SOCIETY
of Corporate Secretaries
& Governance Professionals

October 8, 2015

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549

Re: Pay Ratio Disclosure (Final Release Nos. 33-9877 and 34-75610)

Dear Mr. Fields:

The Society of Corporate Secretaries and Governance Professionals (the "Society") wishes to submit comments on Item 402 of Regulation S-K to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Final Rule").

The Society was founded in 1946 and is a professional membership association of more than 3,200 corporate secretaries, in-house counsel and other governance professionals who serve approximately 1,600 entities, including 1,000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive managements of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

Summary

The Society submitted a comment letter almost two years ago on the proposed pay ratio rule[1] (the "Proposed Rule"). Although our comment letter did include suggestions on how the term "employee" should be defined, it did not reference independent contractors as that concept was largely absent from the Proposed Rule. When the Final Rule was first adopted, the Commission's own press release stated that "… independent contractors would not be considered to be employees of the company."[2] We were therefore concerned to see that the text of the Final Rule instead states "The definition of employee . . . does not include those workers who are employed, and whose

[1] Pay Ratio Disclosure, Release No. 33-9452 (Sept 18, 2013) [78 FR 60560]

[2] SEC Adopts Rules for Pay Ratio Disclosure (Aug 5,2015)

compensation is determined, by an unaffiliated third party but who provide services to the registrant or its consolidated subsidiaries as independent contractors . . ."

We believe this could be read to mean that an individual who provides services to a registrant or its subsidiaries but whose compensation is determined by the registrant would be deemed an "employee" for purposes of the rule. The Society respectfully asks that this be clarified. Independent contractors are not employees. Even when they are retained directly by the company rather than by a third party, their pay structure and commitment to the company is inherently different from that of an employee. Including independent contractors in the determination of the median employee when they are not "employed" by a third party and when the registrant determines their compensation will result in a nonsensical ratio for some companies for the reasons set forth below:

- Independent contractors typically don't receive employee benefits and are not provided with office space or administrative support. These costs are paid for by the contractors themselves, out of the compensation received from the company. Therefore, including their pay in the determination of the median employee would result in an "apples to oranges" comparison.

- Independent contractors choose whether to perform work for a company and how much time to devote to that endeavor. A freelance photographer may elect to submit only a few photographs to a publication in a given year and therefore will receive little income from that company. Independent contractors therefore control how much compensation they receive. Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] was adopted to provide additional disclosure of executive compensation. Because the pay to an independent contractor is largely dictated by the contractor's efforts based on, e.g., zealousness, personal circumstances, etc., his or her compensation will have no relation to the compensation paid to a company's employees or executives. Further, including contractors' pay in the pay ratio calculation does not further Congress' objective to address executive compensation practices.

- The Final Rule does not define independent contractor. If an independent contractor has "contracted" to perform individual services for the company, there could be situations in which he or she performed no services for the company in a fiscal year and therefore received no pay. This would then require a company to include $0 as the pay to that "employee", therefore

[3] Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173)

nonsensically reducing the pay of the median employee. We believe this was not intended by the Act.

- In the alternative, there are companies such as direct marketing companies where the pay to an independent contractor depends only on his or her success in the business. In some cases, these companies use independent contractors who make upwards of one million dollars or more per year. These successes are rare, and in those cases the independent contractor actually may earn multiples of the pay of the median employee. Including such independent contractors would likely skew the determination of the median employee in the opposite, but equally unintended, direction.

- Some of our member companies have indicated that they have tens of thousands of independent contractors. In one extreme case, a member company advised us that it has about 100,000 independent contractors who have obtained licenses that enable them to be active in the business (although many of them may choose not to participate fully in that opportunity). At any given time, they may have another 200,000 independent contractors who are working to obtain their licenses and, as a result, are only permitted to participate in small discrete areas of the business. That same company has only 2,000 employees. Requiring such a company to include all 202,000 "employees" in the calculation of the median employee would likely result in a median "employee" who makes only a nominal amount, thus resulting in a nonsensical pay ratio.

To the extent there is any value in the required pay ratio disclosure, that value would be greatly diminished by the inclusion of independent contractors in the determination of the median employee. Even workers who are hourly, part-time or seasonal ultimately have their pay and standards of employment set by the company, who is their employer. Independent contractors are in a wholly different situation – they perform work for a company completely at their own discretion and their pay can fluctuate greatly from year to year. For the reasons set forth in this letter, we respectfully request that the Commission issue an interpretation clarifying that independent contractors (defined as individuals who are not characterized as employees by the company and who are not entitled to the benefits to which the company's employees are entitled) are not employees under the Final Rule.

Respectfully submitted,

/s/ Rick E. Hansen

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Chair, Securities Law Committee

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