JOURNAL OF PENSION PLANNING & COMPLIANCE

Editor-in-Chief: Bruce J. McNeil, Esq.

VOLUME 41, NUMBER 1
SPRING 2015

Wolters Kluwer

Proxy Statement Reporting for Executive Benefits

BRAD MELTON, LEE NUNN, AND DAVE SUGAR

Brad Melton is vice president in Aon Hewitt's Global Benefits. He may be reached at *brad.melton@aonhewitt.com.*

Lee Nunn, CPA, is a senior vice president in Aon Hewitt's Executive Benefits Practice. He may be reached at *lee.nunn@aonhewitt.com*.

Dave Sugar is a partner in Aon Hewitt's Talent & Rewards Practice in Lincolnshire, IL. He may be reached at *dave.sugar@aonhewitt.com*.

Annual proxy statements filed by public companies provide significant amounts of information concerning all aspects of the compensation paid or otherwise provided to a company's Chief Executive Officer and certain other executive officers of the company. This steady flow of information all but ensures that executive compensation will continue to make headlines. Themes include perceptions of excessive levels of compensation, pay-for-performance, and wage disparity. This article explores those rules and the SEC's guidance on those rules now that companies have had time to digest that guidance.

Because the primary public source of executive compensation information is proxy statements, companies and investors should understand how proxy statements reflect executive compensation. In response to criticism over earlier rules for reporting certain compensation, the Securities and Exchange Commission (SEC) updated the proxy disclosure rules for executive compensation in 2006.[1] Though the rules and guidance from SEC Staff (Compliance and Disclosure Interpretations or C&DIs) are quite detailed, relatively little attention has been directed towards the reporting requirements related to executive benefits. This article explores the pay disclosure rules and the SEC's guidance on those rules with a particular emphasis on the disclosure of executive benefits.

A proxy statement is the primary way in which publicly traded companies solicit votes from shareholders. The term derives from the fact that most shareholders vote by proxy because they do not attend the annual shareholders' meeting in person. The SEC's technical term for a proxy is the definitive proxy statement because some versions of proxy statements are only preliminary. Proxy statements are governed by Regulation 14A of the Securities Exchange Act of 1934 (Exchange Act), which does not require proxy statements but does control the content and solicitation process whenever a registrant solicits proxies. Registrants are companies whose securities are registered under Section 12 of the Exchange Act and usually file definitive proxy statements at least 30 days before the annual shareholders' meeting. These proxy statements are readily available on company Web sites and on the SEC's Web-based database called EDGAR. Proxy statements on these Web sites appear as Form DEF 14A, an abbreviation of "definitive" and Regulation "14A" of the Exchange Act.

Because many shareholders who read the proxy statement are interested in the compensation arrangements used to motivate and retain executives, Regulation 14A requires such information as essential proxy statement content. Although the Dodd-Frank Act requires an expansion of the executive compensation disclosures in proxy statements, the SEC has not yet proposed rules to implement these requirements as of the date of this article. The current requirements for proxy statement disclosure of executive compensation are codified under Item 402 of Regulation S-K. These requirements include a narrative called Compensation Discussion and Analysis (CD&A), executive compensation tables, and other narrative executive compensation disclosures. The tables include the Summary Compensation Table (SCT), Grants of Plan-Based Awards, Outstanding Equity Awards, Option Exercises and Stock Vested, Pension Benefits, and Nonqualified Deferred Compensation. Other Potential Post-Employment Payments are often presented in a table format. Registrants that meet the criteria for a smaller reporting company may use a slightly scaled down version of the executive compensation disclosure requirements.

This article focuses on the identification of named executive officers and the disclosure of their pension benefits, nonqualified deferred compensation, and certain insurance benefits as these items appear in the SCT, the Pension Benefits Table, the Nonqualified Deferred Compensation Table, and Other Potential Post-Employment Payments. The article relies on the SEC's final rules on executive compensation disclosure and the Compliance & Disclosure Interpretations (CD&I) published on the SEC's Web site.[2] Because the SEC's guidance does not address some of the nuances of the issues discussed in this article, companies may have to weigh any new insights on these issues with the value of consistent treatment of a disclosure from year to year. This article does not discuss the requirements for smaller reporting companies or the requirements for director compensation.

