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BY ELECTRONIC SUBMISSION

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

RE: Comments on Section 953(b) of the Dodd-Frank
Wall Street Reform and Consumer Protection Act

Dear Ms. Murphy:

On behalf of the Retail Industry Leaders Association (RILA), I write pursuant to Chairman Schapiro's invitation to submit advanced comments on the rules required under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).¹ Specifically, this letter offers RILA's views on Section 953(b) of Dodd-Frank pertaining to the new requirement for disclosure of the ratio of total compensation of an issuer's chief executive officer (CEO) to that of the median of all employees of the issuer.

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 appreciates the Securities and Exchange Commission's (SEC) consideration of the detailed comments provided below. Section I of this letter explains RILA's general policy concerns with Section 953(b), Section II outlines recommendations for defining the scope of the new disclosure requirement and certain implementation issues, and Section III pertains to the need for a reasonable effective date for the new reporting requirement.

I. GENERAL CONCERNS

Section 953(b) of Dodd-Frank requires the SEC to issue regulations amending the rules under Item 402 of Regulation S-K² to require issuers to disclose the following information in applicable filings:

- The median of the annual total compensation of all employees of the issuer (excluding the CEO);

¹ Pub. L. No. 111-203 (July 21, 2010).

² 17 CFR § 229.402.

- The annual total compensation of the CEO of the issuer; and
- The ratio of the median employee annual total compensation to the CEO's annual total compensation (Compensation Ratio).

The policy rationale for this new disclosure requirement is unclear. The total annual compensation of a company's CEO, as well as specific details on the various elements comprising it, must already be disclosed on the Summary Compensation Table under Item 402. That transparency requirement confirms a well-established fact: CEOs are paid more than the average worker. And, to the extent there is concern about the level of CEO compensation, the new requirement under Dodd-Frank for a so-called "say on pay" vote gives shareholders an avenue to express their views to the company's board of directors.³

Moreover, the Compensation Ratio will add little to shareholders' ability to evaluate the company's performance and will provide no meaningful information or insight as to whether executive or employee compensation is appropriate. In fact, it is more likely to result in confusion and erroneous comparisons between companies because of inherent differences in business models, staffing, and compensation practices. Take for example two substantially similar companies – comparable size, same industry – but one company's business model is based on franchising or contracting out certain operations. By simple mathematical operation, the latter company will have a smaller number of employees covered by the Compensation Ratio and/or a higher resulting ratio than its "comparable" competitor.

Furthermore, these disparate results are only magnified if the ratio is used to compare publicly traded companies across industry sectors. For example, at a retail company with a high percentage of part-time, hourly employees, the individual earning the median total annual compensation could easily be a part-time hourly store employee. In contrast, for a manufacturing company and most other types of non-retail businesses, the person earning the median compensation would almost certainly be a full-time employee, and likely a salaried employee participating in at least some form of incentive-compensation plan. Comparing the Compensation Ratio for these two companies would be totally meaningless. However, such a meaningless comparison could be used unfairly to cause reputational harm to retailers.

Finally, from a policy perspective, if the objective is to improve wages and benefits for average workers, the Compensation Ratio is likely to have a contrary result. Depending on the contours of the SEC's implementing regulations, companies could be forced to spend hundreds of thousands of dollars, even millions in the case of the largest global companies, simply to calculate two numbers – median total annual compensation and the Compensation Ratio. In today's economic environment, those funds are critically needed to retain current employees, create new jobs, maintain competitive wages and benefits, and foster overall business growth. From this perspective, it is difficult to see how the new disclosure requirement in any way contributes to the objective of enhancing growth and profitability, let alone how the enormous cost of this disclosure requirement will produce even a dollar in value for the company's shareholders.

³ Pub. L. No. 111-203, § 951.

At the policy level, RILA has and will continue to advocate for the repeal of this onerous and ill-advised provision. Notwithstanding that objective, as the SEC undertakes its responsibilities of implementing this provision, we offer our views and recommendations to make the required rules as minimally burdensome and costly as possible and to improve the accuracy of the reporting requirement, especially with respect to the retail industry.

