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Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

2 December 2013

Pay Ratio Disclosure
(Release No. 33-9452)
Commission File No. S7-07-13

Dear Ms. Murphy:

Ernst & Young LLP is pleased to comment on the *Pay Ratio Disclosure* proposal issued by the Securities and Exchange Commission (SEC or the Commission). The proposal would implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) by amending Item 402 of Regulation S-K to require registrants to disclose the median annual compensation of all of their employees (excluding the principal executive officer) and the ratio of that amount relative to the annual compensation of their principal executive officer.

We commend the Commission for not prescribing a "one-size-fits-all" approach. The proposal allows each company to consider its facts and circumstances in determining the appropriate approach to identify its median employee and estimate that employee's annual compensation. Under the proposal, a company would be allowed to identify its median employee by using any "consistently applied compensation measure." The proposal also would allow registrants to identify the median employee from their entire employee population or by using a statistical sample of that population.

While we applaud the flexibility provided in the proposed rule, we encourage the SEC to clarify acceptable statistical sampling methodologies and/or introduce a "safe harbor" sample size as a way to reduce compliance costs. By providing additional guidance in the final rule, numerous implementation questions about the use of statistical sampling could be addressed up front and the need for subsequent FAQs or other interpretive guidance could be limited.

Our comments in this letter are limited to certain aspects of the proposed rule. We have not commented on whether we believe the proposed disclosures would be material to investors or whether the benefits of the disclosures exceed their associated costs. We believe our recommendations would reduce the cost and burden on issuers, promote disclosure that is consistent with the spirit of the Dodd-Frank Act and enhance comparability without adversely affecting flexibility.

Statistical sampling (or other reasonable method)

In identifying the employees from which the median compensation is determined, the proposal would allow a registrant to use its entire employee population as of its fiscal year-end or a statistical sample of that population (or other reasonable methods).

In many statistical analyses, the minimum sample size is determined by reference to a specified precision and confidence interval. The determination of an appropriate sample size for estimating a median is not as straightforward as the determination of a sample size for estimating a mean. As stated in the proposal, the variance of the underlying compensation distribution can materially affect the appropriate sample size.

The proposal uses data published by the Bureau of Labor and Statistics (BLS) to identify industries with the highest and lowest wage variances and estimates that the appropriate sample size for registrants with a single business unit or geographic region varies from 81 to 1,065, with an average estimated sample size close to 560. The example sample sizes were determined based on a 95% confidence interval with 0.5% margin of error using a lognormal distribution.

The example sample sizes in the proposal are based on a simple random sampling method and are limited to registrants operating in only a single business unit or geographic region, which the proposal estimates to represent only 50% of the registrant population subject to the disclosure requirement. However, even for registrants operating a single business unit or operating in a single geographic region, the proposal states that the appropriate sample size could be higher or lower than the industry estimate if a registrant's actual wage distribution differs from that of its industry. For registrants operating multiple business units or in multiple geographic regions, the proposal indicates that a more complicated sampling approach may be necessary.

In the adopting release, we encourage the Commission to further clarify its expectations about the methodology a registrant would use to determine an appropriate statistical sample size. In the following sections, we describe the additional guidance we believe is necessary.

Additional guidance on sampling methodology and 'appropriate minimum' sample

We believe the final rule should identify acceptable criteria for defining an "appropriate minimum" sample. For example, we believe it isn't clear from the proposal whether the precision and confidence interval illustrated in the proposing release (i.e., 0.5% and 95%, respectively) would have to be followed for determining an appropriate sample size, whether the 95% confidence interval would be two-sided and whether the SEC staff performed a cost-benefit analysis in setting those levels.

It also isn't clear to us whether it would be appropriate for a registrant that operates a single unit or in a single geographic region to use the relevant industry sample size illustrated in the proposing release if the company has a reasonable basis to believe that its actual distribution of employee wages is consistent with the wage distribution data published by the BLS for its industry.

If the median compensation within the sample (or for the entire employee population, if statistical sampling is not used) includes multiple employees (with the same compensation) rather than a single individual, we also aren't sure how a registrant would determine the "median employee" within the group.

Combining multiple samples across geographies or business units

If the total population is permitted to be segmented into several groups (e.g., by country), it would be advantageous for companies to have an acceptable default approach to combining multiple samples. The SEC should consider identifying at least one method that companies could use that would be acceptable, such as weighted median total compensation based on the total number of employees in each sample relative to the total.

Simplified sampling method or potential safe harbor(s)

For the estimated 50% of registrants that operate in multiple business units or geographic regions, the proposal acknowledges that statistical sampling may be "more complicated" and could result in a "disproportionately higher cost." Given the complexity in designing a statistical sampling method and potential compliance burden, we encourage the Commission to provide a simplified method for determining an appropriate sample size and/or a safe harbor minimum sample size. Such a provision could significantly reduce the complexity and costs of compliance.

Use of 'other reasonable methods'

The proposal allows for the use of a statistical sampling method or "other reasonable methods" for purposes of determining the employees from which the median compensation would be determined. However, the proposal does not provide specific examples of other reasonable methods that would be acceptable. In the adopting release, we believe the Commission should identify additional methods that, if used, would satisfy the requirements for determining which employees should be included in the analysis.

Trade-off between accuracy and compliance burden

The proposed rule allows companies to use a reasonable proxy, such as W2 wages or their equivalent, to identify the median employee. Components of total compensation may not be distributed evenly across a company's workforce (e.g., non-wage benefits may be more prevalent in certain countries). This could lead to an over- or understatement of the median total compensation if the median employee is identified using a proxy measure.

Under the proposal, one possibility a company could use to minimize the risk of over- or understatement would be to determine the total compensation (as determined in accordance with Item 402(c)(2)(x)) for each employee in the sample and then determine the median total compensation. This would result in a more exact calculation of the median total compensation. However, this approach would result in significantly higher compliance costs, which would increase in proportion to the sample size.

Another approach that would result in lower compliance costs would involve determining the total Item 402 compensation for only a portion of the selected employee sample. Because the median is a rank in a distribution, the median is not distorted by removing the same number of high and low compensated individuals from consideration. As the proposing release says, removing some percentage of the distribution from both the high and low ends of a sample based on a compensation proxy should not distort the median because neither the highest nor lowest compensation proxy individuals are likely to be the median in total compensation. Such an approach could result in lower compliance costs than determining total Item 402 compensation for each employee in the sample, and we encourage the SEC to retain this flexibility in the adopting release.

Nevertheless, if a company elects to use a proxy compensation measure to identify its median employee rather than the total compensation used to compute the pay ratio (as determined in accordance with Item 402(c)(2)(x) of Regulation S-K), the total compensation for the median employee identified may not be representative of what the company reasonably believes is the median compensation for its employee population. We suggest that the final rule address what a company could do in this circumstance. At a minimum, we recommend that the SEC allow a company to reassess and revise its methodology, as necessary, to identify the median employee (e.g., use a different compensation proxy, determine the total Item 402 compensation of more employees surrounding the median employee in the selected sample).

Computation of pay ratio

The proposing release would require the total annual compensation of the principal executive officer and the median employee to be calculated or estimated in accordance with Item 402(c)(2)(x) of Regulation S-K. We note that Section 953(b) of the Dodd-Frank Act specifies that the ratio must be computed using an employee's total compensation under Item 402(c)(2)(x) of Regulation S-K.

Item 402(c)(2)(x) of Regulation S-K provides a measure of total annual compensation that relates to both current and future service. For example, Item 402(c)(2)(x) of Regulation S-K includes in total annual compensation the grant date fair value of equity awards, even if those awards have vesting provisions that require services in future years. With respect to the median employee, the elements of total annual compensation would generally represent compensation for current services rendered unless the median employee also received equity awards with future vesting provisions. The resulting ratio would be less meaningful and potentially subject to significant variability to the extent the Item 402 compensation of the principal executive officer is significantly affected by equity awards with future vesting provisions.

Therefore, we recommend that the final rule allow, but not require, the ratio to be computed based on the amount of the principal executive officer's total compensation recognized in the registrant's annual financial statements for the respective fiscal year. Under this alternative, the ratio would better compare the compensation for services rendered for the respective period and provide potentially more meaningful trend information over time. Of course, we would expect the SEC to require a registrant to disclose its election to use the alternative measure of principal executive officer compensation and to require its consistent use from period to period if elected.

Disclosure of supplemental pay ratios

The proposing release acknowledges that registrants would be permitted to supplement the required pay ratio disclosure with a narrative discussion and may also present alternative or additional pay ratios to supplement the required ratio. Consistent with the SEC's rules and regulations, such additional ratios should be clearly identified and not be misleading, and should not be presented with greater prominence than the required ratio. To provide flexibility to registrants that may wish to present supplemental ratios (e.g., computed based on full-time employees only), we encourage the Commission to retain this acknowledgment in the adopting release.

Interaction with other executive compensation disclosures

Currently, registration statements on Form S-1 are required to include executive compensation disclosures for the most recently completed fiscal year. When Form S-1 registration statements are filed after a fiscal year-end but prior to the filing of the proxy or information statement relating to the annual shareholders meeting, the registrant must accelerate its preparation of executive compensation disclosures and, in some cases, may be unable to access the public capital markets.

Conversely, automatic shelf registrations statements filed by well-known seasoned issuers and drawdowns from all shelf registration statements provide investors with updated executive compensation disclosures on the same timetable as the registrant's Exchange Act reporting requirements. In those cases, investors usually are not provided updated executive compensation disclosures until the filing of the definitive proxy statement for the annual shareholders meeting.

Under the proposal, a registration statement would not be required to include the pay ratio disclosure with respect to the most recently completed fiscal year until 120 days after year-end unless the ratio has been disclosed in an annual report or an annual meeting proxy or information statement filed before that date. We strongly agree with this proposed relief.

Moreover, we encourage the Commission to consider providing similar registration statement relief for all executive compensation disclosures required under Item 402 of Regulation S-K. Even when executive compensation information is omitted for the most recent fiscal year, we note that Item 5.02(e) of Form 8-K requires timely disclosure of material changes in compensatory arrangements with named executives and of material grants or awards under such arrangements. By more closely aligning the timing of executive compensation disclosures required by the Securities Act with that required by the Securities Exchange Act, the Commission could ease potential impediments to public capital formation without materially reducing the timeliness or content of disclosures provided to investors.

At a minimum, we do not believe that a registration statement should be required to include executive compensation disclosures with respect to an annual period for which audited financial statements are not also required (or filed and provided) in that registration statement. We see no reason that executive compensation disclosures should be required to be more current than the latest annual audited financial statements included or incorporated by reference in the registration statement. In our view, both financial and non-financial disclosures about completed fiscal periods generally should be provided on a consistent timetable to investors in public securities offerings. Such an approach is currently followed in registration statements on Form S-3 by registrants that do not meet the definition of a well-known seasoned issuer.

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We would be pleased to discuss our comments with the Commission or its staff at your convenience. Please contact Christopher M. Holmes, National Director of SEC Regulatory Matters, at 202-327-8890 or Mary Batcher, National Director, Statistics and Sampling, at 202-327-6773 regarding our submission.

Very truly yours,

Ernst + Young LLP