Council of Institutional Investors
The Voice of Corporate Governance

Via Email

March 11, 2014

Mr. Vikash Mohan
Program Analyst
Office of Financial Management
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Draft 2014-2018 Strategic Plan

Dear Mr. Mohan:

The Council of Institutional Investors ("CII") welcomes the opportunity to submit comments in response to the U.S. Securities and Exchange Commission's ("SEC" or "Commission") *Draft 2014-2018 Strategic Plan* ("Strategic Plan").[1] CII is a nonprofit, nonpartisan association of public, corporate and pension funds and other employee benefit plans, foundations and endowments with combined assets that exceed $3 trillion.[2]

Our members include long-term shareowners with the duty to protect the retirement assets of millions of workers and retirees. Thus, not surprisingly, our members have a great interest in the Strategic Plan of the only federal regulator whose mission is to protect investors. Our comments on select initiatives of the Strategic Plan follow.

Strategic Goal 1: Establish and maintain an effective regulatory environment

Strategic Objective 1.1: The SEC establishes and maintains a regulatory environment that promotes high-quality disclosure, financial reporting, and governance, and prevents abusive practices by registrants, financial intermediaries, and other market participants.

Initiative: Improve the quality and usefulness of disclosure

CII supports the SEC's initiative to "continue to evaluate and, where necessary, amend its requirements to improve the quality and usefulness of registrants' disclosures to investors."[3] We particularly support the Commission's focus on disclosure about "executive compensation decisions and practices."[4]

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[1] U.S. Securities and Exchange Commission, Strategic Plan, Planning for the Future, Fiscal Years 2014-2018, Draft for Comment (2014) [hereinafter Strategic Plan], http://www.sec.gov/about/sec-strategic-plan-2014-2018-draft.pdf.
[2] Additional information about the Council of Institutional Investors (CII) and its members is available from CII's Web site at http://www.cii.org/members.
[3] Strategic Plan, *supra* note 1, at 7.
[4] *Id.*

We continue to believe that disclosures about executive compensation decisions and practices can be improved through the staff's ongoing work "to implement Sections 953(a), 954 and 955 of the Dodd-Frank Act regarding pay-for-performance disclosure, stock exchange listing standards relating to compensation clawback policies, and employee and director hedging disclosure."[5]

Section 953(a)

CII was an active proponent of Section 953(a) during the development of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The legislative history of that Section states:

> Ms. Ann Yerger wrote in congressional testimony on behalf of the Council of Institutional Investors "of primary concern to the Council is full and clear disclosure of executive pay. As U.S. Supreme Court Justice Louis Brandeis noted, 'sunlight is the best disinfectant.' Transparency of executive pay enables shareowners to evaluate the performance of the compensation committee and board in setting executive pay, to assess pay-for-performance links and to optimize their role of overseeing executive compensation through such means as proxy voting.[6]

Our support for Section 953(a) was derived from our related and long-standing membership-approved corporate governance policy that states:

> CII believes that executive compensation is a critical and visible aspect of a company's governance. Pay decisions are one of the most direct ways for shareowners to assess the performance of the board. And they have a bottom line effect, not just in terms of dollar amounts, but also by formalizing performance goals for employees, signaling the market and affecting employee morale.
>
> CII endorses reasonable, appropriately structured pay-for-performance programs that reward executives for sustainable, superior performance over the long-term, consistent with a company's investment horizon.[7]

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[5] Staff of the U.S. Securities and Exchange Commission, Report on Review of Disclosure Requirements in Regulation S-K 58 (Dec. 2013), http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.
[6] S. Comm. On Banking, Hous. & Urban Affairs, 111th Cong., Rep. to Accompany S. 3217, at 135 (Mar. 22, 2010) [hereinafter S. 3217 Report], http://www.banking.senate.gov/public/_files/Comittee_Report_S_Rept_111_176.pdf.
[7] Council of Institutional Investors, Policies on Corporate Governance § 5.1 (Updated Sept. 27, 2013), http://www.cii.org/corp_gov_policies#exec_comp.

