



Via Hand Delivery

August 16, 2013

Keith F. Higgins
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: *Sec. 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act*
("Dodd-Frank")

Dear Mr. Higgins:

I am writing on behalf of the Council of Institutional Investors ("CII") to respectfully request that you consider the following comments in connection with your ongoing development of a proposed rule to implement Sec. 953(a) of Dodd-Frank.

As you are aware, CII is a non-profit association of corporate, public and union employee benefit plans with combined assets in excess of \$3 trillion. CII members are long-term shareowners responsible for safeguarding the retirement savings of millions of American workers.¹

CII was an active proponent of Sec. 953(a) of Dodd-Frank. The legislative history of that Section notes:

Ms. Ann Yerger wrote in congressional testimony on behalf of the Council of Institutional Investors "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."²

¹ For more information about the Council of Institutional Investors ("CII") and our members, please visit our website at <http://www.cii.org/members>.

² S. Comm. on Banking, Hous. & Urban Affairs, 111th Cong., Rep. to Accompany S. 3217 at 110 (Mar. 22, 2010), http://www.banking.senate.gov/public_files/RAFSAPostedCommitteeReport.pdf.

Our support for Sec. 953(a) was derived from our long-standing membership-approved corporate governance best practices that state:

CII 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.

CII 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.³

We are aware that the Division of Corporation Finance has received input from some issuers indicating that they believe that the rules implementing Section 953(a) should require disclosure of a so-called "realized pay approach."⁴ Those issuers appear to be advocating such an approach as an alternative to total compensation as currently defined for purposes of the Summary Compensation Table.⁵ We strongly disagree with that view.

We note that some proponents of the realized pay approach define the approach as including "only . . . those elements of pay that are performance-based,"⁶ and excluding the following forms of compensation:

- The value of new/unvested restricted shares,
- The amount of deferred compensation accruals,
- The amount of changes in pension values/compensation, and
- Other amounts of compensation that will not actually be received in the current year.⁷

³ Council of Institutional Investors, Policies on Corporate Governance §5.1 (last updated Apr. 19, 2013), http://www.cii.org/corp_gov_policies#Intro.

⁴ See, e.g., Memorandum from Paula Dubberly, Deputy Director, Division of Corporation Finance, to Public Comment File on Dodd-Frank Implementation, Title IX – Executive Compensation 1-6 (Feb. 25, 2013), <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-314.pdf> (Center for Executive Compensation, Pay for Performance and the Comparison of the Different Measures of "Total Compensation").

⁵ *Id.*

⁶ *Id.* at 4.

⁷ See *id.* at 5; ExxonMobil, Executive Compensation Overview 4 (2012), http://www.exxonmobil.com/Corporate/Files/news_pub_ir_execcomp2012.pdf (Indicating that realized pay

In our view, while not all compensation directly relates to performance, investors remain keenly interested in understanding the relationship between *all* pay and performance. Regardless of whether a given component of pay is deemed to be 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 do not think it is appropriate to exclude changes in pension values, or the other forms of compensation described above, from a pay-for-performance disclosure.

Exclusions of some components of compensation from the pay-for-performance disclosure would convey to investors that a bright line exists between performance-based pay and other forms of pay, when in practical terms that line is not always clear. A representative from McKesson recently explained to the *Wall Street Journal* that the CEO's significant future pension benefit results in part from "outstanding company performance."⁸ Yet, as indicated, a realized pay approach would exclude any change in pension value as irrelevant to performance.

In another example illustrating the blurred line, Chesapeake Energy's new CEO recently received a host of one-time special awards consisting of a cash signing bonus of \$2 million, a \$2.5 million "Equity Makeup Restricted Stock" award, and two \$5 million "Pension Makeup Restricted Stock" awards.⁹ Altogether, 86 percent of the new CEO's special awards are directly linked to Chesapeake's future performance under his leadership.¹⁰ Yet again, under a realized pay approach, it appears that disclosure of those awards would be excluded.

We are also concerned that allowing for such exclusions would have the unintended consequence of encouraging companies to game the system by decreasing performance-based pay and increasing non-performance-based pay immune from a pay-for-performance disclosure. This perverse outcome flies in the face of investors' decades-long efforts to promote performance-based pay.

"[e]xcludes the value of new/unvested EBU and restricted stock grants, deferred compensation accruals, change in pension value, and other accounts that will not actually be received until a future date.").

⁸ Mark Maremont, *For McKesson's CEO, A Pension of \$159 Million*, Wall St. J.Com, June 24, 2013, at 2, <http://online.wsj.com/article/SB10001424127887323998604578565491579124154.html>.

⁹ Chesapeake Energy Corporation, Form 8-K, Item 5.02 (May 23, 2012), http://www.sec.gov/Archives/edgar/data/895126/000089512613000167/chk05232013_8k.htm.

¹⁰ See *id.*

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Thank you very much for considering our comments. We look forward to reviewing and commenting in detail on your pending proposal to implement Section 953(a) of Dodd-Frank. In the meantime, if you have any questions regarding our views on this topic, please contact me directly at [REDACTED], or CII Director of Research Glenn Davis at [REDACTED].

Sincerely,



Jeff Mahoney
General Counsel