Council of Institutional Investors®
The voice of corporate governance

Via Hand Delivery

April 9, 2019

The Honorable Carolyn B. Maloney
Chair
Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

The Honorable Bill Huizenga
Ranking Member
Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

Re: April 3, 2019 Hearing entitled: "Putting Investors First: Reviewing Proposals to Hold Executives Accountable"[1]

Dear Madam Chair and Ranking Member Huizenga:

I am writing on behalf of the Council of Institutional Investors (CII) to express our appreciation for holding the above referenced hearing and to provide you with our views on several of the legislative proposals on corporate governance related topics that are of great interest to our members and that were discussed at the hearing. We would respectfully request that this letter be made a part of the hearing record.

CII is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than $35 trillion in assets under management.[2]

[1] Hearings, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, Putting Investors First: Reviewing Proposals to Hold Executives Accountable (Apr. 3, 2019), https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=402504.

[2] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org.

Insider Trading

CII generally supports H.R. ___, the Insider Trading Prohibition Act, [3] and H.R. ___, the 8-K Trading Gap Act of 2019.[4]

Long-term investors like CII members can be harmed when there are ongoing practices that undermine confidence in the markets. That loss of confidence can occur when corporate executives are able to sell their company stock—often a significant component of their compensation—before their companies report bad news to the public. CII, therefore, generally supports proposed legislation that is reasonably designed to limit corporate executives from trading company stock while possessing inside information.

For example, earlier this year, CII publicly supported H.R. 624, the Promoting Transparent Standards for Corporate Insiders Act.[5] The bill, generally consistent with CII membership approved policies,[6] would require the Securities and Exchange Commission (SEC or Commission) to study and report on possible revisions to regulations regarding Rule 10b5-1 trading plans.[7] Those plans allow certain corporate executives to be shielded from insider trading liability when conducting certain trades of their companies' securities.[8]

H.R. 624 was prompted, in part, by concerns about a history of suspiciously fortuitous trading patterns by corporate insiders' pursuant Rule 10b5-1 plans.[9] As you are aware, on January 28, 2019, the United States (U.S.) House of Representatives approved H.R. 624 by a vote of 413 to 3.[10]

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[3] H.R. ___, Insider Trading Prohibition Act, 116th Cong. (2019) (DRAFT), https://financialservices.house.gov/uploadedfiles/bills-116pih-insidertrading.pdf.
[4] H.R. ___, 8-K Trading Gap Act of 2019, 116th Cong. (2019) (DRAFT), https://financialservices.house.gov/uploadedfiles/bills-116pih-8-k.pdf.
[5] *See* Promoting Transparent Standards for Corporate Insiders Act, H.R. 624, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/624/text.
[6] CII, Corporate Governance Policies § 5.15b Stock Sales (updated Oct. 24, 2018), https://www.cii.org/files/10_24_18_corp_gov_policies.pdf ("10b5-1 program adoptions, amendments, terminations and transactions should be disclosed immediately, and boards of companies using 10b5-1 plans should: (1) adopt policies covering plan practices, (2) periodically monitor plan transactions and (3) ensure that company policies discuss plan use in the context of guidelines or requirements on equity hedging, holding and ownership.").
[7] Promoting Transparent Standards for Corporate Insiders Act, H.R. 624, 116th Cong. § 2(a), (c).
[8] *See, e.g.*, Nicole Vanatko, Reexamining the Rule 10b5-1 Trading Plans Defense to Insider Trading, CRS 2 (Jan. 31, 2019), https://fas.org/sgp/crs/misc/LSB10249.pdf ("the rule establishes a defense to insider trading for transactions executed pursuant to a prearranged plan adopted in good faith and, importantly, at a time when the person was not aware of material nonpublic information").
[9] *Id.* ("The SEC and others have questioned the plans' potential for abuse and possible weaknesses over at least the past decade, citing certain well-publicized reports and studies indicating that many executives achieve above-average returns when trading . . . pursuant to Rule 10b5-1 trading plans."); Cydney Posner, Blog: New House Bill to Curb Potential Abuse of 10b5-1 Plans, PubCo@Cooley (Jan. 24, 2019), https://www.jdsupra.com/legalnews/blog-new-house-bill-to-curb-potential-19688/ (commenting that articles "identified a number of problems with 10b5-1 plans, including the absence of public disclosure about the plan or changes to it and the absence of rules about how long the plans must be in place before trading under the plans can begin").
[10] *See, e.g.*, Craig M. Scheer, Rule 10b5-1 Trading Plans in the Current Environment: The Importance of Doing it Right, Bus. Law Today (Sept. 19, 2018), http://apps.americanbar.org/buslaw/blt/content/2013/02/article-06-scheer.shtml ("Critics have long viewed the rule as creating an opportunity for abuse, claiming that some insiders