II. SCOPE AND IMPLEMENTATION ISSUES

As drafted, the scope of the new requirement is on the one hand unusually restrictive while on the other troublingly open-ended. The statute requires that “total compensation” be based on the Item 402 disclosure rules as they existed on the day prior to enactment.⁴ As discussed below, this forces the new reporting requirement through the Item 402 disclosure rules and definitions, which were never intended to apply beyond the named executive officers of a company, to cover the issuer’s entire employee population. At the same time, the new provision’s restrictiveness stands as a deterrent to any future improvements to Item 402 at the risk of creating discordant definitions of compensation for purposes of the current Summary Compensation Table and for new Section 953(b).

On the other hand, the statute leaves open a wide range of questions regarding how the Compensation Ratio is to be applied by the broad range of publicly traded companies in today’s market – some that are purely domestic while others have operations across the globe, some with joint ventures and partially owned subsidiaries, as well as varying workforces that can include full-time, part-time, temporary, seasonal, and other employment arrangements and circumstances.

If publicly traded companies are to have any hope of complying with the new requirement, RILA strongly urges the SEC to use its interpretive discretionary authority to the greatest extent possible to address the issues discussed below.

A. Application to Particular Filings

The new provision could be read at the extreme to apply to virtually every filing a company would typically make during a given year, from annual (Form 10-K) and quarterly (Form 10-Q) reports and proxy statements to going-private transaction statements, tender-offer statements, and any other documents required to be filed under the Exchange Act of 1934. We believe a more practical reading of Section 953(b) would be for the SEC to require the Compensation Ratio to be included only in proxy and information statements to shareholders (or in filings like registration statements) in which Item 402 disclosures are already required. Such a reading would be consistent with current reporting requirements and supply the intended information to shareholders in filings specifically designed for their use.

⁴ Section 953(b)(2).

Section 953(b), however, is silent on the frequency of the calculation or the time frame that the Compensation Ratio must cover with respect to a given filing. For companies with multiple filings during a year, including the vast majority of RILA members, recalculation of the ratio for each applicable filing would be excessively onerous, if even possible in most cases, especially if the foregoing recommendation limiting the applicable filings is not implemented. Accordingly, we recommend that the Compensation Ratio be based on the issuer's last completed fiscal year, which would make it consistent with the executive compensation disclosure under Item 402 and reduce the compliance costs and burdens at least in so far as the information required for the Summary Compensation Table could be used for purposes of the Compensation Ratio as well.

B. Application within the Corporate Structure

The Compensation Ratio also raises a range of questions with respect to its application within a large complex corporation. While Section 953(b) provides that the median total annual compensation figure shall be based on "all employees" of the issuer, the statute does not prescribe the scope of the covered workforce in any detail. We recommend that the SEC define the universe of employees from which the median is to be determined to include only employees located in the United States. Such a definition would recognize the significant practical implications that large global issuers would face in determining compensation data on every employee worldwide. Most global companies have separate record-keeping and reporting systems for wages and benefits to satisfy the mandates of foreign jurisdictions and local business practices. As these systems were never designed to produce the consistent and integrated data required for purposes of the Compensation Ratio, companies would have to implement whole new accounting systems, which would be enormously costly and time consuming, if the new reporting requirement is not focused solely on U.S. employees of the issuer.

Apart from the practical repercussions, restricting the Compensation Ratio to U.S. employees would also improve the analytical utility of the new ratio. First, it would avoid distortions caused by compensation rates in foreign countries that reflect substantial cost-of-living differences as well as distortions that frequently fluctuating exchange rates will cause when translating total compensation into U.S. dollars.⁵ Similarly, it will reduce distortion resulting from the comparison of a purely domestic company to one with substantial international operations since the ratio will focus on an issuer's U.S. workforce in relation to its U.S. CEO.

A related corporate-structuring issue relates to non-wholly owned entities of an issuer. For companies that have non-wholly owned subsidiaries as well as affiliated business entities and other types of joint ventures, the new provision raises the question of how to include employees of such entities without risking inaccurate inclusion or duplication by any or all owners of such entities. To avoid such complexities and risks, we recommend that an issuer's workforce for purposes of the Compensation Ratio include only employees of its wholly owned business entities.

⁵ Excluding foreign employees will also eliminate issues surrounding differing compensation and benefits requirements and practices of certain foreign jurisdictions and their treatment under the Item 402 rules for determining "total compensation." Section II.E., *infra*, discusses RILA's concerns regarding the calculation of the Compensation Ratio under the Item 402 rules.

