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March 7, 2014

Via email to: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: **File No. S7-07-13**
Release Nos. 33-9452; 34-70443
Pay Ratio Disclosure

Dear Ms. Murphy:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "**Committee**" or "**we**") of the Business Law Section (the "**Section**") of the American Bar Association (the "**ABA**"), in response to the requests for comment by the U.S. Securities and Exchange Commission (the "**Commission**" or "**SEC**") in the proposing release referenced above (the "**Proposing Release**").¹ In the Proposing Release, the Commission has proposed amendments to Item 402 of Regulation S-K and Form 8-K under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"),³ to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**"),² which requires, among other things, disclosure of the ratio of the median of the total compensation of all employees of an issuer (except the principal executive officer) to the annual total compensation of the chief executive officer of the issuer.

The comments set forth in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors. Accordingly, our comments do not represent the official position of either the ABA or the Section.

¹ 78 FR 60560 (Oct. 1, 2013).

² 15 U.S.C. §§78a *et seq.*

³ Public Law No. 111-203, 124 Stat. 1376 (2010), as amended by Public Law No. 112-106, 126 Stats. 306 (2012).

I. Overview and Summary of Principal Recommendations

We are pleased to have the opportunity to comment on the proposals set forth in the Proposing Release. On September 29, 2010, the Committee submitted a pre-rulemaking letter to the Commission commenting on the executive compensation provisions of the Dodd-Frank Act, including the pay ratio disclosure requirement imposed by Section 953(b).⁴ We appreciate the Commission's efforts to address many of our concerns as outlined in our previous letter. We also recognize the significant challenges that the Commission and its staff have faced in drafting the rules needed to implement Section 953(b).

Many of our responses to specific Commission requests for comment, as discussed in more detail below, reflect our reading of the plain language of Section 953(b) as intended primarily to promote comparability within individual registrants (that is, between the annual total compensation of a registrant's principal executive officer and that of the registrant's "median" employee), rather than overall comparability among registrants. In this regard, the mandated pay ratio disclosure requirement differs from other, more "conventional" Exchange Act disclosure provisions aimed at informing shareholders' investment and voting decisions. Accordingly, we ask the Commission to take this apparent disparity in disclosure goals into account when weighing the limited potential benefits of the pay ratio disclosure to investors against what we anticipate will be the substantial compliance costs and other burdens to registrants. We believe that the Commission has appropriately proposed – and ultimately should adopt – rules that afford registrants reasonable flexibility in preparing and presenting the mandated pay ratio disclosure. More specifically, given the difficulties likely to be encountered by many registrants in collecting the data necessary to prepare the required disclosure, as well as the reality that the compliance alternatives contemplated by the proposals minimize meaningful comparability across registrants, many of our comments and recommendations are based on our view that uniformity of the pay ratio disclosures among registrants should not be the paramount goal of the final rules.

We have structured this letter to set forth our comments, suggestions, and recommendations in the same order as the Commission has presented its proposed rule amendments in the Proposing Release. Unless otherwise defined or indicated, all section and rule references herein are to the Exchange Act and the rules thereunder, and all "Item" references are to Regulation S-K.

At the outset, we wish to go on record as strongly supporting the Commission's decision to craft rules to implement Section 953(b) that, if adopted, would give registrants significant flexibility in developing a methodology to identify their median employee. In our view, this is the one aspect of compliance that is expected to create the most substantial costs and burdens for registrants. We agree with the Commission that, regardless of whether the final rules grant registrants broad discretion in developing such a methodology or prescribe a specific

⁴ This comment letter is available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-19.pdf>.

methodology for such purpose, the required disclosure will have little utility to investors other than to enable them to see the ratio of principal executive to employee compensation for a specific registrant from year to year. Given the significant variation among registrants in the areas that will impact the identification of the median employee, including workforce population (for example, the percentage of full-time employees, part-time employees, and temporary and/or seasonal workers) and demographics (for example, the percentage of foreign employees and the number of jurisdictions in which these employees are located), it will be virtually impossible to glean any relevant information from a comparison of one registrant's pay ratio information to another registrant's pay ratio information.

In short, as long as each registrant accurately describes the methodology it has used, performs the requisite calculations in a consistent manner each year, and discloses whether and how it chose to deviate from the previous year's methodology, if material, we urge the Commission to allow registrants to develop a methodology for collecting, verifying, and aggregating the data necessary to identify their median employee, and to calculate his or her compensation, that is the most cost-effective for them. While we believe that the broad, "principles-based" disclosure framework that the Commission has proposed would provide registrants sufficient latitude to compile and present pay ratio information that fits their particular facts and circumstances, we offer a few suggestions for refinement of the proposed rules that, in our view, would help the agency strike a more effective balance between compliance costs and informational benefits consistent with the mandate of Section 953(b).

The following is a summary of our other key comments and recommendations:

- The Commission should require pay ratio disclosure only in filings in which full Item 402 disclosure is required, as proposed. We recommend that the Commission exclude from Item 402(u) coverage initial registration statements on Forms S-1 and S-11 under the Securities Act of 1933, as amended (the "**Securities Act**"),⁵ and Form 10 under the Exchange Act.
- The Commission appropriately has proposed to exclude smaller reporting companies and foreign private issuers, including Canadian MJDS filers, from Item 402(u) coverage. We recommend that the Commission also exclude registrants without a class of equity securities registered under Section 12 of the Exchange Act (for example, debt-only registrants).
- We support the Commission's proposal to exclude leased workers, and suggest that the Commission also exclude foreign employees in situations where a majority of the registrant's employees, as well as its principal executive officer, work in the United States.

⁵ 15 U.S.C. §§77a *et seq.*

- We recommend that part-time employees and temporary or seasonal workers be excluded from the “median employee” determination, unless a majority of the registrant’s workforce is comprised of such employees and workers. Any temporary or seasonal worker employed and paid by a non-affiliated third party should be excluded.
- We recommend that Item 402(u) limit coverage of “subsidiary” employees to employees of wholly- or majority-owned subsidiaries of the registrant whose financial results are presented on a consolidated basis in the financial statements of the registrant.
- We strongly support the Commission’s judgment in proposing to give registrants reasonable flexibility in both: (1) identifying the median employee, including but not limited to allowing registrants to select their preferred calculation date(s); and (2) calculating the median employee’s total annual compensation. In our view, the proposed obligation to provide brief, non-technical narrative disclosure of the registrant’s methodology, including the use of material estimates, assumptions and/or adjustments and, whether used to identify the median employee and/or to calculate that employee’s total annual compensation, will be sufficient to promote full and fair disclosure in compliance with Item 402(u). We further agree with the Commission that year-to-year changes in methodology, estimates, assumptions and/or adjustments used to determine the required pay ratio should be disclosed if such changes have a material effect.
- We recommend that all registrants – including those not subject to the Commission’s proxy rules, and therefore unable to rely on forward incorporation by reference permitted by General Instruction G(3) to Form 10-K-- be given up to 120 days after fiscal year-end in which to provide the required pay ratio disclosure, either by amendment to the previously filed Form 10-K or a Form 8-K.
- We urge the Commission to provide the same “furnished” treatment of the Item 402(u) disclosure contained in a “filed” document that is now provided in connection with the Performance Graph (Item 201(e)), the Audit Committee Report (Item 407(d)) and the Compensation Committee Report (Item 407(e)(5)).

II. Filings Subject to the Proposed Disclosure Requirements

Question 1: Should we require the pay ratio disclosure only in filings in which Item 402 disclosure is required, as proposed? Should we require the pay ratio disclosure in Commission forms that do not currently require Item 402 disclosure? If so, which forms, and why? Would disclosure be meaningful to investors where no other executive compensation disclosures are required?

We agree with the Commission's proposal to limit the required disclosure to filings in which Item 402 disclosure is required. Because we can identify no discernible benefit to investors from including pay ratio disclosure in "any filing described in Item 10(a) of Regulation S-K," as Section 953(b) on its face would appear to prescribe, we fully support the Commission's more reasonable interpretation of the statute as an appropriate exercise of its discretion to reduce unnecessary costs to registrants consistent with the statute. In our view, it is neither reasonable nor sensible to mandate the inclusion of pay ratio disclosure in filings where no other executive compensation disclosure required by Item 402 will appear to provide meaningful context. In other words, a literal interpretation of the statutory language would elevate the pay ratio information to a position above the other executive compensation disclosure required by Item 402, without any obvious reason as to why such information is more relevant to investment and voting decisions than the detailed information about executive compensation actions and decisions reflected in the Summary Compensation Table required by Item 402(c) and the Compensation Discussion and Analysis required by Item 402(b).

Further, we believe that the presentation of the pay ratio information in filings that do not contain any other executive compensation disclosure would not be meaningful to investors; to the contrary, such a presentation likely would be confusing and potentially misleading. The absence of any related executive compensation disclosure would deprive the information of any context and, at a minimum, compel registrants to provide potentially extensive supplemental disclosure (in addition to the required information about methodology and material assumptions, adjustments, or estimates) to enable investors to fully understand what the disclosed pay ratio means.

Question 2: Do registrants need any additional guidance about which filings would require the proposed pay ratio disclosure? Are there circumstances where the requirements of a particular form call for Item 402 information in certain circumstances, but the applicability of the proposed pay ratio disclosure requirements may not be clear? If so, please provide details about what should be clarified and what guidance is recommended.

In view of the familiarity that registrants have with the presentation of the executive compensation disclosure required by Item 402, we believe that it is not necessary for the Commission to provide any additional guidance about the filings that would require the proposed pay ratio information. The one area where additional guidance potentially may be helpful involves issuers that are filing a registration statement under the Securities Act for the first time and, therefore, may not have prior experience with the disclosure requirements of Item 402.⁶

III. Registrants Subject to the Proposed Disclosure Requirements

Question 3: Should the pay ratio disclosure requirements, as proposed, apply only to those registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c)? If not, to which registrants should pay ratio

⁶ See, for example, Item 11(1) of Part I of Form S-1 (17 C.F.R. 239.11).

disclosure requirements apply?

Although we agree with the Commission's interpretation of Section 953(b) to mean that the pay ratio disclosure requirements should apply only to those registrants that are required to provide the Summary Compensation Table disclosure pursuant to Item 402(c), as proposed, we urge the agency to consider exercising its discretion⁷ to exclude certain registrants from the disclosure requirements. In particular, we believe registrants with no class of equity securities registered under Section 12 of the Exchange Act should be excluded from the new disclosure requirements – even though we acknowledge that such registrants are subject to Item 402 via the line-item requirements of Form 10-K. In our view, the pay ratio information is irrelevant to investors in debt-only registrants (indeed, we believe that most of the executive compensation disclosure currently required of debt-only registrants is not viewed as material to such investors). In recognition of the costs and burdens of compliance with Section 953(b), we believe that excluding such registrants would be in the public interest and consistent with the protection of investors.

Question 4: Should we revise the proposal so that smaller reporting companies would be subject to the proposed pay ratio disclosure requirements? If so, why?⁸

We agree with the Commission's proposal to exclude smaller reporting companies from the pay ratio disclosure requirements. In view of the costs and burdens of compliance with Section 953(b), as compared with the minimal benefits, if any, of the disclosure to investors, we believe that excluding such registrants would be in the public interest and consistent with the protection of investors. Further, by excluding registrants that qualify as "emerging growth companies"⁹ (as that term is defined in Section 3(a) of the Exchange Act) from Section 953(b) coverage, Congress has demonstrated the intent to relieve this category of registrants of the costs and burdens of compliance. One of the benefits that emerging growth companies enjoy under the Jumpstart Our Business Startups Act of 2012 (the "**JOBS Act**") is the ability to avail themselves of the scaled disclosure regime with respect to executive compensation that is available for smaller reporting companies. We see no reason why similar relief from Section 953(b) should not be extended to smaller reporting companies, simply because they became subject to the reporting requirements of the Exchange Act prior to the enactment of the JOBS Act, or do not otherwise qualify for "emerging growth company" status.

⁷ In this regard, we note the Commission's statement that Section 953(b) does not amend either the Securities Act or the Exchange Act, but rather directs the agency to implement the statutory mandate by amending Item 402 of Regulation S-K. See the Proposing Release, at Section I.A. Because Regulation S-K itself was adopted by the Commission to integrate the disclosure requirements of the Securities Act and the Exchange Act (see Adoption of Integrated Disclosure System, SEC Rel. No. 33-6383 (March 3, 1982)[47 FR 11380]), however, we believe that the agency may exercise its broad rulemaking authority and, if deemed necessary or appropriate in the public interest, and consistent with the protection of investors, its general exemptive authority (either conditionally or unconditionally), under the Securities Act and/or the Exchange Act.

⁸ We note that only this portion of the request for comment in Question 4 is addressed in our response.

⁹ See Section 102(a)(3) of the Jumpstart Our Business Startups Act of 2012, Pub. L. No. 112-106, 126 Stat. 306.

Question 5: Should we amend either Form 20-F or Form 40-F to include disclosure that is similar to the proposed pay ratio disclosure requirements? If so, why? Assuming we would not otherwise subject foreign private issuers to the executive compensation disclosure rules, what modifications would be needed to address the different reporting requirements that foreign private issuers and MJDS filers have for executive compensation disclosure in order to require pay ratio disclosure? In particular, how should these registrants calculate total compensation (for the PEO and for employees) for purposes of such a requirement? Please provide information as to particular concerns that foreign private issuers or MJDS filers may have if they were required to comply with such a requirement. Please discuss whether the disclosure would be useful to investors, particularly in the absence of the executive compensation disclosure that would accompany disclosure of the ratio for registrants subject to Item 402 disclosure.

We agree with the Commission's determination that Section 953(b) does not require it to expand the scope of Item 402 to apply to registrants that are not currently subject to the executive compensation disclosure requirements of Item 402. In view of the Commission's long-standing rules allowing foreign private issuers and MJDS filers¹⁰ to provide information about their executive compensation programs based on the applicable disclosure requirements of their home jurisdiction, we would find it anomalous to single out this specific Item 402-based disclosure requirement for mandatory application to these issuers without regard to important policy considerations that have led the Commission for decades to permit disclosure in this area based on home-country law. Consequently, we believe that it is neither necessary nor appropriate to amend either Form 20-F or Form 40-F to include a new disclosure line-item that is similar to the proposed pay ratio disclosure requirement, for purposes of extending this requirement to foreign private issuers or MJDS filers.

IV. New Paragraph (u) of Item 402 (Pay Ratio Disclosure)

Question 6: Are there any other presentation issues that companies need guidance on or that should be clarified in the pay ratio disclosure requirements? If so, please provide details about such issues and any recommended guidance that should be provided.

We note that proposed Item 402(u)(1)(ii) would require disclosure of the "annual total compensation of the PEO of the registrant." In addition, proposed Item 402(u)(1)(iii) would require disclosure of the "ratio of the amount in paragraph (u)(1)(i) of this Item to the amount in paragraph (u)(1)(ii) of this Item." For purposes of the proposed rules, it appears that a registrant's "PEO" would be determined by reference to Item 402(a)(3)(i), which requires disclosure pursuant to Item 402 for "[a]ll individuals serving as the registrant's principal executive officer or acting in a similar capacity during the last completed fiscal year ('PEO'),

¹⁰ An "MJDS filer" is a registrant that files reports and registration statements with the Commission in accordance with the requirements of the U.S.-Canadian Multijurisdictional Disclosure System (the "MJDS").

regardless of compensation level.” This Item is intended to ensure disclosure of the compensation of each individual who has served as a registrant’s principal executive officer at any time during the last completed fiscal year, which can result in disclosure of compensation for multiple individuals where a registrant has had more than one principal executive officer during a given fiscal year.

