March 4, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington. D.C. 20549

VIA ELECTRONIC MAIL
rule-comments@sec.gov

Subject: Reopening of Comment Period for Pay Versus Performance
SEC File No. S7-07-15

Dear Ms. Countryman:

The National Investor Relations Institute ("NIRI")[1] appreciates the opportunity to comment again on the Pay Versus Performance proposed rule, first released by the Securities and Exchange Commission ("SEC") in 2015.[2]

As mandated by Section 953(a) of the Dodd-Frank Act, this regulatory proposal would amend current SEC executive compensation disclosure rules to require a "clear description … that shows the relationship between executive compensation actually paid and the financial performance of the issuer."[3]

By this letter, NIRI re-affirms the arguments it made in its comments on the 2015 proposed rule.[4] Highlights of those earlier comments include the following:

1. **The SEC Should Issue a Principles-Based Rule**. NIRI still believes that the SEC's proposed rule is too prescriptive, given the wide variety of performance metrics that U.S. public companies use to determine executive compensation.

In NIRI's view, a principles-based approach would be better suited for the many distinct types of public companies that would be covered by this rule. As examples, the SEC should note

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[1] Founded in 1969, the National Investor Relations Institute ("NIRI") is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. The largest professional investor relations association in the world, NIRI's more than 2,800 members represent over 1,350 publicly held companies with more than $7 trillion in stock market capitalization.

[2] *See* Pay Versus Performance, 80 Fed. Reg. 26,329 (May 7, 2015).

[3] 15 U.S.C. § 78n(i).

[4] *See* Letter from James M. Cudahy, President & CEO, National Investor Relations Institute, to Brent J. Fields, Secretary, Securities and Exchange Commission (July 10, 2015), *available at* https://www.sec.gov/comments/s7-07-15/s70715-69.pdf.

that these companies differ by market capitalization, growth stage, and tenure of executives; and their directors employ many different metrics and performance periods when setting executive pay.

The SEC's attempt at promulgating a "one-size-fits-all" approach is likely to be ineffective, give the vastly different market and industry circumstances that shape the design of executive pay plans at U.S. public companies. Imposing very detailed requirements and a standardized data table that will force all companies to report their pay versus performance relationship using the same methodology will only obscure, rather than illuminate, executive pay design and practices.

The SEC should reconsider its approach and, instead, adopt a more flexible, principles-based rule that will allow companies to clearly and accurately explain the relationship between executive compensation and their financial performance.

2. **The Rule's Focus on Annual Total Shareholder Return is Too Limiting**. The SEC's proposed rule mandates that public companies prepare a new table using annual total shareholder return (TSR) as a measure of financial performance. As many commenters have pointed out, annual TSR is an imprecise measure of a chief executive officer's impact on company performance. TSR over a one-year period can be impacted by a number of external factors that are beyond the control of executive management, including, but not limited to, Federal Reserve monetary policies, geopolitical events, Federal and state regulatory changes, and capital fund flows.

This disclosure requirement is an incomplete measure and will likely confuse investors, as the substantial majority of public companies use multi-year performance metrics to encourage executive decision-making that promotes long-term shareholder value.

In developing a final rule, the SEC should allow companies the flexibility to report their TSR on either an annual or a multi-year basis, and to select the number of years that would be measured. Companies should also have the flexibility to use alternative performance measures in addition to TSR in the new pay versus performance table.

The SEC's proposal to disclose the collective TSR of a company's peer groups should be eliminated from a final rule. The statutory mandate in Section 953(a) does not mention or require this information to be disclosed and the data will most certainly be impacted by external trends and events as well as the unique characteristics of each peer company. The "noise" in this data significantly reduces its relevance to each reporting company's executive compensation program.

3. **The SEC's Proposed Rule Will Generate Disclosures That Are Not Relevant or Helpful**. As it develops its final rule, the SEC should consider the information that companies are currently providing and avoid new disclosures that will reduce the ability of companies to clearly and accurately describe the relationship between pay and performance in the design and implementation of their executive compensation plans.

Since the arrival of "Say on Pay" votes at shareholder meetings, many public companies now provide very detailed Compensation Discussion and Analysis (CD&A) disclosures explaining how their executive pay is linked to financial performance. Unfortunately, some investors overlook these explanations because proxy statements have become longer and more cumbersome. In response, a growing number of companies voluntarily provide an executive summary, or a separate letter to shareholders, to highlight their pay for performance alignment. These summaries are much more likely to be read and understood by investors—and especially retail investors—than the new table and the standardized disclosures mandated by the proposed rule.

