



Via Hand Delivery

August 6, 2014

Keith F. Higgins
Director
Division of Corporation Finance
United States Securities and Exchange Commission
Washington, D.C. 20549

Dear Mr. Higgins:

Thank you and your staff for taking the time to meet with me and public interest group representatives on July 1st to discuss several of the Securities and Exchange Commission's (SEC or Commission) outstanding rulemakings relating to the implementation of the corporate governance provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).¹ The purpose of this letter is to respond to several issues that were raised at the meeting in connection with the Commission's pending proposed rule to implement the pay-for-performance provisions of Section 953(a) of Dodd-Frank.

As you are aware, the Council of Institutional Investors (Council) is a nonprofit association of employee benefit plans, foundations and endowments with combined assets under management exceeding \$3 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of American workers.²

Language and Intent

As discussed at the meeting, the language and intent of Section 953(a) indicates that the purpose of the provision was to provide investors with more quantitative information about incentive pay that would assist the market in analyzing and understanding the relationship between executive compensation programs and company performance.³ Consistent with the language and intent, the Council supports an implementing rule that provides additional quantitative information illustrating the relationship between executive compensation and the financial performance of the issuer.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010), <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm>.

² For more information about the Council of Institutional Investors (Council) and our members, please visit the Council's website at http://www.cii.org/about_us.

³ S. Rep. No. 111-176, at 135 (Apr. 30, 2010), http://www.banking.senate.gov/public/files/Committee_Report_S_Rept_111_176.pdf.

Importantly, and also consistent with the language and intent of Section 953(a), the Council strongly opposes an implementing rule that would result in changes to the information currently required to be disclosed in the Summary Compensation Table of a company's annual proxy statement.⁴

We are confident in our view of the intent of Section 953(a), in part, because the legislative history of that provision explicitly references the testimony of the Council's Executive Director before the Committee on Banking, Housing, and Urban Affairs Subcommittee on Securities, Insurance, and Investment.⁵ In that testimony, the Executive Director stated:

Enhanced Disclosures: Of primary concern to the Council is full and clear disclosure of executive pay. As U.S. Supreme Court Justice Louis Brandeis noted, "sunlight is the best disinfectant." Transparency of executive pay enables shareowners to evaluate the performance of the compensation committee and board in setting executive pay, to assess pay-for-performance links and to optimize their role of overseeing executive compensation through such means as proxy voting. The Council is very supportive of the SEC's continued efforts to enhance the disclosure of executive compensation, including its recent proposal to require disclosures about (1) how overall pay policies create incentives that can affect the company's risk and management of risk; (2) grant date fair value of equity-based awards; and (3) remuneration to executive/director compensation consultants. *We believe the disclosure regime in the U.S. would be substantially improved if companies would have to disclose the quantitative measures used to determine incentive pay.* Such disclosure—which could be provided at the time the measures are established or at a future date, such as when the performance related to the award is measured—would eliminate a major impediment to the market's ability to analyze and understand executive compensation programs and to appropriately respond.⁶

⁴ 17 C.F.R. § 229.402 (2011), available at <http://law.uc.edu/sites/default/files/CCL/regS-K/SK402.html/>

⁵ S. Rep. No. 111-176, at 135.

⁶ *Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before the S. Subcomm. on Secs., Ins., & Inv. of the Comm. on Banking, Hous., & Urban Affairs, 111th Cong. (July 29, 2009) (testimony of Ann Yerger, Exec. Dir. of the Council at 14) (emphasis added), http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e64b1840-5e6e-4a88-a8f6-3f01b2462404*

As indicated, the Executive Director's testimony did not include any language suggesting that the Summary Compensation Table should be changed other than offering support for the Commission's proposal to require reporting of the grant date fair value of equity-based awards—a proposal that was subsequently adopted and became effective in 2010.⁷

We also note that a working group representing issuers, including the Center on Executive Compensation, issued a paper for The Conference Board last year intended to "be helpful to the SEC as it works to develop regulations implementing Section 953(a) of the Dodd-Frank Act, which requires disclosure of the relationship between pay actually received and financial performance."⁸ In that paper, the working group supports our view that regulations implementing Section 953(a) should not result in changes to the Summary Compensation Table, stating:

The working group did not have as its objective to suggest that the Summary Compensation Table be altered or eliminated since many investors believe it provides helpful information regarding the expense associated with the compensation committee's intended level of pay and provides a standardized measure of compensation expense that is comparable across companies.

....

The Working Group is not suggesting that supplemental definitions of pay should replace the Summary Compensation Table. Rather, each of these definitions of pay [described in the paper as Realizable Pay and Realized Pay] serves a different purpose and provides different insights for investors.⁹

The Summary Compensation Table as it exists today provides an important lens into a compensation committee's decision making during the year. It should not be altered by the pay-for-performance disclosure required by Section 953(a). Instead, the goal of the SEC should be to ensure that the pay-for-performance disclosure can serve as a worthy supplement to the Summary Compensation Table. The comments that follow should assist the Commission in achieving that goal.

