



January 7, 2013

Jan-Michiël Hessels
Chairman
NYSE Euronext
11 Wall Street
New York, NY 10005

Dear Mr. Hessels:

I am writing to you on behalf of the Council of Institutional Investors (“CII”) in response to the important shareowner issues raised in the November 17, 2012, Gretchen Morgenson article in *The New York Times* entitled, “Fair Game, A Change in Carrots, Without a Stick” (“Morgenson Article”).¹ CII is a nonprofit, nonpartisan association of pension funds and other employee benefit funds, foundations and endowments with combined assets of over \$3 trillion.² CII’s mission is to educate its members, policymakers and the public about corporate governance, shareowner rights and related investment issues, and to advocate on members’ behalf.

CII members own and manage a large volume of equity securities that are traded on the NYSE Euronext (“NYSE”) markets.³ As long-term investors, our members share your view that NYSE listing standards should “raise corporate governance and disclosure standards . . . [enhance the] accountability, integrity and transparency of the Exchange’s listed companies [and] . . . allow shareholders to more easily and efficiently monitor the performance of companies and directors”⁴ We, therefore, were surprised and disappointed to learn from the Morgenson Article that the NYSE had concluded that its listing standards did not require that Simon Property Group, Inc., a NYSE listed company (“Simon”), seek shareowner approval of its 2011 amendment to its 1998 Stock Incentive Plan (“Plan”).⁵ We are also deeply concerned about the NYSE’s process for reaching that conclusion.

¹ Gretchen Morgenson, *Fair Game, A Change in Carrots, Without a Stick*, N.Y. Times, Oct. 17, 2012, 1-2, http://www.nytimes.com/2012/11/18/business/at-simon-property-a-change-in-carrots-without-a-stick.html?_r=0.

² For more information about the Council of Institutional Investors (“CII”), including its members, please visit the CII’s website at <http://www.cii.org/about>.

³ See, e.g., Global Pension Assets Study 2012, Towers Watson 30 (Jan. 2012), <http://www.towerswatson.com/assets/pdf/6267/Global-Pensions-Asset-Study-2012.pdf> (indicating that approximately 44% of U.S. pension asset allocation is in equities).

⁴ NYSE, New York Stock Exchange Corporate Accountability and Listing Standards Committee 1 (June 6, 2002), http://www.nyse.com/pdfs/corp_govreport.pdf.

⁵ See Gretchen Morgenson at 2.

As background, in a Form 8-K filed on July 7, 2011, it was disclosed that the board of directors of Simon approved an amendment to the Plan that permitted the award of performance units subject to continuous service vesting requirements.⁶ Prior to that amendment, any performance units granted under the Plan had to be tied to “Performance Goals” over a designated “Performance Cycle.”⁷ Specifically, the pre-amended Plan stipulated that:

[T]he Performance Goals shall be in writing and shall be based on any one or any combination of the following business criteria: (A) earnings per share; (B) return on equity; (C) return on assets; (D) market value per share; (E) funds from operations; (F) return to stockholders (including dividends); (G) revenues; (H) market share; (I) cash flow; and (J) cost reduction goals⁸

Simon’s board decided not to solicit shareowner approval of the Plan amendment after outside counsel obtained confirmation from the NYSE that a shareowner vote could be avoided. Specifically, on Friday, March 4, 2011, at 2:30 PM, Michael J. Segal, partner of Wachtell, Lipton, Rosen & Katz, emailed John Carey, Vice President - Legal, NYSE Regulation, Inc., seeking his view on the matter.⁹ In his email, M. Segal did not identify the company, provide a copy of the Plan or the proposed amendments or include a thorough explanation of the underlying facts. He sought the NYSE’s agreement with his opinion that the briefly described amendment did not constitute a material revision requiring shareowner approval because:

- It did not “fall into one of the specific examples of ‘material revisions’ which require shareholder approval under rule 303a(8) and FAQ C-1”
- It neither increased “potential shareholder dilution . . . nor has an effect ‘similar’ to one of those listed in the specific examples;” and
- It was more akin to changing a “vesting schedule.”¹⁰

Before the end of the following business day, J. Carey responded with an email, concurring with M. Segal’s analysis. J. Carey’s response consisted of the following single sentence: “We have discussed your question and we have concluded that we agree with your analysis.”¹¹

⁶ Form 8-K, Simon Property Group, Inc. 4-5 (filed July 7, 2012), <http://google.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=8033012-1000-24894&type=sect&TabIndex=2&companyid=54360&ppu=%252fdefault.aspx%253fsym%253dSPG>.

⁷ Verified Amended Derivative and Class Action Complaint for Breach of Fiduciary Duties at 16, *Louisiana Municipal Police Employees Retirement System v. Simon Property Group, Inc.*, No. 7764-CS (Del. Ch. Aug. 13, 2012) (on file with CII).

⁸ *Id.*

⁹ Defendants’ Memorandum of Law in Support of their Motion for Judgment on the Pleadings at Exhibit 1, *Louisiana Municipal Police Employees Retirement System v. Simon Property Group, Inc.*, No. 7764-CS (Del. Ch. Sep. 24, 2012) (on file with CII).

¹⁰ *Id.*

¹¹ *Id.*

We are truly puzzled by J. Carey's response. As you are aware, NYSE Listing Rule 303A.08 ("Rule 303A.08") provides that "[s]hareholders *must* be given the opportunity to vote on all equity-compensation plans and *material revisions* thereto"¹²

Moreover, the NYSE provides in a question and answer format a nonexclusive list of changes to compensation plans that would be considered "material revisions" for purposes of Rule 303A.08.¹³ While it is true that that list does not explicitly include Simon's expansion of the definition of performance goals to include simply the passage of time, we believe it defies common sense, and is generally inconsistent with our membership approved policies,¹⁴ for the NYSE to consider such a change anything other than a material revision to the Plan.

As indicated, NYSE listing standards are intended to enhance the accountability and integrity of NYSE-listed companies and allow shareowners to more easily and efficiently monitor the performance of companies and directors. Sadly, the NYSE's interpretation of the material revisions language of Rule 303A.08 to the facts presented by Simon is in direct conflict with that stated intent.

We are also deeply concerned by the process used by the NYSE and NYSE Regulation, Inc. to evaluate and enforce listing standards. The Simon case suggests an informal process lacking transparency and thoughtful consideration of shareowner interests, and it raises serious questions about the integrity of the NYSE's enforcement practices.

¹² NYSE, Listed Company Manual § 303A.08 Shareholder Approval of Equity Compensation Plans (amended Nov. 25, 2009) (emphasis added), <http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2Ficm%2Fsections%2Ficm%2Dsections%2F>.

¹³ NYSE, Frequently asked questions on Equity Compensation Plans C-1 (first posted Dec. 12, 2003), <http://www.nyse.com/pdfs/equitycompfaqs.pdf>.

¹⁴ Council of Institutional Investors, Corporate Governance Policies § 5.4 Shareowner Approval of Equity-Based Compensation Plans (last updated Oct. 5, 2012), http://www.cii.org/UserFiles/file/10_5_12_cii_corporate_governance_policies.pdf ("The Council strongly supports this concept [of shareowner approval of material amendments to equity-based compensation plans] and advocates that companies adopt conservative interpretations of approval requirements when confronted with choices.").

For all of the above reasons, we respectfully request that the NYSE (1) reconsider its evaluation of the meaning of material revisions for purposes of Rule 303A.08, particularly with respect to the facts presented by Simon,¹⁵ and (2) establish a transparent, formal process for interpreting NYSE listing standards. Specifically, we recommend that NYSE Regulation, Inc. adopt formal procedures in which companies would request public and official interpretations of NYSE rules. Without such a formal procedure for publishing official interpretations of NYSE rules, shareowners and issuers alike will lack confidence that the rules have been and will be enforced in a consistent, uniform manner.

Thank you for consideration of our views. Please do not hesitate to contact me with any questions at 202.261.7081 or jeff@cii.org.

Sincerely yours,



Jeff Mahoney
General Counsel

cc: Chairman Elisse B. Walter, U.S. Securities and Exchange Commission
Commissioner Luis A. Aguilar, U.S. Securities and Exchange Commission
Commissioner Troy A. Paredes, U.S. Securities and Exchange Commission
Commissioner Daniel M. Gallagher, U.S. Securities and Exchange Commission
Judith C. McLevey, Managing Director and Head of Operations and Market Watch, NYSE Euronext
John Carey, Vice President - Legal, NYSE Regulation, Inc

¹⁵ If the meaning of material revisions for purposes of Rule 303A.08 is not reconsidered by the NYSE, we believe it may be “necessary or appropriate in the public interest, for the protection of investors” for the United States Securities and Exchange Commission (“SEC”) to pursue, under the authority provided by 15 U.S.C. § 789s(h), an administrative proceeding to order the NYSE to properly enforce the language and intent of Rule 303A.08. See *In the Matter of Philadelphia Stock Exchange, Inc.*, Exchange Act Release No. 53,919 (June 1, 2006), <http://www.sec.gov/litigation/admin/2006/34-53919.pdf> (SEC ordering Philadelphia Stock Exchange (“PSE”) to enforce its own rules and further demanding the PSE to develop a training program to remedy its enforcement problem); *In the Matter of the New York Stock Exchange, Inc.*, Exchange Act Release No. 41,574 (June 29, 1999), <http://www.sec.gov/litigation/admin/34-41574.htm> (SEC ordering the NYSE to enforce its rules aimed at preventing members from achieving personal gains at the detriment of the investing public and further demanding that the NYSE select an independent committee of the NYSE’ board of directors – comprised of a majority of non-industry directors – to draft “comprehensive procedures” manuals for those tasked with enforcing the NYSE rules).