

## **REVIEW OF RECENT SEC STAFF COMMENTS ON PAY VERSUS PERFORMANCE TABLE**

Oct 16, 2023

As companies prepare for next proxy season, they should review SEC staff guidance on the pay vs. performance table. In addition to recent staff interpretations, as discussed in our [October 2, 2023 post](#) and [February 22, 2023 post](#), guidance is available from a number of recent comment letters. We've organized and consolidated the letters into categories below in order to highlight areas of focus and the SEC staff's views on compliance.

The comments indicate that companies need to review carefully the requirements of the new rule (S-K Item [402\(v\)](#)), which we summarized in our [August 29, 2022 post](#), and double-check that the pay versus performance (PvP) table utilizes the proper headings, amounts, calculations and related disclosures.

To ease your review, the headings below summarize the particular requirement of the rule, as articulated by the SEC staff, followed by consolidated examples of the comments they issued.

**Do not use more than one company-selected measure – unless not misleading and not given greater prominence. Explain relationship to executive compensation.**

We note that you include [Revenue, Adjusted Operating Income, and Adjusted EBITDA as your Company-Selected Measures]. Regulation S-K Item 402(v)(2)(vi) permits you to designate only one Company-Selected Measure, which, in your assessment, “represents the most important financial performance measure (that is not otherwise required to be disclosed in the table) used by [you] to link compensation actually paid to [your] named executive officers, for the most recently completed fiscal year, to company performance.” Please ensure that you include only one Company-Selected Measure in the pay versus performance table.

You may elect to provide in the table one or more performance measures in addition to the Company-Selected Measure, provided that the disclosures about those measures “may not be misleading or obscure the required information, and the additional performance measures may not be presented with greater prominence than the required disclosure.” See Pay Versus Performance, Release No. 34–95607 (Apr. 29, 2015) [87 FR 55134 (Sept. 8, 2022)] at 55159.

Note that each additional measure must also be accompanied by a clear description of the relationship between executive compensation actually paid to your CEO and, on average, to the other named executive officers and that measure, across the fiscal years presented. See Regulation S-K Item 402(v)(5)(iv).

**Must use net income (loss) as reported in GAAP financials in PvP table, not a variation of that line item; clearly describe the relationship between net income and compensation actually paid.**

It appears that you have included as net income in column (h) of your pay versus performance table amounts equal to

- [the net income attributable to [name of company]]
- [Income (Loss) from Continuing Operations]

for each year covered by the table. Please include net income (loss), as reported in your audited GAAP financial statements, in column (h) for all years covered by the table as required by Regulation S-K Item 402(v)(2)(v). Refer to Regulation S-K Compliance and Disclosure Interpretations Questions 128D.08 and 128D.09.

Please also provide a clear description of the relationship between compensation actually paid and net income, [as opposed to "net income attributable to [name of company]"] as required by Regulation S-K Item 402(v)(5)(ii). Please note that it is not sufficient to state that no relationship exists, even if a particular measure is not used in setting compensation.

Please note that you may voluntarily provide supplemental measures of compensation or financial performance, so long as any additional disclosure is clearly identified as supplemental, not misleading, and not presented with greater prominence than the required disclosure.

**Disclose how non-GAAP measures are calculated from the company's audited financial statements; cross referencing permitted but not incorporation by reference to another filing.**

We note that you have included [XXX], a non-GAAP measure(s), as your Company-Selected Measure pursuant to Regulation S-K Item 402(v)(2)(vi).

[Examples from comment letters: Adjusted EBITDA, Adjusted Operating Income, Core EBITDA, EBITDA as a percentage of Revenues, Adjusted Earnings Per Share and AORT Revenue Growth.]

Please ensure that you provide disclosure showing how [these numbers are] calculated from your audited financial statements, as required by Regulation S-K Item 402(v)(2)(vi). [We note your reference in footnote (7) to further discussion in the Compensation Discussion and Analysis, but we are unable to locate disclosure showing how your Company-Selected Measure is derived from the audited financial statements.] [We note your reference in footnote (d) to the pay versus performance

table. It is unclear how you determine "baseline" and how it is used in calculating the Company-Selected Measure from your audited financial statements.] If the disclosure appears in a different part of the definitive proxy statement, you may satisfy the disclosure requirement by a cross-reference thereto; however, incorporation by reference to a separate filing will not satisfy this disclosure requirement.

