

Via Post

August 1, 2014

Mr. Martin Schulz  
President of the European Parliament  
Rue Wiertz 60  
1047 Bruxelles Belgique

Dear Mr. President,

I am writing on behalf of the Council of Institutional Investors (“the Council”) as regards the European Commission’s (“the Commission”) recently proposed directive amending the Shareholder Rights Directive and the Corporate Governance Statement (“the Proposal”).<sup>1</sup> The Council is an association of corporate, union, and public employee benefits plans, foundations, and endowments, with combined assets exceeding \$3 trillion (USD).<sup>2</sup> As a leading voice for long-term, institutional investors, the Council believes its perspective on these proposed amendments will be helpful to the European Parliament as it considers them in forthcoming legislative process.

The Proposal, in the main, thoughtful, appropriate, and admirably suited to aligning the interests of management with a company’s long-term success, and thus to the overall benefit of shareowners. These revisions by countenancing greater accountability by management, more transparency from intermediaries and proxy advisors, and encouraging companies to reorient their interests towards long-term success will help foster a greater trust in European capital markets. Several proposed articles, however, merit caution in considering their adoption.

Our comments on specific aspects of the proposed amendments are outlined below. We have limited our responses only to those elements of the Proposal upon which our member-approved policies touch.

---

<sup>1</sup> *Commission Proposal for a Directive of the European Parliament & of the Council Amending Directive 2007/36/EC as Regards the Encouragement of Long-Term Shareholder Engagement & Directive 2013/34/EU as Regards Certain Elements of the Corporate Governance Statement*, COM (2014) 213 final (Apr. 9, 2014) [hereinafter *Commission Proposal*], available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:213:FIN>.

<sup>2</sup> For more information about the Council of Institutional investors and its members, please visit our website at [www.cii.org/about\\_us](http://www.cii.org/about_us).

## **A. Provisions Relating to Shareholders' Ability to Exercise Rights**

### *1. Allowing Companies to Identify and Communicate with Individual Shareowners*

The Council urges forbearance in adopting Article 3a of the Proposal allowing companies the ability to identify and communicate directly with their shareholders.<sup>3</sup> In 2010, the Council commissioned a white paper examining the American practice of allowing beneficial shareowners to choose to remain confidential—prohibiting intermediaries from identifying them to companies (the so-called “OBO/NOBO distinction”).<sup>4</sup> Though allowing beneficial shareowners to remain anonymous may result in expense, inefficiency, and less shareholder engagement overall,<sup>5</sup> allowing companies to directly identify and contact shareowners may be at odds with some investor interests.

The study identified two steps to promote (at least in the United States) greater transparency around shareowner lists and opportunities for direct communications by shareowners and companies:

(1) Eliminate the [anonymity of shareholders] through “a phased implementation [process] . . . . Eventually, the [anonymity allowance] could be eliminated, with customers able to preserve their anonymity through nominee accounts at their own expense.

(2) Relax restrictions on the ability of companies and shareowners to distribute proxy materials and solicit proxies directly, and streamline the process for both companies and shareowners to obtain shareowner lists.<sup>6</sup>

This recommendation for a phased in approach for allowing companies to identify and communicate with shareowners directly may be worth your consideration and we hope the white paper can provide some insight in your decision-making process.

---

<sup>3</sup> *Commission Proposal, supra* note 1, at 17.

<sup>4</sup> Allen L. Beller & Janet L. Fisher, *The OBO/NOBO Distinction in Beneficial Ownership: Implications for Shareowner Communications and Voting* (Council of Institutional Investors White Paper, 2010), available at [http://www.cii.org/files/publications/white\\_papers/02\\_18\\_10\\_obo\\_nobo\\_distinction\\_white\\_paper.pdf](http://www.cii.org/files/publications/white_papers/02_18_10_obo_nobo_distinction_white_paper.pdf).

<sup>5</sup> *Id.* at 11.