C. Application to Varying Employment Arrangements

For the retail industry, a fundamental issue with respect to employees included in the calculation of Compensation Ratio concerns their employment arrangement. As drafted, Section 953(b) provides no clarity as to whether median total annual compensation is to be based on full-time, part-time, temporary, and/or seasonal employees, nor does it address special circumstances such as employees who are on leave under the Family Medical Leave Act or who have been called to active military duty. For retailers, many of which rely heavily on part-time and temporary employees especially during the holiday season, this aspect of the new requirement is fundamental to the accuracy of the Compensation Ratio and to the cost and burden of calculating it. If non-full-time employees are not excluded, the resulting Compensation Ratio for a retailer could easily compare the CEO's total compensation to that of a seasonal, part-time sales clerk earning perhaps \$200 per week – a result that both lacks meaning and comparative relevance. Accordingly, RILA recommends that the Compensation Ratio be based only on permanent, full-time employees of the issuer.

If the SEC determines, however, that part-time and temporary employees must be included, RILA urges the SEC to establish a system of full-time equivalents (FTEs) that issuers may use to comply with the new requirement and permit issuers to use statistical estimates to satisfy such an FTE system. While still extremely onerous, such a system would assist retailers in dealing with the unique demographics of their workforce and help produce a more accurate Compensation Ratio.

D. Measurement Date for the Compensation Ratio

A related issue to the forgoing section is the date on which the Compensation Ratio is to be calculated. For consistency with the requirements of Item 402, we believe that the best option is to determine the median total annual salary of the issuer's employees as of the close of the most recently completed fiscal year for reporting purposes. Even assuming that the SEC accepts RILA's aforementioned recommendations regarding the scope of employees to include, a year-end measurement date would still present certain complexities, including procedures that issuers are to follow when accounting for employees who were hired or terminated mid-year. Again in the interests of striking a reasonable balance between the costs and benefits of the new provision, RILA recommends that the Compensation Ratio include only full-time employees with one year of service who are employed on the last day of the relevant fiscal year. Such a determination would be essentially the same analysis that issuers already perform for purposes of routine administration of a defined-contribution retirement plan (e.g., 401(k) plan).

If the SEC determines that part-time employees must be taken into account, we recommend in the alternative that only employees who are employed by the issuer on the last day of the relevant fiscal year be included in the Compensation Ratio.⁶

⁶ If the FTE alternative were adopted, the same year-end rule should apply to the inclusion of employees for that determination.

E. Application of the Summary Compensation Table Requirements

Once the scope of employees to be included in the Compensation Ratio is determined, the rules implementing Section 953(b) must also address the calculation of “total compensation” for each employee included in the ratio. As noted above, the statute requires that total compensation be determined according to the rules under Item 402, as in effect on July 20, 2010. At the extreme, this would require an issuer to calculate the salary, bonus, stock awards, option awards, non-equity incentive plan compensation, change in pension value and nonqualified deferred compensation earnings, and all other compensation for each employee – potentially tens or even hundreds of thousands of individuals for the largest U.S. employers.

Item 402, however, was never intended to apply beyond an issuer’s named executive officers. In fact, as applied to the Compensation Ratio, it will create a perverse result. By design, Item 402 captures all of the various compensation components received by a named executive officer, excluding certain limited items like benefits under non-discriminatory plans (e.g., healthcare) and perquisites and personal benefits aggregating less than \$10,000. As a result, it operates to push up total compensation from the executive’s base salary. Applied to an average worker, however, these rules will work in the opposite direction. By excluding certain benefit plans and perquisites (e.g., employee discounts, transportation/parking benefits, educational assistance) that do not exceed the \$10,000 threshold, the rules understate the average employee’s real total compensation. Relative to wages, benefits like healthcare and employee discounts both add significant economic value for the employee and are a prime motivator for the average employee when it comes to applying for the position and maintaining employment.

While we do not endorse the inclusion and valuation of such plan benefits and perquisites as part of the calculation to determine the median employee under the Compensation Ratio, as they would increase the burden of the new requirement exponentially, their exclusion highlights the fact that the current Item 402 requirements if applied to the overall employee population of an issuer will only serve to distort the already questionable meaning of the Compensation Ratio. As discussed in detail below, however, we recommend that once the median employee is identified, the value of benefits under non-discrimination plans, perquisites, and personal benefits aggregating less than \$10,000 be included for purposes of determining that one employee’s total compensation.

