



March 14, 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 (Release No. 34-94074; File No. S7-07-15)

Dear Ms. Countryman:

The American Securities Association (ASA)¹ submits these comments in response to the Securities and Exchange Commission (SEC) release announcing the reopening of the comment period for the “pay versus performance” rule mandated by Section 953(a) of the Dodd-Frank Act (Release).

The “Reopening” Release Must Comply with the Administrative Procedure Act

As an initial matter, the ASA is concerned with the process used by the SEC to “reopen” a comment period for a rule that was initially proposed in 2015 (2015 Proposal).

The Release indicates the SEC will impose new mandates for issuers that were not included as part of the 2015 Proposal. These new mandates include additional performance metrics that must be disclosed in a pay for performance table, along with a requirement that issuers determine which metric it deems to be the most “important.” The Release also suggests that issuers would be required to assign rankings to various performance metrics that are used in conjunction with its incentive compensation plan.

In this regard, the SEC’s actions here are not an actual “reopening” of a comment period but rather they constitute a new rule proposal that must be subject to the procedures outlined in the Administrative Procedure Act (APA).

¹ The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA’s mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a diverse membership of almost one hundred members located in every geographic region of the United States.





The SEC is therefore required to conduct a thorough economic analysis to assess the impact of the new mandates it is proposing. Simply asking questions about whether the SEC should add new mandates on top of a rule it has already proposed is not sufficient under the APA nor does that action conform with the text and intent of the APA.

We strongly encourage the SEC to follow the APA and not deprive the public of basic information required by law. Anything less could undermine the agency's credibility.

The Substance of the Pay versus Performance Proposal Will Confuse Investors

From a policy standpoint, the ASA notes that the SEC has not properly incorporated substantial feedback it received on the 2015 Proposal.

As many commenters pointed out in 2015, the original proposal would result in investors receiving misleading or incomplete information in the proposed pay for performance table. Yet, the SEC's approach to implementing Section 953(a) continues to rely upon one-size-fits-all, prescriptive requirements that are not properly calibrated for every issuer and the differences in their incentive compensation plans.

Today, issuers include a host of information in the Compensation, Discussion, and Analysis (CD&A) and other disclosures regarding pay for performance. Many issuers would have to explain why the information included in the pay for performance table is inconsistent with disclosures they provide elsewhere. Such an outcome would not provide clear disclosure to investors, nor will it help them make informed decisions.

The 2015 Proposal's prioritization of total shareholder return (TSR) as a performance metric would also contribute to the phenomenon of "short-termism" in the capital markets by creating a perception that short-term stock returns are the most important measure of performance for companies.

The Release's suggestion that both pre-tax net income and net income be included in the disclosure could also confuse investors as many companies do not use these metrics in designing incentive compensation plans.

Further, the proposed mandate for issuers to choose their own "Company-Selected Measure" to disclose will introduce more confusion. How would disclosing a Company-Selected Measure – alongside three other performance metrics, some of which issuers may not even use – help investors better understand how companies align pay and performance?

Finally, a requirement that companies rank their "top 5" metrics would not provide a clear picture of pay for performance. Creating a new dynamic for issuers, who typically do not think





of metrics used for incentive compensation plans in terms of “rankings” does not make sense to anyone outside the halls of the SEC.

We believe a significantly more desirable approach for the SEC to adopt is one based on principles. Adopting a principles-based standard that allows issuers to explain – in their own words and based upon their unique profile – how they align executive pay with performance will benefit investors. A final rule must also acknowledge the significant amount of disclosure issuers already provide to investors on the topic. This type of approach aligns with the explicit language and the intent of Section 953(a), which does not mandate the type of prescriptive tabular disclosure included in the 2015 Proposal and re-introduced in the Release.

Conclusion

While we appreciate the opportunity to comment on this subject as noted above, we believe the SEC should re-propose the pay versus performance rule so that it can estimate - and the public can properly assess - the impact of the new mandates being considered.

The ASA looks forward to working with commissioners and staff at the SEC on this issue.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association