We continue to believe that investors remain keenly interested in disclosures that help them understand the relationship between all executive pay and performance.[8] We are confident that the implementation of Section 953(a) will be responsive to that interest, and we look forward to reviewing and commenting on the staff's proposal.

Section 954

CII was also an active proponent of Section 954 during the development of Dodd-Frank. Our related membership-approved corporate governance policy states:

> 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.[9]

[8] Letter from Jeff Mahoney, General Counsel, to Keith F. Higgins, Director 3 (Aug. 16, 2013), http://www.cii.org/files/issues_and_advocacy/correspondence/2013/08_16_13_cii_letter_to_sec_pay_vs_performance.pdf.

[9] § 5.5d.

In addition to our policy, our support for Section 954 was also the result of the recommendations of the Investors' Working Group ("IWG"), which CII members endorsed.[10] Those recommendations included the following:

> 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.[11]

We continue to agree with the IWG that the federal clawback provisions on unearned executive pay should be strengthened and we look forward to commenting on the staff's proposal to implement Section 954.

Section 955

CII was also an active proponent of Section 955 during the development of Dodd-Frank. Our related membership-approved corporate governance policy states:

> Hedging: Compensation committees should prohibit executives and directors from hedging (by buying puts and selling calls or employing other risk-minimizing techniques) equity-based awards granted as long-term incentive compensation or other stock holdings in the company. And they should strongly discourage other employees from hedging their holdings in company stock.[12]

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[10] 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. Following its issuance, the report and recommendations of the Investors' Working Group (IWG) were reviewed and endorsed by CII's board and membership. Additional information about the IWG is available on CII's website at http://www.cii.org/investors_working_group.

[11] Investors' Working Group at 23.

[12] § 5.8d

We continue to believe that, generally consistent with our policy and the language and intent of Section 955, required disclosure would be useful to investors in better "allow[ing] shareholders to know if executives are allowed to purchase financial instruments to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform."[13] We look forward to commenting on the staff's proposal to implement Section 955.

Rule 10b5-1

In addition to the executive compensation disclosures in Dodd-Frank, CII believes that the Commission can improve the quality and usefulness of executive compensation decisions and practices by enhancing the required disclosure of Rule 10b5-1 trading programs. Our long-standing interest in those programs is reflected in our related membership-approved corporate governance policy which states:

> Stock Sales: Executives should be required to sell stock through pre-announced 10b5-1 program sales or by providing a minimum 30-day advance notice of any stock sales. 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.[14]

As we explained most recently in our May 2013 letter to Chair White, "evidence continues to mount that many companies and company insiders have adopted practices that are inconsistent with the spirit, if not the letter of Rule 10b5-1."[15] Just last month, it was reported that the curious timing of a series of positive news announcements at Questcor over a ten month period benefitted the CEO's sales of shares under a Rule 10b5-1 trading program.[16]

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[13] S. 3217 Report, *supra* note 6, at 136.
[14] § 5.15b.
[15] Letter from Jeff Mahoney, General Counsel, to The Honorable Mary Jo White, Chairman 2 (May 9, 2013) [hereinafter May 2013 Letter], http://www.cii.org/files/issues_and_advocacy/correspondence/2013/05_09_13_cii_letter_to_sec_rule_10b5-1_trading_plans.pdf; Letter from Jeff Mahoney, General Counsel, to The Honorable Elisse B. Walter, Chairman 2 (Dec. 28, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%20_10b5-1_trading_plans.pdf.
[16] Jessie Eisenger, *Lucky Man: CEO's Repeated Good Fortune in Timing Stock Sales*, ProPublica, Feb. 19, 2014, at 2, http://www.propublica.org/thetrade/item/lucky-man-ceos-repeated-good-fortune-in-timing-stock-sales.

