Council of Institutional Investors
The Voice of Corporate Governance

Via Email

June 25, 2015

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-07-15

Dear Mr. Secretary:

The purpose of this letter is to provide you with the Council of Institutional Investors (CII) comments on the Securities and Exchange Commission's (SEC or Commission) proposed rule on Pay Versus Performance (Proposal).[1] CII 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]

As you know, it is well documented that dramatic failures in corporate governance were a key cause of the financial crisis[3] and improving corporate governance can help restore and maintain trust in the integrity of the U.S. financial markets.[4] Congress responded, in part, by enacting Subtitle E of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) entitled Accountability and Executive Compensation.[5]

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[1] Pay Versus Performance, Exchange Act Release No. 74,835, 80 Fed. Reg. 26,330 (proposed May 7, 2015) *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-10429.pdf.

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

[3] *See, e.g.,* Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report xvii (authorized ed., Jan. 2011) ("We conclude dramatic failures of corporate governance . . . were a key cause of this crisis."), http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

[4] *See, e.g.,* Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective 22 (July 2009) ("Improved corporate governance requirements would . . . help to restore trust in the integrity of U.S. financial markets."), http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf.

[5] Public Law 111-203, 124 Stat. 1900 (July 21, 2010), *available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm.*

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The stated Congressional intent of Subtitle E was to "empower[] shareholders in a public company to have a greater voice on executive compensation and to have more fairness in compensation affairs."[6] Subtitle E includes Section 953(a) which directs:

> [T]he Commission to adopt rules requiring registrants to disclose in any proxy or consent solicitation material for an annual meeting of shareholders a clear description of any compensation required to be disclosed by the issuer under Item 402 of Regulation S-K . . . including information that shows the relationship between executive compensation actually paid and the financial performance of the registrant, taking into account any change in the value of the shares of stock and dividends of the registrant and any distributions.[7]

CII was an active proponent of including a provision in Dodd-Frank that would provide disclosure of key metrics that compensation committees use to determine incentive pay. The legislative history of Section 953(a) explicitly references the testimony of CII's Executive Director before the Subcommittee on Securities, Insurance, and Investment of the Committee on Banking, Housing, and Urban Affairs (Securities Subcommittee).[8] In that testimony, the Executive Director stated:

> 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. . . . 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.[9]

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[6] Report of the Senate Committee on Banking, Housing, and Urban Affairs, S. 3217, S. Rep. No. 111-176, at 37 (Apr. 30, 2010), *available at* http://www.banking.senate.gov/public/_files/Comittee_Report_S_Rept_111_176.pdf.
[7] 80 Fed. Reg. at 26,330 (footnotes omitted).
[8] S. Rep. No. 111-176, at 135.
[9] *Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before the S. Subcomm. on Securities, Insurance, and Investment of the Comm. on Banking, Hous., & Urban Affairs,* 111th Cong. at 14 (July 29, 2009) (testimony of Ann Yerger, Exec. Dir. of CII), http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e64b1840-5e6e-4a88-a8f6-3f01b2462404.

That testimony was derived from our membership-approved corporate governance best practices on executive compensation that includes the following provisions:

> The Council believes that executive compensation is a critical and visible aspect of a company's governance. Pay decisions are one of the most direct ways for shareowners to assess the performance of the board. And they have a bottom line effect, not just in terms of dollar amounts, but also by formalizing performance goals for employees, signaling the market and affecting employee morale.
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> The Council endorses reasonable, appropriately structured pay-for-performance programs that reward executives for sustainable, superior performance over the long-term, consistent with a company's investment horizon. "Long-term" is generally considered to be five or more years for mature companies and at least three years for other companies.[10]
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> . . . .
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> The compensation committee should establish performance measures for executive compensation that are agreed to ahead of time and publicly disclosed.[11]
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> . . . .
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> The compensation committee should commit to provide full descriptions of the qualitative and quantitative performance measures and benchmarks used to determine compensation, including the weightings and rationale for each measure. At the beginning of a period, the compensation committee should calculate and disclose the maximum compensation payable if all performance related targets are met. At the end of the performance cycle, the compensation committee should disclose actual targets and details on final payouts. Companies should provide forward-looking disclosure of performance targets whenever possible.[12]

Consistent with our policies, CII generally supports the Proposal. The following are CII's responses to select questions contained in the "Request for Comment" sections of the Proposal:

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[10] Council of Institutional Investors, Policies on Corporate Governance, § 5.1 Introduction (updated Apr. 1, 2015), http://www.cii.org/files/committees/policies/2015/04_01_15_corp_gov_policies.pdf.
[11] § 5.5d Pay for Performance
[12] § 5.5h Disclosure Practices

6. Should we further prescribe the format of the proposed disclosure to promote comparability across registrants? For example, should we require that registrants present the percentage change in executive compensation actually paid and registrant/peer group financial performance over each year of the required time period graphically or in writing? Are there other format requirements we should consider? Should we provide further guidance on how to present the information in a way that promotes comparability? Are there ways our proposed table can be improved?[13]

CII generally believes that the Commission should require that registrants present a graphic presentation of the relationship between executive compensation and registrant performance disclosed in the proposed table. We agree with those commentators who have indicated that requiring a "graphic representation would help provide meaningful disclosure . . . ."[14] For many investors, particularly long-term investors like CII members, a graphic presentation of the pay versus performance trend line over the required time period combined with the information in the proposed table would likely provide the most useful information from which to determine the relationship between executive compensation actually paid and total shareholder return (TSR).

7. If we were to require a graphic presentation of the disclosure, should we specify requirements for this presentation so that each registrant provides comparable disclosure? Or should we allow registrants to determine the appropriate graphic presentation, if any? How should such a graph describe the relationship between executive compensation actually paid and registrant performance?[15]

CII generally believes that the Commission should specify minimum requirements for the graphic presentation of the relationship between executive compensation and registrant performance disclosed in the proposed table in order to promote comparability. Consistent with one of the examples provided in the Proposal, we generally believe the minimum requirements should include "a graph providing executive compensation actually paid and change in TSR on parallel axes and plotting compensation and TSR over the required time period."[16]

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[13] 80 Fed. Reg. at 26,335.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 26,334.

13. Should we require that the data be tagged in XBRL format, as proposed? Should we require a different format, such as, for example, eXtensible Markup Language (XML)? Should the proposed tabular disclosure be changed in any way to facilitate accurate and consistent tagging? If so, how? Should we require that, as proposed, disclosure about the relationship between executive compensation and registrant performance be tagged? Why or why not? Would tagging the relationship of executive compensation to financial performance enhance comparability among different registrants? Alternatively, instead of requiring that the disclosure about the relationship be tagged, should tagging this disclosure be optional? If a registrant chooses to add more information to the prescribed table, should we require this additional information to be tagged as well, even if registrant-specific extensions are necessary?[17]

CII generally agrees with the Commission that the data resulting from the Proposal should be required to be tagged in eXtensible Business Reporting Language (XBRL) format. While we acknowledge that XBRL presents some challenges,[18] as explained in our comment letter to the Commission in response to its 2010 Concept Release on the U.S. Proxy System:

> The Council supports the use of standardized data-tagging for proxy—related materials . . . as a means of increasing transparency and expanding shareowners' ability to track governance practices, compare practices among peers, make informed voting decisions, and follow the results of shareowner meetings. Data-tagging would also facilitate companies' ability to keep abreast of their peers' governance practices, and may result in a reduction in errors in proxy advisers' reports for shareowner meetings.[19]

[17] *Id.*

[18] *See* Cooley, SEC Proposes New Rules on Pay Versus Performance 5 (May 19, 2005) (Citing a recent study indicating that "analysts and investors—the intended beneficiaries of XBRL—remain skeptical about XBRL, have many concerns about its utlity and accuracy and, most of all, are apparently not using it."), http://www.cooley.com/sec-propposes-new-rules-on-pay-vs-performances; *see also* Letter from Andrey Kuznetsov, Research Analyst, Council of Institutional Investors, to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission 3 (July 31, 2008) (raising concerns about the lack of accuracy and reliability of financial statement data reported in eXtensible Business Reporting Language format), https://www.sec.gov/comments/s7-11-08/s71108-41.pdf.

[19] Letter from Glenn Davis, Senior Research Associate, Council of Institutional Investors, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission 5 (Oct. 14, 2010), https://www.sec.gov/comments/s7-14-10/s71410-80.pdf.

We note that less than three years after the issuance of our comment letter, the SEC's own Investor Advisory Committee issued a recommendation in support of tagging executive compensation data in the proxy statement.[20] The supporting statement for that recommendation explains:

> [T]he tagging of compensation data will facilitate comparisons among public companies. Such data has grown in importance in the era of Say-on-Pay.[21]

For all the above reasons, we generally agree with the Commission's conclusion that:

> [R]equiring the data to be tagged would lower the cost to investors of collecting this information, would permit data to be analyzed more quickly by investors and other end-users than if the data was provided in a non-machine readable format, and would facilitate comparisons among public companies. In addition, requiring the data to be tagged would facilitate analysis of how information related to a single issuer changes over time.[22]

Finally, we would not oppose requiring registrants to tag additional information relating to the prescribed table that would necessitate a registrant-specific extension. We, however, acknowledge that many of the benefits of data tagging are premised on the use of standardized data tags. Thus, permitting, rather than requiring, registrants to tag data when registrant-specific extensions are necessary may be more appropriate.

20. Should we require disclosure for only the PEO? Would information about the non-PEO NEOs be meaningful or useful for investors? Would information about the PEO's compensation provide adequate information to investors about the pay-versus-performance alignment of other NEOs? Would limiting the scope of disclosure to the PEO result in meaningful cost savings to registrants, for example by limiting the extent to which they must perform recalculations of compensation actually paid (see Section II.D below) or average calculations? Would limiting the disclosure to the PEO affect the usefulness of the information for investors?[23]

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[20] Recommendations of the Investor Advisory Committee, Regarding the SEC and the Need for the Cost Effective Retrieval of Information by Investors 5 (Adopted July 25, 2013), http://www.sec.gov/spotlight/investor-advisory-committee-2012/data-tagging-resolution-72513.pdf.
[21] *Id.* at 6
[22] 80 Fed. Reg. at 26,334.
[23] *Id.* at 26,337.

CII generally agrees with the Commission that requiring disclosure for the principle executive officer (PEO) and the non-PEO named executive officers (NEOs) would provide meaningful and useful information for investors. As we explained in a pre-proposal comment letter to the Commission on this issue:

> 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. 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.[24]

In addition, as an organization that was actively involved in the development of the corporate governance provisions of Dodd-Frank, including Section 953(a), we generally agree with the Commission's conclusion "that Congress intended for the rules to provide disclosure about [the NEOs] . . . ."[25] Perhaps more importantly, we believe Congress also intended for the rules to include disclosure of key quantitative metrics, such as thresholds, targets, and goals that compensation committees actually use to design and determine PEO and NEO incentive compensation.

More specifically, and as indicated, the legislative history of Section 953(a) references the testimony of CII's Executive Director before the Subcommittee on Securities. The key message in that testimony, which we believe was an impetus for the pay-for-performance requirement in Dodd-Frank, was the need for more and better disclosure about quantitative measures used to design and determine executive incentive pay. The continued absence of disclosure of this information, more than five years after the testimony was delivered, remains a major impediment to investor's and the market's ability to analyze and understand the compensation programs awarded to PEOs and NEOs. Consistent with our membership-approved policies,[26] we believe requiring such quantitative information to be disclosed may be the single most important improvement the Commission could make to the Proposal.

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[24] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Keith F. Higgins, Director, Division of Corporation Finance, United States Securities and Exchange Commission 4 (Aug. 6, 2014) (footnotes omitted), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/08_06_14_CII_Letter_SEC_on%20953(a).pdf [hereinafter Aug. 2014 Letter].
[25] 80 Fed. Reg. at 26,336.
[26] § 5.5d Pay for Performance; § 5.5h Disclosure Practices.

29. Should we value equity awards at vesting date fair value as proposed? Should we instead value equity awards at grant date fair value as currently required by Item 402(c)(2)(v) and (vi) or fair value at some other point in time? If so, why? Should we require disclosure of vesting date valuation assumptions if they are materially different from those disclosed in a registrant's financial statements as of the grant date, as proposed? Would the disclosure of these assumptions provide meaningful information to shareholders?[27]

CII continues to believe that for purposes of the Summary Compensation Table grant date fair value remains the most appropriate valuation approach for disclosing the decisions of the compensation committee in the applicable year.[28] We, however, generally agree with the Commission that for purposes of determining "compensation actually paid" under Section 953(a) vesting date fair value as proposed is an appropriate valuation methodology. Like the Commission, we believe:

> Using vesting-date valuations will result in a compensation measure that includes, upon the vesting date, the grant-date value of equity awards plus or minus any change in the value of equity awards between the grant and vesting date. Such changes in the value of equity grants after the grant date represent a direct channel, and one of the primary means, through which pay is linked to registrant performance.[29]

We generally oppose the use of exercise date as an alternative valuation methodology for determining compensation actually paid. On this point, we agree with the Commission's conclusion that:

> We do not believe that an award requiring exercise should be considered actually paid only upon its exercise, because once the award is vested the executive can control how and when the award is monetized, and thus could influence pay-versus-performance disclosure by controlling the fiscal year in which the executive receives the compensation. Changes in the fair value of the award after vesting generally reflect investment decisions made by the executive rather than compensation decisions made by the registrant.[30]

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[27] 80 Fed. Reg. at 26,340.
[28] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Nancy M. Morris, Secretary, Securities and Exchange Commission 1 (Jan. 25, 2007), http://www.sec.gov/rules/proposed/s70306/s70306-799.pdf.
[29] 80 Fed. Reg. at 26,339.
[30] *Id.*

Finally, we generally support requiring disclosure of vesting date valuation assumptions if they are different from those disclosed in a registrant's financial statements as of the grant date as proposed. We again generally agree with the Commission that those disclosures "would make these computations readily accessible to shareholders, which may be useful to shareholders to the extent they are interested in computing slightly different measures or using parts of the computations for other purposes."[31]

34. Should we require registrants to use TSR as the performance measure? Would the comparability across registrants resulting from this proposal benefit shareholders? Would prescribing the use of TSR hinder registrants from providing meaningful disclosure about the relationship between executive pay and financial performance? Would requiring the use of TSR result in shareholders or management focusing too much on this single measure of performance or emphasizing short-term stock price improvement over the creation of long-term shareholder value? If so, are there ways we could mitigate that risk?[32]

CII generally agrees with the Commission that registrants should be required to use TSR as the performance measure.[33] We believe that ultimately long-term investors allocate capital to companies with the expectation of returns, and assessing TSR generally over a five-year period as proposed gives one potentially useful view of long-term performance.[34]

We acknowledge that TSR has a number of potential flaws. For example, some critics of TSR have argued, that "it is not necessarily reflective of current incentive compensation design at many companies,"[35] it could encourage "possible manipulation of stock price," it could be impacted by forces "that are well beyond the control or influence of the company's executives, including factors such as central bank policies, macroeconomics and global politics," and it could "mask a decline in a company's economic value."[36]

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[31] *Id.* at 26,340.
[32] *Id.* at 26,341.
[33] Aug. 2014 Letter, *supra* note 24, at 4.
[34] *See id.* at 5; *see also* Deloitte, SEC Proposes Rule on Pay Versus Performance 3 (June 5, 2015) ("Assessing TSR over a five-year period gives a clear illustration of long-term performance."), http://deloitte.wsj.com/cfo/2015/06/05/sec-proposes-rule-on-pay-versus-performance/.
[35] Compensia, SEC's Proposed "Pay versus Performance" Disclosure Rules Likely to Present Numerous Challenges 2 (May 20, 2015), http://compensia.com/tp_alerts/tpa_sec_proposes_section953changes_0515.pdf.
[36] Cooley at 5.

Notwithstanding TSR's potential flaws, we generally agree with the Commission that requiring TSR as the performance measure is consistent with the "language in the statute," and has many potential benefits for investors, including that is "objectively determinable from the share price of the registrant and not open to subjective determinations of performance," and "should increase the comparability of pay-versus-performance disclosure across registrants."[37]

37. Does TSR, standing alone, provide sufficient information about a registrant's performance such that a registrant would provide only the information that would be mandated by this rule? Will registrants opt to provide additional information based on their own calculations or metrics to provide additional context for investors to consider the alignment of pay versus performance?[38]

CII believes that TSR standing alone may not provide sufficient information about a registrant's performance in all circumstances. We, however, note that the Proposal explicitly permits registrants to "provide supplemental measures of financial performance" in addition to TSR.[39]

We are heartened by a recent survey which indicates that many, if not most, registrants will disclose more than the "minimum that would be required under the SEC proposal."[40] In that regard, we believe that it would be in the best interests of registrants and shareowners alike if companies' voluntarily provide those supplemental measures that, after consultation with their shareowners, they believe will assist investors in better understanding how the pay programs support long-term value creation.[41] If such additional information is provided, we agree with the Commission that it is critical that the related disclosure be "clearly identified, not misleading and not presented with greater prominence than the required disclosure."[42]

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[37] 80 Fed. Reg. at 26,341; *see* Deloitte at 3 ("TSR is perhaps the most objective and transparent performance metric available for measuring long-term financial performance.")
[38] 80 Fed. Reg. at 26,341.
[39] *Id.*
[40] Press Release, One-Third of U.S. Companies Expect to Fundamentally Change Pay-For-Performance Disclosures, Towers Watson Poll Finds 1 (June 18, 2015), http://www.towerswatson.com/en/Press/2015/06/one-third-of-us-companies-expect-to-fundamentally-change-pay-for-performance-disclosures.
[41] *Id.*
[42] 80 Fed. Reg. at 26,341.

