July 23, 2015

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Proposed Rules on Pay Versus Performance (Release No. 34-74835; File No. S7-07-15)

Dear Mr. Fields:

The Corporate Governance Coalition for Investor Value (the "Coalition") has been formed to provide a forum for the discussion of issues of common interest among its members to advocate for strong corporate governance policies and the federal securities laws that promote long-term value creation for investors and the firms in which they invest. Coalition members represent American businesses of all sizes, from every industry sector and geographic region. These businesses produce the goods and services that drive the American economy, employing and creating opportunities for millions of Americans, and serving the countless communities nation-wide in which they operate. The Coalition believes that strong corporate governance policies are important to provide investors with return and businesses with the capital needed to grow and operate.

We appreciate the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission ("Commission") in the release entitled "Pay Versus Performance" (the "Proposal"). The Proposal seeks to implement Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). While the Coalition believes that more disclosure on this topic can be beneficial to investors, we are concerned that the Proposal's rigid, one-size-fits-all

approach to the issue of pay versus performance could be damaging to investors' understanding of executive compensation. We are also concerned that the Proposal's rigid schematic disclosure and reliance on total shareholder return ("TSR") will exacerbate the unfortunate trend toward "short-termism" in the way corporations and their managers are evaluated by some market participants.

The Coalition believes that in lieu of the one-size-fits-all disclosure contemplated by the Proposal, investors would be better served by a flexible approach that more accurately captures the nuances in compensation decisions among issuers. Any final rule should jettison the requirement under proposed Item 402(v) to prepare a complicated, multi-columned table. Instead, the Coalition believes that pay versus performance disclosure should follow a principles-based format, allowing issuers to describe the performance metrics they use and to explain their processes for establishing compensation guidelines in a way that best expresses how pay and performance are aligned for their individual circumstances. The Coalition's specific comments are discussed in greater detail below.

I. The Commission should follow a principles-based approach.

The Proposal would add a new paragraph (v) to Item 402 of Regulation S-K. This new disclosure seeks to provide additional information about the relationship between executive compensation actually paid to an issuer's most senior executive officers and the TSR of the issuer, as well as the relationship between the issuer's TSR and its peer group. The proposed disclosure is intended to provide additional information to investors when they make the say-on-pay advisory vote and other voting decisions regarding executive compensation.

To that end, Item 402(v) would require companies to provide a table containing six columns: (a) Year, (b) Summary Compensation Table Total for Principal Executive Officer ("PEO") (c) Compensation Actually Paid to PEO, (d) Average Summary Compensation Table Total for non-PEO Named Executive Officers (each, an "NEO"), (e) Average Compensation Actually Paid to non-PEO Named Executive Officers, (f) Total Shareholder Return, and (g) Peer Group Total Shareholder Return. The Proposal also requires disclosure about the relationship between executive compensation and company performance, which could be described narratively, graphically, or using a combination of the two.

By requiring the preparation of an overly complicated and potentially confusing table, the Proposal departs from the statutory mandate contained in Section 953(a) of the Dodd-Frank Act. We find no requirement in the statute that compels this level of intricacy. We are also concerned that the proposed tabular disclosures will be of little practical utility to investors while at the same time fostering confusion and a false sense of comparability among companies.

As discussed below, a principles-based approach avoids the flaws inherent in comparing compensation "actually paid" to TSR. To our knowledge, few, if any boards of directors use the definition of "compensation actually paid" in determining executive compensation and few, if any, companies disclose the relationship between "compensation actually paid" and TSR in their proxy statements. However, the prescriptive, tabular approach will virtually require that companies provide supplemental disclosure to clarify the potentially confusing and misleading conclusions that the comparisons are likely to generate. This runs counter to the Commission's goals of clear and concise disclosure.

Instead of adopting a table that would contain largely hypothetical information, the Coalition urges the Commission to adopt a more straightforward principles-based approach. Under this approach, issuers would be required to disclose how boards of directors view performance and construct compensation. Thus, issuers would be required to discuss the criteria that are actually important to them, along with how the principal executive officer ("PEO") performs over time against those criteria. Such an approach has the added benefit of being consistent with the narrative style currently embodied in Compensation Discussion and Analysis disclosure under Item 402(b) of Regulation S-K. Moreover, the Proposal already requires supplemental disclosure of this type, and the Coalition believes it would be more sensible simply to cut to the chase, bypassing the mandated use of the proposed table altogether.

