Council of Institutional Investors
The Voice of Corporate Governance

Via Email

January 10, 2015

The Organisation for Economic Co-operation and Development
2, rue André-Pascal
75775 Paris Cedex 16

Re: 2014/2015 Review of the OECD Principles of Corporate Governance

Dear Sir or Madam:

The Council of Institutional Investors (CII) is a U.S.-based nonprofit, nonpartisan association of corporate, union, and public employee benefit plans, foundations, and endowments with combined assets exceeding $3 trillion. CII's mission is to educate our members and the public about effective corporate governance, shareowner rights, and related investment issues and to advocate on our members' behalf.[1]

CII appreciates the opportunity to comment on the Organisation for Economic Co-operation and Development's (OECD) proposed changes to its *OECD Principles of Corporate Governance* (Principles).[2] Our comments are specifically focused on the proposed changes to the Principles that have implications for CII's membership approved Corporate Governance Policies (CII Policies).[3]

CII Policies, a copy of which are attached to this letter, are the result of an extensive due process that solicits and carefully considers input from a broad range of interested parties, including public, corporate, and union employee benefit plans.[4] CII Policies are widely recognized as having a significant influence on improving "business practices in the US generally."[5] We are hopeful that your consideration of CII Policies, particularly those highlighted in this letter, will assist you in achieving your goal of "ensur[ing] the continuing high quality, relevance and usefulness of the Principles . . . ."[6]

[1] Council of Institutional Investors, About Us, *available at* http://www.cii.org/about_us.
[2] OECD Principles of Corporate Governance, Draft for Public Comment (Nov. 14, 2014), *available at* http://www.oecd.org/daf/ca/OECD-Principles-CG-2014-Draft.pdf [hereinafter Principles].
[3] Council of Institutional Investors, Corporate Governance Policies (last updated Oct. 1, 2014), *available at* http://www.cii.org/files/policies/10_01_14_corp_gov_policies(1).pdf.
[4] Council of Institutional Investors, CII Policies, *available at* http://www.cii.org/policies.
[5] *See, e.g.,* Mathias M. Siems, *Convergence in Shareholder Law* 57 (2007), *available at* https://books.google.com/books?id=HqqSaPcSDzUC&pg=PA243&lpg=PA243&dq=Mathias+M.+Siems,+Convergence+in+Shareholder+Law+57+%2820007%29&source=bl&ots=EHgHyRIGAy&sig=ZPbUlA9VdSJkPdmUrwx7KcwQf8g&hl=en&sa=X&ei=3BqwVOvzIe3bsAT20IGIDQ&ved=0CF4Q6AEwCA#v=onepage&q=Mathias%20M.%20Siems%2C%20Convergence%20in%20Shareholder%20Law%2057%20(2007)&f=false.
[6] Principles, *supra* note 2, at 1.

I. ENSURING THE BASIS FOR AN EFFECTIVE CORPORATE GOVERNANCE FRAMEWORK[7]

B. The legal and regulatory requirements that affect corporate governance practices ~~in a jurisdiction~~ should be consistent with the rule of law, transparent and enforceable.[8]

We generally support the modifications to paragraph 5 of the Principles recognizing the important role of "private action" in "deter[ring] dishonest behavior and help[ing] to ensure sound corporate governance practices." CII believes that private rights of action are an essential complement to the enforcement activities of public authorities in the United States (US) in deterring violations of US securities laws and recouping related investor losses that may result from poor corporate governance practices.[9] We most recently explained our views on this issue in connection with an *amicus* brief filed with the US Supreme Court in the case of *Halliburton v. Erica P. John Fund.*[10] In our *amicus* brief, we successfully argued that:

> Enforcement of the securities laws through private rights of action serves vital purposes, as Congress intended and the Court has long recognized. An efficacious private remedy for securities fraud . . . powerfully deters wrongdoing and affords the greatest opportunity for defrauded investors to recover some portion of their losses. In this latter respect particularly, governmental enforcement is no substitute for a meaningful . . . remedy, which forms an essential complement to actions by the SEC and Department of Justice.[11]

E. Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner. Moreover, their rulings should be timely, transparent and fully explained.[12]

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[7] *Id.* at 3.
[8] *Id.* at 4.
[9] *See, e.g.,* Brief for Council of Institutional Investors et al. as Amici Curiae Supporting Respondent at 3;6-8, Halliburton v. Erica P. John Fund, 134 S.Ct. 2398 (2014) (No. 13-317), *available at* *http://www.cii.org/Files/publications/amicus_briefs/02_05_14_CII_amicus_curiae_brief_halliburton.pdf.*
[10] *Id.*
[11] *Id.* at 3.
[12] Principles, *supra* note 2, at 5.

