

Comments Suggest Modifications, Not Just Outright Bans, on the Inclusion of Non-U.S. Employees for Pay Ratio Rules

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Many comment letters on the proposed SEC pay ratio rules recommend that the Commission exclude non-U.S. employees from the calculation altogether, but some letters also seek clarification or changes to make the effort less burdensome.

Exxon Mobil recommends that the Commission expressly endorse the use of a confidence level for purposes of identifying the median employee such that only a limited number of countries and businesses that in the aggregate represents a specified total would need to be included. In Exxon's case, 39 of the 89 countries where they have employees represent less than 1% of total employees, but may require "significant marginal effort." The company favors limiting the data to 50 countries with the largest employee populations. Pearl Meyer similarly recommends confidence levels of at least 80% as sufficient, as well as the ability to exclude non-U.S. populations that make up less than 25% of any company's employee base.

Mercer is concerned about year-to-year fluctuations due to currency impacts, cross-border differences in pay and expatriate pay programs. Two employees with the same salary, an element that can be used as a reasonable measure for finding the median employee, could have wildly different total compensation given that, for example, expatriate pay often include a cost of living, housing and education allowances that provide for very different total compensation amounts. Mercer suggests allowing companies to use a range or average of several median employees' compensation. In addition, Mercer seeks to permit the exclusion of changes in defined benefit pension values which are driven by age, service and factors such as interest rates rather than company pay decisions.

Using salary grades or job levels to identify the median, Towers Watson argues, would alleviate pension-related issues and enable companies to limit assembling the information needed from different payroll systems. The National Association of Manufacturers proposes using an algorithm designed to estimate compensation using salary data and statistics for each location, as they claim that statistical sampling is most helpful only if a company already has an assembled list of employees and detailed information about each location's respective compensation distributions.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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