VIA www.sec.gov

March 23, 2017

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Reconsideration of Pay Ratio Rule Implementation

Dear Mr. Fields:

The Financial Services Roundtable ("FSR")[1] welcomes the opportunity to provide the Securities and Exchange Commission (the "Commission") with comments regarding the reconsideration of the rule (the "Pay Ratio Rule") requiring that certain companies disclose the ratio of the compensation of their principal executive officer ("PEO") to that of all employees in the company's annual report, proxy or information statement, or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K ("Item 402").[2]

While we support meaningful disclosures, FSR continues to believe that the disclosure required in this instance will not provide investors with information that will be materially useful in making informed investment decisions. FSR urges the Commission to seek reconsideration of the Congressional mandate in section 953(b) of the Dodd-Frank Wall Street Reform and

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1 As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO.

2 Regulation S-K, Item 402 [17 C.F.R. § 229.402].

Consumer Protection Act (the "Dodd-Frank Act").[3] In the interim, we ask the Commission to delay the effective date of the rule for at least an additional year to avoid causing companies to expend significant resources to attempt to comply with a mandate that may be repealed once Congress is afforded sufficient time to address this question.

Executive Summary

- FSR urges the Commission to reconsider the requirement that registrants include non-U.S. employees in the determination of the median employee, because the costs and burdens of such determination far outweigh any incremental benefit that investors may derive from the inclusion of non-U.S. employees.

- The exclusion of seasonal, temporary, part-time, and other employees who have not worked for the entire measurement period from the determination of the median employee would provide a more meaningful comparison of principal executive officer pay to median employee pay, eliminate unintended distortions, minimize costs, and reduce the risk of errors.

- FSR urges the Commission to adopt a "Good Faith Compliance" standard so that registrants (and their principal officers) that make a good faith effort to determine the median employee (including relying on the use of statistical sampling) would not be subjected to allegations of non-compliance.

- Registrants have encountered unanticipated problems in preparing for compliance with the Pay Ratio Rule, including (i) the difficulty in assimilating data received from payroll systems utilized in non-U.S. jurisdictions that have been designed for the purposes of complying with local law and practices; (ii) the burden of the factual inquiry (and associated data collection) that is required to determine which, if any, independent contractors must be included in the calculation of the median employee; and (iii) the manner in which to include in the calculation of the median employee those persons who are deemed to having a continuing employment relationship but are not actively at work and receive no current compensation.

- An unintended consequence of the disclosure mandated by the Pay Ratio Rule is the adoption by at least one city of a punitive tax targeting PEO compensation in excess of a certain ratio, which will adversely affect investors. Such a punitive tax will impact the ability of the company's independent directors to exercise their reasonable business judgment and to act in the best interests of shareholders when determining the chief executive officer's compensation.

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[3] Pub. L. No. 111-203, § 953(b), 124 Stat. 1904 (July 21, 2010).

FSR Urges Reconsideration of the Disclosure Mandate

As was stated in our comment letter dated December 2, 2013 on the proposed Pay Ratio Rule,[4] FSR believes that the disclosure required under the Pay Ratio Rule will not be materially helpful to investors, and the Commission should seek reconsideration of the Congressional mandate in the Dodd-Frank Act. FSR continues to believe that the disclosure called for under section 953(b) of the Dodd-Frank Act will not provide investors with material information that will be helpful to their analysis of a reporting company's business or operations or in evaluating investment decisions.

The existing requirements of Item 402 of Regulation S-K require a detailed and thorough discussion of the compensation payable to the reporting company's named executive officers, including its PEO, and the rationale underlying the registrant's applicable compensation programs. This detailed data provides investors with a complete picture of how the PEO's compensation is determined, and fully informs any actions that the investors may determine to take related to such compensation. It is difficult to articulate how disclosing a ratio of the PEO's compensation to the compensation payable to a single employee, who is chosen entirely on the basis of the happenstance of where his or her compensation falls within the ranking of the compensation of all employees in the organization, and without any consideration of such employee's skills, duties or responsibilities or the impact of his or her performance on the company and its stock price, will enhance an investor's ability to assess the performance and contribution of the PEO.

