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RETAIL INDUSTRY LEADERS ASSOCIATION
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VIA ELECTRONIC FILING AT https://www.sec.gov/cgi-bin/ruling-comments

March 23, 2017

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

Re: **Reconsideration of Pay Ratio Rule Implementation**

Dear Mr. Fields:

On behalf of the Retail Industry Leaders Association (RILA),[1] the purpose of this letter is to respond to the Securities and Exchange Commission's ("SEC's" or "the Commission's") request for comments on the Commission's reconsideration of the rule to implement the pay ratio disclosure requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[2]

RILA appreciated the SEC's effort to fulfill the various mandates that Dodd-Frank imposed on the Commission. Nonetheless, the final rule failed to remedy our serious concerns regarding the statutory mandate for pay ratio disclosure, as well as the likelihood that the mandated disclosure will serve as the basis for meaningless comparisons between companies with inherently different business models, staffing and compensation practices.

Our specific comments filed in December of 2013,[3] which are fully incorporated herein, were intended to help the Commission tailor the final rule to the express contours of the statute to minimize the burden imposed in light of the limited (and perhaps non-existent) benefits to investors or registrants presented by the law. In particular, we encouraged the SEC to recognize the appropriate scope of employees to be included in the employee compensation calculation, permit the pay ratio information to be furnished rather than filed, and allow adequate time for registrants to build, test and implement the systems that will be necessary to comply with the ultimate final rule.

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1 RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. RILA member contributions to the overall economic well-being of local, national and international economies are unparalleled.

2 Pub. L. No. 111-203 (July 21, 2010).

3 RILA, Proposed Pay Ratio Disclosure Rule, December 2, 2013. https://www.rila.org/enterprise/RegulatoryCommentLetters/Documents/Comments%20on%20Pay%20Ratio%20Disclosure%20Rule.pdf

I. LEGAL AND REGULATORY BACKGROUND

Section 953(b) of Dodd-Frank required the SEC to promulgate regulations to calculate and disclose the pay ratio between the principal executive officer (PEO) and other employees. Specifically:

> (1) IN GENERAL.—The Commission shall amend section 229.402 of title 17, Code of Federal Regulations, to require each issuer to disclose in any filing of the issuer described in section 229.10(a) of title 17, Code of Federal Regulations (or any successor thereto)—
>
> (A) the median of the annual total compensation of all employees of the issuer, except the chief executive officer (or any equivalent position) of the issuer;
>
> (B) the annual total compensation of the chief executive officer (or any equivalent position) of the issuer; and
>
> (C) the ratio of the amount described in subparagraph (A) to the amount described in subparagraph (B).

The comments outlined below respond to Acting Chairman Michael Piwowar's February 6, 2017 request for information to better understand the difficulties and unexpected challenges issuers have experienced as they prepare for compliance with the rule and whether relief is needed.

II. COMMENTS ON RECONSIDERATION OF PROPOSED RULE

A. The Employee Compensation Calculation Should Require Inclusion of Only Full-Time U.S. Employees Calculated as of a Disclosed Date Certain.

In order to perform the pay ratio calculation that must be disclosed, Section 953(b)(1)(A) requires the registrant to calculate and disclose the median of "the annual total compensation of all employees of the issuer." Although we agree that the ability to generate meaningful investor information from the pay ratio calculation is minimal at best, RILA urged the SEC to at least try to ensure that the ultimate ratio is as balanced as possible and does not result in reporting of truly irrelevant and possibly misleading and sensationalist information. In this regard, and as explained more fully below, the final rule should have required the inclusion of only full-time employees (employed as of a disclosed date certain) from the same geographic area as the PEO. This approach would also have helped to significantly reduce the burden imposed by the law.

> PEO's covered by the regulation are full-time U.S. employees and are the appropriate point of reference for interpreting Section 953(b)

In order to interpret the scope of the statutory requirement in Section 953(b)(1)(A), the SEC should have looked to the characteristics of the PEO covered by Section 953(b)(1)(B) with whom the employees will be compared. Specifically, PEO's of companies covered by the law are by and large full-time employees (exempt from the Fair Labor Standards Act) who are resident in the United States. In order to give the

ratio at least a scintilla of relevance, the SEC should have required the comparison to be conducted against all such full-time, U.S. based employees.[4]

The skewing of the ratio that will occur based upon the finalized rule is particularly acute in the retail industry, which is known for the flexibility that it offers its workforce by providing large numbers of part-time, temporary and seasonal work opportunities. In fact, in the case of many retailers, the percentage of their workforce composed of part-time employees far exceeds 50%, so by definition under the current rule the compensation will be between the PEO and a part-time hourly employee working perhaps 10-20 hours per week.

