

Via Email

December 14, 2023

Brandee Anderson  
Senior Advisor to the Deputy Secretary  
Office of the Secretary  
U.S. Department of Commerce  
1401 Constitution Ave. NW  
Washington, DC 20230

***Docket Number: 231121-0276, Business Diversity Principles.***

Dear Ms. Anderson:

The Council of Institutional Investors (CII) appreciates the opportunity to share our views and provide input on the U.S. Department of Commerce’s Request for Information on Business Diversity Principles (RFI).<sup>1</sup>

CII is a nonprofit, nonpartisan association of U.S. 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 \$5 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$5 trillion in assets, and a range of asset managers with more than \$55 trillion in assets under management.<sup>2</sup>

As the leading U.S. voice for effective corporate governance and strong shareholder rights, CII believes that our membership-approved corporate governance best practices addressing “Board/Director Succession Planning and Evaluation”<sup>3</sup> and “CEO and Management Succession

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<sup>1</sup> U.S. Department of Commerce, Notice; Request for Information, Business Diversity Principles, 88 Fed. Reg. 83,380 (Nov. 24, 2023), <https://www.federalregister.gov/documents/2023/11/29/2023-26254/business-diversity-principles>.

<sup>2</sup> 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>.

<sup>3</sup> CII, Policies on Corporate Governance, § 2.8 Board/Director Succession Planning and Evaluation (as of Mar. 6, 2023), [https://www.cii.org/corp\\_gov\\_policies](https://www.cii.org/corp_gov_policies).

Planning”<sup>4</sup> are generally “aligned”<sup>5</sup> with the “Executive Leadership”<sup>6</sup> principle set forth in the RFI. Those policies state in relevant part:

#### Board/Director Succession Planning and Evaluation

*Board Diversity: CII supports a diverse board. CII believes a diverse board has benefits that can enhance corporate financial performance, particularly in today's global marketplace. Nominating committee charters, or equivalent, ought to reflect that boards should be diverse, including such considerations as background, experience, age, race, gender, ethnicity, and culture.*<sup>7</sup>

When interpreting the above policy language, we have stated:

CII’s policy on board diversity reflects the view that corporate governance best practices include the expectation that corporate boards will reflect the diversity of their communities, customers, and employees. And that diverse boards can have a significant positive effect on financial performance. We, however, believe diverse boards can be achieved without quotas which may result in “check-the-box” diversity.<sup>8</sup>

#### CEO and Management Succession Planning

The board should approve and maintain a detailed CEO succession plan and publicly disclose the essential features, including but not limited to: . . . *processes to identify and include diverse candidates.*

An integral facet of management succession planning involves collaboration between the board and the current chief executive to develop and/or recruit the next generation of leaders. Boards should . . . *ensure that those programs source and develop leaders not exclusively from within their own ranks, but also from a broad and diverse candidate pool . . .*”<sup>9</sup>

Finally, we note that the above referenced Board Diversity policy has been a basis for CII’s general support of several corporate “Diversity initiatives”<sup>10</sup> in recent years including: (1) the

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<sup>4</sup> § 2.9 CEO and Management Succession Planning.

<sup>5</sup> 88 Fed. Reg. at 83,382 (“To what extent are each of the Business Diversity Principles aligned with your organization’s current practices?”).

<sup>6</sup> *Id.* at 83,381 (“Executive Leadership: Strive for diverse c-suites and corporate boards by developing clear strategies to increase diversity among the organization’s executive ranks.”).

<sup>7</sup> § 2.8b Board Diversity (emphasis added).

<sup>8</sup> *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, CII to Secretary, Securities and Exchange Commission 3 (Dec. 30, 2020) (footnote omitted), [https://www.cii.org/Files/December%2030%202020%20Letter%20to%20SEC%20on%20diversity%20proposal%20\(final\)-ABcomments%20LN.v2.pdf](https://www.cii.org/Files/December%2030%202020%20Letter%20to%20SEC%20on%20diversity%20proposal%20(final)-ABcomments%20LN.v2.pdf).

<sup>9</sup> § 2.9 CEO and Management Succession Planning (emphasis added).

<sup>10</sup> 88 Fed. Reg. at 83,382 (“2. Please share specific examples of successful Business Diversity initiatives.”).

Organisation for Economic Co-operation and Development’s revisions to the G20/OECD Principles of Corporate Governance;<sup>11</sup> (2) The Nasdaq Stock Market LLC rule change adopting listing rules to advance board diversity and enhance transparency of diversity statistics;<sup>12</sup> and (3) a Discussion Draft bill before the U.S. House of Representatives Committee on Financial Services<sup>13</sup> that would amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies and require issuers to make certain annual diversity disclosures.<sup>14</sup>

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<sup>11</sup> See Emmanuel Tamrat, Research Analyst, CII to Mr. Serdar Çelic, Acting Head, Corporate Governance and Corporate Finance Division, Organisation for Economic Co-operation and Development 4-5 & n.21 (Oct. 21, 2022), [https://www.cii.org/files/21Oct2022\\_CII\\_Letter\\_to\\_OECD.pdf](https://www.cii.org/files/21Oct2022_CII_Letter_to_OECD.pdf) (“CII believes that diverse boards can enhance a company’s financial performance and agrees with OECD’s inclusion of diversity disclosure provisions in its Public Consultation [and] [o]ur member-supported policies also state that nominating committees should recognize the importance of board diversity, including along such characteristics as background, experience, age, race, gender, ethnicity, and culture, when determining the composition of the board.”).