**Use the correct amounts from the Summary Compensation Table in the PvP table and when calculating compensation actually paid.**

- We note your statement in footnote (2) that "[i]n general, Compensation Actually Paid is calculated as Summary Compensation Table total compensation adjusted to include the fair market value of equity awards as of December 31 of the applicable year or, if earlier, the vesting date (rather than the grant date)." Since some of the required calculations involve changes in fair market value from the prior year end, rather than fair market value at year end, if you choose to include disclosure summarizing Regulation S-K Item 402(v), please ensure that the correct requirements are discussed.
- We note that the amounts listed for 2021 and 2022 in column (b) are not the same as the amounts listed for those years in the PEO "TOTAL" column of the Summary Compensation Table on page [•]. Similarly, the average of the non-PEO NEO amounts reported in column (d) do not appear to be consistent with the amounts reported in the "TOTAL" column of the Summary Compensation Table for the non-PEO NEOs. Please ensure that you have entered the correct Summary Compensation Table amounts in your pay versus performance tables pursuant to Regulation S-K Item 402(v) and that the calculation of compensation actually paid and your relationship disclosures reflect the appropriate calculations.
- You include Mr. [•] "in his role as Executive Vice President, Chief Revenue Officer & Director" as one of your non-PEO named executive officers. It is not clear whether this is intended to be limiting disclosure. If so, please ensure that the amounts reported for the Summary Compensation Table total and compensation actually paid in the pay versus performance table include all compensation required under Regulation S-K Item 402(v)(2)(ii) and (iii). Refer to C&DI; Question 128D.02 regarding exclusion of other non-NEO compensation and the change in value of awards during the executive's tenure as a NEO, which should be included in the calculation of compensation actually paid.

**Use of proper headings in PvP table**

Please ensure that your table headings reflect accurately the amounts used to calculate compensation actually paid. Refer to Item 402(v)(2)(iii)(C)(1)(iv) of Regulation S-K.

**Disclose identities of the PEO and other NEOs and the relevant fiscal years they served.**

Please ensure that you identify the principal executive officer, as well as each named executive officer included in the calculation of average non-PEO NEO compensation, and the fiscal years in which such persons are included, including the most recent fiscal year. You may provide this information in a footnote to the pay versus performance table. See Regulation S-K Item 402(v)(3).

**Include separate columns for the PEO and the other NEOs, and properly calculate compensation actually paid for PEO and the average for other NEOs.**

[We note your disclosure in footnote 1 that compensation actually paid is the same as the total compensation reported in the Summary Compensation Table. ] [We note from footnote (•) on page [•] that the 2022 disclosure of the average Summary Compensation Table total for non-PEO NEOs is meant to include both [•] and [•], and for 2021 is meant to include Messrs. [•] and [•] and Dr. [•]. However, it appears that the pay versus performance table may include only the Summary Compensation Table total and compensation actually paid amounts for Dr. [•].] Please ensure that the pay versus performance table includes separate columns for the PEO's total compensation and the average total compensation for the non-PEO named executive officers for each covered fiscal year as reported in the Summary Compensation Table pursuant to Regulation S-K Item 402(v)(2), and that any footnotes and descriptions of the relationships between information presented in the table accurately reflect the disclosures in the table

**Must include disclosures of relationships between compensation and each of TSR, net income and company-selected measures; use correct amounts and terminology; present disclosure separately from PVP table. Not sufficient to state that no relationship exists.**

- It appears that you have not provided the relationship disclosures required by Regulation S-K Item 402(v)(5). [While we note your disclosure "Company TSR and Peer Group TSR" on page [•], it appears that you have not provided all of the relationship disclosures required by Regulation S-K Item 402(v)(5).] [Please provide a clear description of the relationship between compensation actually paid and both net income and your Company-Selected Measure, as required by Regulation S-K Item 402(v)(5).] Please provide this required disclosure in its entirety.

Although you may provide this information graphically, narratively, or a combination of the two, this disclosure must be separate from the pay versus performance table required by Regulation S-K Item 402(v)(1) and must provide a clear description of each separate relationship indicated in subparagraphs (i), (ii), and (iv) of Regulation S-K Item 402(v)(5).

Please note, it is not sufficient to state that no relationship exists, even if a particular measure is not used in setting compensation.

- Refer to the graph titled "Absolute Pay vs TSR Alignment." The vertical bars identified as CEO Compensation Actually Paid and NEO Average Compensation Actually Paid appear to reflect the Summary Compensation Table amounts, rather Compensation Actually Paid amounts. In

addition, it is not clear why the title of the graph refers to “Absolute Pay,” or why such title refers to TSR but not to “Operating Income,” which is also included in the graph.

The requirement of Items 402(v)(5)(i) and (iii) is to describe the relationship between compensation actually paid and total shareholder return, and compensation actually paid and the Company-Selected Measure, respectively. Please ensure that the disclosures provided pursuant to Regulation S-K Item 402(v)(5) reflect the correct amounts and terminology from the pay versus performance table.

