



Via Email

November 6, 2013

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: *File Number S7-07-13: Proposed rule to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act*¹

Dear Ms. Murphy:

I am writing on behalf of the Council of Institutional Investors (CII) to respectfully request consideration of the following comments in connection with the U.S. Securities and Exchange Commission's (Commission) proposed rule to implement Sec. 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Proposal).² As you are aware, CII is a non-profit association of pension funds, other employee benefit funds, endowments and foundations with combined assets in excess of three trillion dollars. CII members are long-term shareowners generally responsible for safeguarding the retirement savings of millions of American workers.³

CII's membership-approved policies have long stated that "[i]t is the job of the board of directors and the compensation committee specifically to ensure that executive compensation programs are effective, reasonable and rational with respect to critical factors such as company performance, industry considerations, risk considerations and compensation *paid to other employees*."⁴ Furthermore, CII's policies recommend that compensation committees consider "the relationship of executive pay to the pay of other employees" as a factor when developing, approving and monitoring their executive pay philosophy.⁵ Our policies, however, do not advocate for the disclosure of a CEO-to-worker pay ratio and, as a result, CII has not taken a position on Sec. 953(b).⁶

¹ Pay Ratio Disclosure, Securities Act Release No. 9452, Exchange Act Release No. 70,443, 78 Fed. Reg. 60,560 (proposed Oct. 1, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-01/pdf/2013-23073.pdf>.

² *Id.*

³ For more information about the Council of Institutional Investors (CII) and our members, please visit CII's website at http://www.cii.org/about_us.

⁴ CII, Policies on Corporate Governance § 5.1 Introduction (updated Sept. 27, 2013) (emphasis added), available at http://www.cii.org/files/ciicorporategovernancepolicies/09_27_13%20CII%20Corp%20Gov%20Policies%20Full%20and%20Current%20%20FINAL.pdf.

⁵ *Id.* at § 5.5b Executive Pay Philosophy.

⁶ See, e.g., Letter from Jeff Mahoney, General Counsel, CII, to the Honorable John Boehner, Speaker, U.S. House of Representatives *et al.* 3 n.8 (Mar. 7, 2012), available at http://www.cii.org/files/issues_and_advocacy/correspondence/2012/03_07_12_cii_letter_to_house_financial_services_committee_on_capital_formation_bill.pdf.

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In an effort to assist the Commission obtain useful input from investors about the Proposal, CII staff discussed the Proposal in detail with three CII general members from our three main constituencies -- public, corporate and union employee benefit plans. Each of the three members has been actively following, and participating in, conversations surrounding the implementation of Sec. 953(b) since its initial adoption.

The results of the discussion revealed broad consensus among the three members in support of the approach taken in the Proposal. The members generally agreed that the Commission has done an admirable job in proposing to implement Section 953(b) in a flexible manner that attempts to strike an appropriate balance between providing potentially useful information to investors and limiting company compliance costs.

The attachment to this letter summarizes the results of the CII staff discussion with the three members focusing on certain key issues for which the Commission explicitly requested investor input. If you have any questions regarding the contents of this letter or the related attachment, please contact me directly at [REDACTED] or [REDACTED], or my colleague Matthew Frakes at [REDACTED] or [REDACTED].

Sincerely,



Jeff Mahoney
General Counsel

Attachment

File Number S7-07-13

Proposed Rule to Implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹

Responses to Select Request for Comments

November 6, 2013

Filings Subject to the Proposed Disclosure Requirements

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?²

The three members generally agreed that the proposed pay ratio disclosure should only be required for the U.S. Securities and Exchange Commission (SEC) filings in which Item 402 executive compensation disclosures are also required.³ More specifically, they generally agreed with the SEC's conclusion that the proposed pay ratio disclosure is most potentially meaningful to investors when it is "placed in context with other executive compensation disclosure, such as the summary compensation table . . . and the compensation discussion and analysis . . ."⁴ **Two of the three members noted that the proposed pay ratio disclosure may provide investors with an additional useful metric for evaluating the say-on-pay votes required by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.**

Registrants Subject to the Proposed Disclosure Requirements

4. Should we revise the proposal so that smaller reporting companies would be subject to the proposed pay ratio disclosure requirements? If so, why? If so, also discuss how smaller reporting companies should calculate total compensation for employees and the [principal executive officer] PEO. For example, should they be required to calculate total compensation in accordance with Item 402(c)(2)(x) instead of the scaled disclosure

¹ Pay Ratio Disclosure, Securities Act Release No. 9452, Exchange Act Release No. 70,443, 78 Fed. Reg. 60,560 (proposed Oct. 1, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-01/pdf/2013-23073.pdf>.