As indicated in our letter, effectively addressing "the variety and number of abuses that have been identified"[17] with respect to Rule 10b5-1 trading plans, should include the pursuit of "interpretative guidance or amendments . . . that would require Rule 10b5-1 plans to adopt . . . [best practice] protocols and guidelines . . . ."[18] Moreover, consistent with our policy, we continue to believe those protocols and guidelines should include disclosure of Rule 10b5-1 program adoptions, amendments, terminations and transactions.[19] The resulting enhanced transparency would provide long-term shareowners with reasonable access to useful information about insider trades that complete the partial picture provided by Section 16 and Rule 144 filings.

Disclosure of political activities

Finally, with respect to improving the quality and usefulness of disclosures generally, CII continues to support requiring public companies to disclose to shareowners the use of corporate resources for political activities.[20] Our related membership-approved corporate governance policy states:

> The board should develop and disclose publicly its guidelines for approving charitable and political contributions. The board should disclose on an annual basis the amounts and recipients of all monetary and non-monetary contributions made by the company during the prior fiscal year. Any expenditures earmarked for political or charitable activities that were provided to or through a third-party should be included in the report.[21]

We continue to believe, generally consistent with our policy, that having complete and uniform disclosures about political contributions will assist shareowners in their role of monitoring corporate boards.[22]

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[17] May 2013 Letter, *supra* note 15, at 3.
[18] *Id.* at 2
[19] *Id.* ("Companies and company insiders should disclose Rule 10b5-1 program adoptions, amendments, terminations and transactions").
[20] *See, e.g.*, Letter from Glenn Davis, Senior Research Associate, to Ms. Elizabeth Murphy, Secretary 1 (Oct. 19, 2011) [hereinafter October 2011 Letter], https://www.sec.gov/comments/4-637/4637-9.pdf.
[21] § 2.14.
[22] *See, e.g.*, October 2011 Letter, *supra* note 20, at 2 ("Given this variance in transparency and the advantage to investors of having complete, uniform disclosure requirements, we support the substance of the petition"); *cf.*, John Coates, *SEC's Non-Decision Decision on Corporate Political Activity a Policy and Political Mistake*, Harv. L. Sch. F. Corp. Governance & Fin. Reg. 1-2 (Dec. 13, 2013) (providing a listing of "academic research demonstrating the relevance of political activity to shareholder interests"), https://blogs.law.harvard.edu/corpgov/2013/12/13/secs-non-decision-decision-on-corporate-political-activity-a-policy-and-political-mistake.

Initiative: Engage in rulemaking mandated by Congress

CII supports the SEC's initiative to "continue to fulfill its obligations under the Dodd-Frank Act and the JOBS Act to develop and promulgate mandated rules and regulations with appropriate notice and comment and economic analysis."[23] As an organization representing capital market stakeholders, we support efforts to promote job creation. However, we continue to believe that the Jumpstart Our Business Startups Act ("JOBS Act") has the potential to harm the integrity of, and erode faith in, the markets.[24] While the SEC does not have the authority to amend the JOBS Act, the Commission does have the authority and, indeed the responsibility, to reject requests to produce rules, regulations, or other guidance that would increase the likelihood that the JOBS Act will prove detrimental to investors.

In contrast to the JOBS Act, CII members generally continue to support the effective implementation and enforcement of the investor protections contained in Dodd-Frank.[25] It is well established that a key cause of the financial crisis was a failure in corporate governance. Congress responded by including in Subtitles E and G of Title IX of Dodd-Frank several measures designed to reform the governance practices of public companies. In addition to the staff's ongoing work to implement Sections 953(a), 954, and 955 of Subtitle E, we also support the SEC completing its work related to Section 971 of Subtitle G.

CII has a long-standing membership approved policy that states:

> Access to Proxy: Companies should provide access to management proxy materials for a long-term investor or group of long-term investors owning in aggregate at least three percent of a company's voting stock, to nominate less than a majority of the directors.[26]

Consistent with our policy, Section 971 of Dodd-Frank authorized the SEC to promulgate a proxy access rule. We were an active proponent of Section 971 during the development of Dodd-Frank.