IDENTIFICATION OF NAMED EXECUTIVE OFFICERS

The first step in disclosing executive compensation in a proxy statement is identifying those executives whose compensation needs to be reported. In this context, executives are executive officers as defined in Rule 3b-7 of the Exchange Act, which states, "the term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant." Regulation 14A requires the disclosure of compensation for only certain executive officers and labels these individuals "named executive officers" (NEOs), as described in Item 402 of Regulation S-K. NEOs fall into one of three mutually exclusive categories.[3]

The first category includes anyone who served as either the principal executive officer (PEO)[4] or principal financial officer (PFO)[5] during the year, regardless of compensation. Although this category includes both the PEO and PFO, turnover in either position generally requires the inclusion of additional individuals.

The second category comprises the three most highly compensated individuals who are executive officers at year end (other than anyone included in the first category).[6] Because this category includes only executive officers, this category excludes highly compensated individuals such as news anchors, bond traders, and sales professionals when these individuals do not meet the criteria of executive officer as defined in Rule 3b-7 of the Exchange Act. This category also does not include individuals who were no longer executive officers at year end or whose compensation was less than $100,000.[7] When ranking the compensation of individuals who were executive officers at year end, use the total annual compensation as the amount would appear in the SCT but adjusted to exclude any increase in pension value or above market earnings on nonqualified deferred compensation.[8] Finally, it may be appropriate to include certain officers of subsidiaries,[9] and it may be appropriate to exclude certain officers due to overseas compensation.[10]

The third category includes up to two additional individuals who would have been NEOs but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year.[11] The reason for no longer serving as an executive officer is usually an executive officer's termination of employment. However, consider all compensation for the year when an executive officer leaves the role of executive officer but remains an employee. This third category is often empty, but severance benefits paid to an executive officer who terminates employment can cause that executive officer to be an NEO.

SUMMARY COMPENSATION TABLE (SCT)

NEO compensation is featured most prominently in the SCT, which shows compensation by category and in total for the past year and the prior two years if the NEO was in the proxy statement for those years.[12] Each of the following categories of compensation has its own column:

- Salary
- Bonus
- Stock awards granted
- Options awards granted
- Non-equity incentive plan compensation earned
- Change in pension value and nonqualified deferred compensation earnings
- All other compensation
- Total

Do not annualize the compensation of a newly hired executive officer, but consider the full year's compensation for an individual who was promoted from within to an executive officer.[13, 14] The columns of particular importance to pension benefits, nonqualified deferred compensation, and certain insurance benefits are columns labeled "Change in pension value and nonqualified deferred compensation earnings" and "All other compensation."

Change in Pension and Deferred Compensation Earnings

Because the column labeled "change in pension value and nonqualified deferred compensation earnings" includes only the above-market component of interest crediting to nonqualified deferred compensation plans, the change in pension value is usually the more significant component. This change in pension value is the aggregate increase in "defined benefit and actuarial plans" which include both tax-qualified and nonqualified plans.

Defined Benefit and Actuarial Plans

In general, "defined benefit and actuarial plans" should align with any plan that the registrant values under defined benefit accounting for their financial statements.[15] However, certain plans may be ambiguous in terms of their required inclusion. Defined benefit and actuarial plans include cash balance plans, which are plans that credit a percentage of salary to principal and an indexed rate of return until retirement. According to footnote 190 in the adoption release for the final rules,[16] "defined benefit plans include, for example, cash balance plans in which the retiree's benefit may be determined by the amount represented in an account rather than based on a formula referencing salary while still employed."

Confusion may arise when an SEC registrant sponsors a nonqualified account balance plan that was never intended to be a cash balance plan but requires defined benefit accounting methodology. Auditors may require defined benefit accounting methodology when, as examples, a nonqualified deferred compensation plan credits above market interest or when a nonqualified defined contribution plan provides investment returns determined by the plan and not participant driven.

