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August 13, 2010

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Dodd-Frank Act Title
IX Executive Compensation Sections

Dear Chairman Shapiro:

On July 27 you issued an invitation to the public to comment on SEC initiatives required under the Dodd-Frank Act. The attachment to this letter provides our firm's suggestions and recommendations for your consideration in rule making for Sections 951-957 of Subtitle E of Title IX of the Act.

Frederic W. Cook & Co., Inc. is a national compensation consulting firm that specializes in providing executive compensation advice primarily as independent consultants to compensation committees of large public companies. By way of illustrating the breadth of our practice, recent statistics indicate that we provide consulting advice to approximately 30% of the S&P 250 companies. Accordingly, our practice continually brings us into contact with issues raised by the executive compensation sections of the Dodd-Frank Act.

If your staff has any questions about our attached comments, or would like to discuss them with us, we would welcome the opportunity to do so.

Respectfully yours,

Frederic W Cook

FWC/plm
Enclosure

AUGUST 13, 2010

COMMENTS ON DODD-FRANK ACT OF 2010

TITLE IX, SUBTITLE E –ACCOUNTABILITY AND EXECUTIVE COMPENSATION

Section 951. Shareholder Vote on Executive Compensation Disclosures

(1) Say-on-Pay Vote Itself

- No comment.

(2) Separate Vote on Say-on-Pay Vote Frequency

Issues

- The Dodd-Frank Act ("DFA") says that shareholders are to be given a separate advisory vote on the frequency of subsequent "say-on-pay" (S-O-P") votes, with the choices being every 1, 2, or 3 years. It is not clear in the law whether the shareholders are to be given a free choice between the three, or whether the board may propose a specific vote frequency. If the former, it is not clear what happens if no vote frequency receives a majority vote.

Recommendations

- Make clear whether the board may propose a specific frequency, e.g., every three years, or the sooner of every three years or the year after the say-on-pay vote receives less than a specified level of favorable votes (e.g., 51% or some higher level)

- If all three choices must be offered, without a board recommendation, then rulemaking must make clear what happens if no choice receives a majority vote.

- If the proposed frequency of vote does not receive majority approval and a plurality is not determinative, then default position should be an annual vote frequency.

(3) Shareholder Approval of Golden Parachute Compensation

Issues

- If a favorable shareholder S-O-P vote is obtained, does that vote cover golden parachute agreements or understandings disclosed in that notice of annual meeting?

Recommendations

- Clarify that, after a favorable S-O-P vote in a prior year, subsequent shareholder approval of golden parachute compensation is not needed in any proxy or consent solicitation material to approve an acquisition or merger of the company unless different severance compensation for the named executive officer group is proposed than was included in the prior notice of annual meeting.

(4) Disclosure of Votes

- No comment.

(5) Exemptions

- No comment.

Section 952. Compensation Committee Independence

(1) Independence of Compensation Committees

- No comment

(2) Independence of Compensation Consultants and Other Compensation Committee Advisers

Issues

- Clarification of one item and identification of several other factors weighing on independence suggested below.

Recommendations

- Recommend you clarify factor (E) under Sec. 10C (b)(2), "any stock of the issuer owned by the compensation consultant…" to only mean shares owned by the consulting **firm** or by the consultants on the engagement team. Also, stock held indirectly, such as through mutual funds, should be excluded from the disclosure requirement

- We propose the following other factors that the SEC should identify that affect the independence of the compensation consultant or other committee adviser, in addition to those identified in the Act:

  i. Amount of fees that the issuer paid the consultant's firm, parent firm, or affiliated firm for consulting or other services, *other than* the consulting services provided to the Compensation Committee;

  ii. Whether the engagement team serving the committee includes personnel who worked for the company as an employee or as a consultant employed by a consulting firm providing services to the management within a specified period of time (e.g., the past three years);

  iii. Whether the consulting firm employing the compensation committee's engagement team has policies in force prohibiting members of the engagement team or their families from trading in the equity or derivative instruments of the issuer, accepting gifts, products or services from the issuer, or contributing to charities supported by management; and

iv. Whether the compensation committee hiring the consultant or other adviser has a consultant independence policy in place prohibiting:

  – any members of the engagement team from providing consulting or other services to the issuer or affiliate;

  – the consulting firm or an affiliate from providing services to the management without the express permission of the compensation committee; and

  – the consulting or other firm providing services to the compensation committee from having any affiliation, informal or otherwise, or economic ties with a separate firm providing services to management, including compensation or benefit arrangements or fee sharing.

