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# The New Proxy Disclosure Tables: What Goes Where?



By Edward A. Hauder, EXEQUITY LLP  
Libertyville, Illinois

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## Introduction

The new proxy disclosure rules<sup>1</sup> continue to require public companies to disclose compensation information in tabular format for certain executive officers, i.e., the Named Executive Officers (NEOs).<sup>2</sup> This article and accompanying table will help describe how typical compensation arrangements for the NEOs<sup>3</sup> would or could be disclosed in the new and revised compensation tables.

## Who is an NEO?

The starting point in figuring out what goes where is determining for whom these tabular disclosures are required. The NEOs will be the principal executive officer (PEO), the principal financial officer (PFO), and the three highest paid executives (other than the PEO and PFO), determined on the basis of total compensation, less the change in actuarial present value of accumulated pension benefits and above-market earnings on nonqualified deferred compensation (NQDC).<sup>4</sup>

The new rules cause NEO treatment to apply to anyone who served as PEO (CEO under the current rules) during the prior fiscal year (as was the case under the old rules), and extend this concept to the PFO as well.<sup>5</sup> The new rules also keep the old rule that requires the inclusion of up to two additional executives who would have been amongst the top four (top three under the new rules) highest paid executives other than the CEO (other than the PEO or PFO under the new rules) but for the fact that they were not serving as executive officers as of the last day of the applicable fiscal year.<sup>6</sup>

In summary, a company's NEOs are:

- anyone who served as PEO during the last completed fiscal year,<sup>7</sup>
- anyone who served as PFO during the last completed fiscal year,<sup>8</sup>
- the three most highly compensated executives other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year (Top 3 Executives),<sup>9</sup> and
- up to two additional individuals who would have been among the Top 3 Executives but for the fact that the individual was not serving as an executive officer at the end of the last completed fiscal year.<sup>10</sup>

Because the new rules include amounts paid or accrued to an NEO pursuant to a plan or arrangement in connection with termination of employment or a change-in-control, companies may now find themselves

including more terminated executives in their proxy tables than they ever did under the old rules. From a practical perspective, given the size of typical executive termination/severance/change-in-control payments, if an executive terminates his or her

employment or receives a change-in-control payment, he or she will generally end up in the tables, unless other executives received larger termination/change-in-control payments. Thus, a company that has two or more such executives (other than the CEO and CFO) who were paid in relation to their termination or a change-in-control is virtually assured of having to include seven executives (at minimum) in its tables.

In the final rules, the Securities and Exchange Commission (SEC) took comments about establishing NEOs on the basis of total compensation into account and decided that the NEOs will be determined on the basis of total compensation after taking out the change in the actuarial present value of accumulated pension benefits and above-market earnings on NQDC.<sup>11</sup> This methodology will somewhat moderate, but will not eliminate, the variability that is likely to exist in the NEOs disclosed year to year. The NEOs likely will still vary from year to year as a result of special, one-time compensation (e.g., signing bonuses, retention bonuses, and relocation expenses), equity awards, and retirement and severance payments. This variability is likely to have its greatest impact on those executives who traditionally have not been considered among the NEOs, but are only a step or two away.

The new rules eliminate the ability to exclude an executive officer from the tables due to special, one-time compensation payments.<sup>12</sup> However, the new rules continue to permit companies to exclude executive officers due to overseas assignment income.<sup>13</sup>

During the next proxy season, some companies will likely be surprised by the individual executives who end up being their NEOs or by those executives who were left out. In such cases, companies would do well to remember that the new proxy rules merely set the minimum number of executives that must be disclosed in the tables.<sup>14</sup> Companies can include additional executives if they choose. However, before doing so, they should carefully consider all the ramifications of including an executive who did not qualify as an NEO in the tables. For example, will this establish an expectation with the company's shareholders that the company will always disclose compensation for more than the NEOs? What happens if the company later decides not to include an additional executive in the tables? Are there any securities or tax implications from including an extra executive in the tables? Once a company has answers to these and related questions, it can make an informed decision as to whether it will include such an executive in the tables.

