**Pay Ratio Calculation Checklist  
Version Date: December 11, 2017**

*Preliminary Notes: This checklist is intended to facilitate a company’s preparation for the CEO to median employee pay ratio disclosure that is required for fiscal years beginning on or after January 1, 2017. Accordingly, the disclosure will generally be required in proxy statements filed in 2018 (reporting on 2017 compensation) and thereafter.*  *This summary is not a complete recitation of all aspects of the final rule and SEC interpretive guidance, which includes a limited number of compliance and disclosure interpretations. Finally, this checklist briefly identifies but does not address in detail the various company-specific HR and IR considerations that companies should prepare for in connection with disclosure of the company’s CEO to median employee pay ratio to both its stockholders and employees.*

**STEP 1: IDENTIFYING THE MEDIAN EMPLOYEE**

**Step 1A: Select a Measurement Date**

* The measurement date must be a date within the last three months of the fiscal year.
* Most companies will seek to identify a date that has the most “normalized” workforce year to year.
* Companies with part-time, seasonal and temporary employees will likely want to select a date when fewer of such employees are employed.
* The company must disclose the selected measurement date, however it is not obligated to disclose why it chose this date.
* If the measurement date changes from the previous year, the company must disclose the change and explain the reasons for making the change.

**Step 1B: Identify All Employees (or see “Alternative to Steps 1B-1D” below)**

* Unless a company is using statistical sampling as described below, the median employee must be identified from among all of the company’s employees employed on the selected measurement date.
  + Employees include the following categories of employees of the company and all of its consolidated subsidiaries:
    - Full-time and part-time employees
    - Seasonal and temporary employees
    - Foreign employees
    - Salaried and non-salaried employees
    - Certain independent contractors (see below)
    - Furloughed workers if they are considered employees

*Practice Note*: Companies will need to track aggregate workforce data to pinpoint the median employee, but likely also will benefit from tracking employees by segment as well, such as U.S. versus foreign locations, as well as by types of worker: full-time, part-time, temporary, seasonal and contractor. Consider using a uniform spreadsheet throughout locales.

* Independent contractors should be included if the company deems them to be “employees” by applying a widely recognized test used by the company in connection with another area of law (such as tax or employment law, including guidance published by the Internal Revenue Service).

*Practice Note*: Companies should disclose the type of test used by the company to determine the status of independent contractors and briefly describe any material assumptions or adjustments used in such analysis.

* Certain foreign employees may be excluded.
* *Data Privacy Exemption –* Foreign employees may be excluded if gathering the data necessary for the calculation would violate data privacy rules.
  + In order to exclude employees under this exemption, the company must:
    - Make reasonable efforts to obtain the information, including seeking an exemption from the applicable country’s data privacy rules,
    - If no exemption can be obtained, procure a legal opinion that the company is unable to obtain the information without violating applicable data privacy rules and that the company was unable to obtain an exemption (the opinion must be filed as an exhibit to the filing containing the pay ratio disclosure),
    - Exclude all employees from that jurisdiction, and
    - Disclose the excluded jurisdiction(s), identify the applicable data privacy rules prohibiting access to the data and how the pay ratio rule would violate those data privacy rules (including a detailed summary of efforts the company took to use or seek an exemption from such rules) and disclose the approximate number of employees in each such jurisdiction.
  + It is generally assumed that most companies have already navigated the data privacy rules and have access to foreign employee compensation information, such that this exemption is unlikely to be relied upon by many companies. In addition, the cost of seeking an exemption and obtaining a legal opinion may be significant.

*Practice Note*: Foreign data privacy laws are often detailed and require employee consent and/or advance notice. If a company is not confident that it has already complied with such laws in its foreign locations it may want to consider gathering the required information on-site in the relevant foreign country and redacting/anonymizing employees’ personal information prior to transmitting the information to the U.S. in order to avoid violations of such foreign data privacy laws.

