



**SAP AG**  
Dietmar-Hopp-Allee 16  
69190 Walldorf  
Germany  
T +49 6227 7-47474  
F +49 6227 7-57575  
www.sap.com

SAP AG, Dietmar-Hopp-Allee 16, 69190 Walldorf

01.06.2011

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Re: Comments on Proposed Rules Relating to Listing Standards for Compensation Committees**

**Release Nos. 33-9199 and 34-64149 (File Number S7-13-11)**

Dear Ms. Murphy,

We respectfully submit this comment letter in response to Release Nos. 33-9199 and 34-64149 (the "Proposing Release"), in which the Securities and Exchange Commission (the "Commission") solicited comments on the proposed rules and rule amendments to implement Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").

Section 952 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 (the "Exchange Act") by adding Section 10C. Section 10C requires the Commission to direct the national securities exchanges and associations to prohibit the listing of any equity security of an issuer that does not comply with the requirements of Section 10C, including with regard to the independence of compensation committee members and the authority of compensation committees with regard to the retention, compensation and oversight of compensation advisors.

**General Approach to Exemptions – Foreign Private Issuers Should Be Exempt From Proposed Rules 10C-1(b)(2)-(4)**

Proposed Rule 10C-1(b)(1) exempts foreign private issuers from the requirement to have a compensation committee comprised solely of independent members if they explain the reasons for not having an independent compensation committee in their annual reports. This proposed rule is in line with existing Commission rules and regulations, which exempt foreign private issuers, for example, from the requirement to provide disclosures on the role of compensation consultants pursuant to Item 407(e)(3)(iii) of Regulation S-K and generally require less detailed disclosures on executive and director compensation by foreign private issuers than by domestic issuers.

**SAP AG**

Vorstand: Bill McDermott (Co-CEO), Jim Hagemann Snee (Co-CEO), Werner Brandt, Angelika Dammann, Gerhard Oswald, Vishal Sikha  
Vorstand des Aufsichtsrats: Hanno Plattner, Registergericht Mannheim HRB 350269  
Deutsche Bank AG, Heidelberg (BLZ: 672 700 03) Konto: 0912030, SWIFT-BIC: DEUT DE 331 672, IBAN DE75 6727 0000 0001 2030 00

We are not aware of any reason for deviating from the long practice by the Commission and the exchanges of deferring to the corporate governance practices of a foreign private issuer's home jurisdiction with respect to the ability of a foreign private issuer's compensation committee to retain, compensate and exercise oversight over compensation consultants, independent legal counsel or other advisors. We therefore respectfully recommend that the Commission also expressly exempt foreign private issuers from the requirements of Proposed Rules 10C-1(b)(2) through (4), especially since we believe that the Proposed Rules conflict in part with the relevant provisions of the German Stock Corporation Act (*Aktiengesetz*; "AktG") and the German Corporate Governance Code (the "Code")<sup>1</sup> which are based on the two-tier board system. Companies with a two-tier board system have a Management Board, or Executive Board, and a separate Supervisory Board. The Compensation Committee is an optional committee of the Supervisory Board.

Proposed Rules 10C-1(b)(2) and (3) would require a foreign private issuer to provide its compensation committee with:

- (i) the authority, in its sole discretion, to retain or obtain the advice of a compensation consultant, independent legal counsel or other advisor; and
- (ii) appropriate funding, as determined by the compensation committee, to pay reasonable compensation to compensation committee advisors, independent legal counsel or any other compensation committee advisor.

Proposed Rule 10C-1(b)(4) would require a foreign private issuer to consider the independence of any advisor in accordance with the factors set out in the Proposed Rule as well as any other factors deemed relevant by the exchanges.

