NATIONAL ASSOCIATION OF Manufacturers

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Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
VIA Federal eRulemaking Portal (http://www.regulations.gov)

RE: File Number S7-07-13

Attention: Ms. Elizabeth M. Murphy

Dear Ms. Murphy:

The National Association of Manufacturers (NAM)—the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states—appreciates the opportunity to provide comments to the Securities and Exchange Commission (SEC) on the proposed "pay ratio" rule implementing Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act). Thousands of U.S. manufacturers are publically held companies that would be subject to this new reporting requirement.

Overview

Throughout the Congressional consideration of the Dodd-Frank Act, the NAM urged Congress to focus their efforts on strengthening the U.S. financial system and avoiding new regulations that could be costly and hinder job creation for manufacturers and other non-financial companies that had nothing to do with the financial crisis. One example of a costly regulation that raised our concerns is the so-called "pay ratio requirement."

Manufacturers believe that requiring companies to regularly disclose the ratio of employees' median pay to the compensation of the company's chief executive represents a costly and onerous administrative burden on companies that will not produce useful information for investors.

As the SEC recognizes in the proposed rule, "(w)e do not expect that many registrants, if any, currently disclose or track total compensation as determined pursuant to Item 402 for their workforce."[1] Further, we agree with you that the value of the information to investors and the impact on advancing shareholder knowledge, if any, is unclear.

As you state in the release, "neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision or a specific market failure, if any, that is intended to be remedied."[2] Despite the absence of a clear benefit, companies will be required to incur significant financial cost, dedicate substantial man-hour resources and overcome

[1] Pay Ratio Disclosure, Securities Act Release No. 9452; Exchange Act Release No. 70,443; 78 Fed. Reg. 60,560 (proposed Oct. 1, 2013).
[2] 78 Fed. Reg. at 60582.

numerous administrative challenges in order to attempt to comply with the proposed rule. Consequently, Manufacturers believe that the pay ratio requirement, which will generate unnecessary paperwork and waste significant company resources, is an example of rules targeted by President Obama in Executive Order 13563.

As described below, manufacturers continue to support full repeal of this requirement. At the same time, we recognize the challenge facing the SEC in developing guidance on implementing this requirement and offer the following comments to focusing on the lack of benefit, the significant cost and administrative barriers to compliance, and concerns and questions regarding the proposed rule and the filing requirements.

Current Efforts to Repeal or Limit Sec. 953(b)

It is important to note that Sec. 953(b) was inserted into the Act without any hearings to consider the cost of collecting this information, whether other information was already available to simplify the reporting of wage data, or the overall benefit of reporting the information. There is broad acknowledgement among policy makers of the burden of this provision and bipartisan support, at least within the House of Representatives, to alter this requirement.

The NAM supports legislation (H.R. 1135) introduced by Rep. Bill Huizenga (R-MI) to repeal Sec. 953(b). H.R. 1135 was reported out of the House Financial Services Committee on June 19, 2013, by a bipartisan vote and is currently awaiting consideration by the full House. Similar legislation introduced in the 112th Congress (H.R. 1062) also received bipartisan support in the House Financial Services Committee.

Additionally, legislators who have opposed full repeal of the requirement have supported efforts to limit the scope of the rule. During the House Financial Services Committee's consideration of H.R. 1135, an amendment offered by Ranking Member Maxine Waters (D-CA) to limit the Sec. 953(b) received the unanimous support of the Committee Democrats and all of the Committee's Republicans, and five Democrats supported the underlying bill. During the 112th Congress, a similar amendment was offered by then-Ranking Member Barney Frank (D-MA) that also received unanimous support of the Committee Democrats.

A Rule without a Benefit

As stated above, and acknowledged by the SEC in the release, the purpose of Sec. 953(b) is unclear. "(T)he legislative record includes only a few brief references to the pay ratio disclosure requirements, each opposing the provision."[3] The SEC's proposal also notes that, "neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision."[4] Thus, companies will be required to comply with a provision that has no stated benefit but that will require them to incur significant costs and overcome substantial barriers to do so.