* *De Minimis Exemption -* Non-U.S. employees constituting 5% or less of the total employees may be excluded.
* In order to exclude an employee from a jurisdiction, all employees from that jurisdiction must be excluded.
* Companies may use existing, appropriate internal records (including payroll or tax records) to determine the availability of the *de minimis* exemption.
* Any employees excluded pursuant to the data privacy exemption described above count towards the 5% calculation.
* If the company excludes employees under this *de minimis* exemption, the company must disclose:
  + The jurisdictions excluded,
  + The approximate number of employees in each such jurisdiction,
  + The total number of U.S. and non-U.S. employees, excluding use of any exemption (data privacy or de minimis), and
  + The total number of its U.S. and non-U.S. employees used for its de minimis calculation.

*Practice Note*: Companies may wish to consider using the de minimis exemption to exclude non-U.S. employees in those jurisdictions where data collection may be challenging or the data is not easily translated into a company’s consistently applied compensation measure.

* Employees of acquired businesses may be excluded for one year.
  + Employees of a business acquired in the fiscal year for which the ratio is calculated may be excluded. The company must disclose the identity of the business acquired as well as the approximate number of employees excluded from the calculation.
  + Consider whether including the employees of the acquired business in the next year constitutes a substantial change requiring identification of a new median employee (or, whether to include the acquired employees in the first year if possible to avoid this process).

*Practice Note*: A company should thoughtfully document its employee workforce data collection process, assumptions relating to the same, questions examined and analysis throughout the process so that it can defend its process if need be and also replicate the process next year if significant changes occur or, alternatively, at least every three years if no significant changes have occurred.

**Step 1C: Identify the Compensation Measure Used to Identify the Median Employee**

* Any consistently applied compensation measure that reasonably reflects the annual compensation of employees can be used to identify the median employee.
  + A company may use its internal records that reasonably reflect annual compensation to identify the median employee, even if the records don’t include every component of employee compensation, such as widely-distributed equity awards.
  + Possible compensation measures include:
    - Base salary / wages, which should include overtime paid to non-exempt employees in the calculation of wages. Use of base salary / wages may understate the compensation of the median employee compared to using total cash compensation or more of a total rewards concept.
    - Total cash compensation, which includes base salary and cash bonuses or wages and commissions/bonuses.
    - Taxable compensation. Taxable compensation is subject to significant variability and could skew results in years when CEO exercises stock options or vests in equity awards.
    - Total compensation (for example, as calculated under the SEC rules). This measure is subject to significant variability and difficult to calculate for all employees.
  + A compensation measure will be considered to be applied consistently even if the measure is defined differently in different jurisdictions (for example, taxable compensation); but, companies may not use a different measure in different jurisdictions.
  + The compensation measure may use a period different from the company’s fiscal year (for example, if a 12/31 fiscal year end company has a tax year ending 6/30, the company could use the tax record data).
  + The compensation measure is not required to use a period that includes the selected measurement date on which the employee population is determined nor is it required to use a full annual period. The compensation measure may use a prior fiscal year unless there have been significant changes in pay distribution or workforce.
  + Hourly or annual pay rates of pay may not be used as the compensation measure.

*Practice Note*: A company’s consistently applied compensation measure should be reliable and reasonably reflect the annual compensation of employees. It may be helpful for a company to test different iterations of the consistently applied compensation measure to determine which one best reflects its compensation profile.

* Companies may annualize compensation of permanent employees who were only employed for part of the year (due to mid-year hire or termination), but may not adjust compensation on a full-time equivalent basis for part-time, temporary or seasonal employees.
* Cost of living adjustments may be used to identify the median employee.
  + Companies may make a cost of living (COLA) adjustment to the compensation of employees living in all jurisdictions other than where the company’s CEO resides (i.e., the CEO’s residence jurisdiction) in order to adjust the employee compensation to the cost of living in the CEO’s residence jurisdiction.
  + If a COLA is used to determine the median employee, the company must disclose a description of the COLA adjustment it used to identify the median employee.
  + If the company uses a COLA to determine its median employee, and the median employee lives in a jurisdiction other than the CEO’s residence jurisdiction:
  + The same COLA must be used to calculate the median employee’s annual total compensation.
  + The company must disclose:
    - The median employee’s jurisdiction, and
    - A description of the COLA adjustments it used to calculate the median employee’s annual total compensation (including the measure used as the COLA basis).
* The company must also disclose the median employee’s annual total compensation and the pay ratio without the COLA, which requires identification of the median employee (likely a different employee) without utilizing a COLA.