In situations where a nonqualified account balance plan requires defined benefit accounting the registrant must decide if the plan is in principle a "cash balance" plan, which requires Summary Compensation Table disclosure of the year-over-year change in the present value of accumulated benefits, or in principle a deferred compensation plan, which requires disclosure of the above market interest in one column and employer contributions (if any) in another column. On one hand, Regulation S-K's long-standing treatment of above-market interest on deferred compensation strongly suggests that such a plan should be disclosed as a deferred compensation plan. On the other hand, the fact that the accounting treatment is identical to that of a traditional cash balance plans suggests that pension plan treatment is appropriate. A reasonable approach to categorizing nonqualified account balance plans is to disclose plans with defined benefit accounting as pensions if the account balance plan includes only employer contributions and as deferred compensation when the plan only includes voluntary deferrals. In situations where a plan includes both employer monies and employee deferrals, the registrant should address the issue with the appropriate advisors.

Only Aggregate Increases

As previously noted, the SCT explicitly discloses the change in pension value. Due to various circumstances and typically for changes in economic assumptions (e.g., the discount rate), the year-over-year change in pension value for an individual NEO may be negative. However, the aggregate net change in pension value as it appears in the SCT may not be less than zero.[17] If the aggregate change in pension value is negative, the SCT column should reflect zero change in aggregate pension obligation values with the full negative amount documented in the SCT footnotes.[18] The column may not display a zero if there is above market earnings. If the aggregate change is positive but the change in an individual plan is negative, the rules do not require the disclosure of a decrease in the value of a single plan. The instructions in Regulation S-K require that the change in pension value be the same pension value used in the Pension Benefits supplemental table. The later discussion of supplemental tables will explore the issues in calculating the change in pension value for a specific plan.

When an aggregate increase in pension value follows an aggregate decrease (and therefore disclosed as zero), informal discussions with the SEC indicate that registrants should not net the decrease against the increase. In other words, the change in pension value should be based on the current change in pension value, regardless of whether the prior year's change disclosed in the SCT. For example, if the aggregate pension value for an NEO was $1,000,000 at FYE2012, $800,000 at FYE2013, and $1,100,000 at FYE2014, the SCT table would show $0 for 2013 and $300,000 for 2014. As a result, relying on cumulative increases in pension values reported in the SCT overstates the actual increase when some of the years experienced footnoted decreases.

What to Do When an NEO Receives a Distribution?

Labeling the required disclosure as the change in pension value is misleading. For example, when an NEO receives distributions from a pension plan, the distribution is added back to the end of year pension value for purposes of calculating increases.[19] The C&DI gives an example of pension values of $1 million at both the beginning and end of the year with an in-service distribution of $200,000. The increase in the pension value reflects the $200,000 distribution in spite of the fact that the pension value has not changed. Although in-service distributions in defined benefit and actuarial plans are unusual, NEOs who retire during the year can receive pension benefits before year end. Also, an NEO can retire, begin to receive distributions, and then be recalled to join the company while payments are in progress.

Above Market Interest on Deferred Compensation

In addition to increases in pension values, the "change in pension and deferred compensation earnings" column includes (only) the above-market component of interest crediting.[20] The final rules are constructed in a manner that effectively prohibits netting above-market interest on deferred compensation against aggregate decreases in pension values to avoid disclosure of above-market interest in the SCT. Although the market component of interest crediting on deferred compensation escapes the SCT entirely, the nonqualified deferred compensation table reflects all earnings credited to a participant's account (above market and market). Interest crediting includes both interest crediting (e.g., 5%) and notional investments (e.g., S&P500 index). According to a 2014 Aon Hewitt survey, 88% of responding companies with nonqualified deferred compensation plans offered participants a choice of funds for deferrals of salary or bonus.[21]

When interest reflects an interest rate (rather than a notional investment with market risk), the threshold for determining above-market interest is 120 percent of the long-term applicable federal rate (AFR) determined when the interest rate or formula is set or reset.[22] If rates are contingent (*e.g.*, on service), assume satisfaction of all conditions of payment.[23] An informal conversation with SEC staff confirmed the following examples:

Example 1

A registrant agrees to credit 6% on nonqualified deferred compensation balances when the long-term AFR is 4.05%. The above-market portion of the interest crediting remains at 1.95% until the rate is reset.

