

United States Senate
WASHINGTON, DC 20510

February 1, 2022

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Reopening of Comment Period for Pay Versus Performance, File No. S7-07-15; Reopening of Comment Period for Listing Standards for Recover of Erroneously Awarded Compensation, File No. S7-12-15

Dear Chair Gensler:

Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) requires the Securities and Exchange Commission (SEC) to issue rules on pay versus performance disclosure of executive compensation. Section 954 of the Dodd-Frank Act requires the SEC to issue rules directing the exchanges to prohibit the listing of companies that lack a clawback policy to recover incentive-based compensation in the event of an accounting restatement due to material noncompliance. The SEC issued notices of proposed rulemaking (NPRMs) under these sections in 2015, but never finalized the proposals.¹

The SEC now seeks to finalize these proposals by reopening the comment periods, rather than issuing re-proposals reflecting information learned from the prior public comments along with an updated cost-benefit analysis. These shortcuts are inconsistent with the Administrative Procedure Act as well as your response to Senator Shelby's question at your confirmation hearing, when you testified that cost-benefit analysis is at "the heart of good decision-making for any rulemaking."

The SEC reopened the comment period on January 22, 2022, for the pay versus performance proposal² and posed 107 questions, a number of which discussed potential regulatory alternatives not previously raised in 2015. Although the SEC recognizes that executive compensation practices have evolved since 2015 and there has been "a decrease in the use of stock options to compensate [chief executive officers] among S&P 500 and Russell 3000 companies," the 2022 reopening fails to update the cost-benefit analysis and analysis required by the Paperwork Reduction Act (PRA) and the Regulatory Flexibility Act (RFA).

¹ See Pay Versus Performance, 80 Fed. Reg. 26330 (May 7, 2015) and Listing Standards for Recovery of Erroneously Awarded Compensation, 80 Fed. Reg. 41144 (Jul. 14, 2015).

² 87 Fed. Reg. 5751 (Feb. 2, 2022).

Similarly, on October 14, 2021, the SEC reopened the comment period on listing standards for erroneously awarded compensation.³ This reopening raised 40 new questions, including suggestions that the SEC would make substantive changes from the 2015 proposal such as removing the materiality requirements for clawback-triggering restatements. The SEC also did not provide an updated cost-benefit analysis or updated analysis under the PRA or the RFA.

The lack of updated analysis on costs, benefits, PRA burdens, and regulatory flexibility significantly impairs the public's ability to comment thoughtfully on these proposals. Importantly, it deprives the public of any insight into the thought process of the SEC and makes it impossible to evaluate whether the SEC's proposed rules are based on reasoned decision-making. While the SEC extensively discusses executive compensation practices in the NPRMs during the period prior to 2012 – a decade ago – the administrative record is nearly devoid of any analysis by the SEC with respect to more recent data and trends on executive compensation.⁴

For the reasons set forth above, we urge the SEC to re-propose these two rulemakings with updated cost-benefit analysis and analysis under the PRA and the RFA and provide for further public comment periods on prior to finalizing.

Sincerely,



Pat Toomey
Ranking Member
U.S. Senate Committee on Banking,
Housing, and Urban Affairs



Richard Shelby
Vice Chairman
U.S. Senate Committee on Appropriations

cc: The Honorable Hester M. Peirce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner

³ 86 Fed. Reg. 58232 (Oct. 21, 2021).

⁴ See, e.g., 80 Fed. Reg. at 36347-48 (discussing use of executive stock grants and stock option grants between 2010 and 2012) and 80 Fed. Reg. at 41172 (discussing the average number of accounting restatements between 2005 and 2012).