

SEC Staff Issues Interpretative Guidance on Pay Ratio Disclosure Rules

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Yesterday, the Staff [released five questions and answers](#) regarding compliance with the pay ratio disclosure rules, including responses to:

- **Use of a consistently applied compensation measure (CACM).** The rules permit companies to use CACM instead of annual total compensation to identify the median employee, such as information derived from tax and/or payroll records. The Staff noted that the appropriateness of any CACM will depend on a company's particular facts and circumstances. One example the Staff uses is that total cash compensation could be a CACM unless the company also distributed annual equity awards widely among its employees. It is not expected that CACM would necessarily identify the same median employee as if a company used annual total compensation instead.
- **Using hourly or annual rates of pay as a CACM.** The Staff indicated that an hourly or annual pay rate may not be used exclusively as a CACM, although it may be a component used to determine overall compensation.
- **Time period to identify median employee.** A company must first select a date, which must be within three months of the end of its fiscal year, to determine the population of its employees from which to identify the median. In identifying the median employee, a company is not required to use a period that includes the date on which the employee population is determined. It is also not required to use a full annual period. In addition, a CACM may also consist of annual total compensation from a company's prior year, but there cannot have been a change in the employee population or compensation arrangements that would result in a significant change in pay distribution.
- **"Furloughed" employees.** The Staff notes that the rule does not define or even address furloughed employees. Since "furlough" could have different meanings for different companies, companies will need to determine whether furloughed workers should be included as employees based on the facts and circumstances. A company must determine, if it includes the furloughed employee, whether that employee is full-time, part-time, temporary or seasonal, in order to decide whether total compensation may be annualized.
- **Independent contractor, or not.** The rules require that in determining if someone is an "employee," a company must consider the composition of its workforce and its overall employment and compensation practices. The Staff indicates that a company should include workers "whose compensation it...determines" regardless of whether those workers would be considered "employees" under other laws. If a company obtains the services of workers by contracting with an unaffiliated third party that employs the workers, the Staff does not believe that it is "determining" the workers' compensation for purposes of the rule if, for example, the company only specifies that those workers receive a minimum level of compensation.

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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