We generally support the modifications to paragraph 11 of the Principles describing the importance of having supervisory, regulatory and enforcement authorities that "are operationally independent and accountable in the exercise of their functions and powers, have adequate powers, proper resources, and the capacity to perform their functions and exercise their powers, including with respect to corporate governance." CII believes that the lack of independence and resources of US financial regulators was a contributing factor to the US and global financial crisis of 2007-2008. Our views are consistent with the conclusions of the Investors' Working Group—an independent, non-partisan panel formed to provide an investor perspective on ways to improve the regulation of the U.S. financial markets ("IWG").[13] In their seminal report on the financial crisis the IWG observed:

> Poor funding and a lack of independence allowed an anti-regulatory ideology to permeate regulatory agencies. The Congressional appropriations process helped to undermine robust oversight. Fearful of political budgetary retaliation, agencies grew reluctant to exercise their authority fully in certain areas. It is no coincidence that these pockets of poor oversight proved to be sources of great risk.[14]

The IWG report also contained the related recommendation:

> **Regulators should have enhanced independence through stable, long-term funding that meets their needs.** All federal financial regulators should have the resources and independence to fulfill their mission effectively without political interference or dependence on the firms they oversee. The IWG encourages Congress and the Administration to consider ways to develop mechanisms for stable, long-term funding. To ensure that funding keeps pace with rapid market changes and financial innovation, Congress, the Administration and regulators should periodically reevaluate the resources each agency needs to fulfill its mission. To the extent possible, agencies should have funding flexibility to respond to these changes on their own.[15]

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[13] Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective (July 2009), *available at* http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf [hereinafter IWG Report].
[14] *Id.* at 9.
[15] *Id*.

Unfortunately, more than five years have lapsed since the above referenced IWG recommendation, and some US financial regulators continue to lack sufficient independence and funding to fulfill their now expanded post crisis missions.[16]

II. THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND KEY OWNERSHIP FUNCTIONS[17]

We generally do not oppose the modifications to paragraph 18 describing the potential benefits of "[s]pecialised court procedures . . . ." We, however, believe that the OECD should consider further modifications to the paragraph indicating that in some jurisdictions like the US specialized court procedures that are involuntarily imposed on shareowners such as forced arbitration procedures, exclusive forum or fee shifting provisions, may reduce a corporation's accountability to its shareowners by depriving them of the opportunity to obtain effective redress for violations of their rights. Our view on this issue is derived from the following two CII Policies:

> **Judicial Forum:** Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum. Nor should companies attempt to bar shareowners from the courts through the introduction of forced arbitration clauses.[18]

> **Accountability to Shareowners**: Corporate governance structures and practices should protect and enhance a company's accountability to its shareowners, and ensure that they are treated equally. An action should not be taken if its purpose is to reduce accountability to shareowners.[19]

[16] *See, e.g.,* Melanie Waddell*, SEC Needs More Funding to 'Solve' Advisor Exam Deficiency,* Investment Advisor, Dec. 22, 2014, at 1*, available at* http://www.thinkadvisor.com/2014/12/22/sec-needs-more-funding-to-solve-advisor-exam-defic?t=legal-compliance*.*
[17] Principles, *supra* note 2, at 7.
[18] Council of Institutional Investors, Policies on Corporate Governance, § **1.9 Judicial Forum** (last updated Oct. 1, 2014), *available at* http://www.cii.org/corp_gov_policies#intro.
[19] § **1.7 Accountability to Shareowners**.

