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ALERT MEMORANDUM

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Some Observations Concerning the SEC's Proposed Pay-Versus-Performance Disclosure Rules

On April 29, 2015 the Securities and Exchange Commission (the "SEC") announced the issuance of proposed rules (the "Proposed Rules")[1] implementing the mandate of Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[2] Section 953(a) of the Dodd-Frank Act added Section 14(i) to the Securities Exchange Act of 1934, as amended (the "Exchange Act").

Under Section 14(i), the SEC was directed to promulgate rules requiring issuers to disclose 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." The disclosure would be required in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer.

The Proposed Rules implement Section 14(i) by adding new Item 402(v) of Regulation S-K under the Exchange Act. The Proposed Rules mandate a new table comparing executive compensation actually paid to total shareholder return and disclosure that describes the relationship between pay and performance in either narrative or graphic form. For the first time in proxy and information statements, the Proposed Rules would require information to be presented in an interactive data format (XBRL).

In our view, generally, the Proposed Rules appropriately and effectively implement the legislative mandate of Section 953(a) by providing room for issuers to present either only basic or, alternatively, more detailed and individualized information concerning their pay-versus-performance alignment. In particular, the Proposed Rules divide the required disclosure into two parts: prescriptive tabular disclosure and a principles-based description of the information in the required table. The table contains only limited information that should not be burdensome for issuers to assemble. In most cases, an explanation of the information in the table will be necessary in order for shareholders to glean any sense of an issuer's pay-versus-performance alignment, and

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1 SEC Release No. 34-74835 (April 29, 2015), available at http://www.sec.gov/rules/proposed/2015/34-74835.pdf.

2 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title IX, Subtitle E, § 953(b), 124 Stat. 1904 (2010), available at http://www.gpo.gov/fdsys/pkg/STATUTE-124/pdf/STATUTE-124-Pg1376.pdf.

issuers are given considerable flexibility in the amount and type of description to be provided.

Part I of this memorandum summarizes the Proposed Rules, highlighting issues and suggesting clarifications or changes that should be made. Part II of this memorandum provides sample disclosure approaches, discusses some results that might arise from different methods for assessing and describing alignment and identifies some challenges that issuers will face in providing clear disclosure about pay and performance alignment as required by the Proposed Rules.

Comments on the Proposed Rules are due by July 6, 2015.

I. Summary of the Proposed Rules

A. Which Issuers are Subject to the Proposed Rules?

All issuers registered under the Exchange Act except:

- Foreign private issuers
- Registered investment companies
    - However, the Proposed Rules make clear that business development companies are covered.
- Emerging growth companies

Smaller reporting companies will be required to include the new disclosure but it will be scaled much like other executive compensation disclosure requirements applicable to them. See "D. How do the Proposed Rules differ for Smaller Reporting Companies?" below.

B. When and Where is the Disclosure Required to be Included?

The Proposed Rules would require the disclosure in proxy and information statements that contain executive compensation disclosure pursuant to Item 402 of Regulation S-K. However, unlike other disclosure required under Item 402, it would not be required to be included in (or incorporated by reference into) annual reports on Form 10-K or registration statements filed under the Securities Act of 1933, as amended (the "Securities Act"). The SEC believes that it is most relevant to documents pertaining to the election of directors or shareholder action on executive compensation matters and not to pure disclosure documents.

Item 402(v) disclosure can be included in any part of the proxy or information statement. For most issuers, the Compensation Discussion and Analysis section of the proxy or information statement will be the obvious appropriate location.

The Proposed Rules do not specify an effective date but imply that the disclosure would be required in the first filing of a proxy or information statement occurring after the adoption of the final rules.

C. What Disclosure Do the Proposed Rules Require?

1. *Pay Versus Performance Table*

The Proposed Rules require a new "Pay Versus Performance" table ("PvP Table") disclosing for each of the prior five fiscal years (phased in with three years in the first filing, four in the second filing and five in filings thereafter):

- total compensation set forth in the Summary Compensation Table for the principal executive officer ("PEO")
- total compensation "actually paid" to the PEO
- average total compensation set forth in the Summary Compensation Table for all of the other named executive officers ("NEOs")
- average total compensation "actually paid" to the other NEOs
- cumulative total shareholder return ("TSR") of the issuer for various periods
- cumulative TSR of a peer group chosen by the issuer for various periods

Note: Consideration should be given to whether there is a benefit to reliance on the phase-in rule. Use of only three years' data may make it more difficult for some issuers to illuminate their pay-versus-performance alignment in the description following the PvP Table.

2. *Total Compensation "Actually Paid"*

Total compensation "actually paid" would be based on the amount set forth in the total compensation column of the Summary Compensation Table adjusted by:

- replacing amounts in the stock and option award columns relating to awards granted during the applicable year with the fair value of awards that ***vested*** during the applicable year

- Fair value would be determined on the vesting date pursuant to FASB ASC Topic 718 with a footnote if the assumptions vary from those used to calculate the grant date fair values in the Summary Compensation Table.

- Stock options and SARs would be included upon vesting, not upon exercise, unlike their treatment in the Options Exercised and Stock Vested Table.

- If previously vested stock options or SARs are modified, any incremental fair value would be included as compensation paid in the year of modification or, if additional vesting terms are added, upon vesting.

- The Proposed Rules do not define "vesting." It is not clear, for example, when an award with a set vesting schedule which also provides for accelerated vesting on retirement would be deemed to have "vested" for this purpose – on the scheduled vesting date/actual retirement of the NEO or upon the NEO's becoming retirement eligible.[3] In addition, it is not clear how to handle, for example, an award of performance shares which ceases to be forfeitable by the NEO on December 31st but in respect of which the actual number of shares earned is not determined until sometime thereafter. There is mixed practice among issuers as to when such an award would be reported in the Options Exercised and Stock Vested Table, partly as a result of an SEC Compliance and Disclosure Interpretation ("C&DI") addressing a similar question.[4]

- The Release justifies the use of vesting date, rather than grant date, fair value on the basis that using vesting date fair value is more consistent with the statutory requirement that the disclosure be of amounts "actually paid." The use of vesting date fair value is certainly not fully consistent with the plain meaning of that phrase. In addition, the use of vesting date fair value makes it considerably more likely that the amounts in the PvP Table will ***appear*** to show misalignment between pay and performance because of the impact of stock price movements during the period between the grant of an award, when a compensation committee acts, and the vesting date. Accordingly, the obligation to use vesting date fair value effectively de-emphasizes the information in the PvP Table and

[3] Interestingly, the ABA Joint Committee on Employee Benefits recently published its 2014 Q&A session with SEC staff which includes the staff's view as to how such an award should be reported in the tables currently required under Item 402 of Regulation S-K. See http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_sec_qa.authcheckdam.pdf.