Accordingly, FSR encourages the Commission to seek Congressional reconsideration of the disclosure requirement mandated by section 953(b) of the Dodd-Frank Act. To this end, FSR proposes that the Commission delay the effective date of the Pay Ratio Rule for at least an additional year to allow time for such reconsideration, without forcing reporting companies to incur the expense and burden of compliance with the Pay Ratio Rule. Although the Commission made significant efforts to minimize the costs and burdens of compliance associated with the Pay Ratio Rule, reporting companies have encountered a number of issues, some anticipated at the time of adoption and some that were not, in seeking to comply with the Pay Ratio Rule.

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[4] Comments of Richard M. Whiting, *available at* https://www.sec.gov/comments/s7-07-13/s70713-563.pdf.

Accordingly, the burden of compliance with the Pay Ratio Rule is far greater than any benefit that could be derived from the mandated disclosure.

In proposing the Pay Ratio Rule, the Commission sought commentary regarding specific questions related to the scope of the proposed rule,[5] and whether there were additional means of simultaneously complying with the mandate of the Dodd-Frank Act and reducing the cost and difficulties associated with compliance with the rule as proposed.[6] The Commission acknowledged in the Proposing Release that compliance would be particularly challenging for registrants who have a significant number of employees located outside the United States, ranging from the incremental difficulties associated with "simple data collection" to the possibility of non-compliance due to the limitations imposed by applicable home country laws designed to protect the privacy of each employee within that non-U.S. jurisdiction. The Commission in particular asked for comment on the issue pertaining to such non-U.S. employees.

FSR reminds the Commission of these concerns and urges the Commission to reconsider the mandatory inclusion of non-U.S. employees in the calculation of who is the median employee for purposes of the Pay Ratio Rule. The compliance burdens associated with the Pay Ratio Rule have proven to be most significant when trying to include non-U.S. employees in determining the median employee compensation for purposes of comparison to the compensation of the registrant's PEO.

FSR believes that the cost associated with the Pay Ratio Rule would be substantially reduced if the Commission were to revisit the inclusion of such non-U.S. employees in the calculation of the median employee. Excluding such foreign employees from this calculation would eliminate numerous data collection issues that registrants have encountered. These issues range from restrictions imposed by local law in regard to data privacy, collecting and integrating data that is maintained (for good and valid reasons) on different payroll systems from those applicable with respect to U.S. companies, and trying to assimilate different practices regarding compensation and benefits, including in jurisdictions where contributions for benefits are in the form of taxes and other social charges. FSR believes that, in the context

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[5] Pay Ratio Disclosure, 78 FED. REG. 60, 560, Questions 1-5 (the "Proposing Release").

[6] Proposing Release, text following footnote 56, Question 7.

of the vast majority of U.S. registered companies, utilizing only the U.S. based employees to determine the median employee to compare to the PEO will include a meaningful cross section of employees at different levels of compensation, and provide a pay ratio as compared to the PEO that is as useful and meaningful to investors as would derive from a pay ratio that includes non-U.S. employees.

FSR also urges the Commission to revisit the inclusion of seasonal, temporary, part-time, and other employees who have not worked for the entire measurement period in the calculation of the median employee. As we noted in our comments on the Proposing Release, a comparison of the compensation of seasonal, temporary, and part-time employees to regular full-time employees will necessarily be distorted because these categories of employees are generally paid on an entirely different basis from the company's regular workforce. The inclusion of seasonal, temporary, or part-time employees would also skew the determination of the median employee to an individual who is not truly representative of the median of the company's regular, full-time workforce. FSR believes the exclusion of seasonal, temporary, part-time, and other employees who have not worked for the entire measurement period from the median employee calculation would provide a more meaningful comparison of PEO pay to median employee pay, eliminate unintended distortions, minimize compliance costs, and reduce the risk of errors.

