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September 8, 2014

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

Dear Mr. Higgins:

On behalf of more than 300,000 members and supporters of Public Citizen, we write to express our views on the Securities and Exchange Commission's (SEC) forthcoming proposed rule to implement Section 953(a) of the Dodd-Frank Wall Street Reform Act. Many of Public Citizen's members are retail investors and are keenly concerned with executive compensation.

The purpose of Section 953(a) is to provide investors with a means of measuring senior management pay in the context of firm performance.[1] This provision derives from a troublesome trajectory of senior executive pay that absorbs increasing percentages of shareholder capital. By any measure, CEO and senior management pay has escalated—beyond the pace of average wages, beyond any rise in corporate income, beyond share prices. Any frugal investors who would favor a company that economizes on its expenses should also apply that same standard to CEO pay. Yet the legal ability of a shareholder to bridle CEO pay is not only limited, the shareholder even lacks a convenient means of assessing whether management pay accords with performance. While some publicly traded companies do discuss compensation philosophy and offer metrics by which they measure performance,[2] without a consistent performance standard, it is difficult for investors to assess the validity of compensation levels at a single company or across peers. Together with Section 953(b), measuring pay in the context of performance will better equip investors to make informed evaluations.

[1] S. Rep. No. 111-176, at 135 (Apr. 30, 2010), http://www.banking.senate.gov/public/_files/Comittee_Report_S_Rept_111_176.pdf.

[2] Following amendment to IRS Section 162(m), pay above $1 million may not be deducted unless it is performance based on standards that are subjected to a performance test. Typically, however, such tests allow the board to vary the award using its discretion. See, for example, the 2003 Proxy Statement of Goldman Sachs here: http://www.sec.gov/Archives/edgar/data/886982/000095012303002098/y82715def14a.htm. Because of this "discretion," Goldman Sachs notes, "we cannot determine the amount that would have been paid to any person."

Public Citizen encourages the SEC to advance a proposed rule and we are heartened that the agency has placed this policy on its agenda of priorities for publication by October, 2014. We note these simple pay disclosure measures now lag behind passage of the statute by more than four years, a delay that we find unwarranted.

Compelling congressional testimony on the issue addressed in 953(a) came from the Council of Institutional Investors, an amalgam of pension funds and other investors that collectively serve as stewards of some $3 trillion in beneficiary capital. The Senate report references this testimony[3] and in it, the Executive Director of the Council 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.[4]

When looking at how performance might be described, Public Citizen urges that the Total Shareholder Return (TSR) rubric be mandated for all publicly traded companies. TSR is well established and understood by shareholders. The statute indicates this as an appropriate metric when it explains that financial performance should take "into account any change in the value of the shares of stock and dividends of the issuer and any distributions." At the same time, TSR reflects market perception, not necessarily fundamental results. Consequently, Public Citizen advocates that firms also be required to show compensation relative to return on assets, return on equity, and growth in earnings per share in addition to TSR. All of these figures are relevant in examining executive compensation. They are not proprietary and can be gleaned from the firm's financial statements. Stating them in the proxy during the discussion of compensation will be simple and instructive. Further, the performance should be shown in context of a peer group of 5 companies. Section 953(a) provides room for such metrics, as the language where it instructs the SEC to take "into account" value of shares is not exclusive and does not state that no other metrics may be considered.

The rule could allow firms to volunteer additional metrics, provided the firm applies them consistently. A firm should not be allowed to apply one metric that might cast performance in a favorable light one year, but then use another in future years if the previously-used metric proved less favorable. Ideally, companies would disclose precisely how compensation is determined through publication of the metrics they apply. While the statue doesn't mandate the SEC to require this, we believe a company's shareholders would strongly benefit from understanding precisely how it determines compensation. The Council of Institutional Investors agrees: "We believe the disclosure regime in the U.S. would be

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[3] S. Rep. No. 111-176, at 135 (Apr. 30, 2010), http://www.banking.senate.gov/public/_files/Comittee_Report_S_Rept_111_176.pdf.