## What Tables?

Once you figure out who your NEOs are, the next step is to figure out what tables might be required. The instructions to the new proxy rules indicate that if a company does not have any information for a particular table or a column within a table, the company is permitted to exclude such a table or column.<sup>15</sup> For example, if a company does not have a pension plan for its NEOs, it could exclude the Pension Benefits Table from its proxy. However, some companies might want to include such columns or tables so that they can enter zeroes as a way to emphasize the compensation programs that they do not have.

The NEO compensation disclosure tables that are required to be included in a company's<sup>16</sup> proxy statement are as follows (assuming at least one of your NEOs has compensation that needs to be reported under the table):

- **Summary Compensation Table<sup>17</sup>** – discloses salary, (discretionary) bonus, the value of stock awards and option awards, nonequity incentive compensation earned, change in pension value and above-market earnings on nonqualified deferred compensation, all other compensation (including perquisites, if their aggregate value exceeds \$10,000), and the total of the other columns in the table.

- **Grants of Plan-Based Awards Table**<sup>18</sup> – supplements the Summary Compensation Table and discloses plan-based grants to NEOs during the last fiscal year on a grant-by-grant basis.
- **Outstanding Equity Awards at Fiscal Year-End Table**<sup>19</sup> – discloses outstanding equity awards held by NEOs, including out-of-the-money awards, on a grant-by-grant basis for stock option and similar awards and on an aggregate basis for nonvested stock and equity incentive plan awards.
- **Option Exercises and Stock Vested Table**<sup>20</sup> – discloses the options exercises and stock awards that vested for each NEO during the last fiscal year on an aggregated basis.
- **Pension Benefits Table**<sup>21</sup> – discloses for each NEO, each pension plan that provides him or her benefits, the number of years of credited service (if different from actual years of service, a footnote must explain) under the plan, the actuarial present value of the accumulated benefits under the plan, and the dollar amount of any payments and benefits paid during the last fiscal year.
- **Nonqualified Deferred Compensation Table**<sup>22</sup> – for the last fiscal year, discloses the NEO's and company's contributions, aggregate earnings, aggregate withdrawals/distributions, and aggregate balance at fiscal year end.

Additionally, while only a narrative disclosure is required to detail potential payments upon termination of employment or a change-in-control,<sup>23</sup> many companies are considering using some type of table to detail all or some portion of the required quantification disclosure for such payments.

The tables themselves are fairly rigid. Most typical compensation items will fit nicely into the tabular disclosure regime. But a few common compensation items raise questions as to just how they should be disclosed under the new rules, e.g., restricted stock units once they vest but before paid out. Hopefully, the SEC will provide some guidance on the compensation disclosures for such items to help companies and practitioners implement the new rules.

The proxy rules even added a few “stealth” columns to the tables, i.e., columns that are only required if certain requirements are met. Generally, these “stealth” columns are located in the Grants of Plan-Based Awards Table and were not given names by the SEC (however, I have added suggested titles for these columns to make it easier for readers both of this article and proxies to understand the information being presented in these columns):

- **Date of Action** column – If the grant date is different from the date the compensation committee or full board of directors takes action or is deemed to take action to grant an option, a separate column (adjoining the **Grant Date** column) must be added to the table that shows the date the compensation committee or full board of directors took action or was deemed to take action to grant the option.<sup>24</sup>
- **Grant Date Closing Market Price** column – If the exercise price is less than the closing market price on the date of grant, a separate column (adjoining the **Exercise or Base Price of Option Awards (\$/Sh)** column) must be added to the table that shows the closing market price on the date of grant.<sup>25</sup>
- **Required Footnote** – If the exercise price is not the closing market price on the date of grant, a footnote to the table must set forth the company's methodology for determining the exercise price.<sup>26</sup>
- **Units/Rights #** column – If a nonequity incentive plan award is denominated in units (such as a performance unit that pays out in cash), a separate column (adjoining the **Grant Date** column)

must be added to the table that quantifies the number of units or other rights awarded.<sup>27</sup>

