SEC Issues Final Rules for Disclosure of Hedging Policies

By John Ellerman

Background

On December 18, 2018, the U.S. Securities and Exchange Commission (SEC) issued a press release detailing final rules for one of Dodd-Frank's executive compensation provisions, which will "require companies to disclose in proxy or information statements for the election of directors any practices or policies regarding the ability of employees or directors to engage in certain hedging transactions with respect to company equity securities."[1]

Disclosure Requirement

The new rules include the following highlights:

- A new item, 407(i) of Regulation S-K, requires companies to describe any policies regarding whether employees or directors can purchase financial instruments or otherwise use equity securities held or granted as compensation to hedge or offset any decrease in market value.

- To satisfy the above requirement, companies should accurately describe their applicable policies, including who is affected and which hedging categories are acceptable or unacceptable. Companies are also given the option to disclose their policies in full.

- If a company does not have any applicable policies in place, the company must acknowledge that no policy exists and/or state that its employees and directors are allowed to engage in hedging behavior.

- Disclosures are required for equity securities of the companies as well as any parent, any subsidiary, or any subsidiary of any parent of the company.

- For fiscal years starting July 1, 2019 and beyond, companies must comply with these requirements in proxies and information statements for director elections; however, if a company qualifies as a "smaller reporting company" or "emerging growth company," these requirements will not go into effect for an additional year.

- Finally, these new rules will not apply to foreign private issuers or listed closed-end funds.

[1] "SEC Adopts Final Rules for Disclosure of Hedging Policies." The U.S. Securities and Exchange Commission. December 18, 2018. https://www.sec.gov/news/press-release/2018-291.

Pay Governance Comment

It has been our experience that the vast majority of public companies have already implemented formal anti-hedging policies . Most companies have been regularly disclosing such policies with brief statements confirming employees and directors are prohibited from engaging in any hedging activity. These new SEC rules will simply require companies to be more specific in 2020 proxy disclosures regarding anti-hedging policies.

General questions about this viewpoint can be emailed to John Ellerman at john.ellerman@paygovernance.com.