



November 26, 2013

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Office of Rulemaking
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Comments of the National Retail Federation
Regarding Proposed Rule on Pay Ratio Disclosure**

On behalf of its membership, the National Retail Federation submits the following comments with respect to the Commission's rulemaking pursuant to section 953(b) of the Dodd Frank Act (the Pay Ratio Rule).

Dodd Frank directs the Securities and Exchange Commission ("Commission") to promulgate rules requiring registrants to disclose "the ratio of the median of the annual total compensation of all employees to the annual compensation of the [CEO]." We appreciate the flexibility the Commission has provided as to several elements of the proposal. We are concerned, however, that the predominate disclosure is structured in such a way that it could seriously undermine the quality of the information to be conveyed. These comments suggest means by which the Commission might fulfill both the letter and spirit of Dodd Frank while increasing the relevance of the furnished information. Following are our overall observations and suggestions, as well as four specific considerations.

By way of background, NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. Many of our members are registered companies that could be adversely affected depending on the structure of the final rule.

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While the investor purpose served by the required disclosure is murky, the effect on particular categories of registrants is clear: they will be unfairly categorized based on the diversity of their workforces. The proposed disclosure will ostensibly provide a reference for comparisons among companies between the earnings of a hypothetical median employee and that of each company's chief executive officer. Presumably this will augment investor determinations as to whether the compensation of a particular executive is commensurate (or excessive) in comparison with that of his or her peers. A pay ratio of 1100 to 1 for company A might, theoretically, suggest that a particular executive was too richly compensated in comparison with the CEO of company B where the pay ratio was 500 to 1. As the proposal is currently configured, such comparisons would be meaningless. Unless the workforces of the two companies are intimately understood by the investors, the proposed numerical summary is as likely to mislead as to enlighten.

For example, company B may have several thousand full time employees with pay variations largely determined by seniority. Another similar sized company may have businesses operations with great seasonal variations in activity. If its business can be scaled, technologically, to accommodate those changes, its workforce may be very much like that of company B, and its ratios may be similar.

On the other hand, if the delivery of that same company's services were heavily resource dependent, rather than technologically variable, the company might scale-up by hiring a significant numbers of seasonal employees (e.g. amusement parks during the holidays). If, as a result, most of its employees are not full time, their annual compensation could significantly skew the company's median income downward, and create a ratio like that of company A.

This result could occur even if all three CEOs received precisely the same compensation and, on an hourly basis, the employees at company A were paid more generously than were the employees of company B. Innumerable other variations are possible, but none of those variations is adequately expressed by the rule's proposed overall ratio.

The retail industry encompasses enormous employment variations. For example, some on-line merchants are heavily automated. Their customer facing personnel are relatively few in comparison with their brick and mortar equivalents. Both types of retailers may face significant seasonal variations in their workforce but the variance for the latter, given the less intensive reliance on automation, may be more profound. To make matters more complicated, many merchants are omnichannel and thus have a combination of these characteristics.

Every merchant differs. The net effect is that one large retailer may have a core workforce of 60 to 70 thousand full time employees (e.g. store managers, warehouse workers, IT specialists, buyers, commissioned sales associates, loss prevention executives, advertisers, and accountants) and yet issue 200,000 W-2s in the course of a single year. The overwhelming

majority of those W-2s may be for individuals who choose to work part-time or who are hired to meet a six-week seasonal rush. In that circumstance, despite having thousands of full time employees, the “median” W-2 (i.e. the 100,000th W-2 issued -- the standard on which the proposed rule rests) might well reflect the annual compensation of a student who only worked during a single summer recess. For purposes of investor comparison and analysis, highlighting the earnings ratio between that median employee and that of the CEO who, along with sixty thousand others, is in charge of corporate operations twelve months a year is extraordinarily misleading, if not outright meaningless.

