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May 10, 2017

Brett Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: **Acting Chairman Piwowar's Statement on the Commission's CEO Pay Ratio Disclosure Rule**

Mr. Fields:

On behalf of our listed companies, the NYSE Group, Inc. ("NYSE")<sup>1</sup> appreciates the opportunity to respond to Acting Chairman Piwowar's request for comment on the implementation of the SEC's Pay Ratio Disclosure Rule ("PRDR"), promulgated under Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Acting Chairman Piwowar requested comment on whether issuers are facing any "unexpected challenges" in implementing the PRDR and whether the SEC should consider additional relief.<sup>2</sup>

## Background

Section 953(b) of Dodd-Frank directed the Commission to amend Item 402 of Regulation S-K to require disclosure of the median of the annual total compensation of all employees of a registrant (excluding the chief executive officer), the annual total compensation of that registrant's chief executive officer, and the ratio of the median of the annual total

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<sup>1</sup> NYSE Group, Inc. is the parent company of New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., national securities exchanges registered under Section 6 of the Exchange Act. The three markets list the securities of more than 2,400 public companies that may benefit from Commission action on the matters discussed in this comment letter

<sup>2</sup> Public Statement Regarding Reconsideration of Pay Ratio Rule Implementation, Acting Chairman Michael P. Piwowar (Feb. 6, 2017) at <https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html>.

compensation of all employees to the annual total compensation of the chief executive officer.<sup>3</sup> The disclosure is required in any annual report, proxy or information statement, or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. The disclosure requirement does not apply to emerging growth companies, smaller reporting companies, or foreign private issuers. The implementation phase for the PRDR commenced this year, with issuers coming into compliance for their first fiscal year beginning on or after January 1, 2017.

### **NYSE-Listed Company Comments**

NYSE hears from a broad range of our listed companies on the challenges associated with complying with the PRDR. The general consensus of views of our listed companies is that, while the intent of the PRDR may be meritorious, certain requirements of the final rule are overly complex and unduly costly in many respects. In addition, many of our listed companies question the value of this information and are concerned that the disclosure will not be meaningful to stakeholders.

Given the scope of the PRDR and the size and global reach of many of our listed companies, the planning process for PRDR implementation has been underway since the rule's adoption in 2015. Our listed companies have diligently anticipated significant adjustments to their internal and external resources in order to be ready to comply by 2017. Throughout this planning process, our listed companies have encountered a number of complexities and unexpected challenges.

More specifically, and as discussed below, we understand that the definition of "employee" in the PRDR presents two of the most significant difficulties with respect to compliance for our listed companies. First, the PRDR includes non-U.S. employees in the definition of "employee" for purposes of calculating employee compensation. The second challenge related to the definition of "employee" involves the inclusion of certain independent contractors. These two components of the PRDR compensation calculation alone have required our listed companies to acquire new and dedicate additional existing internal and external resources at a cost in the tens of thousands of dollars per company. These two components of the rule alone also create a significant anticipated ongoing compliance cost, which some of our listed companies estimate at approximately \$100,000 total per year.

#### *Key Challenges Presented by Including Non-US Employees in the Definition of "Employee"*

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<sup>3</sup> Exchange Act Release No. 75610 (Aug. 15, 2015), 80 FR 50104 (Aug. 18, 2015) (final rule adopting pay ratio disclosure requirements).

The definition of “employee” in the PRDR includes “an individual employed by the registrant or any of its consolidated subsidiaries, whether as a full-time, part-time, seasonal, or temporary worker.” This definition includes non-US employees, except in limited circumstances.<sup>4</sup>

The process of gathering accurate compensation information in non-U.S. jurisdictions for purposes of the PRDR calculations requires our listed companies to contend with hundreds of different global compensation structures. In order to pay competitive compensation in each jurisdiction in which a company operates, our global listed companies have specific compensation programs that vary from country to country. For example, even determining what constitutes “base pay” varies between jurisdictions and presents significant challenges from a methodology and consistency perspective in light of customary pay practices in foreign countries. For our global listed companies with local operations in foreign countries, collecting even the most basic compensation data requires assessing and collecting information from multiple (in some cases well over a hundred) countries, payroll systems and currencies. The risk of inaccuracies in calculating compensation for non-U.S. employees is significant. As a result, substantial internal and external resources have been expended to ensure appropriate employee training and a consistent data collection/analysis process. These costs, balanced against the benefit gained by including non-U.S. employees, is unduly burdensome and costly to our listed companies.