Section 4.2.2 of the Code, on the other hand, provides as follows:

*"At the proposal of the committee dealing with Management Board contracts, the **full** [emphasis added] Supervisory Board determines the total compensation of the individual Management Board members and shall resolve and regularly review the Management Board compensation system.*

*The total compensation of the individual members of the Management Board is determined by the **full** [emphasis added] Supervisory Board at an appropriate amount based on a performance assessment, taking into consideration any payments by group companies. ..."*

---

<sup>1</sup> An English convenience translation of the German Corporate Governance Code is available at: <http://www.corporate-governance-code.de/eng/kodex/index.html>.

The Code was prepared by the Government Commission on the German Corporate Governance Code, whose members were appointed by the German Federal Minister of Justice. It was published by the Federal Ministry of Justice in the official section of the electronic Federal Gazette and represents "best practice" for German companies. Pursuant to Section 161 AktG, the Management Board and Supervisory Board of exchange-listed German companies must also declare once a year that the company is complying with the recommendations of the most recent version of the Code or, alternatively, which of the Code's recommendations are not being applied.

*If the Supervisory Board calls upon an external compensation expert to evaluate the appropriateness of the compensation, care must be exercised to ensure that said expert is independent of respectively the Management Board and the enterprise."*

While Section 107(3) sentence 1 of the AktG does allow the Supervisory Board to form committees (including a compensation committee) to prepare for its deliberations, to prepare resolutions and to oversee the implementation of its resolutions,<sup>2</sup> Section 107(3) sentence 3 AktG expressly provides that the determination of executive compensation is the responsibility of the full Supervisory Board and not just of the compensation committee. These legal stipulations are reflected in Section 4.2.2 of the Code, which also stresses that the full Supervisory Board is responsible for determining the compensation of the members of the Management Board.<sup>3</sup>

While both the German Stock Corporation Act and the Code clearly prevent a Supervisory Board from delegating the determination of the amount of executive compensation to a committee, it is not clear whether this prohibition also extends to the retention of external compensation experts. In the absence of any clarifying case law, the Supervisory Board of SAP AG has decided to address this potential conflict with the German Stock Corporation Act and the Code in the Rules of Procedure of its compensation committee by authorizing the compensation committee to select and mandate an external compensation expert only once the full Supervisory Board has generally decided that an external compensation expert be retained.

We respectfully submit that German companies that apply mandatory German corporate governance rules should not be required to comply with any potentially conflicting requirements of Proposed Rules 10C-1(b)(2) through (4).

Proposed Amendment of Forms 20-F and 40-F – Foreign Private Issuers That Are Not Subject to the U.S. Proxy Rules Should Not Be Required to Provide Disclosure under Section 10C(c)(2)

Foreign private issuers are exempt from the Commission's proxy rules and the Commission's requirements applicable to foreign private issuers with regard to disclosure of executive compensation are generally less detailed than the relevant requirements for domestic issuers. Amending Forms 20-F and 40-F to require foreign private issuers to provide annual disclosures of the type required by Section 10C(c)(2) would impose a significant additional disclosure burden on foreign private issuers. For the reasons discussed above, we believe these additional disclosures should not apply to foreign private issuers that are not subject to the U.S. proxy rules. Doing so would be inconsistent with the current disclosure regime in which foreign private issuers are encouraged to access capital via the U.S. markets in exchange for disclosure accommodations under U.S. law and general deference to home country rules.

---

<sup>2</sup> See also Section 5.3 of the German Corporate Governance Code.

<sup>3</sup> The Code was specifically drafted to comply with Section 107(3) sentence 3 AktG and with a view toward the German two-tier board system with a Management Board and separate Supervisory Board where the Supervisory Board is fully independent off the Management Board and appoints, supervises and advises the members of the Management Board. The relevant provisions of the German Stock Corporation Act with regard to compensation of the Management Board were adopted by the German Parliament in 2009 specifically to address perceived corporate governance failures (in particular in the area of executive compensation) that may have contributed to the recent financial crisis.

We appreciate the opportunity to comment on the Proposing Release. Any questions regarding this letter may be directed to Wendy Boufford at (650) 845-5791.

Sincerely,

  
Michael Junge  
Executive Vice President and General Counsel