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,

On behalf of more than 500,000 members and supporters of Public Citizen, we 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]

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 the SEC to adopt rules that oblige issuers to disclose in documents associated with the annual meeting of shareholders "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.[2]

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

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[1] Securities and Exchange Commission, *Reopening of Comment for Pay Versus Performance*, FEDERAL REGISTER (Feb 2, 2022) https://www.govinfo.gov/content/pkg/FR-2022-02-02/pdf/2022-02024.pdf

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

includes the change in shareholder value along with dividends that shareholder received. Public Citizen generally supported this proposal, including ways to insure that "actual pay" be unobscured by various tax or actuarial manipulations.[3] We appreciate that the SEC will consider comments submitted in 2015, and we will not repeat here the points that remain relevant to the current proposal.

Since this time, however, we have witnessed an explosion in company share repurchases, or buybacks. Beginning in 2010, American corporations deployed more than $6.3 trillion to purchase their own shares. In fact, between buybacks and dividends, this figure accounted for about 100 percent of corporate profits at non-financial companies.[4] Buybacks do not evince management acumen; in fact, buybacks represent management inability to innovate and find productive use of shareholder capital. A management that lacks ingenuity and enterprise to apply capital to new products, but instead uses that capital to repurchase shares should not be rewarded. Yet a share repurchase generally increases share prices, rewarding the executive compensated in stock. We are concerned that dependence on Total Shareholder Returns promotes these buybacks. While we do not propose that the SEC delete this requirement, we believe that the SEC should include other metrics.

Indeed, in our 2015 comment, we asked that the SEC require firms to include the metrics that firms actually use when determining executive compensation. We are most pleased that the commission is entertaining this concept as it reopens comment.

Any observer of executive compensation will find two glaring issues. First, the level of compensation for the nation's executive officers has grown enormously in the last half century. In the 1960s, the CEO received about 20 times the pay of the average worker at the firm. This grew to 61-1 by 1989. Today, the ratio is more than 300-1.[5] Second, there is no rational defense for this increase. The performance of today's CEOs is not demonstrably better than that of their peers of a half-century ago. In fact, studies affirm no connection between pay and performance.[6] Indeed, high pay can be connected to misconduct, from mine disasters and airplane failures where the CEO was paid to cut expenses; to banking, where managers reap rewards for dangerous and even fraudulent risk-taking; to health care, where executives escalate drug prices well beyond rising costs, and beyond. Public Citizen documented this in our report, "White Collar Crime Still Pays."[7]

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. 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

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[3] Bartlett Naylor, *Comment on Rulemaking*, SECURITIES AND EXCHANGE COMMISSION (July 6, 2015) https://www.sec.gov/comments/s7-07-15/s70715-44.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

[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

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.

We support the Commission’s proposed table, enhanced with citation of pre-tax and net income. The table lists the compensation actually paid, along with a metric for Total Shareholder Return, and the total shareholder return for a peer group. This 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 that its peers. We also support listing of pre-tax income and net income as additional metrics for disclosure. These results are already available, meaning there would be no additional cost to the company, and tabular disclosure would make shareholder analysis more convenient. We do not oppose use of a measure that the company can itself choose. When using this additional measure, we ask the Commission to require that it be used for at least five years, so as to prevent firms from using measure that best justify compensation in a given year. If firms wish to add an additional measure, they would be welcome.

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 turns on factors, such as the development of profitable products and services, improved management of expenses, or advances in productivity. When the commission reopened comment, Commissioner Lee welcomed thoughts on the fact that financial results may relate to the company’s attention to issues such as climate, labor management and governance.[10]

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.

Pay incentives helped to cause climate change.[11] Why oil company executives would knowingly continue to feed (and originally deny) an existential crisis that would imperil themselves, their own progeny, and, needless to say, the world, may be as simple as this: they were paid to.

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[9] Securities and Exchange Commission, *Reopening of Comment for Pay Versus Performance*, FEDERAL REGISTER (Feb 2, 2022) https://www.govinfo.gov/content/pkg/FR-2022-02-02/pdf/2022-02024.pdf

[10] 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

[11] 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

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.[12] 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.[13] Median pay at these firms can also be substantial, nearing $200,000 at Exxon, one of the world's largest employer in this sector.[14] (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.[15] Fully 90 percent of the 30 largest oil and gas producers reward their executives for increases in production and reserves.[16]

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.[17]

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.[18]

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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.

[12] *Groundhog Pay,* CARBON TRACKER (Dec. 14, 2020) https://carbontracker.org/reports/groundhog-pay-how-executive-incentives-trap-companies-in-a-loop-of-fossil-growth/
[13] 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
[14] *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
[15] 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
[16] *Groundhog Pay,* CARBON TRACKER (Dec. 14, 2020) https://carbontracker.org/reports/groundhog-pay-how-executive-incentives-trap-companies-in-a-loop-of-fossil-growth/
[17] 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.
[18] In an increasingly interconnected world, looking at a company's response to climate change may not be enough for an investor to determine whether a corporate executive is planning for the long- term. For example, a corporation may tout net zero emission targets or other metrics focused on combatting climate change but send dues to a trade association that pushes for status- quo policies on the climate crisis. This type of misalignment is of increasing interest to investors as corporations face rising reputational risk from their political activity. Along the same lines, investors want to understand how corporations are planning to retrain their workforce to accommodate a clean-energy economy. While workforce issues are sometimes categorized separately from climate as the "S" of "ESG," investors are really looking for a holistic approach to long-term value creation. Therefore, being able to examine the top five factors that contribute to executive compensation will help investors determine the extent to which a CEO is considering the ESG factors that are important to the investor.

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

For questions, please contact Bartlett Naylor at [redacted].

Sincerely,

Public Citizen