[4] C&DI 106.03.

emphasizes the accompanying description as the basis for clear assessments of pay-versus-performance alignment.

- replacing the change in pension value under all pension plans with the actuarial increase in pension benefits attributable to services rendered by the NEO during the applicable year, i.e., the service cost as defined in FASB ASC Topic 715.

The original amounts and the replacement amounts would be disclosed in a footnote to the PvP Table.

The Proposed Rules state that, in the event more than one person served as PEO during the year, the total compensation numbers should be determined by adding the total compensation of such persons together. The Proposed Rules also require that, with respect to the total compensation of other NEOs, all other NEOs should be included, not just NEOs serving as executive officers on the last day of the fiscal year.

<u>Note</u>: Given that this method of calculating pay would pick up such items as cash sign-on bonuses, accelerated vesting of equity awards upon termination of employment and severance payments and benefits, it appears that the PvP Table for any year with management turnover will inherently have skewed numbers compared to years with a stable NEO roster. This should also tend to de-emphasize the information in the PvP Table and emphasize the accompanying description as the basis for clear assessments of pay-versus-performance alignment.

3. *Total Shareholder Return*

TSR is to be calculated as set forth in Item 201(e) of Regulation S-K for purpose of the stock performance graph that resides in the annual report accompanying the proxy statement.

<u>Note</u>: Consistent with the Item 201(e) disclosure requirement, it appears that the TSR for each year for each of the Company and the Peer Group is measured on a ***cumulative (not annualized)*** basis for periods of ***varying duration***, in each case shown side-by-side with an ***annual*** compensation amount. That is, the Proposed Rule (ignoring the phase-in transition rule) would call for the following TSR information for a 2016 proxy: (1) for the row showing 2015 data, the cumulative (not annualized) TSR for the five-year period from January 1, 2011 through December 31, 2015; (2) for the row showing 2014 data, the cumulative (not annualized) TSR for the four-year period from January 1, 2011 through December 31, 2014; (3) for the row showing 2013 data, the cumulative (not annualized) TSR for the three-year period from January 1, 2011 through December 31, 2013; (4) for the row showing 2012 data, the cumulative (not annualized) TSR for the two-year period from January 1, 2011 through December 31, 2012; and (5) for the row showing 2011 data, the TSR for 2011. Accordingly, as illustrated in the

sample tables below, it will be especially difficult for a reader to accurately infer information about the correlation of pay and performance from the table itself, again tending to de-emphasize the information in the PvP Table and emphasize the accompanying description as the basis for clear assessments of pay-versus-performance alignment.

Note: An understanding of the information in the PvP Table is likely to be enhanced by presenting TSR as a percentage change. However, proposed Item 402(v)(2)(iv) states that "the closing price of the measurement point must be converted into a fixed investment, stated in dollars, in the registrant's stock (or in the stocks represented by the peer group)." That requirement could be read to mean that the amounts in the PvP Table should be stated as the changed amount in the value of a fixed amount of investment (e.g., $100). We believe this approach would not contribute to an understanding of the data in the PvP Table, as illustrated by the alternative Table 1 in Part II below, and that a clarification of the Proposed Rules to the effect that the relevant columns could show percentage changes would be helpful.

The peer group may be chosen by the issuer and may be the peer group (published industry or line-of-business index or selected group of issuers) used in the issuer's Item 201(e) stock performance graph or, if applicable, the peer group disclosed in the issuer's Compensation Disclosure and Analysis for benchmarking purposes. If a selected peer group is used, the issuers in the selected peer group must be identified and the returns of each issuer in the group weighted by stock market capitalization for purposes of the TSR calculation. Again, like the stock performance graph, if the peer group is changed, the performance of both the prior and new peer group must be disclosed in the year of the change. Presumably, the SEC guidance regarding the stock performance graph may be extended to this table as well, including the ability in certain circumstances to omit the performance of the prior peer group.[5]

Note: For issuers that use more than one peer group in the Compensation Discussion and Analysis, it appears that any of the peer groups used for benchmarking purposes in response to the Item 402(b)(xiv) disclosure requirement may be used for purposes of Item 402(v).[6]

The Proposed Rules require that the PvP Table be electronically formatted using XBRL with each amount in the table itself tagged separately and the amounts in the footnotes block-text tagged.

[5] C&DI 206.05.

[6] See footnote 89 of the Release and the statement in the text following footnote 45 of the Release that "under the proposal, the pay-versus-performance disclosure, which would require disclosure of TSR as defined in Item 201(e) for the registrant and ***for a peer group used by the registrant*** for purposes of the CD&A or Item 201(e), would be filed in certain proxy or information statements" (emphasis added).

New registrants would only be required to include compensation information that was previously required to be reported pursuant to Section 13(a) or 15(d) of the Exchange Act. Thus, following the initial public offering of a private issuer that had never reported under the Exchange Act its first proxy statement need only include information regarding the immediately preceding fiscal year even if more than one year of compensation is reported in the Summary Compensation Table as a result of filings under the Securities Act.

4. *Clear Description of Relationship between Pay and Performance*

The Proposed Rules require a "clear" description of the relationship between the executive compensation actually paid and the issuer's TSR (including a comparison of the issuer's TSR with the peer group's TSR) included in the PvP Table.

The SEC states that either a narrative or graphic presentation, or both, may be used to describe the relationship of pay to performance. The Release mentions, by way of example, two possible approaches to the disclosure.[7] One example is a graph with compensation and change in TSR on parallel axes with amounts plotted over the required time period. The other example shows the percentage change year-over-year of pay and TSR with a brief discussion of their relationship. Not surprisingly, these examples are not unlike disclosure already being made voluntarily by issuers in their proxy statements. Unlike the fixed format and elements of the PvP Table, the SEC specifically left the format for the description of the relationship up to issuers.