<sup>6</sup> Letter to Elizabeth M. Murphy, Secretary, Sec. & Exch. Comm'n., from Glenn Davis, Senior Research Associate, Council of Institutional Investors, Oct. 14, 2010 [hereinafter Concept Release Letter] (available online at <http://www.sec.gov/comments/s7-14-10/s71410-80.pdf>).

*2. Easing Intermediary Transfer of Information when Necessary to Exercise a Right, Facilitation of Rights, and Cost Effectiveness*

The Council broadly supports the additions of Articles 3b through 3d concerning intermediaries' role in transferring information and facilitating shareowner rights.<sup>7</sup> The Council believes that the shareholder's ability to exercise the right to vote is "inviolable."<sup>8</sup> It should not be inhibited by inefficient or otherwise inadequate intermediary practices. The Council's member approved policy on Effective and Efficient Proxy Voting states that a proxy voting system must be characterized by:

- Timeliness—Voting related communications should reach eligible voters in sufficient time to allow for careful review of the materials and to facilitate voter participation.
- Accessibility—Technology should be used to improve the proxy voting process. However, mechanisms should be in place to ensure that shareowners receive proxy materials and can vote even if they do not use electronic voting and communications methods.
- Accuracy—All votes properly cast should be correctly tallied.
- Certainty—The proxy voting system should provide for end-to-end confirmation enabling both companies and shareowners to confirm that votes properly cast were included in the final tally as directed.
- Cost-effectiveness—The costs of transmitting proxy materials and votes should be reasonable.<sup>9</sup>

All of the above aspects, which our members believe are essential to a proxy voting system, are reflected in the Proposal. The Council has supported efforts increasing voting accuracy and confirmation in the American proxy voting system.<sup>10</sup> And we have encouraged a market-based but non-discriminatory approach to the distribution of fees for intermediary services as in proposed Article 3d.<sup>11</sup> As such, the Council supports the

---

<sup>7</sup> *Commission Proposal, supra* note 1, at 18–19.

<sup>8</sup> COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE. POLICIES § 3.1 (2014) [hereinafter CORP. GOV. POLICIES], available at [http://www.cii.org/files/ciicorporategovernancepolicies/07\\_08\\_14\\_corp\\_gov\\_policies.pdf](http://www.cii.org/files/ciicorporategovernancepolicies/07_08_14_corp_gov_policies.pdf).

<sup>9</sup> COUNCIL OF INSTITUTIONAL INVESTORS, *CII Policies on Other Issues*, CII.ORG, [http://www.cii.org/policies\\_other\\_issues](http://www.cii.org/policies_other_issues) (adopted Oct. 7, 2008) (policy on Effective & Efficient Proxy Voting).

<sup>10</sup> Concept Release Letter, *supra* note 6.

<sup>11</sup> See *id.*

passage of the Proposal and the Commission's underlying efforts to increase both accountability among intermediaries and respect for shareowners' rights.

## **B. Institutional Investor Engagement**

The Council has long been a staunch advocate for greater shareowner engagement with investee companies. And our members agree that robust shareowner engagement is essential to healthy capital markets. Further, our members largely represent the owners of "patient capital"—investors that maintain long relationships with investee companies and engage them with a view to the long-term success of both the company and shareowners. Our members' long-term outlook in investing is well-reflected in our member-approved policies.<sup>12</sup> Although we agree in some part with the stated purpose of the proposal—that there is insufficient engagement between institutional investors and investee companies<sup>13</sup>—our members, in particular among institutional investors, are staunch advocates for shareowner engagement.

