SEC Adopts Final Pay Ratio Disclosure Rule

August 10, 2015

On August 5, 2015, in a 3-2 vote, the SEC adopted a **final rule** implementing the provision of the Dodd-Frank Act that requires U.S. public companies to disclose the ratio of their CEO's compensation to that of their median employee.[1] The final rule is generally consistent with the SEC's **original proposal** that was issued in 2013, but contains a few accommodations, which are intended to help mitigate compliance costs.[2] This memorandum summarizes the key aspects of the final rule, highlighting the principal revisions. The final rule will become effective 60 days following publication in the *Federal Register*.

Background and the Final Rule

Section 953(b) of the Dodd-Frank Act directs the SEC to amend Item 402 of Regulation S-K to require each registrant to disclose:

- the median of the annual total compensation of all employees of the registrant, except the chief executive officer (or any equivalent position) of the registrant, determined in accordance with Item 402(c);
- the annual total compensation of the chief executive officer (or any equivalent position) of the registrant; and
- the ratio of these two amounts.

The final rule (attached as Appendix A) implements Section 953(b) by adding a new Item 402(u) to Regulation S-K.

Compliance Date

Q: When will the pay ratio disclosure first be required?

A: A registrant's first reporting period is its first full fiscal year commencing on or after January 1, 2017.

For a registrant with a fiscal year ending on December 31, the pay ratio will be required as part of its executive compensation disclosure in proxy statements or Form 10-Ks filed starting in 2018.

A registrant with a December 1 – November 30 fiscal year end will be required to first provide the pay ratio disclosure as part of its executive compensation disclosure in proxy statements or Form 10-Ks filed in 2019.

However, we note that, in 2017, registrants will need to collect the information necessary to complete their disclosure and may want to start preparing, if they have not already done so.

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[1] The SEC's press release and fact sheet announcing the final pay ratio disclosure rule are available **here**. The Commissioners' statements are available here: **Chair White**, **Commissioner Aguilar**, **Commissioner Gallagher**, **Commissioner Piwowar (August 5 remarks)**, **Commissioner Piwowar (August 7 remarks)** and **Commissioner Stein**.

[2] For a discussion of the rule as initially proposed, please see **here**.

Covered Filings and Registrants

Q: Which filings must include the pay ratio disclosure?[3]

A: Any filing described in Item 10(a) of Regulation S-K that requires Item 402 disclosure.

As was proposed, covered filings include proxy and information statements, annual reports on Form 10-K and registration statements filed pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934, if these forms require Item 402 executive compensation disclosure. However, the pay ratio is not required to be disclosed in a registration statement on Form S-1 or Form S-11[4] for an initial public offering (IPO) or an initial registration statement on Form 10 used, for example, in connection with a spin-off. Generally, in registration statements (on Forms S-3 or S-4), a registrant is permitted to incorporate by reference its pay ratio disclosure for the most recent fiscal period that had been included in its Form 10-K or definitive proxy statement for its annual meeting of shareholders.

Registrants are not required to update their pay ratio disclosure for their most recently completed fiscal year until they file their annual report on Form 10-K or, if later, their proxy or information statement for their next annual meeting of shareholders but, in any event, not later than 120 days after the end of such fiscal year.

Like other Item 402 information, registrants are required to treat the pay ratio disclosure as "filed" (and not simply "furnished") for purposes of the Securities Act and the Exchange Act. Therefore, it is subject to potential liabilities under those statutes.

Q: Which registrants are subject to the pay ratio disclosure?

A: Registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c).

As was proposed, the final rule provides that the following types of registrants are *exempt* from the pay ratio disclosure requirement:

- emerging growth companies;[5]
- smaller reporting companies; and
- foreign private issuers (even those filing on Form 10-K) and MJDS filers.[6]

Registered investment companies also are expressly excluded.

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[3] In cases where a registrant relies on Instruction 1 to Items 402(c)(2)(iii) and (iv) to omit CEO compensation information, the final rule allows a registrant to omit its pay ratio disclosure from its annual filing and instead provide the disclosure under Item 5.02(f) in the Form 8-K in which the CEO's salary or bonus is disclosed.

