The Cypress Group

March 23, 2017

Mr. Brent Fields
Secretary
U.S. Securities Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Acting Chairman Piwowar's February 6, 2017, Statement on the Commission's Pay Ratio Rule

Dear Mr. Fields:

I write on behalf of the Insurance Coalition, a group of federally supervised insurance companies and interested parties who share a common interest in federal regulations that apply to insurance companies.[1] In this case, we write because some members of the Insurance Coalition are publicly traded companies and thus subject to the Securities and Exchange Commission ("SEC") pay ratio rule issued under Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[2] We appreciate the opportunity to provide our comments on issues specific to insurance companies subject to the rule.[3]

Executive Summary

The final rule raises issues regarding independent insurance agents and the potential for them to be included as "employees" under the Rule through the inclusion of certain independent contractors. Rather than inappropriately categorizing such individuals as employees, we believe the appropriate solution is for the SEC to allow companies to exclude independent insurance agents for the following reasons. First, they generally do not work exclusively for one insurer and sell products from multiple companies, with no single company considered their employer. Second, an inconsistent treatment of independent insurance agents across the industry (with some including them and others not) will further ensure that the resulting pay ratios are not usefully comparable across different companies. In the absence of a direct

[1] This letter reflects the views of Insurance Coalition members subject to the rule but is not intended to address the full range of issues regarding independent contractors that may be encountered by mutual insurance companies.
[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376 (2010).
[3] Release Nos. 33-9877; 34-75610, Pay Ratio Disclosure, 80 Fed. Reg. 50,103 (Aug. 18, 2015).

exclusion, it may be acceptable to more narrowly define independent contractors using the prevailing Internal Revenue Service ("IRS") independent contractor standard for purposes of the rule. The SEC definition in the final rule is in contrast with the IRS guidance and the definition commonly used in employment law. We believe that reliance on the IRS definition of independent contractor would best reflect the relationship between insurance agents and the companies whose products they sell. Alternatively, we support limiting the pay ratio calculation to employees directly employed by a registrant.

Additionally, we strongly suggest limiting the disclosure to U.S. employees only, as this would remedy the problems associated with amalgamating data from countries with unique employment laws and labor markets. Focusing disclosures on U.S. employees would also eliminate compliance costs associated with collecting and analyzing data from multiple countries. It is clear from our members that the inclusion of employees outside the U.S. is the main driver of the high cost of compliance and once more creates further grounds for inconsistency and for outcomes to not be comparable.

Finally, we recommend that the SEC simplify the definition of total compensation to mean base salary rate plus target incentives. This would be consistent with current human-resource systems capabilities, would accurately reflect total compensation, and would reduce unnecessary compliance burdens.

Specific Recommendations.

I. Allow Companies to exclude Independent Insurance Agents from the Pay Ratio Calculation

The final Pay Ratio Rule (the "Rule") excludes from the pay ratio calculation persons that are independent contractors "as long as they are employed, and their compensation is determined, by an unaffiliated third party."[4]

The text of the final rule does not specify whether independent insurance agents would be considered independent contractors for purposes of the Rule and, if so, whether they should be included as employees on the same grounds as other independent contractors – for example, where they are not employed, or have compensation determined by, a third party. In its 2016 Compliance and Disclosure Interpretation ("CDI"), the SEC noted that companies should include as employees in the pay ratio workers for whom the company determines compensation. The CDI further noted that registrants often obtain the services of workers by contracting with an

[4] Pay Ratio Disclosure, 80 Fed. Reg. 50104, 50117 (Aug. 18, 2015) (codified at 17 C.F.R. pt. 229, 240 and 249).

unaffiliated third party" and that an individual who is an independent contractor "may be the unaffiliated third party who determines his or her own compensation."[5]

We respectfully request that the SEC clarify that independent insurance agents are excluded from the pay ratio calculation under the Rule. Independent insurance agents, as the name implies, are not employees of any insurance company. Rather, they are often sole proprietors or closely held businesses in which licensed insurance agents sell products from a number of companies, depending on customer needs. Insurance companies pay commissions to these agents based on the products sold, but several insurance companies pay commissions in any given year, and no single insurance company controls the total compensation of an independent agent. Rather, the commission from an insurance company whose product is sold by an agent can be thought of as providing input into, not "determining" the total compensation of an independent agent.

