Via Email

June 20, 2013

Mr. John Carey
Vice President—Legal
NYSE Regulation, Inc.
NYSE Euronext
20 Broad Street, 24th Floor
New York, New York 10005

Dear Mr. Carey:

The Council of Institutional Investors ("CII") hereby respectfully requests that you propose a rule for approval by the United States ("U.S.") Securities and Exchange Commission ("SEC") that would require that an issuer that intends to list its equity securities on the New York Stock Exchange, NYSE MKT LLC, or NYSE Alternext (collectively, "NYSE" or "Exchange") adopt a majority voting standard in uncontested elections of directors with a requirement that incumbent directors who do not receive a majority of votes promptly resign from the board. Proposed amendments to the NYSE listed company manual that would give effect to those changes are included in the attachment to this letter.[1]

Founded in 1985, CII is a nonprofit, nonpartisan association of public, corporate and union employee benefit plans, foundations and endowments with combined assets that exceed $3 trillion. Many of those assets are traded in the NYSE markets. Our members include large, long-term shareowners responsible for safeguarding retirement savings of millions of American workers.[2]

CII's membership approved policies have long supported the view that electing directors by majority vote is a basic shareowner right and that directors who lack the support of the shareowners they represent should not serve on the board.[3]

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[1] We would also like to take this opportunity to reiterate our October 2, 2012, request that the New York Stock Exchange "propose a rule for approval by the . . . Securities and Exchange Commission under which (1) companies that seek an initial listing . . . will be ineligible for a listing if they have two or more classes of common stock with unequal voting rights, and (2) companies newly listed on the Exchange in the future will be prohibited from issuing multi-class with unequal voting rights subsequent to their initial listing." Letter from Jeff Mahoney, General Counsel, to Ms. Claudia Crowley, CEO & Chief Regulatory Officer 1 (Oct. 2, 2012) (footnote omitted), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_2_12_cii_letter_to_nyse_dual_class_stock.pdf; *see* Letter from Senator Elizabeth Warren to Mr. John Carey, Vice President—Legal et al. 1 (June 5, 2012), http://www.warren.senate.gov/files/documents/Senator%20Warren%20letter%20to%20NYSE,%20Nasdaq%20-%206-5-2013.pdf (Supporting our request for action to propose a listing standard on one-share one vote.).

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

[3] *See* CII, Corporate Governance Policies, § 2.2 Director Elections (updated Apr. 19, 2013), http://www.cii.org/corp_gov_policies#BOD.

More specifically, our policy states:

> Director Elections: Directors in uncontested elections should be elected by a majority of the votes cast. . . .
>
> Directors who fail to receive the support of a majority of votes cast should step down from the board and not be reappointed. A modest transition period may be appropriate under certain circumstances, such as for directors keeping the company in compliance with legal or listing standards. But any director who does not receive the majority of votes cast should leave the board as soon as practicable.

Our policy is based on the widely accepted view by U.S. investors and the view of most major international markets,[4] that majority voting in uncontested elections "ensures that shareowners' votes count and makes directors more accountable to shareowners."[5] As one legal expert has explained:

> [T]he most significant benefit of . . . majority voting, may be its ability to indirectly impact corporate behavior. . . . Majority voting . . . ensur[es] that a withhold-the-vote campaign represents a credible threat of removal for directors. That threat should serve to indirectly pressure directors to undertake policies consistent with shareholders' interests.[6]

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[4] *See* Amendments to Part IV of the TSX Company Manual 2-3 (proposed Sept. 2011), http://www.osc.gov.on.ca/en/xxr-tse_20110909_rfc-amend-manual.htm (Noting that the United Kingdom, Australia, and Hong Kong all have majority voting); Lisa M. Fairfax, Shareholder Democracy, A Primer on Shareholder Activism and Participation 141 (2011) ("most other developed markets already have a majority vote standard for director elections").

[5] *See, e.g.,* Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective 22 (July 2009), http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf (Recommending that "[i]n uncontested elections, directors should be elected by a majority of the votes cast.").

[6] Lisa M. Fairfax, *The Future of Shareholder Democracy,* 84 Ind. L.J. 1259, 1295 (2009) (footnotes omitted), http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1162&context=ilj&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3DFuture%2Bof%2BShareholder%2BDemocracy%26form%3DDELCHP%26pc%3DMDDCJS%26pq%3Dfuture%2Bof%2Bshareholder%2Bdemocracy%26sc%3D0-13%26sp%3D-1%26qs%3Dn%26sk%3D#search=%22Future%20Shareholder%20Democracy%22.

