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December 2, 2013

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-0609

Re: File No. S7-07-13

Dear Ms. Murphy,

Pearl Meyer & Partners ("PM&P") is pleased to submit comments to the Securities and Exchange Commission on its proposed release containing guidance to implement the provision under Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") regarding the "pay ratio" disclosure requirement.

By way of background, Pearl Meyer & Partners is one of the nation's leading independent compensation consulting firms, serving Board Compensation Committees as advisors and assisting companies in the creation and implementation of innovative, performance-oriented compensation programs to attract, retain, motivate and appropriately reward executives, employees and Board Directors. We help Boards and Committees establish and maintain sound governance practices, particularly as this relates to executive and Director pay decision-making. Since its founding in 1989, PM&P's compensation professionals have advised hundreds of organizations in virtually every industry, ranging from Fortune 500 companies to smaller private firms and not-for-profit organizations.

We appreciate the opportunity to comment and share our views. We note that PM&P is submitting this commentary on its own behalf, and not on behalf of any specific client. Please contact us at 212-407-9517 if you have any questions.

Sincerely,

David N. Swinford
President and CEO
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Background

Although PM&P generally opposes the pay ratio disclosure requirement, as it does not believe it will provide any meaningful or material information that could be used by investors, we recognize that the Commission had an obligation to implement Section 953(b) as drafted. We appreciate the Commission's good faith effort to balance the interest of investors and the associated costs to companies by providing some flexibility in arriving at the ratio. Our comments seek to offer clarification and practical suggestions for reducing the burdens on companies to the extent practical under the current Congressional mandate.

Required Filings

We agree with the proposed rules that the pay ratio disclosure would only be appropriate in filings that already contain Item 402 executive compensation information. Providing such information in multiple filings (e.g., registration statements, annual reports or other filings) throughout the year is unnecessary and would dilute the usefulness, if any, of the disclosure.

Covered Companies

We agree with the proposal that the following entities should be exempt from Section 953(b) disclosure:

- Emerging growth companies, as they are statutorily exempted under the JOBS Act;
- Smaller reporting companies, as they are not required to report Summary Compensation Table data in a manner consistent with the requirements of Section 953(b); and
- Foreign private issuers and MJDC filers, as they are not currently subject to executive compensation disclosure requirements under Item 402.

Even if the pay ratio rules could be construed to apply to the above filers, such disclosure would not be meaningful in light of the curtailed compensation information required in such filings. The pay ratio could be meaningful (if at all), only as a supplement to, and in the context of, a full Summary Compensation Table and Compensation Discussion and Analysis.

Presentation of the Pay Ratio

We commend the Commission for clarifying that the pay ratio should be presented either in narrative format or where median employee compensation is equal to "1" in the fractional equivalent. The literal ratio specified in the legislation (where the median employee compensation is in the numerator and the principal executive officer (PEO) compensation is the denominator) would have been impracticable.

We also recommend that the final rule specifically clarify that the ratio includes compensation information only from the PEO who was in that position at the end of the last completed fiscal year. This would simplify situations where there were multiple PEOs in one fiscal year due to a change in position, death, retirement, etc. Requiring companies to perform weighted calculations on multiple PEO compensation would complicate the rule and further dilute the usefulness, if any, of the disclosure. It would

also make for inconsistency in the ratio over time, particularly in cases where there have been termination/retirement payments and/or sign-on arrangements in some years but not others.

Employees Included in Determining the Median Employee

We continue to believe the intent of the statute would be more appropriately fulfilled if it was limited to only U.S.-based, full-time employees. Section 953(b) was enacted largely in reaction to a U.S-based fiscal crisis. The intent of the provisions was to show pay disparity in the U.S. as opposed to showing cost-of-living disparities around the world. The usefulness of this ratio disclosure, if any, will be completely obfuscated when companies feel compelled to include non-U.S. workers in the equation.

As noted in prior comment letters, the international variation in compensation arrangements and benefits, in addition to currency fluctuations, would distort the comparability of employee compensation to that of a U.S.-based PEO. We believe that if Congress had intended to apply this rule to part-time and non-U.S.-based employees, it would have specifically laid this out in the statutory language. The usefulness of this data, if any, to Compensation Committees and investors would be limited to the analysis of PEOs as compared to the U.S. full-time workforce. Inclusion of non-U.S. and part-time employees will render the ratio completely meaningless.

We understand that the flexible approach adopted by the Commission would allow companies to exclude overseas employees and part-time employees in ultimately identifying the median employee. However, we believe that in order to come to the conclusion that exclusion of such individuals is a valid statistic sampling approach, companies would need to go through a burdensome, costly and unnecessary due diligence process. This is particularly the case for companies that will be stymied by international data privacy laws.