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[23] Strategic Plan, *supra* note 1, at 7.
[24] Letter from Jeff Mahoney, General Counsel, to Ms. Elizabeth M. Murphy, Secretary 2 (Aug. 9, 2012), http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk-2.pdf.
[25] Letter from Jeff Mahoney, General Counsel, to The Honorable Mary L. Schapiro, Chairman 1 (July 23, 2012) [hereinafter July 2012 Letter], http://www.sec.gov/comments/other/other-initiatives/otherinitiatives-66.pdf.
[26] § 3.2

The legislative history of Section 971 states:

> Mr. Jeff Mahoney, General Counsel of the Council of Institutional Investors, wrote in a letter to Chairman Dodd that ―the only way that shareowners can present alternative director candidates at a U.S. public company is by waging a full-blown election contest. For most investors, that is onerous and prohibitively expensive. A measured right for investors to place their nominees for directors on the company's proxy card would overcome these obstacles, invigorating board elections and making directors more responsive, thoughtful and vigilant. . . . A coalition of state public officials in charge of public investments, AFSCME, CalPERS, and the Investor's Working Group also support proxy access.[27]

In addition to our policy, our support for Section 971 was also a result of the recommendations of the IWG. Those recommendations included the following:

> Shareowners should have the right to place director nominees on the company's proxy. In the United States, unlike most of Europe, the only way that shareowners can run their own candidates is by waging a full-blown election contest, printing and mailing their own proxy cards to shareowners. For most investors, that is onerous and prohibitively expensive. A measured right of access would invigorate board elections and make boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight of companies. Federal securities laws should be amended to affirm the SEC's authority to promulgate rules allowing shareowners to place their nominees for directors on the company's proxy card.[28]

Unfortunately, as you well know, despite the language and intent of Section 971 and the broad support of CII and other investors, the proxy access rule subsequently issued by the Commission was vacated, in part, by a controversial decision of a three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit. That decision was a result of a challenge by special interest groups representing business and corporate executives.[29]

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[27] S. 3217 Report, *supra* note 6, at 119.
[28] Investors' Working Group at 23.
[29] *See, e.g.*, Commissioner Luis A. Aguilar, Address at the Consumer Federation of America's 26th Annual Conference: Seeing Capital Through Investor Eyes (Dec. 5, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370540451723#.Ux3R9PldUYM.

We continue to believe that Commission should try again to pursue this investor priority by reissuing an improved proxy access rule.[30] In our view, a reissued rule could both fully address the issues raised by the Court and establish the type of uniform standards and requirements for access at all public companies that investors demand and deserve.

Initiative: Strengthen proxy infrastructure

CII supports the SEC's initiative to "consider issues related to the mechanics of proxy voting and shareholder-company communications . . . ."[31] As you are aware, in October 2010 we issued a comment letter in response to the Commission's Concept Release on the U.S. Proxy System.[32] That letter provided a number of recommendations for improving the mechanics of proxy voting and shareowner company communications, including:

- "[F]urther exploration of the advantages and disadvantages of creating unique identifiers for each beneficial owner, which could establish an audit trail through which beneficial owners and companies could automatically confirm vote accuracy;"[33]
- "Adop[tion] of regulatory reform that allows shareowners to make better informed decisions regarding whether to recall loaned shares;"[34]
- "A market-based approach to the pricing of distribution fees [with] . . . multiple service providers . . . able to compete in the market;"[35]
- "The use of standardized data-tagging for proxy-related materials and voting results as a means of increasing transparency and expanding shareowners' ability to track governance practices, compare practices among peers, make informed voting decisions, and follow the results of shareowner meetings;"[36] and

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[30] *See, e.g.*, July 2012 Letter, *supra* note 25, at 3 n.14 ("We continue to believe the Commission's corporate governance rulemaking should include, as authorized by § 971 of Dodd-Frank, the reissuance of a proxy access rule that sets uniform standards and requirements for access at all public companies."); *cf.* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis* 342 (2013) (Concluding that the "SEC should re-propose a proxy access rule that has been improved . . . in order to win favorable circuit court opinion on cost-benefit analysis"), http://www.acslaw.org/sites/default/files/pdf/Kraus%20and%20Raso%20-%20Rational%20Boundaries.pdf.