Insider Trading Prohibition Act

The provisions of the Insider Trading Prohibition Act largely codifies the existing case law on insider trading. However, the bill also overturns the controversial requirement affirmed in 2016 by the 2nd Circuit decision in *United States v. Newman*[11] that a tippee know about the specific personal benefit that the tipper received.[12] CII generally supports the bill because it provides investors and other market participants with a clearer, simpler standard of the current law of insider trading. As Matt Levine of Bloomberg opined in response to a 2015 version of the bill:

> In that sense, the Himes bill seems like the best of the ban-insider-trading bills so far. It does the least violence to existing law: . . It just keeps as much of current law as possible consistent with throwing out the controversial Newman conclusion.
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> . . .
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> The law doesn't match people's intuitions, and it isn't written down anywhere, so people keep thinking that it's different from what it is. Writing it down in the form of the Himes bill might not make it match people's intuitions. But at least it would make the law less surprising, which is worth something.[13]

CII is pleased that all four witnesses at your April 3 hearing expressed support for the bill, including Professor John C. Coffee, Jr. who "serves as a member of the Task Force on Insider Trading, assembled by Preet Bharara, the former S.D.N.Y U.S. Attorney, . . . which includes ex-U.S. Attorneys and SEC enforcement specialists . . . ."[14] In addition, we do not oppose Professor Coffee's suggested revisions to the bill[15] or the suggestion by Thomas Quaadman of the U.S. Chamber of Commerce that there be some clarification that the bill is not intended to "prohibit" Rule 10b5-1 plans.[16]

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may in fact be aware of material non-public information at the time plans are established and that the rule can be used to provide cover for improper trades.").

[11] United States v. Newman, 773 F.3d 438 (2d Cir. 2014), *available at* https://www.scotusblog.com/wp-content/uploads/2015/08/15-137-op-below.pdf ("In sum, we hold that to sustain an insider trading conviction against a tippee, the Government must prove each of the following elements beyond a reasonable doubt: . . . the tippee knew of the tipper's breach, that is, he knew the information was confidential and divulged for personal benefit").

[12] Memorandum from FSC Majority Staff to Members, Committee on Financial Services 2 (Mar. 29, 2019), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-20190403-sd002-u1_-_memo.pdf.

[13] Matt Levine, Cybersecurity, Another Politician Wants to Ban Insider Trading, Is insider trading law about fairness, or about theft?, BloombergOpinion, Apr. 1, 2015, https://www.bloomberg.com/opinion/articles/2015-04-01/another-politician-wants-to-ban-insider-trading.

[14] Putting Investors First: Reviewing Proposals to Hold Executives Accountable: Hearing Before the H. Subcomm. on Investor Protection, Entrepreneurship, and Capital Mkts. of the FSC, 116th Cong. (Apr. 3, 2019) (Statement of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School at 1-2), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-coffeej-20190403.pdf.

[15] *Id.* at 4-6.