We agree with the Commission that independent contractors, "leased" workers and other temporary workers employed by third parties should not be included in the pay ratio calculation. Inclusion of these individuals is neither mandated by the statute nor the intent of the rule. We do not think that the final rule should be extended to employees of partially-owned subsidiaries or joint ventures as such employees would not likely skew the outcome of the overall population and their pay may be made by an entirely different control entity. We feel particularly strong about this issue in the context of non-U.S. based subsidiaries and joint ventures – individuals of these entities are often times paid through a variety of methods other than the company's payroll systems and would be very difficult to identify.

Calculation Date for Determining Employees

We recommend that the final rule give companies the flexibility to choose a date other than the last day of their most recent fiscal year for identifying the company's employees for purposes of calculating the pay ratio. The proposal would have an adverse and disproportionate impact on certain industries that typically have many temporary and seasonal workers at year-end (i.e., retailers) and have a December 31st fiscal year-end. If such a company is on a fiscal year-end, their median employee pay would be artificially low. Moreover, as an unintended consequence, it may motivate companies to discontinue the use of seasonal and temporary workers when they are most needed. That would eliminate jobs for students and other individuals seeking employment only during this seasonal period, as well as raise labor costs for

companies. On the other hand, if the same company had an off-cycle fiscal end after the holidays, the seasonal employees would be excluded from the pay ratio. Therefore, companies with different fiscal year-ends may have an inappropriate advantage over those companies with calendar fiscal year-ends.

For these reasons, companies should be given flexibility to choose the identification date that most accurately represents their total population of employees over the year. To prevent manipulation, this alternate date should be disclosed, with the same date being used year over year, unless specific reasons are disclosed for a change.

Adjustments and Annualization

We agree that annualization is necessary for inclusion of any employees that have only worked part of the year. In practice, when making compensation decisions, Compensation Committees will only consider peer data when it has been annualized – compensation data for a partial-year worked is meaningless and usually disregarded.

However, we would take the annualization process one step further and apply it to seasonal and temporary workers as well. Including their unusually low wages in the median employee calculation would only serve to further dilute any potential usefulness of the pay ratio. We find it illogical to include, for example, the pay of a minimum wage employee who worked for three months as suggested in the proposed rules, because that worker is "representative" of the work force. The proposed rules dismiss the illogicality of this scenario, however, suggesting that this person would not be employed at year-end and would be excluded, which is not always the case.

We believe that Congressional intent of the statute would not require inclusion of the wages of temporary or seasonal employees. If they are included, there is simply no logic in prohibiting pay annualization. We do not think that the usefulness, if any, of the pay ratio would be diminished, particularly if disclosure as to annualization is made.

In certain cases, it may not make sense for companies to annualize compensation. Therefore, we concur with the proposed rules that annualization should be at the company's discretion.

Finally, we believe sufficient guidance is provided in Instruction 2 to permit companies to disclose information about annualization where material and appropriate to do so. Requiring companies to provide specific information in cases where only a few annualization calculations were required is not helpful.

Statistical Sampling and Safe Harbors

We agree with the Commission's viewpoint that the most efficient and appropriate way to implement Section 953(b) is by giving companies wide latitude to use different methodologies to identify the median employee, as well as to use reasonable estimates in calculating compensation measures. Professionals within the companies and any outside experts would arrive at a median employee and reasonable estimates that they deem to be the best approximation of the intent and spirit of "median employee pay" under Section 953(b). We are very concerned, however, that the processes used and the resulting number, which may very much be the product of a partially subjective process, is wholly susceptible to outside criticism and, more importantly, shareholder litigation.

As we have already seen, the advent of mandatory say-on-pay voting generated a flurry of unsuccessful compensation-related litigation based on a variety of disclosure-related claims. Some plaintiffs' lawyers have already stated their intention to turn to the new pay ratio disclosure requirements as a basis for future claims. The very existence of disclosure requirements on the pay ratio creates an opening for plaintiffs to allege that companies did not follow the pay ratio disclosure guidelines or used misleading calculations and comparisons. The cost to companies of fighting these frivolous claims was not considered by the Commission in its analysis, but they are real and potentially staggering.