42. Does a five-year disclosure period (for registrants other than smaller reporting companies) and a three-year disclosure period (for smaller reporting companies), as proposed, provide meaningful pay-versus-performance disclosure? Should the timeframes be shorter or longer? For example, should we require only three years of disclosure for all registrants consistent with the time period required by the Summary Compensation Table for registrants other than smaller reporting companies? What impact would a different time period have on the disclosure and its usefulness to shareholders?[43]

CII generally agrees with the Commission's proposed five-year disclosure period for registrants other than smaller reporting companies and three-year disclosure period for smaller reporting companies. While many smaller reporting companies are mature companies and, therefore, consistent with our membership-approved policies, should be required to follow the longer time period proposed for other registrants,[44] we understand and generally support the following Commission analysis and conclusion on this issue:

> Our executive compensation rules require smaller reporting companies to provide disclosure for only the last two completed fiscal years, but we believe that requiring pay-versus-performance disclosure for three fiscal years, instead of two, provides more useful information from which investors can evaluate the relationship between a registrant's executive compensation actually paid and its financial performance, and provides a longer time horizon over which to observe any potential trends.[45]

We wish to emphasize that as long-term investors, and consistent with our policies,[46] we generally believe the proposed disclosure periods are the minimum necessary to properly assess the performance of the executives and their board.[47] We share the view apparently held by many issuers that the "longer the time period involved, the greater insight the disclosure will provide to investors as to whether pay and performance are aligned."[48]

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[43] *Id.*
[44] § 5.1 Introduction ("Long-term" is generally considered to be five or more years for mature companies and at least three years for other companies.").
[45] 80 Fed. Reg. at 26,342 (footnotes omitted).
[46] § 5.1 Introduction
[47] Aug. 2014 Letter, *supra* note 24, at 4 ("In our view, and generally consistent with our membership-approved policies, an appropriate time horizon for the disclosure should be, at a minimum, five years.").
[48] Letter from Timothy J. Bartl, President, Center on Executive Compensation et al., to Mr. Kevin M. O'Neill, Deputy Secretary, U.S. Securities and Exchange Commission 3 (Oct. 17, 2014), http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-331.pdf.

45. Is the proposed phase-in for new reporting companies appropriate? Is sufficient information readily available for these companies to provide adequate pay-versus-performance disclosure in any proxy statements or information statements requiring Item 402 disclosure in their first two years as a reporting company? If not, what are the costs of developing this information? Would pay-versus-performance disclosure for only the most recently completed fiscal year in the first proxy statement filed by a newly-reporting company, as proposed, provide sufficient and meaningful information for shareholders to evaluate the executive compensation actually paid as compared to the registrant's financial performance, given the limited time period covered? Does the importance of the information to shareholders justify the costs of preparing the disclosure without a phase-in period?[49]

While CII is generally not opposed to the proposed phase-in periods, we question whether the potential cost savings to registrants outweigh the costs to investors of having less sufficient and less meaningful information about pay versus performance. Our concerns are supported by the views of at least one prominent compensation expert who has indicated that: (1) the proposed phase-ins would hinder the comparability of the information resulting in less meaningful disclosures for evaluating executive compensation; and (2) many companies will likely voluntarily choose to incur additional costs to explain the effect that the proposed phase-ins would have on their pay versus performance table.[50] Thus, we believe the importance of the information to shareowners may indeed justify the costs of preparing the disclosure without a phase-in period.

50. Would the proposed scaled disclosure requirements for smaller reporting companies provide meaningful disclosure to investors without imposing undue costs and burdens on these companies? Are there ways we could modify the proposed disclosure requirements to reduce the costs and still provide useful information for shareholders? For example, should we require only a two year disclosure period for smaller reporting companies (similar to the timeframe for which they are required to provide disclosure in the Summary Compensation Table)?[51]

As indicated in response to question 42, we would generally oppose requiring only a two-year disclosure period for smaller reporting companies.

