Via E-Mail

July 28, 2011

United States Securities and Exchange Commission
100 F Street NE
Washington, DC 20540-1090

Attn: Ms. Elizabeth M. Murphy
Secretary

Re: Request for Public Comments on SEC Regulatory Initiatives under the Dodd-Frank Act Title IX: Investor Protections and Improvements to the Regulation of Securities, Subtitle E Accountability and Executive Compensation

Ladies and Gentlemen:

In response to the July 27, 2010 request for public comments by the Securities and Exchange Commission (the "Commission" or the "SEC"), this letter is submitted on behalf of the undersigned individuals to address section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Section 953(b) of the Dodd-Frank Act requires disclosure of the ratio of the CEO's "annual total compensation" (as reported in the summary compensation table based on SEC rules as in effect on the date of enactment of the Dodd-Frank Act) to the median annual total compensation of all of the registrant's other employees.[1] Dr. John D. Montgomery and Dr. Kent D. Van Liere of NERA Economic Consulting were consulted regarding their suggestions related to the calculation of median compensation for purposes of preparing this comment and the undersigned gratefully acknowledge the assistance they provided.

The comments expressed in this letter are the views of the undersigned individuals only and have not been approved by their firms and are not the official position of their firms or any organization in which these individuals are members. The undersigned respectfully thank the Commission for the opportunity to provide comments as the Commission undertakes the preparation of guidance on the Dodd-Frank Act.

[1] Technically, the statute actually refers to the ratio of the median annual compensation of all employees to the compensation of the CEO. For example, if CEO pay were $2 million and the median annual compensation of all employees were $25,000, the statute literally requires a disclosure that the median annual compensation of all employees is 1/80 of the CEO's pay. Since all commentary on this provision assumes that the ratio will be expressed in terms of the multiple that CEO pay bears to median employee compensation (for example, CEO pay is 80 times the median of all employee pay), we will assume that the regulations will require that the ratio be expressed in this manner.

One final preliminary note is appropriate. All of the undersigned favor the repeal of section 953(b). (A bill has been introduced into Congress repealing section 953(b) of the Dodd-Frank Act and the bill is pending as of the date of this letter.[2] We are submitting this comment supporting such repeal, and in the event the repeal is not enacted, recommending what we believe to be a fair and reasonable interpretation of section 953(b) that is consistent with applicable laws.)

There is a unifying theme with respect to the other sections of Subtitle E of Title IX the Dodd-Frank Act- improving the compensation setting process for senior executives of public companies through rules intended to improve the linkage between pay and performance (consistent with appropriate risk taking). We are unaware of any evidence correlating corporate performance to the ratio of CEO pay to median employee pay,[3] so information regarding this statistic seems irrelevant to the goals of the Dodd-Frank Act. Nevertheless, if section 953(b) is not repealed, we believe the proposals set forth below will improve its workability.

Overview

However the Commission interprets section 953(b), we respectfully request that, for the reasons set forth below, registrants should be given several years (at least two years from the effective date of the regulations) in order to implement the requirements of section 953(b). Generally, companies will not be able to begin the process of integrating multiple payroll systems until the SEC provides clarity on the compensation to be included in the computation of median employee pay and how to incorporate non-U.S.-based pay. Many companies maintain different payroll systems for different groups of employees. Some of these systems are not automated, not all use the same payroll periods, and some are established outside the U.S. and differ from U.S.-based payroll systems (in part because of the requirements of local laws). Compensation that is required to be included under section 953(b) may, at least in some cases, not otherwise be taken into account in some payroll systems. Moreover, there will be many instances where a registrant's payroll systems will not be globally integrated. There also are likely to be several aspects of the payroll collection and consolidation process that will raise issues regarding the implementation of section 953(b), and the registrant will need to use its best judgment to determine how its payroll consolidation process is to be implemented. We understand from a number of our clients that, in many cases, this payroll consolidation process is likely to require years to be completed, and we ask that the effective date of the rules allow sufficient time for the transition.

There are also legal restrictions that limit a U.S.-based multinational company's ability to obtain and transfer data in order to complete a median compensation calculation. For instance, U.S.-

[2] The Burdensome Data Collection Relief Act, H.R. 1062.