Additionally, companies may want to add columns to the tables to make some of their other disclosures easier. For example, in the Outstanding Equity Awards at Fiscal Year End Table, companies might want to add a column that discloses stock options' spread value (difference between the current stock price and the exercise and strike price of the option). This column could then be referenced in the narrative supplemental disclosure that is required to be included that details all payments and benefits upon a termination of employment or change-in-control,<sup>28</sup> especially as a means to explain the in-the-money amount for vested stock options. Depending on the particular termination provisions applicable to the outstanding stock option awards, it may even make sense to include a column showing the spread value for unvested stock options (especially if unvested awards are automatically vested upon a termination event or change-in-control).

## What Goes Where?

Now that you know who needs to be included in the tables, and what tables will apply, the next step is to see how various typical compensation elements would be reported in the new tables. The chart below details common compensation elements, where they would be included in the main tables, and when the disclosure would be required. The following tables are not covered by the chart: Pension Benefits Table, Nonqualified Deferred Compensation Table, and the (voluntary) payments/benefits upon a termination of employment or change-in-control table. For compensation elements for which the new rules do not provide any clear advice or instruction, the chart displays a proposal for how this compensation might be reported.

## Conclusion

The new proxy rules will cause some elements of compensation to be disclosed in ways that may seem strange (annual bonuses with pre-established performance goals granted under a plan), and may even have an impact on compensation surveys (disclosing performance-based annual bonuses as nonequity incentive plan compensation on an aggregated basis with other nonequity incentive plan awards, such as long-term cash plans that are performance-based, may make it difficult to be able to gather competitive data on "bonuses"). Even which executives get included in the tables has undergone a major revision that will take companies a little time to fully appreciate and incorporate into their compensation practices and procedures.

It will take some time before people are fully accustomed to the new requirements and fully understand the implications of the rules for many of the less mainstream compensation elements. Determining how best to disclose such elements of compensation will prove a challenging test of interpretation (and possibly divination) of the new rules, hopefully with some guidance (regardless of whether it is as formal as a release or as informal as a comment or two at a major speaking engagement) from the SEC.

## Table: What Goes Where



Chart: What Goes Where [PDF Image]

## Footnotes

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<sup>1</sup> *Executive Compensation and Related Person Disclosure*, SEC Release Nos. 33-8732; 34-54302; IC-27444; File No. S7-03-06, issued Aug. 11, 2006, and published in the *Federal Register*, 17 CFR Parts 228, 229, 232, 239, 240, 245, 249, and 274, Sept. 8, 2006, as SEC Release Nos. 33-8732A, 34-54302A; IC-27444A [71 Fed. Reg. 53,158] (“Adopting Release”).

<sup>2</sup> Adopting Release, Regulation S-K, Item 402(a)(3) and Instructions 1 to 3 to Item 402(a)(3).

<sup>3</sup> This article will not cover the Director Compensation Table, which is also required by the new proxy disclosure rules and that details the compensation earned or received by directors during the last fiscal year.

<sup>4</sup> Adopting Release, Regulation S-K, Item 402(a)(3).

<sup>5</sup> Adopting Release, Regulation S-K, Item 402(a)(3) and Current Item 402(a)(3).

<sup>6</sup> *Id.*

<sup>7</sup> Adopting Release, Regulation S-K, Item 402(a)(3)(i).

<sup>8</sup> Adopting Release, Regulation S-K, Item 402(a)(3)(ii).

<sup>9</sup> Adopting Release, Regulation S-K, Item 402(a)(3)(iii). Note that no disclosure is required for any executive officer, other than the PEO or PFO, whose total compensation as determined for purposes of determining NEOs, does not exceed \$100,000. *Id.* at Instruction 1 to Item 402(a)(3).