In contrast, we recommend that the Commission make clear that, in the event that a registrant has more than one principal executive officer during the last completed fiscal year, Item 402(u) contemplates that the “PEO” referenced in the proposed rules is the individual serving as the registrant’s principal executive officer as of the last day of the registrant’s last completed fiscal year (subject to the one exception noted in the following paragraph). We believe that this interpretation is consistent with the objectives of Section 953(b), as well as the proposed structure of Item 402(u) itself which contemplates that the relevant employees for purposes of identifying the median employee of the registrant be identified from the pool of individuals employed by the registrant or any of its subsidiaries as of the last day of the registrant’s last completed fiscal year.

Because we recognize that our suggested approach could produce anomalous results in situations where a principal executive officer has served most of a fiscal year, but departs before year-end, we recommend that the Commission require use of the compensation of the principal executive officer who served in this capacity for the majority of the fiscal year as the relevant comparator for purposes of calculating the required pay ratio disclosure.

V. Employees Included in the Identification of the Median

Question 7: Are there alternative ways to fulfill the statutory mandate of covering “all employees” that could reduce the compliance costs and cross-border issues raised by commenters? . . .

One of the fundamental purposes of the federal securities laws is to ensure that issuers provide investors with information that is “material” in connection with such investors’ formulation of investment and/or voting decisions.¹¹ While Congress, as well as the Commission, possesses the power to define what matters will be deemed “material,” we are concerned that Section 953(b) represents a significant departure from what a “reasonable” investor would find important for purposes of investment or voting. At a minimum, given the absence of a stated purpose for Section 953(b) – either in the statute itself or in the related legislative history¹² – we urge the Commission to keep in mind the investor-centric purpose of the federal securities laws when deciding how the term “all employees” should be construed. When this factor is weighed against the substantial costs and burdens of compliance for many registrants if the term “all employees” is construed literally to mean all full-time employees,

¹¹ See *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. ___, 131 S. Ct. 1309 (2011); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

¹² See the Proposing Release, at Section II.A.

part-time employees, and temporary or seasonal workers anywhere in the world, we believe the Commission should exercise appropriate discretion to limit the scope of this term by analyzing whether the mandated information is truly material to a “reasonable” investor making informed investment and/or voting decisions relating to a registrant’s publicly-traded equity securities, rather than merely of interest or helpful to certain types of investors and/or the media.

We note that, in addition to failing to articulate a stated purpose, Section 953(b) (along with the accompanying legislative history) is silent as to whether the term “all employees” was intended to include the foreign employees of a registrant.¹³ Following the enactment of the Dodd-Frank Act, in January 2011, Senator Robert Menendez, the principal sponsor of Section 953(b), submitted a letter to the Commission stating that he had always intended that the term “all employees” include employees working abroad.¹⁴ We respectfully submit, however, that it is a well-established legal principle that no deference should be accorded to statements about legislative intent that are issued after the enactment of a statute.¹⁵ With this principle in mind, we ask that the Commission not give undue weight to Senator Menendez’s post-enactment letter as an expression of legislative intent.

Consistent with the Commission’s overarching theme of flexibility, we believe that registrants should be (i) required to include only full-time U.S.-based employees within their methodology for identifying the median employee, subject to clear limitations if most of a registrant’s employees and its principal executive officer work primarily outside the United States; and (ii) permitted, within such parameters as are established by the Commission, to determine whether to include any other categories of employees within their methodology, subject only to disclosing which additional categories, if any, have been included and explaining why other categories have been excluded. In other words, as further explained below, we believe that the Commission should take a reasonably calibrated approach to imposing cross-border data collection and disclosure costs and other burdens on U.S. registrants in situations where the majority of its workforce – including its principal executive officer – work in the United States.

Question 7 (continued): . . . E.g., exclude non-U.S. employees . . . from the calculation of the median?

¹³ See *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2878 (2010). In construing the foreign application of Section 10(b) of the Exchange Act, the Supreme Court held that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” See also *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991).

¹⁴ Letter to the Commission from the Honorable Robert Menendez, dated Jan. 19, 2011. We note that Senator Menendez does explicitly state in his letter to the Commission that, “when I wrote ‘all’ employees of the issuer, I intended that to mean both full-time and part-time employees, not just full-time employees. I also intended that to mean all foreign employees of the company, not just U.S. employees.”

¹⁵ *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990). Justice Scalia, concurring in part, stated that “[a]rguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.”

We recognize the difficulties that the Commission may face in construing the term “all employees” to exclude all foreign employees.¹⁶ That said, we believe that it is the inclusion of all non-U.S. employees in the identification of the median employee that is likely to create substantial costs and burdens of compliance for many U.S.-based registrants, without necessarily enhancing the quality of the pay ratio information. In our opinion, much of the cost and complexity inherent in identifying the median employee where a registrant has a large non-U.S. workforce is a direct result of the wide variety of compensation schemes (and applicable legal requirements) used abroad.

In our experience, compensation arrangements outside the United States vary widely based on such diverse factors as government-mandated benefits, foreign labor law requirements, prevailing wage standards and the difficulty in providing equity compensation because of the limitations contained in the applicable securities, tax, and other laws. For example, foreign employees may receive ancillary benefits of a significantly greater value than U.S.-based employees who perform equivalent functions, due to Works Council requirements and/or mandatory employer contributions to pay for employee benefits that, in the United States, are funded by the employees themselves. In addition, these same foreign employees may receive equity awards (if any) that have far less value than those granted to similarly-situated U.S.-based employees.

In situations where both the principal executive officer and a majority of a U.S.-based registrant’s employees work in the United States, we recommend that the Commission permit (but not require) the registrant to exclude foreign employees from the median employee pool or statistical sample used pursuant to proposed Item 402(u). As a condition to such relief, and a means of deterring evasion, the Commission could require full disclosure of the basis for a registrant’s determination that its principal executive officer and a majority of its employees work in the United States. In this manner, the Commission would substantially reduce the costs and burdens of compliance for registrants whose workforce is concentrated primarily in the United States (as evidenced by payroll records, Forms W-2, etc.), without allowing undue latitude for manipulation of the underlying employee data. Such an approach also would limit the competitive disadvantage domestic registrants may suffer, by comparison with foreign private issuers that are not subject to Item 402, if the Commission were to require the inclusion of foreign employees in all circumstances. At the same time, a registrant that chose to include non-U.S. employees would be free to do so.

Should the Commission nevertheless determine that foreign employees should be included on a mandatory basis for purposes of identifying the median employee, we recommend that the agency carve out potentially “compensatory” items whose value is difficult to calculate on an equivalent basis for all employees wherever located. Among such potentially excludable items are:

- the value of pension accruals;

¹⁶ See, for example, our response to Question 28.

- employer matching contributions under Section 401(k) of the Internal Revenue Code and other tax-qualified defined contribution plans, as well as other, non-tax-qualified compensatory arrangements; and
- non-cash benefits, whether or not deemed perquisites or other personal benefits.

This would spare registrants from having to identify which of their global employees receive these benefits and from having to estimate the total value of these benefits on a per-employee basis, particularly where such benefits are not provided on equivalent terms throughout the organization.

Question 7 (continued): . . . E.g., exclude . . . non-full-time employees from the calculation of the median?

Consistent with the discussion above, we recommend that the Commission generally exclude part-time, seasonal, and/or temporary employees from the scope of the term “all employees,” and, accordingly, from the pool of employees from which the median employee is to be identified (while leaving registrants the flexibility to include such employees if desired). Based on our experience in representing registrants subject to the reporting requirements of the federal securities laws, the principal executive officer of a registrant is rarely a part-time employee. Further, a registrant’s strategy and approach for compensating part-time employees is frequently quite different from its philosophy and practices for compensating full-time employees. An exception to this exclusionary principle should be made, however, where a majority of a registrant’s employees work on a part-time, temporary, and/or seasonal basis.

Focusing on part-time employees, in our experience these employees are unlikely to be eligible to receive most types of variable compensation, such as annual bonuses and long-term incentive compensation (including equity compensation). In addition, part-time employees often are ineligible to participate in a registrant’s health and welfare benefit programs. These differences in practice may not be readily apparent to an investor. Further, it is virtually certain that, given the customary compensation levels of part-time employees, including such individuals within the definition of the term “all employees” for purposes of proposed Item 402(u) will have a disproportionate – and potentially dramatic – impact on registrants with a workforce comprised of a large number of part-time employees compared to similarly-situated registrants with fewer part-time employees. Registrants in the former category will, inevitably, find that the total compensation of their median employee is lower than the same metric calculated by registrants with a workforce comprised principally of full-time employees.

Given the different factors that contribute to the approaches used to structure the compensation arrangements for full-time and part-time employees, including part-time employees in the term “all employees” in all circumstances would be unlikely to facilitate investors’ understanding the significance of the pay ratio disclosure, much less the rationale of a

registrant's compensation decisions relating to its PEO.¹⁷ Such an understanding will only be possible if the registrant undertakes to provide a thorough discussion of its labor strategy and attendant wage structure across different employee categories and levels. We believe that requiring such additional disclosure (either explicitly or implicitly given applicable antifraud provisions and litigation concerns) would be inconsistent with the Commission's proposal that the required disclosure be accompanied by only a "brief" discussion of the methodology used in identifying the median employee or calculating annual total compensation for employees. Such additional disclosure also would be inconsistent with the Commission's efforts to minimize the costs and burdens of providing the required disclosure. At most, if the Commission were to exclude part-time employees from the term "all employees," we recommend that, to enable investors to put the impact of a registrant's hiring practices into context, the final rules require registrants to disclose their definition of "part-time" status (as well as the definition of "part-time," if any, that is contained in the employment laws of each applicable jurisdiction, if different from the registrant's own definition) and to disclose the total number of part-time employees in their workforce. We believe that this information would enable investors to understand the size of the excluded employee population and, thus, to better understand the scope of the required pay ratio disclosure.

For similar reasons, we recommend that the Commission exclude seasonal and temporary workers employed by a registrant from the scope of the term "all employees" for purposes of proposed Item 402(u). In our view, the factors that make the inclusion of part-time employees within the term "all employees" problematic are even more compelling in the case of seasonal and temporary workers employed by registrants. The compensation arrangements of such workers are likely to be very different from those of full-time employees, or even part-time employees who work on a year-round basis. Seasonal workers, for example, are unlikely to be paid for performance. As in the case of part-time employees, few seasonal or temporary workers will be eligible to receive long-term incentive compensation (such as equity compensation), participate in health and welfare benefit programs, or be eligible to participate in retirement or similar savings plans.

There is an obvious cost to registrants associated with collecting and analyzing the compensation information for such workers as part of the process of identifying the median employee, which we do not believe can be reduced through use of recognized statistical sampling methods. If you assume that, at some multinational registrants, many of these workers may be non-U.S.-based employees, the challenges posed in gathering the necessary information abroad simply compound the costs and burdens of compliance. Further, given the distorting effect that the inclusion of these workers might have on the identification of the median employee – and the attendant pay ratio disclosure – we believe that the benefit to investors would be minimal.

Finally, we are aware that some commenters have expressed concern that permitting registrants to exclude specific categories of employees, such as foreign employees, part-time

¹⁷ We assume in this connection, as noted above, that a registrant would not be allowed to evade disclosure by employing a majority of its employees on a part-time basis.

employees, and/or seasonal and temporary workers, from the identification of the median employee will encourage registrants to restructure their organizations and/or workforce in a manner calculated to reduce or otherwise affect their pay ratio information. We believe that such concerns are vastly overstated. A registrant's labor strategy and wage structure may be influenced by many factors, but we think it is unlikely that either or both would be influenced materially by the optics arising from the disclosure required by proposed Item 402(u). Such "gamesmanship" raises the prospect of shareholder litigation under a variety of possible legal theories, as well as Commission enforcement action. We believe that such risks greatly outweigh any perceived incremental benefit that may be derived from seeking to manipulate the data used to prepare the required disclosure. In addition, any such restructuring has its own attendant costs and burdens, which we believe would not be insubstantial. For all these reasons, we do not envision a significant risk that a registrant would choose to alter its organizational structure or workforce simply to "improve" its pay ratio disclosure by reducing the principal executive officer-to-median employee disparity.

Question 8: Should registrants be allowed to disclose two separate pay ratios covering U.S. employees and foreign employees in lieu of the pay ratio covering all U.S. and foreign employees? Why or why not? Should we require registrants to provide two separate pay ratios, as requested by some commenters? If separate ratios are required, should this be in addition to, or in lieu of, the pay ratio covering all U.S. and foreign employees?

Section 953(b) requires disclosure of the median of the annual total compensation of "all employees" (except the principal executive officer). In response to this directive, the Commission is proposing that the terms "employee" and "employee of the registrant" include any U.S. or foreign full-time employee, part-time employee, and seasonal or temporary worker employed by the registrant or any of its subsidiaries (including officers other than the principal executive officer). As explained in the Proposing Release, the Commission bases this decision on its belief that, by requiring the amendment of Item 402 to implement Section 953(b), Congress intended that the statute cover employees on an enterprise-wide basis, including both the registrant and its subsidiaries, which is the same approach as that taken for other Item 402 information.¹⁸

For the reasons outlined above, we believe that the Commission has the authority necessary to allow exclusion of certain categories of employees in appropriate circumstances, including foreign employees. If the Commission ultimately determines that foreign employees must be included, we recommend that registrants not be required to disclose multiple pay ratios, such as one for United States employees and another for foreign employees. In our view, a requirement to disclose multiple pay ratios would significantly increase the costs of compliance to registrants (over and above what is already likely to be a very substantial cost) while providing little, if any, incremental informational benefit to investors. On its face, Section 953(b) appears

¹⁸ See the Proposing Release, at footnote 42 (citing Item 402(a)(2) and Instruction 2 to Item 402(a)(3)).

to reflect a Congressional desire¹⁹ to provide investors with a general sense of the difference between the compensation of a registrant's most senior executive (using, for this purpose, the annual total compensation of the principal executive officer) and its rank-and-file employees (using, for this purpose, the annual total compensation of the median employee). Presenting this information on a bifurcated basis, in our view, would neither further this objective nor facilitate enhanced investment or voting decisions by investors. If anything, the potential for confusion among investors that would arise as to the significance of multiple pay ratios could undermine the utility to investors of the required disclosure.

Under the Commission's proposal, a registrant is permitted (and even may be required in some circumstances under general antifraud principles) to supplement the required disclosure with an additional narrative discussion of its choosing, as is the case with any other mandated disclosure.²⁰ Likewise, a registrant may, in its discretion, present additional ratios to supplement the required ratio.²¹ Consequently, a registrant with a multinational workforce would be free to provide separate pay ratios covering its United States employees and foreign employees in addition to the required disclosure, if the registrant believes that such information is useful to investors. This permissive disclosure standard would give registrants the flexibility both to identify their median employee on an organization-wide basis (as prescribed by Section 953(b)) and, where appropriate, supplement this information with additional pay ratios which focus on the differences in compensation between the principal executive officer and one or more sub-categories of employees (such as foreign employees).