(3) Disclosure

Issues

- Suggestions for additional disclosure are described below.

Recommendations

- In cases where the consulting firm engaged by the committee also provides other services to the issuer or its affiliates, we recommend the SEC retain in place the current requirement regarding the issuer's disclosure of the fees paid to the firm for services to the committee and total fees paid by the issuer and its affiliates to the firm for other work.

- We propose the SEC require issuers' proxy statements to disclose a summary of the consultant's responsibilities and scope of work to the committee.

(4) Exemptions

- No comment

Section 953. Executive Compensation Disclosures

(1) Disclosure of Pay Versus Performance

Issues

- The most important issue that the SEC needs to address for this section is whether Congress intended for all companies to present their pay versus performance disclosure in a uniform manner, which permits comparisons across companies and industries, or whether Congress intended to permit companies to tell their own story of how their executives' pay is tied to their own performance.

- Other important issues for the SEC to address in its regulations are (1) is it sufficient to include CEO pay only, all named executive officers, or is some larger executive group's pay to be disclosed, (2) is disclosure of *total* compensation from the Summary Compensation Table to be required, or is some other definition of total pay that relates more closely to "executive compensation actually paid" to be permitted, (3) whether Congress intended to have companies disclose their financial performance in addition to market performance or just changes in the value of their shares and dividends, and (4) what time period is to be disclosed for pay and performance?

Recommendations

- If the SEC decides that uniformity and comparability are the goals, then the SEC will have to prescribe a common set of performance definitions, covered executives, pay definitions and time periods. In this case, our recommendations would be:

  (1) Covered executives should include the top five highest paid executive officers for the year in question;

  (2) Total compensation should be as disclosed in the Summary Compensation Table for the year in question but **excluding** the "Change in Pension Value and NQDC Earnings" column and the "All Other Compensation" column (because these figures have nothing to do with performance);

  (3) Performance should include the company's total shareholder return (stock price change plus reinvested dividends), plus from one to three financial metrics used to determine cash and equity incentive payouts, with the performance for each metric having been publicly disclosed in GAAP or non-GAAP form; and

  (4) The pay and performance time period should be five years.

- On the other hand, if the SEC decides that companies should be allowed to tell their own story of how their executives' pay is tied to their own performance, then the SEC still would have to define some parameters. Our recommendations would be:

  (1) Permit companies to limit their pay disclosure to their CEO or the sum of their top 5 highest paid executives each year;

(2) Permit companies to choose from one to three financial metrics to display, in addition to their total shareholder return, so long as (i) those measures are in fact used to determine cash and equity incentive payouts, and (ii) the performance for that metric(s), including non-GAAP performance, has been publicly disclosed and is discernible by an outside observer;

(3) The pay disclosure may be based on total compensation disclosed in the proxy Summary Compensation Table, but other definitions of total compensation should be permitted by the regulations, specifically:

- Summary Compensation Table figures disregarding the "Change in Pension Value and NQDC Earnings" column and the "All Other Compensation" column;

- Substitution of grant date fair values of new option/equity grants made shortly after the close of the year instead of grants made *during* the year, if such grants are based on the prior year's performance (just like annual incentive payments are disclosed), and if such grants are disclosed in the proxy CD&A;

- Substitution of the payout values of earned performance-based equity grants that matured at the end of the year just closed instead of the grant date fair value of new performance-based equity grants made for the year if such payout values are disclosed in the proxy CD&A;

- Substitution of the amounts expensed for the year for outstanding unvested and just vested equity grants if such amounts are disclosed in the proxy CD&A; and/or

- Substitution of (1) changes in the value of outstanding unexercised stock options/SARs during the year based on stock price changes (positive or negative but not below exercise price) plus exercised option grants during the year, if such information is disclosed in the proxy CD&A or in proxy tables or footnotes, for (2) grant date fair values of new option grants.

(4) Require a five year pay and performance disclosure period.

- Finally, if the uniformity/comparability model is chosen, we suggest the SEC affirm that companies continue to be able to disclose other supplemental pay/performance information in text, table or graphic form in their CD&As.