The Council, understanding the importance of investor transparency in fuelling greater engagement, has adopted a set of best disclosure practices for institutional investors. In particular, we advocate:

In order to foster an environment of transparency and accountability, institutional investors—including pension funds, hedge funds, private equity firms and sovereign wealth funds, among others—should make publicly available in a timely manner:

- Proxy voting guidelines;
- Proxy votes cast;
- Investment guidelines;
- Names of governing-body members; and
- An annual report on holdings and performance.<sup>14</sup>

Further, we encourage members to disclose their shareholder votes publicly to increase general awareness about engagement to other investors.<sup>15</sup>

---

<sup>12</sup> See, e.g., CORP. GOV. POLICIES, *supra* note 8, at § 1.6 (companies should protect long-term investment interests); § 1.7 (encouraging investors to encourage long-term corporate governance provisions); § 3.6 (countenancing a shareholder vote for actions threatening a company's long-term viability); §§ 5.1, 5.5d, 5.5h, 5.7, 5.8, 6.1, 6.2, 6.4 (encouraging remuneration plans for both executives and directors solely geared towards the long-term success of the company— defined as at least three to five years).

<sup>13</sup> *Commission Proposal*, *supra* note 1, at 12.

<sup>14</sup> CII POLICIES ON OTHER ISSUES, *supra* note 9.

Though the Council advocates for disclosures and transparency on the part of institutional investors, our best practices do not extend to the extraordinarily robust and detailed disclosures required by in the Proposal in Articles 3f and 3g.<sup>16</sup> We agree in principal with disclosure by investors in line with our adopted best practices, but we urge the European Parliament to carefully consider the necessity of each of these disclosures and the costs of compliance.

### **C. Transparency for Proxy Advisors**

The Council broadly supports the proposed addition of Article 3i regarding increased transparency for proxy advisors.<sup>17</sup> Though the Council understands that proxy advisors are important market participants, their influence in capital markets is often overstated.<sup>18</sup> Nevertheless, the Council supports efforts to increase proxy advisor transparency and preservation of their independence. We have specifically recommended, among other things, that proxy advisors:

- Provide substantive rationales for vote recommendations;
- Minimize conflicts of interest and disclose details of potential conflicts, including those involving companies or resolution sponsors, in the applicable meeting report;
- Correct material errors promptly and notify affected clients as soon as practicable; and
- Provide transparency into the general methodologies—without compromising proprietary models—used to make recommendations.<sup>19</sup>

---

<sup>15</sup> COUNCIL OF INSTITUTIONAL INVESTORS, GETTING INVOLVED IN CORPORATE GOVERNANCE 4 (2014), available at

[http://www.cii.org/files/publications/governance\\_basics/04\\_28\\_14\\_getting\\_involved\\_in\\_CG.pdf](http://www.cii.org/files/publications/governance_basics/04_28_14_getting_involved_in_CG.pdf).

<sup>16</sup> *Commission Proposal*, *supra* note 1, at 19–20.

<sup>17</sup> *Id.* at 22.

<sup>18</sup> See generally *Examining the Market Power & Impact of Proxy Advisory Firms: Hearing before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 113th Cong. 376–89 (2012) [hereinafter *CII Statement on Proxy Advisors*] available at <http://financialservices.house.gov/uploadedfiles/113-27.pdf> (statement of Ann Yerger, Exec. Dir., Council of Institutional Investors); see also Stephen Choi, Jill Fisch, & Marcel Kahn, *The Power of Proxy Advisors: Myth or Reality?*, 59, Emory L.J. 869 (2010) (finding that funds accounting for less only 10 percent of company assets exhibited a strong tendency to follow proxy advisor recommendations and that a recommendation from ISS, the large American proxy advisor, “shifts the outcome of a vote by a mere 6 to 10 percent of votes cast”).