The Proposed Rules require that any information in the description of the relationship of pay to performance be electronically formatted using XBRL and block-text tagged.

Issuers are permitted to include additional supplemental explanations of the relationship between pay and performance using other methods to calculate compensation (such as realized or realizable pay) and other measures of performance. However, any supplemental disclosure must be clearly identified, not misleading and not presented with greater prominence than the required disclosure. Guidance for these requirements can be inferred from similar rules adopted by the staff of the SEC's Division of Corporation Finance in reviewing alternative Summary Compensation Table disclosure.

The absence from the Proposed Rules of a prescribed methodology for determining the extent to which issuers' pay practices are aligned with performance mirrors the absence of any consensus among issuers, shareholders, proxy advisors, compensation consultants, academics and others about a single proper measurement

[7] Release in the text between footnotes 41 and 42.

approach. The SEC recognized that reality and provided issuers with appropriate flexibility to each make the argument that its approach is consistent with a pay for performance philosophy. There are multiple ways to frame that argument, and the effectiveness of a particular approach to making the case will depend on the facts and circumstances at hand.

D. How do the Proposed Rules Differ for Smaller Reporting Companies?

Under the Proposed Rules, smaller reporting companies are subject to the pay versus performance disclosure requirements. However, the disclosure required differs as follows:

- Disclosure is required for the last three fiscal years, not five (phased in with two years in the first filing and three years thereafter)
- Total compensation actually paid to the PEO and other NEOs need not include the service cost representing pension earned for services in the applicable year
- No peer group TSR is required to be included in the PvP Table or in the description of the relationship of pay to performance
- Disclosure is not required to be electronically formatted using XBRL until the third filing in which the pay-versus-performance disclosure is included

II. Sample Approaches to the Proposed Pay-Versus-Performance Disclosure

The following sets forth a non-exclusive sampling of approaches that issuers might consider for meeting the Item 402(v) disclosure requirement as proposed. The sampling is in the form of annotated sample disclosure, utilizing hypothetical data and assuming that the disclosure would be included in the Compensation Discussion and Analysis section of the proxy statement, under the heading "Pay Versus Performance." Each sample disclosure is of course only intended to illustrate an approach, and issuers will want to substantially customize the disclosure for their own situations.

Pay Versus Performance

The following is a table ("Table 1") required by the SEC that provides certain data points concerning the amounts paid by us to our named executive officers during the last five fiscal years and the total shareholder return for our common stock and for companies constituting our Peer Group (as defined above) for various portions of that five-year period. The portion applicable to each year in the table is the period from January 1, 2011, through the end of such year.

	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO named executive officers	Average Compensation Actually Paid to non-PEO named executive officers	Total Shareholder Return	Peer Group Total Shareholder Return
2015	$ 18,000,000	$ 18,000,000	$ 4,500,000	$ 4,500,000	18%	6%
2014	$ 16,000,000	$ 16,000,000	$ 4,000,000	$ 4,000,000	16%	6%
2013	$ 14,000,000	$ 14,000,000	$ 3,500,000	$ 3,500,000	14%	6%
2012	$ 12,000,000	$ 12,000,000	$ 3,000,000	$ 3,000,000	12%	6%
2011	$ 10,000,000	$ 10,000,000	$ 2,500,000	$ 2,500,000	10%	6%

As noted above, an alternative Table 1, under which the TSR amounts would be presented as changes in a specified fixed investment of $100, would read as follows:

	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO named executive officers	Average Compensation Actually Paid to non-PEO named executive officers	Total Shareholder Return	Peer Group Total Shareholder Return
2015	$ 18,000,000	$ 18,000,000	$ 4,500,000	$ 4,500,000	$ 118	$ 106
2014	$ 16,000,000	$ 16,000,000	$ 4,000,000	$ 4,000,000	$ 116	$ 106
2013	$ 14,000,000	$ 14,000,000	$ 3,500,000	$ 3,500,000	$ 114	$ 106
2012	$ 12,000,000	$ 12,000,000	$ 3,000,000	$ 3,000,000	$ 112	$ 106
2011	$ 10,000,000	$ 10,000,000	$ 2,500,000	$ 2,500,000	$ 110	$ 106

A. Basic Approaches

The following are three basic approaches to describing the data in Table 1.

1. *Basic Approach 1*

Our compensation philosophy includes a belief that executive pay ought to be closely aligned with shareholder returns. That is, we strive to achieve a correlation between amounts paid to our named executive officers and changes in TSR. There are standardized statistical methodologies for calculating the correlation between two variables. Under one such methodology (that is incorporated into Microsoft Corporation's Excel program and that can be accessed using the "correl" function in that program), perfect correlation is represented by an outcome of 100%, random results are represented by an outcome of zero and perfect negative correlation (i.e., one variable goes up as the other goes down) is represented by an outcome of minus 100%. Based on that methodology, our CEO's and other named executive officers' pay were each 100% correlated for the period from 2011 through 2015.

Note: The discussion above does not utilize the peer group TSR data from Table 1. That approach may be appropriate for registrants who believe that pay should correlate primarily to absolute company performance, rather than performance relative to peers. This approach is typically justified on the basis that executives' pay should be aligned with returns to shareholders, both on the upside and the downside. Accordingly, the argument goes, if shareholders lose money then management should not be richly rewarded, even if the shareholders lose less money than they would have lost investing with a peer group of companies. The same basic approach can easily be used in a manner that takes into account relative performance, as follows:

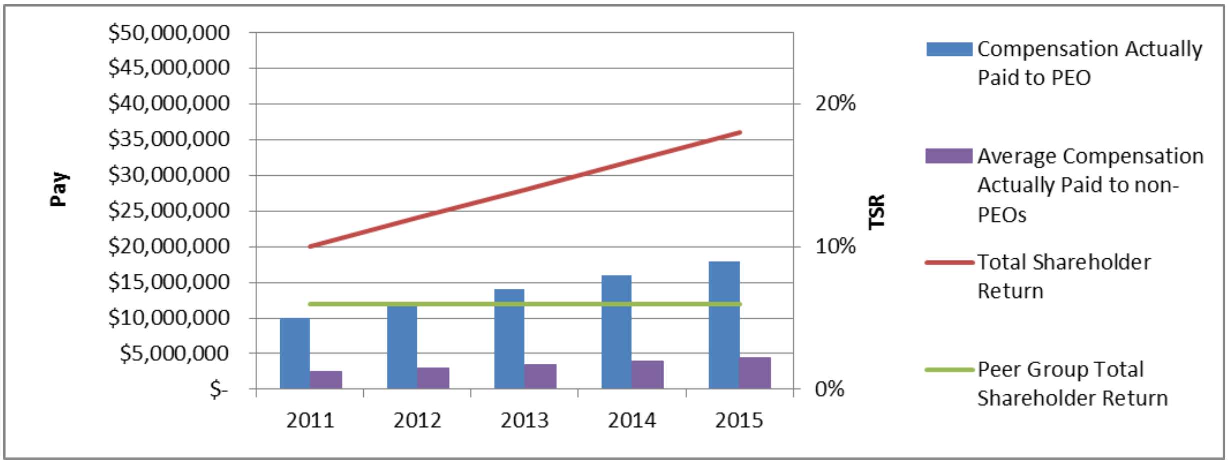
Our compensation philosophy includes a belief that executive pay ought to be closely aligned with relative shareholder returns. That is, we strive to achieve a correlation between changes in pay levels and changes in our TSR relative to our Peer Group's TSR, in order to eliminate the impact of industry or equity market movements in determining the appropriate pay for our executives. There are standardized statistical methodologies for calculating the correlation between two variables. Under one such methodology (that is incorporated into Microsoft Corporation's Excel program and that can be accessed using the "correl" function in that program), perfect correlation is represented by an outcome of 100%, random results are represented by an outcome of zero and perfect negative correlation (i.e., one variable goes up as the other goes down) is represented by an outcome of minus 100%. Based on that methodology and the data set forth in Table 1, our CEO's and other named executive officers' pay were each 100% correlated with our TSR relative to our Peer Group's TSR for the period from 2011 through 2015.

Note: In order to satisfy the disclosure requirement of Item 402(v) that the "description shall also include a comparison of the cumulative total shareholder return of the registrant (column (f)) and cumulative total shareholder return of the registrant's peer group (column (g)) over the same period," issuers using this approach should consider, in addition to the description above, a sentence to the effect that "the Company's TSR was in the __ percentile of our Peer Group's TSR" for a specified period.

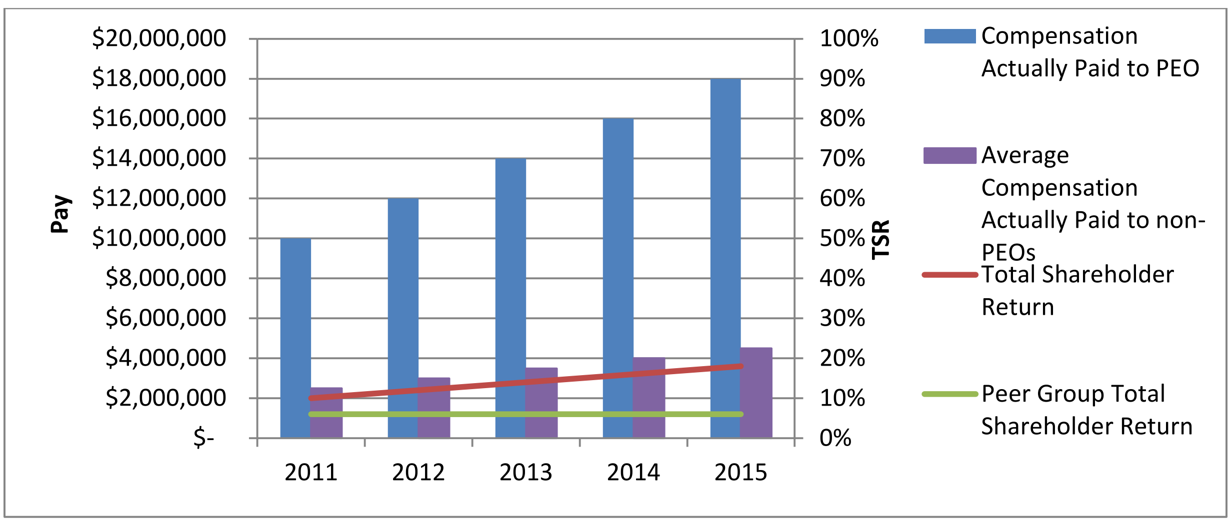
2. *Basic Approach 2*

Note: Basic approach 2 resembles the stock performance graph currently required by Item 201(e) of Regulation S-K, with the addition of bar graphs to show changes in pay.

The following graph describes the relationship between the data points included in Table 1:

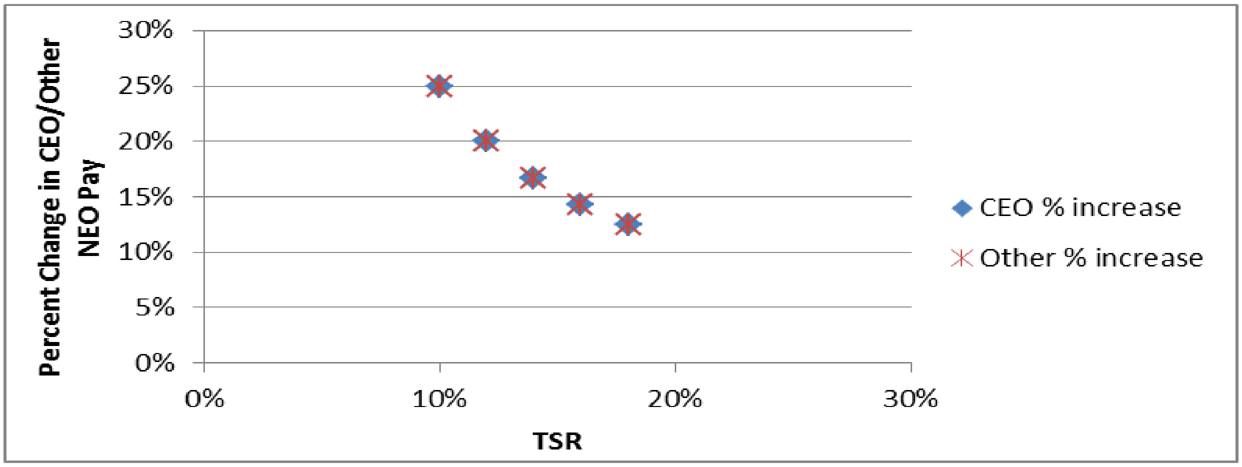


Note: When utilizing this alternative, consideration should be given to the scale of the left and right vertical axes in the graph, as the same data points can be graphed to present the data in different ways. For example, the following graph plots the exact same data from Table 1 as the graph above:



3. *Basic Approach 3*

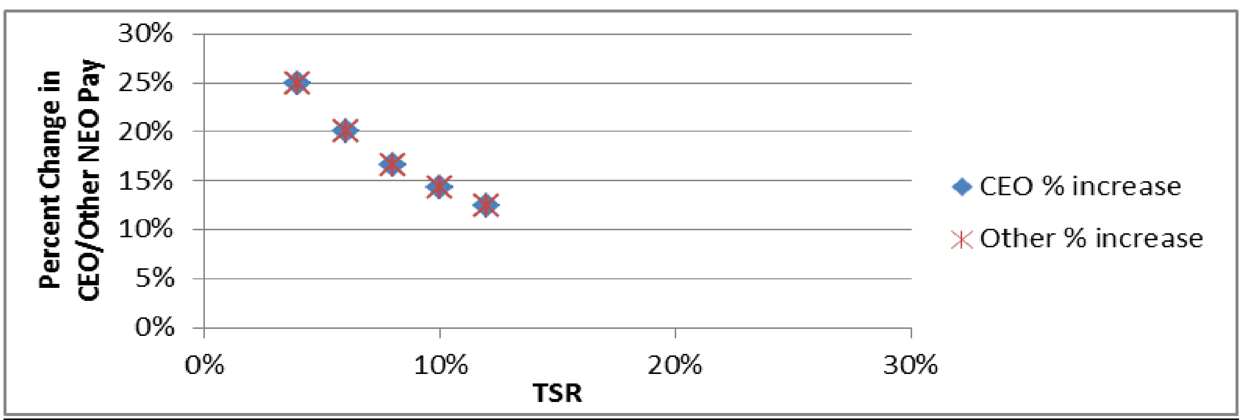
The following scatterplot graph describes the relationship between the data points included in Table 1*:



* The graph above reflects that our CEO and other NEO pay each increased by 25% in 2011 as compared to 2010.

<u>Note</u>: A scatterplot graph is commonly used to suggest correlations between two variables. As suggested by the scatterplot graph above, while the statistical correlation of the data in Table 1 is 100%, as described above, the statistical correlation of TSR to <u>changes</u> in pay levels reflected in Table 1 is approximately <u>minus</u> 98%, because the <u>rate of increase</u> in CEO and other NEO pay decreases as TSR increases, as indicated by the direction of the plotted data in the graph.

<u>Note</u>: The graph above does not utilize the peer group TSR data from Table 1. The same basic approach utilizing relative performance would result in the following graph:



* The graph above reflects that our CEO and other NEO pay each increased by 25% in 2011 as compared to 2010.

Note: In order to satisfy the disclosure requirement of Item 402(v) that the "description shall also include a comparison of the cumulative total shareholder return of the registrant (column (f)) and cumulative total shareholder return of the registrant's peer group (column (g)) over the same period," issuers using this approach should consider, in addition to the description above, a sentence to the effect that "the Company's TSR was in the __ percentile of our Peer Group's TSR" for a specified period.

B. Supplemental Approaches

1. *Revised Data and Basic Approaches*

In the event that one of the basic approaches suggested above clearly describes the relationship between pay and performance, then no further disclosure is required. However, an issuer may decide either that additional information, of the type discussed below, would be useful to communicate to shareholders, or that none of the basic approaches above would clearly describe the relationship between pay and performance. For example, changing the numbers in the hypothetical could result in the following ("Table 2"):

	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO named executive officers	Average Compensation Actually Paid to non-PEOs	Total Shareholder Return	Peer Group Total Shareholder Return
2015	$ 12,000,000	$ 15,000,000	$ 3,000,000	$ 3,750,000	10%	8%
2014	$ 15,000,000	$ 11,000,000	$ 1,750,000	$ 2,000,000	22%	6%
2013	$ 7,000,000	$ 8,000,000	$ 2,500,000	$ 2,000,000	2%	8%
2012	$ 12,000,000	$ 12,000,000	$ 3,750,000	$ 2,750,000	18%	7%
2011	$ 10,000,000	$ 8,000,000	$ 3,000,000	$ 3,000,000	10%	6%

In that case, the basic approaches described above would result in the following:

Basic Approach 1

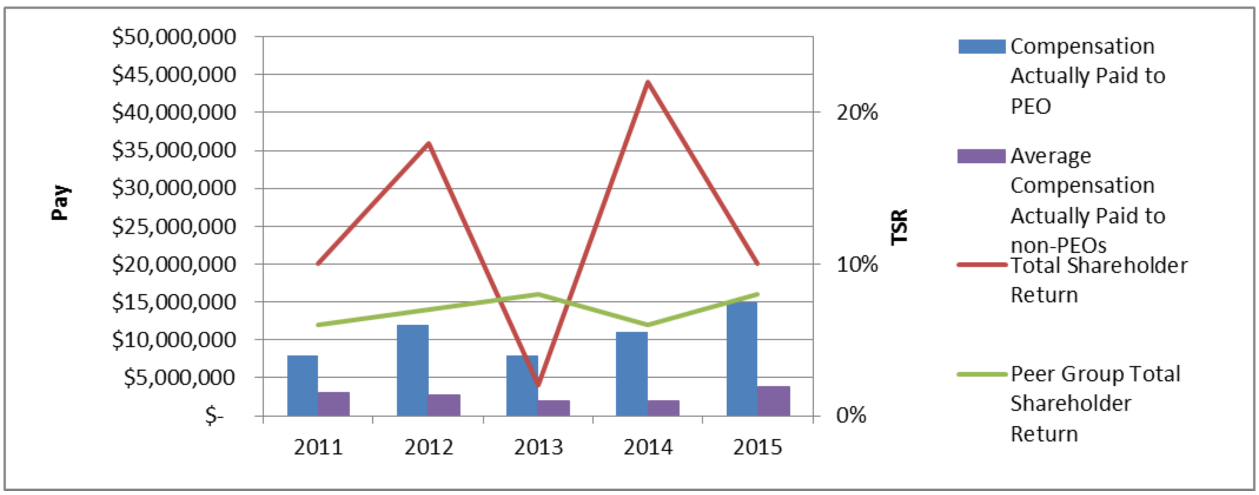
Our compensation philosophy includes a belief that executive pay ought to be closely aligned with shareholder returns. That is, we strive to achieve a correlation between changes in pay levels and changes in TSR. There are standardized statistical methodologies for calculating the correlation between two variables. Under one such methodology (that is incorporated into Microsoft Corporation's Excel program and that can be accessed using the "correl" function in that program), perfect correlation is represented by an outcome of 100%, random results are represented by an outcome of zero and perfect negative correlation (i.e., one variable goes up as the other goes down) is represented by an outcome of minus 100%. Based on that methodology, our CEO's and other named executive officers' pay were 37% and minus 10%, respectively, correlated for the period from 2011 through 2015.

Note: The same basic approach used in a manner that takes into account relative performance would read as follows:

Our compensation philosophy includes a belief that executive pay ought to be closely aligned with relative shareholder returns. That is, we strive to achieve a correlation between changes in pay levels and changes in our TSR relative to a peer group, in order to eliminate the impact of industry or equity market movements in determining the appropriate pay for our executives. There are standardized statistical methodologies for calculating the correlation between two variables. Under one such methodology (that is incorporated into Microsoft Corporation's Excel program and that can be accessed using the "correl" function in that program), perfect correlation is represented by an outcome of 100%, random results are represented by an outcome of zero and perfect negative correlation (i.e., one variable goes up as the other goes down) is represented by an outcome of minus 100%. Based on that methodology, our CEO's and other named executive officers' pay were 30% and minus 13%, respectively, correlated for the period from 2011 through 2015.

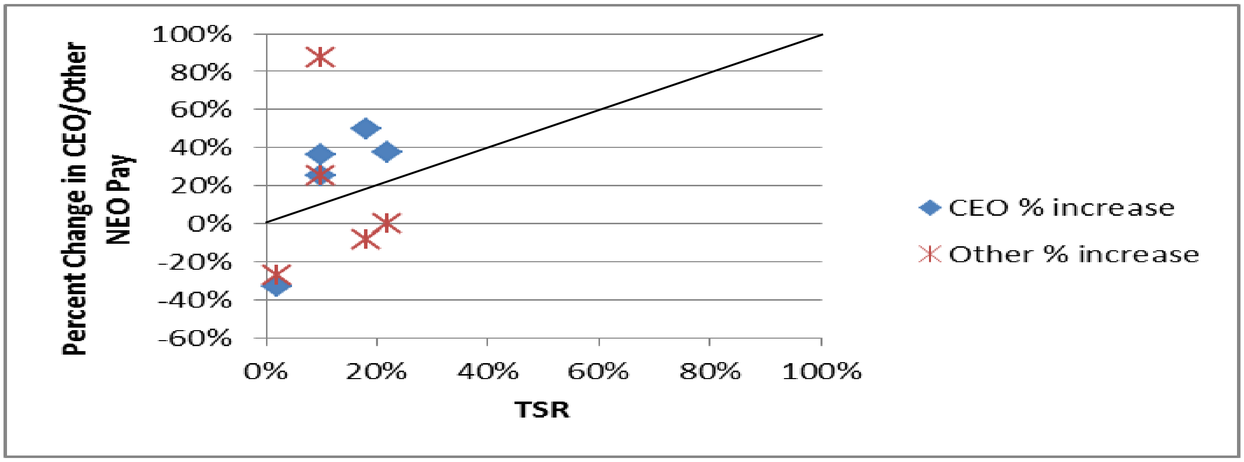
Basic Approach 2

The following graph describes the relationship between the data points included in Table 2:



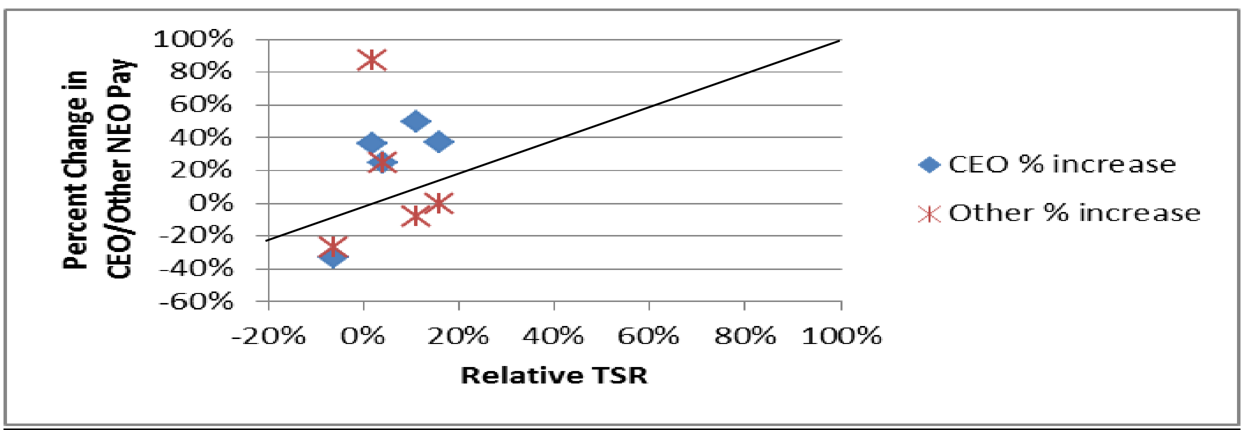
Basic Approach 3

The following graph describes the relationship between the data points included in Table 2*:



* The graph above reflects that our CEO and other NEO pay each increased by 25% in 2011 as compared to 2010. The straight line indicates 100% correlation.