Question 9: Please identify the applicable data privacy laws or regulations that could impact the collection or transfer of the data needed to comply with the proposed pay ratio requirement. Please also identify whether there are exclusions, exemptions or safe harbors that could be used to collect or transfer such data. Please quantify, to the extent practicable, the impact of such laws on registrants subject to Section 953(b), such as an estimate of the number of registrants affected or the average percentage of employees affected. How would the proposed flexibility afforded to all registrants (i.e., selecting a method to identify the median, the use of statistical sampling or other reasonable estimation techniques and the use of consistently applied compensation measures to identify the median employee) impact any potential costs and burdens arising from local data privacy laws? In particular, would a registrant be able to make a reasonable estimation of the total compensation for affected employees? Would a registrant be able to select a consistent compensation measure that is not subject to local data privacy laws? If

¹⁹ As we note in our response to Question 14, there is no stated legislative intent expressed, either in the statutory language or the pertinent legislative history, with respect to the meaning of the term "all employees." Respectfully, there is only Senator Menendez's comment letter submitted to the Commission after the enactment of the Dodd-Frank Act.

²⁰ See the Proposing Release, at Section II.C.5.

²¹ Id.

not, are there alternative ways to meet the statutory mandate of Section 953(b) that would reduce the costs and burdens arising from local data privacy laws?

Many foreign jurisdictions, including, but not limited to, those in the European Union, have adopted stringent rules on the collection, maintenance, and use of personal information – notably, but not exclusively, in the context of human resources. The best known of these data privacy regimes is the European Union’s Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data, 1995 O.J. L 281 (the “EU Directive”). The EU Directive prohibits the collection, maintenance, and use of personal information, unless done in a manner that satisfies established protocols. Under the EU Directive, processors of personally identifiable data must process the data fairly and lawfully, and only for specific legitimate purposes, the data processed must not be excessive in relation to the purpose for which it is collected, and the processing must be necessary (not just convenient) for one of five specified reasons, including compliance with laws. The EU Directive also requires each European Union member state to adopt its own laws mirroring the requirements of the EU Directive. Other jurisdictions, including Argentina, Canada, Japan, and Switzerland, have also adopted strong data privacy laws. Registrants are tasked with complying with the privacy laws of each jurisdiction in which they operate.

Generally, it would be reasonable to expect that registrants which employ workers abroad already have an understanding of their obligations under the data privacy laws of each jurisdiction in which they operate, and have undertaken to comply with those laws. Further, it would be reasonable to expect that, if they can, such registrants would have identified an exemption to their existing obligations for the collection, maintenance, and use of employee data and taken steps to satisfy such exemption. We are concerned that the existing actions that a registrant may have taken (such as satisfaction of an exemption or “safe harbor” or negotiation of a contractual permission) may not be sufficiently flexible to cover data collection, analysis, and transmission for purposes of compliance with proposed Item 402(u). Accordingly, we believe that the Commission should permit registrants to exclude from their methodology for the identification of the median employee the data for any employees in a jurisdiction where such collection, analysis, and transmission would violate a registrant’s existing data privacy obligations.

For example, under the EU Directive, data may be exempt from the dictates of the directive if it is truly anonymous – that is, the data cannot be attributed to any identifiable human being. In the case of registrants that employ hundreds or thousands of employees in a European Union jurisdiction, it thus may be possible that the data collected for purposes of complying with Section 953(b) could be used in a way that would preserve employee anonymity. In a European Union jurisdiction in which a registrant employs only a handful of employees, however, such an exemption is not likely to be available. In this situation, we recommend that Commission consider permitting registrants to exclude from the identification of the median employee those employees who work in a European Union jurisdiction that maintains strict data privacy laws and in which the registrant employs less than 50 employees.

Question 10: Are there applicable local data privacy laws that would prohibit the collection or transfer of data necessary to calculate the annual total compensation of an employee or group of employees or the identification of a median employee using a consistent compensation measure? In that situation, would a registrant be able to reasonably estimate compensation? If not, are there alternatives to the proposed rule that would address such a situation while still being consistent with Section 953(b)? Should any such alternatives be permitted? If an alternative should be permitted, what limitations or conditions should be imposed on using the alternative? For example, should registrants be required to disclose the approximate number of employees affected and identify the law that prohibits the collection or transfer of data? Please discuss whether any such alternatives would significantly impact the pay ratio disclosure.

Please see our response to Question 9.

Question 11: Should the rule cover employees of a registrant's subsidiaries as defined in Rule 405 and Rule 12b-2, as proposed? Are there any situations where an entity meets the subsidiary definition but its employees should not be included for purposes of the proposed requirement? For example, should the rule be limited to subsidiaries that consolidate their financial statements with those of the registrant? . . .

The Commission has proposed to define the terms "employee" and "employee of the registrant" to mean an individual employed (in a variety of capacities) by the registrant or any of its subsidiaries as of the last day of the registrant's last completed fiscal year. For this purpose, the term "subsidiary" would be defined as set forth in Securities Act Rule 405 and Exchange Act Rule 12b-2.²²

We are concerned that such an expansive reading of Section 953(b), if implemented via proposed Item 402(u), would contribute significantly to the costs and burdens of compliance, particularly for those registrants with complex organizational structures involving joint ventures and entities in which they have a minority ownership stake. Consequently, we recommend that the pool of individuals from which a registrant would need to identify its median employee include only the employees of that registrant's wholly-owned or majority-owned consolidated subsidiaries, rather than employees of all subsidiaries generally. In our view, such a modification would help to reduce the costs and burdens of compliance for many registrants.

The definition of the term "subsidiary" under both Securities Act Rule 405 and Exchange Act Rule 12b-2 is very expansive. Specifically, a "subsidiary" of a specified person is an affiliate controlled directly by such person, or indirectly through one or more intermediaries (or under common control). We believe that the collection, verification, and aggregation of the

²² See the Proposing Release, at footnote 42: "By directing the Commission to amend Item 402, we believe that Section 953(b) is intended to cover employees on an enterprise-wide basis, including both the registrant and its subsidiaries, which is the same approach as that taken for other Item 402 information."

compensation data for the employees of all of a registrant's subsidiaries, without regard to the registrant's actual degree of control of the subsidiary, will impose burdens that are not offset by a commensurate increase in the value of pay ratio information to investors. In our experience, registrants do not exercise much, if any, influence on the compensation policies and practices of entities in which they have only a minority or nominal interest (unless the employees of such entities provide services directly to the registrant).²³ Thus, we believe that excluding these entities from the definition of the term "subsidiary" solely for purposes of proposed Item 402(u) would not deprive investors of useful information or important insights into a registrant's compensation structure. At the same time, narrowing the group of subsidiaries from which compensation data must be collected would be likely to reduce compliance costs.

We also believe that adopting a standard that incorporates subsidiaries whose financial results are consolidated with and into a registrant's financial statements would ensure the necessarily high level of ownership and control by the registrant-parent of the subsidiary sufficient to impute to the registrant some ability to control the compensation of subsidiary employees. Such a standard would also provide certainty as to which subsidiaries are to be covered by the final rules based on objective, independently-applicable financial reporting requirements.²⁴ In addition, in our view, this standard would significantly reduce the costs and burdens of compliance. Registrants are unlikely to have ready access to the compensation data of unconsolidated subsidiaries and, thus, obtaining this data is likely to generate significant compliance costs.

Question 11 (continued): . . . Should the rule not apply to subsidiaries of certain types of registrants, such as the portfolio companies of business development companies? Please provide details of any recommended limitations.

We recommend that the Commission not extend the final rules to subsidiaries that are portfolio companies of business development companies. We understand that many business development companies invest in privately-held entities and, thus, may be registered as regulated investment companies. We believe that this type of investment does not reflect the integrated operation of a typical parent-subsidiary relationship. Consequently, we believe that, generally, pay ratio information reflecting such structures would not be useful to investors.

Question 12: Alternatively, should the requirements be limited to employees that are employed directly by the registrant (i.e., excluding employees of its subsidiaries)? How would such a limitation be consistent with Section 953(b)? How

²³ But see also our response to Question 12.

²⁴ Alternatively, the requirements set forth in Item 601(b)(21)(ii) of Regulation S-K, which provides that the names of particular subsidiaries may be omitted if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as of the end of the year covered by this report, could also serve as a useful standard for purposes of determining which subsidiaries must be included in the identification of the median employee. In our view, the approach reflected in this provision would provide certainty as to which subsidiaries' employees would need to be included in the calculation, while at the same time allow registrants to exclude the employees of relatively immaterial subsidiaries.

would such a limitation affect the potential benefits of the disclosure? Would such a limitation have other impacts, such as incentivizing registrants to alter their corporate structure, and, if so, are there alternative ways that the rule could address those impacts?

We believe that limiting the identification of the median employee to employees who are employed directly by a registrant would not effectively advance the objectives of Section 953(b). Many registrants are structured for legitimate business reasons to operate with -- and in many cases, through (for example, pure holding companies) -- one or more subsidiaries. These subsidiaries are often integral to the operation of the parent company. Consequently, excluding the employees of such subsidiaries from the identification of the median employee could potentially distort the determination of the median employee and, thereby, make the pay ratio information less meaningful to investors. As discussed in our response to Question 11, we believe that the more germane inquiry is evaluating -- and limiting -- the entities that would be considered "subsidiaries" of the registrant consistent with the objectives of Section 953(b). As we have stated previously, however, to balance the benefits and burdens of compliance we believe that the Commission should limit the identification of the median employee to the employees of subsidiaries that are wholly-owned or majority-owned and whose results are consolidated into a registrant's financial statements, and, to guard against any scheme to evade compliance, to employees of other subsidiaries who provide substantial services directly or indirectly to the registrant.

Question 13: Should Section 953(b) be read to apply to "leased" workers or other temporary workers employed by a third party? Does the proposed approach to such workers raise costs or other compliance issues for registrants, or impact potential benefits to investors, that we have not identified? Do registrants need guidance or instructions for determining how to treat employees of partially-owned subsidiaries or joint ventures? If so, what should such guidance or instructions entail?

We support the Commission's determination to exclude "leased" or other temporary workers employed by a third party from the identification of the median employee, and urge the agency not to expand the scope of the median employee identification process to include these individuals. Similar to the compensation arrangements of temporary or seasonal workers, a variety of different arrangements may be used for these non-employees of a registrant, who are typically employed and compensated by a third party for rendering services to the registrant. There can be no assurance that information regarding these third-party compensatory arrangements would be captured by a registrant's payroll and/or human resources systems. In fact, such workers often are paid by their own employers at a rate and on terms that may differ significantly from the aggregate fee charged to and paid by the registrant to the particular employer functioning as an independent contractor.

An obligation to procure compensation data from third parties not only may result in significant added costs, but also may distort or disproportionately impact a registrant's choice of methodology for identifying the median employee. For example, the proposed rules permit a

registrant to identify the median employee based on a “consistently applied compensation measure.”²⁵ If a registrant is required to include leased employees or temporary workers employed by third parties in applying its methodology, it would need to coordinate its selection of a “consistently applied compensation measure” with each third-party employer of these workers. In some instances this may require incurring the added costs that inevitably would be associated with arranging for the third-party employer to provide its compensation data in a manner that conforms to the registrant’s selected compensation measure (assuming that the third party is not otherwise barred by applicable privacy laws from complying with a registrant’s request for compensation data, as discussed below). Alternatively, the registrant may be forced to alter its compensation measure to match the means by which the third-party employer records and maintains its compensation data.

This also assumes that a third-party employer is in a position, and willing, to provide the desired compensation data. In some instances, the third-party employer may consider this data to be proprietary information and, thus, may be unwilling to provide the information to a registrant. It is possible that, in some jurisdictions, the third party employer may be legally prohibited from providing the requested data. Where, as is likely to be the case for registrants with significant operations in multiple jurisdictions, each third-party employer uses a different compensation arrangement and/or records and stores compensation data in a manner that varies from location to location, the costs associated with such data collection (and its related verification and aggregation), as well as the time needed to coordinate the procurement of, and obtain, such data, may be substantial.

In any case, given the simple fact that leased employees and other temporary workers employed by a third party are not “statutory” employees of a registrant, we see no reasonable basis for treating these individuals as employees in connection with the identification of the median employee.

If the Commission ultimately decides to include leased employees or other temporary workers employed by a third party in the identification of the median employee, we recommend that it limit the scope of this requirement to cover only leased employees and other temporary workers who work directly for, and are compensated by, the registrant or a consolidated subsidiary of the registrant. While it is likely that the collection, verification, and aggregation of the necessary compensation data still would be difficult and costly, and ultimately subject to whatever privacy, employment and other laws apply to the third-party employer, at least the registrant would be in a better position to obtain such data concerning individuals whose relationship to the registrant – and its compensation policies and practices – is less severely attenuated.

²⁵ See Instruction 2(iii)(B) to proposed Item 402(u).

VI. Calculation Date for Determining Who is an Employee

Question 16: Is the proposed calculation date workable for registrants? If not, what date should be used (e.g., the last day of the registrant's second (or third) fiscal quarter) and why?

We agree with the Commission's position that registrants should be permitted to identify the median employee based on the composition of their workforce on a particular day, rather than being required to consider every employee who was employed by the registrant at any time during the year (or an appropriate sample drawn from that universe of employees). Instead of mandating a single calculation date for all registrants, however, we recommend that the Commission allow registrants reasonable flexibility in selecting the preferred calculation dates (so long as adequate disclosure is made, as discussed further below). For example, as explained in our response to Question 17, different calculation dates could be used for different segments of a registrant's workforce based on existing tax, payroll and/or other established recordkeeping systems developed to comply with applicable laws or generally accepted accounting principles.

In addition, as outlined below in our response to Question 53, we urge the Commission to afford registrants substantial latitude in transitioning to full compliance once the final rules become effective, in recognition of registrants' need to integrate into their existing disclosure controls and procedures the new controls required for collection, processing and analysis of employee compensation data that has never before been subject to disclosure in annual reports on Form 10-K, proxy or information statements and Securities Act registration statements.

We believe that using the last day of the registrant's second or third fiscal quarter is not a feasible alternative. We understand that, currently, most payroll and/or human resources systems are set up to aggregate data based on either a fiscal year-end or calendar year-end. Consequently, shifting the calculation date to the end of the second or third fiscal quarter would not be helpful for most registrants. If the Commission determines that the last day of a registrant's second or third fiscal quarter would be an appropriate calculation date for some registrants, however, it should allow flexibility for these registrants to select which of these dates to use while allowing other registrants to make a choice that is appropriate for their particular facts and circumstances.

In this regard, as discussed below in our response to Question 17, we recommend that registrants be permitted to use the last day of the calendar year for calculating the compensation of certain categories of employees, and the last day of their fiscal year for calculating the compensation of other categories of employees, if this bifurcated approach simplifies their data collection efforts. A key condition – and an important limiting principle – would be a concomitant obligation to disclose the methodology or methodologies chosen in a manner that would enable investors to understand the predicate for the registrant's choice(s).