Good Faith Compliance Standard

If, following its reconsideration, the Commission determines to retain the Pay Ratio Rule, even in a modified form, FSR urges the Commission to adopt a "Good Faith Compliance" standard so that registrants that make a good faith effort to determine the median employee (including relying on permitted cost mitigating provisions included in the Pay Ratio Rule, such as the use of statistical sampling) would not be subjected to allegations of non-compliance. A company's principal officers should not have trepidation in signing a Sarbanes-Oxley certification[7] because there may be immaterial "rounding errors" in the calculation of a pay ratio that is designed to require a general guidepost of the relative compensation of the PEO and the median employee, selected on the basis of the happenstances of where his or her compensation

[7] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302(a), 116 Stat. 745, 777 (July 30. 2002) [codified at 15 U.S.C. § 7241].

falls within the organization for a given year, as a supplement to the already extensive and detailed individual disclosure of the PEO's compensation, especially when the data collection requirements to pinpoint the precise median employee are so extensive.

Difficulties Encountered In Seeking Compliance

Coordinating Data From Foreign Payroll Systems. As was anticipated, the greatest, but not the only, difficulties concerning compliance with the Pay Ratio Rule arise with regard to foreign employees. Because of anticipated complexities and legal impediments likely to be faced under the laws of non-U.S. jurisdictions, the Pay Ratio Rule provides some dispensation for companies that are unable to access data for employees in a particular foreign jurisdiction because of local privacy laws and where such foreign employees are a modest component of the reporting company's workforce. However, there is still a significant compliance burden created from trying to assemble and co-ordinate the data regarding such foreign employees to determine the median employee.

One perplexing difficulty that was not anticipated relates to the integration of the data that is required to be accumulated related to non-U.S. employees. For many valid reasons, including differences in local tax regimes and local laws regarding data privacy, and differences related to mandatory participation in government sponsored benefit plans and arrangements which entail a required employee contribution, the payroll systems used in different non-U.S. jurisdictions around the globe are separate and distinct from each other. Frequently, they have not been designed or operated in a manner that is intended to integrate with that payroll system applicable to U.S- based employees. Indeed, payroll in these non-U.S. jurisdictions is frequently outsourced to third party vendors who have designed their software and systems specifically to accommodate local laws and practices. Integrating the data feeds from these other payroll systems in the various jurisdictions in which a U.S. registrant and its subsidiaries may have a presence has proved to be an administrative burden and complexity that was not anticipated. These integration issues have created a need for an additional commitment of resources and correspondingly increased administrative expense in seeking to manage such an interface.

Determination of Which Independent Contractors Must be Included As Employees. The Pay Ratio Rule adopts the view that independent contractors are not employees required to be

included in determining the median employee, if such independent contractors have their compensation payable determined by a third party. This rule appears to assume that the majority of independent contractors work for an organization that makes the services of individuals whom they employ, or who are owners of the business, available to other business organizations. Classic examples of this structure would be outside law firms and accounting firms. This structure would also be commonly reflected by many temporary employment agencies, which send their employees to a business to fill a temporary need for additional or supplemental support typically provided by employees of those businesses. But this structure is not universally used by persons who employ true independent contractors. Further, this rule requires companies to consider as employees for purposes of determining the median employee individuals who are considered independent contractors for purposes of compliance with the Internal Revenue Code, as well as for other regulatory purposes under federal, state and local laws.

The guidance regarding the inclusion of independent contractors also seems to be predicated on the view that, if the recipient of the services has the right to set the compensation of the service provider, then the service recipient could have (and perhaps should have) retained such person's services as an employee. This apparent presumption leads to the inclusion of such an individual as an employee for purposes of determining the median employee under the Pay Ratio Rule. But this presumption is not universally true. Many independent contractors provide services for which they negotiate their compensation directly with the recipient of their services.