<sup>10</sup> Adopting Release, Regulation S-K, Item 402(a)(3)(iv).

<sup>11</sup> Adopting Release, at Section II.C.6. [71 Fed. Reg. 53,189-53,190].

<sup>12</sup> Adopting Release, at Section II.C.6.b. [71 Fed. Reg. 53,190], and Final Item 402(a)(3).

<sup>13</sup> Instruction 3 to Final Item 402(a)(3).

<sup>14</sup> Adopting Release, Regulation S-K, Item 402(a)(3).

<sup>15</sup> Adopting Release, Regulation S-K, Instruction 5 to Item 402(a)(3).

<sup>16</sup> Assumes that the company is not a small business issuer or a foreign private issuer, but is a “typical” public company.

<sup>17</sup> Adopting Release, Regulation S-K, Item 402(c).

<sup>18</sup> Adopting Release, Regulation S-K, Item 402(d).

<sup>19</sup> Adopting Release, Regulation S-K, Item 402(f).

<sup>20</sup> Adopting Release, Regulation S-K, Item 402(g).

<sup>21</sup> Adopting Release, Regulation S-K, Item 402(h).

<sup>22</sup> Adopting Release, Regulation S-K, Item 402(i).

<sup>23</sup> Adopting Release, Regulation S-K, Item 402(j).

<sup>24</sup> Adopting Release, Regulation S-K, Item 402(d)(2)(ii).

25 Adopting Release, Regulation S-K, Item 402(d)(2)(vii).

26 Adopting Release, Regulation S-K, Instruction 3 to Item 402(d).

27 Adopting Release, Regulation S-K, Instruction 6 to Item 402(d).

28 Adopting Release, Regulation S-K, Item 402(j).

*This article provides general information and not legal advice or opinions on specific facts. Pursuant to Rules 7.2 and 7.4 of the Illinois Rules of Professional Conduct, this article may constitute advertising material.*

<b>Compensation Element</b> <i>Table covers...</i>	<b>Summary Compensation Table<sup>1</sup></b> <i>Compensation when awarded or earned</i>	<b>Grants of Plan-Based Awards<sup>2</sup></b> <i>Plan awards in year of award</i>	<b>Outstanding Equity Awards at Fiscal Year-End<sup>3</sup></b> <i>Equity awards outstanding at FYE; until equity award vests or is exercised</i>	<b>Option Exercises and Stock Vested<sup>4</sup></b> <i>Option exercises and stock vested during last FY</i>
<b>Salary</b>				
Paid in Cash	\$ in col. (c)	NA	NA	NA
Paid in Equity	\$ in col. (e) [stock] or (f) [options] <sup>5</sup>	See treatment for appropriate equity award below	See treatment for appropriate equity award below	See treatment for appropriate equity award below
<b>Bonus</b>				
Discretionary/Non-formulaic	\$ in col. (d)	NA	NA	NA
Performance-Based / Section 162(m)	\$ in col. (g) when earned	In cols. (b) [grant date] and (c)/(d)/(e) [threshold/target/max. \$ amts.]	NA	NA
Paid in Equity	\$ in col. (e) [stock] or (f) [options] <sup>6</sup>	See treatment for appropriate equity award below	See treatment for appropriate equity award below	See treatment for appropriate equity award below
<b>Equity Awards – Time-Based</b>				
Restricted Stock	\$ in col. (e)	In cols. (b) [grant date] and (i) [# shares]	Until vested at FYE, in cols. (g) [# shares], (h) [\$ market value]	In FY becomes vested, in cols. (d) [# shares] and (e) [\$ value realized] – on an aggregated award basis
RSUs/DSUs	\$ in col. (e)	In cols. (b) [grant date] and (i) [# shares]	Until vested at FYE, in cols. (g) [# shares], (h) [\$ market value]	In FY becomes vested, in cols. (d) [# shares] and (e) [\$ value realized] – on an aggregated award basis
Stock Options/SARs	\$ in col. (f)	In cols. (b) [grant date], (j) [# option shares], and (k) [XP]	Until exercised, in cols. (b) [# exercisable], (c) [# unexercisable], (e) [XP] and (f) [expiration date]	In FY exercised, in cols. (b) [# shares] and (c) [\$ value realized] – on a grant-by-grant basis
<ul style="list-style-type: none"> <li>• XP is less than closing stock price</li> </ul>	\$ in col. (f)	In cols. (b) [grant date], (j) [# option shares], (k) [XP], and Closing Stock Price col.	Until exercised, in cols. (b) [# exercisable], (c) [# unexercisable], (e) [XP] and (f) [expiration date]	In FY exercised, in cols. (b) [# shares] and (c) [\$ value realized] – on a grant-by-grant basis
<ul style="list-style-type: none"> <li>• Action date is different than grant date</li> </ul>	\$ in col. (f)	In cols. (b) [grant date], (j) [# option shares], (k) [XP], and Action Date col.	Until exercised, in cols. (b) [# exercisable], (c) [# unexercisable], (e) [XP] and (f) [expiration date]	In FY exercised, in cols. (b) [# shares] and (c) [\$ value realized] – on a grant-by-grant basis