Question 17: In the alternative, should registrants be permitted the flexibility to choose a calculation date for this purpose? Why or why not? If so, should we require the registrant to disclose why a particular date was chosen? Should such

flexibility be limited to certain circumstances? If so, what principles should apply in identifying those circumstances?

In our view, the Commission should permit registrants the flexibility to choose a calculation date (or dates) that enables them to maximize use of existing workforce records, thereby reducing compliance costs. We believe that allowing this flexibility – provided that the registrant discloses the basis for its choice of methodologies – ultimately would result in clearer and more reliable disclosure for investors. We understand that numerous U.S.-based registrants have payroll and/or human resources systems for their U.S. employees that are maintained on a calendar-year basis, in addition to one or more payroll and/or human resources systems for their foreign employees that are maintained on a fiscal-year basis. In these situations, we believe that a registrant should be permitted to adopt a methodology for identifying the median employee that allows for the collection of compensation data for its U.S. employees, as well as any other employees whose compensation data is maintained on a calendar-year basis, who are employed on the last day of the registrant’s calendar year, and the collection of comparable data for its foreign employees whose compensation data is maintained on a fiscal year basis who are employed on the last day of the fiscal year.

To ensure transparency and thereby reduce any incentives for data manipulation, we recommend that, where a registrant uses different calculation dates for different categories of employees, it should disclose that it has done so as part of the disclosure required by Instruction 2(iv) of proposed Item 402(u). Registrants also should be required to disclose the different calculation dates chosen for particular employee categories, accompanied by a brief statement of the basis therefor. By the same token, we do not believe that registrants should be required to explain further their reasons for using different calculation dates. Mandatory disclosure of more detailed information on workforce demographics, in our opinion, likely would cause registrants undue competitive harm by comparison with the minimal informational benefits (if any) that might accrue from the required disclosures.

Question 18: Is it appropriate to limit the scope of covered employees to those who were employed on the last day of the registrant's fiscal year, as proposed? Why or why not? Is consistency with other Item 402 disclosure important in this context? Would this approach ease compliance costs for registrants? What impact would this calculation date have on registrants that employ seasonal workers and would the exclusion of seasonal workers not employed on the calculation date likely have an impact on the median or the ratio? Please provide data, such as an estimate of the number of registrants that employ seasonal workers and the average percentage of seasonal employees that would likely be excluded. Is it likely that registrants might structure their employment arrangements to reduce the number of workers employed on the calculation date? Are there other costs that would be incurred using this approach that we should consider? Would the proposed calculation date have a meaningful impact on the potential usefulness of the disclosure for investors? Are there other ways to deal with defining the scope of covered employees that are more effective at reducing costs and providing meaningful disclosure?

Generally, we agree that it is reasonable for the Commission to limit the scope of covered employees to be considered, for purposes of identifying the median employee, to those individuals who were employed on the last day of a registrant's fiscal year (even if, as discussed in our responses to Questions 16 and 17, that is not the date selected for purposes of the median employee determination in the case of some employee groups). This "snapshot" approach is the most practical way, in our view, to minimize compliance costs for registrants without impairing the quality of the resulting disclosure. In this context, we believe that consistency with other Item 402 disclosure requirements is not an important objective, given what we believe to be the limited utility to investors of the required disclosure and the lack of comparability of such disclosure among registrants. In sum, a flexible approach for identifying the median employee, founded on reasonableness under the totality of a particular registrant's facts and circumstances – an objective that is supported by a limited disclosure obligation, as the Commission has proposed -- should be the overarching principle guiding registrants in selecting a calculation date.

VII. Adjustments for Certain Employees

Question 21: Is it appropriate to allow registrants to annualize the compensation for non-seasonal, non-temporary employees that have only worked part of the year, as proposed? Why or why not? Would allowing annualizing the compensation for these employees likely impact the median or the pay ratio?

Question 22: In the alternative, should registrants be required to annualize the compensation for these employees? Why or why not?

We agree with the Commission's proposal to permit registrants to annualize the compensation of non-seasonal, non-temporary employees who have only worked part of the year. At the same time, we believe that the Commission should not require registrants to annualize the compensation of non-seasonal, non-temporary employees who have only worked part of the year.

Assuming that, as proposed, the identification of the median employee will be based on a "snapshot" of a registrant's workforce as of the last day of the fiscal year, we believe it is appropriate to allow the registrant to annualize the compensation of employees who are present on the calculation date, but who were employed for only a portion of the year. We further believe that, in this situation, the annual compensation payable to any such employee with respect to his or her position provides a more accurate reflection of workforce demographics and compensation practices than the actual amount paid to the employee whose employment was for less than the entire fiscal year. We agree with the Commission, however, that the potential costs associated with annualizing compensation, particularly when a registrant has a rapidly changing workforce, do not justify imposing this approach as a requirement.

Question 23: Should we require all registrants that rely on the proposed instruction to annualize compensation for these employees to disclose that they have done so (or only when the adjustment is material, as would be required under the proposed instruction for disclosure of material assumptions, adjustments and estimates)?

Why or why not? If so, what should the disclosure entail? For example, should the registrant only be required to state that it has relied on the instruction, or should it also be required to discuss the number or percentage of employees for which compensation was annualized?

In our view, any registrant that annualizes the compensation of non-seasonal, non-temporary employees who have worked only part of the year should be required to disclose that it has done so.²⁶ This disclosure should include an approximation of the number of non-seasonal, non-temporary employees who have worked only part of the year whose compensation has been annualized. Further, we recommend that during the initial years of compliance with new Item 402(u), this disclosure should be required without regard to its materiality. If, over time, the Commission determines that few registrants actually annualize the compensation of their partial-year employees or that the number of such employees for whom registrants annualize compensation is statistically insignificant, the agency can then choose to relax the disclosure requirement.

We recommend that the Commission not require registrants to state the effect of annualizing the compensation of non-seasonal, non-temporary employees who have worked only part of the year or to determine whether annualizing their compensation has had a material effect on the pay ratio information. Otherwise, registrants would be required to perform the calculation twice - both with and without annualizing, thereby increasing the costs and burden of compliance.

Question 24: Should we allow full-time equivalent adjustments for part-time employees and temporary or seasonal employees, as recommended by some commenters? . . . If so in either case, please explain why. . . .

If the Commission ultimately adopts its proposal to include part-time employees and temporary or seasonal workers within the term “all employees” (which, for the reasons discussed above, we do not support), we believe that the agency should permit full-time equivalency adjustments for such employees. For purposes of comparing the total compensation of the principal executive officer to that of the “typical” employee, it is only logical that such a comparison should be made over a comparable time period. Thus, the compensation of the comparators should be viewed on a full-time equivalency basis.

In our view, allowing such an adjustment would not undermine the integrity of the pay ratio information. Nor do we believe that, from the perspective of investors, such an adjustment would result in a less accurate portrayal of a registrant’s overall compensation practices. We note that neither Section 953(b) nor the proposed rules require registrants to provide an analysis of their workforce demographics or specific compensation practices. Any potential concern that a full-time equivalency adjustment may distort investors’ understanding of these items could be

²⁶ Similarly, as addressed in our response to Question 24, we believe that any registrant that uses a full-time equivalent adjustment as part of its methodology for identifying the median employee, or any other permitted adjustment, should disclose this fact as part of its required methodology disclosure,

mitigated by simply requiring any registrant that uses a full-time equivalent adjustment, as an element of its methodology for identifying the median employee, to disclose this fact as part of its required methodology disclosure, and to accompany this disclosure with an approximation of its number of full-time employees, part-time employees, and/or temporary and seasonal workers.

Consistent with our response to Question 23, we recommend that the Commission not require registrants to state the effect of making full-time equivalency adjustments for its part-time employees and temporary or seasonal workers, or to determine whether any such adjustments have had a material effect on the pay ratio information. Once again, to impose such a requirement would force registrants to perform the calculation both with and without the adjustments, thereby increasing the costs and burden of compliance.

We also note that permitting such an adjustment should allay concerns that, in response to Section 953(b), registrants that find their pay ratio information skewed as a result of a large number of part-time employees and/or temporary or seasonal workers will restructure their hiring or compensation practices to reduce or eliminate the impact of such employees and workers as of the required calculation date(s). Allowing for full-time equivalency adjustments would eliminate the potential differences in treatment among specified categories of employees (and other workers, if included), and decrease the potentially disparate impact on registrants attributable to workforce demographics.

Question 24 (continued): . . . Should we allow cost-of-living adjustments for non-U.S. employees as recommended by some commenters? If so in either case, please explain why. In particular, please address the potential concern that these kinds of adjustments could cause the ratio to be a less accurate reflection of actual workforce compensation. Is there an alternative way to mitigate this concern?

We believe that the Commission should not allow registrants to make cost-of-living adjustments for non-U.S.-based employees (should the agency determine to include them), other than the annualization and full-time equivalent adjustments discussed above in our responses to Questions 23 and 24. We believe the total compensation of such full-time employees is more directly comparable to the total compensation of a registrant's principal executive officer without a cost-of-living adjustment than with it.

VIII. Identifying the Median

Question 25: Should registrants be permitted, as proposed, to choose a method to identify the median that is workable for the company based on its particular facts and circumstances? Will registrants be able to use the proposed approach to identify the median? Do registrants need additional guidance or instructions to be able to use the proposed approach to identify the median? If so, what additional guidance is needed?

We support the Commission's proposal to permit registrants to select a methodology to identify the median employee based on a registrant's particular facts and circumstances.

Moreover, we appreciate the Commission's sensitivity to the potential compliance costs and burdens the pay ratio disclosure requirement would impose. We believe that most registrants will be able to utilize the flexibility reflected in the proposed rules to identify their median employee in the manner which they determine to be the most efficient and cost-effective for them. It is important to note, however, that while this flexibility will undoubtedly reduce compliance costs in comparison to other approaches the Commission could have taken, registrants nevertheless will incur significant, and, in some cases, excessive, costs and administrative burdens to comply with the disclosure requirements. As has been previously noted, most of these costs and burdens are expected to arise in the collection and analysis of the data necessary to identify the median employee – particularly if non-U.S. employees, part-time employees and temporary or seasonal workers are included. Accordingly, we encourage the Commission to provide as much flexibility in this area as possible consistent with its obligation to implement Section 953(b).

With respect to its question on the need for additional guidance, we believe the Commission should avoid providing guidance beyond further enhancing the flexibility already provided in the Proposing Release and reflected in the proposed rules. We anticipate that the myriad of different corporate profiles and structures will result in registrants employing a wide variety of methodologies to identify the median employee, as they seek to develop an approach that best fits their particular facts and circumstances and reduces the costs of compliance. We are concerned that more detailed guidance by the Commission regarding specific methodologies or approaches may inadvertently (and unnecessarily) constrain flexibility and creativity as registrants with significantly different characteristics endeavor to identify, enhance, and refine a methodology that best balances the disclosure mandate and costs of compliance. We believe that the final rules should make clear that, as long as a registrant is consistently applying (and disclosing, as the Commission has proposed) the methodology that it has developed for identifying the median employee, and this methodology uses reasonable assumptions, adjustments, and estimates selected in good faith, the registrant should be deemed to comply with the median employee identification requirement of Section 953(b). Again, we concur in the Commission's judgment that full and fair disclosure of the foregoing in accordance with proposed Item 402(u) is appropriate.

Question 26: Do registrants need further guidance on the permitted use of reasonable estimates in identifying the median? If so, what should that guidance be? In the alternative, should the proposed requirement expressly disallow the use of reasonable estimates? Please explain how the usefulness of the pay ratio disclosure would be affected by the use of reasonable estimates. Should the rule specify requirements for statistical sampling or any other estimation methods, such as appropriate sample sizes for reasonable estimates or requiring the results to meet specified confidence levels? Why or why not? If so, what should the requirements be? For example, should the estimate have at least a 90% (or 85%, or some other percentage) confidence level?

Consistent our response to Question 25, we believe that, at this time, registrants do not need further guidance on the permitted use of reasonable estimates in identifying the median

employee, nor should the Commission provide any such additional guidance. The principles-based disclosure framework the Commission has proposed, coupled with the generally applicable antifraud provisions of the federal securities laws and Exchange Act Rule 12b-20 or Securities Act Rule 408(a) (as applicable), will suffice to deter the use of unreasonable estimates and assumptions. Accordingly, the final rules should permit, rather than prohibit, the use of reasonable estimates.

In our view, the use of reasonable estimates is necessary for registrants to mitigate the potential for excessive compliance costs and other burdens likely to be incurred in connection with identifying the median employee. Moreover, we believe that, the usefulness of the pay ratio information would not be impacted materially by allowing registrants to use reasonable estimates for two reasons. First, it is implicit that, to make a reasonable estimate a registrant must make the estimate in good faith and with a reasonable basis. In our view, this means that registrants are required to ensure the estimate or estimates used are reasonably likely to provide a realistic, if approximate, picture of the median employee. Second, the proposed rules require registrants to disclose the fundamental assumptions applied in arriving at a reasonable estimate.²⁷ The duty to make public disclosure of the assumptions used to formulate a reasonable estimate, as well as the estimate itself, along with the potential liability for failure to comply, will constitute a sufficient safeguard against the misuse of reasonable estimates.

We believe that, at this time, the Commission should not specify requirements for statistical sampling or any other estimation methods, such as appropriate sample sizes or confidence levels, as we are concerned that any such requirements will unduly constrain registrants from developing a methodology for identifying the median employee that best suits their individual facts and circumstances. Any such requirements would be inconsistent with the flexibility that the Commission has recognized as essential for compliance at reasonable cost with the new rules, and impose a heavy burden on the Commission itself to re-calibrate its rules as the science of statistics evolves over time. Given the observations of some investors indicating that they are unlikely to view the ratio disclosure information as material,²⁸ we believe that imposing additional prescriptive requirements would not provide a more precise pay ratio number or otherwise benefit investors.

Question 28: Should registrants be permitted, as proposed, to identify the median employee using a consistently applied compensation measure? Why or why not? How would this impact compliance costs? Would this address costs arising from having employees in multiple jurisdictions and payroll systems? Should there be any limitations on the types of compensation measures that can be used? What

²⁷ See Instruction 2(iv) to proposed Item 402(u): “Registrants must briefly disclose and consistently apply any methodology used to identify the median and any material assumptions, adjustments or estimates used to identify the median or to determine total compensation or any elements of total compensation, and registrants must clearly identify any estimated amount as such.”

²⁸ See, for example, the comment letter submitted to the Commission by British Columbia Investment Management Corporation (Dec. 2, 2013).

compensation measure would registrants likely use for this purpose? How would that measure compare to total compensation calculated under Item 402(c)(2)(x)? How would the use of that measure affect the median (e.g., would it be likely to generate a median that is a reasonable approximation of the median of Item 402(c)(2)(x) total compensation)? What impact, if any, would the use of a consistently applied compensation measure have on the usefulness of the pay ratio disclosure? How could the proposed rules be changed to address any such impact? Are there any circumstances where it would be inappropriate to permit a registrant to use a consistently applied compensation measure to identify the median employee?