[4] A Form S-11 is used to register securities (i) issued by real estate investment trusts or (ii) issued by other registrants whose business is primarily that of acquiring and holding for investment real estate or interests in real estate or interests in other registrants whose business is primarily that of acquiring and holding real estate or interests in real estate for investment.

[5] "Emerging growth companies" include issuers that have completed their IPO after December 8, 2011 and that have less than $1 billion in total annual gross revenues during their most recently completed fiscal year. An issuer remains an emerging growth company until the earliest of (i) the last day of the fiscal year during which it has total annual gross revenues in excess of $1 billion, (ii) the last day of the fiscal year following the fifth anniversary of its IPO, (iii) the date upon which it has issued more than $1 billion in non-convertible debt in the last three-year period and (iv) the date upon which it becomes a "large accelerated filer."

[6] MJDS filers are registrants that make filings in accordance with the U.S.-Canadian Multijurisdictional Disclosure System.

Identifying the Median Employee

Q: Which employees are included?

A: All employees, including non-U.S. (subject to two limited exemptions), part-time, seasonal and temporary employees.

The final rule includes all employees (including officers other than the CEO) of the registrant and its consolidated subsidiaries employed on any date of the registrant's choosing within the last three months of its last completed fiscal year. This includes all individual employees, whether full-time or part-time, seasonal or temporary, in or outside of the United States. Service providers who are not employed by the registrant and whose compensation is determined by an unaffiliated third party, such as independent contractors or leased workers, are excluded.

Unlike the proposed rule, the final rule includes only employees of consolidated subsidiaries (as determined by the applicable accounting rules and typically requiring ownership of over 50% of the outstanding voting shares of an entity), rather than employees of all subsidiaries. Registrants may choose any date within the defined window for purposes of determining who is an employee, rather than be required to use the last day of the last completed fiscal year, and must disclose their chosen determination date (but not the basis for their selection) and any change to this date in subsequent years, together with a brief explanation of the reasons for the change.

Q: How often is the median employee identified?

A: Once every three years.

The final rule allows a registrant to identify the median employee only once every three years, unless there has been a change in its employee population or employee compensation arrangements that it reasonably believes would result in a significant change to its pay ratio disclosure. If there have been no changes that the registrant reasonably believes would significantly affect its pay ratio disclosure, the registrant must disclose that it is using the same median employee in its pay ratio calculation and describe briefly the basis for its reasonable belief.

If the registrant is using the same median employee, it must calculate that median employee's annual total compensation each year and use that figure to update its pay ratio disclosure each year. If, within the three-year period, the median employee's compensation significantly changes or the employee is no longer working at the registrant, the registrant may replace the median employee with an employee whose compensation is substantially similar, or re-identify the median employee.

Q: Under what circumstances can non-U.S. employees be excluded?

A: Non-U.S. employees who are employed in jurisdictions with data privacy laws where compliance with the mandated pay ratio disclosure would violate those laws, and up to 5 percent of non-U.S. employees, subject to certain limitations.

The SEC amended its original proposal to allow the following two exemptions from the general requirement to include all non-U.S. employees:

- a **data privacy exemption**, for non-U.S. employees who are employed in jurisdictions with data privacy laws that make the registrant unable, despite its reasonable efforts, to comply with the pay ratio disclosure requirement without violating those laws; and
- a ***de minimis* exemption**, for up to 5 percent of the registrant's non-U.S. employees, including any non-U.S. employees excluded under the data privacy exemption.

Data privacy exemption. The registrant's reasonable efforts must include seeking an exemption or other relief under any governing data privacy laws and using it if granted. If a registrant excludes any non-U.S. employees in a particular jurisdiction under this exemption, it must exclude all non-U.S. employees in that

jurisdiction and disclose the excluded jurisdictions, the approximate number of employees excluded from such jurisdictions, the applicable data privacy laws, how compliance with the SEC rule would violate those laws and the registrant's efforts to use or seek relief under them.

