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November 7, 2013

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0609

Attention: Elizabeth M. Murphy, Secretary, Securities and Exchange Commission

Re: Comments on Proposed Rules for Pay Ratio Disclosure, File Number S7-07-13

Ladies and Gentlemen:

We appreciate the opportunity to provide our comments on certain aspects of the Securities and Exchange Commission's proposed rules regarding the "pay ratio" disclosure requirement under Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Our comments focus on possible improvements to lessen the burden on affected companies while complying with the statutory requirements.

Background

The proposed rules under Section 953(b) of the Dodd-Frank Act represent a significant effort by the Commission to balance the interests of investors and the associated costs to registrants. We appreciate the work of the Commission to make the rules workable for registrants while providing the information to investors that is required under Section 953(b) of the Dodd-Frank Act. Our comments offer suggestions on how the final rules could build on this balance of interests.

Proposed New Item 402(u) of Regulation S-K

Determining the Median Employee

We agree with other commenters that the primary cost associated with the pay ratio disclosure will be in making the determination of the median employee. Therefore, the proposed rules take the appropriate position of allowing some flexibility for registrants in making this determination. We believe that the proposed rules could be improved in the following areas.

1. Registrants should be allowed to identify the median employee by using statistical sampling based on a definition of compensation other than "annual total compensation" under Item 402. Having identified that median employee, the pay ratio would then be calculated on the basis of that employee's "annual total compensation".

If the registrant is required to determine the "annual total compensation" of all individual employees in the statistical sample, there could be substantial costs without any benefit from a reporting perspective. In our experience with current Item 402 disclosures, disproportionate costs and time in calculating "annual total compensation" for the summary compensation table are generated by two aspects of the Item 402 rules: the change in pension value and perquisites.

The most costly and time consuming calculation usually is the change in pension value. Since the individual who is the median employee will be different each year, the pay ratio calculation will require that the value of that employee's pension be calculated twice, as of the beginning and the end of the period. Doing those two calculations for the number of employees involved in a statistically significant sample could be extremely costly and time consuming. For perquisites, the incremental cost to the registrant of a perquisite is not a commonly maintained value.

The second alternative in the proposed rule of using an alternative measure of compensation, such as Form W-2 total compensation, to rank all of a company's employees for purposes of identifying the median employee will be useful for some companies. However, many companies do not currently have a single database with compensation information for all of their employees. Companies maintain multiple databases of compensation for a variety of legitimate business purposes, including foreign operations and using multiple payrolls for different divisions or U.S. locations. Absent the pay ratio disclosure rule, there is no requirement that these various databases be designed to allow consolidation of their information. Because of the costs and time involved in aggregating the information in these various databases, many companies will have no practical alternative but to use the statistical sampling method.

The use of statistical sampling on the basis of a compensation definition other than "annual total compensation" would also mitigate the potential problems associated with including non-U.S. employees in the pay ratio disclosure.

Therefore, we recommend that the rules allow a registrant to use statistical sampling on the basis of one or more alternative measures of compensation to identify the median employee. Registrants should be allowed to use different alternative measures for different groups of employees, such as using W-2 compensation for U.S. employees and another measure of compensation for non-U.S. employees. The annual total compensation of the employee identified as the median employee would then be calculated for purpose of the pay ratio disclosure on the basis of the Item 402 rules.

2. We recommend that the final rule follow the proposed rule by not including leased employees, independent contractors or other individuals who are not statutory employees of the registrant in the determination of the median employee. These non-employees are paid through a variety of methods other than the registrant's payroll systems. It would be extremely difficult both to identify these individuals and to determine their annual total compensation from the registrant.

For example, a registrant may engage an employee leasing company to provide 100 workers for a particular function. During the course of a year, the leasing company might furnish multiple workers for each of these 100 positions. The registrant would know the amount paid to the leasing company but that amount would not be the amount paid by the leasing company to the individual workers for the work performed for the registrant.

Based on our experience, we do not believe that registrants would use this exclusion to produce a more favorable pay ratio. A company will structure its work force in the most efficient manner based on business needs. We do not believe that the potential effect on the pay ratio disclosure of using leased employees or independent contractors would even be a consideration in this type of business decision.

We also believe that the exclusion of non-employees from the determination of the median employee is consistent with the purpose of the statute and is the only practical approach for registrants.

3. We recommend that the final rule give companies the flexibility to choose a date other than the last day of the company's most recent completed fiscal year for identifying the company's employees for purposes of calculating the pay ratio.