[16] Putting Investors First: Reviewing Proposals to Hold Executives Accountable: Hearing Before the H. Subcomm. on Investor Protection, Entrepreneurship, and Capital Mkts. of the FSC, 116th Cong. (Apr. 3, 2019) (Statement of U.S. Chamber of Commerce at 15), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-quaadmant-20190403.pdf.

8-K Trading Gap Act of 2019

The provisions of the 8-K Trading Gap Act of 2019 "would direct the SEC to issue a rule requiring public companies to put in place policies and procedures that are reasonably designed to prohibit officers and directors from trading company stock after the company has determined that a significant corporate event has occurred, and before the company has filed a Form 8-K disclosing such event."[17] CII generally supports the bill because it is based on empirical evidence and could enhance investor confidence in the markets.

A 2015 study, in which current SEC Commissioner Robert J. Jackson Jr. participated, found that over a six-year period, corporate executives who traded during the four-day gap between when a corporate event occurred and when the event was publicly reported, successfully earned $105 million in above market returns on those trades.[18] CII generally agrees with Chair Maloney's view that the 8-K trading gap can undermine '"investor confidence'"[19]

CII also generally agrees with the reported view of SEC Chairman Jay Clayton that "it was wrong for executives to make money based on significant, non-public information during the 8-K trading gap [and] . . . like[s] the 'concept' of a rule that would prohibit trading during that period."[20]

CII does not object to Professor Coffee's suggestions that the definition of "covered period"[21] in the bill be revised so that "phrasing [of the term] would be more useful."[22]

Mandatory Arbitration

CII generally supports H.R. ___, the Investor Choice Act of 2019[23]

CII strongly opposes shareowner arbitration clauses between U.S. public companies and investors. Our long-standing membership approved policies addressing this issue states: "[C]ompanies [should not] attempt to bar shareowners from the courts through the introduction of forced arbitration clauses."[24]

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[17] Memorandum from FSC Majority Staff to Members, Committee on Financial Services at 4.
[18] Robert J. Jackson et al., The 8-K Trading Gap, Colum. Law & Econ. Working Paper No. 524 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657877 (finding "systematic abnormal returns of 42 basis points on average, per trade, from trades by insiders during the 8-K gap [and recommending] . . . lawmakers should reconsider the effects of information-forcing rules such as those governing Form 8-K on the incidence and profitability of trading by insiders").
[19] Andrew Ramonas, News, House Hearing to Probe Bill Banning Subset of Insider Trading, Bloomberg L., Apr. 3, 2019 (on file with CII).
[20] *Id.*
[21] H.R. ___, 8-K Trading Gap Act of 2019, 116th Cong. § 2(a) ('"(a) COVERED PERIOD DEFINED.—In this section, the term 'covered period' means a period beginning on the date on which an issuer determines that the issuer possesses material nonpublic information and ending on the date on which that information is publicly disclosed or no longer material").
[22] Statement of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School at 9.
[23] H.R. ___, Investor Choice Act of 2019, 116th Cong. (2019) (DRAFT), https://financialservices.house.gov/uploadedfiles/bills-116pih-investorchoice.pdf.
[24] CII, Corporate Governance Policies § 1.9 Judicial Forum.

CII's policies are based on the view that shareowner arbitration clauses in public company governing documents represent a potential threat to principles of sound corporate governance that balance the rights of shareowners against the responsibility of corporate managers to run the business.[25] More specifically, among the many problems that our members have identified with shareowner arbitration clauses is the fact that disputes that go to arbitration rather than the court system generally do not become part of the public record and, thereby, may lose their deterrent effect.[26] As Hillary Sale, a law professor at Georgetown University recently commented: Because arbitration is private, "[w]e won't have a good understanding of when companies are committing fraud or in fact behaving in an above-board manner."[27]

CII agrees with SEC Commissioner Jackson that the existence of private shareowner actions is a necessary supplement to the Commission's limited enforcement resources.[28] Those actions aid the SEC in identifying and addressing corporate wrongdoing and poor corporate governance practices, and decisions by courts in private actions have developed much of the law governing securities fraud.[29]