⁷ Proxy Disclosure Enhancements, Securities Act Release No. 9089, Exchange Act Release No. 61,175, Investment Company Act Release No. 29,092, at 65-66 (Feb. 28, 2010), *available at* <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

⁸ The Conference Board, Supplemental Pay Disclosure: Overview of Issues, Proposed Definitions, and a Conceptual Framework, The Conference Board Working Group on Supplemental Pay Disclosure 2 (2013), http://paygovernance.com/wp-content/uploads/2013/11/Supplemental_Pay_Disclosure-1.pdf.

⁹ *Id.* at 2-3

Executive Officers

At the meeting you inquired as to whether the disclosure of pay for performance required by Section 953(a) should apply only to the chief executive officer (CEO) or to some broader group individually or in the aggregate. We would propose that, at a minimum, the rule result in two graphic representations of pay-for-performance information: (1) a graph for the CEO individually and (2) a graph for all of the named executive officers in the aggregate.

While the media, and some investors, may focus much of their attention on the pay of the CEO, our members generally evaluate the individual and aggregate packages paid to the reporting group.¹⁰ The broader scope of evaluation performed by our members should not be surprising, particularly since the say-on-pay provision of Dodd-Frank requires the compensation of all named executives to be subject to a shareowner vote.¹¹ A graphic representation of pay for performance for the CEO individually and the named executives in the aggregate would provide investors with valuable data to assist them in their role as shareowners in overseeing executive compensation.

Time Horizon

At the meeting you also inquired about the time horizon for the pay-for-performance disclosure. In our view, and generally consistent with our membership-approved policies,¹² an appropriate time horizon for the disclosure should be, at a minimum, five years. As long-term investors, we generally believe a disclosure of at least a five-year comparison of executive compensation to performance would assist our members in properly assessing the performance of the board. Moreover, when the executive has served in the same capacity for more than five years, we generally believe it would be helpful to investors and appropriate for the time horizon to cover the entire service period.

Measuring Performance

At the meeting you inquired as to whether the Section 953(a) language describing performance in terms of “any change in the value of the shares of stock and dividends of the issuer and any distributions” should be interpreted as a measure of total shareholder return (TSR).¹³ We would generally support that interpretation.

¹⁰ See, e.g., Jeremy Bowman, The Motley Fool, *Are CEOs Worth the Millions They’re Paid?*, USA Today, July 26, 2014, <http://www.usatoday.com/story/money/business/2014/07/26/are-ceos-worth-the-millions-of-dollars-theyre-paid/13169983/>.

¹¹ Pub. L. No. 111-203, § 951.

¹² Council, Corporate Governance Policies § 5.1 Introduction (last updated May 9, 2014), http://www.cii.org/files/ciicorporategovernancepolicies/07_08_14_corp_gov_policies.pdf.

¹³ Pub. L. No. 111-203, § 953(a).

Ultimately long-term investors allocate capital to companies with the expectations of returns. While disclosure of other performance metrics may also be appropriate, we believe the required disclosure should, at a minimum, compare executive compensation to TSR.

Executive Compensation Actually Paid

At the meeting you also inquired about the Section 953(a) language describing executive compensation in terms of “executive compensation actually paid.”¹⁴ We believe that language should be interpreted as broadly as possible consistent with our members’ interest in understanding the relationship between all pay and performance.

Regardless of whether a given component of pay is deemed directly related, indirectly related or unrelated to performance, investors want to know the connection between the capital they provide and the performance delivered in return. Thus, we believe it would be inappropriate to exclude from the pay-for-performance disclosure compensation such as executive compensation payments of one-time bonuses for new hires, “make whole” awards for forfeited pay, and any other compensation that is clearly actually paid.

We also note that the Commission should carefully consider the consequences of concluding that any form of executive compensation is not “actually paid” and, therefore, should be excluded from the required disclosure. One obvious consequence of such a determination is that some companies will attempt to game the disclosure by decreasing executive compensation that the Commission determines to be actually paid and increasing executive compensation for those forms of compensation that are excluded from the Commission’s determination. Such a result would not likely be in the best interests of our members, issuers, or the Commission.

¹⁴ *Id.*; see generally Joseph E. Bachelder III, *Executive Compensation Under Dodd-Frank: an Update*, N.Y.L.J. 3 (Mar. 21, 2014) (commenting that it is unclear what the statute means when it refers to “executive compensation actually paid”), available at <http://www.mccarter.com/files/Publication/d7860a65-f88f-416e-ad21-0970132355ff/Presentation/PublicationAttachment/10d53cea-d540-4b7e-8ac5-8c7c6eab159d/NYLJColumnExecutiveCompensation03.pdf>.

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We appreciate the opportunity to provide input to the Commission in advance of your proposed rulemaking on Section 953(a). Should you have any questions or require any additional information about the Council's views on this, or any other, matter please feel free to contact me at 202.261.7081 or jeff@cii.org.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel