Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
United States
www.sec.gov

Chris Barnard

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- 17 CFR Parts 229, 240, and 249
- Release Nos. 34-94074; File No. S7-07-15
- Reopening of Comment Period for Pay Versus Performance

Dear Sir.

Thank you for giving us the opportunity to comment on your proposed rule concerning Pay Versus Performance.

You are reopening the comment period for your proposal to implement Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The proposed rule would amend the current executive compensation disclosure rule to require a description of how executive compensation actually paid by a registrant related to the financial performance of that company.

I support proposed new Item 402(v) of Regulation S-K that would require a registrant to provide a clear description of: the relationship between executive compensation actually paid to the registrant's NEOs and the cumulative total shareholder return (TSR) of the registrant; and the relationship between the registrant's TSR and the TSR of a peer group chosen by the registrant, over each of the registrant's five most recently completed fiscal years. In my view the proposal is rather prescriptive, and certainly more prescriptive than required by Section 953(a) of the Dodd-Frank Act. However, I believe that this level of prescription is necessary in order to provide a consistent and comparable approach and interpretable results for different registrants.

The Dodd-Frank Act was enacted on July 21, 2010. Given the elapsed time, I would strongly recommend that you adopt the proposed amendments without further delay. Whilst not perfect, further delay would reduce amenity without regulatory advantage.

The proposed definitions of compensation do appropriately capture the concept of “executive compensation actually paid”. In particular the compensation required to be disclosed should be based on total compensation and not only on amounts that are based on the financial performance of the company, as there is wide variability in the split of fixed and variable components of total compensation, and the split changes over time and between executives within the same company. Total compensation is more consistent and comparable between different companies and less easy to manipulate.

I strongly believe that comparability across registrants is relevant and necessary in determining which compensation elements should be covered by the pay-versus-performance disclosure. The main aim should be to provide meaningful information to the users of the financial statements. The alternative of a principles-based approach would lead to companies simply showing the best picture of executive performance relative to company performance, which would not provide meaningful information. I caution however that the prescriptive approach may not allow for all of the nuances and differences that exist in executive compensation structures, and would recommend that users should analyze the resulting information and disclosures over time as trends, as an aid to decision-making, rather than only looking at information and disclosures at a single point in time.

The proposal to require only the actuarial present value of benefits attributable to services rendered during the applicable fiscal year, rather than the change in actuarial present value of pension benefits that is required by the Summary Compensation Table, does not necessarily appropriately reflect compensation “actually paid” to NEOs during that year for purposes of the pay-versus-performance disclosure mandated by Section 14(i). The change in the actuarial present value of pension benefits over a period represents a solid estimate of the full additional cost of securing the accrued pension benefits over that period. However, I agree that the actuarial present value of benefits is highly sensitive to exogenous factors such as interest rates, which do not necessarily fairly reflect the executives’ performance over the period. To mitigate this disadvantage, registrants should be required to disclose the change in (increase) the actuarial present value of pension benefits over the applicable fiscal year using the same economic assumptions as used in the calculation at the start of the applicable fiscal year. This would not be a burdensome assessment, rather a simple run through standard actuarial software with minor changes to basic assumptions, and not a full recalculation on new assumptions.

I agree that you should require registrants to use cumulative total shareholder return (TSR) as the performance measure. TSR is a well-known and widely used metric. It is also relatively straightforward to determine and fairly represents the financial performance over the period. I agree that the comparability across registrants resulting from this proposal would benefit shareholders, and that prescribing the use of TSR would not hinder registrants from providing meaningful disclosure about the relationship between executive pay and financial performance. I do not believe that requiring the use of TSR would result in shareholders or management focusing too much on this single measure of performance or emphasizing short-term stock price improvement over the creation of long-term shareholder value; this is happening anyway, and would not worsen because of this new measure.

Regarding additional disclosures, I would support a “freedom with publicity” approach. Registrants should be permitted to supplement the require disclosure where absolutely necessary to provide meaningful information to the users of the financial statements.

I would recommend that you should not permit registrants to voluntarily include fiscal years beyond the five-year period. There is clearly a risk that some registrants may choose the time period which is most favorable for performance. We see this in similar situations where companies are permitted to choose the period over which financial performance is disclosed.

Yours faithfully

C.R.B.

Chris Barnard