January 9, 2013

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

RE: Comments on Proposed Rule on Pay Ratio Disclosure; Release Nos. 33-9452; 34-70443; File No. S7-07-13

Dear Ms. Murphy,

On behalf of the American Benefits Council, we are writing to supplement our comment letter filed on November 26, 2013 regarding the proposed Pay Ratio Disclosure rule published in the Federal Register on October 1, 2013 (the "Proposed Rule").[1]

The American Benefits Council ("Council") is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

Preliminarily, our members uniformly agree with many others in the corporate world that the compliance costs and burdens of the Proposed Rule far outweigh its purported benefits. Indeed, as the Securities and Exchange Commission ("SEC" or "Commission") recognized in its release of the Proposed Rule, there is limited legislative history to inform the SEC's understanding of the legislative intent behind Section 953(b) or the specific benefits that the provision is intended to secure. Above all, our members note that the proponents of the pay ratio disclosure rule have not cited any empirical evidence supporting its supposed benefits. We believe supporters of the

[1] Pay Ratio Disclosure, 78 Fed. Reg. 60,560 (Oct. 1, 2013).

Proposed Rule underappreciate the compliance challenges that issuers face and the substantial costs that will be borne by their shareholders, especially on a multinational level (as explained in our comments below).

Against the backdrop of speculative benefits, our members cannot support the pay ratio disclosure requirement. We nevertheless realize that the Commission is acting under a statutory requirement to promulgate rules implementing Section 953(b) of the Dodd Frank Act. Our comments below consequently describe various changes that our members believe will reduce the substantial compliance costs associated with the pay ratio disclosure requirement. We wish to emphasize, however, that our suggested changes should not be taken as support for the Proposed Rule or the view that it can be implemented at a reasonable cost to shareholders or without significantly distracting management from running the company's business. Again, in the absence of any proven benefit to shareholders or investors, it is impossible to justify imposing substantial costs on shareholders. Moreover, many of our members (especially those with large multinational operations) are unwilling to incur significant costs for their shareholders now to analyze the information technology changes, consolidation of payroll systems, and application of foreign data privacy laws that the Proposed Rule will impose on them. As a result, the Proposed Rule poses significant risks of unforeseen costs and complications for issuers and their shareholders.

1. Exclude Non-U.S. Employees

For the reasons set forth below, the Council recommends that the Proposed Rule be amended to permit a company to exclude all of its non-U.S. employees from the determination of the median employee. If the Commission determines that it does not have the statutory authority for a full exclusion, some of our member companies have recommended that the SEC create a *de minimis* safe harbor under which a company could exclude those non-U.S. employees working in any foreign country in which less than 5% of the company's aggregate global workforce is employed. Such a *de minimis* proposal could significantly reduce compliance costs for some companies, by limiting the inclusion of non-U.S. employees to countries in which the company has a material percentage of its workforce.

A. Administrative Costs

Our member companies with multinational operations have indicated that the single biggest driver of costs under the Proposed Rule is the inclusion of non-U.S. employees. Conversely, these member companies have indicated that permitting companies to exclude non-U.S. employees would be the single biggest change that could be made to the Proposed Rule to reduce administrative compliance costs and make the median employee determination administrable. As one of our members put it:

We have determined that the calculation of median compensation on a worldwide basis would be extremely costly and nearly impossible. We estimate that whatever the cost of implementing the final rule, it would be 20-30 times higher if foreign workers are included in the calculation.

Other member companies have estimated that the annual cost to make the median employee determination on a worldwide basis could be hundreds of thousands of dollars, which would divert resources that the companies could otherwise direct toward job creation and accretive business investments.

B. Multiple Payroll Systems/Lack of Centralized Data

In general, our member companies have indicated that the process outlined in the Proposed Rule will not be manageable in any practical sense if their global workforce needs to be considered. Many of our member companies with multinational operations have multiple payroll systems in the various countries in which they operate and they do not have a centralized database that could be used to aggregate worldwide compensation data. These companies expect that they will face major challenges in gathering the necessary data for the median employee determination. Some members will have to rely on local staff in each foreign location to gather and transmit the data, and have expressed concerns that this likely will result in erroneous information because the staff will not understand the nature of the request.