[3] In that regard, we note a submission by the Institute for Policy Studies that refers to a study linking executive turnover rates to management pay disparities. http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-62.pdf. Managerial pay differences raise different issues, however, than the ratio of CEO pay to median employee pay.

based multinational companies need to ensure compliance with data privacy regulations in transmitting personally identifiable HR data ("Personal Data") in the European Union ("EU") onto global human resource information system networks in the U.S., sending Personal Data in hard copy from the EU to the U.S. as well as Personal Data "onward transfers" to third-party payroll, pension and benefits processors outside of the EU. The EU Directive 95/46/EC (European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data) ("EU Data Privacy") regulates the transfer of personal data from an EU Member State to a third party country such as the U.S. Further, certain EU Member State's data protection regulations impose even tighter restrictions on transmitting Personal Data outside of the EU. In some Member States, employee consent is required; in others, consent may not be sufficient. While compensation data may be transferrable to the extent it excludes identifying information, developing such a list likely would require development and implementation of additional administrative systems such as a special download format for the data that may create burdensome challenges when attempting to reconcile back to the original data for accuracy. Thus, the EU Data Privacy rules may make compliance with the median calculation with respect to employees in the EU unduly burdensome and limit the verifiability of the accuracy of the data used from the EU in the calculation if the information is fully de-identified.[4]

We respectfully submit several proposals that relate to the SEC's interpretation of what is required by the references to "the median of the annual total compensation of all employees" in section 953(b)(1)(A) of the statute. Because in many circumstances we believe that it will be impossible for registrants to establish such median with mathematical certainty, we believe that the Commission can prescribe a menu of alternative methods from which a registrant may select the alternative which works best in its situation to facilitate a disclosure that will be meaningful and useful to shareholders while minimizing the cost of extracting the data. We expect that the SEC's rules would require a registrant to explain the alternatives or assumptions it utilized to calculate median compensation.

<u>Application of Median Compensation and Compensation Ratio to a Global Company: The Ability to Exclude Non-U.S. Employees.</u>

In the context of today's workforce, the calculation of median compensation on a worldwide basis for a multinational registrant not only imposes significant costs on registrants already facing significant difficulties and challenges in a multinational business environment, but also may result in a calculated amount that falls short of providing a meaningful and useful comparison of the CEO's compensation to the median employee's compensation. As discussed above, for U.S.-based multinational companies operating in the EU, the EU Data Privacy rules make the calculation considering the EU employees in some cases impossible and in others extraordinarily burdensome due to individual consent requirements.

[4] EU countries are not the only countries with privacy protection laws. For example, generally EU is the most protective but Peru and Argentina have similar legislation, Canada is rather protective and Japan may restrict the transmission of the financial aspects.

Compensation across jurisdictions varies greatly and the compensation reported in the payroll systems of some jurisdictions may not adequately capture amounts that would be considered compensation under U.S. disclosure rules. Thus, the aggregate compensation (as reported in the payroll system) in non-U.S. jurisdictions may not be comparable to the aggregate compensation computed for a registrant's U.S.-based employees. For example, all of the following amounts may under circumstances not be counted as taxable compensation in China—housing, company car, children's education, and club membership and dues.[5] To the extent these amounts are not captured in the payroll system (because they are not taxable items), comparisons based on payroll systems could be somewhat misleading. On the other hand, requiring registrants to recompute the output of their payroll systems to include non-payroll items that would be reportable in the United States has the potential to impose enormous compliance costs and administrative burdens.

Another example of significant international variation is the area of retirement benefits. There are great variations in the level of retirement benefits provided in various jurisdictions and whether these benefits are provided through public or private sector pension plans. In addition, there are significant and difficult issues involved in determining the value of both government-provided and private sector retirement programs. These issues become especially problematic when non-U.S. employees are included because the value of public sector pensions for foreign private sector employees (i.e., the foreign equivalent of the U.S. Social Security system) is much larger in some foreign jurisdictions than in the United States. For example, in France the government provided pension benefit can be 50% of average monthly compensation.[6] In the United States, however, the Social Security pension is generally based on 32% of average indexed monthly earnings, dropping to 15% for monthly earnings over $4,517.[7] Failure to take into account these differences makes the foreign comparisons misleading (especially when the registrant is contributing through higher social-insurance taxes). Attempts to adjust these figures to account for some of the differences would likely add significantly to the compliance costs and attending administrative burdens.