(2) <u>CEO Pay Ratios</u>

<u>Issue</u>

- The calculation of *median total pay* for all employees other than the CEO is problematic, burdensome and perhaps impossible for many issuers. This requirement is also, in our opinion, the most meaningless of the DFA compensation requirements.

- Calculation of median employee pay requires the calculation of *each employee's* pay (however employee and pay are defined), and then stacking them from high to low. The median is the specific employee's pay which is exactly halfway between the top and the bottom.

- It may be that the drafters of this language did not mean to specifically require "median" pay, which has a precise statistical meaning, instead of "mean" or average pay.

<u>Recommendations</u>

- We recommend that the SEC issue rules that adhere to the spirit, but not the letter of the law, specifically:

  — Allow companies to compute ***<u>average</u>*** total compensation per full-time employee instead of median pay for all employees,

  — Allow the exclusion of benefit costs, training, relocation, expat allowances, etc. (focusing on wages/salaries/overtime, and equity grant values),

  — Permit the use of full-time employee equivalents instead of part-time and seasonal employees, and

  — Allow the exclusion of non-U.S.-based employees and employees in partially owned subsidiaries (including joint ventures).

- If you cannot rule that it is reasonable allow companies to compute average employee compensation instead of median pay, and to allow different ways of computing total direct compensation instead of total Summary Compensation Table compensation, then we recommend you develop and request Congress to approve a Technical Corrections Act to allow companies the flexibility recommended above.

- Suggest you also clarify in the CEO pay ratio calculation whether the CEO's pay is the numerator or the denominator.

- Recommend you defer requiring this CEO pay ratio disclosure at least a year

Section 954. Recovery of Erroneously Awarded Compensation

Issues

- No comments

Recommendations

- Suggest the SEC include in its rule making:

  (1) Definition of "material noncompliance";

  (2) Exemptions for accounting restatements based on changes in accounting principles or retroactive applications of principles directed by the company's auditors;

  (3) Exemptions for incentive compensation paid (including options granted) that was not based on the performance measure subject to restatement;

  (4) Allow companies to recoup erroneously paid compensation first from current compensation owing and second to pay back from the executive's after-tax funds;

  (5) Allow compensation committees to exercise their judgment as to whether recoupment is required, including a de minimis exemption; and

  (6) Definition of how the three-year look back period is computed.

Section 955. Disclosure Regarding Employee and Director Hedging

- No comment

Section 956. Enhanced Compensation Structure Reporting

Issues

- This is the only compensation section of DFA that applies only to a sub-set of public companies, namely covered financial institutions, and does not require public disclosure in company proxy statements.

- It is also the only compensation section of DFA where rule making is not specifically directed at the SEC, but rather the “appropriate Federal regulators” which may or may not include the SEC.

- If it does include the SEC, the DFA requires the regulations or guidelines to be issued jointly by the Federal regulators, not by the SEC alone.

- Finally, the development of regulations or guidelines for this section will require careful thought, identification and evaluation of alternatives, and consideration of unintended consequences beyond the purpose of these comments to the SEC.

Recommendation

- We offer no specific recommendations to the SEC at this point since rulemaking will be done jointly. We will welcome the opportunity to offer suggestions and recommendations for rulemaking in response to a call for comments from the Federal regulators charged with rule making.

Section 957. Voting by Brokers

Issues

- This portion of the Act has the effect of magnification of the votes of activist investors by reducing the vote count of retail shareholders who hold their shares in street name and neglect to instruct their broker how to vote their shares.

- The SEC has a separate effort underway to correct perceived deficiencies in the U.S. proxy system, including a goal of increasing the participation of retail investors by permitting "client-directed voting."

Recommendations

- We recommend that companies be able to facilitate a process whereby shareholders with shares held in street name are permitted to give their broker a proxy providing an ongoing election to vote in favor of (or against) election of directors, say-on-pay proposals, approval of auditors, independent shareholder proposals, and approval of new or amended incentive and equity plans for key employees, including approvals necessary to obtain tax deductions for performance-based pay under IRC 162(m).

    — Such on-going election proxies may be revoked by the shareholder at any time and should be subject to periodic reconfirmation (e.g., annual or biennial).

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