In this vein, we believe that the SEC must provide some safe harbors for companies, both in methodology and reasonable estimates, to reduce or at least mitigate the risk of baseless actions attacking methodology. We note that these methodologies would not be prescriptive, but provide additional guidance, as well as some incremental protection from baseless litigation. Below are some suggestions:

- Small Non-U.S. Population: Where the international aspect of any company is less than 25%, this population may be excluded from consideration.
- Data Privacy Laws: To the extent a company is unable, through reasonable requests, to obtain compensation-related data from non-U.S. locales, companies may eliminate such employees/countries from the sampling.
- Confidence Levels: A statistical confidence level of at least 80% should be sufficient.
- Sample Size: A sample size of at least the square root of the total population should be sufficient in size.
- More than One Median Employee: If only salaries are used to identify the median employee, there may be multiple employees who are at the median. In this case, the final rules should provide that selection of any of one of the employees at the median level may be used for the ratio.

Finally, we agree with the Commission that companies should have the flexibility to use either the time period used for payroll or for tax recordkeeping when identifying the median employee based on a consistently applied compensation measure. This aspect of the rule should assist in reducing compliance costs and should not materially impact the quality of the disclosure or its usefulness, if any to investors.

Determination of Total Compensation

At the outset, we are deeply troubled that the proposal has taken a position that Item 402(c)(2)(x) could ever logically be applied to determining compensation of a non-executive officer. No public company currently calculates total compensation in this manner for employees who are not currently, or expected to be, executive officers. The most disconcerting part of using Item 402(c)(2)(x) relates to inclusion of pension values for both the PEO and median employee.

Changes to the actuarial value of pensions typically vacillate dramatically from year to year for both the PEO and the median employee (whose identity will likely change year-over-year, as well), with a significant impact on annual total compensation for both individuals. The following factors – all well outside the control of the Compensation Committee that makes determinations about executive pay – will have considerable impact on pension values:

- Age
- Years of service
- Interest rate movements
- Most recent salary increases during the year (for final average pay plans)
- Definition of "pay" in the retirement plan
- Type of retirement plan
- Change in identification of median employee

Given the tremendous variations in this number for both individuals, we urge the Commission to exclude pension value from the calculation of total annual pay, just as it found a basis to exclude this amount in identifying Named Executive Officers for purposes of inclusion in the Summary Compensation Table.

If the final rule must include pension values, we find it highly problematic that the proposed release seems to indicate that government-related pensions of overseas employees should be excluded on the same basis as they are currently excluded for Named Executive Officers. In many countries outside of the U.S., a government pension represents a substantial benefit to the employee and a cost that might otherwise need to be paid by the company. We believe that the spirit of 953(b) would have captured this amount for the median employee. If the purpose of the disclosure is to show the economic relationship of benefits to the PEO vs. other employees, excluding government pensions would result in a wholly flawed process.

The proposal contends that the use of "reasonable estimates" diminishes any potential issues associated with applying Item 402(c)(2)(x) to the median employee, yet it provides zero guidance for what a "reasonable estimate" may be. We request additional guidance as to what a "reasonable estimate" may mean generally, and in particular in the following scenarios:

- Data privacy laws of non-U.S. jurisdictions prevent accessing compensation-related information for the median employee
- Multi-employer pension plans that do not provide information about defined benefit pension plan values
- Other typical non-U.S. related compensation (housing, perquisites, etc.)

If the final rules are unable to provide further guidance as to how to reasonably estimate these numbers, the final rule should state, absent manifest error, that there is a presumption that the company is in the best position to assess a reasonable estimate for such elusive items.

Lastly, as currently drafted, "total compensation" is determined in accordance with paragraph (c)(2)(x) of Item 402. As a technical correction, we would suggest adding the term "and any successor thereto" to take into consideration future changes in Section 402 of Regulation S-K, rather than waiting to address it in the future.

Disclosure and Assumptions

We believe that the proposed disclosure instructions are consistent with the mandate of Section 953(b) and provide a balanced approach that will result neither in boilerplate language nor an overabundance of information. Limiting the requirement to “material” assumptions, adjustments or estimates is an appropriate approach that will lead to meaningful explanations for investors to understand the methodologies employed. Requiring a more technical discussion would only obfuscate the significance, if any, of the mandated disclosure.

We also agree that if a “material” change is made in methodology, there should be an explanation of the change, as proposed.

The proposed parameters with respect to additional disclosure are sufficient. The proposal allows companies to volunteer information, as necessary. What information is material and necessary to an understanding of the methodology and ratio should be determined on a company by company basis, with each registrant determining the most material elements of its process as needed. Requiring additional statistical measures would not be useful to investors, although we believe that the flexibility in the rule should allow companies to do so if they think it would provide meaningful context to the required disclosure.

Annual Compensation Considered

We agree that the appropriate time period for the pay ratio disclosure should be the same as that used for the company’s other executive compensation disclosures. The required median employee calculations should therefore be done for the last completed fiscal year. There should, however, be some flexibility to allow later filings as permitted under Item 5.02(f) to the extent that such information is not reasonably available at the time of proxy filing.

