March 2, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Reopening of Comment Period for Pay Versus Performance

Dear Ms. Countryman:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the “AFL-CIO”), I am writing to provide comments to the U.S. Securities and Exchange Commission in response to the reopening of the comment period for pay verses performance [Release No. 34-94074; File No. S7-07-15]. The AFL-CIO is a federation of 57 national and international labor unions that represent 12.5 million working people. Union members participate in the capital markets as individual investors as well as participants in pension and employee benefit plans. We appreciate the opportunity to share our views on the important topic of executive compensation. This letter supplements the AFL-CIO’s previously submitted comments on the proposed pay verses performance rule [Release No. 34-74835; File No. S7-07-15].

We commend the Commission for moving forward with its rulemaking agenda to implement Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Excessive and poorly designed executive pay was a contributing cause of the Wall Street financial crisis. Unfortunately, runaway CEO pay is still a problem today. In 2020, CEOs of S&P 500 companies received, on average, $15.5 million in total compensation. Section 953 of the Dodd Frank Act is intended to better inform shareholder “say-on-pay” votes on executive compensation that are required under Section 951. Section 953(a) requires rules for public company issuers to disclose information that shows the relationship between executive compensation actually paid and the financial performance of the company (or the lack thereof). This pay verses performance disclosure requirement complements the Section 953(b) pay ratio disclosure rule that provides investors with a valuable perspective on the amount of CEO pay relative to other company employees.

We strongly support requiring the disclosure of other measures of financial performance in addition to total shareholder return. The total shareholder return of a company’s stock is not the only or even the best yardstick for measuring financial performance. A wide variety of external factors affect a company’s share price that are not connected to the efforts of executives. Simply varying executive pay according to total shareholder return is not “pay for performance.” Rather, it is a feeble excuse for the economic rents that CEOs extract from companies above their actual contribution to company success. For this reason, the Commission’s disclosure rules should not favor a simplistic “pay for performance” analysis based on total shareholder return. Instead, the Commission’s disclosure rules should empower shareholders to consider the actual financial metrics that determine executive pay and their connection to company performance.

We urge the Commission to require that companies disclose the financial results for all of the performance measures that are actually used for determining executive compensation. Simply listing net income, pre-tax net income, and one company-selected measure is not sufficient to give shareholders a complete picture of the company’s executive compensation and its connection to financial performance. Rather, the Commission should require disclosure of the company’s financial results for each of the performance metrics that were actually used to determine executive pay over the past five years. Each actually used performance metric should be included in the Pay Versus Performance Table with the numerically quantifiable performance of the company with respect to that measure. Companies should also be required to disclose the dollar amounts of executive pay that are tied to each of these financial performance metrics.

Allowing companies to self-select their most important financial measure for disclosure creates the possibility of gamesmanship. Companies may cherry pick the financial metric that casts the most favorable light on the company’s executive compensation practices in an attempt to win shareholder approval of say-on-pay votes. Disclosing only one company-selected performance metric may also have the unintended consequence of focusing executive compensation on just one metric. Ranking the five most important performance measures will provide less information to investors than simply identifying the amounts of compensation that are subject to each performance measure that was actually used. Such disclosure is particularly important given the growing use of GAAP-adjusted financial performance metrics in executive compensation plans. At present, shareholders have poor visibility into how GAAP adjustments alter executive pay.

Requiring public company issuers to disclose the quantitative results of the financial metrics actually used for executive compensation will dramatically reduce information processing costs for shareholders. Under the Commission’s current disclosure rules, shareholders must comb through the narrative disclosure provided in the Compensation Discussion and Analysis and then separately match up the company’s actual performance from financial statements. Moreover, there is no existing rule that specifically mandates disclosure of the performance measures that actually determined the level of executive compensation actually paid. The non-uniform presentation of existing disclosures combined with the lack of universal disclosure makes it nearly impossible for investors to incorporate this data into their proxy voting policies on executive compensation. As a result, many say-on-pay votes are cast using an overly simplistic pay for performance model that is based on total shareholder return rather than a more thoughtful and nuanced approach.
Requiring companies to disclose the actual performance metrics used to determine executive compensation and their corresponding financial results easily satisfies a cost-benefit analysis. The incremental cost of mandating the disclosure of this additional executive compensation data should be trivial given that companies already have compiled the data for determining executive compensation. Requiring that financial performance pay metrics and results be disclosed retroactively avoids any concern about revealing confidential information to competitors. And it is far more cost efficient for public company issuers to uniformly disclose this information than for shareholders to compile such information on their own. Moreover, this task is even more challenging for diversified investors who vote on executive pay at thousands of annual shareholder meetings. Finally, the uniform presentation of pay verses performance data will create economic benefits by promoting more informed and thoughtful voting on executive compensation by shareholders.

For these reasons, we are pleased to support the contemplated amendments to the Commission’s originally proposed rule on pay verses performance, and we urge the Commission to further improve the final rule by requiring disclosure of the financial results for all performance metrics that are actually used to determine executive compensation. Since the Commission’s original pay verses performance rule was proposed in 2015, the need for greater granularity in executive pay disclosure has become more apparent as investors and companies have gained experience with say-on-pay voting. Thank you for the opportunity to share our views. If the AFL-CIO can be of further assistance, please contact me at __________ or __________.

Sincerely,

Brandon J. Rees
Deputy Director, Corporations and Capital Markets