The company should consider the impact of applying COLAs to all jurisdictions, other than the CEO’s residence jurisdiction, and the cost and burden of performing such calculations.

*Practice Note*: Companies should document the analysis, including material assumptions, adjustments or estimates they use to “determine total compensation or any elements of total compensation, which shall be consistently applied.” For example, Regulation S-K, Item 402(u) does not address foreign currency conversion, however companies with international employees will need to convert the compensation of those employees into U.S. dollars. It is likely that many companies will use a method consistent with that used to prepare their annual financial statements. Most companies use an annual average conversion rate or the conversion rate in effect at fiscal year-end or, in the case of material bonus payment, a spot rate.

Companies may also wish to document other compensation measures they considered but ultimately did not choose and note why they were not chosen (i.e., why such measures would not have had a significant impact on a company’s calculations), which need not be disclosed but may be useful later in the company’s internal analysis compared to its peers.

**Step 1D: Identify the Median Employee**

* Identify the median employee from among all employees other than the CEO using the compensation measure selected.
* The median employee must be an actual employee.
  + If the calculation of total compensation for the identified median employee is determined to include unusual circumstances that may skew the ratio, the company may substitute another employee who has substantially similar compensation to the median employee, and disclose this substitution.
  + The company should not disclose any personally identifiable information about the median employee, other than the employee’s total compensation, but companies may consider disclosing the employee’s position and possibly location to provide context.
* The median employee only needs to be identified once every three years.
  + However, if the company has significant changes in its employee population or employee compensation arrangements that would result in a significant change in the pay ratio, the company will need to identify a new median employee.
  + If the company relies on the prior year’s identification of the median employee, the company must disclose that fact and state the basis for its reasonable belief that there were no changes that would significantly affect the ratio.
  + If there were no significant changes in the employee population or compensation arrangements, but the median employee is affected uniquely (e.g., the employee leaves the company or the employee’s compensation change significantly), the company select a similarly situated employee, if there is one, to become the median employee.

*Practice Note*: A company should consider identifying similarly-situated employees to the median employee when it first performs its median employee analysis. Again, the process should be well documented and repeatable.

* + Even though median employee only needs to be identified once every three years (except as provided above), the median employee’s total compensation needs to be recalculated every year to calculate the pay ratio.

**Alternative to Steps 1B-1D: Engage in Statistical Sampling**

* As an alternative to identifying the actual median employee, companies may use statistical sampling techniques to identify the median employee.
  + Examples include:
    - Simple random sampling, stratified sampling, cluster sampling and systematic sampling.
    - Use the “Square root of n + 1” estimation technique, where “n” is the total employee population.
    - Exclude the highest and lowest paid employee groups to reduce the pool for identifying the median employee.
  + Companies are also permitted to use more than one statistical sampling method or a combination of statistical sampling for certain geographic/business units and other methodologies or reasonable estimates for other geographic/business units.
  + The rules do not prescribe the sample size or other requirements for statistical sampling. Companies are instructed to use reasonable methods (or a combination of reasonable methods) and make reasonable estimates.
  + The many nuances of statistical sampling are not covered in this outline.

*Note Regarding Statistical Sampling: Statistical sampling may be a useful alternative if a company has a complex workforce utilizing many different pay structures or incompatible payroll systems across the world making it difficult to identify the actual median employee, however it may be challenging to use without input from statistical consultants. Please consult the final rules as well as SEC interpretive guidance and seek more detailed advice if you are interested in pursuing statistical sampling.*

