

CII Makes Recommendations to SEC on Writing Dodd-Frank Pay for Performance Rulemaking, Questions How to Define Compensation “Actually Paid”

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The Council of Institutional Investors (CII) sent a [letter](#) to Keith Higgins, the director of the SEC Division of Corporation Finance, related to the Dodd-Frank requirement for the SEC to promulgate rules for disclosure of the link between executive pay and company performance. Companies must provide a “clear description” of the relationship between executive compensation “actually paid” and the “financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions.” These highlighted areas represent several challenges for interpretation in formulating rules.

CII’s letter indicates that a prior meeting took place with the SEC staff to discuss Dodd-Frank rulemaking and urges the SEC not to change the existing Summary Compensation Table in preparing new rules. CII suggests that the SEC require, at minimum, two graphic representations of pay for performance information, one for the CEO and another graph that includes all named executive officers in the aggregate, to span at least a five-year time period. CII supports the reading that the reference in the statute to changes in value of shares and dividends and distributions represents a measure of total shareholder return (TSR), and that executive compensation should at least be compared to TSR.

As to the question of compensation “actually paid,” CII believes that the language should be interpreted as broadly as possible to cover various components of pay that would include one-time bonuses for new hires and “make whole” awards for forfeited pay. They recommend that the SEC carefully consider the possible consequences of deciding in the rules that any form of compensation is not “actually paid,” out of concern that some companies will “attempt to game the disclosure.”

The SEC faces a challenge in addressing that term in the statute for equity awards. In a November 2013 [policy briefing](#), the Center for Executive Compensation noted that determination of “actually paid” may vary depending on the performance basis of incentive compensation. If incentive grants are based on future performance, then “actually paid” may be akin to “realized pay.” By contrast, if incentive grants are rewarding past performance, then the compensation “actually paid” may be the grand date fair value of the awards or the realizable value of the awards as of the reporting date, because realizable pay shows the value of awards based on the intrinsic value of stock-based grants.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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