FINANCIAL
SERVICES
ROUNDTABLE

SUBMITTED ELECTRONICALLY

December 2, 2013

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

Re: Pay Ratio Disclosure, Securities Act Release No. 9,452 [File No. S7-07-13], 78 FEDERAL REGISTER 60560 (Oct. 1, 2013) (the "Proposing Release")

Dear Ms. Murphy:

The Financial Services Roundtable[1] ("FSR") welcomes the opportunity to provide the Securities and Exchange Commission (the "Commission") with comments on its proposal (the "Proposal") to require that certain companies disclose the ratio of the

[1] As *advocates for a strong financial future*™, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

compensation of their principal executive officer ("PEO") to that of all employees in the company's annual report, proxy or information statement, or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K ("Item 402").[2] While we support meaningful disclosure, FSR believes that the disclosure required in this instance will not be materially helpful to investors, and the Commission should seek reconsideration of the Congressional mandate in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3] In our comments, we also recommend certain adjustments or alternative approaches that will further enhance the Commission's flexible approach to identifying the median employee as reflected in the proposed amendments to Item 402, which would implement the so-called "Pay Ratio Rule" mandated pursuant to section 953(b) of the Dodd-Frank Act.

I. FSR Urges Policymakers to Reconsider the Disclosure Mandate

FSR believes that the disclosure called for under section 953(b) of the Dodd-Frank Act will not provide investors with material information that will be helpful to their analysis of a reporting company's business or operations or in evaluating investment decisions. The existing requirements of Item 402 of Regulation S-K require a detailed and thorough discussion of the compensation payable to the reporting company's named executive officers, including the PEO, and the rationale underlying the registrant's applicable compensation programs. This detailed data provides investors with a complete picture of how the PEO's compensation is determined, and fully informs any actions that the investors may determine to take related to such compensation.

No incremental value will derive from disclosing a ratio of the PEO's compensation to that payable to a random employee, whose skills, duties, responsibilities and impact on the performance of the company and its stock price bear no relationship to

[2] Regulation S-K, Item 402 [17 C.F.R. § 229.402].

[3] Pub. L. No. 111-203, § 953(b), 124 Stat. 1904 (July 21, 2010).

the importance of the performance and contribution of the PEO. Moreover, the investment returns to the reporting company's investors will of necessity be adversely impacted by the costs imposed on the reporting company related to the extensive data collection efforts that must be undertaken to comply with this disclosure requirement, even under the flexible approach reflected in the Proposal.

Since the premise underlying the pay ratio disclosure régime is without merit, FSR has significant reservations about the mandated disclosure. Accordingly, FSR encourages the Commission to seek Congressional reconsideration of the disclosure requirement mandated by section 953(b) of the Dodd-Frank Act. If and to the extent that this disclosure requirement is not repealed or significantly modified, FSR also encourages the Commission to consider comments on the Proposal with the objective of further minimizing the costs and burdens of compliance in light of the minimal theoretical benefit—and real economic detriment—to investors of having registrants expend substantial resources to effect such disclosure.

II. Executive Summary

FSR's comments are focused primarily on methods by which the costs and burdens of compliance with the pay ratio disclosure régime can be reduced, without violating the spirit and intent of the provisions of section 953(b) of the Dodd-Frank Act.

FSR urges the Commission to adopt a "Good Faith Compliance" standard so that registrants that utilize the flexibility afforded by the Proposal to determine the median employee (including such provisions as statistical sampling) would not be subjected to allegations of non-compliance because the reporting in their "filed" materials would be based on a methodology using estimates for determining the median employee that the Commission itself has deemed appropriate. A company's principal officers should not have trepidation in signing a Sarbanes-Oxley certification[4] because there could be an immaterial rounding error in the calculation of a pay ratio that on its face must be considered only to require a general guidepost of the relative compensation of the principal executive officer, and an "average" employee, as a supplement to the already extensive and detailed individual disclosure of the principal executive officer's compensation.

Our remaining comments are focused mainly on the most difficult compliance burden of the Proposal: collecting and properly synthesizing compensation data pertaining to the registrant's non-U.S. based employees. FSR believes that the burdens and costs arising from the administrative and legal challenges that are likely to be confronted in including non-U.S. based employees in the determination of the median employee far outweigh any marginal benefit that could be derived by investors from an unduly strict inclusion of non-U.S. based employees and their compensation in the identification of the registrant's median employee. Accordingly, FSR recommends that the Commission adopt several enhancements to the flexible approach presented in the Proposal, each of which would help fulfill the statutory mandate of providing disclosure that covers "all employees," but which would do so in a manner that would reduce the registrant's compliance costs and cross-border issues implicated by the Proposal.

The following is a summary of FSR's comments:

- FSR urges the Commission to adopt a "Good Faith Compliance" standard which would eliminate the registrant's exposure (and that of its principal executive officers) to litigation challenges for compliance with a rule that would provide—at best—marginal benefit to investors in evaluating their investment decisions.

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[4] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302(a), 116 Stat. 745, 777 (July 30. 2002) [codified at 15 U.S.C. § 7241].

- Seasonal, temporary and part-time employees should be excluded from the determination of the median employee because their compensation is not representative of the practices applicable to the "average" employee.
- Measuring the compensation of non-U.S. based employees presents significant compliance burdens.
- FSR urges the Commission to provide registrants with non-U.S. based employees a transition period of two fiscal years to comply with the final rule.
- A registrant should be allowed to use data related to non-U.S. based employees on its payroll as of its next to last completed fiscal (or calendar) year, to permit adequate time to collect the data before the disclosure is required.
- The proposed requirement to "consistently apply" the pay ratio methodology to all employees would create an unduly burdensome standard for registrants with non-U.S.-based employees.
- The Commission should include an express instruction regarding foreign exchange calculations.
- The Commission should exclude non-U.S. based employees (including U.S. expatriates) entirely from the determination of the "median employee" if they represent in the aggregate less than five percent (5%) of the registrant's employees.
- FSR urges the Commission to adopt a "Statistical Sampling Safe Harbor" for non-U.S. based employees.
- The Commission should allow registrants to substitute the closest U.S. employee for a non-U.S. based employee who would otherwise be the median employee.
- FSR urges the Commission to clarify that a reporting subsidiary of a publicly-traded entity would not be required to include the pay ratio in its separate filings.

III. FSR Urges the Commission to Adopt Further Enhancements That Would Reduce the Compliance Burden Imposed by the Pay Ratio Disclosure Régime

We acknowledge that the Commission has attempted to reduce the costs and burdens that would be imposed on registrants due to the mandate of section 953(b) of the Dodd-Frank Act. The pay ratio disclosure régime would be extremely burdensome if a registrant were required to determine the compensation of all employees in the same manner that is required for disclosure of the compensation payable to the registrant's named executive officers pursuant to Item 402. Therefore, FSR fully supports the Commission's recognition that compelling such expense would not be justified by the insignificant benefit to investors of the required disclosure.

As stated above, FSR believes that it would be vastly preferable for Congress to revisit its decision to enact section 953(b). However, if registrants are compelled to disclose the pay ratio, we support a flexible approach to compliance that minimizes to the maximum extent possible the significant costs associated with such compliance. FSR acknowledges that the Commission has attempted to develop an appropriate and more cost-effective approach to satisfy the disclosures required by section 953(b) of the Dodd-Frank Act, but we believe the Commission must go further to reduce the burdens of such disclosures, particularly in regard to the inclusion of the compensation data for non-U.S.-based employees.

IV. FSR Urges the Commission to Adopt a "Good Faith Compliance" Standard

As proposed, the Commission's flexible approach would create substantial potential risk for registrants who avail themselves of the proposed alternatives to minimize the potentially onerous burdens of the disclosure mandated by section 953(b). For example, the Commission has determined that the pay ratio disclosure will be deemed "filed" material. Registrants who apply the flexibility permitted under the proposed rule would be subject to challenge as to whether their disclosure complied with the applicable requirements under the Federal securities laws. The registrant's principal executive officer and principal financial officer will be required to certify compliance,[5] knowing that the calculation of pay as required by the Pay Ratio Rule will have been effected using reasonable methods that are intended to minimize cost and produce disclosure that is at best generally accurate. Thus, the very flexibility that the Commission has concluded is appropriate and necessary to meet the conditions of section 953(b) may form the basis of challenges to the registrant's disclosure.