Example 2

A registrant agrees to credit Moody's corporate average bond yield on nonqualified deferred compensation balances when the long-term AFR is 4.05%. Any excess of the Moody's rate over 4.05% is above-market until a new rate or formula is set.

Example 3

A registrant agrees to retroactively credit Moody's corporate average bond yield plus 2% on nonqualified deferred compensation balances if the NEO remains employed for 10 years. If the NEO terminates employment voluntarily, the crediting rate will be zero. The long-term AFR is 4.05% at the time of the agreement. Any excess of the Moody's plus 2% rate over 4.05% is above-market (regardless of vesting) until a new rate or formula is set.

The primary alternative to an interest rate or interest rate formula (*e.g.*, Moody's plus 2 percent) is measuring account balances as notional investments with fluctuating market values. The distinction between an interest rate and a notional investment is not always obvious. For example, crediting a high-yield bond rate without adjusting balances for the market risk of such an investment is an interest rate, whereas measuring account balances with a high-yield bond index (with fluctuating market values) is an example of a notional investment. Allowing NEOs to benefit from the yield premium on high-yield bonds without requiring them to suffer market losses creates the potential for above-market interest. Neither Regulation S-K Item 402 nor the final rules on executive compensation disclosure address how the use of notional investments creates above-market interest.

However, avoiding above market interest may be more complicated than simply using a notional investment. The SEC's position is that market rate notional investments are limited to "externally managed investments to employees participating in a tax-qualified plan providing for broad-based employee participation" (*e.g.*, the 401(k) plan investment menu).[24] The SEC's guidance extends this position to "excess benefit plans," which includes plans that limit benefits to those lost to Internal Revenue Code (IRC) limits,[25] but many deferred compensation plans are not purely "excess benefit plans." The SEC expresses particular concern with a "top hat" plan or Supplemental Employee Retirement Plan (SERP) "that bears no relationship to a tax-qualified plan of the issuer." Presumably this concern stems from the belief that NEOs might benefit from notional investment choices that are not available to rank and file employees. However, there is little evidence to support this concern.

Despite the SEC's position as expressed in the C&DI,[26] we have not seen any registrant that credits earnings based on the returns of notional investments consider them to be above market earnings. Instead, prevailing practice appears to be that any notional investment that reflects an actual financial instrument (whether owned by registrant or not) delivers a market-based return. Although notional investments available to NEOs through deferred compensation plans usually reflect a broader spectrum than solely those available to 401(k) participants, the nature of those investments does not appear to be significantly different. It is possible that many SEC registrants limit the menu of notional investments to those in their 401(k) plan. It is also possible that many notional investments in nonqualified deferred compensation arrangements are comparable, but not identical to, the 401(k) offerings, and registrants are taking a common sense approach to determining above-market interest.

Looking to the FICA tax or accounting rules for guidance on the reasonableness of interest rates is of little help in determining above-market interest. The FICA tax rules use Moody's average corporate bond rate as an example of a reasonable interest rate but require the use of the January mid-term AFR to determine the market rate when the rate is not reasonable. A reasonable rate of interest for FICA purposes is not necessarily a market rate for proxy reporting purposes. However, the FICA tax rules do state that a "predetermined actual investment" credits reasonable interest without limiting those investments to 401(k) choices. Accounting rules are even less helpful. Crediting an interest rate significantly above the discount rate can prompt auditors to require the defined benefit methodology of a cash balance plan. However, there is no clear guidance on categorizing nonqualified account balance plans as cash balance plans.