**Disclose each of the individual adjustments in reconciliation of totals in Summary Compensation Table to compensation actually paid.**

- Please revise the table that provides a reconciliation of the adjustments to the totals as presented in the Summary Compensation Table to compensation actually paid to show each of the numerical amounts deducted and added pursuant to Regulation S-K Item 402(v)(2)(iii). [We note that you have provided one line item in the Summary Compensation Table for vested and unvested stock-based awards. See Regulation S-K Item 402(v)(3).] For guidance, refer to Regulation S-K Compliance and Disclosure Interpretations Questions 128D.03 and 128D.04.
- Please ensure that the reconciliation table at the top of page 48 shows each of the numerical amounts added under Regulation S-K Item 402(v)(2)(iii)(B)(1)(i) and (ii) to calculate the "Pension Benefit Adjustments." See Regulation S-K Item 402(v)(3). For guidance, refer to Regulation S-K Compliance and Disclosure Interpretations Question 128D.04.

**Use of year-end fair value for all outstanding and unvested awards in calculation of compensation actually paid.**

In calculating the compensation actually paid for the non-PEO named executive officers, you indicate that you exclude the value of certain outstanding and unvested performance-based equity awards that were granted in the covered fiscal year. Regulation S-K Item 402(v)(2)(iii)(C)(1)(i) requires that you include the “fair value as of the end of the covered fiscal year of all awards granted during the covered fiscal year that are outstanding and unvested as of the end of the covered fiscal year.” In your calculations of compensation actually paid, please ensure that you include the fair values required by Regulation S-K Item 402(v)(2)(iii)(C)(1)(i).

**Use difference between year-end fair value for prior year and fair value as of vesting date for awards that vest during year.**

Refer to the reconciliation table in the footnotes to your pay versus performance table. It is unclear what amounts are reflected:

- [In the row titled "ADD Year over Year Change in Fair Value of Equity Awards Granted in Prior Year that Vested in the Year."]

- [In the row titled "Year over Year Change in Fair Value of Equity Awards Granted in Prior Years that Vested in the Year."]
- [In the columns with the headings titled "Add Year-End Equity Value," "Change in Value of Prior Equity Awards" and "Add Change in Value of Vested Equity Awards."]

Specifically, equity awards granted in prior years that vest during the relevant year should be valued as the difference between the fair value as of the end of the prior fiscal year and the vesting date, not the "year over year" change in value. Please ensure that your table headings reflect accurately the amounts used to calculate compensation actually paid [and clearly indicate when the equity awards were granted (current or prior year) and the time period over which changes in value, if any, are measured.] Refer to Item 402(v)(2)(iii)(C)(iv) of Regulation S-K.

**Use proper start date for TSR measurement period, which is the last trading day before the earliest fiscal year in the PvP table.**

We note that your cumulative total shareholder return amounts are calculated from December 31, 2017, rather than December 31, 2019. Item 402(v)(2)(iv) of Regulation S-K provides that the period for calculating cumulative total shareholder return begins with the market close on the last trading day before the registrant's earliest fiscal year in the pay versus performance table. Given that your pay versus performance table begins with your fiscal year 2020, the measurement period would begin with December 31, 2019. Please ensure that your cumulative total shareholder return calculation is limited to the timeframe required by Item 402(v)(2)(iv) of Regulation S-K.

**Disclose composition of peer group used in peer group TSR.**

Please clarify the peer group you have used for purposes of the peer group total shareholder return column in the pay versus performance table. Refer to footnote 4 where you indicate that you have not identified a peer group based on either industry classification or financial characteristics. It also appears that your peer group is not the same as the index you use for disclosures under Regulation S-K Item 402(b), since that index is based upon financial characteristics. Regulation S-K Item 402(v)(2)(iv) requires that you use the same index or issuers you use for purposes of Regulation S-K Item 201(e)(1)(ii) or, if applicable, the companies you use as a peer group for purposes of your Regulation S-K Item 402(b) disclosures. If the peer group is not a published industry or line-of-business index, the identity of the issuers composing the group must be disclosed in a footnote.

**Describe the relationship of company TSR to peer group TSR.**

Please provide a clear description of the relationship between your total shareholder return and the total shareholder return of the peer group you selected for your pay versus performance table, as required by Regulation S-K Item 402(v)(5)(iv).

**Include tabular list of financial performance measures.**



We note that you have included [Revenue] as your Company-Selected Measure pursuant to Regulation S-K Item 402(v)(2)(vi). Please ensure that you provide a Tabular List that includes your Company-Selected Measure and at least three, and up to seven, financial performance measures, which represent the most important financial performance measures that you use to link compensation actually paid to your named executive officers, for the most recently completed fiscal year, to company performance. Refer to Regulation S-K Item 402(v)(6).

Please note that non- financial performance measures may also be included only if such measures are among your three to seven most important performance measures, and you have disclosed your most important three (or fewer, if you only use fewer) financial performance measures.

## RELATED PRACTICE AREAS

- Securities & Corporate Governance

## MEET THE TEAM



### R. Randall Wang

St. Louis

[randy.wang@bclplaw.com](mailto:randy.wang@bclplaw.com)

[+1 314 259 2149](tel:+13142592149)

---

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon ([kathrine.dixon@bclplaw.com](mailto:kathrine.dixon@bclplaw.com)) as the responsible attorney.