We note that a recent decision by the Delaware Supreme Court in the US has resulted in dozens of US corporations adopting fee shifting bylaw provisions without shareowner approval.[20] Some of those provisions are broadly written to require shareowners to be entirely successful on almost every claim brought to avoid personal liability for litigation expenses.[21] As a result, many US legal and corporate governance experts agree that these broad fee shifting provisions are inconsistent with good corporate governance best practices because they may effectively insulate corporate officials from meritorious litigation.[22]

C. **Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings:**

1. **Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.**

2. **Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cash votes.**[23]

We generally support the modifications to paragraph 20 of the Principles indicating that the "corporate governance framework . . . [should include] the electronic distribution of proxy materials." We, however, believe that the paragraph should be further modified to indicate that the electronic distribution of proxy materials may make it more difficult for some shareowners to participate effectively and vote at shareowner meetings unless there are mechanisms in place to ensure that those shareowners who do not use electronic proxies are able to effectively receive and vote their proxies.[24]

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[20] *See, e.g.,* Michael Greene, *More Opposition Expressed Toward Delaware Fee-Shifting,* BNA, Dec. 12, 2014, *available at* http://www.bna.com/opposition-expressed-toward-n17179918841/.
[21] *See, e.g.,* Michael Greene, *ABA Speakers: Fee-Shifting Bylaws, Proxy Access to Continue Drawing Attention,* BNA, Dec. 5, 2014, *available at* http://www.bna.com/aba-speakers-feeshifting-n17179918042/.
[22] *Id.*
[23] Principles, *supra* note 2, at 8.
[24] Council of Institutional Investors, Policies on Other Issues, Efficient and Effective Proxy Voting (adopted Apr. 13, 2010) (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), *available at* http://www.cii.org/policies_other_issues.

An additional reason to include qualifying language in paragraph 20 is that in the U.S. we have had recent experience with electronic proxy platforms that appear to treat some shareowners in an inequitable manner.[25] More specifically, in a May 2013 letter to the Chairman of the US Securities and Exchange Commission, we explained:

> In spite of repeated complaints from shareowners, Broadridge [Financial Solutions, Inc.—a company that controls more than 95 percent of the proxy distribution business in the US] persisted in maintaining a "vote all items with management" button on its electronic platform. It maintained this button despite the fact that a comparable option is not permitted on proxy cards filed by management.[26]

4. Effective shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated. Shareholders should be able to make their views known, including through votes at annual shareholder meetings, on the remuneration ~~policy for~~ of board members and key executives. The equity component of compensation schemes for board members and employees should be subject to shareholder approval.[27]

We generally support the modifications to paragraph 22 of the Principles indicating that shareowners "should have access . . . to the company's . . . voting materials which are sent to shareholders, . . . subject to conditions to prevent abuse." Those modifications are generally consistent with CII Policies which state:

> 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. Eligible investors must have owned the stock for at least two years.[28]

[25] Letter from Ann Yerger, Executive Director, Council of Institutional Investors, to The Honorable Mary Jo White, Chairman, U.S. Securities and Exchange Commission 2 (May 17, 2013), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/05_17_13_CII_Letter_Regarding_Proxy_Distributors.pdf.
[26] *Id.*
[27] Principles, *supra* note 2, at 9.
[28] § **3.2 Access to the Proxy**.

Our policy is based on the widely held view that "[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."[29] The broad and active shareowner support for proxy access in the U.S. is evidenced by the more than "100 proxy access proposals [that] will be submitted in the 2015 season . . . ."[30]

We also generally support the modifications to paragraph 23 of the Principles indicating that disclosure to shareowners of board and key executive remuneration should include "the remuneration policy as well as the total value of compensation arrangements made . . . [and] how remuneration and company performance are linked . . . ." We, however, would support, consistent with CII policies, further modifications to the paragraph to include one or more of the following additional areas of remuneration disclosure:

> [A]nnual . . . disclosure of the [board's] . . . decisions with respect to salary, short-term incentive compensation, long-term incentive compensation and all other aspects of executive compensation, including the relative weights assigned to each component of total compensation. The [board] . . . should commit to provide full descriptions of the qualitative and quantitative performance measures and benchmarks used to determine compensation, including the weightings and rationale for each measure. At the beginning of a period, the [board] . . . should calculate and disclose the maximum compensation payable if all performance related targets are met. At the end of the performance cycle, the [board] . . . should disclose actual targets and details on final payouts. Companies should provide forward-looking disclosure of performance targets whenever possible.[31]

We also generally support the modifications to paragraph 23 of the Principles that recognize the important role that "say-on-pay . . . play[s] . . . in conveying the strength and tone of shareholder sentiment to the board . . . ."[32] Those modifications are generally consistent with CII Policies providing that "[a]ll companies should provide annually for advisory shareowner votes on the compensation of senior executives.[33]

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[29] IWG Report, *supra* note 13, at 23.
[30] Yin Wilczek, *Whole Foods Action Shapes Up Battlefront for Proxy Access Proposals*, BNA, Dec. 11, 2014, at 2, *available at* http://www.bna.com/whole-foods-action-n17179918816/.
[31] § **5.5h Disclosure Practices**; *see also* § **6.1 Introduction** ("investors must have complete and clear disclosure of both the philosophy behind the compensation plan [for directors] as well as the actual compensation awarded under the plan.").
[32] Principles, *supra* note 2, at ¶ 23
[33] § **5.2 Advisory Shareowner Votes on Executive Pay**.

