

# SEC PUBLISHES GUIDANCE ON PAY RATIO DISCLOSURE

*Hodgson Russ Employee Benefits Newsletter*  
October 27, 2017

Along with the confirmation from the leadership of the Securities and Exchange Commission (SEC) that the new pay ratio disclosure rules will go into effect in 2018, the SEC published interpretative guidance and the Staff of the SEC's Division of Corporate Finance published interpretative guidance and updated Compliance & Disclosure Interpretations (C&DI) on this disclosure. This new guidance confirms that companies will have a degree of flexibility in compliance with the disclosure requirements. Highlights of guidance include:

- **Determination of Employees.** The SEC confirmed that for purposes of pay ratio disclosure a company may utilize widely recognized tests to determine whether an individual is an employee or not. This includes rules developed for tax treatment or employment law purposes. This will make it much easier for companies in that they would not have to collect data in many independent contractor situations.
- **Determination of Median Employee.** Companies may use existing records such as payroll or tax reporting records that reasonably reflect annual compensation even though they may not include every element of compensation. For example, these records may not include the value of equity awards widely distributed to employees. Previous guidance had indicated that cash compensation could be utilized unless the company distributed annual equity awards among a wide group of employees. Further, if the identified median employer using these consistently applied compensation measures produces an identified median employee with characteristics that would have a significant impact on the pay ratio computation, then the company may utilize another employee with similar compensation to the originally identified median employee as its median employee.
- **Currently Statistical Sampling.** The SEC provided further clarification on the use of specific statistical sampling techniques and that companies may combine different sampling or determination methods to fit their unique situations.
- **Enforcement.** The SEC indicated that a company can use reasonable estimates, assumptions, and methodologies as long as these are identified and disclosed in the proxy statement. The SEC also stated that it would not bring an enforcement action as long as disclosure is made in good faith and on a reasonable basis.

For more details see, *Division of Corporation Finance Guidance on Calculation of Pay Ratio Disclosure*, (Sept. 21, 2017) <https://www.sec.gov/corpfin/announcement/guidance-calculation-pay-ratio-disclosure> ; *Commission Guidance on Pay Ratio Disclosure*, Release No. 33-10415 (Sept. 21, 2017) <https://www.sec.gov/rules/interp/2017/33-10415.pdf> ; C&DI 128C.01 (Oct. 18, 2016; updated Sept. 21, 2017); C&DI 128C.05 (Withdrawn, Sept. 21, 2017); C&DI 128.06 (Sept. 21, 2017) <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.