While it is almost certain that any reasonable investor would not consider any difference in the pay ratio to be a material fact related to any investment decisions, registrants may nonetheless be subjected to inordinate expense in proving that to be the case. Accordingly, FSR urges the Commission to adopt a "Good Faith Compliance" standard in the final rule. The principle behind our recommendation is akin to that supporting the good faith compliance standard for the recently-proposed "Crowdfunding rules," which are intended to "protect an issuer who made a diligent attempt to comply with the proposed rules from losing the exemption as a result of insignificant deviations from Regulation Crowdfunding."[6]

Under our recommended *Good Faith Compliance* standard, the Commission by rule would provide that any registrant that in good faith applies the flexibility afforded to the registrant pursuant to the Pay Ratio Rule to determine applicable "pay ratio disclosure" shall be deemed to be in compliance with the disclosure requirements of section 953(b). As a result of this revision, neither the registrant nor its principal officers would be exposed to litigation challenges for compliance with a rule that would provide—at best—marginal benefit to investors in evaluating their investment decisions.

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[5] *See* rule 13a-14, Certification of disclosure in annual and quarterly reports [17 C.F.R. § 240.13a-14].

[6] Crowdfunding, Securities Act Release No. 9,470 [File No. S7-09-13], 78 FEDERAL REGISTER 66428 at 66496 (Nov. 5, 2013) (the "Crowdfunding Proposing Release").

V. Exclusion of Temporary, Seasonal and Part-Time Employees is Necessary and Appropriate to Fulfill the Mandate under Section 953(b)

The Commission states in the Proposing Release that section 953(b) requires the inclusion of all employees in determining the median employee.[7] While that statement may be consistent with the literal language of the statute, it is inconsistent with the premise underlying the comparison mandated by the Dodd-Frank Act. On its face, section 953(b) assumes that there is value to investors of comparing the total compensation of the PEO to that of an average employee, identified in the statute as the median employee. However, the logic of that assumption is questionable. Thus, the premise behind section 953(b) must be that a comparison of the PEO's compensation to the compensation payable in the ordinary course to a representative employee would provide a meaningful point of reference.

Including in such comparison seasonal and other temporary employees—who by definition are not included among the registrant's regular workforce, and are generally paid on an entirely different basis from its regular workforce—can afford no material benefit to investors. Therefore, a comparison of the compensation of a temporary or seasonal employee to a regular full-time employee will necessarily be distorted.

Similarly, distortion will also occur by including part-time employees in the comparison. While they are part of the company's regular work force, they are in a different class than those individuals employed on a full-time basis. Part-time employees are frequently paid on a substantially different basis than full-time employees, which recognizes that the flexibility afforded to such individuals in their work schedules is a benefit that alters the dynamic applied in setting the compensation of their full–time counterparts.

[7] Pay Ratio Disclosure, 78 FEDERAL REGISTER 60560 at 60565.

The distinction between the compensation payable to temporary, seasonal and part-time employees has long been recognized. The Internal Revenue Code imposes strict rules that are intended to prohibit discrimination as to contributions and benefits under employee benefit plans under a tax qualified plan. Yet, these rules allow the plans to provide no benefit or contributions to employees who, in a given period, do not perform a minimum of 1,000 hours of service. The evident basis for this exclusion is that applying the same rules to employees who do not perform at least the specified level of service such class would not be justified.

A similar distortion would occur if the registrant must include part-time, seasonal and temporary employees in the determination of the median employee—each of whom would be expected to be in the lower quadrant, when measured by compensation, of the registrant's workforce. Thus, their inclusion will generally just mean that the registrant will increase the employee headcount used to measure the median employee. This will, of necessity, skew the determination of the median employee to some individual who is not truly representative of median of the registrant's regular, full-time workforce. Accordingly, whatever benefit could derive from the comparison of the PEO's compensation to a representative employee will be lost entirely because the inclusion of such different category of employees will essentially assure that the employee selected for comparison is not an appropriate representative.

VI. Measuring the Compensation of Non-U.S. Based Employees Presents Significant Compliance Burdens

In proposing the Pay Ratio Rule, the Commission sought commentary regarding specific questions related to the scope of the proposed rule,[8] and whether there were additional means of simultaneously complying with the mandate of the Dodd-Frank Act

[8] Proposing Release, Questions 1-5.

and reducing the cost and difficulties associated with compliance with the rule as proposed.[9]

The Commission acknowledged in the Proposing Release that compliance would be particularly challenging for registrants who have a significant number of employees located outside the United States,[10] ranging from the incremental difficulties associated with "simple data collection" to the possibility of non-compliance due to the limitations imposed by applicable home country laws designed to protect the privacy of each employee within that non-U.S. jurisdiction. The Commission in particular asked for comment on the issue pertaining to such foreign employees.[11]

FSR shares the views and concerns expressed by the Commission. The burdens of compliance with the Pay Ratio Rule will be most significant for registrants having non-U.S. based employees (including U.S. expatriates) who must be included to determine the median employee compensation for purposes of comparison to the compensation of the registrant's PEO. Our comments are focused primarily on this issue, in response to the Commission's invitation to suggest alternative ways of compliance that could reduce the costs and efforts of compliance while still satisfying the mandate of section 953(b).

VII. FSR Urges the Commission to Provide Registrants a Transition Period of Two Fiscal Years to Comply with the Final Rule

As the Commission appreciates, registrants with any degree of international operations will have difficulty assembling the core data that will be required to comply with the disclosure requirements. Unless additional provisions are added to allow alternative means of compliance, registrants will likely have to modify significantly the

[9] Proposing Release, text following footnote 56, Question 7.

[10] Proposing Release, text following footnote 52.

[11] Proposing Release, Questions 9 and 10.

reporting systems that are currently in place for capturing the compensation payable to employees located in non-U.S. jurisdictions. This task is not only expensive, but also time consuming. As the Government itself has discovered, the task of data collection is not one that is simply accomplished; it requires time, effort, coordination and extensive systems modifications, each of which must be tested to identify errors or failures to ultimately produce useful information. Given these costs in money and time, no registrant will want to embark on such task without the benefit of a final rule, so that it is known at the commencement of the project exactly what data is sought to be obtained.

Accordingly, unless the Commission affords registrants additional relief or flexibility to lessen materially the burdens associated with assembling the data for non-U.S. based employees in all applicable jurisdictions, registrants will need a transition period of at least two full fiscal years to comply with the final Pay Ratio Rule with regard to its international employees. FSR's suggested relief could be effected by either allowing any registrant with more than a *de minimis* non-U.S. workforce a delayed effective date, or a transition period during which the registrant may report its pay ratio disclosure solely on the basis of the data available in respect of its employees based in the United States.

While the Commission has stated that section 953(b) requires the inclusion of all employees,[12] thereby rejecting a U.S. only approach, our suggested transitional rule merely reflects the realities of the time and effort required to meet effectively the requirement of including the data for affected non-U.S. based employees in the registrant's pay ratio disclosure.

[12] *See supra* note 7.

VIII. The Registrant Should Be Allowed to Use Data on Non-U.S. Employees on Its Payroll as of the Next to Last Completed Fiscal (or Calendar) Year

As proposed, the pay ratio disclosure régime would be applied to those employees who are in employment "at the end of the registrant's fiscal year" (or calendar year, if different from its fiscal year); however, this requirement would present an inordinate burden for larger employers with a significant non-U.S. workforce.

The task for a U.S.-only registrant with a meaningfully large workforce may be difficult, but at least the U.S.-only registrant is accustomed to having its tax reporting competed by the end of January of the year following the year for which the compensation is paid. However, for a registrant that will need to include pay ratio disclosure in a proxy statement for a shareholders' meeting occurring in April or May, the task of determining the pay ratio for U.S.-based employees may be daunting. But for those with non-U.S. based employees it is likely impossible, even with sufficient lead time to design, build, test, and implement new systems.

Accordingly, we ask the Commission to allow registrants the alternative to determine the pay ratio using data with respect non-U.S. based employees (including U.S. expatriates) on its payroll as of the last completed fiscal (or, if applicable, calendar) year or as of the immediately prior year. This alternative would not be expected to alter materially the pay ratio calculation. To the extent that it has any effect on the calculation, the operation of this alternative would be expected to set the median employee at a slightly lower level (since compensation generally increases at least marginally year over year), making the pay ratio relative to the principal executive officer less attractive from the point of view of the registrant.