#### *Key Challenges Presented by Including Independent Contractors in the Definition of “Employee”*

The final PRDR rule text provides that the “definition of employee or employee of the registrant does not include those workers who are employed, and whose compensation is determined by, an unaffiliated third party but who provides services to the registrant or its consolidated subsidiaries as independent contractors or ‘leased’ workers.”<sup>5</sup> Accordingly, our listed companies have adopted the approach that to exclude independent contract workers from the definition of “employee,” an independent contractor must satisfy at least three requirements: (1) the contract worker must be employed by a third party; (2) the contract worker’s compensation must be determined by the unaffiliated third party; and (3) the third party must be unaffiliated with the company.

Many of our listed companies utilize independent contractors to fulfill specific business functions for their firms, (e.g.; Information Technology), many of which are located in non-US

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<sup>4</sup> Under the final PRDR rule, a company may exclude non-U.S. employees from the determination of its median employee in two circumstances: (1) Non-U.S. employees that are employed in a jurisdiction with data privacy laws that make the company unable to comply with the rule without violating those laws; and (2) Up to 5 percent of its total employees who are non-U.S. employees, including any non-U.S. employees excluded using the data privacy exemption. If a company excludes any non-U.S. employee in a particular jurisdiction, it must exclude all non-U.S. employees in that jurisdiction.

<sup>5</sup> Item 402(u)(3) of Reg SK, as amended.

jurisdictions. By way of example, in preparing for PRDR implementation, one of our global listed companies collected compensation information on independent contractors from approximately 100 countries and across 75 currencies within its global footprint. The process of identifying the population of independent contractors that satisfy the definition within the final PRDR and are potentially within the scope of the PRDR is very costly and has led to significant challenges.

In preparing to comply with the PRDR, our listed companies first had to determine the status of independent contractors servicing their organizations by looking at the third party employment arrangements for the contractors. Once our companies determined the universe of those independent contractors that were potentially within scope of the PRDR, each independent contractor then was then analyzed to determine whether “compensation was determined by an unaffiliated third party.” This second step in assessing independent contractor status requires creating entirely new reporting and review methodologies to appropriately code independent contractors as “in-scope” or “out-of-scope” of the PRDR. This independent contractor coding work has required thousands of human hours and involved project teams of thousands of regional and legal entity internal controllers as well as new external resources. And this independent contractor coding work is not a one-time event; rather, it is an ongoing process as independent contractors revolve in and out of our listed companies’ workforces depending on the nature of their engagement within the companies.

*Recommended Changes to the PRDR Definition of “Employee”*

In balancing the stated goals of the PRDR against the complexities associated with its implementation, our listed companies believe that, at minimum, two key adjustments should be made to the definition of “employee” under the PRDR: (1) the definition should include only those workers who are domiciled in the United States; and (2) all independent contractors, regardless of whether their compensation is determined by a third party, should be excluded. The SEC has broad latitude to make these definitional changes -- there is nothing in Section 953(b) that dictates the class of employees who must be included in the definition -- and doing so would provide a more concise and meaningful assessment of the types of employees included in the PRDR compensation calculation. Our listed companies appreciate the SEC’s willingness to review the PRDR rule and its implementation and believe that companies subject to the PRDR would benefit from additional relief and/or guidance.

Sincerely,



Thomas W. Farley  
President, NYSE

cc: The Honorable Michael Piwowar, Acting Chairman,

The Honorable, Kara Stein, Commissioner  
Shelley Parratt , Acting Director of the Division of Corporate Finance