Our policy is based on the recognition that say-on-pay votes can assist shareowners in ensuring "that the executive pay programs of their portfolio companies incentivize executives to increase shareowner value for the long term . . . ."[34]

We also generally support the modifications to paragraph 23 of the Principles indicating that "[s]hareholder approval should also be required for . . . any material changes to existing schemes . . . ." Those modifications are generally consistent with CII Policies that state:

> Current listing standards require shareowner approval of equity-based compensation plans and material amendments to plans (with limited exceptions). The Council strongly supports this concept and advocates that companies adopt conservative interpretations of approval requirements when confronted with choices. (For example, this may include material amendments to the plan.)[35]

Our policy is based on the view that shareowner approval of equity-based compensation plans and material amendments to those plans "enhance[s] the accountability and integrity of . . . companies and allow shareowners to more easily and efficiently monitor the performance of companies and directors."[36]

5. Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia.[37]

We generally support the modifications to paragraph 24 of the Principles that eliminate the reference to the disclosure of how undirected proxies will be voted. On this issue, CII Policies state that "[u]ninstructed broker votes and abstentions should be counted only for purposes of a quorum."[38]

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[34] Ann Yerger, *Say on Pay Identifying Investor Concerns*, Harv. L. Sch. Forum on Corp. Governance & Fin. Reg. (Nov. 15, 2011, 9:38AM), *available at* http://blogs.law.harvard.edu/corpgov/2011/11/15/say-on-pay-identifying-investor-concerns/.
[35] § **5.4 Shareowner Approval of Equity-based Compensation Plans**.
[36] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Jan-Michiel Hessels, Chairman, NYSE Euronext 3 (Jan. 7, 2013), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/01_07_13_cii_letter_nyse_simon_property_group_stock_incentive_plan.pdf.
[37] Principles, *supra* note 2, at 10.
[38] § **3.7 Broker Votes.**

Our policy is based on the view that final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares.[39]

E. All shareholders of the same series of a class should be treated equally. Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.

1. Within any series of a class, all shares should carry the same rights. All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase. Any changes in voting rights should be subject to approval by those classes of shares which are negatively affected.[40]

We generally do not oppose the modifications to paragraph 28 of the Principles deleting the following two sentences: "~~The Principles do not take a position on the concept of "one share one vote." However, many institutional investors and shareholder associations support this concept.~~ We, however, believe that, consistent with CII Policies, the Principles should explicitly take a position in favor of the concept of one share one vote.[41] CII Policies on this issue state:

> Each share of common stock should have one vote. Corporations should not have classes of common stock with disparate voting rights.[42]

In an October 2012 letter to the NYSE, we explained the basis for our long-time and continuing support for one-share one-vote as follows:

> As major, long-term shareowners, Council members have long believed that multi-class stock structures with unequal voting rights are not in the long-term interest of investors or the markets.

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[39] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Board of Directors c/o Mark D. Andrews, Corporate Secretary, Nabors Industries Ltd 1 (Aug. 1, 2013), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/08_01_13_cii_letter_nabors.pdf.
[40] Principles, *supra* note 2, at 11.
[41] § **3.3 Voting Rights.**
[42] *Id.*