In addition, the registrant would be required to obtain a legal opinion from counsel on the registrant's inability to comply (including being unable to obtain an exemption or other relief). The legal opinion must be filed as an exhibit to the proxy statement or annual report.

De minimis exemption. In identifying the median employee, a registrant may exclude all of its non-U.S. employees if they account for 5 percent or less of its total employee population. If the registrant chooses to use this exemption, it must exclude all of its non-U.S. employees.

If a registrant has more than 5 percent non-U.S. employees, then the registrant may also exclude up to 5 percent of its total employees who are non-U.S. employees. If the registrant chooses to use this exemption, it must exclude all of the employees of any particular jurisdiction and cannot pick and choose which non-U.S. employees to exclude in any one jurisdiction. This effectively means that the *de minimis* exemption cannot be used in any non-U.S. jurisdiction where more than 5 percent of a registrant's total employees are located

Similar to the data privacy exemption, registrants must disclose the excluded jurisdictions and the approximate number of employees excluded from such jurisdictions. In the case of the *de minimis* exemption, a registrant must also disclose the total number of its U.S. and non-U.S. employees irrespective of these two exemptions and the total number of its U.S. and non-U.S. employees used for the *de minimis* calculation.

Interplay of two exemptions. Any non-U.S. employees excluded under the data privacy exemption must be counted against the 5-percent mark, although the total number of non-U.S. employees excluded cannot exceed 5 percent. If the number of non-U.S. employees excluded under the data privacy exemption equals or exceeds 5 percent, the *de minimis* exemption would not be available.

Q: Can a registrant annualize the compensation of any of its employees?

A: Total compensation may be annualized for permanent employees (whether full- or part-time) who are not employed during the entire fiscal year, but not for temporary and seasonal workers.

The final rule follows the proposed rule, allowing a registrant to annualize compensation only for permanent employees. However, a permanent part-time employee's compensation may not be adjusted to reflect a full-time equivalent schedule.

Example. If a permanent part-time employee with a three-day-per-week schedule earns $900/week and is on unpaid leave for eight weeks, such employee's compensation may be annualized to reflect an additional $7,200 in total compensation. In contrast, the compensation of this employee cannot be adjusted to reflect earnings of $1,500/week, as if the employee were a full-time employee.

Q: Are cost-of-living adjustments permitted?

A: Registrants can make cost-of-living adjustments when identifying the median employee if they live in a different jurisdiction than the CEO.

In a change from the proposed rule, to identify the median employee, the final rule permits registrants to make cost-of-living adjustments for the compensation of employees in jurisdictions other than the jurisdiction in which the CEO resides, provided the adjustments are applied to all employees in such jurisdictions who are included in the calculation. If a registrant makes a cost-of-living adjustment to identify its median employee, then the registrant must use the same adjustment in determining the median employee's annual total compensation and disclose the median employee's jurisdiction. If the registrant did not make the adjustment in identifying the median employee, then the registrant is precluded from making the adjustment to calculate that employee's compensation.

The registrant must disclose the country in which the median employee is located and briefly describe the cost-of-living adjustments it used, including the measure used as the basis for the adjustment. To provide context for this adjustment, a registrant must also disclose the median employee's annual total compensation and the pay ratio without the effect of the cost-of-living adjustments.

Q: How is the median employee identified?

A: Using any reasonable method, including the use of statistical sampling or a consistently applied compensation measure.

Consistent with the proposed rule, the final rule provides flexibility for a registrant to choose a method for determining its median employee that fits the size, structure and compensation practices of its business. It expressly provides that registrants do not have to calculate each employee's compensation using the Item 402(c)(2)(x) standard, which is the method used for the disclosure of a named executive officer's total annual compensation.