Note: The same basic approach used in a manner that takes into account relative performance, would appear as follows:



* The graph above reflects that our CEO and other NEO pay each increased by 25% in 2011 as compared to 2010. The straight line indicates 100% correlation.

2. *Examples of Supplemental Disclosure*

In those cases in which additional or different disclosure is thought to be appropriate, consideration could be given to disclosure along the following lines:

The Company believes the data included in Table 2 is insufficient to provide meaningful insight into the relationship between our performance and the pay actually received by our named executive officers. Instead, we believe the relationship between pay and performance is better viewed as follows.

Supplemental Approach 1

Note: The following approach focuses on the definition of "pay actually received."

For purposes of understanding the relationship between the compensation actually paid to our named executive officers and our performance, we believe that it is more useful to consider "realized pay" than pay determined pursuant to the SEC's rules. By "realized pay," we mean ______________. By contrast, the SEC's rules require equity-based compensation to be taken into account when the equity award vests, even though the pay may have been awarded in recognition of performance in a different year than the vesting year and may not be actually received by the executive until many years after the vesting year. Our definition of "realized pay" conforms to the definition proposed in 2012 by a group of experts convened by The Conference Board, the Center on Executive Compensation and the Society of Corporate Secretaries and Governance Professionals (http://www.conference-board.org/governance/index.cfm?id=17959).

Note: The revised definition of pay actually received suggested above could then be used for any of the variations of the basic approaches discussed above. In addition, it may be appropriate to further revise the definition of pay to back out fixed elements of the compensation program, on the basis that they are not intended to correlate with performance, as set forth below. Issuers that use this approach should consider including additional disclosure concerning the relative size of the fixed and variable elements of the pay package, to address potential investor concern that backing out fixed elements of pay would not give a full picture of the responsiveness of the pay program to performance.

The measure of "pay actually received" that we believe best illuminates our pay for performance approach would not include the non-variable elements of the compensation program described above. Those elements of our compensation program, including, for example, base salary, by design are fixed and do not vary to reflect performance. Including them in any analysis of pay versus performance, therefore, necessarily distorts the extent to which the variable elements of our compensation program – those designed to change as performance changes – have been appropriately designed and administered to in fact result in an appropriate correlation between the amount actually paid to our executives and our performance.

Supplemental Approach 2

Note: The following approach focuses on timing issues arising from the SEC's proposed approach and is best illustrated by assuming a new hypothetical "Table 3," as follows:

	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO named executive officers	Average Compensation Actually Paid to non-PEOs	Total Shareholder Return	Peer Group Total Shareholder Return
2015	$ 12,000,000	$ 13,000,000	$ 3,000,000	$ 3,250,000	10%	8%
2014	$ 15,000,000	$ 8,000,000	$ 1,750,000	$ 2,000,000	22%	6%
2013	$ 7,000,000	$ 12,000,000	$ 2,500,000	$ 3,000,000	2%	8%
2012	$ 12,000,000	$ 9,000,000	$ 3,750,000	$ 2,250,000	18%	7%
2011	$ 10,000,000	$ 10,000,000	$ 3,000,000	$ 2,500,000	10%	6%

In particular, the data suggested by Table 3 fails to illuminate the relationship between pay and performance at the Company because our compensation actually paid for a year tends to reflect performance in the prior year, not in the year for which it is required to be included in the PvP Table pursuant to the SEC's rules. Accordingly, the data in Table 3 above suggests, based on the methodology incorporated into Microsoft Corporation's Excel program, that our CEO's and other named executive officers' pay were each approximately minus 81% correlated for the period from 2011 through 2015. However, the data in the following table adjusts the data in Table 3 so that the compensation shown as paid in each year in Table 3 is instead shown as paid in the following year, with 2011 compensation reflecting compensation actually paid (within the meaning of the SEC's rules) in 2010:

	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO named executive officers	Average Compensation Actually Paid to non-PEOs	Total Shareholder Return	Peer Group Total Shareholder Return
2015	$ 12,000,000	$ 8,000,000	$ 3,000,000	$ 2,000,000	10%	8%
2014	$ 15,000,000	$ 12,000,000	$ 1,750,000	$ 3,000,000	22%	6%
2013	$ 7,000,000	$ 9,000,000	$ 2,500,000	$ 2,250,000	2%	8%
2012	$ 12,000,000	$ 10,000,000	$ 3,750,000	$ 2,500,000	18%	7%
2011	$ 10,000,000	$ 8,000,000	$ 3,000,000	$ 2,000,000	10%	6%

As a result of that adjustment, based on the methodology incorporated into Microsoft Corporation's Excel program, our CEO's and other named executive officers' pay were each approximately 75% correlated for the period from 2011 through 2015.

Note: Similarly, correlations between pay and performance may be distorted by required inclusion in the table of, on the one hand, annual compensation amounts and, on the other hand, cumulative multi-year TSR numbers (for 1-, 2-, 3-, 4- and 5-year periods). The distortion caused by the mismatch between annual pay and cumulative multi-year performance can be best illustrated by refocusing on the data in Table 1 above. The table below utilizes the data from Table 1, but adds a new column to show the annual TSR implied by the cumulative numbers in the TSR column of Table 1. (It is likely that the rules will not permit the addition of extra columns in the actual Item 402(v) disclosure.)

