March 4, 2022

The Honorable Gary Gensler
Commissioners
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090
Washington D.C.

Via email: rule-comments@sec.gov

File Number S7–07–15
RIN 3235–AL00
Reopening of Comment Period for Pay Versus Performance

Dear Commissioners,

The undersigned organizations are pleased to offer the following comments in response to the invitation from the Securities and Exchange Commission (SEC, agency, commission) regarding implementation of the pay-versus-performance rule mandated by statute. The agency notes that it is "reopening" comment for a proposal first unveiled in 2015.[1]

We support the Commission's proposals for increased disclosure regarding Total Shareholder Returns (TSR), but we also strongly urge you to expand the definition of financial performance beyond this narrow indicator. The current corporate model of shareholder primacy has encouraged reckless executive behaviors that have accelerated climate change, increased inequality, and made millions of low-wage U.S. families much more vulnerable to the pandemic crisis. All these trends pose threats to the financial health of companies, the country, and the world. We therefore urge you to require that companies also report metrics that reflect how well they are performing in addressing climate change, creating good jobs, and advancing racial and gender equity. We welcome Commissioner Allison Lee's invitation to comment on how the "compensation landscape" may relate to issues such as climate and other social and governance goals.[2]

Background

In 2010, Congress approved the Dodd-Frank Wall Street Reform and Consumer Protection Act. As part of this, Section 953(a) added Section 14(i) to the Securities Exchange Act of 1934 1 ('Exchange Act'), which requires that the SEC adopt rules that oblige issuers to disclose in their materials associated with

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[1]Securities and Exchange Commission, *Reopening of Comment Period for Pay Versus Performance*, FEDERAL REGISTER (Feb. 2, 2022) https://www.govinfo.gov/content/pkg/FR-2022-02-02/pdf/2022-02024.pdf
[2] Commissioner Allison Lee, *Measuring Pay Against Performance: Are Shareholders Getting Their Money's Worth?* SECURITIES AND EXCHANGE COMMISSION (Jan 27, 2022) https://www.sec.gov/news/statement/lee-statement-pvp-012722

the annual shareholder meeting "a clear description of any compensation" along with the "relationship" with "the financial performance" of the company. This performance should include "any change in the value of the shares of stock and dividends" paid.[3]

In 2015, the Commission offered a proposal and invited comment. This 2015 proposal included a table that would describe compensation "actually" paid along with the total shareholder return (TSR) of the company as well as the total shareholder return of peer group companies. Total Shareholder Return (TSR) includes the change in shareholder value along with dividends that shareholder received. More specifically, the 2015 proposal would include a table that lists the executive compensation actually paid to be presented separately for the principle executive officer (PEO), and as an average for the remaining named executive officers (NEOs); the TSR, (as defined in Item 201(e) of Regulation S–K), and the TSR of the registrant's peer group; the relationship between executive compensation actually paid to the registrant's NEOs and the cumulative TSR of the registrant; the relationship between the registrant's TSR and the TSR of a peer group chosen by the company, in each case over the registrant's five most recently completed fiscal years; and require that the disclosure be provided in a structured data language using the Inline eXtensible Business Reporting Language (''Inline XBRL'').

We support the Commission's proposed table, enhanced with citation of pre-tax and net income. Net income is required to be disclosed in financial statements. While some registrants are not explicitly required to present pre-tax net income in their financial statements, U.S. Generally Accepted Accounting Principles includes presentation and disclosure requirements that result in information sufficient to calculate pre-tax net income. This table will help investors see clearly how pay connects to shareholder return, and to see whether an increase in pay simply stems from market conditions that benefit all firms in the peer group, or whether the company performs better or worse than its peers.

We do not oppose disclosure of a measure that the company can itself choose. Many companies already use revenue as a basic metric. When using this additional measure, we ask the Commission to require that it be used for at least five years, to prevent firms from using a measure that best justifies compensation in a given year. If firms wish to add an additional measure, they would be welcome. We appreciate the commission's injunction that supplemental measures of compensation and/or financial performance be clearly identified, not misleading and not presented with greater prominence than the required disclosure.

We also appreciate that the Commission will review the individual comments that many of us submitted during the 2015 rulemaking as new submissions to this record.