Compensation Element	Summary Compensation Table <sup>1</sup>	Grants of Plan-Based Awards <sup>2</sup>	Outstanding Equity Awards at Fiscal Year-End <sup>3</sup>	Option Exercises and Stock Vested <sup>4</sup>
<b>Equity Awards – Performance-Based</b> Performance Shares	Target fair value \$ in col. (e)	In cols. (b) [grant date] and (f)/(g)/(h) [threshold/target/max. # shares]	<ul style="list-style-type: none"> <li>• Until earned, at FYE, in cols. (i) [# unearned shares at threshold performance unless prior FY performance exceeded threshold, then use next higher performance measure, i.e., target or max.] and (j) [\$ market value]</li> <li>• After earned and until vested, in cols. (g) [# unvested shares] and (h) [\$ market value]</li> </ul>	In FY becomes vested, in cols. (d) [# shares] and (e) [\$ value realized] – on an aggregated award basis
Restricted Stock	Target fair value \$ in col. (e)	In cols. (b) [grant date] and (f)/(g)/(h) [threshold/target/max. # shares]	<ul style="list-style-type: none"> <li>• Until earned at FYE, in cols. (i) [# unearned shares at threshold performance unless prior FY performance exceeded threshold, then use next higher performance measure, i.e., target or max.] and (j) [\$ market value]</li> <li>• After earned and until vested, in cols. (g) [# unvested shares] and (h) [\$ market value]</li> </ul>	In FY becomes vested, in cols. (d) [# shares] and (e) [\$ value realized] – on an aggregated award basis
Stock Options/SARs	Target fair value \$ in col. (f)	In cols. (b) [grant date], (f)/(g)/(h) [threshold/target/max. # option shares], and (k) [XP]	<ul style="list-style-type: none"> <li>• Until earned, in cols. (d) (# unexercised and unearned at threshold performance unless prior FY performance exceeded threshold, then use next higher performance measure, i.e., target or max.), (e) [XP], and (f) [expiration date]</li> <li>• After earned and until exercised, in cols. (b) [# exercisable], (c) [# unexercisable], (e) [XP] and (f) [expiration date]</li> </ul>	In FY exercised, in cols. (b) [# shares] and (c) [\$ value realized] – on a grant-by-grant basis
<ul style="list-style-type: none"> <li>• XP is less than closing stock price</li> </ul>	Target fair value \$ in col. (f)	In cols. (b) [grant date], (f)/(g)/(h) [threshold/target/max. # option shares], (k) [XP], and Closing Stock Price col.	<ul style="list-style-type: none"> <li>• Until earned, in cols. (d) (# unexercised and unearned at threshold performance unless prior FY performance exceeded threshold, then use next higher performance measure, i.e., target or max.), (e) [XP], and (f) [expiration date]</li> </ul>	In FY exercised, in cols. (b) [# shares] and (c) [\$ value realized] – on a grant-by-grant basis

