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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

Subject: Comments on Proposed New Item 402(u) of Regulation S-K (Pay Ratio Disclosure); File Number S7-07-13

Dear Ms. Murphy:

We appreciate the opportunity to provide our comments on the Securities and Exchange Commission's proposed new Item 402(u) of Regulation S-K (the "Proposed Rule") regarding the "pay ratio" disclosure requirement under Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Proposed Rule would require registrants to disclose the median annual compensation of all employees (excluding the principal executive officer) and the ratio of that amount relative to the annual compensation of the principal executive officer.[1]

The Proposed Rule defines employee as "any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries (including officers other than the PEO)" but excludes, "workers who are not employed by the registrant or its subsidiaries, such as independent contractors or 'leased' workers or other temporary workers who are employed by a third party" from the definition.[2] Our comments focus on the meanings of "'leased' workers" and "employed by a third party."

There is no clear definition of "leased worker" or "employee" in the context of co-employment agreements. Many different types of third-party staffing

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[1] Pay Ratio Disclosure, 78 Fed. Reg. 60560 (proposed Oct. 1, 2013) (to be codified at 17 C.F.R. pts. 229 and 249).

[2] Id.

arrangements exist, and depending on the structure of the arrangement, employees may, or may not, be considered leased employees or employees of the third party.

Footnote 44 to the Proposed Rule states that a registrant that, "pays a fee to another company (such as a management company or an employee leasing company) that supplies workers to the registrant, and those workers receive compensation from that other company, those workers would not be counted as employees of the registrant for purposes of the proposed rules." This illustration provides some guidance, but not enough to help registrants analyze co-employment circumstances. It is not always clear which company is the employer and different agencies apply different tests to determine the answer to this question.[3]

The issue of "leased workers" and "employer" becomes increasing difficult in the area of professional employer organizations ("PEOs"). Unlike employee leasing agencies, PEOs do not recruit employees from the employment market and then lease or assign them to their clients. PEOs do not supply labor, but instead provide administrative services, such as payroll, payroll taxes, employee benefits, and other employer-related responsibilities on behalf of their clients. The PEO's clients maintain physical care, custody and control of their workforce, including the authority to hire and terminate employees and set their wages. Although the services require the establishment of a co-employment relationship, the PEO's primary focus is on providing services to the client employer.

It is not clear under the Proposed Rule whether PEOs' must include their clients' workforces when calculating the PEOs' pay ratio disclosure. Given the structure of PEO arrangements, however, it does not make sense to require PEOs to include these co-employees as their employees when calculating the median annual compensation of the PEO's employees. PEOs do not hire or set the wages of their clients' workers. If

[3] The tax code, IRC § 3121(d)(2), defines employee as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." The Internal Revenue Service ("IRS") uses a 20-factor test in determining whether an individual qualifies as a common law employee under the general common law of agency. Factors considered include: control over the order and sequence of work performed; source of instrumentalities and tools; location of work; duration of the relationship; and whether work is full time. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992). The Bureau of Labor and Industries (BOLI) and the US Department of Labor use similar criteria as the IRS, including degree of control and permanency of relationship, to determine whether someone is an employer. Employer's Guide for Doing Business in Oregon, Business Information Center, Corporate Division, Secretary of State, 11 (July 2008). Additionally, most states have statutory definitions of employer.

compensation is not controlled by a registrant, the registrant should not be required to include the compensation when calculating median annual compensation.

Additionally, requiring PEOs to include their clients' workers as employees for purposes of calculating median annual compensation will lead to inaccurate and misleading pay ratio disclosures. The purpose of the pay ratio disclosure is to provide shareholders with a gauge for assessing compensation packages. PEOs do not control the compensation packages provided to their clients' labor force, which means that including these individuals' compensation will skew the compensation packages that the PEOs provide to their employees and distort the PEO's pay ratio, providing shareholders with misleading information.

We respectfully request that the Securities and Exchange Commission (the "Commission") provide guidance for evaluating the terms "leased worker" and "employee" as applied to PEO registrants. Additionally, we request that the Commission provide clear instructions that "all employees" does not include the employees working for PEOs' clients.

Very truly yours,

Miller Nash LLP

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