New Proposals

Since the SEC first proposed a rule for this pay-for-performance disclosure, there has been a substantial increase in company share repurchases, or buybacks. Beginning in 2010, American corporations spent more than $6.3 trillion to purchase their own shares.[4] These buybacks have increased share values and led to an increase in executive compensation where a firm uses stock-based plans. But buybacks do not evince management acumen; in fact, management justifies a buyback when they believe they cannot deploy investor capital through innovation, greater production, or other expressions of management

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[3] *Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 953* (2010) https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf

[4] Lenore Palladino, William Lazonick, *Regulating Stock Buybacks: The $6.3 Trillion Question*, ROOSEVELT INSTITUTE (May 2021) https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI_Stock-Buybacks_Working-Paper_202105.pdf

success. We are concerned that dependence on Total Shareholder Returns (TSR) promotes buybacks. While we do not propose that the SEC delete this requirement, we believe that the SEC should include other metrics.

We are therefore pleased that the agency entertains this concept as it reopens comments.

Executive compensation in the last half-century has grown substantially. In the 1960s, the CEO received about 20 times the pay of the average worker at the firm. Today, the ratio is more than 300-1.[5] Moreover, this increase does not stem from better performance. In fact, studies affirm little if any connection between pay and performance.[6] Shareholders should wish to bridle this excessive expense on executive compensation, as they would with any unnecessary expenditure, and certainly prevent pay from incentivizing misconduct.[7] Through the so-called say-on-pay votes required by statute at publicly traded companies, some pay packages are rejected by shareholders.[8] But shareholders lack a key ingredient when assessing a pay package, namely, a clear report by the company as to how specific pay relates to any performance metric that the company actually uses. Firms will discuss pay at length, as required by SEC rule, but shareholders cannot decipher precisely how the resulting pay is determined. As the agency notes, "there is no existing rule that specifically mandates disclosure of the performance measures that actually determined the level of . . . compensation actually paid."[9]

We therefore enthusiastically welcome the SEC's newly proposed consideration that companies list the "five most important performance measures used . . . to link compensation actually paid . . . over the time horizon of the disclosure, in order of importance." This elegant idea will certainly help investors understand how and why executive pay is determined. Ideally, it will equip investors to better understand how they should vote on say-on-pay resolutions.

Environmental Metrics

As noted, the statute in Section 953(a) requires disclosure of pay as it relates to the "financial performance" of the firm. Financial performance naturally turns on many factors, such as the development of profitable products and services, improved management of expenses, or advances in productivity. The existential challenge of our day is how the world, including its companies, will respond to, and, ideally, mitigate climate change. Climate change will mean immeasurable differences in virtually all segments of every industry. Real estate developers will encounter diminishing shorelands, where most large cities are now based. Pharmaceutical companies will be challenged by new diseases from an altered biosphere. The food industry, including restaurants, will face evolving produce changes.

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[5] Lawrence Michel, *CEOs were paid 351 times as much as a typical worker in 2020,* ECONOMIC POLICY INSTITUTE (AUGUST 21, 2021) https://www.epi.org/publication/ceo-pay-in-2020/
[6] Lucian Bebchuk, Jesse Fried, *Pay Without Performance,* HARVARD UNIVERSITY PRESS (2004) http://www.law.harvard.edu/faculty/bebchuk/pdfs/Performance-Part2.pdf
[7] Bartlett Naylor, *White Collar Crime Still Pays,* PUBLIC CITIZEN (July 21, 2020) https://www.citizen.org/news/white-collar-crime-still-pays-10-years-after-dodd-frank/
[8] Rosanna Landis Weaver, *The 100 Most Overpaid CEOs,* AS YOU SOW (February 2020) https://www.asyousow.org/report-page/the-100-most-overpaid-ceos-2020
[9] Securities and Exchange Commission, *Reopening of Comment Period for Pay Versus Performance*, FEDERAL REGISTER (Feb. 2, 2022) https://www.govinfo.gov/content/pkg/FR-2022-02-02/pdf/2022-02024.pdf

Pay incentives helped to cause climate change.[10] Why oil company executives would knowingly continue to feed (and originally deny) an existential crisis that would imperil themselves, their own progeny, and the world, may be as simple as this: they were paid to.