The U.S. Senate Committee on Banking, Housing, and Urban Affairs ("Committee") agrees.[7] During the development of the Dodd-Frank Wall Street Reform and Consumer Protection Act the Committee concluded:

> The Committee believes that in the uncommon circumstance where a majority of shareholders voting in an uncontested election prefer that a nominee not serve on the board, it is fair and appropriate for their wishes to be honored.[8]

We note that the basis for a majority voting policy is consistent with the stated goal of the NYSE listing standards to "enhance[] the accountability . . . of the Exchange's listed companies . . . [and] allow shareholders to more easily and efficiently monitor the performance of . . . directors . . . ."[9]

Recognition in the U.S. that majority voting in the uncontested election of directors is a basic shareowner right has grown significantly in recent years.[10] More than 78 percent of S&P 500 companies have adopted a majority voting standard;[11] in contrast to just 16 percent in 2006.[12] In addition, from 2007 to 2012 the "proportion of small-cap companies with majority voting provisions in director elections has grown from 7% to 19% and the proportion of mid-cap companies has jumped dramatically from 18% to 52%."[13]

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[7] S. Rep. to accompany S. 3217, at 118 (Mar. 22, 2010), http://www.banking.senate.gov/public/_files/RAFSAPostedCommitteeReport.pdf.

[8] *Id.* We also note that the Toronto Stock Exchange recently concluded that "[m]ajority voting policies support good governance by providing a meaningful way for security holders to hold directors accountable and remove underperforming or unqualified directors." Amendments to Part IV of the TSX Company Manual at 3.

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

[10] *See, e.g.,* Bruce Kistler, State of Play, A Snapshot of US Corporate Governance in 2012, ISS Corporate Services 12 (July 19, 2012) (on file with CII) ("the S&P 500 is the only index with more than one-half of its constituents using a majority voting standard").

[11] *Id.*

[12] Claudia H. Allen, Study of Majority Voting in Director Elections, Neal, Geber & Eisenberg LLP 1 (last updated Nov. 12, 2007), http://www.ngelaw.com/files/Uploads/Documents/majoritystudy111207.pdf ("when this Study was initially published in February 2006, only 16% of the companies in the S&P 500 were known to have adopted a form of majority voting").

[13] Ernst & Young, Governance Trends and Practices at US Companies: A review of Small-and Mid-sized Companies 10 (May 2013), http://www.ey.com/Publication/vwLUAssets/Governance_trends_practices_at_US_companies/$FILE/Governance_trends_practices_at_US_companies.pdf.

We also note that in the current proxy season support for shareowner resolutions to adopt majority voting has averaged more than 54 percent.[14] In explaining the high success rate for recent majority voting proposals, Anne Sheehan, director of corporate governance at the California State Teacher' Retirement System, and current CII chair, stated:

> [The] 'success rate . . . indicates that companies recognize the importance of providing shareholders with a meaningful voice in the voting process." . . . "Today's economic challenges underscore the importance of board accountability. Holding directors to a reasonable election standard is a fundamental step in maintaining the integrity of a company's leadership and trust of its shareholders."[15]

Unfortunately, directors in uncontested elections at most NYSE listed companies are elected by *a plurality*, rather than by a majority of votes cast.[16] As a result, those companies continue to follow the antiquated, or as some have described "truly bizarre," plurality voting process,[17] whereby a director nominee is elected or reelected "so long as she receives any votes in her favor, even if ninety percent or more of the shareholders vote against her."[18]

As the Investors' Working Group observed in their seminal report on U.S. financial regulatory reform, "[p]lurality voting in uncontested elections results in 'rubber stamp' elections."[19] Rubber stamp elections pose no genuine threat of removal, and thus votes cast under the plurality voting system are unlikely to shape director behavior in favor of long-term shareowners.[20]

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[14] Institutional Shareholder Services, Voting Results Database (last visited June 13, 2013) (on file with CII).
[15] News Release, CalSTRS 2012 Proxy Season Successful in Advancing Majority Vote 1 (Aug. 3, 2012), http://www.calstrs.com/news-release/calstrs-2012-proxy-season-successful-advancing-majority-voting.
[16] *See, e.g.,* Ernst & Young at 10 (indicating that only 33 percent of the Russell 3000 Index has adopted majority voting provisions).
[17] Alyce Lomax, Public Companies' Public Enemies, AOL Inc. 1 (July 27, 2012), http://www.dailyfinance.com/2012/07/27/public-companies-public-enemies/ ("Majority voting could be called a 'bizarre governance thing,' but the truth is, many companies for years rejected calls for majority voting, instead opting for a voting policy that is truly bizarre: plurality voting, *where a director can be elected with a single vote."*).
[18] Shareholder Democracy at 85.
[19] Investors' Working Group at 22.
[20] *See, e.g.,* 84 Ind. L.J. at 1259.