We agree with the Commission's decision, in recognition of the wide range of corporate profiles and structures and the potential burdens of the required disclosure, to propose a flexible approach to identification of the median employee that is not limited by, or wedded to, Item 402(c)(2)(x). We believe that registrants should be permitted to use any reasonable compensation measure that fits their organizational structure, which will vary from registrant to registrant, for purposes of identifying the median employee. Specifically, a registrant should be permitted to identify the median employee using a compensation measure that is internally consistent with the registrant's individual facts and circumstances, rather than a measure (such as total executive compensation as calculated for purposes of Item 402(c)(2)(x)) that is intended to produce disclosure that is consistent across registrants. In our view, it is also important to note that "internally consistent" as applied to a registrant should not mean internally identical; rather, it should mean a measure based on the registrant's individual organizational structure that is reasonably designed to identify the median employee. For example, where a registrant selects "taxable wages" as a compensation measure, it is possible that this measure may be defined differently across multiple jurisdictions and be calculated over differing time periods. Further, "taxable wages" may vary to such a degree from jurisdiction to jurisdiction that the registrant may need to capture the relevant information on the basis of how it is recorded, stored, and transmitted in different payroll systems. In some jurisdictions, this information may be stored and reported on a specific tax-oriented form or report (such as a Form W-2 in the case of U.S.-based employees), while in other jurisdictions the information may be stored only on the registrant's internal database (such as a payroll system).

Although we agree with the Commission that, where a compensation measure such as "taxable wages" is selected a registrant should endeavor to use the non-United States equivalent to a Form W-2 for purposes of conducting its analysis, we believe that the final rules should provide sufficient flexibility to permit the use of other reasonable data sources for collecting the comparable information relating to non-U.S. employees. In addition, while it may be reasonable to limit registrants to using the same "internally consistent" measure within each jurisdiction in which they have employees to avoid possible manipulation, we believe that the Commission's flexible approach should be construed as sufficiently broad to encompass different approaches across jurisdictions as long as such measures are consistently applied within each subject jurisdiction.

As a practical matter, we believe that it is unlikely that most registrants would be able to use the formulation of compensation calculated under Item 402(c)(2)(x) – a measure used to determine the total compensation of named executive officers -- for purposes of identifying the median employee. As has previously been pointed out, “[b]y design, Item 402 captures all of the various compensation components received by a named executive officer, excluding certain limited items like benefits under non-discriminatory plans (*e.g.*, healthcare) and perquisites and personal benefits that aggregate less than \$10,000. . . . Applied to an average worker, however, these rules will work in the opposite direction. By excluding certain benefit plans and perquisites (*e.g.*, employee discounts, transportation/parking benefits, education assistance) that do not exceed the \$10,000 threshold, the rules would understate the average employee’s real total compensation.”²⁹ We agree with this observation. In our view, for many registrants calculating Item 402(c)(2)(x) compensation for each employee would be unduly burdensome and time-intensive, if even theoretically possible. Thus, the availability of a reporting principle permitting the identification of the median employee using a consistently applied compensation measure is essential to registrant’s ability to comply with proposed Item 402(u) at a reasonable cost.

The Commission has noted that, given the approach reflected in the proposed rules, the required pay ratio disclosures will not be comparable from registrant to registrant in most instances. Nonetheless, a registrant’s specific, internally consistent approach, even if not internally identical, should permit registrants to calculate a relatively comparable pay ratio from year to year. In our view, this is the extent to which investors will be able to use the pay ratio information on a year-over-year basis (assuming for discussion purposes, without necessarily conceding, that such information may be useful to some investors).

Question 29: Should we, as proposed, permit registrants to use the time period that is used for payroll or tax recordkeeping when identifying the median employee based on consistently applied compensation measures, whether or not the time periods correspond with the last completed fiscal year or the tax year? Why or why not? . . .

We believe that registrants should be permitted to use the time period or periods otherwise used for payroll or tax recordkeeping when identifying the median employee, regardless of whether the time period corresponds with the last completed fiscal year or tax year. In our view, the final rules should extend the Commission’s flexible approach to allow for the use of a period and form of recordkeeping as appropriate, including using separate tax and accounting periods or forms of recordkeeping in different jurisdictions. Providing such flexibility to registrants will likely reduce compliance costs to a significant degree, because compensation information may be more readily available for time periods corresponding with payroll or tax recordkeeping. For example, if a registrant determines that such a method is appropriate, it could simply reference its employees’ Forms W-2 (or equivalent) in the process of identifying the median employee. In addition, we believe that permitting such flexibility will decrease costs for registrants by eliminating the need to establish a separate system for identifying the median employee. In the situation where the individual identified as the median

²⁹ See the comment letter submitted to the Commission by the Retail Industry Leaders Association (Oct. 1, 2013).

employee is no longer an employee at the end of the fiscal year (which is relevant for determining the total annual compensation of the median employee, as discussed below), under a flexible approach, a registrant may be able efficiently to identify an different median employee without the need to expend substantial additional time and resources.

Question 29 (continued): . . . Are there any parameters that should be set, such as requiring the period to end within a designated amount of time before the filing of the proxy or information statement relating to the annual meeting of shareholders or written consents in lieu of such meeting or annual report, as applicable, in which updated pay ratio information is required (such as 3 months, 6 months, 9 months or 12 months) or, alternatively, a period ending no more than 9 months (or 12 months or another amount of time) following the last annual meeting of shareholders? Should such flexibility only be permitted where the registrant's fiscal year-end is different from calendar year-end? Are we correct that this accommodation would decrease costs for registrants? . . .

We also believe that, for purposes of identifying the median employee, the time periods used should be limited to any time within a registrant's last completed fiscal year. In our view, such a limitation would offer registrants sufficient flexibility while, at the same time, remaining consistent with the time frame contemplated by Section 953(b) for calculating annual total compensation. We believe that a more stringent parameter is not necessary. Further, we recommend that the Commission not adopt an approach that permits flexibility only where a registrant's fiscal year-end differs from calendar year-end. In our experience, payroll and tax recordkeeping time periods vary across jurisdictions. Consequently, it is entirely possible that a registrant with a fiscal year-end that coincides with the calendar year could have different or, more likely, multiple payroll and/or tax recordkeeping time periods. Restricting such registrants from using such payroll and/or tax recordkeeping time periods to identify the median employee promotes no obvious informational benefit, and would make data collection significantly more difficult for registrants with employees in multiple jurisdictions.

Question 29 (continued): . . . Would the use of different time periods for different employees have an adverse impact on the disclosure? Would such flexibility meaningfully reduce the comparability of the median of the annual total compensation of all employees to the annual total compensation of the PEO, or otherwise impair the potential usefulness to investors of the pay ratio disclosure?

We believe that the use of different time periods for different employees when collecting and analyzing the data necessary to identify the median employee will not materially impact the quality or reliability of that data (or the required disclosure based on such data), and will further help to reduce compliance costs. Generally, as long as a registrant uses a reasonable approach in devising its methodology and provides the requisite disclosure, any timeframe during the last completed fiscal year that is "reasonably" contemporaneous with the last completed fiscal year, should yield useful information for purposes of identifying the median employee.

As noted elsewhere in this letter, we believe that the Commission's proposal to define "annual total compensation" to mean total compensation for the last completed fiscal year is reasonable and appropriate. Inasmuch as the required disclosure is intended to compare the annual total compensation of the median employee with the annual total compensation of a registrant's principal executive officer during the last completed fiscal year, we believe that, as long as the time period for identifying the median employee is reasonably contemporaneous with the last completed fiscal year, such an approach would not materially impact the integrity of the pay ratio information. In our view, the obligation to disclose the parameters of the methodology should suffice to deter manipulation.

Question 30: Could the flexibility of the proposed requirements allow a registrant to distort its pay ratio in material respects? If so, explain how.

We do not believe that the flexibility contemplated by the proposed rules would necessarily allow a registrant to distort its pay ratio information in any material respect. This flexibility is reasonably circumscribed by the requirement for the registrant to provide a narrative explanation of its methodology along with the pay ratio information, and we expect that this explanation will provide investors and the Commission with the necessary information to evaluate the quality of a registrant's pay ratio disclosure both on an absolute and relative basis, while serving to diminish any temptation to distort the disclosure in any material respect. Moreover, these requirements will be imposed against an existing backdrop of the antifraud provisions of the federal securities laws and the Commission's rules regarding the establishment and ongoing evaluation of disclosure controls and procedures.

Question 31: Is our belief correct that allowing flexibility in identifying the median could minimize the potential anti-competitive impact of the costs of compliance? Would the proposed flexibility address other impacts on competition that could arise from the proposed requirements? Could a registrant's competitors infer proprietary or sensitive information about a company's business operations, strategy or labor cost-structure from the disclosure of the median of the annual total compensation of all employees? If so, how can this impact be addressed?

We agree with the Commission's statement in the Proposing Release that "Section 953(b) does not expressly set forth a methodology that must be used to identify the median, nor does it mandate that the Commission must do so in its rules."³⁰ Accordingly, we applaud the Commission's efforts to reduce the compliance costs and burdens on registrants through permitting the use of various flexible approaches to identify the median employee. We believe that, compared to the more onerous requirements the Commission could have proposed, the agency has made a sincere and reasonable effort to minimize the anti-competitive impact of compliance with the statutory provision.

In our view, allowing significant flexibility in complying with the disclosure requirement set forth in proposed Item 402(u) – in particular, the identification of the median employee – is a

³⁰ See the Proposing Release, at Section II.C.3.

reasonable and, perhaps, the only way to strike a meaningful balance between the compliance burdens to registrants and the informational benefits to investors (if any) stemming from Section 953(b). While, as noted previously in this letter, such flexibility cannot eliminate all or, for many registrants, even a significant portion of the compliance costs and burdens, the Commission's proposed approach should mitigate, to some extent, at least some of the potential negative effects on competition arising from the mandated requirements.

As noted, however, the diminished anti-competitive impact and compliance costs attendant to the flexible approach the Commission has proposed is simply a reflection of the compliance approach selected by the Commission, by comparison with alternative, more onerous approaches that could have been chosen to implement Section 953(b). These anticipated cost reductions do not negate the reality that, for virtually every registrant, Section 953(b) and, correspondingly, proposed Item 402(u), will impose significant costs while providing, at best, minimal informational benefits to most investors. Thus, the final rules likely will put publicly-traded United States registrants at some competitive disadvantage compared to privately-held domestic and foreign companies, as well as those foreign competitors able to file periodic reports with the Commission under Exchange Act rules applicable to foreign private issuers. That said, we acknowledge that Congress has made its own cost-benefit determinations as reflected in the plain language of Section 953(b), and believe that the Commission has appropriately proposed the most flexible disclosure rules possible consistent with its obligation to implement the statute.

Question 32: Are there alternative ways to satisfy the statutory mandate? Please be specific.

We believe the Commission could satisfy the statutory mandate to identify the median employee by providing that registrants may identify this employee periodically (for example, once every three years) rather than annually, but calculate annual total compensation for this employee each year. Under this approach, a registrant would identify its median employee for a specific year (Year One) and then be permitted to use an employee who is similarly-situated to the employee identified in Year One as its median employee in the following two years for purposes of determining the median of the annual total compensation of all its employees (except its principal executive officer) to be used in calculating the required pay ratio. For example, if the median employee identified in Year One is in a particular pay band or holds a particular position (such as an hourly employee working at a particular manufacturing plant), the registrant would be permitted to identify its median employee in each of the following two years from among those employees in that pay band or holding that particular position. To remain consistent with the statutory mandate, the Commission could require a registrant to re-identify the median employee for any given year where it has experienced a material change in its employee population which could reasonably result in a material change in the pay ratio disclosure.

With respect to the calculation of total compensation for the median employee under this approach, we believe the Commission could also satisfy the statutory mandate by allowing registrants the flexibility to calculate total compensation for the identified median employee on either an annual basis (as is now proposed) or, alternatively, only when a registrant would be

required to re-identify the median employee, whether at the end of the permitted period or more frequently as the result of a material change in the registrant's employee population as described in the previous paragraph. Also relevant in this regard, obviously, would be a material change in the total annual compensation (whether a single number or a range) associated with the median employee. As is true with respect to our suggestion regarding identification of the median employee, our suggestion on total annual compensation assumes no material change. If there is such a change, the total annual compensation figure would have to be re-calculated.

We believe that this alternative is worth considering, inasmuch as it satisfies the statutory mandate of annual disclosure of pay ratio information by registrants while, at the same time, further mitigating the costs of collecting the data necessary to identify the median employee when there have not been any significant changes between years in the size and composition of a registrant's workforce. The requisite diligence would have to be performed annually to determine whether there has been any material change, either with respect to the median employee or that employee's total annual compensation.

IX. Determination of Total Compensation

Question 33: Are there other alternatives to calculating total compensation in accordance with Item 402(c)(2)(x) that would be consistent with Section 953(b)?

When calculating the total compensation of the median employee and the principal executive officer, we agree that registrants should be permitted, but not required, to include the value of benefits received under non-discriminatory plans and the value of perquisites and other personal benefits that total less than \$10,000. As the Commission observed, this accommodation is consistent with Section 953(b) because Item 402(c)(2)(x) of Regulation S-K merely permits, and does not require, the exclusion of such items when calculating total compensation for named executive officers. Given the importance of such benefits to some employees, the mandatory exclusion of these pay elements from the median employee's compensation may render the pay ratio information less meaningful and perhaps even harm employee morale. If applicable, we agree that it is appropriate for a registrant to explain the difference between the total compensation of the principal executive officer presented and used in the pay ratio calculation and the total compensation of the principal executive officer reported in the Summary Compensation Table.

We also agree with the suggestion made by the National Association of Corporate Directors,³¹ which recommended that registrants be permitted, but not required, to supply a supplemental pay ratio that compares the compensation of the median employee to the

³¹ See the comment letter to the Commission submitted by the National Association of Corporate Directors (Dec. 1, 2013). We recognize that, to address the discrepancy in how Item 402 of Regulation S-K would operate to capture the total compensation of a named executive officer and an average employee, the NACD has recommended that registrants be permitted, but not required, to provide two additional ratios in note form: the ratio of CEO Form W-2 "take-home" pay to median employee Form W-2 "take-home" pay, and the ratio of CEO total pay to median employee pay, adding back items excluded under Item 402 for both. Our endorsement of the former recommendation is not intended to suggest any objection to the latter recommendation.

compensation of the principal executive officer using solely Form W-2 wages, tips, and other compensation. This accommodation would allow a registrant to provide additional information to investors in the event that the registrant believes that the calculation of the pay ratio information using the total compensation of the principal executive officer, as determined in accordance with Item 402(c)(2)(x), distorts the pay ratio disclosure (for example, as a result of equity inducement awards made to the principal executive officer during the last completed fiscal year) and, thereby, limits its utility.

Question 34: Should the requirements provide instructions or should we provide additional guidance about how to apply the definition of total compensation under Item 402(c)(2)(x) (or any particular elements of total compensation under Item 402(c)(2)) to employees that are not executive officers? If so, what specific instructions or guidance would be useful to registrants? Please also address whether specific instructions or guidance would limit flexibility and thereby raise costs for registrants.

