March 24, 2017

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

Re: COMMENTS ON RECONSIDERATION OF DODD FRANK SECTION 953 (b), THE PAY RATIO RULE

Dear Mr. Fields:

The Society for Corporate Governance (the "Society") appreciates the opportunity to provide comments on the proposed amendment of Item 402 of Regulation S-K to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Rule").

Founded in 1946, the Society is a professional membership association of more than 3,200 corporate secretaries, in-house counsel and other governance professionals who serve approximately 1,600 entities, including about 1000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive managements of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

Background

The Society previously submitted comments on the Pay Ratio Rule in letters dated December 16, 2013 and October 8, 2015. This letter responds to the SEC's February 6, 2017 request for comments to better understand unanticipated compliance difficulties and whether additional guidance or relief may be appropriate.

The Society has previously provided comment and testimony on the advisability and implementation of the then-proposed Rule. While the Society testified in opposition to the Rule, we also provided constructive suggestions intended both to reduce the administrative burden on issuers and allow the SEC to fulfill its Congressional mandate. We recognize that the SEC has shown some flexibility through the final Rule and associated guidance, but we have ultimately concluded that the Rule should be delayed for reconsideration and withdrawn.

Actual implementation efforts by Society members have validated the concerns expressed in previous comment letters including:

- The Rule does not provide material information to investors and obfuscates information that investors actually do deem material to their investment decisions;
- Despite its failure to facilitate the delivery of material information to investors, the Rule imposes significant direct and indirect costs to companies in the forms of data gathering and systems costs, legal expense, auditing expense, public relations expense, litigation risk and other costs.

Finally, an unanticipated ruling by the National Labor Relations Board has further complicated the already fraught process of distinguishing between "employees" and "independent contractors." This complication merits serious consideration by the Commission and we believe, at a minimum, supports a delay in implementation of the Rule.

<u>The Pay Ratio Provides Little Benefit and is Not Material</u>

The Society believes that Section 953(b) of the Dodd-Frank Act exacerbates a significant problem with the current disclosure rules - overloading disclosure documents with information that is not material to investors and has the effect of interfering with the delivery of information that investors deem to be material to their investment decisions.

Society members take a company's responsibilities to its shareowners very seriously. For this reason, Society members and the boards and management teams they advise regularly engage with a wide variety of shareowners, and are the principal drafters of the documents through which disclosure is made. As such, we now know that the overwhelming majority of investors do not believe that the disclosure mandated by Section 953(b) is material to a reasonable investor in making an investment or voting decision. Nor does it meaningfully improve the substantial executive compensation disclosure that is already required to be disclosed by the proxy rules, or the publicly available data on *average* worker pay in the US. Numerous groups (including the Commission itself) have stated that the pay ratio disclosures will likely be of little value to investors. And, the final rule does not further the Commission's core mission of protecting investors.

<u>The High Cost of the Disclosure</u>

Experience over the last two years clearly validates previously expressed concerns that the Rule will result in significant direct and indirect costs to companies in the forms of data gathering and systems costs, legal expense, auditing expense, public relations expense, and litigation risk expense, among others. While there is no uniform expense associated with each company's compliance, actual costs range from more than $100,000 to $550,000 per year for compliance over and above the costs incurred to date for the data gathering and systems work in anticipation of the date of effectiveness. Cumulative costs across the Society's 998 public members would range between $99 million to $548 million per year on an ongoing basis.

The Society believes that there is no acceptable amount of money and resources for compliance with a Rule that does not provide any material information to investors.

NLRB's New Joint Employer Standard Calls Into Question Employee vs. Independent Contractor Distinction

Further undermining the basis and feasibility of the Rule, unanticipated developments impacting implementation have come to light that deserve the Commission's consideration.