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[25] *See, e.g.*, Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission et al. 1 (Dec. 11, 2013), https://www.cii.org/files/issues_and_advocacy/correspondence/2013/12_11_13_CII_letter_to_SEC_forced_arbitration.pdf; *cf.* Letter from State Financial Officers Foundation to Chairman Clayton (Nov. 13, 2018), https://secureoursavings.com/wp-content/uploads/2018/11/SFOF-Letter-to-SEC-Chairman-Clayton-1.pdf (setting forth four "specific concerns in allowing companies to impose forced arbitration clauses that limit class action claims on investors").

[26] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury 8 (Aug. 23, 2017), https://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf. ("Our policy is based, in part, on the fact that disputes that go to arbitration rather than to the court system generally do not become part of the public record and, thereby, may lose their deterrent effect.").

[27] Dave Michaels, Johnson & Johnson Drafted Into Fight Over Shareholder Lawsuits, Wall St. J., Dec. 13, 2018, https://on.wsj.com/2EAZGnY; *see* N. Peter Rasmussen, Corporate Transactions Blog, Mandatory Arbitration Proposal Creates Strange Bedfellows, Bloomberg L. (Jan. 8, 2019), https://www.bna.com/mandatory-arbitration-proposal-b57982095134/ (quoting Securities and Exchange Commission Commissioner Robert J. Jackson, Jr. that "as compared to closed-door arbitration proceedings, 'a public hearing gives judges a chance to tell corporate insiders what the law expects of them'"); *cf.* Carol V. Gilden, Partner, Cohen Milstein, A Clear and Present Danger: The Continued Threat of Forced Arbitration, Shareholder Advoc. 5 (Winter 2019) https://www.cohenmilstein.com/sites/default/files/A%20Clear%20and%20Present%20Danger.pdf (quoting James D. Cox, Professor of Law, Duke Law School: '"In the classic work, *Democracy in America*, Alexis de Tocqueville wrote nearly 200 years ago that a central strength of the democracy in America was our country's commitment to access to justice through mechanisms such as . . . making the courts available for everyone [and] [m]andated arbitration of investor and shareholder claims would be a grave departure from what makes America exceptional.'").

[28] *See* N. Peter Rasmussen; *see, e.g.*, Brief Amici Curiae of the Council of Institutional Investors et al. at 6, Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317 (U.S. 2014) https://www.cii.org/files/issues_and_advocacy/legal_issues/02_05_14_CII_amicus_curiae_brief_halliburton.pdf (quoting Securities and Exchange Commission Chairman Arthur Levitt, Jr. that '"private rights of action are not only fundamental to the success of our securities markets, they are an *essential complement* to the SEC's own enforcement program'").

[29] *See* N. Peter Rasmussen; *see also* Letter from Michael Pieciak, NASAA President, Commissioner, Vermont Department of Financial Regulation to the U.S. Securities and Exchange Commission 4 (Jan. 30, 2019) ("Class action litigation . . . contributes materially to the development of the common law.") (on file with CII).

In addition, CII also agrees with the testimony of your April 3 hearing witness Melanie Senter Lubin who provided the following views based on her perspective as a state securities regulator:

> Forcing investors into mandatory arbitration or otherwise precluding investors from joining class actions is bad policy, as this would harm retail investors and be disruptive to the marketplace. The SEC and state securities regulators have limited resources and cannot combat all securities frauds entirely on their own. The Supreme Court has long recognized that securities class actions are "an essential supplement" to government enforcement powers, which is a point that Congress has also recognized.
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> Securities class actions serve as a deterrent to violative conduct and a primary mechanism by which investors are compensated for the misconduct of fraudsters. While funds recovered by federal and state regulators can be returned to investors, such as through an SEC Fair Fund or a court appointed receiver, these amounts have historically paled in comparison to the amounts recovered directly by investors.[30]