> . . . .
>
> The importance of one-share, one vote is particularly critical to Council members as heavy users of passive investment strategies. With the average Council member indexing approximately 47 percent of its U.S. stock portfolio and approximately 16 percent of its U.S. bonds, our members cannot simply sell their stock in companies with a multi-class stock structure.
>
> The basis for the Council's one-share, one vote policy is generally consistent with the purpose of the NYSE listing standards. The policy, like the listing standards, is intended to enhance the accountability and integrity of publicly traded companies, and preserve and strengthen investor confidence in the integrity of the markets.
>
> The basis for our policy is supported by empirical research that demonstrates that multiclass stock structures have questionable benefits to long-term shareowners and "the prevalence of dual-class shares has lead [sic] to decreases in shareowner value and increases in irresponsible behavior by the controlling superior shareowners."
>
> A study . . . by the Investor Responsibility Research Center Institute ("IRRC Institute Study") adds to the ample body of evidence supporting our policy, and underlying our request for a change to the NYSE listing standards. Relevant findings from the IRRC Institute Study include:
>
> • Companies with multi-class stock structures underperform companies with noncontrolling single-class structures over three-, five-, and ten-year time periods;
> • Companies with multi-class structures have more significant material weaknesses in internal controls than non-controlled companies; and
> • Companies with multi-class structures have more related party transactions than non-controlled companies.[43]

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[43] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Ms. Claudia Crowley, CEO & Chief Regulatory Officer, NYSE Regulation 2-3 (Oct. 2, 2012) (footnotes omitted), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_2_12_cii_letter_to_nyse_dual_class_stock.pdf.

III. INSTITUTIONAL INVESTORS, STOCK MARKETS, AND OTHER INTERMEDIARIES[44]

A. Institutional investors acting in a fiduciary capacity, including asset managers, should disclose their ~~overall~~ corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. Disclosure of actual voting records is considered good practice, especially where an institution has a declared policy to vote.[45]

We generally support the modifications to paragraph 47 of the Principles emphasizing "disclosure of actual voting records [as a] . . . good practice . . . ." Those modifications are generally consistent with CII Policies that state:

> 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.[46]

B. **Votes should be cast by custodians or nominees in ~~a manner agreed upon~~ line with the directions of the beneficial owner of the shares.**[47]

We generally support the modifications to paragraph 48 of the Principles emphasizing that "[c]ustodian institutions holding securities as nominees for customers shold not be permitted to cast the votes . . . on those securities unless they have received specific instructions to do so."

[44] Principles, *supra* note 2, at 15.
[45] *Id.*
[46] Council of Institutional Investors, Policies on Other Issues, Best Disclosure Practices for Institutional Investors (May 1, 2009); *see generally* Eleanor Bloxham, *Shareholders: Don't Give Away Your Voting Rights*, Fortune, Dec. 16, 2014 (Discussing the importance to investors of disclosure of voting records by mutual fund companies), *available at* http://fortune.com/author/eleanor-bloxham/.
[47] Principles, *supra* note 2, at 16.

We generally believe that pension fund fiduciaries have a legal duty to ensure that their fund proxies are voted in the best long-term interests of plan participants and beneficiaries.[48] That duty extends to ensuring external money managers or specialized proxy voting services vote the fund's proxies in line with the fund's proxy voting guidelines/principles.[49]

D. The corporate governance framework should ~~be complemented by an effective approach that addresses and promotes~~ ensure that ~~the provision of analysis or advice by~~ proxy advisers, analysts, brokers, rating agencies and others~~,~~ that provide analysis or advice~~is~~ relevant to decisions by investors, ~~free from material~~ disclose and minimize conflicts of interest that might compromise the integrity of their analysis or advice.[50]

We generally support the addition of paragraph 53 and the modifications to paragraphs 54-55 of the Principles indicating that providers of corporate governance services, such as proxy advisors, should disclose and minimize conflicts of interest. In general, we believe that while proxy advisors are important market participants, their influence on proxy voting is, in our view, often overstated.[51] Nevertheless, we have publicly supported efforts to increase proxy advisor transparency.[52]

For example, we have recommended 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.[53]

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[48] Council of Institutional Investors, Getting Involved in Corporate Governance 2 (Feb. 2012), *available at* http://www.cii.org/files/publications/governance_basics/04_28_14_getting_involved_in_CG.pdf.
[49] *Id*.
[50] Principles, *supra* note 2, at 17.
[51] Letter from Todd W. Noelle, Council of Institutional Investors, to Martin Schulz, President of the European Parliament 5 (Aug, 1, 2014), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2014/08_01_2014_EU_Letter_Shareholder_Rights.pdf.
[52] *Id.*
[53] *Id.* at 5-6.