Pending litigation[1] stemming from the National Labor Relations Board's decision in Browning-Ferris Industries[2] creates substantial uncertainty and confusion regarding the critical definition in the Rule of "employee or employee of the registrant."[3] The Rule seeks to exclude from consideration as employees "those workers who are employed, and whose compensation is determined, by an *unaffiliated* (emphasis added) third party but who provide services to the registrant…as independent contractors."[4]

In Browning-Ferris Industries, the NLRB expanded its definition of "joint employment" creating uncertainty regarding the circumstances in which a registrant could be considered a joint employer with an entity that provides putative independent contractor labor to that same registrant.[5] In Browning-Ferris Industries, the NLRB ruled that "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law.[6]" The NLRB went on to hold that "the right to control [essential terms and conditions of employment] , in the common law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect."

The practical impact of the NLRB decision may well be to require companies reporting under the Rule to consider themselves "joint employers" along with entities supplying putative independent contracting labor. Such an outcome would make it impossible for registrants to argue that "independent contractors" are in fact employed by "an unaffiliated third party,"[7] while simultaneously being characterized as "joint employers" with the company supplying said "independent contractors."

Moreover, the expansion of who is (and is not) an "employee" caused by the NLRB's Browning-Ferris Industries ruling appears to contradict or at least confuse the SEC's guidance.[8] In Reg. S-K guidance, staff stated that "frequently, a registrant will obtain services of workers by contracting with an unaffiliated third party that employs the workers. When a registrant obtains services in this way, we do not believe it is determining the workers' compensation for purposes of the rule if, for example, the registrant only specifies that those workers receive a minimum level of compensation."[9] The inconsistency between the Rule and the NLRB ruling compounds the uncertainty registrants face in determining who precisely is an "employee" under the Rule.

[1] Browning-Ferris Industries of California, Inc., Case No. 16-1028, U.S. Court of Appeals, D.C. Circuit
[2] https://apps.nlrb.gov/link/document.aspx/09031d4581d99106
[3] 17 CFR 229.402-u-3Rule (3)
[4] *Ibid*
[5] https://apps.nlrb.gov/link/document.aspx/09031d4581d99106, p. 15-17
[6] https://apps.nlrb.gov/link/document.aspx/09031d4581d99106, p. 15
[7] 17 CFR 229.402-u-3Rule (3)
[8] https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#128c.01, Section128C- Item 402(u); Question 128C.05
[9] Ibid.

Indeed, as the dissent in the NLRB's Browning-Ferris Industries decision argued, the "number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited.[10]" Arrangements where one company has the "right to control" some or all of the "terms or conditions" of putative independent contractors are highly susceptible to being found to be "joint employers." As a result, companies that supply "independent contractors" to registrants reporting under the Rule cannot be characterized as "unaffiliated" as required under the Rule when the NLRB would characterize them as "joint employers." In sum, two companies that are likely to be considered "joint employers" by the NLRB cannot be "unaffiliated' for the purposes of reporting under the Rule.

Requiring companies to include in their pay ratio calculation workers employed by previously "unaffiliated" entities will further undermine the relevance of the Rule in helping investors assess executive compensation and arguably contravenes the will of the Congress to provide meaningful information to investors.

Moving forward with implementation of the Rule while definitional elements of compliance are placed in doubt by the NLRB and the federal courts is not consistent with reducing the regulatory burden on issuers. Regardless of the merits and/or ultimate outcome of the litigation stemming from this NLRB ruling, the Society believes the SEC should delay the Rule until such time as definitional clarity can be achieved.

Summary

The absence of benefit to investors, high costs, and the negative internal and external public relations impact of the Rule combine to create yet another reason for companies to eschew public listing and ownership. At a time when the Commission and many others are trying to foster conditions for growth and vitality in the public markets, it is clear that the Rule inhibits rather than facilitates a robust capital market.

For these reasons, we respectfully request that the SEC delay and/or repeal the Rule at its earliest opportunity, and in any event, issue guidance to relieve companies of the obligation to file such disclosure in 2018.

Respectfully submitted,

Darla C. Stuckey

Darla C. Stuckey
President and CEO
The Society for Corporate Governance

[10] https://apps.nlrb.gov/link/document.aspx/09031d4581d99106, p. 37

cc: Michael Piwowar, Acting Chairman
Kara Stein, SEC Commissioner