

October 17, 2014

Mr. Kevin M. O'Neill
Deputy Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Comments on Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. O'Neill:

The Center On Executive Compensation (“Center”) is pleased to submit this set of comments to the Securities and Exchange Commission (“Commission”) providing its perspective on the Commission’s implementation of Section 953(a) of the Dodd-Frank Act, the pay for performance disclosure. Recently two commentators submitted letters making recommendations with regard to how the Commission should implement Section 953(a).¹ This letter will address a number of the assertions made within those two comment letters and provide the Center’s perspective on the implementation of Section 953(a).

The Center is a research and advocacy organization that seeks to provide a principles-based approach to executive compensation policy from the perspective of the senior human resource officers of leading companies. The Center is a division of HR Policy Association, which represents the chief human resource officers of over 350 large companies, and the Center’s more than 100 subscribing companies are HR Policy members that represent a broad cross-section of industries.

I. The Pay for Performance Disclosure Should Supplement the Summary Compensation Table

The Center believes that the Commission should implement Section 953(a) as a supplement to the Summary Compensation Table rather than a replacement. In this way, we agree with both the Council of Institutional Investors (CII)² as well as the AFL-CIO.³ There are, however, several inherent problems with how the Summary Compensation Table reports executive

¹ See Comments on Dodd-Frank Section 953(a) by the Council of Institutional Investors, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-328.pdf> (last visited 10/17/2014); and Comments on Dodd-Frank Section 953(a) by the American Federation of Labor and Congress of Industrial Organizations, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-329.pdf> (last visited 10/17/2014).

² Comments on Dodd-Frank Section 953(a) by the Council of Institutional Investors, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-328.pdf> (last visited 10/17/2014).

³ Comments on Dodd-Frank Section 953(a) by the American Federation of Labor and Congress of Industrial Organizations, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-329.pdf> (last visited 10/17/2014).

compensation which distort the total pay figure.⁴ Thus, while the Summary Compensation Table disclosure is useful because it is comparable among companies and provides helpful information regarding the expected expense associated with the compensation committee's intended level of pay, total compensation as disclosed in the Summary Compensation Table cannot provide a useful assessment of pay for performance or pay versus alignment with total shareholder return (TSR). The pay for performance disclosure requirement of Dodd-Frank Section 953(a) provides the Commission with an opportunity to mitigate the shortcomings of the Summary Compensation Table through a supplemental disclosure.

In its comment submission the AFL-CIO discourages the Commission from adopting "alternative" pay formulas in implementing Section 953(a).⁵ The AFL-CIO's argument, however, seems purposefully misguided in an effort to promote its own suggested implementation of Section 953(a) which utilizes a comparison of Summary Compensation Table total pay with TSR.⁶ The AFL-CIO justifies its criticism of "alternative" pay formulas by claiming that the disclosures "dramatically underestimate executive compensation."⁷ This claim is without merit because the Summary Compensation Table is susceptible to the same criticism, as demonstrated in Facebook's disclosure of CEO Mark Zuckerberg's total pay. According to Facebook's 2013 Summary Compensation Table disclosure, Mr. Zuckerberg received less than \$700,000 in total compensation for fiscal year 2013 while serving as Facebook's CEO. However, a realized pay disclosure would have included the value of options exercised by Mr. Zuckerberg which amounted to \$3.3 billion, providing a superior view of compensation actually "paid."⁸ Regardless, the AFL-CIO's argument misses the point of Section 953(a) which is to provide an additional, supplemental pay disclosure with the goal of presenting the connection between CEO pay and company performance.

⁴ The Summary Compensation Table is not useful in assessing pay for performance or pay versus alignment with total shareholder return (TSR) because the total measure of pay includes a mix of *actual* pay (e.g. salary, annual incentive and any long-term cash incentives) and accounting *estimates* of *future potential* pay (e.g. performance shares, restricted stock, and stock options) in addition to changes in pension value resulting from fluctuations in the discount rate.

⁵ Comments on Dodd-Frank Section 953(a) by the American Federation of Labor and Congress of Industrial Organizations, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-329.pdf> (last visited 10/17/2014).