Compensation Element	Summary Compensation Table <sup>1</sup>	Grants of Plan-Based Awards <sup>2</sup>	Outstanding Equity Awards at Fiscal Year-End <sup>3</sup>	Option Exercises and Stock Vested <sup>4</sup>
<ul style="list-style-type: none"> <li>Action date is different than grant date</li> </ul>	Target \$ in col. (f)	In cols. (b) [grant date], (f)/(g)/(h) [threshold/target/max. # option shares], (k) [XP] and Action Date col.	<ul style="list-style-type: none"> <li>After earned and until exercised, in cols. (b) [# exercisable], (c) [# unexercisable], (e) [XP] and (f) [expiration date]</li> <li>Until earned, in cols. (d) [# unexercised and unearned at threshold performance unless prior FY performance exceeded threshold, then use next higher performance measure, <i>i.e.</i>, target or max.], (e) [XP], and (f) [expiration date]</li> <li>After earned and until exercised, in cols. (b) [# exercisable], (c) [# unexercisable], (e) [XP] and (f) [expiration date]</li> </ul>	In FY exercised, in cols. (b) [# shares] and (c) [\$ value realized] – on a grant-by-grant basis
Performance-accelerated vesting equity awards <sup>7</sup>	Fair value \$ in col. (e)	<ul style="list-style-type: none"> <li>If stock: in cols. (b) [grant date] and (i) [# shares]</li> <li>If Options: in cols. (b) [grant date], (j) [# option shares], and (k) [XP]</li> </ul>	If Options: <ul style="list-style-type: none"> <li>Until earned, in cols. (d) [# unexercised and unearned], (e) [XP], and (f) [expiration date]</li> <li>After earned and until exercised, in cols. (b) [# exercisable], (c) [# unexercisable], (e) [XP] and (f) [expiration date]</li> </ul> If Stock: <ul style="list-style-type: none"> <li>Until vested at FYE, in cols. (i) [# unearned shares] and (j) [\$ market value]</li> </ul>	If Stock: <ul style="list-style-type: none"> <li>In FY becomes vested, in cols. (d) [# shares] and (e) [\$ value realized] – on an aggregated award basis</li> </ul> If Options: <ul style="list-style-type: none"> <li>In FY exercised, in cols. (b) [# shares] and (c) [\$ value realized] – on a grant-by-grant basis</li> </ul>
<b>Non-Equity Incentive Compensation</b>				
Long-Term Cash Plans	\$ in col. (g) when earned	In cols. (b) [grant date] and (c)/(d)/(e) [threshold/target/max. \$ amts.]	NA	NA
Performance Units	\$ in col. (g) when earned	In cols. (b) [grant date], (c)/(d)/(e) [threshold/target/max. \$ amts.], and Units/Rights # col.	NA	NA

**Legend:**

Amts. – amounts	FY – fiscal year	Max. – maximum
Col. – column	FYE – fiscal year end	XP – exercise price

Footnotes

<sup>1</sup> Adopting Release, Regulation S-K, Item 402(c).

<sup>2</sup> Adopting Release, Regulation S-K, Item 402(d).

<sup>3</sup> Adopting Release, Regulation S-K, Item 402(f).

<sup>4</sup> Adopting Release, Regulation S-K, Item 402(g).

<sup>5</sup> Adopting Release, Regulation S-K, Instruction 2 to Item 402(c)(2)(iii) and (iv).

<sup>6</sup> *Ibid.*

<sup>7</sup> Assume these awards would otherwise vest based on the passage of time, *i.e.*, providing continued service to the company for a period of time.