<sup>19</sup> *CII Statement on Proxy Advisors*, *supra* note 18, at 380. See also Concept Release Letter, *supra* note 6. The United States Securities & Exchange Commission recently released a guidance on Proxy Advisory Firms. This guidance states, in part, that investment advisers who retain proxy advisory firms should reasonably oversee the advisory firm and educate itself as to the advisory firm’s changing conflicts

With these recommendations in mind, we support the similar principles and disclosures contained in proposed Article 3i. We do however suggest that the proposed revisions should, as in Council policies, include language both allowing proxy advisors to safeguard their proprietary and suggesting that any regulation should not interfere with the methodologies proxy advisors use to provide recommendations.<sup>20</sup>

#### **D. Shareholder Right to Vote on Director Remuneration Policy and Report**

The Council supports in part the proposed amendments relating to director remuneration.<sup>21</sup> The Council's member-approved policies concerning director remuneration state:

Director [remuneration] policies should accomplish the following goals: (1) attract highly qualified candidates, (2) retain highly qualified directors, (3) align directors' interests with those of the long-term owners of the corporation and (4) provide complete disclosure to shareowners regarding all components of director compensation including the philosophy behind the program and all forms of compensation.<sup>22</sup>

These goals broadly align with the Commission's purpose in proposing these amendments, as well as its acknowledgement that "remuneration is one of the key instruments for companies to align their interests and those of the directors[.]"<sup>23</sup>

##### *1. Voting on Director Compensation Policy*

The proposed amendments in Article 9a, paragraph 1 go considerably farther on shareholder engagement in director compensation than do Council policies. Though the Council advocates for annual shareowner advisory votes on *executive* pay,<sup>24</sup> as well

---

of interest to satisfy the investment adviser's fiduciary duties. See SEC Staff Legal Bulletin No. 20 (June 30, 2014), available at <http://www.sec.gov/interps/legal/cfs1b20.htm>. It also requires proxy advisory firms to disclose relationships or material interests creating conflicts to investors retaining them. *Id.* We recommend the Parliament consider the SEC's guidance in considering the proposal.

<sup>20</sup> See Concept Release Letter, *supra* note 6.

<sup>21</sup> The Council policies and communications generally use the term "compensation" rather than "remuneration." We considered them equivalent terms for the purpose of this document.

<sup>22</sup> CORP. GOV. POLICIES, *supra* note 8, AT § 6.1 (2014).

<sup>23</sup> *Commission Proposal*, *supra* note 1, at 13.

<sup>24</sup> CORP. GOV. POLICIES, *supra* note 8, at § 5.4.

as full disclosure of the compensation policy and philosophy for directors,<sup>25</sup> our policies do not require a vote on a director remuneration policy. Our policies do acknowledge that, for any *equity-based* remuneration plan, current United States listing standards require shareowner approval,<sup>26</sup> and the Council expressly endorses this practice.<sup>27</sup>

These policies allow that the Council can broadly support the principle of a shareowner vote on some aspects of director compensation. However, we also acknowledge that “[c]ompanies should have flexibility within certain broad policy parameters to design and implement director compensation plans that suit their unique circumstances.”<sup>28</sup>

## 2. Required Contents of the Remuneration Policy

The Council heartily endorses the Commission’s proposed requirements for the style and contents of the remuneration policy.<sup>29</sup> Our policies strongly express the necessity for robust disclosures of director compensation policies and practices.<sup>30</sup> Notably, the Proposal’s requirements in Article 9a, paragraph 2 that the policy be “clear, understandable, and in line with the business strategy, objectives, values and long-term interests of the company”<sup>31</sup> broadly aligns with the requirements in the Council’s Corporate Governance Policies.

For example, the Council requires that all aspects of remuneration “are clearly, comprehensively, and promptly disclosed, in plain English, in the annual proxy statement,”<sup>32</sup> and that the compensation policy should also be disclosed.<sup>33</sup> The Council further charges company remuneration committees to “structur[e] director pay . . . so that it is aligned with the long-term interests of shareowners.”<sup>34</sup> As such, the Council

---

<sup>25</sup> *Id.* at § 6.2c (“The annual director compensation disclosure included in the proxy materials should include a discussion of the philosophy for director pay and the processes for setting director pay levels.”); *id.* at § 6.4e (“The present value of equity awards paid to each director . . . and the philosophy and process used in determining director pay should be fully disclosed in the proxy statement.”).