⁶ *Id.*

⁷ *Id.*

⁸ The AFL-CIO's comments seem specifically targeted at discouraging the Commission from adopting realized pay as promoted by the Center and espoused in the recent Conceptual Framework on Supplemental disclosures, noting that "while realized pay may be helpful to investors as supplemental disclosure" that "there are certain fundamental flaws to this approach that make it unsuitable for illustrating the relationship of executive pay to performance." Although the decision to exercise options is, as the AFL-CIO points out, often a voluntary one, the fact remains that the executive realizes no compensation until the option is exercised. Since realized pay is a measure of what the executive actually receives, under a realized pay disclosure, options should not be considered realized until exercised, at which point the gains may be compared to the corresponding return to shareholders over the period the options were outstanding. As noted above, however, the AFL-CIO's argument misses the fact that Section 953(a) is aimed at providing additional and supplemental information to the Summary Compensation Table to facilitate an investor's evaluation of an issuer's pay for performance program.

II. The Commission Should Define “Actually Paid” Broadly to Include both Realized and Realizable Pay

The statutory text of Section 953(a) of the Dodd-Frank Act instructs the Commission to require issuers to disclose

“...information that shows the relationship between executive compensation *actually paid* and the financial performance of the issuers, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions” (emphasis added).

As the Commission engages in rulemaking on 953(a), the interpretation of the phrase “executive compensation *actually paid*” (emphasis added) will be the key determination. The language of Dodd-Frank Section 953 provides little guidance as to the definition of “actually paid,” except for language in Section 953(b)(2) which distinguishes Summary Compensation Table total pay from the definition of “actually paid” referenced in 953(a)(1).⁹ The Center urges the Commission to adopt a broad definition of “actually paid” which would allow companies to craft disclosures which will by necessity vary based on how the Compensation Committee and the Board structure the performance basis of incentive compensation granted to executives. We believe the Commission should interpret “executive compensation actually paid” in a manner which would include both realized and realizable pay disclosures.¹⁰

With regard to the broad interpretation, our views generally align with the August 6, 2014 letter from the Council of Institutional Investors, which supported a broad interpretation of the phrase “actually paid” in their recent comment submission.¹¹ Our viewpoints differ from both CII¹² and the AFL-CIO,¹³ however, with regard to whether or not one-time special make-whole awards should be included in the pay for performance disclosure. Unlike pay awarded based on the achievement of performance objectives, these awards are granted to serve as an inducement to join a company by replacing awards forfeited by leaving a prior job and are not tied to the performance of the new company. We are not suggesting that one-time special make-whole awards should not be included elsewhere in the proxy statement and believe that investors should

⁹ The language of Section 953(b)(2) expressly references Summary Compensation Table total pay stating “For purposes of [953(b)], the total compensation of an employee of an issuer shall be determined in accordance with section 229.402(c)(2)(x) of title 17, Code of Federal Regulations.” Congress presumably would not have used distinct language in both 953(a) and 953(b) if there had been an intent for both 953(a) and 953(b) to share the same definition of pay. As a result, requiring a standardized disclosure of Summary Compensation Table pay data compared to TSR or a comparison of the percentage change in pay to a percentage change in TSR as suggested by the AFL-CIO would directly contradict the language of Dodd-Frank and Congressional intent.

¹⁰ “Supplemental Pay Disclosure: Overview of Issues, Proposed Definitions, and a Conceptual Framework”, The Conference Board Working Group, available at <http://www.execcomp.org/Docs/Conference Board Supplemental Pay Disclosures 9-29.pdf>, (last visited 10/17/2014).

¹¹ Comments on Dodd-Frank Section 953(a) by the Council of Institutional Investors, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-328.pdf> (last visited 10/17/2014).

¹² *Id.*

¹³ Comments on Dodd-Frank Section 953(a) by the American Federation of Labor and Congress of Industrial Organizations, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-329.pdf> (last visited 10/17/2014).

be provided the opportunity to judge whether or not any such payment was appropriate in the context of overall performance and company strategy. However, by requiring non-performance-based pay like one-time special make-whole awards to be included in a pay for performance disclosure, the Commission risks creating the same distortions that render the Summary Compensation Table less useful for assessing pay for performance or pay versus alignment with TSR. Consistent with the objective of Section 953(a), the intent of supplemental pay disclosures is not to merely replicate the Summary Compensation Table measure of pay but rather to provide information on compensation actually paid and the relationship to performance.