Moreover, the idea that a single statistic, like the pay ratio, could be an indicator of a company's approach to compensation practices, business strategy, or hundreds of other decisions that comprise their business plan is false and overly simplistic. Manufacturers agree with the SEC, "that using the ratios to compare compensation practices between registrants without taking into account inherent differences in business models, which may not be readily

[3] 78 Fed. Reg. at 60562.
[4] 78 Fed. Reg. at 60562.

available information, could possibly lead to potentially misleading conclusions and to unintended consequences."[5]

The Significant Cost of Compliance

While compliance costs will be significant for all manufacturers covered by the rule, the cost burden will be particularly high for global companies with multiple payroll and human resource systems. Almost 50 percent of U.S. global companies are manufacturers and these entities will bear the largest compliance costs. For instance, "Company A" operates in approximately 160 countries; has employees in nearly 70 countries with a total of 145,000 employees worldwide, 65,000 of who are in the United States and maintains over 60 different payroll systems. Company A's experience is not unlike many manufacturers' and this is particularly concerning when viewed through the lens of competitiveness. The NAM has found that it is 20 percent more expensive to manufacture in this country compared to our major trading partners, excluding the cost of labor. Tax and regulatory burdens drive this cost disadvantage.

To provide an idea of the actual cost to individual companies, take the example of "Company B," a U.S. multinational manufacturer with approximately 130,000 employees in about 275 locations worldwide, including 30,000 employees in the United States and 100,000 overseas. Currently only about 25,000 employees are on two common payrolls accessible to the human resources team; the rest of the company's employees are on over 500 separate payrolls that may or may not be outsourced by local human resource teams. The company has no centralized human resources information system (HRIS) function. Company B expects that the cost to build the global HRIS system needed to comply with the proposed rule would exceed $18 million and the system would have no other business purpose for the company.

As mentioned above, manufacturers share the Commission's concern that, "the provision does not identify a specific objective and therefore, the appropriateness of the costs in relation to the statutory objective is not readily assessable."[6] The lack of an objective is exacerbated by the fact that based on the estimates of impact and costs that we received from NAM members, we believe that SEC's estimate[7] that companies will pay $72,772,200 for the services of outside professionals to help them comply with the requirement is grossly underestimated.

Based on input from a number of NAM members, we also have concerns with SEC's assertion that, "(b)ecause the proposed requirements would allow registrants some flexibility in identifying the median and the annual total compensation of employees, the actual burden could be lower if the methodology used is able to reduce the effort needed to collect the data or if the registrant is able to use information that it uses for other purposes."[8] Many global Manufacturers, however, do not agree that the actual burden would be lower because most of these companies have HR/compensation data –where it exists –in a variety of other databases that are tailored to the localities in which they operate.

While we appreciate the SEC's attempt to lessen the burden by allowing "a broad use of any consistently applied compensation measure and statistical sampling and the use of other

[5] 78 Fed. Reg. at 60589.
[6] 78 Fed. Reg. at 60587.
[7] 78 Fed. Reg. at 60600.
[8] 78 Fed. Reg. at 60601.

reasonable estimates to identify the median,"[9] arriving at the median would still require the compilation of the various compensation forms for employees all around the world to determine what compensation measure can be used as the baseline. This will require hundreds of man-hours to gather the data that would then be used as the basis of the determination.

In sum, the cost of compliance with this proposed rule will require a substantial diversion of company resources from productive investment to compliance activities. Manufacturers also have significant concerns about the impact of the cost burden of this requirement on competitiveness. According to the SEC, the approximately 3,830 registrants[10] covered by the rule "could be at a competitive disadvantage to registrants (including private companies, foreign private issuers, smaller reporting companies and emerging growth companies) that are outside the scope of Section 953(b)."[11] While the competiveness concerns may not weigh as heavily on two companies within the same sector that both are required to comply with this proposal, the burden on competitiveness could be considerable if a company's competitor is exempt from these requirements.

Legal and Administrative Barriers

There also are a number of real legal and administrative barriers that companies will face in complying with the proposed rule. For example, companies with international operations have concerns about data privacy laws in some countries that could make it extremely difficult, if not impossible for them to identify the median employee.

More specifically, compliance with the data protection laws of each European Union member country, as well as data protection laws of Australia, will be a significant obstacle to collection of necessary information. In order to transfer personal data of employees between legal entities of the company within Europe, and from any European Union location to the United States, it will be necessary to justify the activity both to local management and employee representatives at each location, and to the data protection regulators of the country. Failure to follow this time and resource consuming process will result in the refusal of local management at sites across Europe to provide the necessary data for fear of personal criminal liability, and exposure of the company to investigations and fines by country data protection regulators.