In addition to traditional 9:00 am to 5:00 pm jobs, retail stores offer employees a full-range of employment opportunities that are valued across the workforce, from the high school or college student who needs to support herself while pursuing her education to the retiree seeking to supplement his retirement income to the father or mother who wants to be at home when his or her kids return from school to the freelance writer who needs the flexibility to pursue other professional avenues. The reasons for engaging in part-time, seasonal or temporary work are as varied as the workforce itself.[5] But whatever the reasons underlying the choice, the bottom line is that it is not reasonable to compare the compensation provided for a limited work schedule (which may provide other benefits that may or may not be quantifiable) with the compensation of a full-time PEO of a company subject to SEC regulation. [6]

Moreover, the compensation of even full-time employees who live in other countries likewise cannot be reasonably compared to the compensation of a U.S. PEO. The wage and hour structure, costs of living and other important factors in other countries are likely to be completely different from those in the United States. For example, in the United States, employers are, even today, the primary providers of

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4 One approach would be to include only those employees of the issuer (or parent) company and not those of any ancillary or subsidiary entities. See, e.g., "Dissenting Statement of Commissioner Daniel M. Gallagher Concerning the Proposal of Rules to Implement the Section 953(b) Pay Ratio Disclosure Provision of the Dodd-Frank Act" (Sept 18, 2013).

5 The SEC improperly suggested in the preamble to the proposed rule that part-time workers inherently have lower morale. See, 78 Fed. Reg. 60569. While the economic conditions present when the rule was proposed may not have allowed everyone who wanted a full-time job to have one in any sector, many of those who work for retailers on different schedules do so gladly and value the flexibility that retail employment provides them. In fact, many retailers conduct company-wide surveys about all aspects of the business, including pay, benefits and work schedules, that serve as good, company-specific barometers of employee morale.

6 RILA and others suggested in earlier comments that the SEC consider allowing employers to annualize compensation for non-full-time employees if they are ultimately included within the scope of employees covered by Section 953(b)(1)(A). The proposed rule would allow annualizing for a limited number of employees on a limited basis, such as those who were hired during the fiscal year in question or employees who took an unpaid leave of absence, but not for seasonal, temporary or part-time workers. 78 Fed. Reg. 60569. RILA agrees that annualizing should be allowed in the circumstances permitted under the proposal but urges the SEC to permit the use of annualizing compensation for all employees and to a full-time equivalent basis if the SEC concludes for purposes of the final rule that those employed on a basis other than full-time must be included in the employee compensation calculation.

health insurance, whereas in other countries, such services are provided by the government so U.S. companies logically do not provide such coverage to those non-U.S. employees.

In addition to the lack of comparability of compensation in other countries, the costs and logistical challenges of obtaining such information in a way that comports with the standards set forth in the rule compound the burdens that already substantially outweigh the benefit of including such information.[7] For example, international privacy laws present virtually insurmountable logistical challenges. As the SEC attempted to address this concern in the final rule, multinational companies based in the United States may need to ensure compliance with data privacy regulations in order to transmit personally identifiable human resources data of European Union persons onto global human resources information systems networks in the United States. 78 Fed. Reg. at 60566. In those countries in which employers must obtain employee consent, companies may have to devote significant resources to obtain consent from each and every individual employee in order to fulfill a mandate that, at the end of the day, provides questionable if any meaningful information to investors. *Id.* Indeed, in those countries in which consent may not even be sufficient to relieve an employer from liability, the proposed rule has placed U.S. companies in the untenable position of being caught between two competing, diametrically opposed legal obligations – one to the SEC and one to the country whose citizens it is employing. This will eventually lead to shareholders covering the cost for any penalties for non-compliance.

As the Commission moves forward with the reevaluation of the final rule, it is important to take into account the dynamics of the wage and hour structure the retail community offers its employees and to focus solely on full-time U.S. employees as of a date certain.