Investor Choice Act of 2019

The provisions of the "Investor Choice Act of 2019 . . . would prohibit both broker-dealers and investment advisers from including mandatory arbitration clauses in their agreements with customers [and] . . . would prohibit public companies from including mandatory arbitration clauses in their bylaws or other corporate governance documents."[31] While CII has not taken a position on mandatory arbitration clauses in agreements with customers, we support the bill because it prohibits shareowners from being subject to mandatory arbitration clauses in corporate governance documents generally consistent with our membership approved policies.[32]

Clawbacks

CII generally supports H.R. ___, a bill to require the SEC to complete rulemaking required by section 10D of the Securities Exchange Act of 1934.[33]

CII continues to support prompt completed action on the SEC's required response to Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) entitled, "Recovery of Erroneously Awarded Compensation."[34]

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[30] Putting Investors First: Reviewing Proposals to Hold Executives Accountable: Hearing Before the H. Subcomm. on Investor Protection, Entrepreneurship, and Capital Mkts. of the FSC, 116th Cong. (Apr. 3, 2019) (Written Testimony of Melanie Senter Lubin, Board Member, North American Securities Administrators Association and Maryland Commissioner of Securities at 5-6), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-lubinm-20190403.pdf (footnotes omitted).

[31] Memorandum from FSC Majority Staff to Members, Committee on Financial Services at 3.

[32] CII, Corporate Governance Policies § 1.9 Judicial Forum.

[33] H.R. ___, a bill to require the SEC to complete rulemaking required by section 10D of the Securities Exchange Act of 1934, 116th Cong. (2019) (DRAFT), https://financialservices.house.gov/uploadedfiles/bills-116pih-secrulemaking-u1.pdf.

[34] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 954 (2010), https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm.

We note that Section 954 was responsive to the recommendations of the Investors' Working Group (IWG).[35] In its seminal report on U.S. Financial Regulatory Reform, the IWG concluded:

> **Federal clawback provisions on unearned executive pay should be strengthened**. Clawback policies discourage executives from taking questionable actions that temporarily lift share prices but ultimately result in financial restatements. Senior executives should be required to return unearned bonus and incentive payments that were awarded as a result of fraudulent activity, incorrectly stated financial results or some other cause. The Sarbanes-Oxley Act of 2002 required boards to go after unearned CEO income, but the Act's language is too narrow. It applies only in cases where misconduct is proven—which occurs rarely because most cases result in settlements where charges are neither admitted nor denied—and only covers CEO and CFO compensation. Many courts, moreover, have refused to allow this provision to be enforced via private rights of action.[36]

The SEC's proposed rule to implement Section 954 (2015 Proposal) is generally consistent with CII's membership approved policies.[37] Those policies state:

> The compensation committee should ensure that sufficient and appropriate mechanisms and policies (for example, bonus banks and clawback policies) are in place to recover erroneous bonus and incentive awards paid in cash, stock or any other form of remuneration to current or former executive officers, and to prevent such awards from being paid out in the first instance. Awards can be erroneous due to acts or omissions resulting in fraud, financial results that require restatement or some other cause that the committee believes warrants withholding or recovering incentive pay. Incentive-based compensation should be subject to recovery for a period of time of at least three years following discovery of the fraud or cause forming the basis for the recovery. The mechanisms and policies should be publicly disclosed.[38]

Consistent with CII policies, we believe the final SEC rule should, as proposed,[39] apply broadly to the compensation of all current or former executive officers, whether or not they had control

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[35] S. Rep. No. 111-176, at 136 (Apr. 30, 2010), https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf ("The Investor's Working Group wrote 'federal clawback provisions on unearned executive pay should be strengthened.'")

[36] Report of the Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective 23 (July 2009), http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf.

[37] Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 9,861, Exchange Act Release No. 75,342, Investment Company Act Release No. 31,702, 80 Fed. Reg. 41,144 (proposed rule July 2015), https://www.federalregister.gov/articles/2015/07/14/2015-16613/listing-standards-for-recovery-of-erroneously-awarded-compensation.