Additionally, FSR recommends that the Commission require a registrant that changes its methodology from the immediately prior year's data to the most recently completed year's data to calculate and report the ratio using the data from both years. A registrant that changes from the most recent year's data to the immediately prior year's data (which may be done because the more current data is not available) could be precluded from changing its methodology again for a specified period of time.

IX. The Proposed Requirement to "Consistently Apply" the Pay Ratio Methodology to All Employees Would Create an Unduly Burdensome Standard for Registrants with Non-U.S.-Based Employees

Instruction 2 to new proposed Item 402(u) states,

> A registrant may identify the median employee using (A) annual total compensation or (B) any other compensation measure *that is consistently applied to all employees* included in the calculations, such as amounts derived from the registrant's payroll or tax records (emphasis added).

The Proposing Release indicates that the purpose of this Instruction is to afford the registrant flexibility to determine the means of calculation best suited to its own facts and circumstances.[13] However, requiring that the methodology be "consistently applied to all employees" would create a standard that is unduly burdensome, because it is unintentionally and unnecessarily inflexible for registrants with employees outside of the United States. For example, while the Commission has specifically identified the use of tax records as a possible methodology for identifying the median employee,[14] because of the "consistently applied" requirement, the alternative of using tax records for all employees would not be available if in a particular foreign jurisdiction, no such records exist or the applicable tax laws do not require the reporting of individual employee compensation.

To illustrate, if a registrant has even a small number of employees in Kuwait or the United Arab Emirates, where no tax records would exist with respect to individual employee compensation, the Instruction could be seen as precluding the utilization of tax

[13] Proposing Release, text following footnote 75.

[14] Proposing Release, text accompanying footnote 90.

records for any employee. This is because the method of using tax records could not be "consistently applied to all employees included in the calculation."

This problem could be rectified simply by modifying the Instruction to require that the method be consistently applied to all employees "within the same country." In this way, tax records could be utilized as the appropriate measure for jurisdictions in which tax records exist, and an alternative method could be applied for employees in jurisdictions where the tax records don't exist or where there is another reason (such as home country privacy laws) that would preclude the use of tax records for this purpose.

Without this flexibility, registrants would be compelled to utilize a method for determining the compensation of employees for purposes of identifying the median employee by selecting the method that is essentially "the least common denominator"—that is, a methodology that works in all jurisdictions, regardless of whether it works best in any particular jurisdiction or among the majority of jurisdictions in which the registrants' employees are resident.

We reference to the tax records methodology as the simplest way to illustrate the possible difficulty with the "consistently applied" requirement. However, the ability to use different methods across jurisdictions should not be limited to circumstances where tax records are not available or able to be utilized. Due to legal constraints, the number of employees, the limitations of the payroll or compensation reporting systems, or a myriad of other administrative concerns, one methodology may be the most efficient and cost effective way to measure the compensation for the employees in a particular jurisdiction, even though it would be a less optimal (or perhaps even ineffective or prohibitively expensive method) when applied in other jurisdictions.

In the United States, using W-2 compensation may be the best and easiest method of measuring compensation for purposes of identifying the median employee, whereas payroll records or other methods of measuring compensation may be best suited to identifying the data in other jurisdictions. Further, the concentration of employees in a particular jurisdiction may dictate the most effective method of measurement. Consistent with the Commission's view that the rule should be flexible so as to permit each registrant to gather and evaluate the information in a cost-effective manner best suited to its circumstances,[15] making the modest change suggested above to require consistency only within a particular jurisdiction would provide the flexibility necessary to achieve the Commission's objective.

This flexibility will not adversely affect the quality of the disclosure registrants would be required to provide under section 953(b) of the Dodd-Frank Act. Indeed, such flexibility will allow more effective and efficient compliance. Any concern that affording flexibility to registrants might result in "gaming the system" could be readily addressed by a general instruction that the method of determining the compensation of employees will not be considered reasonable if the utilization of different methodologies across different jurisdictions is undertaken purposefully to impact materially the outcome. Thus, where different approaches are selected for the appropriate reasons of cost effectiveness, ease of access to the information, legal constraints, and *bona fide* administrative convenience, the appropriate flexibility would be available.