B. The Pay Ratio and Underlying Numbers Should Be Treated as Furnished Numbers

The SEC finalized rule treats the pay ratio information as "filed" because Section 953(b) refers to the pay ratio information being disclosed in the registrant's "filing" with the Commission. 78 Fed. Reg. at 60580. RILA respectfully disagrees with the SEC's approach and strongly recommends that issuers be allowed to treat the information as furnished rather than filed.

Specifically, although Section 953(b) uses the word "filing," the statute does not, in fact, expressly require the information to be filed.[8] The information that will be generated by this calculation is not even remotely germane to a reasonable investor's decision making. For the reasons set forth above and acknowledged in the SEC's preamble, the complexities presented in calculating the figures required for

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[7] After acknowledging the validity of commenters' concerns regarding international privacy law compliance, the SEC states that "we are not proposing any additional accommodation to address this concern" and asks whether the flexibility afforded in other areas of the proposed rule would offset the challenges presented by the inclusion of non-U.S. employees. 78 Fed. Reg. at 60566. Although the flexibility provided in the proposed rule is essential, it cannot offset the virtually irremediable hurdles that will be presented for those who hire employees in some countries.

[8] Indeed, it is worth noting that in other areas that permit "furnishing," like items 2.02 and 7.01 of Form 8-K and related exhibits under Item 9.01, the documents are still listed in EDGAR as having a "Filing Date" even though they are furnished.

the pay ratio calculation are significant. This type of disclosure has never been attempted and it stands to reason that the risk of errors presented is substantial.

Accordingly, RILA urges the SEC to reevaluate the final rule to allow issuers to furnish the final pay ratio comparison numbers rather than to file them. Furnishing the numbers would not in any way adversely affect the purpose or intent of the reporting requirement, but it would recognize the inherent complexities of calculating the pay ratio disclosure and acknowledge the good faith effort of employers to comply with this new requirement.

C. Registrants Will Need Additional Time to Comply

The SEC's final rule requires registrants to comply with the new requirements for their first fiscal year beginning on or after January 1, 2017. For the reasons explained below, we encourage the SEC to provide at least one more year for registrants to comply.

Our members, particularly those with significant international operations resulting in multiple payroll and human resources systems, report that it has been extremely difficult to put a system in place that can adequately calculate the disclosure as set forth in the finalized rule. Accordingly, registrants have had to design, test and implement new systems to obtain the requisite information necessary to perform the calculations. Moreover, as explained more fully above, we strongly encourage the SEC to modify the final rule in certain respects (and we suspect other stakeholders will likewise recommend changes). Although it is difficult to predict the exact amount of time that retailers and other issuers will ultimately need to comply with the final rule, we expect that the industry will need at least one more year than the SEC has currently proposed to enable accurate compliance without imposing an undue burden.[9]

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[9] The transition period proposed in Instruction 5 to Item 402(u), 78 Fed. Reg. at 60605, relates to registrants that become subject to the SEC's filing requirements. However, as a practical matter, during the first year or so following an acquisition, it will be very difficult to take the employees of the newly acquired entity into account when determining the median employee. Following an acquisition, companies often spend several years transitioning employees to the acquirer's payroll systems and benefit plans. In addition, during this transition period, it is unlikely that the compensation paid to newly acquired employees will reflect the compensation philosophy and practices of the registrant. For this reason, the Internal Revenue Code provides a transition period following an acquisition before such employees must be taken into account for benefit plan purposes. We believe that the SEC should permit a similar transition period for purposes of the Pay Ratio Disclosure. See Section 410(b)(6)(C) of the Internal Revenue Code of 1986, as amended.

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III. CONCLUSION

RILA appreciates the opportunity to inform the Commission about our members' experience implementing the SEC's Pay Ratio Disclosure rule and respectfully requests that the Commission adopt our recommendations and respond to our comments on the record. Given the lack of truly meaningful information and thus the quantifiable benefit that can be generated from the statutory mandate, it is essential that the final rule be reevaluated in a manner that is as minimally burdensome as possible to both the industry and the SEC. We would be pleased to provide further information or explanation at your request.

Respectfully submitted,

Austen Jensen
Vice President,
Government Affairs
[redacted]

cc: The Honorable Michael S. Piwowar
The Honorable Kara M. Stein