Registrants can use statistical sampling and a consistently applied compensation measure (*e.g.*, payroll or tax records). Registrants can also use reasonable estimates in calculating compensation measures. Statistical sampling is put forth by the SEC as a method that could assist registrants with a large number of employees in determining the median in a relatively cost-efficient manner. The final rule does not mandate any particular estimation technique or confidence level for an estimated median, although it acknowledges that compensation variance in a registrant's workforce can impact the necessary sample size.

Registrants are required to briefly disclose the methodology that they used to identify their median employee and any material assumptions, adjustments (including any cost-of-living adjustments), or estimates that they used to identify the median employee or to determine total compensation or any elements of total compensation. The SEC indicates that the description should be brief and does not need to be overly detailed or technical, and would include information on statistical sampling like sample size and the estimated whole population, any material assumptions used in determining the sample size and the sampling method used. Registrants could also explain how the sampling deals with separate business or geographic segments, currency translations and the annualizing of a newly hired permanent employee's compensation. Any significant changes from the prior year calculation should also be disclosed.

For registrants that choose to use a consistently applied compensation measure, the final rule provides a number of examples, including wages, total annual cash compensation, total direct compensation, and payroll and tax records, as well as total compensation calculated pursuant to Item 402(c)(2)(x). The measure may be defined differently across jurisdictions, such as "taxable wages" or "cash compensation." It is also not required that the compensation measure used include data that covers the same one-year period as the registrant's fiscal year. For example, a registrant with a July 1 – June 30 fiscal year could use employee tax record data for the prior calendar year.

Disclosing the Pay Ratio

Q: How is "annual total compensation" for the median employee determined?

A: In the same manner used for the summary compensation table.

Once the median employee is identified, a registrant must calculate the median employee's compensation to be re-quantified based on "annual total compensation," determined in the same manner used under Item 402(c)(2)(x) for named executive officers. In recognition that the elements of compensation of the median employee may differ from those of named executive officers, the final rule permits registrants to use reasonable estimates where appropriate. The registrant must provide a brief description of any estimate used.

For example, estimates may be appropriate in determining the value of multiemployer pension plan benefits and certain unique benefits provided to non-U.S. employees under local law or custom. Pension benefits that are being provided to the employee from the government and not by the registrant, even if funded by employer tax payments (*e.g.*, mandatory government pensions or social healthcare), are not considered a "defined benefit plan" and the accrued pension benefit cannot be included.

In addition, the final rule permits the voluntary inclusion of certain compensation elements that registrants are allowed to omit from the summary compensation table (*e.g.*, health benefits, employee discounts, tuition reimbursements and other employee benefits provided under a non-discriminatory plan or perquisites and other personal benefits with an aggregate value of less than $10,000). However, if these elements of compensation are included in the median employee's annual total compensation, then they must also be included (to the extent applicable) in the CEO's annual total compensation for purposes of the pay ratio disclosure.

Q: Can another median employee be substituted after one is already identified?

A: Yes, if they have similar compensation.

When calculating the total compensation for the median employee, if the registrant reasonably determines that there are anomalous compensation characteristics of that employee's compensation that would have a significant higher or lower impact on the pay ratio, the registrant may substitute another employee with substantially similar compensation to that of the original median employee based on the compensation measure used to select the median employee, so long as it discloses this fact as part of its brief description of the methodology it used to identify the median employee.

Q: What pay ratio must be disclosed?

A: The (i) annual total compensation of the registrant's median employee and the CEO, (ii) ratio of the two amounts and (iii) methodology, material assumptions, adjustments and estimates used in the calculations.

As was proposed, the final rule requires that the ratio be expressed either (i) as a ratio with the median employee compensation being "one" or (ii) narratively in terms of the multiple the CEO's compensation represents in respect of the median employee's compensation.

Example. If the median employee's annual total compensation is $40,000 and the CEO's annual total compensation is $8 million, the ratio could be described as "1 to 200" or "the CEO's compensation is 200 times the median of all employees' annual total compensation."

Q: Can additional ratios be disclosed?

A: Yes, additional ratios or other information to supplement the required ratio may be presented.

