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VIA ELECTRONIC FILING

December 02, 2013

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

Re: **Proposed Pay Ratio Disclosure Rule (RIN 3235-AL47)**

Dear Secretary Murphy:

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 proposed rule to implement the pay ratio disclosure requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[2] 78 Fed. Reg. 60559 (Oct. 1, 2013).

RILA appreciates the SEC's effort to fulfill the various mandates that Dodd-Frank imposes on the Commission. Nonetheless, we remain concerned by the lack of a congressional policy rationale underlying 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. Indeed, we agree with the Commission that meaningful disclosure comparisons across registrants (or across industries) is not achievable and appreciate the SEC's efforts to provide regulatory flexibility in order to reduce the burden associated with the statutory requirement.

Our specific comments set forth below are 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 benefits to investors or registrants presented by the law. In particular, we encourage 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).

I. LEGAL AND REGULATORY BACKGROUND

Section 953(b) of Dodd-Frank requires the SEC to promulgate regulations to calculate and disclose the pay ratio between the principal executive office (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 SEC has undertaken a multi-step regulatory process to implement the statutory pay ratio mandate and RILA has participated to the extent possible, including with comments filed in response to the Commission's request for guidance on implementing the statutory language. Those comments are incorporated by reference herein. We were pleased that the SEC acknowledged several of the points made in RILA's initial comments; however, we remain concerned by the issues in the proposed rule that are discussed more fully below.

II. COMMENTS ON PROPOSAL

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." The SEC has proposed to require registrants to include "any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries on that day." Proposed Item 402(u)(3). Although we agree that the ability to generate meaningful investor information from the pay ratio calculation is minimal at best, we urge 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 information. In this regard, and as explained more fully below, the final rule should require 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 help to significantly reduce the burden imposed by the law.

1. PEO's covered by the regulation are full-time U.S. employees and are the appropriate point of reference for interpreting Section 953(b)(1)(A)

In order to interpret the scope of the statutory requirement in Section 953(b)(1)(A), the SEC should look 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 require the comparison to be conducted against all such full-time, U.S. based employees.[3]

The skewing of the ratio that will occur if the rule is finalized as proposed 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. Specifically, retailers are some of the largest employers in the United States and are important job creators for the domestic economy as a whole and for the individual communities in which stores are located.[4]

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 who wants to be at home when his 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]

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[3] 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).

[4] *See, e.g.,* PricewaterhouseCoopers, "U.S. Retail Trade Industry Employment and Reform" (November 2012).

[5] The SEC suggests that part-time workers inherently have lower morale. See, 78 Fed. Reg. 60569. While the current economy may not allow everyone who wants 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

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 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 proposed 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 itself recognizes in the preamble to the proposed 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 network 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 would place a U.S. company 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.

Nonetheless, in the spirit of flexibility embraced by the Commission, we would recommend that the final rule allow those companies for which inclusion of all employees is feasible to be allowed to do so, provided that the disclosure to the SEC fully and accurately identifies the scope of employees included.

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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.

[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.

2. The final rule should provide additional flexibility in terms of employee determination date.

The proposed rule would define an "employee" for the purposes of the pay ratio calculation as an individual who is employed by the registrant on the last day of the registrant's last completed fiscal year. Proposed Item 402(u)(3). The SEC recognizes that the workforce composition changes during the year and reasons that a "bright line calculation date" is a better solution than requiring registrants to monitor the changing workforce composition every day over the course of the year. 78 Fed. Reg. at 60568. Although we fully agree that a single date is an important way to manage the potential challenge, we respectfully ask the SEC to allow issuers to use either the last day of their fiscal year or another date certain (e.g., end of the first quarter, end of calendar year or the proposed end of fiscal year) for the determination provided that the date is disclosed in the report.

Specifically, the retail industry has identifiable "high" seasons that occur for many at the end of the calendar year but which for others may be in the spring or "back to school" or other times during the calendar year. These periods may utilize disproportionately high numbers of seasonal employees. For some issuers, the last day of the fiscal year may correspond with a "high" season and for others it will not. But whether or not these dates align or happen at polar opposite points in the calendar is completely arbitrary and a function of happenstance. Accordingly, although we urge the SEC to codify the proposal to use a single date certain for calculating the employee base, we strongly recommend that the Commission allow issuers to use either the last day of the fiscal year or another specific date that is fully disclosed in the submission.[8]

[8] This is important because, despite the SEC's remarks (with which we agree) about the lack of meaningful comparability, many commentators have expressed that it is naïve to think that comparisons will not be made. *See, e.g.,* Mark Borges, Principal, Compensia, Paul Platten, Managing Director of Towers Watson, and Steve Seeling, Executive Compensation Counsel, Towers Watson, *Webcast "Doing Your Pay Ratio Homework Now: A Roadmap"* (Oct. 9, 2013)).

3. The final rule should provide additional flexibility in the methods used to determine the median employee.

The proposed rule would permit a registrant to identify the median employee using either annual total compensation or any other compensation measure that is consistently applied such as amounts derived from the registrant's payroll or tax records. 78 Fed. Reg. at 60604. In order to reduce the cost of using payroll or other data and annualizing information for employees such as new hires who are employed for less than an entire fiscal or other year, we would propose that registrants be permitted as an alternative to determine the median employee based upon employee rate of pay on the measurement date. For some issuers, determining the median employee based upon rates of pay, rather than pay earned over the course of a year, will reduce the burden and minimize the skewing effects on the ratio of a large number of part-time, temporary and seasonal employees. Provided that the method is disclosed, the final rule should give issuers flexibility in this regard.

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

The SEC proposes to treat 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 the final rule authorize issuers 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.[9] The information that will be generated by this calculation is not truly germane to investor decision making. For the reasons set forth above and acknowledged in the SEC's preamble, the complexities presented in calculating the figures required for the pay ratio calculation are significant. Although we appreciate the flexibility that the Commission has included in the proposed rule, 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 promulgate a final rule that allows 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.

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[9] 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.

C. Registrants Will Need Additional Time To Comply

Section 953(b) of Dodd-Frank does not specify a date certain upon which registrants must provide pay ratio information. The SEC proposes to require registrants to comply with the final rule in the first fiscal year commencing on or after the effective date of the final rule. 78 Fed. Reg. 60580. 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 there is currently no system in place that can adequately calculate the disclosure as set forth in the proposed rule. Accordingly, registrants will need 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). Accordingly, retailers and others will not be able to start developing pay ratio calculation systems until a final rule has been promulgated and provides certainty with respect to the information that will be necessary.[10] 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 proposed to enable accurate compliance without imposing an undue burden.[11]

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[10] For example, some companies capture time worked in hours but converting to total compensation, as suggested in the proposed rule, will also require significant time.

[11] 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.

III. CONCLUSION

RILA appreciates the opportunity to comment on the SEC's Pay Ratio Disclosure proposed 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 crafted 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,

Deborah White
Executive Vice President
& General Counsel
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