Another inevitable problem of global compensation comparisons would be exchange rate fluctuations. Over the 12 months ending May 18th, the Euro fluctuated about 25% versus the U.S. dollar. There are numerous potential methodologies for converting wages paid in Euros into U.S. dollars and, depending on the methodology chosen (e.g., end of year exchange ratio, average exchange ratio, etc.), the results of the comparisons would be quite different.

There also will be major technical challenges in modifying the compensation reported on multiple payroll systems to ensure equivalent total compensation elements are covered for all employees for the same time period when not all systems report in the same way or at the same time or for the same period as the U.S. system. There are also significant issues involved when a

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[5] http://us.kpmg.com/microsite/tax/ies/tea/spring2006/article2.asp
[6] http://www.cleiss.fr/docs/regimes/regime_france/an_3.html
[7] http://www.ssa.gov/oact/COLA/piaformula.html

multinational registrant has multiple payroll systems in different jurisdictions. Integrating the output from the different payroll systems to find the median compensation of all employees will be challenging and costly.

The final, and perhaps most important, reason for questioning the utility of including foreign compensation data stems from the fact that, depending on the foreign country involved, the gap between average U.S. wages and average foreign wages may be enormous. According to the Bureau of Labor Statistics, in April 2011, average weekly nonfarm earnings were $787.19, or approximately $19.70 an hour (assuming a 40-hour week).[8] Contrast this to basic wages in India, which according to a January 2011 news story average $1.71 an hour.[9] These huge international disparities mean that two U.S. companies with comparable U.S. workforces could have completely different median pay data depending on the degree to which they outsourced work to India and the extent to which these outsourced workers were considered employees as opposed to independent contractors.

Thus, we respectfully suggest that the Commission consider permitting a registrant to disclose the comparison with respect to only employees whose compensation is reported on the U.S. payroll system (the "U.S. employees") rather than the median compensation of all global employees, recognizing that even this limitation will be burdensome on registrants with multiple U.S.-based payroll systems. From what we know of the origins of section 953(b), a primary focus was on disparities between the pay of U.S. CEOs and U.S. workers. Including data with regard to foreign employees will in many cases produce numbers that are vastly different with respect to what is included as well as a distorted ratio. Shareholders in many cases will not receive a comparison of comparable or even relevant data within and across registrants.

The cost of valuing foreign benefits can far outweigh any improvement in disclosure resulting from including such amounts. If the policy of section 953(b) is to provide a valid comparison of U.S. CEO pay to the median compensation of workers paid on the same basis and dealing with the same economic pressures in terms of cost of living, then a comparison done using only U.S. employees to calculate the median compensation will provide the comparison that is most relevant to the shareholders.[10]

We respectfully request that the Commission consider permitting registrants to limit the compensation calculations to only U.S. employees.

Use of a Simplified Calculation of Total Compensation for Employees Who Are Not Named Executive Officers as a Safe Harbor

We also respectfully request that the Commission allow registrants the discretion to elect to use, in place of annual total compensation, the W-2 compensation for employees who are not part of

[8] http://www.bls.gov/news.release/pdf/realer.pdf
[9] http://www.sdcexec.com/online/printer.jsp?id=12946

the named executive officer ("NEO") group to make the compensation more readily available and the calculation less burdensome. To the extent that the Commission rules require that compensation outside the U.S. be taken into account, we request that the amount used to determine non-CEO compensation be limited to amounts that are includible in taxable income for the applicable jurisdiction or that are required to be recorded under the payroll system of the applicable jurisdiction. We anticipate that the proposed approach would not materially affect the determination of the median amount but, in many cases, would significantly reduce the administrative burden associated with determination of the median. It would, for example, avoid the need to determine the value of compensation that is not taxable on grant (e.g., stock options) that must be included in determining non-CEO compensation for the proxy statement. Companies track equity compensation grants to CEOs and other NEOs, but do not generally track equity grants by individuals and some companies grant equity awards across broad groups of employees. Tracking such awards by individual to calculate the median compensation would be unduly burdensome.