II. <u>The compulsory use of TSR and Compensation "Actually Paid" are problematic.</u>

Under the Proposal, issuers would be required to use TSR as the primary measure of financial performance for purposes of the Item 402(v) disclosure, in place of other metrics that companies may rely on when evaluating performance and establishing compensation guidelines for executives. Issuers other than smaller

reporting companies would also be required to disclose peer group TSR, using either the same peer group used for Item 201(e) of Regulation S-K or a peer group used in the compensation discussion and analysis for purposes of disclosing the company's compensation benchmarking practices. If the peer group is not a published industry or line-of-business index, the identity of the companies in the peer group would be required to be disclosed.

Although boards of directors strive to create long-term shareholder value when identifying performance metrics and setting performance targets for the PEO and other senior executives, few boards rely exclusively on total shareholder return, especially as Item 201(e) of Regulation S-K requires it to be disclosed as proposed Item 402(v) otherwise contemplates. Rather, most boards usually rely on a mix of other financial and nonfinancial metrics, along with TSR, that are appropriate for their companies' individual circumstances and respective industries. Another unintended consequence of a Commission endorsement of TSR is that issuers may begin to rely more heavily on stock performance instead of operating metrics in setting executive pay, which runs counter to concerns raised by investors, consultants and research organizations. Putting undue emphasis on TSR exacerbates the risk that issuers will chase short-term performance at the expense of pursuing long-term value creation for shareholders.

The Coalition is concerned that using TSR as a yardstick will confuse many investors by incorrectly suggesting that TSR is the only metric that companies use (or should be using) when they negotiate executive compensation. To the contrary, most companies consider numerous variables when negotiating executive compensation. Similarly, the exclusive use of TSR does not take into account company-specific factors that affect compensation decisions or any of the numerous reasons that compensation may not be correlated with performance, especially over a short-term horizon.

Doubling down on complexity, the Proposal defines compensation "actually paid" as total compensation as reported in the Summary Compensation Table, adjusted for amounts included for pension benefits and equity awards. First, the change in the actuarial present value of all defined benefit and pension plans would be deducted, but the actuarial present value of benefits attributable to services rendered by the executive during the applicable year would be added back. Second, the above-

market or preferential earnings on deferred compensation that is not tax-qualified would be included in the compensation calculation. Third, the grant-date value of any stock and option awards granted during the year that are subject to vesting would be subtracted. Finally, the fair value at vesting date of equity awards that vested in the applicable year would be added. Equity awards would be considered actually paid on the date of vesting, regardless of whether or not they are exercised, and valued at fair value on the vesting date, rather than fair value on the grant date. Additionally, if the exercise price of previously vested options or stock appreciation rights was adjusted or amended during the last completed fiscal year, the company's compensation calculation must include the incremental fair value.

Even with explanatory footnotes, we believe few investors will use the intricate calculus that goes into arriving at compensation "actually paid," and they will instead focus on the very deceptive bottom-line number. Moreover, when the calculation is unpacked, it becomes evident that compensation "actually paid" includes a variety of adjustments that do not provide a fair measure of the total amount paid to the PEO and other NEOs or its relation to those officers' performance. The Coalition is confused, for example, as to why the Proposal places such heavy emphasis on the accounting expense estimate of stock options as of the vesting date. Assuming, as the Commission states in the release that the compensatory aspect of an option ends at the vesting date, the appropriate valuation would be the difference between the market price of the stock on the vesting date and the exercise price. Thus, valuing the option using the spread as of the vesting date aligns the time frame for performance with the time frame for pay.

Few boards of directors think of compensation "actually paid" in the same way that the Proposal does. In many cases, boards and compensation committees also base compensation decisions on executive performance occurring over multiple years rather than a single one. However, the outstanding time frame for these awards will not align with the time periods for TSR in the proposed table. Each of the foregoing shortcomings provides further evidence that a principles-based approach to pay versus performance disclosure is superior to the Proposal's forced comparison between TSR and compensation "actually paid".