ALL OTHER COMPENSATION

All other compensation is a catch-all column, designed to ensure that no item of compensation is overlooked. This column includes any compensation not required to be included in another column.[27] Examples include employer contributions to defined contribution retirement plans, termination of employment or change in control payments, life insurance premiums, discounts on stock purchases, dividends on stock and option awards, gross-ups, and perquisites and other personal benefits. Items of compensation for the last fiscal year that exceed $10,000 must be separately identified and quantified in a footnote.[28] Perquisites and personal benefits with an aggregate value of less than $10,000 for a particular NEO are the only compensation excluded from the SCT. Note that registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.[29]

Employer Contributions to Retirement Plans

Employer contributions to defined contribution retirement plans include contributions to both qualified and nonqualified plans as well as both vested and unvested amounts.[30]

Termination of Employment or Change-in-Control Payments

All other compensation includes amounts paid or due in connection with termination of employment or change-in-control if the performance is complete.[31] A C&DI gives two examples.[32] If payment is not contingent but simply delayed to comply with IRC § 409A, the compensation is included in all other compensation. If payment is contingent on the satisfaction of a two-year noncompete agreement, performance is not complete and the amount is not included in the current year's all other compensation column.

Gross-Ups

Gross-up arrangements often result from another benefit or the taxes on that benefit and are reported in the same year as the related benefit is reported even when gross-up is the paid during the following year.[33] For proxy reporting purposes, gross-ups are separate from any other benefit. Gross-ups that total more $10,000 must be separately quantified in a footnote disclosure and they cannot be combined with the related perquisite or benefit to avoid disclosure as a gross-up. A gross-up for a perquisite or personal benefit that falls below $10,000 must be included in the All Other Compensation column (but need not be described as such in the footnotes) even when the related perquisite or personal benefit does not require disclosure.[34]

Executive Life

Life insurance (other than broad-based group arrangements) must be reported at the "dollar value of any insurance premiums paid."[35] Life insurance arrangements are not eligible for treatment as a perquisite or personal benefit, possibly because life insurance cash value is a potential source of retirement income or because of the SEC's past concerns that registrants would understate the dollar value. When the NEO owns the life insurance policy without restriction and the registrant pays the life insurance premium on the NEO's behalf, the dollar value of any insurance premiums paid equals the premium.

When NEOs participate in split-dollar arrangements, the dollar value of the premium is less obvious. The SEC specifically addressed the reporting of split-dollar arrangements in 1994 by requiring registrants to report both unreimbursed term insurance component of the premium paid and the expected opportunity cost of the non-term element of split-dollar premiums paid during the year.[36] Most SEC registrants terminated split-dollar arrangements for NEOs after the Sarbanes-Oxley Act prohibited personal loans to executive officers, because many split-dollar arrangements could be interpreted as personal loans. In instances in which a registrant maintains a split-dollar arrangement for an NEO and is no longer paying premiums, the SEC offers no updated guidance on the dollar value of such an arrangement. In addition, most registrants that maintain postretirement split-dollar arrangements for NEOs only report the unreimbursed value of the current term insurance as measured for tax purposes in spite of the fact that US GAAP generally requires an expense accrual related to the actuarial value of the post-retirement death benefit. Since the "All other compensation" column should be used to pick up all compensation that could not be more properly disclosed in another column of the Summary Compensation Table, it may be more in keeping with the principles of the executive compensation disclosures to include some value related to growth in the post-retirement benefit obligation.

Perquisites and Other Personal Benefits

The SEC deliberately refuses to provide a bright line definition of perquisites and other personal benefits. Instead, the SEC provides only general guidance. Items "integrally and directly related to the performance of the executive's duties" are not perquisites and other personal benefits. Items for which the NEO has fully reimbursed the company are not reportable.[37] An item is a perquisite or personal benefit if it "confers a direct or indirect benefit that has a personal aspect." This is true regardless of whether there is a business reason, or whether the arrangement is for convenience of the company. Perquisites and other personal benefits that exceed the greater of $25,000 or 10 percent of the perquisites and personal benefits for a particular officer must identified and quantified using the aggregate incremental cost to the company.

Executive disability coverage is an example of a perquisite or other personal benefit. This is disability coverage for an NEO that is not provided on a nondiscriminatory basis to all employees.[38] When the premium, aggregated with all other perquisites and other personal benefits for an NEO, falls below the $10,000 threshold, none of the items (including the disability premium) is included in all other compensation.[39] When the aggregate value exceeds $10,000, the premium for the disability coverage is included in all other compensation. When the disability premium alone exceeds the greater of $25,000 or 10 percent of the perquisites and personal benefits for that NEO, the premium must be identified and quantified in the footnotes to the SCT.