We agree with the Commission's flexible, non-prescriptive approach regarding the valuation of particular types of employee compensation, and reiterate our response to Question 33. Further, we support the clear guidance provided by the Commission regarding registrants' ability to exclude government-mandated pension plans from the calculation of the aggregate change in actuarial value of defined benefits plans.

Question 35: Do registrants need further guidance on the permitted use of reasonable estimates in determining total compensation (or specific elements of total compensation) for employees other than the PEO in accordance with Item 402(c)(2)(x)? If so, what should that guidance entail? Would the use of reasonable estimates ever be inappropriate? Please also address whether specific instructions or guidance would limit flexibility and thereby raise costs for registrants.

We strongly support the Commission's flexible approach as reflected in Instruction 2(i) to proposed Item 402(u). The variance in compensation arrangements among registrants, and the evolving nature of compensation practices, would make it difficult for the Commission to provide interpretive guidance regarding the valuation of particular types of arrangements and the types of estimates that would be reasonable to employ when conducting such valuations. Further, we believe that providing more specific instructions regarding the use of reasonable estimates would constrain registrants in preparing the required disclosure and, necessarily, increase the costs of compliance. The Proposing Release makes clear that, in using an estimate for annual total compensation (or for a particular element of total compensation), a registrant should have "a reasonable basis to conclude that the estimate approximates the actual amount of compensation under Item 402(c)(2)(x) (or for a particular element of compensation under Item 402(c)(2)(iv) – (ix))."³² Given the experience that most registrants have with preparing the

³² See the Proposing Release, at Section II.C.4. We further note that Instruction 2(iv) to proposed Item 402(u) requires registrants to provide brief disclosure of any material estimates used to identify the median or to determine total compensation or any elements of total compensation, as well as to identify clearly any estimated amount.

disclosure required by Item 402 of Regulation S-K, we believe that this standard is sufficient to enable registrants to calculate a reasonable total annual compensation figure for employees.

In our view, the disclosure obligation imposed by proposed Instruction 2(iv) (which is described in more detail in note 32 of this letter) regarding material estimates should suffice to deter a registrant's use of unreasonable and/or bad-faith estimates. Situations where a registrant uses an estimate or estimates that are not reasonable, should they arise, are better addressed by the Commission and/or its staff on a case-by-case basis, as the agency gains experience in administering Item 402(u)'s disclosure requirements.

Question 36: Instead of allowing the use of reasonable estimates in determining total compensation (or any elements of total compensation) as described in this proposal, should the rules prohibit the use of reasonable estimates for that purpose? If so, why? Please include an explanation of how the potential usefulness of the pay ratio disclosure would be affected by a registrant's use of reasonable estimates in this context. Are there alternative ways to address this impact, such as requiring an explanation describing the use of estimates, rather than prohibiting the use of estimates?

We believe that the final rules should allow the use of reasonable estimates in determining total compensation (or specific elements of total compensation). Without the use of estimates, compliance with the rules may be difficult, if not impossible, for some registrants. For other registrants, the cost of compliance would increase, to the potential detriment of both the registrant itself and its shareholders (to the extent such costs affect the value of the registrant's stock or otherwise are passed through to investors). Further, because we believe that the impact of a reasonable estimate on the accuracy of the pay ratio information would be minimal (assuming the required disclosures of the inherent limitations of any estimate, however reasonable, are made), prohibiting the use of reasonable estimates is unlikely to result in improved disclosures while at the same time increasing the attendant costs for many, if not most, registrants.

X. Disclosure of Methodology, Assumptions and Estimates

Question 38: Should we require registrants to disclose information about the methodology and material assumptions, adjustments or estimates used in identifying the median or calculating annual total compensation for employees, as proposed? Why or why not? Would this information assist investors in understanding the pay ratio? Are there changes we could make to the requirement to avoid boilerplate disclosure? . . .

We support the Commission's proposal to require registrants to briefly disclose information about the methodology and material assumptions, adjustments, or estimates used in identifying the median employee or calculating annual total compensation for employees. Given that registrants would have flexibility both to select the methodology to be used in identifying the median employee, and to use reasonable estimates in calculating annual total compensation

for non-principal executive officer employees, we recognize that differences in pay ratios among registrants would necessarily be impacted by differences in methodologies or estimates, as well as differences in the registrants' individual facts and circumstances. We believe that investors would benefit from receiving information about the methodology and material assumptions, adjustments, or estimates on which the pay ratio disclosure is based and that registrants would be willing to provide this additional information to enable investors to assess the context of that disclosure and the utility of the pay ratio information to an investment or voting decision. Specifically, we believe that accompanying the pay ratio disclosure with this additional information could help investors better understand the lack of precise comparability of the pay ratio information among registrants and, thereby, reduce the risk of overreliance on the pay ratio information in making an investment or voting decision.

Although we do not believe further guidance on the use of methodologies, including the use of estimates, assumptions and adjustments, is necessary or appropriate for the reasons discussed above, we suggest that the Commission clarify the nature of the information that it expects registrants to disclose, without imposing restrictions on registrants' choice of methodologies (beyond reasonableness and good faith). For example, we note that, in the Proposing Release, the Commission indicates that when statistical sampling is used, registrants should disclose the size of both the sample and the estimated whole population, any material assumptions used in determining the sample size, which sampling method or methods were used, and, if applicable, how the sampling method deals with separate payrolls such as geographically separated employee populations or other issues arising from multiple business or geographic segments.³³ While there undoubtedly will be situations where the provision of such information will be appropriate, we question whether literal compliance with this guidance by every registrant will unnecessarily obfuscate a meaningful understanding of its methodology. If anything, we believe that compliance with this requirement may lead to the type of technical discussion which the Commission has chosen not to require.

We also note that some registrants may find that they do not need to use material assumptions, adjustments, or estimates to identify the median employee or to calculate annual total compensation for employees. The instructions to proposed Item 402(u) are unclear, however, as to whether any such registrant would be required to make a statement in the negative (that is, that it did not use material assumptions, adjustments, or estimates in the course of prepared the required disclosure). We believe that requiring such a statement would be problematic, as it would require verifying a negative statement without otherwise providing useful information to investors. In such circumstances, a registrant's compliance with the requirement to disclose its methodology should be sufficient.

Accordingly, while we agree with the Commission's proposal to require registrants to briefly disclose information about the methodology and material assumptions, adjustments, or estimates used in identifying the median employee or calculating annual total compensation for employees, we believe that the agency should clarify the instructions to the proposed rules to state expressly that disclosure of material assumptions, adjustments, or estimate is required only

³³ See the Proposing Release, at Section II.C.5.

if the registrant used any such material assumptions, adjustments, or estimates in identifying the median or calculating annual total compensation for employees.

Question 38 (continued): . . . Should we require a more technical discussion, such as requiring the disclosure of statistical formulas, confidence levels or the steps used in the data analysis?

If the Commission ultimately decides to require registrants to briefly disclose information about the methodology and material assumptions, adjustments, or estimates used in identifying the median employee or calculating annual total compensation for employees – which we fully support -- we also support the agency’s proposal that the instructions to clarify that it is not necessary to provide technical analyses or formulas as part of the required disclosure. In the first instance, Section 953(b)’s silence on this issue implies that lengthy, technical explanatory disclosures are neither necessary nor appropriate as part of the mandated pay ratio disclosure.

We share the Commission’s concern that such disclosure could become dense and overly technical. It should be enough, as the Commission stated in the Proposing Release, to leave it to issuers to decide how best to “provide sufficient information for a reader to be able to evaluate the appropriateness of the estimates.”³⁴ To prescribe a technical discussion that goes beyond the parameters articulated by the Commission would likely result in lengthy, opaque disclosure that not only would be confusing to investors, but also could distract them from considering other information that could be material to an investment or voting decision. At its worth, requiring technical disclosure could discourage investors from reviewing or reading the disclosure altogether, contrary to Congress’s apparent objective. Adding a technical disclosure duty inevitably would increase the length and complexity of executive compensation disclosures – thereby increasing registrants’ compliance costs due to the difficulties inherent in presenting complex technical data -- without providing useful information to investors. In short, we think that the Commission has struck the correct balance here.

Question 39: Should we require disclosure when a registrant changes its methodology (or material assumptions, adjustments or estimates) from previous periods, where such change has a material effect, as proposed? . . .

For the same reasons that we support the Commission’s proposal to require registrants to briefly disclose information about the methodology and material assumptions, adjustments, or estimates used in identifying the median employee, and/or in calculating annual total compensation for that employee, we likewise support the proposed requirement that, if a registrant changes its methodology or material assumptions, estimates, or adjustments from those used in calculating the previous fiscal year’s pay ratio disclosure, the registrant must include a brief description of this change if its effect is material.

³⁴ See the Proposing Release, at Section II.C.5.

Question 39 (continued): . . . Should registrants be required to describe the reasons for the change, as proposed? . . .

Consistent with our prior response to this Question 39, we support the Commission's proposal to require a covered registrant to describe the reasons for a material change to its methodology (or material assumptions, adjustments, or estimates). In our view, this requirement (if adopted) would deter potential manipulation of the methodology solely to produce a more "favorable" pay ratio. We believe that this requirement should be limited, however, to material changes to a registrant's methodology or to material assumptions, adjustments, or estimates. In our view, a minor, immaterial change should not trigger a disclosure obligation as it is unlikely to produce meaningful information for investors.

Question 39 (continued): . . . Should registrants be required to provide an estimate of the impact of the change on the median and the ratio, as proposed? . . .

Assuming that the Commission adopts its proposal to require registrants to describe the reasons for any material change to its methodology or to any material assumptions, adjustments, or estimates on the determination of the median employee and the pay ratio disclosure, we do not believe that registrants should be required to provide an estimate of the impact of any such change to their methodology (or material assumptions, adjustments, or estimates). In our view, such a requirement would unnecessarily increase the compliance costs and burdens of registrants without providing useful information to investors. Inevitably, such a requirement likely would compel registrants to calculate the median employee and prepare the requisite pay ratio disclosure under both its prior methodology (and material assumptions, adjustments, or estimates) and its new methodology (and material assumptions, adjustments, or estimates) to provide any meaningful explanation of how the change affected the median and the ratio. Without undertaking such work, the estimate of the impact of the change would be inherently uncertain and unreliable. We are also concerned that disclosing an estimate of the impact of the change also could be confusing to investors and detract from the quality of the pay ratio information. .

Question 39 (continued): . . . Is the proposed information useful? Is there other information that should be required?

We believe that the proposed disclosure about methodology, assumptions, adjustments, and estimates is appropriate although, as noted previously, we have strong reservations about the usefulness of the pay ratio disclosure itself. We expect that, at least in the initial years of compliance, registrants will provide sufficient disclosure about how they generated their pay ratio information, both to familiarize investors with their methodology and to put the required disclosure into context. Thus, pending a review of the actual disclosure practices that develop with respect to the pay ratio information, we do not believe any other information should be required.

Question 40: Should we require registrants to disclose additional narrative information about the pay ratio or its components, or factors that give context for

the median, such as employment policies, use of part-time workers, use of seasonal workers, outsourcing and off-shoring strategies? If so, what additional information should be required? Please be specific as to how this information would assist investors in understanding the pay ratio or in using the pay ratio disclosure. Please also be specific about the costs of providing such disclosure. How could such a requirement be designed to avoid boilerplate disclosure? Would such a requirement raise competition concerns?

For the reasons set forth in our responses to Questions 38 and 39, we support the Commission's proposed explanatory disclosure standard, and believe that a requirement to disclose additional narrative information about the pay ratio or its components, or factors that give context to the registrant's determination of the median employee, are not necessary or appropriate at this time. As we have noted, we expect that, at least in the initial years of compliance, registrants will provide sufficient disclosure about how they generated their pay ratio information both to familiarize investors with their methodology and to put the required disclosure into context. Consequently, we recommend that the Commission allow disclosure practices with respect to such additional narrative information to develop on their own before assessing whether the required disclosure is adequate and/or additional information should be made available to investors.

Question 41: Should we require registrants to disclose additional metrics about the total compensation of all employees (or of the statistical sample if one is used), such as the mean and the standard deviation, as a supplement to the required disclosure? Would additional metrics be useful to investors? We assume that these metrics could be provided without additional cost or at a low cost once the median has been identified. Is this assumption correct? If not, please identify the costs and benefits of such additional disclosure. Would such a requirement raise competition concerns?

The Commission should not require registrants to disclose additional metrics about total compensation of employees (or of statistical samples if one is used), such as mean and standard deviation. We believe that such additional disclosure would make the already mandated disclosure dense and excessively technical. Over the years, executive compensation disclosure has become increasingly lengthy and complicated, just as investors increasingly are finding this information difficult to digest. More technical information, such as standard deviation and mean, may only further confuse investors while substantially raising costs for registrants in connection with the careful review and verification (both internally and externally) attendant to public disclosure. We do not believe such additional disclosure is justified as it provides limited potential benefits to investors, while possibly overburdening registrants.

Further, as discussed, the statutory language of Section 953(b) does not specifically require such additional disclosure. Accordingly, we believe that any such additional disclosure would exceed the scope of the information required by Section 953(b) without meaningfully serving investors' informational interests.

XI. Clarification of the Meaning of “Annual”

Question 42: For purposes of the disclosure of the median of the annual total compensation of employees and the pay ratio, should we, as proposed, require total compensation to be calculated for the last completed fiscal year, rather than some other annual period? Why or why not? How does this impact the ability of a registrant to compile the disclosure in time to include it in a proxy or information statement relating to an annual meeting of shareholders (or written consents in lieu of such meeting)?

We believe that the Commission’s proposal to define “annual total compensation” to mean total compensation for the last completed fiscal year is reasonable and appropriate, as it is clearly consistent with the time period used for purposes of the other disclosure requirements of Item 402. We agree with the commenter who suggested that this definition would reduce compliance costs and burdens in at least so far as the information required for the Summary Compensation Table would be used for purposes of the pay ratio disclosure as well.

As the Commission notes in the Proposing Release, we believe that it is entirely appropriate for the time period for the required disclosure to be the same as the time period used for the registrant’s other executive compensation disclosures. This approach should minimize or eliminate the potential for investor confusion. Additionally, since Section 953(b) specifically references Item 402, we believe that it is reasonable for the principal components of the required disclosure to conform to the time period specified in Item 402. Otherwise, registrants may be compelled to further explain in the narrative disclosure accompanying the pay ratio information the differences between the calculation of total annual compensation used for purposes of this disclosure and the amounts disclosed in their Summary Compensation Table and addressed in their Compensation Discussion and Analysis.

Finally, given the obvious complexity involved in collecting the data necessary to identify the median employee, we see no benefit to requiring that the pay ratio information be updated throughout the year. If anything, such a requirement would further exacerbate the disparity between the costs and benefits of the required disclosure.

XII. Timing of Disclosure

Question 43: Should we, as proposed, require the pay ratio disclosure to be updated no earlier than the filing of a registrant’s annual report on Form 10-K or, if later, the filing of a proxy or information statement for the registrant’s annual meeting of shareholders (or written consents in lieu of such a meeting), and in any event not later than 120 days after the end of its fiscal year? Are we correct that the proposed timing rule would not affect the potential usefulness of the pay ratio disclosure for investors? If not, how should the requirements be changed to address that impact? Are we correct that the proposed timing rule would help to keep costs down for registrants by providing certainty as to the timing for annual updates and by allowing registrants to compile the disclosure at the same time as other executive

compensation disclosure under Item 402? Are we correct that the proposed timing rule would help keep down costs for registrants that request effectiveness of registration statements after the end of the last fiscal year but before the filing of their annual proxy statement?