We suggest the Commission reconsider how compensation "actually paid" to the PEO and executive officers should be determined. The proposed calculation—

starting from the Summary Compensation Table total, backing out unvested stock and option awards and pension values, and adding back the fair value of vested awards and the value of the pension accrual for the applicable year—is unnecessarily complicated, and does not represent what the ordinary retail investor would think was "actually paid" to an executive. For example, it seems unlikely that a retail investor would expect that "actual pay" would include as-yet unpaid pension accruals, the accounting value of vested stock awards (as opposed to the amount actually received) or unexercised stock options. Pension benefits are not paid until the executive experiences a distributable event (e.g., death, disability, retirement), so including them in "actual pay" overstates and misrepresents the PEO or executive's current actual pay. Similarly, including stock options that are vested but have not yet been exercised also misrepresents the PEO or executive's actual pay, since he or she could later exercise the options at a much higher or much lower stock price. As a result, we recommend that (a) options be excluded from this disclosure until options have been exercised and the executive has actually received the resulting cash or stock and (b) pension benefits be excluded altogether. Finally, we note that both pension benefits and unexercised stock options are also already clearly disclosed in the Pension Benefits and Outstanding Equity Awards tables.

We believe the Commission should instead consider giving companies the flexibility to utilize an appropriate calculation for compensation "actually paid" that is consistent with the way in which the company makes its own internal compensation decisions and that appropriately reflects the company's compensation structure. For example, in some cases it may be most useful for a company to use the wages reported to the Internal Revenue Service on the Form W-2.

More specifically, we believe the Commission should instead consider permitting companies to use the wages reported to the Internal Revenue Service on the Form W-2 (or, for executives who do not report their income in the U.S., the amount reported to the applicable tax authority) as the compensation actually paid to the executive. The proposed calculation seems to contradict the statutory language, adding complexity not intended by Congress. In Section 953 of the Dodd Frank Act, Congress very clearly referenced the Summary Compensation Table total in subsection (b), but did not do so in (a), where Congress chose not refer to the Summary Compensation Table total and instead uses the phrase "actually paid". Given the close proximity of these two provisions and the difference in statutory

language, we suggest that Congress did not intend that compensation for this purpose would be determined by reference to the Summary Compensation Table. We suggest that the commonly understood, ordinary meaning of the phrase "actually paid" is reportable income, which is shown as wages on the Form W-2. Among other things, Form W-2 wages would include base salary, annual and retention bonuses, and vested stock awards as well as amounts received in connection with exercised stock options. Bonuses, stock awards and vested options that are exercised in future years would be reflected in the Form W-2 and the pay for performance disclosure for the year of actual payment. The change we propose merely alters the timing of this supplemental disclosure (again, unexercised options are already disclosed in the Outstanding Equity Awards table).

Finally, Form W-2 wage information is readily available to companies preparing their proxy and similar filings, eliminating additional compliance costs that would result from the proposed approach (for example, the added expense for fair value accounting or actuarial calculations).

III. The Commission should only require disclosure for the PEO.

In addition to tabular and narrative disclosure concerning the PEO, the Proposal would also require separate aggregated disclosure for the remaining NEOs who are listed in an issuer's Summary Compensation Table. We note that Section 953(a) of the Dodd-Frank Act includes no requirement to discuss the other NEOs. The Coalition believes that providing disclosure for these other executives will further undermine a clear understanding of pay versus performance.

The Proposal relies on aggregated data for the other NEOs to smooth out the high degree of variability in compensation among this executive group as well as to overcome the higher level of turnover within the group relative to the PEO. But it is precisely this smoothing effect that makes this feature of the Proposal so problematic.

The fluctuation in the annual make-up of the NEO group and the inherently high level of volatility that will be associated with an average compensation number makes the use of that average number wholly unreliable for any individual company, and the problem is compounded when it is used as the basis for comparison among multiple companies. Issuers hire and compensate senior executives using criteria that

are constantly evolving. Compensation packages may vary widely for different executives within the same company, especially in the case of external recruitment of a critical role. Furthermore, the NEO group often includes administrative officers (such as the chief accounting officer and general counsel) who may have limited ability to influence a company's financial results in the same way as the PEO. Moreover, their influence varies widely according to their respective roles within their own companies and also in comparison to the NEOs of peer issuers. Therefore, the Coalition urges the Commission to limit disclosure in Item 402(v) to the PEO only.

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Thank you for considering our views on the Proposal. We would be pleased to discuss our concerns or any other matters that you believe would be helpful.

Sincerely,

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American Insurance Association
Biotechnology Industry Organization
Independent Community Bankers of America
National Association of Manufacturers
National Association of Real Estate Investment Trusts
National Black Chamber of Commerce
Property Casualty Insurers Association of America
Securities Industry and Financial Markets Association
The Center On Executive Compensation
The U.S. Chamber of Commerce