² *Id.* at 60,563-64.

³ For a description of the "three members" referenced in this Attachment see accompanying letter from Jeff Mahoney, General Counsel, CII, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission 2 (Nov. 5, 2013).

⁴ 78 Fed. Reg. at 60,563.

requirements? In the alternative, should smaller reporting companies be required to provide a modified version of the pay ratio disclosure? If so, why, and what should that modified version entail? Should it be based on the compensation amounts required under the scaled disclosure requirements applicable to smaller reporting companies, such as a ratio where the PEO compensation and other employee compensation are calculated in accordance with Item 402(n)(2)(x)? Please provide information as to particular concerns that smaller reporting companies may have. Please discuss whether the disclosure would be useful to investors in smaller reporting companies.⁵

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 [U.S.- Canadian Multijurisdictional Disclosure System] 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.⁶

Two of the three members were “not comfortable” with the proposed exemption from the pay ratio disclosure requirements for emerging growth companies, smaller reporting companies, foreign private issuers, and MJDS filers. All three members, however, generally agreed with the Commission’s analysis and conclusion that the language of Section 953(b) can, and should, be read to provide that only those registrants “required to provide summary compensation table disclosure pursuant to Item 402(c)” should be subject to the proposed pay ratio disclosure requirements.⁷ As indicated, they also generally agreed that the pay ratio disclosure would be most potentially meaningful to investors when placed in context with the summary compensation table disclosure and the compensation disclosure and analysis.

Employees Included in the Identification of the Median

8. Should registrants be allowed to disclose two separate pay ratios covering U.S. employees and non-U.S. employees in lieu of the pay ratio covering all U.S. and non-U.S. employees? Why or why not? Should we require registrants to provide two separate pay ratios, as requested by some commentators? What should the separate ratios cover (e.g., should there be one for U.S. employees and one for non-U.S. employees, or should there be one for U.S. employees and one covering all employees)? If separate ratios are required, should this be in addition to, or in lieu of, the pay ratio covering all U.S. and non-U.S. employees? Would such a requirement increase costs for registrants? Would it increase the usefulness to investors of the disclosure?⁸

⁵ *Id.* at 60,564-55.

⁶ *Id.* at 60,565.

⁷ *Id.* at 60,564.

⁸ *Id.* at 50,567.

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?⁹

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 employees 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?¹⁰

The three members generally agreed with the SEC that, consistent with the language of Section 953(b), all employees, including non-U.S. employees, should be considered in the calculation of the median “without carve-outs for specific categories of employees.”¹¹ Two of the three members noted that since many publicly traded companies employ a majority of international employees, or part-time employees, investors would receive an incomplete picture of a registrant’s practices if those employees were excluded from the calculation. The three members also generally agreed that since leased employees and other temporary workers employed by a third party are not “employees” of the registrant, it was appropriate that those workers should not be considered in the calculation.

The three members generally would permit, but not require, registrants to provide disclosure of separate pay ratios covering U.S. employees and non-U.S. employees in addition, but not in lieu of, the proposed disclosure covering all employees if the registrant chose to provide such information. Two of the three members generally agreed with the SEC that the “flexibility afforded to all registrants under the proposed rules could permit registrants to manage any potential costs” arising from the proposed requirement to include non-U.S. workers in the calculation.¹²

Finally, the three members generally agreed that, as proposed, it is appropriate to limit the scope of covered employees to those who were employed on the last day of the registrant’s fiscal year “to ease compliance for registrants by eliminating the need to monitor changing workforce composition during the year, while still providing a

⁹ *Id.*

¹⁰ *Id.* at 60,568.

¹¹ *Id.* at 60,566.

¹² *Id.* at 60,566-67.

recent snapshot of the entire workforce.”¹³ They, however, also acknowledged that there might be other ways to deal with defining the scope of covered employees that provides registrants more time to perform the calculation prior to the deadline for filing their proxy statements without negatively impacting the usefulness of the disclosure for investors.

Identifying the Median

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? 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? 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?¹⁴

The three members generally agreed with the SEC that permitting registrants, as proposed, to use the time period that is used for payroll or tax recordkeeping when identifying the median employee based on consistently applied compensation measures should help “reduce compliance costs without appreciably affecting the quality of the disclosure.”¹⁵ They also generally agreed that the flexibility provided by that approach should not impair the usefulness of the disclosure to investors. On this latter point, they generally agreed with those commentators who concluded that “a primary benefit of the pay ratio disclosure would be providing a company-specific metric that investors could use to evaluate the PEO’s compensation within the context of his or her own company, rather than a benchmark for compensation arrangements across companies.”¹⁶

Disclosure of Methodology, Assumptions and Estimates

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? Should we require a more

¹³ *Id.* at 60,568.

