accessing the U.S. market via the multi-jurisdictional disclosure system ("MJDS") are exempt from this rule
- However, Canadian companies that are not eligible to file as a foreign private issuer or as an MJDS issuer will be impacted by this rule

What needs to be disclosed?

Affected companies will need to provide at table summarizing the following data for the last five years

- Compensation *"actually paid"* to the Principal Executive Officer (i.e., President or CEO) and the average of the remaining NEOs
    - The calculation of "actually paid" will differ from what is shown in the summary compensation table and is intended to better align the timing of the disclosure and valuation with when each award is actually earned by the executive
    - A key adjustment will be the replacement of the grant date fair values for stock and option awards granted during the year, with the fair values of equity awards earned during the year – entails a number of assumptions and modifications depending on the type, grant year, and vesting status of outstanding awards
    - Similar changes are required for the aggregate change in the actuarial present value of DB pension plans

- Multiple corporate performance measures:
  - Total shareholder return ("TSR") for the Company
  - TSR for the Company's peer group
  - Company's net income
  - A Company Selected Measure (excluding TSR and net income) that the Company believes to be the single most important financial performance measure used to link compensation actually paid to the NEOs with the Company's performance for the most recently completed fiscal yearIn addition to the primary Company Selected Measure described above, an unranked list of atleast three and up to seven performance measures, which may include non-financial metrics
- Narrative description of;
  - the relationships between each performance measure included in the table and executive compensation actually paid, and
  - the relationship between the Company's TSR and its peer group TSR.

The enhanced pay for performance disclosure will also need to be tagged using Inline XBRL, as part of the SEC's continuing move to modernize financial reporting.

For further information, we invite you to reach out to a Hugessen consultant.

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