Even more disturbing, for those minority of listed companies that have adopted a majority voting standard, the evidence indicates that—"only half of directors" —ultimately step down from the board after failing to obtain a majority of the "For" votes.[21] The evidence also indicates that these aptly named "zombie directors" are rarely, if ever, retained for what many investors and other market participants might consider legitimate reasons—such as to maintain compliance with securities regulations, avoid a violation of a contractual provision, or avoid a violation of state law or of a provision of the company's governing documents.[22]

One recent example is the NYSE listed company Commonwealth REIT ("REIT").[23] At REIT's annual meeting held on May 14, 2013, *approximately 78 percent of the shareowners voted "Against" board member Joseph L. Morea*.[24] Despite the overwhelming shareowner opposition to Mr. Morea, REIT's Form 8-K describes what happened immediately following the election:

> [O]n May 14, 2013, Mr. Morea resigned from the Board of Trustees. The Board of Trustees determined that Mr. Morea's continued service would be in the Company's best interest and the Board of Trustees requested that Mr. Morea accept appointment to the vacancy created by his resignation. Mr. Morea subsequently accepted appointment . . . . Mr. Morea will serve as a member of the Company's Audit Committee, Compensation Committee and Nominating and Governance Committee.[25]

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[21] IRRC Institute & GMI Ratings, The Election of Corporate Directors: What Happens When Shareowners Withhold a Majority of Votes from Director Nominees? 2 (Aug. 2012), http://www.irrcinstitute.org/pdf/Final%20Election%20of%20Directors%20GMI%20Aug%202012.pdf ("Only 8% of the directors who received majority withhold votes at companies with plurality plus resignation standards stepped down shortly after the annual meeting, and only half of directors at companies with majority standards did so."). CII staff's own research utilizing Institutional Shareholder Services Voting Results Database found that of the uncontested directors (both at plurality and majority voting companies) who failed to receive majority support during the three-year period from 2010 to 2012 at a Russell 3000 Index company, 74 percent continued to occupy their board seat as of June 14, 2013.

[22] *See* IRRC Institute & GMI Ratings at 7-12 (None of the company disclosures from 2010-2012 identified in the study describe a circumstance when failed directors were retained by the board to maintain compliance with securities regulations, avoid a violation of a contractual provision, or avoid a violation of state law or of a provision of a company's governing documents.).

[23] Commonwealth REIT, Form 8-K Item 5.02 & 5.07 (May 14, 2013), http://www.sec.gov/Archives/edgar/data/803649/000110465913042913/a13-7724_288k.htm.

[24] *Id.* at Item 5.07 ("Mr. Morea received the following votes: For – 11,956,566; Against – 42,925,606 . . . .").

[25] *Id*. at Item 5.02. We also note that at the NYSE listed company Nabors Industries Ltd., which has a plurality voting standard coupled with a director's resignation policy, two directors resigned after failing to receive an affirmative vote of a majority of the shares cast at this year's annual meeting. The board, however, refused to accept the resignations stating that it would not be in the "best interests" of the company—an action that disappointed many long-term shareowners and other market participants. *See, e.g.,* Paul Hodgson, Nabors' Governance Disaster Continues, Forbes 1-2 (June 10, 2013), http://www.forbes.com/sites/paulhodgson/2013/06/10/nabors-governance-disaster-continues/.

CII believes that the time has come for the Exchange to demonstrate its recognition of, and commitment to, meaningful investor voting rights and improved board accountability by proposing a revision to your listing standards that would require a majority voting standard in uncontested elections of directors with a requirement that incumbent directors who do not receive a majority of votes promptly resign from the board.[26] In our view, such a proposal would benefit the Exchange by strengthening investor confidence in the NYSE and the markets you serve. As indicated, to assist you in accomplishing this important and necessary reform, we have attached to this letter a draft of proposed amendments to the listing standards for your consideration.

We would welcome the opportunity to meet with you or your colleagues in person to discuss this request in more detail. In the meantime, if you have any questions, please do not hesitate to contact me directly as 202.261.7081 or jeff@cii.org.

Sincerely,

Jeff Mahoney
General Counsel

Attachment

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[26] We note that the Council of the Corporate Law Section of the Delaware State Bar Association and the American Bar Association Business Law Section's Committee on Corporate Laws have rejected CII's requests to amend the Delaware General Corporation Law and the Model Business Corporate Act, respectively, to require majority voting in the uncontested election of directors at public companies, seemingly leaving a revision to the listing standards (either voluntarily or through federal legislation) the only remaining alternatives to accomplishing this necessary reform. *See* Letter from Norman M. Monhait, Rosenthal, Monhait & Goddess, P.A., to Jeff Mahoney, General Counsel 1-2 (Mar. 26, 2013), http://www.cii.org/files/issues_and_advocacy/correspondence/2013/03_26_13_DE_bar_response_letter.pdf; Letter from Jeff Mahoney, General Counsel, to Mr. Norman M. Monhait, Rosenthal, Monhait & Goddess, P.A. 1-3 (Oct. 25, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_25_12_cii_delaware_majority_voting_letter.pdf; Letter from Jeff Mahoney, General Counsel, to Mr. A. Gilchrist Sparks III, Morris, Nichols, Arsht & Tunnell LLP 1-4 (Oct. 25, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_25_12_cii_aba_majority_voting_letter.pdf.