Putting aside the whether these individuals are rightly included in the determination of the median employee, the standard adopted by the Commission—whether the registrant has set the compensation payable to an independent contractor—is an inherently factual question that does not satisfy a "bright line" test. Trying to determine which contractors must be counted in the calculation of who is the median employee for purposes of the Pay Ratio Rule, can prove to be an intricate and time consuming task that may have little true effect on establishing who should be the median employee.

Moreover, the facts required to make this determination are not typically isolated by the person bargaining for the provision of services, and certainly not in a manner that is easily discernable and traceable. When addressing individuals who provide services as employees, wage data is collected for tax reporting purposes, at least in the United States. It is readily

accessible and can be used efficiently and effectively to help identify the median employee. To access this data does not mandate an inquiry into the manner in which such wages were determined. But there has to date been no reason, in the ordinary course of business, for companies to gather data on who sets the compensation of independent contractors. We note that adding such data to the reams of information already required to be collected, synthesized and reported for other regulatory purposes will entail significant additional expense, regardless of whether the business uses independent contractors occasionally, regularly, or to provide modest or significant amounts of the services it requires. What therefore appeared on first blush of the Pay Ratio Rule to be a logical dichotomy, can prove to be a massive undertaking to get a reasonably accurate analysis of which independent contractors should be characterized as employees or not. This will be required, even before trying to capture their compensation data (which is reported on an entirely different reporting regime, and may include payments that relate to expenses incurred in the performance of the services) in order to factor such individuals into the determination of who the median employee is.

Employees Classified as Employees but Not Actively at Work. Another not immediately apparent complexity in trying to determine which employee is the median employee relates to persons who are classified as employees on the company's books and records, but who receive no compensation in a given year because they are on some form of indefinite leave or other separation from active service. Some companies treat persons who have qualified for long-term disability benefits as continuing to be employed, but such persons may not have performed actual services in several years. Such persons may be receiving disability benefits under a long-term disability insurance policy, or they may be on an unpaid leave, but afforded status as an employee for administrative convenience. These individuals may or may not receive a W-2. If they do not, they may be classified as employees by the company but not show up in a run of its tax payroll records.

It is not clear under the Pay Ratio Rule whether the compensation of individuals who work only a portion of a year due to being on such a leave may be annualized in the same manner as persons who were hired during the year. Employees who are not able to work the full year due to illness, or who elect not to work for the full year to take other types of leaves, are much more akin to workers who are intended to be full-time employees but work only a portion

of the year that seasonal employees whose compensation may not be annualized. Yet the Pay Ratio Rule offers no guidance on how to address this category of employees who may work only a portion of the applicable year. If the Commission retains and does not materially delay the implementation of the Pay Ratio Rule, it should provide guidance on how to calculate the compensation of such employees in determining who the median employee is. Similarly, guidance is also required to address how to report any compensation that might be received in a given year by such an inactive employee from incentive awards (such as stock options that are exercised years after grant) that were awarded in respect of active employment in prior years.

Other classes of employees may fall into a similar category. Employers may offer sabbatical leaves that could last for several years as employees pursue other interests on a "temporary" basis. They may be kept as employees to bridge a gap in certain benefit programs, and therefore may generate no taxable income from the company. Moreover, some persons may have terminated their status as employees, but are receiving payments that are treated as wages for federal income tax purposes such as non-qualified retirement benefits, installment payments under a non-qualified deferred compensation account or stipends to help them pay for their post-retirement medical benefits that are deemed taxable as wages. For administrative convenience and to assure proper compliance with the tax reporting regime, these payments which are for prior services are run through the payroll system, and properly characterized as payments to an individual for services as an employee. In the year of payment, these persons are not employees, but because their payments are made to them because of their prior employment relationship, the payroll system needs to report them as receiving payments as employees. If a reporting company makes its determination of employees based on its tax reporting system, these truly former employees may be included in the testing, and it may be extremely difficult and costly to try to properly include or exclude such persons from the determination of who is the median employee for a given year.