III. The Commission's Pay for Performance Disclosure Should Focus on Long-Term, CEO Pay

We recommend the Commission require the disclosure to apply over multiple years because the longer the time period involved, the greater insight the disclosure will provide to investors as to whether pay and performance are aligned. The Center believes that, in general, a three-year period should be used for the pay for performance disclosure. However, the Center believes that longer time frames may be appropriate and advises the Commission to provide for flexibility to allow companies to craft a disclosure consistent with the company's investment and business cycles. Our views are generally consistent with CII which emphasized the need for the disclosure to encompass a longer time horizon.¹⁴

With regard to the individual(s) included in the pay for performance disclosure, the Center recommends the Commission limit the disclosure to the CEO. Since 2010, the average CD&A length for an S&P 500 company has grown from 15 pages to nearly 17.5 pages, according to Center data. Some of this growth has been driven by mandated disclosures, but much of it is a result of company efforts to effectively and completely tell their pay for performance stories for the benefit of investors. Since CEO pay typically sets the tone for the organization and say on pay results from the last three years demonstrate that CEO pay is the primary focus of investors, supplemental pay disclosures should focus on CEO pay as a means to manage the growing length of pay disclosures. The SEC should provide flexibility for companies to provide supplemental disclosures on other named executive officers, especially if they feel it would be helpful for investors to understand the company's pay for performance story.

IV. The Commission Should Provide Flexibility with Regard to Performance Measures in the Pay for Performance Disclosure

With regard to the measure of performance in the pay for performance disclosure, the statutory text of Section 953(a) of the Dodd-Frank Act instructs the Commission to require issuers to disclose

“...information that shows the relationship between executive compensation actually paid and the financial performance of the issuers, *taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions*” (emphasis added).

¹⁴ Comments on Dodd-Frank Section 953(a) by the Council of Institutional Investors, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-328.pdf> (last visited 10/17/2014).

The Center believes the Commission should interpret the language of 953(a) regarding the measure of performance to include TSR. However, we do not recommend that TSR be the sole metric allowed and recommend that in the proposed rules the Commission permit companies to use other metrics which demonstrate their incentive plans are consistent with long-term increases in shareholder value and with the company's business strategy. We note that our views are consistent with those of CII, which stated that the language of Section 953(a) should be interpreted as a measure of TSR but also noted that "other performance metrics may be appropriate."¹⁵

On the other hand, the Center does not recommend the Commission require the disclosure of "quantifiable performance metrics, numerical formulas, and payout schedules" as suggested by the AFL-CIO.¹⁶ Executive compensation plan structures provide issuers with a competitive advantage and serve as a fundamental recruitment and retention tool in the highly competitive market of hiring and retaining executive talent. Furthermore, issuers develop their executive compensation plans to reflect business and market realities with the goal of maximizing shareholder value. By requiring the disclosure of "quantifiable performance metrics, numerical formulas, and payout schedules," the Commission may effectively negate any competitive advantage received from developing a superior compensation plan, thereby harming shareholders and issuers alike. Furthermore, the disclosure may lead to the homogenization of pay packages as it would create external pressures on issuers in areas which are traditionally the purview of a company's board of directors.

¹⁵ *Id.*

¹⁶ Comments on Dodd-Frank Section 953(a) by the American Federation of Labor and Congress of Industrial Organizations, available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-329.pdf> (last visited 10/17/2014).

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V. Conclusion

The Center appreciates this opportunity to provide additional comments on the implementation and rulemaking related to Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. If you have any questions about the Center's comments, please do not hesitate to contact me at tbartl@execcomp.org.

Sincerely,



Timothy J. Bartl
President



Henry D. Eickelberg
Counsel

cc: Securities and Exchange Commission:
Hon. Mary Jo White, Chair
Hon. Luis A. Aguilar, Commissioner
Hon. Daniel Gallagher, Commissioner
Hon. Kara M. Stein, Commissioner
Hon. Michael S. Piwowar, Commissioner