Registrants may include additional ratios, so long as any additional ratios are clearly identified, are not misleading and are not presented with greater prominence than the required ratio. For example, a registrant may wish to present separate pay ratios covering U.S. and non-U.S. employees or provide additional ratios to show the effect of including part-time, seasonal and temporary employees on its pay ratio disclosure. For registrants that believe that their ratio may be skewed due to their structure or business model, such as those with significant non-U.S., part-time or seasonal employees, this voluntary disclosure may help to put things in context.

Q: What if a registrant has two CEOs during the year?

A: Registrants have a choice of two options.

The final rule uses the term "principal executive officer" for consistency with Item 402. This term includes any individual serving in the capacity as the registrant's principal executive officer during the last completed fiscal year. The result is that, if a registrant has more than one CEO during its last completed fiscal year, then, theoretically, the pay ratio for each of these CEOs would need to be disclosed. Under these circumstances, the final rule provides that a registrant may take the total compensation provided to

each person who served as the chief executive officer during the year and combine those figures to constitute the registrant's annual total CEO compensation. Alternatively, a registrant can look to the CEO serving in that position on the date it selects to identify the median employee and annualize that CEO's compensation. Regardless of the approach selected, the registrant is required to disclose which option it chose and how it calculated its CEO's annual total compensation.

Transition Timing

Q: Do any transition rules apply to newly public registrants?

A: Yes.

A newly public registrant's first pay ratio disclosure is required in its first full fiscal year beginning after the registrant has (a) been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months beginning on or after January 1, 2017 and (b) filed at least one annual report that does not contain the pay ratio disclosure.

Example from the release. If a newly public registrant completes its IPO on March 1, 2017, it will first provide the pay ratio disclosure in the proxy or information statement for its 2019 annual meeting of shareholders, where the disclosure would relate to its 2018 fiscal year.

Q: Do any transition periods apply for registrants that cease to be smaller reporting companies or emerging growth companies?

A: Yes.

Registrants that cease to be smaller reporting companies or emerging growth companies do not need to provide the pay ratio disclosure until after the first full fiscal year after exiting such status, and not for any fiscal year commencing before January 1, 2017.

Q: Do any transition periods apply for registrants that have acquired another company?

A: Yes.

Registrants that engage in acquisitions may omit the employees of a newly acquired entity from their pay ratio calculation (but must disclose the business acquired and the approximate number of employees) for the fiscal year in which the acquisition becomes effective. Registrants need not include them in their median employee calculation until the first full fiscal year following the acquisition.

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§ 229.402 (Item 402) Executive Compensation

(u) Pay ratio disclosure.

(1) Disclose:

(i) The median of the annual total compensation of all employees of the registrant, except the PEO of the registrant;

(ii) The annual total compensation of the PEO of the registrant; and

(iii) The ratio of the amount in paragraph (u)(1)(i) of this Item to the amount in paragraph (u)(1)(ii) of this Item. For purposes of the ratio required by this paragraph (u)(1)(iii), the amount in paragraph (u)(1)(i) of this Item shall equal one, or, alternatively, the ratio may be expressed narratively as the multiple that the amount in paragraph (u)(1)(ii) of this Item bears to the amount in paragraph (u)(1)(i) of this Item.

(2) For purposes of this paragraph (u),

(i) Total compensation for the median of annual total compensation of all employees of the registrant and the PEO of the registrant shall be determined in accordance with paragraph (c)(2)(x) of this Item 402. In determining the total compensation, all references to "named executive officer" in this Item 402 and the instructions thereto may be deemed to refer instead, as applicable, to "employee" and, for non-salaried employees, references to "base salary" and "salary" in this Item 402 and the instructions thereto may be deemed to refer instead, as applicable, to "wages plus overtime";

(ii) Annual total compensation means total compensation for the registrant's last completed fiscal year; and

(iii) Registrant means the registrant and its consolidated subsidiaries.