[31] Strategic Plan, *supra* note 1, at 7.

[32] Letter from Glenn Davis, Senior Research Associate, to Elizabeth M. Murphy, Secretary 1 (Oct. 14, 2010), http://www.sec.gov/comments/s7-14-10/s71410-80.pdf.

[33] *Id.* at 1-2.

[34] *Id.* at 2.

[35] *Id.*

[36] *Id.* at 5.

- "[An expectation that] proxy advisory firms . . . provide clients with substantive rationales for vote recommendations; minimize conflicts of interest and disclose the details of such conflicts; . . . correct material errors promptly and notify affected clients as soon as practicable . . . [and] support[] [for] the registration of proxy advisory firms, but oppose[] regulatory involvement in methodologies used by proxy advisers to determine vote recommendations."[37]

As indicated, while we have publicly supported a number of potential reforms to proxy advisory firms, we continue to believe that there is currently insufficient empirical evidence to support an allocation of the Commission's limited resources to that effort.[38] We, therefore, again urge the Commission, as part of the inspection process, to gather and publish data relevant to the issues some have raised about proxy advisory firms, including data on the proxy voting practices of investment advisers.[39]

Initiative: Promote high-quality accounting standards

CII supports the SEC's initiative to "promote the establishment of high-quality accounting standards by independent standard setters in order to meet the needs of investors."[40] We also agree with the Commission that this initiative should include promoting "higher quality financial reporting worldwide and . . . consider, among other things, whether a single set of high quality global accounting standards is achievable . . . ."[41]

This initiative is generally consistent with CII's long-standing membership-approved policy on "Independence of Accounting and Auditing Standard Setters."[42] Our policy supports "a common goal of convergence to a single set of high quality standards . . . [but] does not support replacing U.S. accounting . . . standards or standard setters with international standards or standard setters unless and until [seven criteria or milestones] have been achieved."[43]

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[37] *Id*. at 6-7.
[38] *See, e.g.*, Hearing on Examining the Market Power and Impact of Proxy Advisory Firms, Before the H. Sub. Comm. on Cap. Markets & GSEs, 113th Cong. 4-5 (June 5, 2013) (Statement of Ann Yerger, Executive Director, CII), http://www.cii.org/files/publications/misc/06_05_13_cii_proxy_advisor_hearing_submission_ann_yerger.pdf.
[39] *See, e.g.*, Letter from Ann Yerger, Executive Director, to Norm Champ, Director et al. 2 (June 13, 2013) ("Specifically, we request that the SEC, as part of its inspection process, gather and publish data on the proxy voting practices of investment advisers."), http://www.sec.gov/comments/s7-14-10/s71410-321.pdf.
[40] Strategic Plan, *supra n*ote 1, at 8.
[41] *Id.*
[42] CII Policies, Independence of Accounting and Auditing Standard Setters (Oct. 7, 2008), http://www.cii.org/policies_other_issues#indep_acct_audit_standards.
[43] *Id.*

One of the seven criteria or milestones contained in our policy is that the "international standard setter has sufficient resources—including a secure stable source of funding that is not dependent on voluntary contributions of those subject to the standards . . . ."[44] We, therefore, read with interest the recent news reports that the Financial Accounting Foundation ("FAF"), the parent of the Financial Accounting Standards Board ("FASB"), agreed to "a $3 million pledge" to the IFRS Foundation, the parent of the International Accounting Standards Board.[45]

While we have no objection to the pledge *per se*, we, however, are concerned about reports that the SEC pressured the FAF to make the donation.[46] If those reports are accurate, we agree with former FASB Chairman Edmund Jenkins that such actions by the SEC may impair the independence of the FASB[47] and are in direct conflict with this initiative's goal of "strengthen[ing] and support[ing] the FASB's independence."[48]

Strategic Objective 1.2: The SEC promotes capital markets that operate in a fair, efficient, transparent, and competitive manner, fostering capital market information and innovation.