<sup>26</sup> See *id.* at 6.4f; e.g. NEW YORK STOCK EXCH., LISTED CO. MANUAL § 303A.08 (2014), available at [http://nysemanual.nyse.com/lcm/Help/mapContent.asp?sec=lcm-sections&title=sx-ruling-nyse-policymanual\\_303A.07&id=chp\\_1\\_4\\_3\\_9](http://nysemanual.nyse.com/lcm/Help/mapContent.asp?sec=lcm-sections&title=sx-ruling-nyse-policymanual_303A.07&id=chp_1_4_3_9).

<sup>27</sup> See CORP. GOV. POLICIES, *supra* note 8, at § 5.4 (“The Council strongly supports [shareowner approval of equity-based compensation plans] . . .”).

<sup>28</sup> *Id.* at § 6.1.

<sup>29</sup> See *Proposed Amendments*, *supra* note 1, at 22–23.

<sup>30</sup> E.g. CORP. GOV. POLICIES, *supra* note 8, at § 6.1 (“Director compensation Policies should . . . provide complete disclosure to shareowners regarding all components of director compensation including the philosophy behind the program and all forms of compensation.”).

<sup>31</sup> *Commission Proposal*, *supra* note 1, at 22.

<sup>32</sup> CORP. GOV. POLICIES, *supra* note 8, at § 5.5h.

<sup>33</sup> *Id.* at § 5.5b.

<sup>34</sup> *Id.* at § 6.2.

supports remuneration policies that are plainly written, comprehensive, and include explanations such as the kind proposed.

As far as the contents for the Remuneration policy outlined in the proposed revisions, Council policies support the disclosure of these items to shareowners. Our policies require that the compensation committee should “provide complete disclosure to shareowners regarding all components of director compensation including the philosophy behind the program and all forms of compensation.”<sup>35</sup> We are confident that this disclosure would include all of the requirements contained in Article 9a, paragraph 3. Although our disclosures do not expressly require such items as, for example, maximum amounts of total remuneration, the spirit of complete disclosure in our policies would advocate disclosing these items. We would, however, encourage that the amendments go further and require inclusion of a summary of any outside advice given by compensation consultants and similar professionals, as required in our policies.<sup>36</sup>

### *3. Voting on and Disclosures in the Remuneration Report*

The Council supports the requirement in Article 9b, paragraph 1 requiring companies to annually produce a clear and understandable remuneration report.<sup>37</sup> Council policies, as noted above, expressly countenance an annual clear and complete disclosure in proxy materials of all information relating to remuneration for both executives and directors.<sup>38</sup>

As with voting on a director remuneration *policy*, the Council does not specifically endorse a shareowner vote on a director remuneration *report*. As noted above, however, we do endorse strong shareowner oversight in remuneration practices including robust disclosures and shareowner ratification on equity remuneration plans. Further, we support an advisory “say-on-pay” vote for *executive* remuneration.<sup>39</sup>

## **E. Conclusion**

Thank you for the opportunity to comment on this proposal. We hope that the members of the European Parliament will find our comments and suggestions helpful as they work to increase trust and accountability in European capital markets.

---

<sup>35</sup> *Id.* at § 6.1.

<sup>36</sup> *Id.* at 6.2b.

<sup>37</sup> *Commission Proposal*, *supra* note 1, at 23–24.

<sup>38</sup> *See, e.g.*, CORP. GOV. POLICIES, *supra* note 22, at §§ 5.5b, 5.5h, 6.4.

<sup>39</sup> *Id.* at § 5.2.

Page 9 of 9  
August 1, 2014

If you have any questions please contact me at [todd@cii.org](mailto:todd@cii.org) and 202.822.0800 or our General Counsel, Jeff Mahoney, at [jeff@cii.org](mailto:jeff@cii.org) and 202.261.7081.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd W. Noelle", with a long horizontal flourish extending to the right.

Todd W. Noelle  
Council of Institutional Investors  
888 17<sup>th</sup> St. NW, Suite 5000  
Washington, DC 20006  
202.822.0800