AGENDA
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Opinion

SEC Requests Comments for Pay Ratio Rule Rethink

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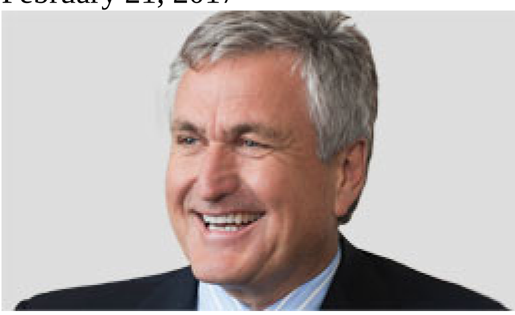

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On Feb. 6, **Michael Piwowar**, acting chairman of the **SEC**, announced that the agency was opening a 45-day comment period to allow companies to comment on the challenges they are facing in complying with the SEC's CEO pay ratio disclosure rule. Piwowar announced that he had directed the SEC staff to reconsider the implementation of the rule based on the comments and to determine whether additional guidance or relief might be appropriate. Companies should take advantage of this extraordinary opportunity to comment on their experiences in trying to comply with the pay ratio rule or else accept struggling with the rule annually hereafter and the precedent it sets for even more partisan, burdensome and unnecessary regulation on U.S. public companies.

No one who has followed the controversial path of the CEO pay ratio disclosure requirement, from its enactment as part of the Dodd-Frank Act in July 2010 to its adoption in August 2015, should be surprised by the acting chairman's decision. Of all the Dodd-Frank executive compensation rules, ranging from the requirement that companies hold periodic say-on-pay votes to disclosing the independence of their compensation advisors, none has been more controversial or problematic than the CEO pay ratio disclosure requirement.

The pay ratio rule was inserted into Dodd-Frank at the last minute with little notice or discussion. The SEC, in its 2013 release on the proposed rule, commented on the difficulty of performing its statutorily mandated cost/benefit analysis for a rule without any clear statement of its objective or its intended benefits. The SEC adopted the final rule on Aug. 15, 2015, in a partisan vote, at which time commissioner Piwowar issued a strong dissenting statement during the SEC's open meeting. In an extraordinary move, two days later he wrote additional dissenting comments which dissected the rule in clinical detail and exposed its many frailties.

The final rule took effect this Jan. 1, and companies are now struggling to comply with the rule by identifying and disclosing the ratio of their CEO's compensation to that of the median compensated employee in their 2018 proxies. None of this is easy or cheap, especially for companies with complex organizational structures, multiple business lines and global operations.

Acting on the pay ratio rule indicates that Piwowar is living up to his promise not to sit and do nothing until the appointment of three new commissioners. Now that the acting chairman has opened a comment period, companies struggling with the rule should seize this opportunity to file comments with the SEC before March 23 either directly or through anonymous comments being aggregated and filed by the **Society for Corporate Governance** and other associations.

In reviewing Piwowar's dissenting comments and commenting on the rule, companies should give special attention to the final rule's inclusion of independent contractors and other contract workers as "employees" who must be taken into account in identifying a company's median employee unless the worker is employed by a third party and the worker's compensation is determined by a third party who is not affiliated with the company. This requirement was not foreshadowed by the proposed rule, was not exposed to public comment before being finalized and makes the final rule especially vulnerable to challenge and reconsideration.

Piwowar's strong views on the independence and mission of the SEC and the imminent arrival of a Republican majority among its commissioners means that the SEC is likely to concentrate on restoring its ability to carry out its core mission of protecting investors, ensuring fair and efficient markets and facilitating capital formation. Given the frailties of the CEO pay ratio rule, companies should now do their jobs and file detailed comments. If they do, it is likely that the rule will be formally reconsidered and delayed in its implementation and possibly repealed at a later date, saving U.S. public companies from a regulation that is costly and burdensome and of little or no value to investors.