Initiative: Enhance oversight of derivatives

CII supports the SEC's initiative to "continue to implement the derivatives provisions of Title VII of the Dodd-Frank Act . . . ."[49] It is widely acknowledged that over-the-counter (OTC) derivatives, and particularly credit default swaps, played a significant role in the financial crisis.[50]

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[44] *Id.*
[45] Steve Burkholder, *FASB's Parent's $3 Million Pledge to IASB's Parent Raises Concerns in Rulemaking Circles*, BNA Acct. Pol'y & Prac. Rep. 1, Feb. 12, 2014, http://www.bna.com/fasb-parents-million-n17179882071/.
[46] *Id.* ("SEC officials made it clear to FAF trustees, in the first half of 2013, that they wanted the U.S. to provide some funding to the IFRS Foundation, and they asked the FAF to make the contribution").
[47] *See id.* at 2 ("'I think many of us . . . would be concerned if the SEC kind of arm-twisted' the FAF or FASB 'on this issue' as it would be if there were intervention on the substance of accounting standards, Jenkins said in a Feb. 1 interview.").
[48] Strategic Plan, *supra* note 1, at 8.
[49] *Id*. at 10.
[50] Investors' Working Group at 10 ("It is widely acknowledged that OTC derivatives contracts, and particularly CDS, played a significant role in the current financial crisis.").

During the development of Dodd-Frank, and since its enactment, CII has advocated for the adoption and implementation of the recommendations of the IWG with respect to OTC derivatives.[51] Those recommendations, consistent with this initiative, emphasize the important role of oversight by the Commission and the Commodity Futures Trading Commission "of the [OTC derivatives] market and all its participants."[52] As the SEC continues its implementation of the derivatives provisions of Dodd-Frank, we urge the Commission to also continue to consider ways to use its existing oversight authority to improve the transparency and integrity of the OTC derivatives market consistent with the recommendations of the IWG.

Strategic Goal 3: Facilitate access to the information investors need to make informed investment decisions

Strategic Objective 3.1: The SEC works to ensure that investors have access to high-quality disclosure materials that facilitate informed investment decision making.

Initiative: Update disclosure and reporting requirements to reflect the informational needs of today's investors

CII supports the SEC's initiative to "enhance disclosure requirements for the benefit of investors . . . . includ[ing] a review of proxy voting and shareholder communications to identify ideas and proposals for potential changes to those rules."[53] We look forward to working with the Commission on this important initiative to better ensure that "investors are armed with timely and useful information they need to make informed investment decisions."[54]

Initiative: Evaluate the effectiveness of filing review programs for reporting entities so that investors receive material information in a timely manner without imposing undue regulatory burdens on filers

CII supports the SEC's initiative to "evaluate the Commission's filing review processes and make changes in response to evolving trends or market developments."[55] We believe that one filing review process that should be evaluated for potential improvements is the review of proxy statements.

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[51] *See, e.g.*, Letter from Glenn Davis, Senior Research Associate, to Elizabeth M. Murphy, Secretary 1-2 (July 20, 2011) (Comment letter in response to File Number S7-16-11—Further Definition of "Swap, "Security-Based Swap," and Security-Based Swap Agreement;" Mixed Swaps; Security-Based Swap Agreement Recordkeeping) (on file with CII).
[52] Investors' Working Group at 11.
[53] Strategic Plan, *supra* note 1, at 27.
[54] *Id.*
[55] *Id.*

During the 2013 proxy season we identified a number of disclosures, or lack thereof, in proxy statements that appeared to be clear violations of the Commission's proxy rules.[56] We encourage experimentation with "risk management tools," "technology," or other means to establish a more effective and efficient filing review program for proxy statements that identifies material issues and results in better compliance with the proxy disclosure rules.