We believe the proposed rules would result in misleading disclosures for retailers and other similar companies that have a calendar-year fiscal year and that typically hire many temporary and seasonal employees around the holidays. The requirement to use the last day of the fiscal year (December 31) for these companies means that the median employee's annual compensation will be artificially lower than it would be on most other identification dates during the year and lower as compared to other similar companies who may have a different fiscal year end. If the same retail company had a fiscal year ending in February, for example, the employee population at the end of the fiscal year would not include the seasonal employees. The final rule should not require that a company's pay ratio be arbitrarily impacted based purely on whether the company uses a calendar-year fiscal year.

We recommend that companies be given the flexibility to choose any identification date during the most recently completed fiscal year for this purpose, as long as the date was disclosed. To prevent manipulation, the Commission could consider requiring that,

once chosen, an identification date must remain in effect for a given period, for example, three years. We believe this approach would provide investors with more meaningful and comparable information about a company's pay ratio.

Covered Registrants

We recommend that the final rule follow the proposed rules in requiring registrants to provide a pay ratio disclosure only if the registrant is currently required to report annual total compensation in the summary compensation table pursuant to Item 402(c)(2)(x). The rationales that the Commission relied on to provide different summary compensation disclosure requirements for these registrants in Release Nos. 33-8732 and 34-54302 are equally valid with respect to the pay ratio disclosure rules.

Presentation of the Pay Ratio

We recommend that the final rule clarify that a registrant may provide any other information that it believes would be useful to investors to understand the meaning of the pay ratio. In particular, it would be useful for the adopting release or the instructions explicitly to allow registrants to disclose (1) a comparison of the current pay ratio with the pay ratio for prior years, and (2) an explanation for the changes in the pay ratio from prior years.

It is likely that the annual total compensation of the median employee will not vary substantially from year to year. However, the annual total compensation for the PEO is likely to fluctuate to a much larger degree. This fluctuation for the PEO will occur, in part, due to the fact that the typical PEO has a much larger percentage of annual total compensation that is performance-based than the typical median employee. In addition, because of the methodology for calculating annual total compensation, there will be other fluctuations that disproportionately affect the PEO. For example, if a registrant makes equity awards on a cycle other than annually, PEO will have larger annual total compensation in the years in which equity awards are made and less in other years.

Showing the pay ratio for a single year based on these types of fluctuations in a PEO's annual total compensation without any explanation would be unhelpful to investors. Therefore, guidance on the ability to include additional disclosures would be useful.

Identification of the PEO

We recommend that the final rule clarify that the relevant PEO whose annual total compensation is included in the pay ratio disclosure is the person serving as the registrant's PEO "as of the end of the last completed fiscal year." This will make clear that in those cases in which there is a change in PEOs during the fiscal year (such as a

result of retirement or death), only the annual total compensation of the PEO serving as PEO as of the end of the fiscal year must be included in the pay ratio disclosure.

We believe that this clarification is appropriate for a number of reasons. First, the language of Section 953(b) expresses Congressional intent that the pay ratio disclosure relate to a single PEO. Section 953(b) requires disclosure of the annual total compensation "of the chief executive officer (or any equivalent position) of the issuer" (emphasis added). Although Section 953(b) calls for implementation of the pay ratio disclosure through amendment to Item 402 of Reg. S-K, Congress specifically chose not to use language similar to that in Item 402(a)(3)(ii) for defining the PEO for whom disclosure is required. If Congress had intended to require the pay ratio disclosure for any individual who served as PEO during the fiscal year, then Section 953(b) could have instead directed that disclosure apply to "all individuals serving as the chief executive officer during the year," consistent with Item 402(a)(3)(ii). In our view, the absence of such a direction supports the application of the rule to a single PEO.

We also believe that having disclosure of the pay ratio for multiple PEOs could make the disclosure confusing to investors. If the pay ratios for multiple PEOs were disclosed, the ratios would be different for each of the PEOs and could be substantially different. The differences in pay ratios could depend on arbitrary factors, such as when a PEO change occurred during a year, and are unlikely to provide investors with any useful information.

A better approach would be footnote disclosure of any material information about the compensation of the PEO included in the pay ratio disclosure who did not serve in that position for the entire fiscal year. That information might include the portion of the year served in that position and any compensation specifically related to the assumption of the position (such as part-year incentive compensation or moving perquisites) that materially affects the pay ratio disclosure during the transition year.

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We wish to thank the Commission for the opportunity to submit our comments on the proposed rules. Any questions in relation to our comments may be directed to Steven D. Kittrell or G. William Tysse in our Washington, D.C. office at (202) 857-1700 or Jeffrey R. Capwell in our Charlotte, N.C. office at 704-373-8999.

Sincerely,

McGUIREWOODS LLP