The IRS definition of independent contractor and the definition commonly used in employment law would capture independent insurance agents and appropriately categorizes the relationship between agent and insurer/product manufacturer. The IRS definition, for example, focuses on the degree to which the company controls the performance of the individual, and conversely, the degree to which the individual exercises independence. As the name implies, independent insurance agent performance is truly independent and not under the control of any insurance company whose products the agent sells. The relationship does not include the legal indicia of the employer-employee relationship, including, notably, control over or direction of performance of the agent. The IRS definition of independent contractor is consistent with employment law, and with a common-sense understanding of what it means to be an employee, and includes independent insurance agents.

By contrast, the SEC CDI references companies contracting with an unaffiliated third party, and does not specify whether an insurance agency qualifies as an unaffiliated third party. While we believe strongly that independent insurance agencies meet the definition of unaffiliated third party under the CDI, there is no need to rely on this factor, rather than merely relying on well-established IRS and employment law definitions.

Including Independent Insurance Agent Commissions is Impractical and Misleading

Because independent insurance agents receive commissions from any company whose products they sell, even if it were appropriate to treat them as employees for purposes of the Rule, doing so poses practical problems. Such problems include determining whether such

[5] U.S. Sec. and Exch. Comm'n, Regulation S-K: Questions and Answers of General Applicability, Question 128C.05 (Oct. 18, 2016).

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agents should be classified as part-time or full-time, and whether the registrant needs to take into account compensation from other insurers (which is impossible as a practical matter). Reporting the commissions to an independent agent by one company does not capture the total compensation of that agent, and would be misleading to a registrant's employees and shareholders.

II. Limit the Disclosure to Full-Time Workers Employed Directly by the Company.

While we strongly support the explicit exclusion of independent insurance agents from the pay ratio calculation, we also support limiting the pay ratio disclosure to full-time workers employed directly by registrants. References to part-time and seasonal employees, as well as independent contractors, are problematic as systems intended to track these populations lack centralization, the population constantly changes, hours-worked can vary, compensation is not always controlled by the company, and review of these populations is manual and time-consuming. While we advocate for allowing companies to use the IRS guidance independent contractor standard when determining whether a person is an independent contractor, we suggest limiting the disclosure to workers employed directly and permanently by the company (commonly referred to as "regular full-time"), with no reference to independent contractors or otherwise.

III. Limit Disclosure to U.S. Employees.

The main compliance cost associated with the Rule results from companies manually collecting and analyzing data from multiple countries. Furthermore, each country has differing labor laws, talent markets and currencies, and to compound these different features together can be misleading and uninformative. We support other comments that suggest that the SEC limit the disclosure to U.S. employees only. This limitation would reduce compliance costs, eliminate possible misinformation and provide more consistency (and therefore better comparability) in the disclosures.

IV. Simplify the Definition of Total Compensation to Base Salary Rate Plus Target Incentives.

We agree with other commenters that total compensation should be defined as base salary plus target incentives. The Rule's definition of total compensation requires companies to use payroll data. This creates issues as such data is not contained within a centralized global system, and most companies' human resource ("HR") systems lack some of the information required for a Summary Compensation Table view of total compensation. We recommend

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simplifying the definition of total compensation to base salary rate plus target incentives, as this definition is more compatible with modern-HR systems.

Conclusion

For the reasons described above, we strongly support clarifying that independent insurance agents should not be included in the pay ratio calculation. This could be accomplished explicitly, or through aligning the definition of independent contractors with the IRS definition, or through limiting the population included in the ratio to regular full-time U.S. workers Such a clarification would reflect the true nature of the agent/insurer relationship, and ensure that registrants' disclosures are more consistent and comparable. As noted above, we also support other amendments to improve the quality of disclosures and reduce unnecessary compliance costs.

We appreciate the opportunity to comment and look forward to working with you to address the specific concerns of insurers subject to the Rule.

Sincerely,

Bridget Hagan
Executive Director, The Insurance Coalition