**STEP 2: CALCULATING THE PAY RATIO AND PREPARING THE PROXY DISCLOSURE**

**Step 2A: Calculate the Total Compensation of the Median Employee and the CEO**

* Total compensation should be calculated consistent with the SEC rules on calculating total compensation for the Summary Compensation Table, subject to the following:
  + Reasonable estimates may be used so long as they are disclosed. For example, a reasonable estimate of the approximate change in actuarial present value of pension benefits may be used in calculating the median employee’s total compensation. Government-mandated defined pension plans do not need to be included.
  + Perquisites less than $10,000, as well as the value of non-discriminatory benefits that are otherwise not disclosed, may be included in the median employee’s total compensation as long as they are also included in the CEO’s total compensation for purposes of the pay ratio, and any difference between the total compensation used for purposes of the ratio versus the Summary Compensation Table must be explained. Companies should consider the impact of including perquisites since they may have the effect of lowering the pay ratio as their proportionate contribution to the median employee’s total compensation is likely to be greater than their contribution to the CEO’s total compensation, however, this should be weighed against whether year to year changes in the benefits would damage the stability of the company’s pay ratio over time.
  + If a COLA was used to identify the median employee, the same COLA must be used to calculate the median employee’s total compensation. COLAs may not be used in calculating the median employee’s total compensation if they were not used in identifying the median employee.
* If the CEO changes during the year, the company may either (i) annualize the compensation of the CEO serving on the selected measurement date or (ii) sum the total compensation paid to each person who served as CEO during the year. The company must disclose which method it used.

**Step 2B: Calculate the Ratio of the Median Employee’s Total Compensation to the CEO’s Total Compensation**

* A reasonable estimate of the pay ratio must be calculated and presented as either (i) a ratio (e.g., 20 to 1 or 20:1) or (ii) a multiple (e.g., 20 times). It may not be presented by disclosing the median employee’s total compensation as a percentage of the CEO’s total compensation (e.g., 5% of). If the company states that the pay ratio is an estimate, it should also state that the pay ratio has been calculated in a manner consistent with Item 402(u) of Regulation S-K.

**Step 2C: Prepare Accompanying Proxy Disclosure**

* Companies must disclose:
* The pay ratio, as described above.
* The required explanations described above.
* The methodology the company used to identify the median employee.
* Material assumptions, estimates or adjustments (such as COLAs) used in identifying the median employee (such as the selected measurement date on which the employee population is determined as well as the compensation measurement period) or conducting any of the calculations (including total compensation or any elements of total compensation).
* Any changes in methodology, assumptions, estimates or adjustments from the prior year as well as the reasons for such change, if the effects of any such change are “significant.”
* In addition, companies may disclose:
* One or more additional ratios, based on alternative calculations, so long as the additional ratios are clearly identified, not misleading and not presented with greater prominence than the required ratio.
* Examples of additional ratio calculations or other disclosures companies may want to include are:
  + Pay ratio excluding part-time, seasonal and temporary workers.
  + Pay ratio excluding other foreign employees.
  + Impact of inclusion of independent contractors on pay ratio.

*Practice Note*: Companies may want to consider determining whether supplemental disclosure might set a precedent for future disclosures.

* Companies may wish to note that the pay ratio set forth in any required disclosure is a reasonable estimate calculated in a manner consistent with Item 402(u) of Regulation S-K.
* Companies also may consider adding language noting that their pay ratio disclosure takes into account certain material assumptions, estimates or adjustments (as detailed therein) and that the related underlying calculations and resulting ratio are specific to the company, making informal comparisons to its peer group’s pay ratio information challenging or possibly inaccurate.
* Pay ratio disclosure need not be included in CD&A, and several treatise-authors and well-known securities law bloggers suggest that it should not be included in the CD&A. However, if pay ratio or pay equity is part of company’s compensation setting and decision-making process it should be discussed in CD&A.
* Companies may consider including pay ratio disclosure as a separate section following the executive compensation disclosure (including all the tabular disclosure).

*Practice Note*: Since pay ratio is “filed” with the SEC, it is subject to the CEO/CFO Sarbanes-Oxley certifications. Companies should consider whether back-up certifications should be edited to include pay ratio items or whether any additional responsible employees should execute such a certification. Companies may also want to study whether additional disclosure controls and procedures should be implemented to encompass pay ratio data gathering, storage and analysis.