Effect of Deferrals and Conversions of Nonqualified Pension Plans

Deferral of any component of compensation does not change the column of compensation. For example, an elective deferral of nonequity incentive compensation does not convert nonequity incentive compensation into deferred compensation for purposes of the SCT,[40] but the deferral is reflected as an executive contribution in the supplemental deferred compensation table discussed later in this article.[41] Likewise, converting a nonqualified defined benefit arrangement into an account balance deferred compensation arrangement has no immediate effect on the SCT. However, future market rate interest credit on the converted arrangement will avoid the SCT, whereas actuarial growth (including interest) would have been included in the change in pension values had the benefit arrangement not been converted.

SUPPLEMENTAL TABLES

Although the proxy reporting rules require the following supplemental tables when applicable, this article discusses only the supplemental tables for pension benefits, nonqualified deferred compensation, and potential payments upon termination or change-in-control.

Discussed in greater detail below

- Pension Benefits
- Nonqualified Deferred Compensation
- Potential payments upon termination or change-in-control (not necessarily a table)

Outside the scope of this article

- Grants of Plan-Based Awards
- Outstanding Equity Awards at Fiscal Year-End
- Option Exercises and Stock Vested

Pension Benefits Supplemental Table

The aggregate change in pension values reported in the SCT reflects the changes in the value of the individual plans reported in the pension benefits supplemental table. from one year to the next. These plans include both qualified and nonqualified arrangements, but exclude any type of "defined contribution" plans.[42] Qualified defined contribution plans do not require disclosure in a supplemental table, and nonqualified defined contribution plans are included in the Nonqualified Deferred Compensation table discussed below.

For each named executive officer and each individual pension benefit plan, the following information as of the end of the fiscal year is provided:[43]

- Plan name
- Number of years of credited service under the plan
- Present value of accumulated benefits under the plan
- Payments under the plan during the past year

In disclosing years of credited service, footnote any difference between credited service under the plan and actual service. Also disclose any resulting benefit increase and the corporate policy for awarding such additional service.[44]

The present value of accumulated benefits starts with the same assumptions that are used for financial reporting purposes.[45] These assumptions include the discount rate (and lump-sum interest rate), form of benefit, years of service, and mortality. The discount rate is the rate used for the plan and does not reflect the effect of a yield curve applied to the benefits received by a particular NEO.

Assumption	**Present Value of Accumulated Benefits**
Interest rate to discount future payments	The single discount rate used for the plan in the registrant financial statements; note a different rate may apply for different plans, but should not vary by executive
Mortality	None prior to retirement; Same as used in registrant financial statements thereafter
Retirement	Earlier of normal retirement age or earliest unreduced retirement age, but no sooner than current age
Increases in pensionable earnings or service	Not included; for final average pay benefits, use the average pay as of the measurement date (i.e., do not project forward at the current rate to determine the average)
Other economic assumptions including inflation and lump sum conversation rates	Same as used for the plan in registrant financial statements
Other demographic assumptions including form of payment and percent covering a spouse/dependent	Same as used for the plan in registrant financial statements

The executive compensation reporting rules do specify certain differences between assumptions used for proxy disclosure and assumptions used for financial reporting. Whereas financial reporting rules require an assumed rate of future compensation increases (when applicable), the proxy rules require the use of current compensation.[46] Likewise, whereas financial reporting rules allow decrements for preretirement forfeitures, the proxy rules require the assumption that all vesting conditions will be met.[47, 48] For an executive who has not met the vesting criteria for a subsidized early retirement benefit, assume that the executive meets the vesting criteria if that is a possibility. Finally, the proxy rules require a discrete retirement age, which is the earlier of the normal retirement age or, if applicable, the earliest age at which benefits are not actuarially reduced for age.[49, 50] While there is ambiguity and lack of guidance around how the earliest unreduced age criteria applies for cash balance plans, general practice has been to use the normal retirement age as specified in the plan document (generally age 65) in determining the commencement date.[51] For an executive who has worked beyond his normal retirement date, use the current age at the valuation date. Reflect the effect of the six month delay required by IRC section 409A when appropriate. Footnote the valuation method and all material assumptions or incorporate this information by reference to the notes to Form 10-K.[52]