Since drillers began extracting oil from places such as Titusville, Pa in the mid-19th century, entrepreneurs were paid to find and sell more. Even today, major oil companies largely pay their executives based on how much more fossil fuels they locate and sell.[11] One study found that the CEOs of the 30 largest oil companies made nearly 10 percent more than the average S&P 500 CEO, and the heads of Exxon and ConocoPhillips made double that average.[12] Median pay at these firms can also be substantial, nearing $200,000 at Exxon, one of the world's largest employer in this sector.[13] (The median means half are paid more, and half less.) Incentivized by these pay structures, half of all fossil fuel infrastructure has been built since 2004, a period long after scientists had reached consensus on the severity of the threat from human-driven climate change.[14] Fully 90 percent of the 30 largest oil and gas producers reward their executives for increases in production and reserves.[15]

Enlightened shareholders, including some institutional shareholders, have begun to focus on the link between how these executives face their responsibility to repair the atmosphere and how they are paid. As You Sow, for example, presses companies through shareholder resolutions to reform their pay practices.[16]

The SEC's proposal to require firms to list the five most important metrics that determine executive pay can help spotlight whether a company's pay incentives contribute to or complicate needed reforms to combat climate change. Ideally, self-interested shareholders who understand that an unhealthy planet will be unprofitable will promote companies to link pay to appropriate metrics.

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[10] Among the first experts to understand that carbon emissions were warming the planet through the greenhouse effect were oil company scientists themselves. Major drillers hoped to extract oil from the Arctic, a forbidding prospect given the prevailing freeze. This oil would generate more income, and more compensation. Their scientists' studies, beginning in the 1970s, showed that the prospect for profiting from such oil might improve as they documented persistent warming. Only as other experts began to understand the planetary threat from global warming, which dwarfed the benefit of shaving costs from Artic drilling, did these same companies squash the studies, and even financed a public campaign to deny, or at least question climate change science.

[11] *Groundhog Pay*, CARBON TRACKER (Dec. 14, 2020) https://carbontracker.org/reports/groundhog-pay-how-executive-incentives-trap-companies-in-a-loop-of-fossil-growth/

[12] Sarah Anderson, *Money to Burn*, INSTITUTE FOR POLICY STUDIES (Sept. 2, 2015) https://ips-dc.org/wp-content/uploads/2015/09/EE2015-Money-To-Burn-Upd.pdf

[13] *Battered Schlumberger Reported Largest CEO to Median Employee Pay Ratio*, S&P GLOBAL (Sept. 15, 2020) https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/battered-schlumberger-reported-largest-ceo-to-median-employee-pay-ratio-in-2019-60328650

[14] Ezra Klein, *It Seems Odd That We Would Just Let the World Burn*, NEW YORK TIMES (July 15, 2021) https://www.nytimes.com/2021/07/15/opinion/climate-change-energy-infrastructure.html?action=click&module=Opinion&pgtype=Homepage

[15] *Groundhog Pay*, CARBON TRACKER (Dec. 14, 2020) https://carbontracker.org/reports/groundhog-pay-how-executive-incentives-trap-companies-in-a-loop-of-fossil-growth/

[16] Camila Domonoske, *Some CEOs are Hearing a New Message: Act on Climate or We'll Cut Your Pay*, NPR (April 20, 2021) https://www.npr.org/2021/04/20/988686847/some-ceos-are-hearing-a-new-message-act-on-climate-or-well-cut-your-pay. As You Sow is a non-profit shareholder activist organization

Again, we appreciate the support expressed by Commissioner Lee's that financial results may relate to the company's attention to issues such as climate, labor management and governance.[17]

In conclusion, we appreciate the SEC's attention to this important rulemaking, and especially welcome the needed disclosure of metrics actually used by companies in determining executive compensation.

Sincerely,

Better Markets

Institute for Policy Studies, Global Economy Project.

Public Citizen

[17] Commissioner Allison Lee, *Measuring Pay Against Performance: Are Shareholders Getting Their Money's Worth?* SECURITIES AND EXCHANGE COMMISSION (Jan 27, 2022) https://www.sec.gov/news/statement/lee-statement-pvp-012722