V. DISCLOSURE AND TRANSPARENCY[54]

A. Disclosure should include, but not be limited to, material information on:

2. Company objectives and non-financial information.[55]

We generally support the addition of paragraph 77 to the Principles and its recognition that "disclosure of donations for political purposes is . . . considered good practice . . . ." Consistent, however, with CII Policies we would revise the new paragraph to indicate that disclosure of charitable contributions is also considered good practice.[56] More specifically, CII Policies state:

> 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.[57]

We believe the disclosure of charitable and political contributions by companies is a "good practice" because it "assist[s] shareowners in their role of monitoring corporate boards" and their use of corporate funds.[58]

3. Foreseeable risk factors.[59]

We generally support the modifications to paragraph 87 indicating that the "Principles envision sufficient and comprehensive information . . . to fully inform investors of the foreseeable risks of the enterprise." Those modifications are generally consistent with CII Policies describing the board's responsibilities for risk oversight.[60]

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[54] Principles, *supra* note 2, at 23.
[55] *Id.* at 24.
[56] § **2.14b Disclosure.**
[57] *Id.* (emphasis added).
[58] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Mr. Vikash Mohan, Program Analyst, Office of Financial Management, Securities and Exchange Commission 6 (Mar. 11, 2014), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_11_14_CII_letter_to_SEC_strategic_plan.pdf.
[59] Principles, *supra* note 2, at ¶ 87.
[60] § **2.7 Board's Role in Risk Oversight.**

More specifically, CII Policies state that the "board should disclose to shareowners, at least annually, sufficient information to enable them to assess whether the board is carrying out its [risk] oversight responsibilities effectively."[61] Our policy is based on the view that disclosure about the board's risk oversight enhances board accountability to shareowners.[62]

9. Governance structures and policies, ~~in particular,~~ including the content of any corporate governance code or policy and the process by which it is implemented.[63]

We generally support the modifications to paragraph 90 of the Principles providing that "[c]ompanies should clearly disclose the different roles and responsibilities of the CEO and/or Chair and, where a single person combines both roles, the rationale for this arrangement." We, however, would further modify the paragraph, consistent with CII Policies, to provide that where a single person combines both roles companies should "name a lead independent director who should have approval over information flow to the board, meeting agendas and meeting schedules to ensure a structure that provides an appropriate balance between the powers of the CEO and those of the independent directors."[64]

C. An annual audit should be conducted by an independent competent and qualified, auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the company in all material respects.[65]

We generally support the modifications to paragraph 93 of the Principles indicating that the "independence of auditors and their accountability to shareholders should be required." CII Policies relating to the annual audit are included under a single heading, entitled "Auditor Independence," a sign of the great weight that our members ascribe to the independence of the external auditor.[66]

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[61] *Id.*
[62] Letter from Todd W. Noelle, Council of Institutional Investors, to Ms. Catherine Woods, Financial Reporting Council 6 (June 11, 2014), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2014/06_11_14_CII_letter_UK_financial_reporting_council.pdf.
[63] Principles, *supra* note 2, at 27.
[64] § **2.4 Independent Chair/Lead Director**
[65] Principles, *supra* note 2, at 27.
[66] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Phoebe Brown, Office of the Secretary, PCAOB 2 (Dec. 16, 2013 Attachment), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/12_16_13_ATTACHMENT_CII_letter_PCAOB_docket_no_034_proposed_auditing_standards.pdf.

Consistent with our policies, we would support the insertion of additional language in paragraph 93 emphasizing that investors are the "customers" of the annual audit and that auditors and audit committees should recognize that principle.[67]

We also generally support the modifications to paragraph 94 of the Principles indicating that it is a "good practice for external auditors to be recommended by an independent audit committee of the board or an equivalent body and to be appointed either by that committee/body or by shareholders directly." Those modifications are generally consistent with CII Policies which state: "[t]he audit committee should fully exercise its authority to hire, compensate, oversee and, if necessary, terminate the company's independent auditor"[68] [and the] "[a]udit committee charters should provide for annual shareowner votes on the board's choice of independent, external auditor."[69]

Finally, we also generally support the modifications to paragraph 95 of the Principles indicating that the audit committee or an equivalent body "should be required" to disclose payments to external auditors for non-audit services. We believe, however, the those modifications, consistent with CII Policies, should go further and provide that as a best practice a "company's external auditor *should not perform any non-audit services* for the company, except those, such as attest services, that are required by statute or regulation to be performed by a company's external auditor."[70]

Our policy is based on our members' view that generally prohibiting non-audit services by the external auditor "reassures investors that the auditor of a company's financial statements has no other financial interest at stake with the company, and, therefore, it can be objective."[71] We also note that our policy appears to follow from the existing language in paragraph 95 indicating that the "[p]rovision of non-audit services by the external auditor to a company can significantly impair their independence . . . [and result] in skewed incentives . . . ."