(3) For purposes of this paragraph (u), employee or employee of the registrant means an individual employed by the registrant or any of its consolidated subsidiaries, whether as a full-time, part-time, seasonal, or temporary worker, as of a date chosen by the registrant within the last three months of the registrant's last completed fiscal year. The definition of employee or employee of the registrant does not include those workers who are employed, and whose compensation is determined, by an unaffiliated third party but who provide services to the registrant or its consolidated subsidiaries as independent contractors or "leased" workers;

(4) For purposes of this paragraph (u), an employee located in a jurisdiction outside the United States (a "non-U.S. employee") may be exempt from the definition of employee or employee of the registrant under either of the following conditions:

(i) The employee is employed in a foreign jurisdiction in which the laws or regulations governing data privacy are such that, despite its reasonable efforts to obtain or process the information necessary for compliance with this paragraph (u), the registrant is unable to do so without violating such data privacy laws or regulations. The registrant's reasonable efforts shall include, at a minimum, using or seeking an exemption or other relief under any governing data privacy laws or regulations. If the registrant chooses to exclude any employees using this exemption, it shall list the excluded jurisdictions, identify the specific data privacy law or regulation, explain how complying with this paragraph (u) violates such data privacy law or regulation (including the efforts made by the registrant to use or seek an exemption or other relief under such law or regulation), and provide the approximate number of employees exempted from each jurisdiction based on this exemption. In addition, if a registrant excludes any non-U.S. employees in a particular jurisdiction under this exemption, it must exclude all non-U.S. employees in that jurisdiction.

Further, the registrant shall obtain a legal opinion from counsel that opines on the inability of the registrant to obtain or process the information necessary for compliance with this paragraph (u) without violating the jurisdiction's laws or regulations governing data privacy, including the registrant's inability to obtain an exemption or other relief under any governing laws or regulations. The registrant shall file the legal opinion as an exhibit to the filing in which the pay ratio disclosure is included.

(ii) The registrant's non-U.S. employees account for 5% or less of the registrant's total employees. In that circumstance, if the registrant chooses to exclude any non-U.S. employees under this exemption, it must exclude all non-U.S. employees. Additionally, if a registrant's non-U.S. employees exceed 5% of the registrant's total U.S. and non-U.S. employees, it may exclude up to 5% of its total employees who are non-U.S. employees; provided, however, if a registrant excludes any non-U.S. employees in a particular jurisdiction, it must exclude all non-U.S. employees in that jurisdiction. If more than 5% of a registrant's employees are located in any one non-U.S. jurisdiction, the registrant may not exclude any employees in that jurisdiction under this exemption.

(A) In calculating the number of non-U.S. employees that may be excluded under this Item 402(u)(4)(ii) ("*de minimis*" exemption), a registrant shall count against the total any non-U.S. employee exempted under the data privacy law exemption under Item 402(u)(4)(i) ("data privacy" exemption). A registrant may exclude any non-U.S. employee from a jurisdiction that meets the data privacy exemption, even if the number of excluded employees exceeds 5% of the registrant's total employees. If, however, the number of employees excluded under the data privacy exemption equals or exceeds 5% of the registrant's total employees, the registrant may not use the *de minimis* exemption. Additionally, if the number of employees excluded under the data privacy exemption is less than 5% of the registrant's total employees, the registrant may use the *de minimis* exemption to exclude no more than the number of non-U.S. employees that, combined with the data privacy exemption, does not exceed 5% of the registrant's total employees.

(B) If a registrant excludes non-U.S. employees under the *de minimis* exemption, it must disclose the jurisdiction or jurisdictions from which those employees are being excluded, the approximate number of employees excluded from each jurisdiction under the *de minimis* exemption, the total number of its U.S. and non-U.S. employees irrespective 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.

Instruction 1 to Item 402(u). Disclosing the date chosen for identifying the median employee.

A registrant shall disclose the date within the last three months of its last completed fiscal year that it selected pursuant to paragraph (u)(3) of this Item to identify its median employee. If the registrant changes the date it uses to identify the median employee from the prior year, the registrant shall disclose this change and provide a brief explanation about the reason or reasons for the change.

Instruction 2 to Item 402(u). Identifying the median employee.