C. Data Privacy Laws

Many of the countries in which our member companies have operations have data privacy rules that will severely limit their ability to obtain and disseminate the relevant compensation data. In particular, the European Union ("EU") has adopted a data privacy regime that the EU member states are required to implement at the national level.[2] Among other things, the EU data privacy regime prohibits" the transfer of personal data to a third country which does not ensure an adequate level of protection."[3] We also understand that many other countries, including China, Japan, Mexico, Canada, Peru, and Singapore, have or are in the process of implementing similar data privacy rules.

These data privacy laws will make it even more challenging and costly for our members to gather the necessary compensation data on non-U.S. employees. For example, in some jurisdictions these laws could require the removal of all personally

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[2] EU Directive 95/46/EC of the European Parliament and the Council (the "EU Directive").

[3] EU Directive at 57.

identifiable data and the transfer of only anonymous data. Moreover, we understand that companies with operations in countries with data privacy laws will likely be required to retain local counsel in each such country to ensure compliance with the applicable laws.

The problems faced by issuers in complying with foreign data privacy laws are further exacerbated by several factors. For example, such laws are always subject to change and additional limitations imposed in the future may make it impossible for some issuers to gather the information necessary to compute the ratio if foreign employees are included. A foreign jurisdiction in which a company operates may adopt a data privacy law after the rule takes effect that poses unanticipated costs and legal risks that can't be calculated now. A company seeking to hire employees in a new country will have to consider its ability to collect the necessary information in light of the country's data privacy laws, incurring additional costs and delays. Above all, such laws are frequently so complicated and subject to interpretation that a company will incur unnecessary litigation risk, face regulatory enforcement action, and expose itself to reputational harm each time it seeks to gather the information.

D. Data Inconsistencies/Misleading Data

Our member companies indicated that the inclusion of non-U.S. employees in the pay ratio determination will also result in highly variable and misleading compensation data due to:

- *Differences in the cost-of-living between various countries* – Many of the countries and regions in which our member companies have multinational operations have a much lower cost of living than the U.S., which will lead to distortions in the pay ratio calculation.

- *Currency exchange rate fluctuations* – Compensation data in a company's foreign country operations will have to be converted from the local currency into U.S. dollars, which will require the determination of the exchange rate at a particular point in time. Currency exchange rates often fluctuate over time, which means that median employee compensation data could change significantly based solely on fluctuations in exchange rates.

- *Highly variable compensation of non-U.S. employees* – In particular, our members indicated that compensation paid to non-U.S. employees is often highly variable from year to year due to great variations in the levels of retirement plan accruals and the reliance on various types of incentive compensation and commission arrangements.

- *Wide variations in types of compensation* – There are vast international differences in what is considered compensation. For example, there is the expectation in certain countries that an employer will provide meals to employees and reimburse them for housing costs. In other countries, health and retirement benefits are provided by the government.

E. No Separate Ratio for Non-U.S. Employees Only

The Proposed Rule requests comments on whether the Commission should require companies to provide two separate pay ratios – *e.g.*, one for U.S. employees and one for non-U.S. employees, as requested by some commenters. As discussed above, we recommend that the Proposed Rule be amended to permit a company to exclude all of its non-U.S. employees from the determination of the median employee. But if the Commission chooses not to exclude non-U.S. employees, we strongly recommend against any alternative approach that would require companies to compute more than one pay ratio. We believe that such an approach would merely exacerbate the already significant administrative compliance burdens that would result from the inclusion of non-U.S. employees in the median employee determination.