[38] CII, Corporate Governance Policies § 5.5 Pay for Performance.

[39] *See* 80 Fed. Reg. at 41,153 ("the compensation recovery provisions of Section 10D apply without regard to an executive officer's responsibility for preparing the issuer's financial statements").

or authority over the company's financial reporting.[40] As we explained in our comment letter to the SEC in response to the 2015 Proposal:

> In our view, establishment of a broad clawback arrangement is an essential element of a meaningful pay for performance philosophy. If executive officers are to be rewarded for "hitting their numbers"—and it turns out they failed to do so—the unearned compensation should generally be recovered notwithstanding the cause of the revision.[41]

A broad clawback can be "a powerful tool for companies seeking to punish executives for wrongdoing."[42] In addition, we agree with legal experts that broad clawback arrangements may "keep executive officers focused on sound accounting company-wide."[43]

Moreover, requiring a broad clawback policy would appear to be consistent with the "Commonsense Principles of Corporate Governance 2.0" endorsed in October 2018 by a number of prominent leaders of U.S. public companies, including: Jamie Dimon, JPMorgan Chase; Alex Gorsky, Johnson & Johnson; Brian Moynihan, Bank of America; and David Taylor, Proctor & Gamble.[44] Those principles state that "[c]ompanies should maintain clawback policies for both cash and equity compensation."[45]

We believe the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets (Subcommittee) and the Commission should consider the empirical studies indicating that the adoption of clawback provisions is generally associated with improved financial reporting quality, enhanced investor and auditor confidence in the quality of financial reporting, and reduced audit fees.[46] We note that one of the more recent studies indicates clawbacks generally protect accounting integrity while maintaining and even enhancing the advantages of performance based CFO pay.[47]

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[40] *See, e.g.*, Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 5 (Aug. 27, 2015), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/08_27_15_letter_to_SEC_clawbacks.pdf.

[41] *Id.* (footnotes omitted).

[42] *See, e.g.*, Jef Feeley & Anders Melin, Hertz Seeks $70M in Clawbacks Tied to Accounting Scandal, Acct.Today, Apr. 1, 2019, https://www.accountingtoday.com/articles/hertz-seeks-70m-in-clawbacks-tied-to-accounting-scandal.

[43] *See, e.g.*, Financial CHOICE Act of 2017, Hearing Before the H. Comm. on Fin. Servs., 115th Cong. (Apr. 26, 2017) (Testimony of Michael S. Barr, The Roy F. and Jean Humphrey Proffitt Professor of Law, University of Michigan Law School at 15) (on file with CII).

[44] Press Release, AT&T, Bank of America, Coca-Cola, IBM, Johnson & Johnson, P&G and Other Leaders Sign on to Updated Commonsense Corporate Governance Principles (Oct. 18, 2018), https://www.businesswire.com/news/home/20181018005402/en/ATT-Bank-America-Coca-Cola-IBM-Johnson-Johnson.

[45] Commonsense Corporate Governance Principles 2.0 VII(g) (2018), http://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf.

[46] *See* Gregory L. Prescott & Carol E. Vann, Implications of Clawback Adoption in Executive Compensation Contracts: A Survey of Recent Research, 29 J. Corp. Acct. & Fin. 59, 67 (Jan. 2018), https://onlinelibrary.wiley.com/doi/full/10.1002/jcaf.22312.

[47] *See* Peter Kroos et al., Voluntary Clawback Adoption and the Use of Financial Measures in CFO Bonus Plans, 93 Acct. Rev. 213-235 (May/June 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312762; *see also* Ben Hiamowitz, Adoption of Clawbacks Means Stronger Link Between Firm Performance and CFO Pay, CPA

We acknowledge SEC Chairman Clayton's observation that "several companies . . . [have clawback] policies [that] go beyond what would be required under Dodd-Frank."[48] However, we believe that there are a multitude of potential benefits to long-term investors from the SEC requiring *all* companies to adopt, at a minimum, clawback policies consistent with the 2015 Proposal mandated by the U.S. Congress.

