



October 29, 2009

Mr. Michael S. Emen
Senior Vice President
Listing Qualifications
The NASDAQ Stock Market
9600 Blackwell Road
Rockville, MD 20850

Dear Mr. Emen:

I am writing on behalf of the Council of Institutional Investors (CII) to discuss the Nasdaq Listing and Hearing Review Council's (Listing Council) proposed corporate governance best practices for listed companies. CII is a nonprofit association of public, corporate and labor pension funds representing more than \$3 trillion in assets. As a leading voice for long-term investors responsible for the retirement savings of millions of American workers and retirees, CII welcomes the opportunity to share its views and recommendations on the proposed best practices.

We agree that the need for corporate transparency, accountability, independence, rigor and risk management is more pressing than ever in the face of the ongoing financial crisis, decimated shareowner returns and shattered investor confidence. The Listing Council's proposals are laudable and consistent with corporate governance best practices.

However, we urge the Listing Council to make the final product mandatory instead of advisory. Good corporate governance should not be optional. We feel that the Listing Council's concerns that "new mandatory listing requirements could distract boards and consume valuable resources, and, thus, prove counterproductive" are unwarranted. Strong and appropriate obligatory governance standards will focus directors and managers on superior, sustainable shareowner value creation. In this way, requiring adherence to good governance principles will ultimately generate resources in excess of those consumed, which is the very definition of productivity.

Our specific feedback on the Listing Council's best practice proposals follows:

Executive Sessions of Independent Directors

CII has a policy that "the independent directors should hold regularly scheduled executive sessions without any of the management team or its staff present." Regular executive sessions allow the independent directors to serve as a more-effective check on management. Directors are more likely to speak candidly about the CEO and management strategy when management isn't present. An executive session of independent directors at each regularly scheduled board meeting would be consistent with our position, along with disclosure of the frequency of the executive sessions.

Overboarding

Overcommitted directors cannot devote the time and energy necessary to adequately fulfill their duties and represent shareowners. CII policy states that “currently serving CEOs should not serve as a director of more than one other company, and then only if the CEO’s own company is in the top half of its peer group. No other director should serve on more than five for-profit company boards.”

Auditor Ratification

The shareowner ratification process promotes auditor objectivity and competence. Shareowners are afforded a clear method of communicating their views on an auditor’s independence of management, while leaving ultimate discretion for auditor retention with audit committees, as required by law.

Therefore, CII supports annual shareowner votes on the board’s choice of independent, external auditor. If the board’s selection fails to achieve the support of a majority of the for-and-against votes cast, the audit committee should: (1) take the shareowners’ views into consideration and reconsider its choice of auditor and (2) solicit the views of major shareowners to determine why broad levels of shareowner support were not achieved.

Majority Voting for Directors

CII considers plurality voting to be fundamentally flawed: It results in “rubber stamp” elections and directors who are less accountable to shareowners because the shareowners lack a meaningful vote. CII believes strongly that in uncontested elections, directors should be elected by a majority of votes cast (plurality voting is more appropriate in contested elections). Majority voting ensures that shareowners’ votes count and makes directors more responsive to the company’s owners.

To this end, CII has adopted a policy that says, in part, “all candidates for the board of directors, including incumbent directors and candidates nominated by shareowners, [should] tender conditional resignations in advance of any election, to take effect in the event that they fail to win majority support in uncontested elections.”

Board Interaction with Investors

Since directors are the shareowners’ elected representatives, the shareowners should have the right to talk to them on issues of concern. Such direct communication would also enable shareowners to some extent to evaluate the directors.

Therefore, CII agrees that companies should establish board-shareowner communications policies. The policies should include detailed contact information for at least one independent director (but preferably for the independent board chair and/or the independent lead director and the independent chairs of the audit, compensation and nominating committees). Companies should also establish mechanisms by which shareowners with non-trivial concerns can communicate directly with all directors. In

addition, all directors should attend the annual shareowners' meetings and be available, when requested by the chair, to answer shareowner questions.

Independent Board Leadership

Separating the board chair and CEO positions appropriately reflects the differences in the roles, provides a better balance of power between the CEO and the board—particularly when the CEO dominates the board—and facilitates strong, independent board leadership and functioning.

Consequently, CII policy stipulates that the board should be chaired by an independent director. The CEO and chair roles should only be combined in very limited circumstances; in these situations, the board should provide a written statement in the proxy materials discussing why the combined role is in the best interests of shareowners, and it should name a lead independent director who should have approval over information flow to the board, meeting agendas and meeting schedules to ensure a structure that provides an appropriate balance between the powers of the CEO and those of the independent directors.

Annual Election of Directors

A staggered board is inherently insulating and entrenching, limiting directors' accountability to their representatives, the shareowners. As a result, CII policy calls for annual election of directors.

Additional Recommended Reforms

CII also encourages the Listing Council to require listed companies to adopt the following additional key corporate governance reforms. Adoption would promote meaningful investor oversight of management and boards, and would address many of the problems that led to the current crisis. Even more importantly, the provisions would empower shareowners to anticipate and address unforeseen future risks.

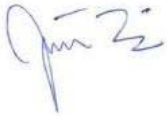
- Advisory Shareowner Vote on Executive Pay. All companies should provide shareowners an *annual, advisory vote on the compensation of senior executives*. Such a mechanism would efficiently and effectively provide boards with useful information about whether investors view the company's compensation practices to be in shareowners' best interests. The possibility of a majority "against" vote might serve as an additional deterrent against devising incentive plans that promote excessive and unnecessary risk-taking.
- Clawbacks. A clawback policy is an essential element of a pay for performance philosophy. If executives are rewarded for "hitting their numbers"—and it turns out that they failed to do so—they should not profit. Therefore, the compensation committee should *develop and disclose a policy for reviewing unearned bonus and incentive payments* that were awarded to executive officers owing to fraud, financial results that require restatement or some other cause. The policy should

require recovery or cancellation of any unearned awards to the extent that it is feasible and practical to do so.

- Severance Pay Limitations. CII believes severance pay awarded to executives that leave a company as a result of poor performance amounts to “pay for failure.” Therefore, we recommend that *no severance be paid at all* in the event of termination for poor performance, resignation under pressure or failure to renew an employment contract.

Thank you for the opportunity to comment on the proposed best practices. If you have any questions, please contact me at 202-261-7088 or justin@cii.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Justin Levis".

Justin Levis
Senior Research Associate