Unintended Political Consequences and Costs. The City of Portland, Oregon has recently adopted an incremental business tax (a surcharge of 10% on its standard business income tax) that will be imposed on employers who will report under the Pay Ratio Rule a CEO to median employee ratio of in excess of 100 to 1. A higher, and truly punitive rate of tax, a surcharge of an additional 25% will be imposed on companies whose CEO to median employee

ratio is more than 250 to 1. These kinds of ratio differentials can readily occur for numerous good and valid business reasons. Consider a retail company that has many seasonal employees or large turnover, where there will be many employees who receive modest compensation in any given year, in part due to the fact that they work only a small portion of the year. Additionally, the skills, experience, training and ability required of the PEO of a large public company are vastly different from those required of the median employee. Thus, this disclosure, now will have the effect of diminishing the returns to the shareholders of companies who have to pay competitive market rates of compensation to attract the decision makers who will determine whether the business they invest in will be successful. It is possible that other state and local entities will similarly follow the lead of Portland. This truly was an unintended consequence of the Pay Ratio Rule that will adversely affect the returns payable to shareholders. Indeed, this action is directly contrary to the expressed tax policy of the Trump Administration, which intends to reduce the heavy burden on U.S. businesses to promote growth in the economy and create jobs for the American citizenry. Thus, while federal tax policy will be changing to enhance growth and improve the competitiveness of U.S. companies in a global economy, state and local governments may use the Pay Ratio Rule to increase the tax burden on companies.

Such a tax may create a true conundrum for directors of companies whose business may operate in a place that would make the company be subject to this tax. A director must exercise his or her business judgment to do what is right for the company and its shareholders. If the director believes that retaining the services of a particular individual is in the best interests of shareholders, the director has a duty to try to promote that course of action. This will almost universally entail comparing the compensation package of the CEO to market competitors. In the context of someone being recruited from outside the organization, it will certainly have to take into account what that individual is currently receiving as his or her compensation at the company where such candidate is then currently employed.

Thus, to acquire for the company and its shareholders the services of the person that the director's business judgment has determined the company needs to retain, the director may have to approve a compensation package that will create a material pay ratio disparity with the company's median employee. By approving that level of compensation necessary to retain or acquire the correct leader for the organization, the director may need to cause the company to be subjected to an additional tax or taxes that are imposed by state and local governments based on

a policy choice that disfavors CEO compensation that exceeds a certain ratio. Thus, the directors of a company could be forced by the Pay Ratio Rule to decide whether to harm the business by not securing the best candidate, or knowingly trigger a punitive tax. This seems truly to be an unintended consequence of the Pay Ratio Rule.

Conclusion

FSR urges the Commission to seek Congressional reconsideration of the Pay Ratio disclosure requirement and to postpone its application for at least an additional year to allow time for Congress to review and repeal the mandate for the Pay Ratio Rule. Forcing companies to spend valuable resources—and potentially become subjected to taxation based on CEO compensation that exceeds specified ratios—to provide data that is merely reflective of the operation of the law of supply and demand for services at various skill levels is not consistent with the objective of reducing unjustified burdens on businesses that interfere with the operation of an effective and efficient enterprise. Moreover, the purpose of any rule pertaining to mandated disclosure should be to benefit the investors who may have an interest in the enterprise. Given the additional burdens and expense for registrants to provide information that does not pertain in a material way to the operation of the business, we believe the Pay Ratio Rule would not promote the interests of the registrants' shareholders.

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FSR appreciates the opportunity to provide the Commission with our comments on the reconsideration of the Pay Ratio Rule. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at [redacted] or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs, at [redacted].

Sincerely yours,

Rich Foster

Richard Foster
Senior Vice President and Senior Counsel for
Regulatory and Legal Affairs
Financial Services Roundtable

With a copy to:
The Honorable Michael S. Piwowar, Acting Chairman
The Honorable Kara M. Stein, Commissioner

Shelley Parratt, Acting Director
Division of Corporation Finance
United States Securities and Exchange Commission