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[49] 80 Fed. Reg. at 26,342.
[50] *See* Compensia at 3 ("As a result [of the proposed phase-in], at any given point in time, many companies would be providing the 'pay versus performance' table covering a different number of fiscal years, hindering comparability and, in all likelihood, necessitating an explanation of the table's coverage.").
[51] 80 Fed. Reg. at 26,344.

We agree with the Commission that requiring pay-versus-performance disclosure for three fiscal years for smaller reporting companies, instead of two, provides more useful information from which investors can evaluate the relationship between a registrant's executive compensation actually paid and its financial performance, and provides a longer time horizon over which to observe any potential trends. As also indicated, our view would appear to be shared by many issuers who believe that the longer the time period involved, the greater insight the disclosure will provide to investors as to whether pay and performance are aligned.

Finally, as indicated in response to question 49, it is unclear to us that the cost savings that might result from the proposed transition period for smaller public companies would offset the costs to investors of having less comparable and less meaningful disclosures from those companies.

51. Should we exempt smaller reporting companies from the proposed pay-versus-performance disclosure requirements? Why or why not? What impact, if any, would the absence of the proposed disclosure have on the ability of shareholders of smaller reporting companies to effectively exercise of their say-on-pay voting rights? Would shareholders be able to assess the relationship between the company's financial performance and the compensation paid absent the disclosure required under proposed Item 402(v)? Would the proposed disclosure be more or less meaningful to shareholders in the absence of CD&A and Item 201(e) performance graph disclosure? What are the burdens on smaller reporting companies of requiring pay-versus-performance disclosure and would the benefits of requiring this disclosure for smaller reporting companies justify the burdens? If not, please explain why not. Should registrants that exit smaller reporting company status be provided the same phase-in period applicable to other registrants when they first become subject to the proposed requirement to provide five fiscal years of pay-versus-performance disclosure?[52]

CII generally opposes exempting smaller reporting companies from the proposed pay-versus-performance disclosure requirements. We agree with the Commission that shareowners of smaller reporting companies "may benefit from having the proposed pay-versus-performance disclosure when casting their say-on-pay advisory votes and that such disclosure can be provided without imposing undue costs on smaller registrants."[53]

[52] *Id.*
[53] *Id*.

More broadly, and as recently explained in our comments in response to the Commission's proposed rule, Disclosure of Hedging by Employees, Officers and Directors:

> [W]e note that the Council's membership approved policies have long recognized that compensation is a critical and visible aspect of a company's governance. We believe pay decisions are one of the most direct ways for shareowners to assess the performance of the board. And, as indicated, they have a bottom line effect, not just in terms of dollar amounts, but also by formalizing performance goals for employees, signaling the market and affecting employee morale. As a result, the Council has and will continue to oppose exempting SRCs and EGCs from compensation related disclosures . . . that . . . are useful to investors.[54]

53. Have we struck the appropriate balance between prescribing rules to satisfy the requirements of Exchange Act Section 14(i) and allowing registrants to disclose pay-versus-performance information most relevant to shareholders?[55]

CII generally believes that under the circumstances the Commission has struck the appropriate balance between prescribing rules to satisfy the requirements of Exchange Act Section 14(i) and allowing registrants to disclose pay-versus-performance information most relevant to shareowners. We note that those who criticize the Proposal as too prescriptive seem largely to focus on the proposed requirement to use TSR as the financial performance metric.[56] We believe that focus and the related criticism is, at best, unfair for at least two reasons.

First, as one expert noted, the statutory language of Section 953 effectively "hamstrung" the Commission into requiring TSR or a TSR-like metric.[57] Second, as indicated in response to question 37, the so-called prescriptive nature of the Proposal ignores its explicit language permitting registrants to disclose supplemental measures other than TSR that they have determined "best communicate their compensation story to investors."[58] Moreover, registrants appear willing to voluntarily provide such information. As indicated, more than 50 percent of companies recently surveyed expect to provide more disclosures about pay for performance than prescribed by the Proposal.[59]

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[54] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 7 (Apr. 16, 2015) (footnotes omitted), https://www.sec.gov/comments/s7-01-15/s70115-5.pdf.
[55] 80 Fed. Reg. at 26,344.
[56] Cooley at 2.
[57] Cooley at 5.
[58] *Id.* at 2.
[59] Press Release at 1.

As always, we appreciate the opportunity to provide input to the Commission in response to the Proposal. Should you have any questions or require any additional information about CII's views on this, or any other matter, please feel free to contact me at 202.261.7081 or jeff@cii.org.

Sincerely,

Jeff Mahoney

Jeff Mahoney
General Counsel