

Publications

Securities Alert: New SEC Proposed Rules on 'Pay Ratio' Disclosure

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CLIENT ALERT | 9.20.2013

On September 18, 2013, the Securities and Exchange Commission proposed new "pay ratio" disclosure rules pursuant to Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The proposed rules would require issuers to disclose (1) the median of the annual total compensation of all employees of the issuer except the chief executive officer (CEO), (2) the annual total compensation of the CEO and (3) the ratio of the median to the annual total compensation of the CEO.

Employees Included in Median Determination

Issuers may choose to determine the median by using their entire employee population, a statistical sample of that population or any other reasonable method. For purposes of the proposed rules, the term "employees" includes all full-time, part-time, temporary and seasonal employees of the issuer or any of its subsidiaries as of the end of the issuer's most recently completed fiscal year. Workers who are not employed by the issuer or its subsidiaries, such as independent contractors or "leased" workers or other temporary workers who are employed by a third party, are not included in the median determination.

Determining the Median Annual Total Compensation

The proposed rules would allow issuers to determine the median annual total compensation by using a methodology that is most appropriate given their size, structure and how they compensate their employees. Issuers may determine the median (1) by calculating the annual total compensation for each employee included in the calculation in accordance with Item 402(c)(2)(x) of Regulation S-K or (2) by identifying the median employee based on any consistently applied compensation measure (e.g., amounts reported in the issuer's payroll or tax records) and then calculating the annual total compensation for that median employee in accordance with Item 402(c)(2)(x).

Because issuers are not required to calculate the compensation of employees other than named executive officers in accordance with Item 402(c)(2)(x), the proposed rules would permit issuers to use reasonable estimates to calculate the annual total compensation or any elements of the annual total compensation for employees other than the CEO. The proposed rules would require the annual total compensation of the CEO to be calculated in accordance with Item 402(c)(2)(x).

Issuers would be permitted to annualize the total compensation for a permanent employee who only worked part of the year, but would not be permitted to annualize adjustments for temporary or seasonal employees or project full-time equivalent adjustments for part-time employees.

Issuers would be required to also disclose the methodology, including any material assumptions, adjustments or estimates, used to identify the median or calculate annual total compensation, including a clear identification of any estimated amounts and any changes in methodology from one year to the next.

Filings Required to Include "Pay Ratio" Disclosure

Issuers would be required to provide the new "pay ratio" disclosures in registration statements, proxy statements and annual reports on Form 10-K whenever those forms require executive compensation disclosure under Item 402 of Regulation S-K.

Exempt Issuers

The proposed rules would not apply to smaller reporting companies, emerging growth companies or foreign private issuers.

Compliance Date of New Rules

The proposed rules are subject to a 60-day public comment period which will expire on or about November 18, 2013. Issuers would be required to comply with the proposed rules with respect to compensation for the first fiscal year that commences on or after the effective date of the rules. Accordingly, if the final rules become effective in 2013, an issuer with a December 31 fiscal year end would be required to include the new disclosures in its Form 10-K or proxy statement to be filed in 2015.