A registrant is required to identify its median employee only once every three years and calculate total compensation for that employee each year; provided that, during a registrant's last completed fiscal year there has been no change in its employee population or employee compensation arrangements that it reasonably believes would result in a significant change to its pay ratio disclosure. If there have been no changes that the registrant reasonably believes would significantly affect its pay ratio disclosure, the registrant shall disclose that it is using the same median employee in its pay ratio calculation and describe briefly the basis for its reasonable belief. For example, the registrant could disclose that there has been no change in its employee population or employee compensation arrangements that it believes would significantly impact the pay ratio disclosure. If there has been a change in the registrant's employee population or employee compensation arrangements that the registrant reasonably believes would result in a significant change in its pay ratio disclosure, the registrant shall re-identify the median employee for that fiscal year. If it is no longer appropriate for the registrant to use the median employee identified in year one as the median employee in years two or three because of a change in the original

median employee's circumstances that the registrant reasonably believes would result in a significant change in its pay ratio disclosure, the registrant may use another employee whose compensation is substantially similar to the original median employee based on the compensation measure used to select the original median employee.

Instruction 3 to Item 402(u). Updating for the last completed fiscal year.

Pay ratio information (*i.e.*, the disclosure called for by paragraph (u)(1) of this Item) with respect to the registrant's last completed fiscal year is not required to be disclosed until the filing of its annual report on Form 10-K for that last completed fiscal year or, if later, the filing of a definitive proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such fiscal year; provided that, the required pay ratio information must, in any event, be filed as provided in General Instruction G(3) of Form 10-K (17 CFR 249.310) not later than 120 days after the end of such fiscal year.

Instruction 4 to Item 402(u). Methodology and use of estimates.

1. Registrants may use reasonable estimates both in the methodology used to identify the median employee and in calculating the annual total compensation or any elements of total compensation for employees other than the PEO.

2. In determining the employees from which the median employee is identified, a registrant may use its employee population or statistical sampling and/or other reasonable methods.

3. A registrant 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 registrant's tax and/or payroll records. In using a compensation measure other than annual total compensation to identify the median employee, if that measure is recorded on a basis other than the registrant's fiscal year (such as information derived from tax and/or payroll records), the registrant may use the same annual period that is used to derive those amounts. Where a compensation measure other than annual total compensation is used to identify the median employee, the registrant must disclose the compensation measure used.

4. In identifying the median employee, whether using annual total compensation or any other compensation measure that is consistently applied to all employees included in the calculation, the registrant may make cost-of-living adjustments to the compensation of employees in jurisdictions other than the jurisdiction in which the PEO resides so that the compensation is adjusted to the cost of living in the jurisdiction in which the PEO resides. If the registrant uses a cost-of-living adjustment to identify the median employee, and the median employee identified is an employee in a jurisdiction other than the jurisdiction in which the PEO resides, the registrant must use the same cost-of-living adjustment in calculating the median employee's annual total compensation and disclose the median employee's jurisdiction. The registrant also shall briefly describe the cost-of-living adjustments it used to identify the median employee and briefly describe the cost-of-living adjustments it used to calculate the median employee's annual total compensation, including the measure used as the basis for the cost-of-living adjustment. A registrant electing to present the pay ratio in this manner also shall disclose the median employee's annual total compensation and pay ratio without the cost-of-living adjustment. To calculate this pay ratio, the registrant will need to identify the median employee without using any cost-of-living adjustments.

5. 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. If a registrant changes its methodology or its material

assumptions, adjustments, or estimates from those used in its pay ratio disclosure for the prior fiscal year, and if the effects of any such change are significant, the registrant shall briefly describe the change and the reasons for the change. Registrants must also disclose if they changed from using the cost-of-living adjustment to not using that adjustment and if they changed from not using the cost-of-living adjustment to using it.

6. Registrants may, at their discretion, 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 PEO's annual total compensation. The registrant shall also explain any difference between the PEO's annual total compensation used in the pay ratio disclosure and the total compensation amounts reflected in the Summary Compensation Table, if material.