We recognize that Dodd Frank requires that a total ratio, however ill advised, be calculated. However, the Commission should ensure that reports issued under its auspices not frustrate the purposes for which the Commission was created: to provide useful, timely information for the investing public. NRF suggests the Commission use its discretion to allow, as the primary disclosure, a ratio that would be more meaningful within and across industry segments: specifically, the ratio of the median of the annual total compensation of all full time employees to the annual compensation of the CEO. There will still be variations. Nevertheless, this disclosure will more accurately reflect the relative pay differentials of those fully responsible for the year-to-year operations of the business - the matter likely to be of greatest investor interest – than will the currently proposed ratio.

Disclosure of a full-time to full-time ratio would not supplant the requirement that the overall ratio also be calculated and disclosed elsewhere. But by making the full-time comparison the *primary* disclosure, the Commission will be highlighting a number that is less subject to the vagaries of seasonal demands, and is more reflective of consistent operations. The overall ratio would still be disclosed, but in a secondary context that better signals the anomaly it most often will be.¹

NRF also would like to highlight four specific points with respect to the proposed rules.

First, we appreciate the proposal’s flexibility in determining which employee constitutes the median (subject to the company’s explanation as to its methodology). A number of retailers have operations in countries outside the United States. Developing a “consistently applied compensation measure” as the proposal requires, creates considerable uncertainty when employees are subject to significantly differing payroll and tax systems, and where the tax reported incomes themselves might not be directly comparable. Although companies may

¹ Highlighted information should be useful. It is for this reason that so many entities, including NRF, alternatively encourage the Commission to adopt a rule that would allow companies to annualize the earnings of part-time and seasonal employees. An annualized comparison better reflects the relatively differences in hourly earnings between the average employee and those of the CEO. Even though an annualized calculation will overstate the ratio in most instances (since most CEOs work far more hours than does the typical employee), such an overstatement is likely to be common across businesses and thus provide a more valid basis for comparative assessments. We note that the proposed rule does provide for annualizing income among newly hired employees. That flexibility should be extended to all employees in the interest of a more meaningful rule.

attempt to reconcile these variations, recalculating every employee's income every year in an attempt to normalize them worldwide could be a Sisyphean undertaking. We would urge the Commission to either provide guidance or a safe harbor for such situations. Relatedly, the proposed rule might be clarified as to ensure that only employees of the registrant itself or U.S. subsidiaries of the registrant should be used for the calculation. This again has the advantage of likely providing a more meaningful calculation across companies and industries.

Second, we also welcome the proposal's flexibility in allowing registrants to use sampling techniques in an effort to estimate data. In light of that, and the imprecision inherent in developing the disclosed ratios, we strongly urge the Commission to amend the final rule so that the disclosures are deemed "furnished" as opposed to "filed." Liabilities of precision should not attach to disclosures that, by their nature, will be imprecise.

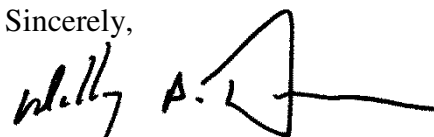
Third, for many companies, especially those with operations outside the U.S., developing the proper calculation will be time and labor intensive (we have heard from mid-sized retail corporations that a \$100,000 compliance cost estimate is likely to be conservative). Accordingly, the effective date to provide registrants sufficient time to prepare to comply with the final rule should not be *in* the first fiscal year commencing on or after the effective date of the final rule, but rather *for* the first fiscal year commencing on or after the effective date of the final rule. This would avoid the possibility that some companies might have only weeks in which to comply, and instead would provide all companies with a full year.

Finally, there is a question as to when and where disclosures be made. Consistently with our suggestion above regarding the primacy of disclosure, we support the proposal that the pay ratio disclosures be included solely in the proxy and information statements to shareholders in which item 402 disclosures are currently required.

In closing, we appreciate the Commission's effort to provide flexibility in the proposed rules. If it will use that flexibility to encourage, in the first instance, disclosures in the clearest and most meaningful matter, while remaining true to the requirements of Dodd Frank, the Commission will better serve the investing public in a manner consistent with its history and its mission.

If you should have any questions, please feel free to contact me (202.783.7971).

Sincerely,

A handwritten signature in black ink, appearing to read "M. B. Duncan", followed by a stylized, elongated horizontal line that tapers to a point on the right.

Mallory B. Duncan
Senior Vice President
General Counsel