

Via E-Mail

February 24, 2022

Vanessa A. Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

*Re: File No. S7-13-21*

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII). CII is a nonprofit, nonpartisan association of United States (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 \$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, 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 \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.<sup>1</sup>

This letter is in response to the Securities and Exchange Commission’s (SEC or Commission) invitation to comment on its semiannual regulatory agenda (Agenda).<sup>2</sup> CII’s current SEC rulemaking priorities fall into the following three categories: (1) Investor Rights and Protections; (2) Corporate Disclosure; and (3) Market Systems & Structure.<sup>3</sup>

## **1. Investor Rights and Protections**

We include under this heading our support for completed action on “Listing Standards for Recovery of Erroneously Awarded Compensation.”<sup>4</sup> We are pleased that the Commission reopened the comment period for the proposed rules to implement the clawback requirements in

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<sup>1</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>2</sup> Regulatory Flexibility Agenda, Securities Act Release No. 10,995, Exchange Act Release No. 93,258, Investment Adviser Act Release No. 5,885, Investment Company Act Release No. 34,393, 87 Fed. Reg. 5,382 (Jan. 31, 2022), <https://www.federalregister.gov/documents/2022/01/31/2021-27952/regulatory-flexibility-agenda>.

<sup>3</sup> See CII Advocacy Priorities – 2022 (2022), [https://www.cii.org/advocacy\\_priorities](https://www.cii.org/advocacy_priorities).

<sup>4</sup> CII Advocacy Priorities – 2022, Investor Rights & Protections (2022), [https://www.cii.org/investor\\_rights\\_protections](https://www.cii.org/investor_rights_protections).

Section 954 of Dodd-Frank, and believe this long-standing project should be advanced to the “Final Rule Stage” and a final rule promptly issued.<sup>5</sup>

### Listing Standards for Recovery of Erroneously Awarded Compensation

CII has long advocated for implementation of Section 954 of Dodd-Frank and adoption of a rule to require clawbacks of unearned executive compensation in certain circumstances. As described on CII’s website:

Boards should recover previously paid executive incentive compensation in the event of acts or omissions resulting in fraud, financial restatement or some other cause the board believes warrants recovery, which may include personal misconduct or ethical lapses that cause, or could cause, material reputational harm to the company and its shareholders.<sup>6</sup>

We agree with SEC Chair Gary Gensler’s October statement that the proposed rule presents an “opportunity to strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors.”<sup>7</sup>

As we stated in a November 18 comment letter, CII acknowledges that some U.S. companies have voluntarily adopted clawback policies that go further than Dodd-Frank requirements, but we continue to support the adoption of a baseline rule for all listed companies consistent with the intent of the Dodd-Frank requirements.<sup>8</sup>

As CII’s November letter states, CII believes that the final rule should include provisions from the proposed rule<sup>9</sup> as well as the following improvements:

- Interpreting the term “an accounting restatement due to material noncompliance” to include all required restatements made to correct an error in previously issued financial statements;
- Adding check boxes to the cover page of the Form 10–K that indicate separately (a) whether the previously issued financial statements included in the filing include an error

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<sup>5</sup> 87 Fed. Reg. at 5,386.

<sup>6</sup> CII Advocacy Priorities – 2022, Investor Rights & Protections.

<sup>7</sup> Statement on Rules Regarding Clawbacks of Erroneously Awarded Compensation, Gary Gensler, Chair (Oct. 14, 2021), <https://www.sec.gov/news/public-statement/gensler-clawbacks-2021-10-14>.

<sup>8</sup> See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Vanessa Countryman, Secretary, Securities and Exchange Commission 9 (Nov. 18, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/November%2018%202021%20SEC%20clawback%20letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/November%2018%202021%20SEC%20clawback%20letter%20(final).pdf) (“CII acknowledges that there have been a number of developments since the Proposed Rule relating to clawbacks, most notably the voluntary adoption by some companies of clawback policies that go beyond the requirements of Section 954 of Dodd-Frank [and] [w]e, however, continue to believe that it is in the best interests of investors for the Commission to finally bring this long overdue, Congressionally mandated rulemaking to a close by issuing a final rule.”).

<sup>9</sup> See 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 (July 14, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-07-14/html/2015-16613.htm>.

correction, and (b) whether any such corrections are restatements that triggered a clawback analysis during the fiscal year;

- Disclosure of how issuers calculated the recoverable amount, including their analysis of the amount of the executive’s compensation that is recoverable under the rule, and the amount that is not subject to the rule; and
- Requiring Inline XBRL detail tagging of all the compensation recovery information required by the rule.<sup>10</sup>

CII would support prompt issuance of a final rule on clawbacks of erroneously awarded compensation.

## 2. Corporate Disclosure

We include under this heading our support for Commission action on CII’s rulemaking priorities to reform and improve disclosure of Rule 10b5-1 trading plans<sup>11</sup> and to improve disclosure for executive pay versus performance,<sup>12</sup> including disclosure of the reconciliation to Generally Accepted Accounting Principles (GAAP) of non-GAAP metrics used to determine executive compensation.<sup>13</sup>

We thank the Commission for the proposed rule to tighten the loopholes and enhance transparency of Rule 10b5-1 trading plans in company stock.<sup>14</sup> We look forward to commenting favorably on the proposed rule and to its prompt finalization.

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<sup>10</sup> Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Vanessa Countryman, Secretary, Securities and Exchange Commission at 2.

<sup>11</sup> See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission 3 (Dec. 28, 2012), [http://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2012/12\\_28\\_12\\_cii\\_letter\\_to\\_sec\\_rule%2010b5-1\\_trading\\_plans.pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%2010b5-1_trading_plans.pdf) (“More specifically, we would respectfully request that the Securities and Exchange Commission . . . consider pursuing . . . amendments to Rule 10b5-1 that would require Rule 10b5-1 plans to adopt [certain] . . . protocols and guidelines . . .”).

<sup>12</sup> See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission 3 (June 25, 2015), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2015/06\\_25\\_15\\_letter%20to%20SEC%20on%20953\(a\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2015/06_25_15_letter%20to%20SEC%20on%20953(a).pdf) (“Consistent with our policies, CII generally supports the Proposal.”).

<sup>13</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission 1 (Apr. 29, 2019), [https://www.cii.org/Files/issues\\_and\\_advocacy/correspondence/2019/20190426%20CII%20Petition%20revised%20on%20non-GAAP%20financials%20in%20proxy%20statement%20CDAs.pdf](https://www.cii.org/Files/issues_and_advocacy/correspondence/2019/20190426%20CII%20Petition%20revised%20on%20non-GAAP%20financials%20in%20proxy%20statement%20CDAs.pdf) (“non-GAAP financial measures presented in the proxy statement Compensation Discussion & Analysis . . . required reconciliation shall be included within the proxy statement or made accessible through a hyperlink in the CD&A”).

<sup>14</sup> See Rule 10b5-1 and Insider Trading, Securities Act Release No. 11,013, Exchange Act Release No. 93,782, 87 Fed. Reg. 8,686 (proposed rule Jan. 13, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01140.pdf>.

We also appreciate the Commission's reopening of the comment period on pay-for-performance disclosure.<sup>15</sup> We plan to again comment favorably on the proposal and request two important revisions: (1) require registrants to disclose all of the quantitative metrics and thresholds the registrant actually uses in determining the incentive compensation paid to named executive officers for the current year;<sup>16</sup> and (2) require registrants to disclose (or include a link to) a quantitative reconciliation of non-GAAP executive pay metrics to the related GAAP amounts.<sup>17</sup>

### Rule 10b5-1 Trading Plans

As described on CII's website:

Under SEC Rule 10b5-1, executives, directors and other top company insiders are able to establish a written plan that details when they will be able to buy or sell shares at a predetermined time on a scheduled basis. But press reports and empirical research suggest that corporate insiders may have used 10b5-1 trading plans as cover for improper stock trades. Insiders can adopt, amend and cancel these plans easily and without disclosure, a recipe for fortuitously timed trades while in possession of material, non-public information. In 2012, CII submitted a rulemaking petition [2012 Petition] to the SEC recommending improvements to Rule 10b5-1 and we have urged the commission repeatedly to close the loopholes that invite plan abuse.<sup>18</sup>

We note that on December 15, the Commission unanimously supported the proposed rule to improve disclosure of 10b5-1 trading plans.<sup>19</sup> We agree with SEC Commissioner Caroline Crenshaw that "increased transparency from issuers and insiders will lead to better outcomes for investors by limiting the temptation for insiders to engage in practices that take unfair advantage or could be perceived to do so."<sup>20</sup>

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<sup>15</sup> See Reopening of Comment Period for Pay Versus Performance, Securities Act Release No. 94,074, 87 Fed. Reg. 5,751 (Feb. 2, 2022), <https://www.federalregister.gov/documents/2022/02/02/2022-02024/reopening-of-comment-period-for-pay-versus-performance>.

<sup>16</sup> See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 7 ("Consistent with our membership-approved policies, we believe requiring such quantitative information to be disclosed may be the single most important improvement the Commission could make to the Proposal").

<sup>17</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 2 ("the registrant should include the required GAAP reconciliation and other information in the CD&A itself, or in an appendix to the proxy statement or hyperlink to the relevant section of the 10-K.").

<sup>18</sup> CII Advocacy Priorities – 2022, Corporate Disclosure (2022), [https://www.cii.org/corporate\\_disclosure](https://www.cii.org/corporate_disclosure).

<sup>19</sup> See Press Release, U.S. Securities and Exchange Commission, SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures (Dec. 15, 2021), <https://www.sec.gov/news/press-release/2021-256>.

<sup>20</sup> Statement on the Proposed Amendments to the Availability of the Affirmative Defense to Allegations of Insider Trading Provided by Exchange Act Rule 10b5-1, Caroline A. Crenshaw, Commissioner, SEC (Dec. 15, 2021), <https://www.sec.gov/news/statement/crenshaw-statement-10b5-1-121521>.

In June, CII's general counsel testified before the SEC's Investor Advisory Committee. His prepared remarks in connection with the panel discussion included the following specific recommendations:

CII believes, generally consistent with its membership-approved 2020 Statement, that the IAC should recommend to the SEC the following actions to strengthen Rule 10b5-1:

First, the SEC should enhance the public disclosure of Rule 10b5-1 plans and related transactions. This may be accomplished by:

- Issuing a final rule in connection with the SEC's 2020 proposed rule on "Rule 144 Holding Period and Form 144 Filings" to require:
  - Form 4 and Form 5 indicate, via a mandatory check box, whether their reported transactions were made pursuant to Rule 10b5-1(c) rather than provide it as an option for the filer,
  - Disclosure of the adoption date of the respective Rule 10b5-1 plan on the forms, and
  - Electronic filing of Form 144.
- Propos[ing] a rule requiring that the "compensation discussion and analysis" section of the proxy statement include information on the number of shares covered under named executive officers' Rule 10b5-1 plans.
- Propos[ing] a rule requiring disclosure of Rule 10b5-1 plans, including disclosure of the adoption, modification, or cancellation of those plans, and the number of shares covered, to be filed on Form 8-K.

Second, the SEC should propose rules providing the following additional conditions to qualify for an "affirmative defense" under Rule 10b5-1:

- At least a three month "cooling off" period between plan adoption and initial trade execution; and
- Limitations on:
  - Multiple overlapping plans; and
  - On when and how plans may be cancelled.<sup>21</sup>

CII plans to emphasize these points in our comment letter in support of the Commission's proposal. We respectfully request that the Commission prioritize the issuance of a final rule on Rule 10b5-1 trading plans.

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<sup>21</sup> Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to the United States Securities and Exchange Commission, Investor Advisory Committee 10-11 (June 10, 2021) [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/June%2010%202021%20SEC%20IAC--\(final\)%20LN%20\(005\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/June%2010%202021%20SEC%20IAC--(final)%20LN%20(005).pdf) (footnotes omitted).

## Pay Versus Performance

CII is pleased to see that the SEC has moved “Pay Versus Performance” to the Proposed Rule stage<sup>22</sup> and has since reopened the comment period for the proposal (Reopening Proposal).<sup>23</sup> We agree with SEC Commissioner Allison Herren Lee that it is critical for investors to understand the financial incentives that drive executive performance when evaluating a company’s compensation practices.<sup>24</sup> In 2015, CII wrote a letter to the SEC generally supporting the Commission’s original proposal (Proposing Release)<sup>25</sup> to implement Sec. 953(a) of Dodd-Frank.<sup>26</sup> In the letter, CII requested that the Proposing Release be revised to provide additional quantitative information illustrating the relationship between executive compensation and the financial performance of the issuer.<sup>27</sup>

Similarly, in response to the Reopening Release, CII currently plans to recommend that the Commission require registrants to disclose all of the performance measures that are used to determine named executive officers’ (NEO) compensation in the current year. More specifically, we believe the information required to be disclosed should include all quantitative metrics and thresholds that were actually used in the current year to determine NEO compensation.

Our view is generally consistent with our current membership-approved corporate governance best practices on executive compensation that include the following provisions relating to disclosures of performance measures:

Compensation committees should make compensation disclosures (including those in the U.S.-style Compensation Disclosure and Analysis), as clear, straightforward and comprehensible as possible. Each element of pay should be clear to shareholders, especially with respect to any goals, metrics for their achievement and maximum potential total cost.

Descriptions of metrics and goals in the proxy statement should be at least as clear as disclosures described in other investor materials and calls. To the extent that compensation is performance-based, it is critical that investors have information to evaluate the choice of metrics, how those metrics relate to key company strategic goals, and how challenging the

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<sup>22</sup> 87 Fed. Reg. at 5,382.

<sup>23</sup> See Reopening of Comment Period for Pay Versus Performance, Exchange Act Release No. 94,074, 87 Fed. Reg. 5,751, 5,751 (reopening of proposal Jan. 27, 2022), <https://www.federalregister.gov/documents/2022/02/02/2022-02024/reopening-of-comment-period-for-pay-versus-performance>.

<sup>24</sup> See Measuring Pay Against Performance: Are Shareholders Getting Their Money’s Worth?, Allison Herren Lee, Commissioner, SEC (Jan. 27, 2022), <https://www.sec.gov/news/statement/lee-statement-pvp-012722> (“financial incentives drive how executives perform in their role as fiduciaries to companies and their shareholders [and] [u]nderstanding what those incentives are and whether they are actually working – that is, if and how they link to company performance – is critical for investors in evaluating a company’s compensation practices”).

<sup>25</sup> Pay Versus Performance, Exchange Act Release No. 74,835, 80 Fed. Reg. 26,330 (proposed May 7, 2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-10429.pdf>.

<sup>26</sup> See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 3 (“Consistent with our policies, CII generally supports the Proposal.”).

<sup>27</sup> *Id.* at 7 (“Perhaps more importantly, we believe Congress also intended for the rules to include disclosure of key quantitative metrics, such as thresholds, targets, and goals that compensation committees actually use to design and determine PEO and NEO incentive compensation.”).

goals are. Any intra-period or *post hoc* discretionary adjustments to awards should be justified, disclosed and fully explained.<sup>28</sup>

....

The compensation committee should ensure that performance-based programs are not too complex to be well understood by both participants and shareholders, that the underlying performance metrics support the company's business strategy, and that potential payouts are aligned with the performance levels that will generate them. In addition, the proxy statement should clearly explain such plans, including their purpose in context of the business strategy and how the award and performance targets, and the resulting payouts, are determined. Finally, the committee should consider whether long-vesting restricted shares or share units would better achieve the company's long-term compensation and performance objectives, versus routinely awarding a majority of executives' pay in the form of performance shares.<sup>29</sup>

CII also plans to respectfully request that the Reopening Release be revised to require disclosure of a quantitative reconciliation to GAAP of non-GAAP metrics used to determine executive compensation.<sup>30</sup> As CII policy explains:

Metrics for performance and performance goals can be numerous and wide-ranging. They often are based on non-GAAP "adjusted" measures without reconciliation to GAAP. Investors need sufficient information to understand how the plan works. Performance-based award programs typically are more difficult to understand, more difficult to value and more vulnerable to obfuscation than time-vesting restricted stock.<sup>31</sup>

It is estimated that over 95% of S&P 500 companies disclose a customized version of earnings that is not in accordance with GAAP.<sup>32</sup> These non-GAAP financial measures often exclude costs such as "[s]tock option expenses, write-offs [of] acquired intangibles, and restructuring charges."<sup>33</sup> Some companies and some investors believe these exclusions are "not important for understanding the future value of the company."<sup>34</sup>

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<sup>28</sup> CII policy, Section 5.3, Transparency of Compensation (last updated on Sept. 22, 2021), [https://www.cii.org/corp\\_gov\\_policies#exec](https://www.cii.org/corp_gov_policies#exec).

<sup>29</sup> *Id.*

<sup>30</sup> See CII Advocacy Priorities – 2022, Corporate Disclosure.

<sup>31</sup> CII policy, Section 5.5c, Performance-based compensation.

<sup>32</sup> See Vijay Govindarajan et al., Finance & Accounting, Mind the GAAP, Harv. Bus. Rev. (May 4, 2021), <https://hbr.org/2021/05/mind-the-gaap> ("95% of S&P 500 companies report both GAAP and non-GAAP earnings, showing its wide prevalence.").

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

The onset of Covid-19 appears to have further increased the use of non-GAAP financial measures, and perhaps more significantly, increased the gap between GAAP earnings and non-GAAP earnings.<sup>35</sup> As one legal expert observed last year:

[I]n the sample group [of earnings releases for 2020 issued by companies in the S&P 500 that reported both GAAP and non-GAAP earnings], non-GAAP net income exceeded GAAP net income by \$132.3 billion—more than double the total GAAP net income of \$130.7 billion. By comparison, a 2019 op-ed co-authored by former SEC Commissioner Robert Jackson cited research showing that firms in the S&P 500 announced adjusted earnings that were, on average, 23% higher than GAAP earnings and pointed to 36 companies in the S&P 500 that, in 2015, announced non-GAAP earnings more than 100% higher than the GAAP equivalent, and 57 more companies that reported non-GAAP earnings that were 50% to 100% higher than GAAP.<sup>36</sup>

Thus, while non-GAAP financial measures may be useful in understanding a company's performance, they also may be misused to “opportunistically report higher profits.”<sup>37</sup>

Since 2003, the SEC has generally required companies to give equal prominence to GAAP and non-GAAP financial measures, and an explanation of why non-GAAP measures are better than GAAP, as well as provide a quantitative reconciliation of the numbers.<sup>38</sup> Yet an anomaly exists in that the SEC rules currently do not apply to the target measures for compensation contained in the Compensation, Discussion & Analysis (CD&A) section of a corporation's proxy statement.<sup>39</sup>

One analysis revealed that in 2018, more than two-thirds of the S&P 500 companies used non-GAAP financial measures to establish compensation targets in the CD&A.<sup>40</sup> That same analysis indicated that about 30% of S&P 500 companies that used non-GAAP financial measures in the CD&A used identically labeled non-GAAP metrics in their earnings releases *but calculated the*

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<sup>35</sup> See Cydney Posner, *Is There a Resurgence in the Use of Non-GAAP Financial Measures?*, Cooley PubCo (May 17, 2021), <https://cooleypubco.com/2021/05/17/resurgence-non-gaap-financial-measures> (“with the onset of COVID-19, there seems to have been something of a resurgence in the use of non-GAAP measures”).

<sup>36</sup> *Id.*

<sup>37</sup> Vijay Govindarajan et al., *Finance & Accounting, Mind the GAAP*, Harv. Bus. Rev.

<sup>38</sup> See *Conditions for Use of Non-GAAP Financial Measures*, Securities Act Release No. 8,176, Exchange Act Release No. 47,226 (Jan. 23, 2002), <https://www.sec.gov/rules/final/33-8176.htm> (“Regulation G contains a general disclosure requirement and a specific requirement of a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure.”).

<sup>39</sup> See, e.g., Kevin Douglas, *Navigating the Maze: Which SEC Rules Apply to Your Non-GAAP Financial Measure Disclosures*, Bass Berry & Sims, Sec. L. Exch. (Oct. 24, 2019), <https://www.bassberrysecuritieslawexchange.com/non-gaap-financial-measures-disclosure/> (“where non-GAAP financial measures are disclosed as a target metric for compensatory purposes, the applicable non-GAAP requirements . . . reconciliation, equal prominence, etc. . . do not apply”).

<sup>40</sup> See Olga Usvyatsky, *Pros and Cons of Using Non-GAAP Metrics for Executive Compensation, Including ESG Considerations*, Audit Analytics (June 11, 2019), <https://blog.auditanalytics.com/pros-and-cons-of-using-non-gaap-metrics-for-executive-compensation-including-esg-considerations/> (“In 2018, more than two-thirds of the S&P 500 companies used non-GAAP to establish compensation targets.”).



*measures differently.*<sup>41</sup> Other research has indicated that non-GAAP metrics determined a significant percentage of CEO’s annual cash bonuses, long-term stock awards, or both.<sup>42</sup>

CII believes that the CD&A is the most important source of information used by investors in evaluating executive compensation.<sup>43</sup> Investors often struggle to make sense of how companies assess performance when approving large compensation packages.<sup>44</sup>

CII also believes the need for clarity is especially appropriate in the CD&A context because shareholders cast advisory votes on executive compensation regularly—every year at most public companies.<sup>45</sup> The CD&A also informs investors’ understanding of a corporation’s governance more generally, and in voting on the election of its directors.<sup>46</sup>

In 2019, CII filed a petition with the SEC asking that CD&A reports include an explanation of why non-GAAP measures are better for determining executive pay than GAAP, and that they include a quantitative reconciliation (or a hyperlink to a reconciliation in another SEC filing) of these two sets of numbers (2019 Petition).<sup>47</sup> More specifically, the 2019 Petition requests that the Commission: (1) initiate a rule change to amend Item 402(b) of Regulation S-K to eliminate Instruction 5; and (2) revise the Division of Corporation Finance’s Compliance & Disclosure Interpretations on Non-GAAP Financial Measures to be consistent with the aforementioned amendment and to provide that all non-GAAP financial measures presented in the proxy statement CD&A are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K and (3) require that the reconciliation be included within the proxy statement or made accessible through a hyperlink in the CD&A.<sup>48</sup>

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<sup>41</sup> *Id.* (“some firms will double-adjust executive compensation metrics by identically labeling metrics in both earnings releases and executive pay but calculating the metrics differently”).

<sup>42</sup> See Nicholas Guest et al., High Non-GAAP Earnings Predict Abnormally High CEO Pay\*, MIT, Sloan Sch. of Mgmt. 10 (May 2018), <https://www.hbs.edu/faculty/Shared%20Documents/conferences/2018-imo/GKP%20Non-GAAP%20Compensation%20Paper%20May%202018.pdf> (“For example, 38% of FirstEnergy’s 2013 target CEO pay was granted for meeting a non-GAAP earnings target, 20% as an annual cash bonus and 18% as restricted stock.”).

<sup>43</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 10 (Apr. 22, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/April%202021%20SEC%20Reg%20Flex%20Letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/April%202021%20SEC%20Reg%20Flex%20Letter%20(final).pdf) (“The CD&A is the most important source of information used by investors in evaluating executive compensation.”).

<sup>44</sup> *Id.* (“Investors often struggle to make sense of how companies assess performance in approving large compensation packages.”).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 2.

<sup>48</sup> *Id.* at 1 (CII “respectfully submits this petition to the Securities and Exchange Commission . . . requesting that the Commission (1) initiate a rule change to amend Item 402(b) of Regulation S-K [17 CFR 229.402(b)] . . . to eliminate Instruction 5; and (2) revise the Division of Corporation Finance’s Compliance & Disclosure Interpretations on ‘Non-GAAP Financial Measures’ consistent with the aforementioned amendment and to provide that all non-GAAP financial measures presented in the proxy statement Compensation Discussion & Analysis . . . are subject to the requirements of Regulation G [17 CFR 244.101-102] and Item 10(e) of Regulation S-K [17 CFR 10(c)] and that the required reconciliation shall be included within the proxy statement or made accessible through a hyperlink in the CD&A.”).

In a December 2020 opinion piece in MarketWatch, Robert Pozen, a senior lecturer at the MIT Sloan School of Management and formerly vice chairman of Fidelity Investments and John Coates, John F. Cogan Professor of Law and Economics at Harvard Law School, advocated for making the issues raised by the 2019 Petition a consensus agenda rulemaking item for the Commission.<sup>49</sup>

Some might argue that the rulemaking envisioned by the 2019 Petition is unnecessary because companies will voluntarily improve their proxy disclosures to include an explanation of why non-GAAP measures are better for determining executive pay than GAAP and a quantitative reconciliation or a hyperlink to a quantitative reconciliation in another SEC filing. In anticipation of that argument, we reviewed the 2020 and 2021 proxy statements of the seven companies we highlighted in the 2019 Petition as examples of companies in need of better non-GAAP disclosure: Abbott Laboratories, Advanced Micro Devices, Altice USA, Cisco Systems, Cogent Communications Holdings, Oracle Corporation, and Revlon.<sup>50</sup> Based on our review, it does not appear that any of the companies have to-date improved their proxy disclosures to include an explanation of why non-GAAP measures are better for determining executive pay than GAAP. They also have not provided a quantitative Non-GAAP to GAAP reconciliation or even a hyperlink to a Non-GAAP to GAAP quantitative reconciliation in their 2020 or 2021 CD&A.<sup>51</sup>

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<sup>49</sup> See John Coates & Robert Pozen, FA Center, Opinion; New SEC Chair Needs to Tackle These Big Issues so the Government Can Do a Better Job for Investors, Mkt.Watch (Dec. 17, 2020), <https://www.marketwatch.com/story/new-sec-chair-needs-to-tackle-these-5-big-issues-so-the-government-can-do-a-better-job-for-investors-2020-12-17> (“It should be a nonpartisan point of agreement to start a rulemaking process on the use of non-GAAP measures in compensation committee reports . . .”).

<sup>50</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 3-4 n.7.

<sup>51</sup> See Abbott Laboratories, Schedule 14A at 36, 38, 40 (Mar. 12, 2021), <https://www.sec.gov/Archives/edgar/data/1800/000104746921000592/a2242988zdef14a.htm> (various “adjusted” measures); Advance Micro Devices, Inc., Schedule 14A at 48, 56 (Mar. 31, 2021), <https://www.sec.gov/Archives/edgar/data/2488/000119312521102463/d85905ddef14a.htm> (adjusted non-GAAP net income and adjusted non-GAAP free cash flow); Altice USA, Inc., Schedule 14A at 16-17 (Apr. 29, 2021), [https://www.sec.gov/Archives/edgar/data/1702780/000162828021008291/a2021proxystatement.htm#idf1a5efed63a409097f239df52ce09ef\\_160](https://www.sec.gov/Archives/edgar/data/1702780/000162828021008291/a2021proxystatement.htm#idf1a5efed63a409097f239df52ce09ef_160) (adjusted EBITDA); Cisco Systems, Inc., Schedule 14A at 25 (Oct. 22, 2021), [https://www.sec.gov/Archives/edgar/data/858877/000119312521306708/d174342ddef14a.htm#toc174342\\_22](https://www.sec.gov/Archives/edgar/data/858877/000119312521306708/d174342ddef14a.htm#toc174342_22) (adjusted revenue and adjusted operating income); Cogent Communications Holdings, Inc., Schedule 14A at 43 (Apr. 28, 2021), [https://www.sec.gov/Archives/edgar/data/1158324/000110465921032599/tm212366-1\\_def14a.htm](https://www.sec.gov/Archives/edgar/data/1158324/000110465921032599/tm212366-1_def14a.htm) (adjusted EBITDA “as defined in the Company’s earnings releases”); Oracle Corporation, Schedule 14A at 34 (Sept. 24, 2021), [https://www.sec.gov/Archives/edgar/data/1341439/000119312521282422/d162163ddef14a.htm#toc162163\\_25](https://www.sec.gov/Archives/edgar/data/1341439/000119312521282422/d162163ddef14a.htm#toc162163_25) (“non-GAAP pre-tax profit”, “non-GAAP operating income”); Revlon, Inc., Schedule 14A at 21-22 (Apr. 20, 2021), [https://www.sec.gov/Archives/edgar/data/0000887921/000114036121013412/nc10020840x1\\_def14a.htm](https://www.sec.gov/Archives/edgar/data/0000887921/000114036121013412/nc10020840x1_def14a.htm) (adjusted EBITDA and free cash flow); Abbott Laboratories, Schedule 14A at 34-36 (Mar. 13, 2020), <https://sec.report/Document/0001047469-20-001466/> (various “adjusted” measures); Advance Micro Devices, Inc., Schedule 14A at 40-43, 53 (Mar. 26, 2020), available at <https://seekingalpha.com/filing/4902379> (adjusted non-GAAP net income and Non-GAAP adjusted free cash flow); Altice USA, Inc., Schedule 14A at 19 (June 10, 2020), <https://sec.report/Document/0001628280-20-005457/> (Adjusted EBITDA and Capex Adjusted EBITDA); Cisco, Notice of Annual Meeting of Shareholders and Proxy Statement 27 (Oct. 18, 2019), [https://www.cisco.com/c/dam/en\\_us/about/annual-report/cisco-proxy-statement-2019.pdf](https://www.cisco.com/c/dam/en_us/about/annual-report/cisco-proxy-statement-2019.pdf) (adjusted revenue and adjusted operating income); Cogent Communications Holdings, Inc., Schedule 14A at 25 (May 6, 2020), available at <https://www.sec.gov/Archives/edgar/data/0001158324/000104746920001415/a2240954zdef14a.htm> (“adjusted EBITDA”) (as defined in the Company’s earnings releases”); Oracle Corporation, Schedule 14A at 36 (Sept. 27, 2019), <https://www.sec.gov/Archives/edgar/data/1341439/000119312519257430/d755300ddef14a.htm>

CII believes it is imperative that the SEC require, at a minimum, that companies include a hyperlink to a GAAP reconciliation for any non-GAAP pay targets contained in their CD&A.<sup>52</sup> The Reopening Release provides the Commission the opportunity to address this long-standing issue while improving the disclosure of pay versus performance consistent with Section 953(a) of Dodd-Frank.

### 3. Market Systems & Structure

We include under this heading our appreciation for Commission's recent issuance of a final universal proxy rule<sup>53</sup> and our support for the Commission's project on "Proxy Process Amendments."<sup>54</sup>

#### Universal Proxy

We are very pleased that the Commission finalized the universal proxy rule in November.<sup>55</sup> CII has long supported universal proxies in contested elections for seats on public company boards.

CII policy states that, "to facilitate the shareholder voting franchise, the opposing sides engaged in a contested election should utilize a proxy card naming all management-nominees and all shareholder-proponent nominees, providing every nominee equal prominence on the proxy card."<sup>56</sup> As we said in our June comment letter, CII believes that providing shareholders the ability to use either proxy card to vote for any combination of board nominees they support delivers a critical benefit to the market.<sup>57</sup>

However, we are disappointed that the Commission's project on proxy process remains categorized under "Long-Term Actions" on the Commission's regulatory agenda.<sup>58</sup>

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("non-GAAP pre-tax profit"); Revlon, Inc., Schedule 14A at 22-23, 25-32 (Apr. 22, 2020), <https://sec.report/Document/0001140361-20-009411/> (includes no specific description of GAAP or non-GAAP targets).

<sup>52</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 11 ("CII and many of its members agree that it is imperative that the SEC require at least the same level of transparency in the proxy statement CD&A as in other public company documents.").

<sup>53</sup> Universal Proxy, Securities Act Release No. 93,596, Investment Company Act Release No. 34,419, 86 Fed. Reg. 68,330 (Dec 1, 2021), <https://www.federalregister.gov/documents/2021/12/01/2021-25492/universal-proxy>.

<sup>54</sup> SEC, Long-Term Actions, Proxy Process Amendments, Agency Rule List (Fall 2021), available at [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPubId=202110&showStage=longterm&agencyCd=3235&csrf\\_token=4DCE8DEA397AACCF238A6D37040C300F7B2DD0DDEDCDC79E3A53279C6817DD68CD3383ED8FACCEFD97D513538F1B47498C32](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=202110&showStage=longterm&agencyCd=3235&csrf_token=4DCE8DEA397AACCF238A6D37040C300F7B2DD0DDEDCDC79E3A53279C6817DD68CD3383ED8FACCEFD97D513538F1B47498C32).

<sup>55</sup> See Press Release, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections (Nov. 17, 2021), <https://www.sec.gov/news/press-release/2021-235>.

<sup>56</sup> CII Policy, Section 2.2, Director Elections.

<sup>57</sup> See Letter from Glenn Davis, Deputy Director, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 2-3 (June 2, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/06-02-21%20CII%20letter%20to%20SEC%20Release%20No%2034-91603.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/06-02-21%20CII%20letter%20to%20SEC%20Release%20No%2034-91603.pdf).

<sup>58</sup> SEC, Long-Term Actions, Proxy Process Amendments, Agency Rule List.

### Proxy Process Amendments

As described on CII's website:

As shareholder voting is a core and essential element of corporate governance, shareholders have a keen interest in a reliable, transparent and cost-effective system for voting proxies. Yet the U.S. system of proxy voting is extraordinarily complex and inefficient. Many CII members lack confidence that their shares are always fully and accurately voted and for a decade, a mechanism for confirming that votes were counted as intended has eluded market participants.<sup>59</sup>

Since the universal proxy rule is finalized, we believe the SEC should prioritize as a next step improving the proxy plumbing to address end-to-end vote confirmation.<sup>60</sup> As you are aware, many CII members continue to lack confidence that their shares are always fully and accurately voted. This is largely due to the complex daisy chain of the proxy voting infrastructure.

A nominee bank may have a larger share position on its books than is entitled to vote (often as a result of shares being out on loan). Institutional investors generally vote on electronic platforms and should be able to promptly get vote confirmations of how, and how many shares in each account, were voted on for each voting item.

In December 2021, a working group of banks, broker-dealers, public companies, tabulators, transfer agents and others in the proxy service community agreed to provide vote confirmation for 2022 annual shareholder meetings of Fortune 500 companies.<sup>61</sup> In addition, Broadridge Financial Solutions, Computershare, EQ and Mediant have agreed to provide vote confirmation for all annual meetings for which they tabulate votes.<sup>62</sup> In total, this means vote confirmation will be possible for more than 2,000 U.S. annual meetings in 2022.<sup>63</sup>

CII co-chaired this working group with the Society for Corporate Governance and welcomed the agreement. We will monitor the efficacy of this new vote confirmation process, based on feedback from investor members. To the extent that this effort does not ultimately result in an effective end-to-end vote confirmation system, CII believes that SEC staff should issue guidance or a proposed rulemaking that effectively requires companies and their agents to exchange information about securities positions. This would allow them to correct any discrepancies

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<sup>59</sup> CII Advocacy Priorities – 2022, Market Systems & Structure (2022), [https://www.cii.org/market\\_systems\\_structure](https://www.cii.org/market_systems_structure).

<sup>60</sup> See John Coates & Robert Pozen, FA Center, Opinion; New SEC Chair Needs to Tackle These Big Issues so the Government Can Do a Better Job for Investors, Mkt.Watch (opining that in recent years the Securities and Exchange Commission could have mandated “end-to-end vote confirmation that could improve proxy ‘plumbing,’ [but instead] the SEC set out examples of how proxy advisors could be sued.”); see also Cydney Posner, Blog: Coates named Acting Director of Corp Fin, Cooley PubCo (Feb. 3. 2021), available at <https://www.jdsupra.com/legalnews/blog-coates-named-acting-director-of-9232130/> (providing background on John Coates and the proxy plumbing issue, including end-to-end vote confirmation).

<sup>61</sup> See Council of Institutional Investors & Society for Corporate Governance, Industry Group Agrees to End-to-End Vote Confirmation for Fortune 500 Annual Meetings (Dec. 21, 2021), <https://www.cii.org/Files/Pilot%20Announcement%20as%20of%2012.18.21.pdf>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

sufficiently in advance of the annual meeting so that issuers could confirm votes back to nominees, who in turn would confirm votes with beneficial owners. The result would be an important advancement in proxy plumbing and responsive to the agenda's "proxy process amendments."<sup>64</sup>

CII also supports broader steps the Commission could take to improve the proxy system infrastructure on a fundamental level. In our 2019 letter on the Proxy Process roundtable, CII supported "specific regulatory relief the SEC could provide to foster the use of innovative technology by permitting issuers to elect to place their equity securities on a private, permissioned blockchain."<sup>65</sup> The Commission should advance this effort or propose alternative rulemaking designed to use existing technologies to improve the proxy system infrastructure.

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Thank you for consideration of CII's views. If we can answer any questions or provide additional information on the Agenda or this letter, please do not hesitate to contact me at [lucy@cii.org](mailto:lucy@cii.org).

Sincerely,

A handwritten signature in black ink that reads "Lucy Nussbaum". The signature is written in a cursive, flowing style.

Lucy Nussbaum  
Senior Research Analyst

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<sup>64</sup> SEC, Long-Term Actions, Proxy Process Amendments, Agency Rule List.

<sup>65</sup> Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Brent J. Fields, Secretary, Securities and Exchange Commission 1 (Jan. 31, 2019), <https://www.cii.org/files/20190131%20CII%20Follow%20Up%20Letter%20to%20SEC%20on%20Proxy%20Mechanics%20FINAL.pdf>.