Instruction 5 to Item 402(u). Permitted annualizing adjustments.

A registrant may annualize the total compensation for all permanent employees (full-time or part-time) that were employed by the registrant 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 registrant may not annualize the total compensation for employees in temporary or seasonal positions. A registrant may not make a full-time equivalent adjustment for any employee.

Instruction 6 to Item 402(u). PEO compensation not available.

A registrant that is relying on Instruction 1 to Item 402(c)(2)(iii) and (iv) in connection with the salary or bonus of the PEO for the last completed fiscal year, shall disclose that the pay ratio required by paragraph (u) of this Item is not calculable until the PEO salary or bonus, as applicable, is determined and shall disclose the date that the PEO's actual total compensation is expected to be determined. The disclosure required by paragraph (u) of this Item shall then be disclosed in the filing under Item 5.02(f) of Form 8-K (17 CFR 249.308) that discloses the PEO's salary or bonus in accordance with Instruction 1 to Item 402(c)(2)(iii) and (iv).

Instruction 7 to Item 402(u). Transition periods for registrants.

1. Upon becoming subject to the requirements of Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), a registrant shall comply with paragraph (u) of this Item with respect to compensation for the first fiscal year following the year in which it became subject to such requirements, but not for any fiscal year commencing before January 1, 2017. The registrant may omit the disclosure required by paragraph (u) of this Item from any filing until the filing of its annual report on Form 10-K (17 CFR 249.310) for such fiscal year or, if later, the filing of a proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such year; provided that, such disclosure shall, in any event, be filed as provided in General Instruction G(3) of Form 10-K not later than 120 days after the end of such fiscal year.

2. A registrant may omit any employees that became its employees as the result of the business combination or acquisition of a business for the fiscal year in which the transaction becomes effective, but the registrant must disclose the approximate number of employees it is omitting. Those employees shall be included in the total employee count for the triennial calculations of the median employee in the year following the transaction for purposes of evaluating whether a significant change had occurred. The registrant shall identify the acquired business excluded for the fiscal year in which the business combination or acquisition becomes effective.

3. A registrant shall comply with paragraph (u) of this Item with respect to compensation for the first fiscal year commencing on or after the date the registrant ceases to be a smaller reporting company, but not for any fiscal year commencing before January 1, 2017.

Instruction 8 to Item 402(u). Emerging growth companies.

A registrant is not required to comply with paragraph (u) of this Item if it is an emerging growth company as defined in Section 2(a)(19) of the Securities Act (15 U.S.C. 77(b)(a)(19)) or Section 3(a)(80) of the Exchange Act (15 U.S.C. 78c(a)(80)). A registrant shall comply with paragraph (u) of this Item with respect to compensation for the first fiscal year commencing on or after the date the registrant ceases to be an emerging growth company, but not for any fiscal year commencing before January 1, 2017.

Instruction 9 to Item 402(u). Additional information.

Registrants may present additional information, including additional ratios, to supplement the required ratio, but are not required to do so. Any additional information shall be clearly identified, not misleading, and not presented with greater prominence than the required ratio.

Instruction 10 to Item 402(u). Multiple PEOs during the year.

A registrant with more than one non-concurrent PEO serving during its fiscal year may calculate the annual total compensation for its PEO in either of the following manners:

1. The registrant may calculate the compensation provided to each person who served as PEO during the year for the time he or she served as PEO and combine those figures; or

2. The registrant may look to the PEO serving in that position on the date it selects to identify the median employee and annualize that PEO's compensation.

Regardless of the alternative selected, the registrant shall disclose which option it chose and how it calculated its PEO's annual total compensation.

Instruction 11 to Item 402(u). Employees' personally identifiable information.

Registrants are not required to, and should not, disclose any personally identifiable information about that employee other than his or her compensation. Registrants may choose to generally identify an employee's position to put the employee's compensation in context, but registrants are not required to provide this information and should not do so if providing the information could identify any specific individual.