We anticipate that the pay ratio information will attract a high degree of attention, particularly in the initial years of compliance. We also expect that the collection of employee data and preparation of the required disclosure immediately following the end of the fiscal year, at a time when registrants are engrossed with the closing of their financial records and the preparation of their audited financial statements and other year-end regulatory and business-related filings, will be potentially time-consuming and burdensome. Under the circumstances, and given the problematic utility of the information to investors, we believe that all registrants should be given the same amount of time to prepare the required disclosure.

We recommend that the Commission permit all registrants to disclose the pay ratio information no later than 120 days after the end of their last completed fiscal year in an appropriate Exchange Act report; provided, however, that such information must be included or incorporated by reference in any proxy statement or information statement for the registrant's next annual meeting of shareholders (or written consents in lieu of a meeting) that involves the election of directors filed before 120 days after fiscal year end. In the case of a registrant that is not subject to Section 14 of the Exchange Act, we recommend that such a registrant be permitted to amend its annual report on Form 10-K no later than 120 days after the end of the fiscal year covered by the report to provide the pay ratio information or, alternatively, to provide the disclosure by filing a current report on Form 8-K no later than 120 days after the end of its last completed fiscal year.

As discussed more fully in Section XIV of this letter (specifically, our response to Question 54), we believe that this modification is necessary to ensure that registrants that are not subject to Section 14 of the Exchange Act or do not file a proxy statement or information statement in connection with their annual meeting of shareholders are not compelled to provide their pay ratio disclosure any earlier than registrants that are subject to Section 14 of the Exchange Act.

For purposes of illustration, we are providing revisions to Instruction 1 to proposed Item 402(u) to demonstrate how we believe that this result can be achieved (see [Exhibit A](#)).

Question 44: Is the proposed timing workable for registrants? Does it provide enough time after the end of the fiscal year for companies to identify the median of the total compensation of all employees for that year? We note that one commenter asserted that it could take registrants three months or more each year to calculate pay ratio disclosure, and, accordingly, that the disclosure would not be available in time to be included in the annual proxy statement or annual report. Would the ability to use reasonable estimates, consistently applied compensation measures, or statistical sampling be sufficient to alleviate this issue? For example, if a registrant is unable to calculate its employees' incentive compensation before such time, would it

be able to reasonably estimate such compensation? Instead, should the proposed rules provide an accommodation for a company that cannot compile compensation information in time to be included in its proxy statement for the annual meeting of shareholders or Form 10-K, as applicable? For example, should registrants be permitted to delay the pay ratio disclosure until it is calculable and then file the disclosure under Item 5.02(f) of Form 8-K? If so, under what circumstances should registrants be permitted to do so? Or, if we were to allow for such a delay, should we specify when the disclosure should be required to be made? If so, what deadline should we impose? Would such a delay impact the usefulness to investors of the disclosure, particularly if the disclosure would not be available in time for inclusion in proxy or information statements for the annual meeting of shareholders?

While we recognize that there may be situations where an individual registrant may encounter difficulties in meeting any short-term deadline for collecting the data necessary to identify the median employee and prepare the required disclosure, we believe that, on balance, and assuming that the final rules permit registrants to use reasonable estimates, statistical sampling, and/or consistently applied compensation measures to identify the median employee, all registrants should be permitted to disclose the pay ratio information no later than 120 days after the end of their last completed fiscal year in an appropriate Exchange Act report. While all registrants would clearly benefit from having additional time to collect the data necessary to identify the median employee and prepare the required disclosure, we believe that any further delay beyond the requested 120-day period would simply further diminish any theoretical utility of such information to investors.

In the case where a registrant encounters difficulties in meeting the specified deadline for making the required disclosure (due, in material part, to an inability to collect and analyze the data necessary to identify the median employee without unreasonable effort or expense), we recommend that the final rules provide sufficient flexibility to omit the required disclosure from the filing requiring Item 402 disclosure and, instead, provide the information in a current report on Form 8-K as soon as reasonably practicable. This flexibility could be contained in a new provision added to Item 5.02 of Form 8-K.³⁵

Question 45: Is the proposed instruction appropriate in instances where registrants are relying on Instruction 1 to Items 402(c)(2)(iii) and (iv) with respect to the salary or bonus of the PEO?

We believe that Instruction 4 to proposed Item 402(u) is the most practical way to address the situation where a registrant is relying on Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K to postpone the disclosure of the salary or bonus of its principal executive officer because either or both of such amounts are not calculable at the time that it is preparing

³⁵ Given what we believe to be the limited utility to investors of the information contained in the pay ratio disclosure, we also recommend that any such provision under Item 5.02 of Form 8-K also make clear that a failure to file a current report on a timely basis will not result in the loss of eligibility to file a short-form registration statement on Form S-3.

the executive compensation disclosure required by Item 402. Please see our response to Question 47 for our suggested clarifications to proposed Instruction 4.

Question 46: Instead of the proposed approach, should these registrants be required to calculate pay ratio disclosure using only the amounts of total compensation of the PEO that are available at the time of the filing, or in the alternative, make a reasonable estimate of the omitted total compensation amounts? Would such disclosure be useful or meaningful? In that case, should the registrant be required to update (by Form 8-K or otherwise) its pay ratio disclosure to reflect the PEO's recalculated total compensation?

We believe that it would be neither fair to registrants nor useful to investors to compel production of the required disclosure in situations where either the salary or bonus of a registrant's principal executive officer is not calculable at the time that the registrant is preparing its executive compensation disclosure. In our experience, this situation does not arise frequently and, even when it does, the information necessary to calculate the principal executive officer's salary or bonus becomes available within a relatively short amount of time thereafter. Consequently, we believe that requiring the use of an estimate for the missing compensation element, particularly within a framework that already contemplates a significant number of estimates and assumptions, would serve to further dilute any utility to investors of the required disclosure.

Question 47: Is the proposed instruction clear? If not, what changes should be made to clarify it?

We believe that Instruction 4 to proposed Item 402(u) can be clarified to make it easier to understand (see [Exhibit B](#)).

Question 48: Should we require any additional or supplemental disclosure when a registrant relies on the proposed instruction? If so, what would that disclosure entail? For example, should the proposed instruction require registrants to report the median annual total compensation of employees, even if the PEO total compensation and pay ratio are not available? Should registrants relying on the proposed instruction be required to disclose the pay ratio for the prior year in the Form 10-K or proxy or information statement?

For the reasons set forth in our response to Question 46, we believe that it is not necessary to require any additional or supplemental disclosure when a registrant relies on Instruction 4 to proposed Item 402(u).

XIII. Status as "Filed" Not "Furnished"

Question 50: Should the Section 953(b) information be filed rather than furnished? What weight should we give to the use of the word "filing" in the statute?

We recommend that the information required by Section 953(b) be treated as “furnished” rather than “filed” for purposes of the Securities Act and Exchange Act and, therefore, protected from potential liability exposure under certain provisions of those statutes. We understand that the proposal to treat the information as “filed” is based largely, if not entirely, on the reference in Section 953(b) itself that indicates the pay ratio information must be disclosed in “any filing of the issuer” described in Item 10(a) of Regulation S-K. As discussed below, however, we believe the Commission has the authority to accord “furnished” treatment to Item 402(u) disclosure contained in a “filed” document.

As the Commission has explained throughout the Proposing Release, the proposed pay ratio disclosure requirements are intended to be very flexible.³⁶ The proposed rules would allow a registrant to use a methodology that employs reasonable estimates both to identify the “median employee,” and to determine the total annual compensation or any element of total compensation for its employees (other than the principal executive officer). Further, in determining the employee pool from which the “median employee” is to be identified, a registrant may examine its actual total employee population, make use of statistical sampling, or use any other reasonable method. The flexibility contemplated by the proposed rules to use statistical sampling, as well as various estimates and assumptions, for what would otherwise be an exceedingly complex analysis for most registrants is likely to result in disclosure that is calculated on a highly subjective basis. This disclosure is also likely to be difficult for third parties to reproduce and verify.

In recent years, we have seen a pronounced increase in compensation-related litigation involving registrant disclosures about their executive compensation programs. While much of this litigation has proven to be without merit, it has, nonetheless, increased the disclosure compliance costs for many registrants, and added a level of uncertainty to the preparation of their executive compensation disclosure with no discernible benefit to investors. We believe that the combination of significant flexibility in identifying the median employee, the need to produce a specific compensation ratio (which is to be accompanied by only “brief” disclosure of the methodology and any material assumptions, adjustments or estimates used), and a requirement that a registrant’s principal executive officer and principal financial officer certify to the accuracy and completeness of the information contained in its annual report on Form 10-K, together are likely to increase registrants’ concerns regarding the potentially heightened risks of private litigation.

Accordingly, we suggest that the Commission follow the approach it has taken in similar situations involving “soft” or somewhat subjective disclosure (including disclosures based on opinions, estimates and assumptions, as here) by alleviating registrants’ concerns regarding undue liability exposure arising from such disclosure. Among the “filings” described in Item 10(a) of Regulation S-K are registration statements under the Securities Act and Exchange Act, annual and other reports under Sections 13(a) and 15(d) of the Exchange Act, and proxy and

³⁶ For example, the Commission states (at p. 12 of the Proposing Release, citation omitted) that, “[i]n light of the significant potential costs articulated by commenters, we believe that it is appropriate for the proposed rules to allow registrants flexibility in developing the disclosure required by the statute.”

information statements under Section 14 of the Exchange Act. Some of these “filings” include information that is considered “furnished” to, rather than “filed” with, the Commission, and therefore not subject to liability under Section 18 of the Exchange Act or automatic incorporation by reference into Securities Act registration statements or Exchange Act reports or other filings.³⁷ We recommend that the Commission extend similar treatment to the required pay ratio disclosures.

In the event that the Commission determines not to treat the required pay ratio information as “furnished” rather than “filed” for purposes of the Securities Act and Exchange Act, we recommend that that the agency consider providing a “safe harbor” excluding this information from the portion of a registrant’s filings that must be certified pursuant to Exchange Act Rules 13a-14 and 15d-14 and are also subject to Section 906 of the Sarbanes-Oxley Act of 2002.

XIV. Transition Matters

Question 52: Should the proposed requirements have a transition period, as proposed? Is the period too long? Too short? If so, how long should the transition period be and why? Please be specific (for example, instead of the proposed period, should compliance be delayed until the first fiscal year beginning on or after six months following the effective date of the final rules?).

In light of the widely-acknowledged costs and complexity of compliance with Section 953(b), we agree with the Commission’s decision to provide an extended transition period for compliance with the pay ratio disclosure requirement. However, we believe that the Commission’s proposal to require that registrants begin to comply with proposed rules with respect to compensation for their first fiscal year commencing on or after the effective date of the final rules does not allow sufficient time for the vast majority of registrants, particularly registrants with significant international operations and registrants without a centralized, consolidated payroll, benefits, and pension system that captures the relevant compensation information, to select an appropriate methodology for identifying the median employee and to implement this methodology.³⁸

Although the Commission’s intentions to promulgate rules implementing Section 953(b) were announced in mid-2013 and the proposed rules have been publicly-available for some time, we have observed that many of the registrants we counsel are awaiting adoption of the final rules before incurring the substantial costs expected to be incurred in complying with these rules.

³⁷ See, for example, the Performance Graph required by Item 201(e) of Regulation S-K (see Instruction 8 to Item 201(e)), the Audit Committee Report required by Item 407(d) of Regulation S-K (see the Instruction to Item 407(d)), and the Compensation Committee Report required by Item 407(e)(5) of Regulation S-K (see Instruction 1 to Item 407(e)(5)).

³⁸ Implicit in our conclusion, as outlined in the above text, is an assumption that the Commission’s final rules will require inclusion of foreign employees, part-time employees and seasonal and/or temporary workers. An extended transition period may not be necessary if foreign employees are excluded from the median employee determination.

Even though the Commission is proposing to give registrants a full fiscal year to prepare for the required disclosure, which we greatly appreciate, we believe that there will be numerous registrants, particularly those with significant international operations or multiple compensation-related databases, that will need at least one additional year to comply – an initial year to establish and test the systems that may be necessary to collect and analyze the data required to identify their median employee and develop the necessary disclosure controls and procedures, and then a second year involving a full reporting cycle to actually put their selected system into operation. In this regard, we respectfully request that the Commission take into account the fact that many affected registrants already have had to devote extensive corporate resources to compliance with the new conflict minerals disclosure requirements of Rule 13p-1 under the Exchange Act.

Accordingly, we recommend that the Commission extend the proposed transition period so as to require that registrants begin to comply with the final version of Item 402(u) with respect to compensation for their first full fiscal year commencing on or after the second anniversary of the effective date of the final rules.

Should the Commission decide against allowing such a two-year transition period, we suggest that the proposed guidance be modified to minimize the potential adverse impact on registrants with non-calendar fiscal years. The Commission is proposing that registrants begin to comply with proposed Item 402(u) with respect to compensation for their first fiscal year commencing on or after the effective date of the final rules. By way of illustration, the Commission indicates that, if the final rules were to become effective in 2014, a registrant with a fiscal year ending on December 31, 2014, would be first required to include pay ratio information relating to compensation for fiscal 2015 in its proxy or information statement for its 2016 annual meeting of shareholders (or written consents in lieu of such a meeting).

It appears to us that this illustration assumes that the Commission will complete its rulemaking near the end of 2014, thereby causing registrants with calendar year-end fiscal years to be the initial group of registrants subject to the final rules. If the Commission were to complete its rulemaking earlier in 2014 (for example, in July), however, it is entirely possible that registrants with fiscal years ending during the second half of 2014 would become the initial group of registrants subject to the final rules. As a consequence, many of these registrants would then be required to include the pay ratio information in the proxy or information statement for their 2015 annual meeting of shareholders.

To avoid this possible result, we recommend that the Commission modify its transition guidance to provide that registrants would be required to begin to comply with the final rules with respect to compensation for the first fiscal year commencing on or after December 15 of the year in which the final rules first become effective. This will eliminate the prospect of disclosure in 2015 for a subset of registrants, thereby allowing these registrants additional time to prepare to present the required disclosure.

Question 53: In the alternative, should the transition periods be different for different types of registrants? If so, what transition periods should apply to which

registrants? For example, should registrants with a workforce below a certain size (e.g., fewer than 1,000 employees) have a shorter phase-in period than others? Should there be a longer phase-in for multinational registrants? Please provide specific information about how to define the categories of registrants that should be subject to any recommended phase-in.

Consistent with our recommendation in response to Question 52, if the Commission concludes that it is not appropriate to extend the length of the transition period generally, we recommend that the agency extend the proposed transition period for registrants with significant international operations to enable them to develop a methodology for identifying their median employee in an efficient and cost-effective manner.³⁹ While we anticipate that many registrants will incur significant costs in collecting and analyzing the data necessary to identify their median employee, we expect that the largest burden will fall on registrants with international operations.