X. The Commission Should Include an Express Instruction Regarding Foreign Exchange Calculations

In footnote 120 in the Proposing Release, the Commission referenced the instruction to Item 402(c) regarding the conversion of compensation from other currencies to U.S. dollars for purposes of disclosure in the Summary Compensation Table. While that instruction requires footnote disclosure of the currencies, exchange rates and methodologies used for converting compensation reported in the Summary Compensation Table, the footnote states that registrants will <u>not</u> need to disclose such currencies, exchange rates and methodologies used to convert compensation for purposes of determining the total annual compensation of employees. However, the footnote states

[15] Proposing Release, text following footnote 75.

that, where applicable, such exchange rates and methodologies should be consistent with those used for reporting the compensation of the named executive officers in the Summary Compensation Table.

FSR recommends that the Commission specifically address the conversion process in an instruction to Item 402(u), incorporating specifically into the rule the statement that "Disclosure is not required of the applicable exchange rates and methodologies used in identifying the median employee and in determining the total annual compensation of the median employee." The Commission also should clarify that what is meant by "using rates and methodologies consistent with those applicable to the reporting of the named executive officers' compensation in the Summary Compensation Table" is that the same methods are required solely with respect to the same elements of compensation that are otherwise reflected in the disclosure reported in the Summary Compensation Table. By means of this clarification, alternative methods can be applied in respect of different currencies and different types of compensation, if the using the methodology used in respect to different currencies or elements of compensation reflected in the Summary Compensation reporting would not be appropriate or most effective with regard to such currency or with regard to the compensation payable to the substantially larger group employees who must be considered for purposes of determining the median employee.

XI. The Commission Should Exclude Non-U.S. Based Employees (including U.S. expatriates) Entirely from the Determination of the "Median Employee" if They Represent in the Aggregate Less Than Five Percent (5%) of the Registrant's Employees

To the extent that a registrant either has a modest portion of its workforce outside the United States—or a modest portion of such workforce in a given jurisdiction outside the United States—the burden of collecting the requisite data, as compared to the effect of excluding that data in providing the pay ratio disclosure, could be excessive. Thus, excluding *de minimis* concentrations of non-U.S. based employees (including U.S. expatriates) from the determination is appropriate.

Establishing the *de minimis* exclusion is a reasonable and limited exercise of administrative discretion that is consistent with the purposes of section 953(b) of the Dodd-Frank Act. Excluding a small number of employees from the determination of the median employee would have only marginal effect (if that), but could save the registrant significant expense (further benefitting investors as a sound way to conserve company capital that would have little or no impact on the pay ratio disclosure provided). While one might generally assume that the pay distribution among the majority of non-U.S. based employees would be in the lower part of the distribution, this result would not always be the case.

To illustrate, a registrant that has 1,051 employees including 50 employees (approximately five percent (5%) of its total employee population) outside the United States would be determining its median employee, other than the PEO, as a function of its 1,001 U.S. employees. Without including the 50 non-U.S. employees, the median employee would be the person ranked number 501. If the 50 non-U.S. based employees are included and the compensation of all employees could be readily identified, the median employee would be the person ranked number 526. The distinction between the employee ranked 526 and the employee ranked 501 is unlikely to be material. Indeed, if it were the case that 25 of the non-U.S. based employees were paid at a rate above the median, and 25 paid below that level, the same employee would be the median employee in each calculation—such employee would simply have moved from being employee 501 of the U.S. based employees, to employee 526 of the world-wide employees. Moreover, the benefit to investors of avoiding any modest differential that would arise because the non-U.S. based employees are not evenly divided by the median is unlikely to justify the added cost to the registrant.

Accordingly, FSR requests that the Commission modify the proposed rule to exclude non-U.S. based employees (including U.S. expatriates) entirely from the determination of the median employee if such employees represent in the aggregate less than five percent (5%) of the registrant's employees. For registrants with more than five percent (5%) of their workforce outside the United States, we urge the Commission to allow registrants to exclude those employees located in any single non-U.S. jurisdiction where such non-U.S. workforce represents less than two percent (2%) of the total workforce, with an aggregate cap of five percent (5%) of all of a registrant's employees. Where the number of employees located in such smaller non-U.S. locations exceeds the five percent (5%) cap, the registrant should be permitted to choose which country's employees could be excluded, so long as it has a reasonable business or administrative reason for its choice unrelated to an intentional manipulation of the determination of the median employee.

