Committee on Securities Regulation

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Via E-mail: rule-comments@sec.gov

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

Re: Proposed Pay Ratio Disclosure; File No. S7-07-13

Dear Ms. Murphy:

This letter is submitted to you on behalf of the Committee on Securities Regulation (the "Committee") of the New York City Bar Association. We appreciate the opportunity to provide these comments to the Securities and Exchange Commission (the "Commission") on the amendments to Item 402 of Regulation S-K proposed in Release Nos. 33-9452; 34-70443 (the "Pay Ratio Disclosure Proposal").

We support the Commission's effort to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2012 (the "Dodd-Frank Act") in a manner that provides flexibility to issuers while still retaining the potential benefits of the mandated disclosure. In that regard, we offer the following comments on some of the issues raised in the Pay Ratio Disclosure Proposal that we believe will further enhance comparability of disclosure across companies and avoid unnecessary costs.

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to corporations, investment banks, investors and government agencies, and academics in the field of law. As such, this letter does not necessarily reflect the individual views of all members of the Committee.

Companies Should Be Permitted to Exclude Non-U.S. Employees

The Pay Ratio Disclosure Proposal requests comments on the Commission's proposed inclusion of non-U.S. employees for purposes of calculating the median. We believe that issuers should be permitted to exclude non-U.S. employees, provided that they disclose the number of employees included and excluded. We are concerned that requiring the disclosure of employees in all jurisdictions worldwide could reduce the potential benefit of the ratio. By comparing employees on a worldwide basis, the ratio would be significantly impacted by specific and idiosyncratic regional factors unrelated to the broader concept of pay equality. For example, cost of living differences and exchange rate fluctuations can cause similar compensation arrangements to equate to very different dollar amounts for purposes of the ratio, depending on the particular country. In addition, companies provide varying medical and other benefit packages, different forms of compensation (e.g., cash versus equity) and different retirement and other social security arrangements, based largely on the differing legal regimes and social structures in the jurisdictions in which they operate, including the level of government-provided social services in a particular country. We believe that allowing issuers to limit the disclosure to U.S. employees would increase comparability among companies, without distortion based on the jurisdictions in which they operate.

In addition to reducing the potential benefits of the disclosure, the required inclusion of employees located outside the U.S. would impose significant costs on registrants with global operations. Many companies have different databases and tracking systems, and different employing entities, in various jurisdictions, and we would anticipate significant technical hurdles to integrating data from varying systems to determine a median. The Pay Ratio Disclosure Proposal would allow companies the use of "consistently applied compensation measures" to identify a median employee, but it is much less likely that the most convenient and cost-effective measures that a company might use in this regard – for example W-2 or other information reported to tax authorities – would be "consistently" applicable to non-U.S. employees at all.

If the Commission is concerned that allowing the exclusion of non-U.S. employees would lead to excessive exclusions by some issuers, the Commission could limit the scope – for example, to companies that have a U.S.-based CEO and that have more than 50% of their employees based in the U.S.

We recognize that the statute uses the phrase "all employees" in directing the Commission to issue the implementing rules. We believe that the Commission's general exemptive authority provides it with the flexibility to issue a rule that interprets "employees" to mean "U.S. employees," particularly if the benefits of a broader, more literal interpretation cannot be justified in light of the costs.[1] At a minimum, given that the statutory directive has no deadline, the Commission can allow companies to exclude non-U.S. employees in its adopted rules, and then evaluate whether this provision should be modified in the future.

Companies Should Be Permitted to Exclude Seasonal, Temporary, Part-Time and Short-Term Employees as of Year-End

We believe that the required disclosure will be more useful if issuers are permitted to exclude seasonal, temporary, part-time and short-term employees, provided that companies disclose the number of employees included and excluded. The inclusion of seasonal, temporary, part-time and short-term employees for companies that happen to employ them at year-end would distort the median, and would create a focus not merely on the disparity in pay at different levels but also on the disparity in the type of employment among different companies. In particular, the required inclusion of these employees, combined with a mandated fiscal-year end determination date, would reduce comparability of the median for companies that have seasonal variations in the use of these employees – for example, retailers or manufacturers that hire seasonal, part-time or temporary employees during the holiday shopping season, as compared to companies that may hire such employees during the summer or at other times. Requiring companies to include seasonal, part-time or temporary employees, as proposed, would also increase distortion and impair comparability depending on whether companies fill non-full-time positions with employees versus independent contractors. Because companies that actually employ their seasonal, temporary and part-time workers would generally be penalized for doing so in terms of the ratio calculation, the disclosure obligation could have the unintended consequence of incentivizing these companies to instead use independent contractors.

If the Commission determines to continue to mandate the inclusion of seasonal, temporary, part-time and short-term employees, we would recommend giving registrants the choice to use a full-time equivalent salary for purposes of determining the median as this would help to focus the median on the disparity in pay instead of a distortion resulting from varying employment practices.

The Commission Should Provide Transition Periods for Business Combinations

In the Pay Ratio Disclosure Proposal, the Commission requests comment on whether it should provide transition periods for business combinations. We believe that companies should be permitted to omit employees of entities acquired during the year, provided that they disclose the number of employees included and excluded. The legacy compensation decisions of acquired companies do not necessarily reflect the compensation programs or philosophy of the reporting company on a going-forward basis. In addition, the compensation reporting and information databases of newly acquired companies may not be integrated into those of the reporting company in a way that allows cost-effective information gathering and analysis. We believe that requiring full-year inclusion of newly acquired companies would reduce comparability and unnecessarily increase costs.

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[1] We note, for example, that despite the literal references in Dodd-Frank Section 953(b) to "each issuer" and disclosure "in any filing" described in Item 10(a) of Regulation S-K, the Commission has used its discretion to exempt certain categories of issuer from the filing and to limit the filings in which the disclosure must appear.

The Commission Should Clarify That Companies Can Use Reasonable Methods of Choosing a Median Employee if the Chosen Method Yields Multiple Median Employees

Under the Pay Ratio Proposal, registrants may use any reasonable method of determining their median employee, including the application of any "consistently applied compensation measure." We believe that, for many companies, it is unlikely that a convenient and cost-effective compensation measure applied to their entire pool of employees will yield one single employee with differentiated compensation. Instead, it is much more likely to yield a group of median employees who measure equally on that measure. We believe that these companies should then be permitted to limit further analysis to this group of median employees and to use any reasonable method to determine which employee to use as the median, rather than creating a refined compensation measure and reapplying it to all employees. This seems consistent with the Commission's proposal, but we believe that it would be beneficial for the Commission to include, in the adopting release or in an instruction to the rule, that: "If the consistently applied compensation measure yields multiple employees, the registrant may use any reasonable method to determine which employee to use as the median employee."

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Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully submitted,

Sandra L. Flow
Chair, Committee on Securities Regulation

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