	Summary Compensation Table Total for PEO	Compensation Actually Paid to PEO	Average Summary Compensation Table Total for non-PEO named executive officers	Average Compensation Actually Paid to non-PEO named executive officers	Total Shareholder Return	Annual TSR Implied by the Cumulative TSR shown in the Immediately Preceding Column	Peer Group Total Shareholder Return
2015	$ 18,000,000	$ 18,000,000	$ 4,500,000	$ 4,500,000	18%	1.72%	6%
2014	$ 16,000,000	$ 16,000,000	$ 4,000,000	$ 4,000,000	16%	1.75%	6%
2013	$ 14,000,000	$ 14,000,000	$ 3,500,000	$ 3,500,000	14%	1.79%	6%
2012	$ 12,000,000	$ 12,000,000	$ 3,000,000	$ 3,000,000	12%	1.82%	6%
2011	$ 10,000,000	$ 10,000,000	$ 2,500,000	$ 2,500,000	10%	10.00%	6%

As set forth above, the correlation between annual pay and cumulative performance suggested by Table 1 is 100% both for the CEO and the other named executive officers using the Excel methodology. The correlation between annual pay and annual performance, using the same data, for the CEO and the other named executive officers using the Excel methodology is instead about minus 71%. While the foregoing illustrates how annual pay may correlate well with multi-year cumulative TSR but not with annual TSR, the reverse – an apparent lack of correlation between annual pay and multi-year cumulative TSR but in fact good correlation between pay and performance measured over the same periods - may also arise.

Supplemental Approach 3

Note: The following approach focuses on the correlation between pay and performance at the issuer compared to the correlation between pay and performance at the peer group.

In particular, the information in Table 2, which is prescribed by the SEC, includes information about the TSR performance of our Peer Group, but not about the pay of our Peer Group. We believe that an appropriate understanding our compensation program should compare the extent to which the pay of our named executive officers correlates with our TSR with the extent to which the pay of the Peer Group's named executive officers correlates with the Peer Group's TSR. A closer or similar correlation between pay and performance at the Company compared to our Peer Group suggests that our compensation program is appropriately designed from the perspective of pay versus performance.

Note: Any of the variations of basic approaches 1 or 3 discussed above could be used to illustrate the comparison of correlations, as suggested for this approach.

Note: The pay of peer group named executive officers, determined in accordance with the SEC's proposed rules, should not be very difficult to compute. It would not be surprising if executive compensation data analysis services, such as those available from Equilar, Inc., were prepared to provide such information if demand existed for the data.

Supplemental Approach 4

Note: The following approach focuses on the perspective that equity-based awards inherently align pay and performance.

In particular, we believe that it is appropriate to consider pay versus performance from the starting premise that our named executive officers' pay should be considered perfectly aligned with our shareholders' interests if all of our executives were paid entirely in Company stock. While we have not chosen that approach to paying our named executive officers, we believe that it is appropriate to use that as a benchmark against which the approach we do use can be compared.

Based on that premise, we calculated the value of the shares that would have been held by our named executive officers as of December 31, 2015, if for the five-year period from 2011 through 2015 their base salary, target amount of bonuses and non-equity incentive compensation awards, grant date fair value of equity awards, pension service credit and perquisites were paid in equal monthly portions in the year for which they were paid (for base salary, annual incentives and perquisites), awarded (for long-term equity or non-equity incentive awards) or accrued (for pension service credits) entirely in shares of our stock. For that purpose, we assumed that all of those shares continued to be held through December 31, 2015, and we ignored all other shares that may have been held by our named executive officers during that period. We then compared that value to the aggregate amounts actually paid to our CEO and other named executive officers, calculated as required by the SEC for purposes of Table 2 during that period, including interest at the rate of __% from the date as of which the amount is deemed paid through December 31, 2015. The excess of the value under the equity-only approach over the other approach, in the amount of $_____________, conceptually represents savings to the Company, or in other words an efficient use by the Company of its executive compensation budget.

Note: Alternatively, an alignment argument that is focused on TSR can sometimes be persuasively made as follows.

We note that during the five-year period from 2011 through 2015 the aggregate dollar amount of increased market capitalization, excluding primary stock offerings, and dividends paid to our shareholders was approximately $__________. The amount actually paid to our named executive officers, in the aggregate, during that period, calculated as required by the SEC as set forth in Table 2, was $____________, or only __% of the aggregate amount realized by our shareholders during the applicable period.

Conclusion

As stated and illustrated above, we believe the Proposed Rules appropriately and effectively provide room for issuers to present either only basic or, alternatively, more detailed and individualized information in response to the requirement of Section 953(a) of the Dodd-Frank Act. That is, we believe the Proposed Rules sensibly carry out the legislative mandate imposed by Dodd Frank Section 953(a). However, a number of important clarifications to the Proposed Rules should be provided and issuers will face challenges in providing a clear description of their pay-versus-performance alignment in light of the data required to be described in the PvP Table.

The question remains, however, as to whether the new disclosure mandated by Section 953(a), as implemented by the Proposed Rules, will have the consequence of changing the way public companies design their compensation programs. We do not think they will or should. Most large public companies have been focused on pay for performance for a number of years. While most of them will continue to refine their approach, including based on changed facts or circumstances, the new disclosure requirement is unlikely to drive that effort.

There is a risk that companies will feel a need to change their compensation plan designs in response to a concern that shareholders or proxy advisors will expect that alignment be evident from the PvP Table on its face. We think the approach of the Proposed Rules should help to minimize that risk. We note in particular that finding evidence of pay-versus-performance alignment, or misalignment, in actual fact is usually not a trivial undertaking. In most contexts, a conclusion about pay for performance sensitivity cannot be confidently drawn from a simple presentation of basic data in a proxy table. That statement is supported by the numerous methodologies of varying complexity employed by proxy advisors, institutions and compensation consultants to try to get to the core of the pay for performance linkage for different companies, each of which has its own more or less unique business circumstances. The SEC sensibly recognized that fact, and reflected it in the Proposed Rules by prescribing the disclosure of limited factual and historical datapoints, and requiring issuers to describe the relationship of those datapoints in a way that illuminates the pay for performance linkage. Issuers should take advantage of the flexibility provided by the Proposed Rules, and shareholders and proxy advisors should not expect that the new disclosure will coalesce around a one-size-fits-all approach for thinking about alignment.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under "Executive Compensation and ERISA" under the "Practices" section of our website at http://www.clearygottlieb.com.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road, Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Cleary Gottlieb Steen & Hamilton LLP
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District
Beijing 100020, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Sila Tower, 27th Floor
Abu Dhabi Global Market Square
Al Maryah Island, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099