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SECURITIES AND CAPITAL MARKETS
EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

SEC PROVIDES NEW GUIDANCE ON THE CEO PAY RATIO RULE

On September 21, 2017, the Securities and Exchange Commission published new interpretive guidance regarding the CEO pay ratio disclosure rule, which should generally make compliance simpler. The publication of the new guidance appears to confirm that the pay ratio disclosure rule will be effective for the 2018 proxy season, as planned.

The new interpretive guidance includes the following:

- **No SEC Enforcement Action if Estimates, Assumptions and Methodologies Used are Reasonable.** Companies may use estimates, assumptions, adjustments, and statistical sampling to calculate the pay ratio. Companies may combine the use of reasonable estimates with statistical sampling and other reasonable methods to identify the median employee. As long as the estimates, assumptions and methodologies are reasonable, the pay ratio and related disclosure that results will not provide the basis for SEC enforcement action unless the disclosure was made or reaffirmed without a reasonable basis or was provided other than in good faith.
- **Use of Internal Records.**
 - **Exemption for Non-U.S. Employees.** Companies may use appropriate existing internal records, such as tax or payroll records, to determine whether they may use the 5% *de minimis* exemption, which allows non-U.S. employees to be excluded for purposes of the pay ratio rule where such employees account for 5% or less of a company's total U.S. and non-U.S. employees.
 - **Median Employee.** Companies may use existing 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. In addition, if a company determines that there are anomalous characteristics of the identified median employee's "total compensation" that have a significant impact on the pay ratio, the company may substitute another employee with substantially similar compensation to the original identified median employee based on the compensation measure it used to select the median employee, instead of using a different compensation measure.
- **Independent Contractors.** In determining whether an individual is an independent contractor or an "employee" for purposes of the pay ratio rule, companies may apply a widely recognized test under another area of law (e.g., employment or tax law) that the company otherwise uses to determine whether its workers are employees.

Additional Information

If you would like more information regarding the new guidance and how it may apply to your company, please contact Harter Secrest & Emery LLP at (585) 232-6500.

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