[4] 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. (July 29, 2009) (testimony of Ann Yerger, Exec. Dir. of the Council) (emphasis added), http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e64b1840-5e6e-4a88-a8f6-3f01b2462404

substantially improved if companies would have to disclose the quantitative measures used to determine incentive pay."[5]

Moreover, we advise that shareholders be apprised of the relation between pay and performance over an ample time horizon. Given the varied lengths investments are held by investors, a time horizon of 10 years would be instructive. The Conference Board agreed that a longer period of time of disclosure would be beneficial to investors, saying that a period of "five years or longer" should apply.[6] This would help an investor assess pay and performance over business cycles and even across multiple CEOs and management teams at the same company. This longer disclosure is also important as business cycles may vary in length for particular industries. In the financial sector, for example, it would be useful to see pay and performance starting several years before the crash of 2008 through the present and even beyond. In its 2014 proxy statement, for example, JP Morgan found it useful to recite the CEO's pay for the previous six years. [7] The firm annotates this chart. It shows $1 million pay in 2008, with the notation: "financial crisis." After paying compensation ranging from $15 to $23 million for the next three years, it paid the CEO $11.5 million in 2012, with the notation "CIO event." The Chief Investment Office—CIO--was responsible for the "London Whale" loss of $6 billion. In 2013, the CEO was awarded $20 million. In its discussion earlier, the board explained that this recognized the CEO's "strong performance" in the resolution of "legal matters." It was in 2013 where the firm agreed to pay $20 billion because of numerous frauds committed under the CEO's tenure. Some shareholders have disagreed that acknowledgement of massive fraud would be a time to reward management and this discussion helps shareholders assess whether the board is acting appropriately.

We are aware that some apologists for excessive compensation may seek to weaken disclosure through this Dodd-Frank reform section by advocating use of "realized pay."[8] We firmly believe there is no policy basis and certainly no statutory basis in 953(a) for such weakening. The statute clearly states that compensation "actually paid" be disclosed "under section 229.402 of title 17, Code of Federal Regulations [CFR]." Section 229.402 carefully details the compensation information actually paid required of public companies, including the value of stock-based awards made each year (even when the cash may only be realized in years beyond the grant date). Then, the statute provides that the firm must include "information that shows the relationship between executive compensation actually paid and the financial performance" of the firm. What is new from the statute in 953(a) only is that this compensation be described in relationship with the company's performance.

There should be no confusion about what "actually paid" means. In brief, "actual" pay is not "realized" pay. Again, in referencing the current compensation disclosure regulation, the statute emphasizes that the current regime under CFR section 229.402 should apply. The compensation required under CFR section 229.402 is different than "realized pay." Realized pay addresses the exercise of stock options in a given year from awards that may have been given in previous years. Realizing such awards when the CEO exercises options in a given year does not reflect how the Board of Directors viewed the performance of that year. Rather, the exercise of options simply reflects the *personal* decisions of the CEO or other senior managers, which presumably stem from considerations of personal cash wishes, personal tax issues, or

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[5] *Id.* at 2-3

[6] 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.

[7] JP Morgan, Proxy Statement p. 34 (2014), available at: http://www.sec.gov/Archives/edgar/data/19617/000001961714000321/jpm2014definitiveproxy.htm

[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.

other personal circumstances completely unrelated to firm performance. These decisions to exercise options do not reflect the views the board about performance. The Conference Board itself recognizes this as a "limitation" of realized pay.[9] The title of 953(a) is "Pay Versus Performance." A section titled "Pay Versus Performance" would be subverted by the use of realized pay.

Again, we urge the Commission to promulgate a rule expeditiously. For questions, please contact Bartlett Naylor at [redacted], or [redacted].

Sincerely,

Bartlett Naylor
Financial Policy Advocate

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[9] 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.