FSR's suggested modifications to the proposed Pay Ratio Rule support the goals of eliminating unnecessary cost and difficulty in compliance, while still supporting the disclosure of an accurate, meaningful pay ratio. Under FSR's suggested modification, the registrant would either identify (a) the same employee as the median employee (assuming that, were actual compensation used, all non-U.S. based employees would still be ranked below the median) or (b) an employee with a lower level of compensation as the median employee. Thus, by affording registrants the opportunity to use this cost saving measure, they could not manipulate the provision in a manner that would present a more favorable pay ratio.

XII. FSR Urges the Commission to Adopt a "Statistical Sampling Safe Harbor" for Non-U.S. Based Employees

The Commission's determination to allow registrants to use statistical sampling of the compensation of its employees, rather than having to collect specific data on each employee, is a thoughtful and reasonable approach. As the Commission notes, the compensation of persons not likely to be candidates for "median employee" positioning is irrelevant for purposes of the pay ratio disclosure.[16] Consistent with this reasoning, FSR urges the Commission to adopt a "Statistical Sampling Safe Harbor" applicable to non-U.S. based employees (including U.S. expatriates), which would enable registrants to provide pay ratio disclosure in a cost effective manner. Because our suggested safe harbor would not be focused on individual compensation, it also would better enable registrants to assure compliance with applicable non-U.S. privacy laws.

Under the Statistical Sampling Safe Harbor, the registrant would identify the average compensation payable to all employees in a particular non-U.S. jurisdiction. It would then compare such average to the compensation of the employee who is preliminarily determined to be the median employee (the "Estimated Median Compensation") based solely on a review of all employees employed in jurisdictions for which the safe harbor does not apply (including any foreign jurisdiction where the average exceeds the Estimated Median Compensation). It is believed that calculating the aggregate average compensation of all employees in a particular jurisdiction would be permitted under any applicable privacy laws. If the average compensation of such non-U.S. employees in a given jurisdiction is below the Estimated Median Compensation, the registrant could then designate a specified number of these foreign employees to be above and below the median. This specified number would be determined based on the ratio resulting from dividing the Estimated Median Compensation by the applicable average compensation of the particular jurisdiction (the "Allocation Ratio").

To illustrate, if the Estimated Median Compensation were $65,000, and the average compensation of the employees in a given non-U.S. jurisdiction were $35,000, the Allocation Ratio would be 1.8 to 1. If there were 420 employees in this jurisdiction, 270 would be counted as being below the median and 150 would be deemed above the median. After completing this analysis for all applicable foreign jurisdictions, the actual

[16] "A registrant could, rather than calculating exact compensation, identify the employees in the sample that have extremely low or extremely high pay and that would therefore fall on either end of the spectrum." Proposing Release, text immediately preceding footnote 86.

median employee would be determined by including in the determination the foreign employees deemed to above or below the median by using the Allocation Ratio. Through the Statistical Sampling Safe Harbor mechanism, all employees and their compensation would be considered in determining the median employee, consistent with the mandate of the Dodd-Frank Act. Moreover, the safe harbor would allow for simplified and cost-effective data collection and assure that the registrant is not forced to violate applicable privacy laws outside the U.S. in the course of complying with its U.S. disclosure requirements.

We encourage the Commission to adopt the Statistical Sampling Safe Harbor for employees (including U.S. expatriates) located in non-U.S. jurisdictions. However, if the Commission has concerns that this safe harbor would conflict with the mandate of section 953(b), it could in the alternative apply the safe harbor solely with respect to those non-U.S. jurisdictions which the registrant determines in good faith that identifying and utilizing individual specific compensation data would raise issues of compliance under applicable local law.