¹⁴ *Id.* at 60,573.

¹⁵ *Id.* at 60,572.

¹⁶ *Id.* (footnote omitted).

technical discussion, such as requiring the disclosure of statistical formulas, confidence levels or the steps used in the data analysis?¹⁷

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?¹⁸

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?¹⁹

The three members generally agreed with the requirement, as proposed, that registrants disclose information about the methodology and material assumptions, adjustments or estimates used in identifying the median or calculating annual total compensation for employees. They also generally agreed with the SEC that the proposed disclosure “should provide sufficient information . . . [to investors] to evaluate the appropriateness of the estimates.”²⁰ They also generally agreed that the ideal explanatory disclosure would likely be a high-level narrative discussion of the approach taken by the company in identifying the median and calculating total compensation and not a lengthy and detailed discussion that could significantly detract from the readability of the company’s compensation discussion and analysis or overall proxy statement disclosures.

In addition, the three members noted that the proposal explicitly permits registrants “to supplement the required disclosure” with a narrative discussion and additional metrics if they choose to do so.²¹ They believe that over time useful voluntary supplemental disclosures might develop to meet best practices.

Timing of Disclosure

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

¹⁷ *Id.* at 60,576-77.

¹⁸ *Id.* at 60,577.

¹⁹ *Id.*

²⁰ *Id.* at 60,575.

²¹ *Id.*

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?²²

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 commentator 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 the 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 for inclusion in proxy or information statements for the annual meeting of shareholders?²³

49. Would the proposed instruction cause registrants to change their compensation practices? Alternatively, would the proposed instruction have an adverse impact on the usefulness to investors of the proposed pay ratio disclosure? How should we change the proposed requirements to address such impacts?²⁴

The three members generally agreed that, as proposed, the “pay ratio disclosure not be required to be updated for the most recently completed fiscal year until the registrant files its proxy statement for its annual meeting”²⁵ Moreover, they generally agreed with the SEC “that such an approach would not diminish the potential usefulness of the disclosure” to investors.²⁶ They, however, also acknowledged that the proposed timing might not provide enough time after the end of the fiscal year for *all* companies to calculate the pay ratio disclosure publication in the annual proxy statement. In that circumstance, they generally would not object to the rules providing for some additional accommodation to the extent that it does not significantly diminish the usefulness of the disclosure to investors.

²² *Id.* at 60,578-79.

²³ *Id.* at 60,579.

²⁴ *Id.* at 60,580.

²⁵ *Id.* at 60,577-78.

²⁶ *Id.* at 60,578.

The three members generally agreed that any additional accommodations that would allow registrants to delay the pay ratio disclosure beyond the date of the annual proxy statement could diminish the usefulness of the disclosure to investors. Notwithstanding that concern, they generally would not object to the proposed instruction that permits registrants relying on Instruction 1 to Items 402(c)(2)(iii) and (iv) with respect to the salary or bonus of the PEO “to omit pay ratio disclosure until those elements of the PEO’s total compensation are determined and provide its pay ratio disclosure in the same filing under Item 5.02(f) of Form 8-K in which the PEO’s salary or bonus is disclosed.”²⁷ They generally agreed with the SEC that under this fact pattern “the potential benefits of the disclosure could be diminished if the pay ratio were to be calculated using less than the entire amount of the PEO’s total compensation for the period”²⁸ The three members’ views on this issue were also influenced by the SEC’s expectation that such an accommodation would not “impact a significant number of registrants each year.”²⁹

Proposed Transition for New Registrants

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 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 burdens on these companies of complying with the requirements in their Form S-1, Form S-11, or Form 10?³⁰

The three members generally agreed with the proposed transition period for new registrants noting that it was consistent with the “proposed time frame provided for other registrants to comply with pay ratio disclosure requirements following the effective date of the final rules.”³¹ As indicated, the pay ratio disclosure requirements are most potentially meaningful to investors when placed in context with other executive compensation disclosures, particularly when included in the company’s proxy statement. They, therefore, generally would not object to the SEC’s proposal that the disclosure “would not be required in a registration statement on Form S-1 or S-11 for an initial public offering or a registration statement on Form 10.”³²

²⁷ *Id.* at 60,579.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 60,582.

³¹ *Id.* at 60,581.

³² *Id.*