A bill to require the SEC to complete rulemaking required by section 10D of the Securities Exchange Act of 1934

The provisions of the "discussion draft would require the SEC to finalize the section 954 rulemaking within 60 days [and] [i]f the SEC has not finalized the rulemaking within 60 days, the SEC Chair is required to testify in the House Financial Services Committee and the Senate Banking Committee once a month until the rule is finalized."[49] CII generally supports the bill because implementing the 2015 Proposal is consistent with our membership approved policies,[50] and for far too long has been one of our rulemaking priorities.[51] We again generally agree with the testimony of Ms. Lubin that "just as the 111th Congress was correct to reform our financial system in 2010, the 116th Congress is correct to insist that the SEC fully implement the law, including by completing rulemakings mandated therein."[52]

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PracticeAdvisor, June 7, 2018, http://www.cpapracticeadvisor.com/news/12416039/adoption-of-clawbacks-means-stronger-link-between-firm-performance-and-cfo-pay.

[48] U.S. Securities and Exchange Commission, Chairman Jay Clayton, Testimony on "Oversight of the U.S. Securities and Exchange Commission," Before the Comm. on Fin. Servs., U.S. H.R. at n.50 (June 21, 2018), https://www.sec.gov/news/testimony/testimony-oversight-us-securities-and-exchange-commission; s*ee* Proxy Process and Rules: Examining Current Practices and Potential Changes: Hearing before the S. Comm. on Banking, Hous. & Urban Affairs, 115th Cong. (Dec. 6, 2018) (statement of Michael Garland, Assistant Comptroller, for Corp. Governance and Responsible Inv., In the Office of the N.Y.C. Comptroller Scott Stringer at 8), https://www.banking.senate.gov/imo/media/doc/Garland%20Testimony%2012-6-18.pdf (indicating that the successful negotiation of a broad clawback policy at Wells Fargo "enabled the Wells Fargo Board of directors to announce in September 2016 that it would recoup $60 million from two senior executives in order to hold them financially accountable for the fake account scandal that involved the loss of jobs by 5,300 lower-level employees and cost Wells Fargo $185 million in fines and penalties"); Kathryn Neel et al., The Business Case for Clawbacks, Harv. L. Sch. Forum on Corp. Governance & Fin. Regulation (May 6, 2018), https://corpgov.law.harvard.edu/2018/05/06/the-business-case-for-clawbacks/ (listing Cognizant Technology Solutions, Wells Fargo, Zions Bancorp, and EBay as companies that have adopted "detrimental conduct" clawback policies); *see also* Michael S. Melbinger, Update on Clawback Policy Issues, Executive Compensation Blog, Winston & Strawn (Oct. 19, 2017), https://www.winston.com/en/executive-compensation-blog/update-on-clawback-policy-issues.html (recommending that "directors should protect themselves and their companies by adopting a strong policy").

[49] Memorandum from FSC Majority Staff to Members, Committee on Financial Services at 4.

[50] CII, Corporate Governance Policies § 5.5 Pay for Performance.

[51] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission 1 (Dec. 13, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/December%2013%202018%20SEC%20Reg%20Flex%20Letter.pdf ("We respectfully reiterate our requests that the following two individual agenda items currently listed under the "Division of Corporation Finance—Long Term Actions" be advanced to "Division of Corporation Finance— Final Rule Stage:" "Universal Proxy" and "Listing Standards for Recovery of Erroneously Awarded Compensation.").

[52] Written Testimony of Melanie Senter Lubin, Board Member, North American Securities Administrators Association and Maryland Commissioner of Securities at 3-4).

If we can answer any questions or provide additional information that would be helpful to you or the Subcommittee, please do not hesitate to contact me at 202.822.0800 or jeff@cii.org.

Sincerely,

Jeffrey P. Mahoney
General Counsel