The rules allow no adjustment for the individual circumstances of a specific NEO,[53] including but not limited to marital status, form of benefit elected, or announced future retirement date. The change in the present value of accumulated benefits includes the effect of any additional years of service, compensation increases, plan amendments, and change in the discount rate. For nonqualified plans offset by qualified plans, apply IRC limits at the pension measurement date.[54]

Nonqualified Deferred Compensation Supplemental Table

Whereas the SCT reflects only the above market interest component of nonqualified deferred compensation, the nonqualified deferred compensation supplement table reflects all activity for the year and the ending account balance.[55] Tax-qualified plans (e.g., 401(k)) are excluded from this table. For each nonqualified arrangement payable to each NEO, provide the following information by column:[56]

- Name
- Executive contributions in last FY
- Registrant contributions in last FY
- Aggregate earnings in last FY
- Aggregate withdrawals/distributions
- Aggregate balance at last FYE

Registrant contributions earned in one year, but not credited to the account until the following year, are included in the year earned.[57] Aggregate earnings include any change in account balance that is not attributable to contributions or distributions, and include losses and above-market interest.[58]

Footnote the extent to which amounts reported as contributions, earnings, or year-end account balance are included SCT for current or previous years.[59] Also footnote any other information that would be important to readers, such as the types of compensation permitted to be deferred, any limitations on deferrals, the methodology for determining registrant contributions, any vesting rules, measures for calculating earnings and quantification of the related rates, who selects earnings measurement, and any material terms of payouts.[60, 61] Registrants rarely comply with this requirement when notional investments are used.

Potential Payments on Termination or CIC

In addition to the required tabular disclosures, registrants must provide a narrative description and quantification of payments a Named Executive Officer might receive upon a termination or a Change in Control (with or without a termination).[62] Although disclosure of this information does not necessarily require a tabular format, most registrants use a table to categorize all payments by NEO and by circumstance. (Vested amounts that are disclosed in the Pension Table and Nonqualified Deferred Compensation Table are not required to be disclosed as payments related to a termination of employment.) The broad definition of termination includes resignation, severance, retirement, death, disability and constructive (good reason) termination. Registrants must describe and explain the circumstances[63] and form of payment (e.g. death, disability, termination without cause, change-in-control, non-compete).[64] Assume triggering event occurred on last day of fiscal year. If triggering event has already occurred by the end of the reporting period, include only applicable potential payments. Make estimates as necessary (and disclose assumptions). Disclosure is not required with respect to those items generally available on a nondiscriminatory basis.[65] For example, if all employees have access to the same level and duration of outplacement services, disclosure would not be required. Quantification within a table may be challenging for benefits that are not paid as a single payment, including pension benefits paid as a lifetime annuity and not available as a lump sum. In such cases, the registrant will want to review prior practice, consider the benefits of consistency against prior disclosures, and also be careful to document actual payment forms available and any assumptions made.

SUMMARY

Proxy disclosure of executive compensation carries high stakes. Corporate governance consultants use the information to challenge board recommendations, and the media use proxy disclosures as fodder for articles on examining executive pay. Furthermore, registrants are well aware of the SEC's enforcement power. These high stakes give both registrants and readers of proxy statements an incentive to understand the nuances of proxy statement disclosure of executive compensation.