From a practical perspective, Item 402 raises a host of complexities when applied to an issuer’s overall employee population for purposes of calculating the Compensation Ratio. For example, “salary” and “bonus” presumably would translate into total hourly wages plus overtime for non-salaried employees. However, if non-U.S. employees are not excluded from the Compensation Ratio (as recommended above), country-specific requirements and currency translation will make even the seemingly straightforward salary-bonus calculation extremely difficult to determine, if even possible based on existing information systems in some cases.

Similarly, calculating changes in pension value and nonqualified deferred compensation earnings for each participating employee will be particularly difficult for companies that have broad-based equity-compensation plans. And, in cases involving multi-employer plans for union employees,

the availability of the required information may be a significant issue when the plan is not required to provide such data on each beneficiary. Even in cases where the issuer only offers a defined contribution plan (e.g., 401(k) plan), Item 402 would still require each employee's total compensation to include issuer contributions to a plan on the employee's behalf. Ultimately, inclusion of these changes in value and plan contributions could encourage companies to freeze or discontinue their pension and incentive plans and/or eliminate matching contributions to defined contribution plans in order to facilitate the calculation of the Compensation Ratio – far from a desirable result of this new disclosure requirement.

In light of the foregoing issues, RILA strongly urges the SEC to apply its interpretive authority as broadly as possible to harmonize the Item 402 requirements with the realities of compensation arrangements for non-named executive officers, who make up the overwhelming majority of an issuer's employees, especially in the retail industry. One option would be to streamline the "total compensation" calculation for U.S. full-time employees, employed for one year or more. For these employees, wages (including overtime and bonuses) generally make up their compensation, with other benefits either excluded or totaling less than the \$10,000 exemption under Item 402. Accordingly, the SEC should permit issuers to use "wages, tips, other compensation" reported on IRS Form W-2 as "total compensation" under the Compensation Ratio for purposes of determining the median employee. Once that individual employee is identified, an issuer can then determine the value of that median employee's compensation, benefits, and perquisites either under Item 402 or with the addition of benefits under non-discrimination plans (e.g., healthcare), perquisites and personal benefits aggregating less than \$10,000, as discussed above, which would achieve a more meaningful result than calculating each component of compensation while omitting the value of these crucial benefits.

If this streamline approach were adopted along with the recommendations in the preceding sections, namely limiting the application of the Compensation Ratio to U.S. employees, issuers would have a significantly improved chance of complying with the new reporting requirement in an accurate and timely manner.

F. Treatment as Furnished Numbers

Even if the foregoing recommendations are accepted, the complexities of calculating median total annual compensation and the Compensation Ratio will present enormous challenges for issuers and create substantial risk of errors. Accordingly, RILA endorses the proposal by the Center on Executive Compensation that both figures be treated as furnished numbers rather than filed numbers.⁷ Such a designation would in no way undercut the requirement for reporting these figures nor jeopardize the intent of the disclosure requirement, but it would recognize the inherent complexities of the Compensation Ratio and the good faith effort by an issuer to comply with the new reporting requirement.

⁷ See Letter from Timothy J. Bartl, Senior Vice President and General Counsel, Center on Executive Compensation, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Sept. 1, 2010) at 22.

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III. EFFECTIVE DATE

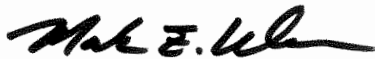
While Section 953(b) leaves the effective date for the Compensation Ratio in the SEC's hands, a reasonable effective date will depend greatly on the contours of the final rule implementing the new disclosure requirement. If the foregoing recommendations in this letter are included in the final rule, RILA believes that issuers would need as much as two years after the promulgation of the final rule to modify existing recordkeeping and reporting systems and/or put new ones in place. To the extent that the SEC decides against recommendations like excluding non-U.S. employees or part-time, temporary or seasonal employees or permitting the use of W-2 wages to identify the median employee, we believe issuers will require significantly more time – at least three years in many cases – to implement systems and databases necessary to make the calculations and comply with the reporting requirement.

Concluding Remarks

RILA appreciates the opportunity to comment in advance on the new Compensation Ratio. We recognize the challenges that the SEC faces in implementing this and the other new requirements under the Dodd-Frank legislation. However, RILA urges the SEC to consider the issues outlined in this letter before proposing the new rules to ensure that any implementation can be effected without creating undue compliance burdens and costs on publicly traded companies.

We would be pleased to discuss RILA's views with you further at your convenience.

Respectfully submitted,



Mark E. Warren
Vice President, Tax & Finance