The fact that local operating entities across Europe already possess the information required for this exercise is irrelevant to data protection legal compliance. Each new use of personal data requires a new notification, consultation and registrations process, site by site, country by country. Compliance with these laws and following the required process will take at least nine months with hundreds of employees and lawyers involved in the process. Indeed, a Manufacturer operating in Russia found that, according to that nation's data privacy laws, the company will need to get the personal sign-off from every Russian employee to share the data with the corporate headquarters.

Manufacturers are concerned that the SEC has not adequately considered the challenge posed by the varying types and standards of compensation that exists between countries. If average data is not acceptable in finding the median, one NAM member has considered using base salary as the consistent measure. This approach however has its own challenges in a global context because base salary is not consistently defined across countries. For example, in

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[9] 78 Fed. Reg. at 60601.
[10] 78 Fed. Reg. at 60584.
[11] 78 Fed. Reg. at 60588.

India, the usual measure of what we would call “base salary” is really “fixed cash” or “guaranteed cash” compensation, which includes several types of benefits including car, cell phone, housing allowances. Thus just using just the “basic salary” for employees in India would not be a true reflection of base salary for these employees as the allowances can sometimes total more than the basic salary itself.

This SEC’s decision to not allow for cost-of-living adjustments, we believe does not allow the pay-ratio data to reflect the varying economic norms around the world. However, the SEC acknowledges concerns that “the inclusion of non-U.S. employees raises compliance costs for multinational companies…and could raise concerns about the impact of non-U.S. pay structures on the comparability of the data to companies without off-shore operations.”[12] While we acknowledge that cost-of-living adjustments will add another layer of complication to data collection efforts, disallowance of the adjustments will negatively impact the quality of the pay ratio data because it does not allow for an accurate reflection of the costs of doing business across the world.

Another concern is that the release proposes that in the definition of “all employees” includes workers at any of the employer’s subsidiaries “as set forth in Securities Act Rule 405 and Exchange Act Rule 12b-2.”[13] While Manufacturers appreciate the SEC efforts to adhering to the statute on this issue, this approach poses a number of compliance issues. For example, for some subsidiaries, the reporting company may not have data on the employees, or any control over their pay structures.

One way to address this issue would be to only include employees in consolidated subsidiaries where the registrant has actual control over compensation decisions made at the subsidiary level. Compensation disclosure is designed to facilitate the comparison of the CEO’s pay to the performance of the company based on its consolidated financial statements. Accordingly, if the purpose of the proposed rule is to enhance compensation disclosure, then the ratio should relate to the same consolidated financial performance of the company and not consider other factors (i.e., non-consolidated entities) or entities which are not under the control of the reporting company.

Additionally, for non-wholly owned subsidiaries or joint ventures, a company only would be able to collect the necessary date if it is the majority owner and runs the joint venture. If the company is the minority owner, it would not have access to the data. These concerns are exacerbated if the subsidiary or joint venture is overseas where there may also be data privacy concerns and barriers to compliance.

Another cross border concern is the challenge of normalizing data from foreign currency fluctuations for companies with international operations. These fluctuations would impact the accuracy of the data collected from day to day and month to month. For example, “Company C” has payrolls in over 35 currencies and U.S.-based and “global” payroll systems. However, the global system is a Human Resources Management System with separate payrolls in over 40 countries. This company also has more than 25 subsidiaries, each of which has their own payroll system or multiple systems that include international employees. The currency and data consolidation concerns raised by this proposal for a multinational company are significant.

Process Concerns

[12] 78 Fed. Reg. at 60566.
[13] 78 Fed. Reg. at 60565.

While we appreciate the SEC's effort to address companies' concerns about their ability to comply with the pay ratio requirement and the flexibility in the draft rule, the reality is that sampling is not a panacea and does not mitigate the main costs and burdens of determining the pay ratio. In fact, sampling is most helpful if an organization already has an expensive process in place. In determining the median employee, however, the costs are heavily weighted to the beginning of the process when a company is trying to assemble either a list of employees for the sample, or trying to stratify/segment the employee population with little information about the various business locations' respective compensation distributions. This problem is exacerbated in the case of companies with multiple locations, multiple payroll systems, and multiple currencies in play. In short, permitting sampling within the prescribed limits of the proposed rule does not reduce the most significant costs associated with determining the pay ratio.