*Practice Note*: Pay ratio disclosure is “filed” with the SEC (rather than “furnished”) and subject to the liability provisions of Section 18 of the Exchange Act. The SEC interpretive guidance has stated that if a company uses reasonable estimates, assumptions or methodologies, the pay ratio and the related disclosure would not provide the SEC with a basis for enforcement actions “unless the disclosure was made or reaffirmed without a reasonable basis or was provided other than in good faith.”

**Step 2D: Prepare Proxy Disclosure-Related Communications**

* Companies should consider the various constituencies who may be interested in their pay ratio disclosure, such as their employees and institutional investors as well as other audiences such as the local press or labor unions, and develop a cohesive communications strategy in advance of any required pay ratio disclosure.
* Each company’s communications strategy should be thoughtful and individually-tailored, taking into account the timing, method and forum of each communication as well as any potential audience sensitivities. Companies also should determine whether any such communication would potentially trigger additional SEC disclosure obligations.

**REFERENCES**

* [Press Release on Interpretive Guidance on Pay Ratio Disclosure Rule](https://www.sec.gov/news/press-release/2017-172), September 21, 2017
* [Commission Guidance on Pay Ratio Disclosure](https://www.sec.gov/rules/interp/2017/33-10415.pdf), September 21, 2017
* [Staff Guidance on Calculation of Pay Ratio Disclosure](https://www.sec.gov/corpfin/announcement/guidance-calculation-pay-ratio-disclosure), September 21, 2017
* [Compliance and Disclosure Interpretations](https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#128c.01), September 21, 2017 (revised)

(See Questions 128C.01-128C.06)

* [Pay Ratio Disclosure Adopting Release](https://www.sec.gov/rules/final/2015/33-9877.pdf), August 5, 2015
* 17 CFR [§229.402   (Item 402)   Executive compensation.](https://www.ecfr.gov/cgi-bin/text-idx?SID=8e0ed509ccc65e983f9eca72ceb26753&node=17:3.0.1.1.11&rgn=div5#se17.3.229_1402) (See Item 402(u) of Regulation S-K)

**Proposed Work Plan for Pay Ratio Calculation (based on calendar year dates)**

***Items That Should Be Accomplished to Date***:

* Establish internal working group to assess data required to calculate ratio
  + Members likely include:
    - HR (pay/benefits) representatives
    - Legal representative
    - If not represented by the above members, a lawyer or other person familiar with the data privacy issues related to employee compensation data, if applicable
    - Investor relations representative (could be added to group later)
  + Determine availability of data on compensation
    - Assess data available from various payroll providers and systems
* Work on preliminary calculation of ratio and assess alternative calculation methodologies
* Report to compensation committee on internal working group, calendar for completing work and any preliminary information about calculation; update proxy statement timeline and work plan to incorporate pay ratio calculation and disclosure
* Refine calculation using 2016 compensation data
* Report to board of directors on calculation (consider including sample format of proposed disclosure)

***Upcoming Items*:**

* Q4 2017:
* Analyze potential consequences of disclosure of ratio (investors, employees, etc.) and prepare IR/HR strategy for communicating with investors and employees as needed
* Prepare preliminary calculation based on estimated 2017 compensation data and present to compensation committee/board on calculation and IR/HR strategy
* Q1 2018: Prepare final calculation based on 2017 compensation data and prepare disclosure for proxy statement; implement IR/HR strategies related to disclosure of pay ratio calculation

**Notes About this Checklist:**

* This checklist reflects a general summary of the SEC rule, the relevant interpretive guidance provided by the SEC and the Division of Corporation Finance, pay ratio-related compliance and disclosure interpretations and general industry thinking about certain interpretive issues under the rule.
* This checklist is subject to change and update if and as the SEC provides further guidance on certain interpretive issues under the rule and/or as industry practices develop.
* The attached sample disclosure is a very basic disclosure and does not include everything that may be required for disclosure for a company that used certain processes or assumptions or wishes to include certain voluntary disclosures.