NOTES

1. Securities and Exchange Commission, *Executive Compensation And Related Person Disclosure*, *http://www.sec.gov/rules/final/2006/33-8732a.pdf*
2. Securities and Exchange Commission, *Regulation S-K Questions and Answers of General Applicability*, last update May 17, 2013, *http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm*
3. *See* for example Regulation S-K CD&I 117.06, which says that a PFO is not included in the three most highly compensated officers.
4. Item 402(a)(3)(i) of Regulation S-K
5. Item 402(a)(3)(ii) of Regulation S-K
6. Item 402(a)(3)(iii) of Regulation S-K
7. Instructions to Item 402(a)(3), paragraph 1
8. *Ibid*.
9. Instructions to Item 402(a)(3), paragraph 2
10. Instructions to Item 402(a)(3), paragraph 3
11. Item 402(a)(3)(iv) of Regulation S-K
12. Item 402(c) of Regulation S-K
13. Item 402(a)(4) of Regulation S-K
14. Regulation S-K CD&I 119.18
15. Item 402(c)(2)(viii)(A) of Regulation S-K
16. Securities and Exchange Commission, *Executive Compensation And Related Person Disclosure*, *http://www.sec.gov/rules/final/2006/33-8732a.pdf*
17. Regulation S-K CD&I 119.06
18. Instructions to Item 402(c)(2)(viii), paragraph 3
19. Regulation S-K CD&I 219.04
20. Item 402(c)(2)(viii)(B) of Regulation S-K
21. *See* Voluntary Nonqualified Deferred Compensation section from Aon Hewitt's 2014 Executive Compensation Policies and Programs report
22. Instructions to Item 402(c)(2)(viii), paragraph 2
23. *Ibid*.
24. Regulation S-K CD&I 219.01
25. *Ibid*.
26. *Ibid*.
27. Item 402(c)(2)(ix) of Regulation S-K
28. Instructions to Item 402(c)(2)(ix), paragraph 3
29. Item 402(a)(6)(ii) of Regulation S-K
30. Item 402(c)(2)(ix)(E) of Regulation S-K
31. Item 402(c)(2)(ix)(D), also *see* Instructions to Item 402(c)(2)(ix), paragraph 5
32. Regulation S-K CD&I 119.13

33. Regulation S-K CD&I 119.19
34. Item 402(c)(2)(ix)(B) of Regulation S-K
35. Item 402(c)(2)(ix)(F) of Regulation S-K
36. *See https://www.sec.gov/interps/telephone/cftelinterps_item402.pdf*, item 14
37. Regulation S-K CD&I 119.07
38. Regulation S-K CD&I 117.07
39. Item 402(c)(2)(ix)(A) of Regulation S-K, also *see* Instructions to Item 402(c)(2)(ix), paragraph 4
40. Regulation S-K CD&I 119.03
41. Regulation S-K CD&I 125.05
42. Instructions to Item 402(h)(2), paragraph 1
43. Item 402(h)(2) of Regulation S-K
44. Instructions to Item 402(h)(2), paragraph 4
45. Instructions to Item 402(h)(2), paragraph 2
46. The instructions to Item 402(c)(2)(viii) require the disclosure of the amount of the change in the actuarial present value of the accumulated pension benefit. Although the SEC does not define accumulated pension benefit, ASC 715 30 20 differentiates the accumulated benefit obligation from projected obligation "in that it includes no assumption about future compensation levels."
47. *See* for example C&DI (124.03), which requires full accrual of a fixed benefit subject to delayed, age specific vesting. The C&DI says to assume the individual will continue to work until he vests. Accounting rules require a project and prorate methodology in which the expense of projected benefits is recognized ratably over the attribution period, which is often the vesting period when a plan does not attribute benefits to specific years of service. The fixed amount example in the C&DI is unusual in a large public company but some private companies do offer these arrangements and later become SEC registrants.
48. Regulation S-K CD&I 124.04
49. Instructions to Item 402(h)(2), paragraph 2
50. Regulation S-K CD&I 124.02
51. Regulation S-K CD&I 124.05
52. *Ibid.*
53. Regulation S-K CD&I 124.01
54. Instructions to Item 402(h)(2), paragraph 3
55. Regulation S-K CD&I 119.10
56. Item 402(i)(2) of Regulation S-K
57. Regulation S-K CD&I 125.04
58. Regulation S-K CD&I 125.02
59. *Ibid.*
60. Item 402(i)(3) of Regulation S-K
61. Regulation S-K CD&I 125.03
62. Item 402(j) of Regulation S-K
63. Item 402(j)(1) of Regulation S-K
64. Item 402(j)(2) of Regulation S-K
65. Instructions to Item 402(j), paragraph 5