Disclosure Timing

We agree that, as proposed, the pay ratio disclosure should not be required earlier than the proxy statement for the previous fiscal year, which would in no way impact its usefulness, if any, to investors. As every company is different and faces its own unique set of challenges in acquiring year-end data, it is likely that there will be extenuating circumstances that prevent some companies from compiling compensation information in time to be included in their proxy statements. Requiring the disclosure using less than accurate information which is available at the time of filing the proxy would diminish any potential benefits of the disclosure. For the same rationale that allows delayed disclosure where PEO total compensation is unavailable, we urge the SEC to allow companies to delay the disclosure until it is calculable in a subsequent Form 8-K.

Filed vs. Furnished

We believe that the Commission relied too heavily on the word “filing” in the statute to reach the conclusion that the pay ratio disclosure must be “filed.” While there are multiple types of “filings” mandated by the SEC, clearly not all information contained in such filings is required to be “filed.” We believe that Section 953(b) refers only to the

type of documents that must contain the pay ratio disclosure, rather than *whether* the information is furnished or filed.

In the past, the SEC has been sympathetic to public company concerns about the fairness of imposing liability on certain types of disclosure and the chilling effect that such liability might have on their disclosure practices. For example, in enacting the disclosure rules issued prior to the 2007 amendments, the SEC stated that it appreciated the concern about litigation and went on to provide that such disclosure would be deemed “not filed.” In this case, the SEC’s use of the “not filed” tool recognized that in the case of disclosure initiatives aimed at producing free-flowing and potentially subjective disclosure, imposition of heightened liability (either under the securities law or the threat of shareholder derivative suits), may produce concerns or create incentives that are counter to the SEC’s objectives of good disclosure.

When the disclosure rules were amended in 2007, the SEC still permitted the Compensation Committee Report (CCR) to be furnished, not filed, reasoning that if shareholders were not satisfied with the decisions reflected in the CCR, the proper mechanism for complaint is the ballot, not litigation. We believe that similarly, companies should be able to actively employ the flexibility afforded by the proposed pay ratio rules without subjecting themselves to federal securities laws (and shareholder derivative suits based on these alleged violations). If shareholders are dissatisfied with the ratio and methodology used to calculate the ratio, rather than filing a derivative suit, they have the means to express their concern by voting against the Say on Pay proposal.

Aside from statutory construction, we strongly believe that this information needs to be furnished, rather than filed, as a litigation deterrent. While the proposal suggests that the wide latitude and flexibility afforded in determining the median employee and annual total compensation should mitigate concerns about litigation, in fact it has the opposite effect. There could be hundreds of assumptions inherent in such decision-making and the key issues will involve a high degree of judgment most of the time. The methodologies used may include subjective disclosures that may be unverifiable. Arriving at the final number may in some cases become more an art than a science, requiring input of various functions of the organization (human resources, finance, audit, the Board, etc.). These determinations, however, should be not be subject to second guessing; as the Commission recognized in the proposal, each company is in the best position to determine how its pay ratio should be determined. In no case should this serve as potential grounds for shareholder litigation.

Transition Rules

As a general matter, we believe the longer the transition period that companies have to gather the onerous information required under Section 953(b), the better. Currently, companies must begin to comply for their first fiscal year commencing on or after the effective date of the rule. The proposal notes that if the final requirements become effective in 2014, companies with a fiscal year ending on December 31st would be required to include pay ratio disclosures starting with compensation for fiscal year 2015, for their 2016 annual meetings. That would be an adequate transition period for most companies.

If the final rules were to become effective in mid-2014, however, those companies with fiscal years beginning on or after such date would be required to include the disclosure for fiscal year 2014 in their proxy statements filed in 2015 for their 2015 annual meetings. They would not have the same transition period afforded to regular fiscal year filers. To give non-fiscal year filers an equivalent transition period, we suggest that the compliance reference date be changed to fiscal years commencing on or after the January 1st following the adoption of the final rule.

We agree with the proposed transition period that new registrants should not be required to include pay ratio disclosure in their initial registration statements, and that to do so could significantly delay the IPO. In any event, there would be little, if any, usefulness in providing such data outside the context of the executive compensation disclosures provided in the company's proxy statement.

In light of the dramatic change in workforce undergone by almost all merged entities, we would also urge that transition rules be provided for companies that have recently undergone significant business combinations. The cleanest approach would be to exclude newly acquired employees from the pay ratio consideration for the surviving entity until at least two fiscal years after the transaction date.