**APPENDIX: SAMPLE DISCLOSURE**

CEO Pay Ratio[[1]](#footnote-2)

We are providing the following information about the relationship of the annual total compensation of our employees and the annual total compensation of [          ], our Chief Executive Officer (our “CEO”):

For [2017, our last completed fiscal year]:

* the median of the annual total compensation of all employees of our company (other than our CEO) was $[        ]; and
* the annual total compensation of our CEO, as reported in the Summary Compensation Table included on page [  ] of this proxy statement, was $[        ].

Based on this information for [fiscal year 2017], we reasonably estimate[[2]](#footnote-3) that the ratio of our CEO’s annual total compensation to the annual total compensation of our median employee was [  ]:1[[3]](#footnote-4). Our pay ratio estimate has been calculated in a manner consistent with Item 402(u) of Regulation S-K.[[4]](#footnote-5)

We identified our median employee based on the [total compensation][[5]](#footnote-6) actually paid during [fiscal year 2017][[6]](#footnote-7) to all [       ] members[[7]](#footnote-8) of our workforce (including full-time, part-time and temporary employees [as well as certain independent contractors]),[[8]](#footnote-9) other than our CEO, who were employed on [              ], 2017.[[9]](#footnote-10)

For purposes of determining the [total compensation] actually paid, we included:[[10]](#footnote-11) the amount of base salary the employee received during the year, and the amount of any cash incentives paid to the employee in the year (which include annual cash incentives that are generally paid in [February] for performance during the prior fiscal year) and the value of any equity grants that vested during the year based on the value of the shares on the date of vesting. [We did not did not include any adjustments for the [value of benefits provided] [or the annualization of pay[[11]](#footnote-12) for any employees who were employed by us for only part of the year].][[12]](#footnote-13)

Once we identified our median employee, we then determined that employee’s total compensation, including any perquisites and other benefits, in the same manner that we determine the total compensation of our named executive officers for purposes of the Summary Compensation Table disclosed above.[[13]](#footnote-14) The total compensation of our median employee, a [       ],[[14]](#footnote-15) was determined to be $[           ]. This total compensation amount for our median employee was then compared to the total compensation of our CEO disclosed above in the Summary Compensation Table, of $[        ]. The elements included in the CEO’s total compensation are fully discussed above in the footnotes to the Summary Compensation Table.[[15]](#footnote-16)