<sup>12</sup> See Brief of Investors & Investment Advisors as Amici Curiae Supporting Respondent at 7-8 & n.5, Alliance for Fair Board Recruitment et al. v. SEC (5th Cir. 2022) (No. 21-60626), [2022-02-24 NASDAQ Amicus Brief dkt 00516217385 Amici Curiae1259813 \(002\).pdf \(cii.org\)](https://www.cii.org/files/2022-02-24_NASDAQ_Amicus_Brief_dkt_00516217385_Amici_Curiae1259813_(002).pdf) (arguing that: “Many Investors and Investment Advisers Believe that Overall Board Diversity Is a Material Benefit to Companies”); Letter from Jeffrey P. Mahoney, General Counsel, CII to Secretary, Securities and Exchange Commission 4-5 & n.15 (Apr. 1, 2021), [April 1 2021 Letter to SEC on diversity proposal \(final\).pdf \(cii.org\)](https://www.cii.org/files/2021-04-01_Letter_to_SEC_on_diversity_proposal_(final).pdf) (“We supported the Diversity Proposal and we similarly support the Amendments because we believe they provide a transparent framework for listed companies to present their board composition, with the flexibility to explain why the requirements cannot be met [and] ‘[w]hile Nasdaq’s proposed definition of diversity is narrower than suggested by our policy, we believe that the Amendments would improve transparency and comparability of disclosure across companies.”); see generally Kate Azevedo, Director Qualities Prioritized in Board Composition: Analysis, Bloomberg Law (Dec. 11, 2023) (on file with CII) (Discussing the results of a survey of 147 practitioners in the areas of corporate, compliance, ESG, and securities finding that when advising clients on how to improve board effectiveness the third most important consideration is diversity of the Board a “movement [that] has likely been given a bump from the Nasdaq Diversity Rule . . .”).

<sup>13</sup> See To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R. \_\_\_, 117th Cong. (discussion draft Sept. 24, 2021), <https://democrats-financialservices.house.gov/uploadedfiles/bills-117pih-improvinggovernanceatmulti-classstockcompanies.pdf> (“(1) DIVERSITY DISCLOSURE.—Each issuer required to file an annual report under subsection (a) shall include in such report the following: ‘(A) Data, based on voluntary self-identification, on the racial, ethnic, and gender composition of— ‘(i) the board of directors of the issuer; ‘(ii) nominees for the board of directors of the issuer; and ‘(iii) the executive officers of the issuer. ‘(B) The status of any member of the board of directors of the issuer, any nominee for the board of directors of the issue, or any executive officer of the issuer, based on voluntary self-identification, as a veteran, disabled, or LGBTQ+. ‘(C) Data on any policy, plan, or strategy adopted by the board of directors of the issuer, or any committee of the board of directors, to promote racial, ethnic, and gender diversity among— ‘(i) the board of directors of the issuer; ‘(ii) nominees for the board of directors of the issuer; or ‘(iii) the executive officers of the issuer.”).

<sup>14</sup> See Letter from Jeffrey P. Mahoney, General Counsel, CII to The Honorable Brad Sherman, Chair, Investor Protection, Entrepreneurship and Capital Markets Subcommittee, Committee on Financial Services, U.S. House of Representatives et al. 4 & n.12 (Nov. 2, 2021), [November 2 2021 letter to Subcommittee AB \(final1\).pdf \(cii.org\)](https://www.cii.org/files/2021-11-02_Letter_to_Subcommittee_AB_(final1).pdf) (“CII believes the Stock Exchange Improvement Act provides a thoughtful solution to preventing the next Facebook [and] [i]ts provisions are consistent with U.S. corporate governance principles and reflect sound, legislative policy recommendations of the U.S. Securities and Exchange Commission’s [ ] Office of the Investor Advocate.”); Letter from Jeffrey P. Mahoney, General Counsel, CII to The Honorable Maxine Waters, Chairwoman, Committee on Financial Services, U.S. House of Representatives et al. 2 & n.5 (Oct. 1, 2021), [October 1, 2021 letter to Committee on Financial Services \(final\).pdf \(cii.org\)](https://www.cii.org/files/2021-10-01_Letter_to_Committee_on_Financial_Services_(final).pdf) (“As the leading voice for corporate governance, CII believes the Draft Bill is consistent with U.S. corporate governance principles and reflects the sound, ‘near-term,’ legislative policy recommendations of the U.S. Securities and Exchange Commission’s [ ] Office of the Investor Advocate”).

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We appreciate the opportunity to present CII's corporate governance best practices and related perspective relevant to issues raised in the RFI. Please let me know if you have any questions, including any, about the content of this letter.

Sincerely,

A handwritten signature in blue ink that reads "Jeff Mahoney". The signature is written in a cursive style with a long, sweeping underline.

Jeffrey P. Mahoney  
General Counsel