XIII. The Commission Should Allow Registrants to Substitute the Closest U.S. Employee for a Non-U.S. Based Median Employee

The issues of data collection and compliance with foreign privacy laws will likely reach their apex if and to the extent a non-U.S. based employee (including a U.S. expatriate) is determined to be the median employee. In such instance, the disclosure of that employee's individual compensation may violate the privacy and other laws of the jurisdiction in which that employee provides services. In addition, determining that individual's total annual compensation under the methodology imposed by Item 402 for the named executive offices reported in the Summary Compensation Table may be quite difficult and imprecise, because such employee may receive benefits under local law or custom that may not be valued or accounted for under such local laws and customs. Therefore, FSR urges the Commission to adopt further provisions that would allow registrants to avoid the risk of violating local law and undue expense and valuation errors. To solve these issues, we respectfully suggest that, if the initial determination of the median employee identifies a non-U.S. based employee (or a U.S. expatriate), the registrant would substitute as the median employee the closest, lower paid U.S.-based employee.

The benefits of this approach include: (i) avoidance of individualized disclosure of employee compensation that could violate applicable non-U.S. law; and (ii) avoidance of costs that could be significantly disproportionate to the benefit to investors that would otherwise be occasioned by having to identify elements of compensation not otherwise captured in the registrant's standard reporting systems for the applicable jurisdiction.

By choosing the next lowest compensated U.S.-based employee, the effect on the actual pay ratio disclosed is likely to be immaterial. Indeed, since the identity of the median employee will likely have been determined without calculating total annual compensation as defined in Item 402, it will not be known whether the total annual compensation of the substituted median employee is higher, lower or the same as the non-U.S. based employee (or U.S. expatriate) being replaced. As the substituted employee's compensation will be in close proximity to that of the employee being replaced, the total annual compensation of the substituted employee should be equally representative of the "average" employee in the employee population. Thus, this substitution rule should not have any significant impact on the registrant's pay ratio disclosure, but will afford the registrant a more flexible and workable means of compliance with the Pay Ratio Rule.

XIV. FSR Urges the Commission to Exempt Any Subsidiary of a Publicly Traded Entity from the Pay Ratio Régime

Consistent with its approach of allowing modifications to the disclosure requirements for a registrant that is a subsidiary (a "Reporting Subsidiary") of another entity that itself is a publicly traded company,[17] we recommend that Commission by rule provide that the Reporting Subsidiary will be expressly exempt from having to comply with the Pay Ratio Rule.

The Commission has recognized that, where a publicly traded parent has disclosed the compensation payable in respect to its executive officers pursuant to the requirements of Item 402, there is no need for a Reporting Subsidiary, which has no public shareholders, but offers other securities that otherwise require registration under the Federal securities laws, to disclose the compensation payable to the executive officers of the Reporting Subsidiary.

The same logic should apply to the disclosure required by the Pay Ratio Rule. Without the context of the other executive compensation disclosure, the Reporting Subsidiary's pay ratio disclosure will likely be more confusing than helpful to investors. Additionally, since the Reporting Subsidiary's reporting would almost universally cover an employee population that is smaller than that of its publicly traded parent and may pertain to a different principal executive officer, separate pay ratio disclosure for the Reporting Subsidiary may confuse investors of the public parent, who may not appreciate the different bases for reporting.

[17] Form 10-K, General Instruction I, "Omission of Information by Certain Wholly-Owned Subsidiaries" [17 C.F.R. § 249.310].

XV. Conclusion

If and to the extent that disclosure of the pay ratio is ultimately compelled, FSR urges the Commission to allow registrants reasonable flexibility to identify the median employee for purposes of the Pay Ratio Rule without undue, unnecessary or unwarranted costs or burdens. We also urge the Commission to consider FSR's comments in the context of reaching a reasonable cost-benefit approach that provides the investor whatever modest benefits are available under section 953(b) of the Dodd-Frank Act, without creating excessive burdens and unnecessary legal problems for registrants, which ultimately impact the registrants' shareholders.

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FSR appreciates the opportunity to provide the Commission with our comments and suggestions on the proposed Pay Ratio Rule. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at [redacted] or Rich Foster at [redacted].

Sincerely yours,

Richard M. Whiting

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Executive Director and General Counsel
Financial Services Roundtable

With a copy to:
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The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner

Keith F. Higgins, Director
Felicia Kung, Chief, Office of Rulemaking
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