There are several alternatives that could ease the compliance burden. For example, an algorithm designed to estimate the median employee's compensation using certain actual salary data and statistics for each location would be a more cost-effective, less time-consuming, and less error-prone alternative than the proposed exercise of finding an individual median employee. An algorithmic methodology that estimates the median would also more easily permit companies to include non-US workers in the determination of the median employee, which would defray the cost and complexity of including these workers in the disclosure.

Alternatively, the ability to use the previous year's data in a limited way (e.g., absent major structural or staffing changes) could reduce the compliance burden. For example, allowing a company to assume that this year's salary distribution is close to last year's, or if two locations historically had very similar salary distributions, allowing a company to assume that their distributions this year are also similar, would help a company identify the median without resurveying every location every year.

Another potential alternative is a safe harbor that would allow companies to use the ratio for domestic employees to estimate a final ratio that includes non-U.S. workers. A safe harbor option like this could save U.S.–based companies millions of dollars.

The timing of reports is another concern for NAM members. For early filers, the timeframe to close the books, adjust for non-full-time employees, make assumptions to identify the median employee and calculate total compensation is difficult if the company is finalizing the annual report and proxy statements at the same time. Another timing question not addressed in this release is how a company should address compliance requirements in the case of acquisitions. For acquisitions that occur at the end of a fiscal year, the data may not be available to the registrant in time for reporting. This is especially true in instances where the acquired company was not previously subject to the pay ratio requirement.

In addition, companies with a fiscal year other than a calendar year will need a secondary system, at additional cost, to collect data at fiscal year-end. For example, "Company B" currently has a Fiscal Year End of September 30th. In their situation, a record date of the prior Calendar Year End or Prior Fiscal Year End "Look Back Year", would allow them to deal with the complexities of consolidating the information kept in over 500 payroll systems in 275 locations worldwide. The data collection alone will provide significant challenges that could jeopardize the ability to meet the 120 day Proxy Reporting requirement. The concerns about timing are complicated by the data privacy rules described above that could significantly complicate obtaining timely approvals needed to export the necessary data. Additional time is needed to allow for addressing these challenges and ensuring that accurate information is used in the formulation of the ratio.

Finally, we believe the disclosure should be "furnished" and not "filed." Given that the disclosure will necessarily be based on an estimate, a Sarbanes-Oxley certification is inappropriate. Moreover, the additional validation work that would be necessary to support a "filed" disclosure would be unduly burdensome under the circumstances.

Conclusion

Like the SEC, manufacturers are stymied that "there is limited legislative history to inform our understanding of the legislative intent behind Section 953(b) or the specific benefits the provision is intended to secure."[14] In particular, the lack of a "specific market failure" calls into question value of the significant costs that are expected to be incurred by companies as they attempt to comply.

Manufacturing supports an estimated 17.2 million jobs in the United States—about one in six private-sector jobs. Nearly 12 million Americans (or 9 percent of the workforce) are employed directly in manufacturing.[15] Manufacturers strive to compete in a global world and are committed to ensuring that their workforces are highly trained and well compensated. In fact, in 2011, the average manufacturing worker in the United States earned $77,060 annually, including pay and benefits. The average worker in all industries earned $60,168.[16] Manufacturers are proud of their commitment to their workforces and want to dedicate resources to competing, growing and investing in their companies, their products and their employees and are concerned about regulatory burdens that will distract them from this mission.

In sum, the cost of complying with this rule will divert company resources from needed and investment and job creation without providing a benefit to shareholders, companies or the broader economy. On behalf of the NAM and the 12 million men and women that work in manufacturing, we appreciate your attention to these concerns.

Sincerely,

Carolyn Lee
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[14] 78 Fed. Reg. at 60584.
[15] Bureau of Labor Statistics, U.S. Department of Labor, May 2012. Estimate of total employment supported by manufacturing calculated by NAM using data from the Bureau of Economic Analysis (2011).
[16] Bureau of Economic Analysis (2011).