Accordingly, we recommend that the Commission extend the proposed transition period for so-called “multinational” registrants to permit them to begin to comply with the final rules with respect to compensation for their first full fiscal year commencing on or after the second anniversary of the effective date of the final rules (assuming foreign employees are not excluded from the “median employee” determination). While we have not conducted a specific analysis for purposes of defining what registrants would qualify for such an extended transition period, we believe that any registrant with operations in multiple foreign countries (that is, non-United States jurisdictions) should be deemed eligible to take advantage of the extended transition period.

Although we believe that, in the absence of a blanket extension of the compliance transition period for all registrants, our recommendation in response to Question 53 is appropriate, we urge the Commission to opt for a single, extended transitional period for all registrants as discussed above in our response to Question 52. This will give registrants ample opportunity to revise their existing disclosure controls and procedures to accommodate the new disclosure burdens to be imposed under Item 402(u), and thus should improve the quality of the required pay ratio information.

Question 54: Are there any other accommodations that we should consider for particular types of companies or circumstances (other than the proposed transition period for new registrants described below in this release)?

We have identified the following three situations for which we believe additional accommodations should be made for particular types of registrants.

³⁹ Such relief would not be necessary if the Commission permits the exclusion of foreign employees from the median employee determination in situations where a majority of the registrant’s employees and PEO work in the United States.

(a) Business Combinations

In the case of a business combination, we recommend that a registrant be permitted to omit the employees of a newly-acquired entity from its pay ratio disclosure until the first full fiscal year commencing on or after the first anniversary of the closing of the underlying transaction. We believe that, as discussed above with respect to the transition period generally, such an extended period of time will be necessary to allow the registrant to familiarize itself with the compensation structures and recordkeeping systems of the newly-acquired entity and to determine how to incorporate this information and these systems into its existing methodology for identifying its median employee in an efficient and cost-effective manner.⁴⁰ These challenges are likely to be further compounded if the Commission ultimately decides to adopt an expansive definition of the terms “employee” and “employee of the registrant” in the final rules. An obligation to include foreign employees, part-time employees, seasonal or temporary workers, and/or leased employees and temporary workers employed by a third party, in the identification of the median employee will expand the costs and burdens of compliance substantially and, in our view, require additional time for a registrant that is attempting to integrate a newly-acquired entity into its existing organization.

In the case of registrants that acquire an entity with significant international operations, we recommend that this transition period be further extended to the first full fiscal year commencing on or after the second anniversary of the closing of the underlying transaction.

(b) Registrants That Are Not Subject to the Proxy Rules

The Commission’s proposal contemplates that a registrant that is not subject to Section 14 of the Exchange Act, or does not file a proxy statement or information statement in connection with its annual meeting of shareholders, would be required to include pay ratio information relating to compensation for its last completed fiscal year in its annual report on Form 10-K, which would be due in the first fiscal quarter of its subsequent fiscal year. As discussed above, we recommend (if the Commission otherwise determines not to exclude the registrant from the scope of the pay ratio disclosure obligation) that such a registrant be permitted to provide such information not later than 120 days after the end of its last completed fiscal year in an appropriate Exchange Act report.

We note that such registrants, by virtue of their Exchange Act filing status, are not eligible to rely on General Instruction G(3) to Form 10-K to include the information required by Part III of Form 10-K (which includes Item 11, *Executive Compensation*) through incorporation by reference from the registrant’s definitive proxy statement or definitive information statement which involves the election of directors, if such definitive proxy statement or information

⁴⁰ See, for example, the limited transitional relief afforded to registrants in connection with integrating a newly acquired entity into an acquirer’s existing internal control over financial reporting system. Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Frequently Asked Questions (rev’d Sept. 24, 2007), Question 3, available at <http://www.sec.gov/info/accountants/controlfaq.htm>.

statement is filed with the Commission not later than 120 days after the end of the fiscal year. Thus, under the proposed transition period, these registrants would be disadvantaged relative to registrants that are subject to Section 14 of the Exchange Act which, by virtue of General Instruction G(3), would be permitted to omit their initial pay ratio disclosure from their Annual Report on Form 10-K until the filing of their proxy statement or information statement for their next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such year (assuming that such proxy statement or information statement is filed not later than 120 days after the end of such fiscal year).

Similarly, in each subsequent fiscal year, such registrants would be required to include the pay ratio information in their annual report on Form 10-K, whereas their counterparts would continue to avail themselves of the “forward incorporation by reference” technique permitted by General Instruction G(3). We believe that all registrants should be on equal footing with respect to the timing of their obligation to provide this disclosure. Accordingly, we recommend that registrants that are not subject to Section 14 of the Exchange Act be permitted to amend their annual report on Form 10-K no later than 120 days after the end of the fiscal year covered by the report to provide the pay ratio information or, alternatively, be permitted to provide the disclosure by filing a current report on Form 8-K no later than 120 days after the end of their last completed fiscal year.

(c) Smaller Reporting Companies

We recommend that the Commission provide a transition period for registrants that cease to be smaller reporting companies (which the Commission appropriately has proposed to exclude from coverage under Item 402(u)). We believe that such registrants will encounter the same challenges in preparing to comply with the pay ratio disclosure requirement as registrants generally and, therefore, will need time to determine how they will collect the data necessary to identify their median employee and prepare the necessary disclosure. At the same time, we expect that, as relatively small entities, these registrants are not likely to need as much time as “regular” (larger) registrants to transition to compliance with the pay ratio disclosure requirement. Accordingly, we recommend that the Commission require that registrants which are formerly smaller reporting companies to comply with proposed rules with respect to compensation for their first full fiscal year commencing on or after the first anniversary of the end of the fiscal year in which the registrant determined that it was no longer eligible to use the scaled disclosure for smaller reporting companies.⁴¹

Question 55: Instead of the proposed transition period, should we require new registrants that are not emerging growth companies to comply with pay ratio disclosure requirements in registration statements on Form S-1, Form S-11 or Form 10? Are we correct that the incremental time needed to compile pay ratio disclosure could cause companies that are not emerging growth companies to delay an initial

⁴¹ Should the Commission decide to extend the new pay ratio disclosure requirement to foreign private issuers (which, as discussed, we do not support), we recommend that similar relief be granted to such issuers in connection with initial public offerings (or Exchange Act registration) of their securities.

public offering? What costs would be imposed on these companies if we did not provide the transition? Does the potential importance of the information to investors justify the burden on these companies of complying with the requirements in their Form S-1, Form S-11 or Form 10?

We recommend that the Commission not require registrants that are not emerging growth companies to comply with the final rules in registration statements on Form S-1 or Form S-11 for an initial public offering of securities or a registration statement on Form 10 (assuming that the company otherwise is not a registrant due, for example, to having conducted a registered debt offering triggering Exchange Act Section 15(d) reporting obligations).⁴² While we recognize that Congress' decision to exempt emerging growth companies from the required disclosure was based largely on considerations of size and burden, we believe that any informational benefits that might be associated with the pay ratio information would be far outweighed by the additional burdens imposed on an issuer conducting the initial public offering of its securities or effecting an initial Exchange Act registration of a class of equity securities. Although we doubt that a company considering an initial public offering of its securities would decide to forego such a transaction simply because of the pay ratio disclosure obligation, in some situations, the time and costs associated with Item 402(u) compliance could certainly weigh in the timing of the offering.

Question 56: Does the proposed transition period for compliance by new registrants provide sufficient time (or, alternatively, too much time) for these companies to be able to comply? Why or why not?

While we support the Commission's proposal for compliance by new registrants, which would require such a registrant to first comply with the proposed rules with respect to compensation for the first fiscal year commencing on or after the date the registrant becomes subject to the requirements of Section 13(a) or Section 15(d) of the Exchange Act, and permit the registrant to omit the initial pay ratio information from its filings until the filing of its annual report on Form 10-K for such fiscal year or, if later, the filing of a proxy statement or information statement for its next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such fiscal year, for the reasons stated in our response to Questions 52 and 54, we believe the Commission should consider giving such registrants additional time to comply with the final rules. Specifically, we recommend that the Commission permit new registrants to comply with the final rules with respect to compensation for their first full fiscal year commencing on or after the first anniversary of the date a registrant becomes subject to the requirements of Section 13(a) or Section 15(d) of the Exchange Act.

In our view, such registrants will need time to develop the methodology that they will use to identify the median employee and, if necessary, establish the systems needed to collect, verify, and aggregate the compensation data required for compliance with proposed Item 402(u)(if

⁴² As discussed above in Section III of this letter, we recommend that the Commission exclude debt-only registrants from Item 402(u) coverage.

adopted substantially as proposed).⁴³ Since, concurrently, many of these registrants will be coping with the requirements of being a new public reporting company, we believe that they should be given at least as much time in which to comply as is being proposed for registrants generally with respect to the transition to the final rules.

Question 57: Are there any alternatives to the proposed transition period that we should consider? For example, should we permit new registrants to omit pay ratio disclosure from Form S-1 and Form 10 (as proposed), but require them to comply with the proposed pay ratio disclosure requirements in their first proxy statement or annual report, as applicable?

Please see our response to Question 56.

XV. General Request for Comment

Question 59: Have we struck the appropriate balance between prescribing rules to satisfy the mandate of Section 953(b) and allowing a registrant flexibility to identify the median in a manner that is appropriate to its own facts and circumstances?

We believe that the Commission has gone far in its efforts to strike the appropriate balance between discharging its Section 953(b) mandate and allowing registrants the flexibility to select their own methodology for identifying the median employee, which may include the use of statistical sampling, and to use estimates in calculating the median employee's total annual compensation. The ability to use consistently applied compensation measures, statistical sampling, and reasonable estimates will be essential to enable registrants to develop the disclosure required by Section 953(b) as implemented by the Commission through Item 402(u). This flexibility is particularly important because the proposed rules would require many registrants to gather data across multiple entities and countries with differing approaches to compensation and different currencies. If the Commission were to take a more prescriptive approach, we believe that compliance could become prohibitively costly and complex for many registrants. Given the strong skepticism that we and other commenters have expressed regarding the utility of the new pay ratio disclosure to the "reasonable" investor -- whose perspective normally drives materiality determinations under the federal securities laws -- we urge the Commission to preserve the level of flexibility provided by the proposed rules.

According to the Commission's estimates, each year the average registrant subject to the new rules will have to dedicate more than 140 hours of company personnel time and spend over \$18,500 in outside professionals' fees to create the pay ratio information and related narrative

⁴³ As the Commission notes in the Proposing Release, many of these registrants are likely to be businesses with more extensive operations or a greater number of employees than many emerging growth companies, which could increase the initial efforts needed to comply with the proposed rules. See the Proposing Release, at Section II.D.2.

disclosure.⁴⁴ In our view, the Commission could do more to reduce the anticipated compliance costs under new Item 402(u) consistent with its Section 953(b) mandate. For example, compliance burdens could be reduced for many registrants, without running afoul of the statute, if the Commission were to limit the pool of employees included for purposes of identifying the median to employees located in the United States, but only where a majority of such employees and the PEO work in this country. For the reasons previously discussed in our letter, the inclusion of foreign employees in these circumstances is likely to increase the costs and complexity associated with identifying the median employee without providing any substantial informational benefit.

We are cognizant of the burden the mandate of the Dodd-Frank Act has imposed upon the Commission and we are appreciative of the efforts that the proposed rules represent. We are also aware of the ever-increasing list of disclosures that registrants are required to provide and that, consequently, investors are obliged to read in search of relevant information. The Commission itself has recognized this dilemma, as reflected in Chair White's October 2013 remarks on "information overload."⁴⁵ We have prepared the foregoing comments in an effort to suggest ways in which the Commission could permit registrants additional flexibility while assuring that they remain compliant with Section 953(b). It is our belief that this additional flexibility not only would reduce the costs and complexity of compliance for registrants, but also would enable investors to track median employee vs. PEO pay disparities on an annual basis as Congress intended.

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⁴⁴ See the Proposing Release at pp.143 and 153. The Commission estimates that 3,852 registrants will be subject to the proposed rules and that there will be an annual aggregate burden of 545,792 company personnel hours and \$72,772,200 in outside professionals' fees.

⁴⁵ Remarks of SEC Chair Mary Jo White, "The Path Forward on Disclosure," before the National Association of Corporate Directors Leadership Conference 2013 (National Harbor, Md., Oct. 15, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539878806>. Accord Remarks of SEC Chair Mary Jo White, "The SEC in 2014," at the 41st Annual Securities Regulation Institute (Coronado, California, Jan. 27, 2014), available at <http://www.sec.gov/News/Speech/Detail?Speech/1370540677550>.

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We appreciate the opportunity to comment on the Proposing Release and respectfully request that the Commission consider our recommendations and suggestions. We are available to meet and discuss these matters with the Commission and its staff, and to respond to any questions.

Very truly yours,

/s/ _____
Catherine T. Dixon
Chair of the Federal Regulation of
Securities Committee

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cc: The Hon. Mary Jo White, Commissioner (Chair)

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Secretary
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The Hon. Luis A. Aguilar, Commissioner
The Hon. Daniel M. Gallagher, Commissioner
The Hon. Michael S. Piwowar, Commissioner
The Hon. Kara M. Stein, Commissioner
Keith F. Higgins, Director, Division of Corporation Finance

Exhibit A

Instruction 1 to Item 402(u). Information for the last completed fiscal year. [Subject to the provisions of Instruction 4 below] Pay ratio information (i.e., the disclosure called for by paragraph (u)(1) of this Item) with respect to the registrant's last completed fiscal year is not required to be disclosed until 120 days after fiscal year end or, if earlier [but subject to the provisions of Instruction 4 below], the filing of the registrant's definitive proxy statement (filed pursuant to Regulation 14A) or definitive information statement (filed pursuant to Regulation 14C) which involves the election of directors relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such fiscal year. The registrant may disclose the pay ratio information in a definitive proxy statement, in a definitive information statement, as part of the Form 10-K or amendment thereto or on Form 8-K [under Item ()]. In any filing made by a registrant that requires Item 402(u) information after the end of its last completed fiscal year and before the filing of such proxy statement, information statement or report including such information, as applicable, a registrant that was subject to the requirements of paragraph (u) of this Item for the fiscal year prior to the last completed fiscal year shall include or incorporate by reference the information required by paragraph (u) of this Item for that prior fiscal year.

Exhibit B

Instruction 4 to Item 402(u). PEO compensation not available. A registrant that is relying on Instruction 1 to Item 402(c)(2)(iii) and (iv) in connection with the salary or bonus of the PEO for the last completed fiscal year shall disclose that the pay ratio required by paragraph (u) of this Item is not calculable until all the omitted PEO compensation information is determined and shall disclose the date by which all such omitted compensation information, including the PEO's actual total compensation, is expected to be determined. The disclosure required by paragraph (u) of this Item must then be disclosed in the filing, or the last of such filings, made under Item 5.02(f) of Form 8-K (17 CFR 249.308), where the omitted PEO compensation information is disclosed in accordance with Instruction 1 to Item 402 (c)(2)(iii) and (iv), [but in no case later than 120 days after the end of the preceding fiscal year].

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