Application of a Good Faith Standard and Timing Issues Regarding the Calculation of Median Compensation

As indicated above, the consolidation of payroll information, particularly for non-U.S. payrolls, will require the exercise of the registrant's judgment. Because of the multiple payroll systems and methodologies that may be used by a registrant, as well as the need for occasional corrections that must be made to amounts reported for payroll purposes, reasonable persons will differ as to the amount that represents the median compensation of a registrant's employees. We recommend that a registrant not be deemed in violation of the required disclosure if the registrant can demonstrate it used good faith efforts to determine the median.

As can be readily seen, the number for median compensation will vary by the day on which compensation is calculated and will shift based on such variables as overtime, benefits, and whether and when equity compensation becomes payable or is exercised. The inherently imprecise nature of the computation should be recognized with two rules that may somewhat lessen the burden of the process:

- Rule One--the registrant can select any date as of which to calculate median compensation, provided the date is within 12 months of the proxy filing, and is the most recent practicable date, and
- Rule Two--if different payroll systems are involved, the 12-month period for computing compensation data for each payroll system's data will be acceptable so long as the period ends within 12 months of the date chosen under Rule One.

For example, if the proxy filing date is March 1, 2015, any date between March 1, 2014 and February 28, 2015 would be an acceptable date for computing the compensation data. If, for example, the chosen date was July 1, 2014, compensation for an employee over any 12-month period would be acceptable so long as the period ended after July 1, 2013.

As is the case with the other choices we have described, the registrant would be required to disclose how it has constructed the computation. This is analogous to the manner in which the proxy rules acknowledge that the standard for reporting the value of pensions, with the disclosure of actuarial assumptions, permits different choices. A registrant is not bound to any one method of calculation, but it must disclose how it calculated the value of the pension benefit.

These recommendations promote transparency in how the median is calculated and do not result in anyone being penalized as a result of a mathematical error in not attaining the exact precise median compensation. We respectfully recommend that due to the inherent fluctuations in the calculation that the registrant be permitted to state that their disclosure of the ratio is an "estimate."

Computing the CEO Pay Ratio With Reference to the Average Weekly Earnings of Private Nonfarm Workers

As is implicit in our comments, we firmly believe that no matter how much the SEC attempts to simplify the median compensation computation, it will be an expensive process with an artificial precision and arguably limited utility. In light of this, we think the SEC should allow registrants to choose to provide as an alternative voluntary disclosure, a more simplified computation for reporting purposes—the ratio of CEO pay to the average pay of private nonfarm workers. This weekly wage statistic is published on a monthly basis by the Bureau of Labor Statistics and is readily obtainable. As previously noted, the April 2011 value was $787.10, equating to an annualized wage of $40,929.20.

If a registrant chose this option, a registrant could simply report the ratio of CEO pay in the proxy to this BLS statistic as an alternative voluntary disclosure that would provide a comparison that would be more easily compared from one company to the next. If the CEO, for example, earned $3 million, the proxy would report that the CEO's compensation was 73.1 times the average wage of private nonfarm workers.

We believe this option is compatible with the purposes of supporters of section 953(b). We believe the supporters of this section see its benefits as alerting investors to the magnitude of the compensation disparity between a company's CEO and rank and file workers. Since public companies represent the largest companies in the U.S. economy and average wages at large companies are generally larger than average wages at smaller companies,[11] we believe that this methodology would, if anything, produce a higher number than would be produced by actually comparing CEO pay to median employee pay. If a company decides to avoid the cost and other burdens of an actual median computation by publishing a statistic that shows a higher disparity, it should be allowed to do so.

[11] http://www.rau.ro/intranet/Aer/1999/8902/89020099.pdf

Conclusion

We again reiterate that we first favor complete repeal of section 953(b). In the event a complete repeal does not occur, we prepared the foregoing comments in anticipation of the Commission's rule making in hopes that the comments will be helpful to the staff of the Commission in formulating its rule-making proposal. We appreciate the opportunity to submit these comments. The undersigned are available to meet and discuss these matters with the Commission and its staff and to respond to any questions. If you would like to discuss these matters with the undersigned, please contact Greta E. Cowart at greta.cowart@haynesboone.com or 214.651.5592 to coordinate a discussion with the co-authors of this comment.

Very truly yours,

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