The SEC's proposed rule would replace these more qualitative disclosures with a one-size-fits-all approach that will force companies to develop and issue supplemental disclosures to explain any misleading information contained in the mandated table and standardized disclosures. Some of this information is also not relevant to current market practices in executive compensation plans and is only going to confuse investors and add additional burdens to public companies.

The Commission should pay particular attention to the concerns expressed by BlackRock in its 2015 comment letter. BlackRock, which analyzes the proxy statements of thousands of companies each year, observed the following in its letter commenting on the SEC's proposed rule:

> We are concerned that a prescriptive reporting requirement (as in the Proposal) could result in disclosures that are not relevant to particular issuers. This could result in issuers expending additional resources to explain the information, and investors also expending additional resources to understand the disclosures. We believe this additional engagement activity may draw attention away from other high priority engagement topics on corporate governance issues linked to long-term performance, including but not limited to board composition and effectiveness, executive succession planning and risk management.[5]

[5] *See* Letter from Zachary M. Oleksiuk, Director, Head of Corporate Governance and Responsible Investment, Americas, BlackRock, to Brent J. Fields. Secretary, U.S. Securities and Exchange Commission (July 2, 2015), *available at* https://www.sec.gov/comments/s7-07-15/s70715-31.pdf.

4. **The SEC Should Reduce the Compliance Burden on Smaller Reporting Companies**. A disproportionate amount of investor concern and activism on the subject of executive pay has focused on widely held S&P 500 companies, where the limited market for top CEO talent has resulted in significant compensation packages for many chief executives. Chief executives at small-cap and microcap companies typically receive more modest pay packages, and their investors are usually more focused on a company's revenue and growth prospects, rather then on the design of executive compensation packages.

The SEC and Congress have long recognized the importance of reducing the compliance burdens of smaller public companies. Smaller companies are already exempt from other disclosure requirements, such as Section 404(b) of the Sarbanes-Oxley Act. They also receive more time to make their Form 10-K filings and have fewer reporting obligations under Regulation S-K.

The Commission should consider exempting smaller reporting issuers for five years after the effective date of this rule, so the SEC staff can first assess how larger companies are complying with the rule.[6]

5. **The SEC Should Limit the Rule to Principal Executive Officers**. The SEC's proposed rule includes a mandate to disclose the average of the compensation of all named executive officers ("NEOs") in the new pay for performance table. Including other named executive officers in this new table will make the rule more costly, while producing information that is not material to many investors.

There is no evidence that a majority of investors pay close attention to the compensation of the general counsel, the chief financial officer, or other named executive officers when casting their "Say on Pay" votes, unless the compensation for these executives is an extreme outlier or is swelled by unusual one-time circumstances. Not surprisingly, investors primarily focus on the monetary incentives for the CEO because the design of the pay package for the chief executive typically sets the tone for how the other named executive officers are compensated.

6. **The SEC Should Reconsider Several of Its More Recent Proposals**. In its January 27 release to re-open the comment period for this rulemaking, the SEC proposed several additional requirements to implement the Section 953(a) mandate from Congress. The first of these proposals would require companies to disclose three additional measures of performance: (a) pre-tax net income; (b) net income; and (c) a measure specific to a particular company. While the first two of these measures are provided for under U.S. Generally Accepted Accounting Principles ("GAAP"), they are completely impractical as measures of financial

[6] During this proposed 5-year exemption period, smaller reporting companies would still be required to hold "Say on Pay" votes, ensuring that investors would retain a powerful mechanism to express concern if any of these companies fail to provide sufficient disclosures regarding executive pay and performance metrics.

performance for smaller companies that are at a startup or early phase and are not generating any net income under GAAP. Disclosure of these additional measures is also likely to be misleading and confusing to investors, especially if they do not accurately describe the design of the substantial majority of compensation plans.

The SEC also proposes a requirement that companies create a separate table with rankings to determine—in order of importance—their five most important performance measures used to link compensation to financial performance. This proposal is completely impractical for those companies that use fewer than five performance measures in the design of their compensation plans. This is yet another argument favoring the adoption of a principles-based approach in any final rule and avoiding a "one-size-fits-all" regulatory framework. Additionally, the SEC's proposal for ranking performance measures will be duplicative of what companies include in their CD&A disclosures, as they are already required to "explain all material elements of the [company's] compensation of the named executive officers."[7]

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NIRI appreciates your consideration of our views. Please contact us with any questions, or if we can provide additional information.

Sincerely,

Gary A. LaBranche
President and CEO

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Allison Herren Lee
The Honorable Caroline A. Crenshaw
Renee Jones, Director, Division of Corporation Finance

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[7] *See* 17 C.F.R. § 229.402(b)(1).