2. Exclude Part-time, Temporary and Seasonal Employees

We recommend that the SEC limit the scope of the pay ratio determination and disclosure to require the inclusion of only full-time, regular employees. Requiring the inclusion of part-time, temporary and seasonal employees adds an extra layer of cost and complexity to the determination and would have the effect of distorting a company's median employee compensation data. Our members see no compelling policy reason for this, and believe that the SEC could reasonably provide flexibility that allows issuers to make their own determinations in this regard, provided they disclose any classes of excluded employees. Because CEOs work full-time, it is illogical to make pay ratio determinations by reference to an issuer's employees who are not also working full-time throughout the year.

At a minimum, the SEC should allow companies to annualize the pay of part-time employees. A logical "fix" is less evident for seasonal and temporary employees because these workforce groups vary randomly, by their nature, depending on the time of year and the issuer's industry sector. Because the Proposed Rule depends on a snapshot date for identifying the workforce to be assessed, the vagaries of a year-end date could grossly distort identification of an issuer's median employee for pay ratio purposes. A simple example comes from the many sectors that hire-up in December for year-end holiday traffic. Our members see inclusion of seasonally-hired or temporary employee groups as an unnecessary distortion of the pay ratio disclosure.

3. Exclude Employees of Non-Wholly Owned Subsidiaries and Joint Ventures

Our members expressed concerns that they would not have ready access to compensation data from non-wholly-owned subsidiaries and joint ventures, and that requiring the consideration of employees of those types of entities would significantly increase their administrative compliance burdens and costs. We therefore recommend that the Commission permit companies to exclude the employees of those entities.

4. Control the Risks of Disclosure-Related Litigation

Because any statistical approach for selecting the median employee is subject to second-guessing, we encourage the SEC to revise the Proposed Rules in two main respects in order to discourage costly and frivolous litigation intended to produce a quick settlement and payment of counsel fees.

First, the disclosure should be considered "furnished" not "filed" for the same reasons that compensation committee reports and annual performance graphs are treated that way (namely: so that unhappy shareholders exercise voting rights rather than litigate). Given that pay ratio disclosure has a highly uncertain, if any, value to investors, this is the appropriate approach.

Second, the SEC should provide safe harbors upon which issuers may rely when making choices about how they identify the median employee. This would be especially useful for statistical sampling (*e.g.*, determining minimum sample sizes and precision and confidence indicators). If such safe harbors create a presumption of reasonableness, the SEC will promote consistent standards upon which issuers can make sampling decisions, and will discourage disputes over the details of selection criteria.

5. Effective Date/Transition Issues

Under the Proposed Rule, the new pay ratio disclosure rules would become effective for the first fiscal year commencing on or after the effective date of the final rule. This means that if the final rule takes effect in 2014, a company with a fiscal year ending December 31st would first be required to include the pay ratio disclosure in its 2016 proxy statement. However, a company with a fiscal year ending on some other date potentially could have to include the pay ratio disclosure in its 2015 proxy statement depending upon when the final rule is effective. We recommend that the Commission include a transition period in the final rule under which a company is not required to comply until the first fiscal year beginning on or after six months after the effective date of the final rule.

If a final rule requires the inclusion of foreign employees, multinational companies should be given an extra year before being required to provide the required pay ratio disclosure, in recognition of the special challenges they will face. Thus, if a company without multinational operations will be required to provide the disclosure in its 2016 proxy statement, a multinational company should be given an additional one-year transition period and be required to provide the disclosure in its 2017 proxy statement.

6. Alternative Measurement Date

The weeks and months following fiscal year-end generally challenge issuers with preparing both annual Form 10-Ks and annual proxy statements. The legal, finance and human resource departments of most issuers bear the weight of preparing these documents. They will also be primarily responsible for making pay ratio determinations. The SEC could reasonably provide welcome but limited relief by allowing issuers to announce their pay ratio determinations in a Form 8-K filed within some extended period (such as 180 days after fiscal year end, as is the case for Form 11-Ks and other reports). Alternatively, the flexibility to choose a measurement date other than fiscal year end could ease calculation challenges, as well as the burden of addressing seasonal hires.

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Thank you in advance for your consideration of our recommendations. Please let us know if further information or a meeting would be helpful.

Sincerely,

Lynn D. Dudley

Lynn D. Dudley
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