



March 4, 2022

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: Reopening of Comment Period for Pay Versus Performance; Proposed Rule, Securities and Exchange Commission; 87 FR 5751, Release No. 34-94074, File No. S7-07-15**

Dear Ms. Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness submits these comments in response to the Securities and Exchange Commission's (SEC) reopening of the comment period for its previous proposal ("2015 Proposal") to implement the pay versus performance mandate of Section 953(a) of the Dodd-Frank Act ("Reopening Release").

Attached to this letter is the Chamber's June 30<sup>th</sup>, 2015 comment letter on the 2015 Proposal as well as a 2015 letter submitted by the Corporate Governance Coalition for Investor Value. The Chamber continues to hold the views and recommendations set forth in those submissions and urges the Commission to fundamentally re-think its current approach towards implementing Section 953(a).

The Chamber's 2015 comment letter called for the SEC to adopt a more principles-based rulemaking that is considerate of existing disclosure, and which allows companies to communicate pay for performance information in the most effective way possible. The Chamber also pointed out that the prescriptive, tabular disclosure requirement included in the 2015 Proposal would provide investors with misleading or incomplete information regarding pay for performance. We believe the concerns and recommendations we raised in 2015 are even more relevant today and urge the SEC to rethink its approach to Section 953(a) implementation.

**Discussion**

The Chamber strongly supports disclosure policies that enable issuers to effectively communicate to their shareholders how incentive compensation plans are structured to align pay with performance. Ensuring that executive pay is aligned with corporate performance has been established as a top priority for institutional investors that regularly analyze and vote on executive compensation matters via corporate proxies.

Unfortunately, the 2015 Proposal would further complicate the proxy disclosure framework, fail to facilitate investor decision-making regarding executive compensation, and disadvantage retail shareholders that do not possess the same analytical resources as institutional investors. Even more troubling, the Reopening Release discusses *additional* prescriptive mandates the SEC is contemplating which only exacerbate the shortcomings on the 2015 Proposal. This raises serious concerns from both a policy and process standpoint as the SEC appears not to have conducted any type of economic or other analysis for the new mandates it is considering.

Accordingly, the Chamber makes the following recommendations and observations in response to the Reopening Release:

- 1. Given the potential new mandates being considered in the Reopening Release, the SEC should re-propose the pay versus performance rule and conduct a new economic analysis to assess the rule’s implications for issuers and investors;**
- 2. The Chamber reiterates its position that the SEC should ultimately adopt a principles-based rulemaking that considers the evolution of disclosure since passage of the Dodd-Frank Act twelve years ago; and**
- 3. The SEC should not use the pay versus performance rulemaking as a vehicle to promote certain non-financial objectives.**

These recommendations and observations are discussed in further detail below

- 1. Given the potential new mandates being considered in the Reopening Release, the SEC should re-propose the pay versus performance rule and conduct a new economic analysis to assess the rule’s implications for issuers and investors.**

The 2015 Proposal was reliant upon a uniform, prescriptive table that all issuers would be required to include in their proxy statement. As the Chamber emphasized in our previous comments, this table would be comprised of metrics that will, in many instances, communicate misleading or incomplete information to investors. Issuers would be left with no choice but provide “clean up” narrative disclosure to clarify any misconceptions created by the table. This will further complicate executive compensation disclosure and make it difficult for investors who rely on this disclosure – particularly retail investors – to understand how issuers align pay with performance.

Unfortunately, the Reopening Release doubles down on this flawed approach by seeking to include even *more* prescriptive disclosures as part of the table. The potential inclusion of pre-tax net income, net income, and a “Company-Selected Measure” as performance measures will impose new considerations for issuers and likely sow greater confusion amongst investors. A mandate that companies then assign “rankings” to various performance metrics would also create challenges for issuers who typically do not view the performance metrics used for incentive compensation plans in terms of rank.

In this regard, the action taken by the SEC reads less like the “reopening” of a comment period and more like a newly-issued rule proposal that should be subject to robust economic analysis by the SEC and a sufficient comment period for the public. If the SEC wishes to consider new regulatory mandates to implement Section 953(a) that were not included in the 2015 Proposal, it should issue a re-proposal with an updated economic analysis of the rule’s potential consequences in accordance with the Administrative Procedure Act (APA).

**2. The Chamber reiterates its position that the SEC should ultimately adopt a principles-based rulemaking that considers the evolution of disclosure since passage of the Dodd-Frank Act twelve years ago.**

When the Dodd-Frank Act was passed in 2010, there was an underlying assumption behind Section 953(a) that a regulatory mandate was the only way for investors to obtain information on pay versus performance. Regardless of whether that assumption was accurate at the time, there is little question that issuers today are *already* disclosing a significant amount of information regarding pay versus performance through Compensation Discussion & Analysis (CD&A) and other disclosure requirements.

Stated differently, it is unclear whether investors are actually demanding the type of tabular disclosure contained in the 2015 Proposal and discussed in the Reopening Release. The sophistication of analytical tools that institutional investors, as well as proxy advisory firms, use to examine pay versus performance and other executive compensation issues has increased significantly since 2010. There is no evidence that institutional investors are having difficulty understanding how issuers incorporate pay versus performance principles into their incentive compensation plans.

As noted previously, in its current form the proposed rules would compel issuers to provide significant remedial disclosure to explain why information included in the table is misleading or does not provide a full picture of pay versus performance. A principles-based rulemaking that allows issuers to customize pay versus performance disclosures based upon their own profile would avoid this outcome and provide shareholders with information that may actually be useful.

The text of Section 953(a) and a report from the Senate Banking Committee<sup>1</sup> support the concept of a principles-based approach and permit the SEC a great deal of flexibility in implementing pay versus performance. We urge the Commission to use this discretion granted by Congress to adopt a more principles-based rulemaking that affords issuers greater flexibility.

**3. The SEC should not use the pay versus performance rulemaking as a vehicle to promote certain other non-financial objectives.**

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<sup>1</sup> See Report of the Senate Committee on Banking, Housing and Urban Affairs to accompany S. 3217: “This disclosure about the relationship between executive compensation and the financial performance of the issuer may include a clear graphic comparison of the amount of executive compensation and the financial performance of the issuer or return to investors and may take many forms.”

Section 953(a) makes clear that the pay versus performance disclosure is meant to show the relationship between executive compensation and the *financial* performance of an issuer. Yet the Reopening Release contemplates whether certain non-financial measures should be included in the table as its “Company-Selected Measure”.<sup>2</sup>

Encouraging the use of non-financial performance measures in pay versus performance disclosures would be at odds with both the language and intent of Section 953(a). Accordingly, the SEC should focus its rulemaking on the scope defined in the Section 953(a) and not wade further into splicing certain non-financial objectives into the 2015 Proposal.

### **Conclusion**

While the Chamber appreciates this opportunity to again comment on Section 953(a) implementation, we believe that the topic warrants a formal re-proposal from the SEC and sufficient opportunity for the public to provide comments. The Chamber looks forward to being a resource and engaging with the SEC on this critical issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Quadman', with a long, sweeping horizontal line extending to the right.

Tom Quadman  
Executive Vice President  
Center for Capital Markets Competitiveness  
U.S. Chamber of Commerce

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<sup>2</sup> Reopening Release at 20: “should we allow the Company-Selected measure to be any measure that could be disclosed under the existing CD&A requirements, including financial performance measures; environmental, social and governance related measures; or any other measures used by the registrant to link compensation actually paid during the fiscal year to company performance?”