Other initiatives

In addition to the items discussed above, CII believes that the following two areas should be included in the Commission's near term initiatives:

1. Interim Vote Tallies

CII has deep concerns over the arbitrary and biased disclosure of interim vote tallies and the role of proxy distributors in that process.[57] We believe proxy distributors have obligations not simply to their clients, but also to the investing public.

In our recent letter to the Director of the Division of Corporation Finance, we outlined three specific actions that the staff might take to ensure that the distribution of interim voting tallies by proxy distributors is fair and impartial.[58] We believe the prompt pursuit of one or more of our suggested actions would effectively resolve investor concerns surrounding interim vote tallies.

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[56] *See, e.g.*, Letter from Jeff Mahoney, General Counsel, to The Honorable Elisse B. Walter, Chairman (Mar. 13, 2013) (Suggesting that staff establish a process to more effectively and efficiently detect obvious noncompliance with Rule 14a-4 and other proxy rules), http://www.cii.org/files/issues_and_advocacy/correspondence/2013/03_13_13_letter_to_sec_on_unbundling.pdf.

[57] Letter from Jeff Mahoney, General Counsel, to Keith F. Higgins, Director 1 (Mar. 6, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_06_14_CII_letter_SEC_proxy_distributors.pdf.

[58] *Id.* at 2 (Potential actions include: (1) Issue interpretative guidance clarifying the definition of "impartiality" under Rule 14a-2(a)(1); (2) Issue interpretative guidance clarifying that Rules 14b-1 and 14b-2 may not be relied upon to justify selective disclosure of interim vote tallies; and (3) Expand the reportable events on Form 8-K to require disclosure of interim vote tallies).

2. Universal Proxy Cards

Last fall, CII's general membership voted to amend our corporate governance policies to support universal proxy cards.[59] The amendment to CII's policies states:

> 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.[60]

The amended policy reflects our members' view that the shareowner voting franchise is a fundamental tenet of corporate democracy and the most effective means of providing accountability. More specifically, in a proxy contest the voting franchise and accountability can be improved by removing barriers that prevent shareowners, voting by proxy, from picking and choosing among all of the duly nominated candidates. One such barrier is SEC Rule 14a-4(d)(1) under Section 14 of the Exchange Act—the so-called "bona fide nominee" rule.

As you are aware, the practical effect of the bona fide nominee rule is that shareowner proponents in a proxy contest cannot offer shareowners, voting by proxy, the full flexibility to "split their tickets" and vote for a combination of shareowner nominees and management nominees. As we indicated in our recent rulemaking petition, we believe the Commission should have a near-term initiative to amend Section 14 eliminating the requirement to obtain a nominee's consent to be named on a proxy card in contested elections and allow shareowners to vote for their preferred combination of shareowner and management nominees on a single proxy card.[61]

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[59] Letter from Glenn Davis, Director of Research, to Ms. Elizabeth Murphy, Secretary 2 (Jan. 8, 2014) [hereinafter January 2014 Letter], http://www.cii.org/files/issues_and_advocacy/correspondence/2014/01_08_14_CII_letter_to_sec_petition%20_for_rulemaking.pdf.

[60] § 2.2

[61] January 2014 Letter, *supra* note 59, at 1 (Requesting that the Commission "propose amendments that eliminate the requirement to obtain a nominee's consent to be named on a proxy card in contested elections and allow shareholders to vote for their preferred combination of shareholder and management nominees on a single proxy card, thereby ensuring that investors voting by proxy have the same practical ability to vote their shares for their preferred mix of nominees that they would have if they attend a shareholder meeting in person."); *cf.* Recommendation of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots (Adopted July 25, 2013) ("The current 'bona fide nominee' rule codified in Rule 14a-4, is a significant inhibiting factor to the adoption of so-called universal proxy ballots . . . and relaxation of this rule should be explored."), http://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf.

Thank you for consideration of CII views. If the Commission or staff should have any questions regarding this letter, please do not hesitate to contact me at 202.261.7081 or jeff@cii.org.

Sincerely,

Jeff Mahoney
General Counsel