1. General Note: Organized into three sections: (i) disclosure of ratio estimate, (ii) identification of the median employee, including brief explanation of methodology, including material assumptions, adjustments (including any cost-of-living adjustments and foreign currency conversions) or estimates it used to identify the median employee or to determine total compensation or any elements of total compensation and (iii) explanation of the total compensation per SEC rules used to calculate compensation of median employee and CEO that are used in the ratio. [↑](#footnote-ref-2)
2. The SEC Division of Corporation Finance’s Compliance & Disclosure Interpretation Question 128C.06 provides that a company may state in any required disclosure that the pay ratio calculation is “a reasonable estimate calculated in a manner consistent with Item 402(u) of Regulation S-K.” [↑](#footnote-ref-3)
3. Insert pay ratio estimate based on CEO compensation listed in Summary Compensation table. Per Instruction 4(6) of Regulation S-K, Item 402(u), a company must explain any difference between the CEO's annual total compensation used in the pay ratio disclosure and the total compensation amounts reflected in the Summary Compensation Table, if material. See also Footnote 2 and Footnote 13. [↑](#footnote-ref-4)
4. See Footnote 2. While this disclosure is not required, it may be helpful. [↑](#footnote-ref-5)
5. Identify the compensation measure, which was consistently applied to all employees and contractors included in the calculation. Instruction 4(3) of Regulation S-K, Item 402(u) provides that a company may identify the median employee using annual total compensation or any other compensation measure that is consistently applied to all employees included in the calculation, such as information derived from the company’s tax and/or payroll records. A company’s consistently applied compensation measure should be reliable and reasonably reflect the annual compensation of employees. In its interpretive release dated September 21, 2017, the SEC stated: “a registrant my use internal records that reasonably reflect annual compensation to identify the median employee, even if those records do not include every element of compensation, such as equity awards widely distributed to employees.” [↑](#footnote-ref-6)
6. Insert the relevant compensation measure period. The compensation measure period is not required to include the selected measurement date on which the employee population is determined (see Footnote 9 below) nor is it required to use a full annual period. The compensation measure may use a prior fiscal year unless there have been significant changes in pay distribution or workforce. [↑](#footnote-ref-7)
7. Although not required disclosure, consider disclosing total number of individuals in workforce as part of methodology. See Footnote 12. [↑](#footnote-ref-8)
8. Include the following categories of employees of the company and all of its consolidated subsidiaries: (i) full-time and part-time employees, (ii) seasonal and temporary employees, (iii) foreign employees, (iv) salaried and non-salaried employees, (v) furloughed workers if they are considered employees and (vi) certain independent contractors (included if the company deems them to be “employees” by applying a widely recognized test used by the company in connection with another area of law (such as tax or employment law, including guidance published by the Internal Revenue Service). If a company’s independent contractor calculation relies upon the use of a widely recognized test described above, the test should be disclosed as well as a brief description of any material assumptions or adjustment used in connection therewith. [↑](#footnote-ref-9)
9. Companies must choose a date within the last three months of their most recently completed fiscal year that was selected to identify their median employee. [↑](#footnote-ref-10)
10. State expressly what is included in the company’s measurement figure and then consider stating things that were not included. Instruction 4(3) of Regulation S-K, Item 402(u) requires: “Where a compensation measure other than annual total compensation is used to identify the median employee, the registrant must disclose the compensation measure used.” In this context, annual total compensation is determined in accordance with Item 402(c)(2)(x) of Regulation S-K. [↑](#footnote-ref-11)
11. Instruction 5 of Regulation S-K, Item 402(u) provides that a company may annualize the total compensation for all permanent employees (full-time or part-time) that were employed by the company for less than the full fiscal year (such as newly hired employees or permanent employees on an unpaid leave of absence during the period). A company may not annualize the total compensation for employees in temporary or seasonal positions. A company may not make a full-time equivalent adjustment for any employee. [↑](#footnote-ref-12)
12. With respect to required disclosure regarding methodology, assumptions and estimates used, Instruction 4(5) of Regulation S-K, Item 402(u) states: “The registrant shall briefly describe the methodology it used to identify the median employee. It shall also briefly describe any material assumptions, adjustments (including any cost-of-living adjustments), or estimates it used to identify the median employee or to determine total compensation or any elements of total compensation, which shall be consistently applied. The registrant shall clearly identify any estimates used. The required descriptions should be a brief overview; it is not necessary for the registrant to provide technical analyses or formulas.” [↑](#footnote-ref-13)
13. Instruction 4(6) of Regulation S-K, Item 402(u) provides that companies may include personal benefits that aggregate less than $10,000 and compensation under non-discriminatory benefit plans in calculating the annual total compensation of the median employee as long as these items are also included in calculating the CEO's annual total compensation as well. If a company does include benefits they should be disclosed. If CEO’s compensation amount is adjusted from the summary compensation table to include parallel benefits this should be disclosed. See also Footnote 3 above. [↑](#footnote-ref-14)
14. Instruction 11 to Regulation S-K, Item 402(u) provides that a company may choose to generally identify an employee’s 's position to put the employee’s compensation in context, but companies are not required to provide this information and should not do so if providing the information could identify any specific individual. [↑](#footnote-ref-15)
15. General comment: Confirm company is not relying on any other assumptions/exclusions that require disclosure under Regulation S-K, Item 402(u), such as exclusion of any foreign employees (either under data privacy or *de minimus* exemptions), exclusion of employees of businesses acquired in last year, cost of living adjustments, substitution of median employee, use of estimates for determining total compensation of median employee. See the Instructions to Item 402(u) of Regulation S-K regarding required disclosures relating to the same. This model disclosure does not include statistical sampling disclosure language. For additional guidance on the use of statistical sampling, see Division of Corporation Finance Guidance on Calculation of Pay Ratio Disclosure dated September 21, 2017 at http://www.sec.gov. [↑](#footnote-ref-16)