VI. THE RESPONSIBILITIES OF THE BOARD[72]

4. Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.[73]

[67] § **2.13a Audit Committee Responsibilities Regarding Independent Auditors.**
[68] *Id.*
[69] § **2.13f Shareowner Votes on the Board's Choice of Outside Auditor.**
[70] § **2.13c Non-audit Services.**
[71] Letter from Ann Yerger, Executive Director, Council of Institutional Investors, to Letter from Office of the Secretary, PCAOB 1 (Jan. 28, 2005), *available at* http://pcaobus.org/Rules/Rulemaking/Docket017/738_Council_of_Institutional_Investors.pdf.
[72] Principles, *supra* note 2, at 30.
[73] *Id.* at 32.

We generally agree with the modifications to paragraph 111 of the Principles' emphasizing that it "is regarded as good practice for boards to develop and disclose a remuneration policy statement covering board members and key executives." CII policies describe the necessity for robust disclosures of director compensation policies and practices as follows:

> [I]nvestors must have complete and clear disclosure of both the philosophy behind the compensation plan as well as the actual compensation awarded under the plan. Without full disclosure, it is difficult to earn investors' confidence and support for director and executive compensation plans.[74]

We also generally support the modifications to paragraph 112 of the Principles emphasizing that it is "good practice . . . that remuneration policy . . . for board members and key executives be handled by a special committee of the board comprising either wholly or a majority of independent directors . . . and exclude~~s~~ executives that serve on each others' remuneration committees, which could lead to conflicts of interest." We, however, consistent with CII policies, would further modify the paragraph to indicate that good practice is that remuneration committees should be comprised entirely of independent directors.[75]

Finally, we generally support the modifications to paragraph 112 of the Principles recognizing that clawback provisions are considered good practice. Those modifications are generally aligned with CII Policies that state:

> 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.[76]

[74] § **6.1 Introduction.**
[75] § **5.5a Committee Composition** (All members of the compensation committee should be independent).
[76] § **5.5d Pay for Performance**.

Our policy is based on the view that a "tough" clawback policy is an essential element of meaningful 'pay for performance' philosophy. If executives are rewarded for hitting their numbers—and it turns out they failed to do so—they should not profit.[77] Examples of strong clawback policies include performance-based policies in which clawbacks apply to all executives in the event of a restatement, regardless of who was responsible, and policies requiring clawbacks if executives fail to identify material risks or operate outside the firm's risk parameters.[78]

Finally, we note that our clawback policy is generally consistent with the findings of the IWG.[79] The IWG concluded that:

> 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.[80]
>
> **7. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.** Large companies should be encouraged to put in place an internal audit function and an audit committee of the board to oversee the effectiveness and integrity of the internal control system.[81]

We generally support the modifications to paragraph 116 of the Principles indicating the importance of "direct reporting to the board, with respect to risk management."

[77] *See, e.g.,* Letter from Laurel Leitner, Senior Analyst, Council of Institutional Investors to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation 1 (May 19, 2011), https://www.fdic.gov/regulations/laws/federal/2011/11c07Ad73.PDF.
[78] *Id.*
[79] IWG Report, *supra* note 13, at 23.
[80] *Id.*
[81] Principles, *supra* note 2, at 33.

The modifications are generally consistent with CII Policies that state:

> Effective risk oversight requires regular, meaningful communication between the board and management, among board members and committees, and between the board and any outside advisers it consults, about the company's material risks and risk management processes.[82]

E. The board should be able to exercise objective independent judgement on corporate affairs.[83]

We generally support the modifications to paragraph 120 of the Principles indicating that it is generally regarded as good practice to separate the role of the chief executive and board chair. We, however, would further modify the paragraph, consistent with CII Policies, to strengthen the language to indicate that in those very limited circumstances in which combining the role of the chief executive and board chair may be appropriate, the board "should provide a written statement in the proxy materials discussing why the combined role is in the best interests of shareowners, and it should name a lead independent director who should have approval over information flow to the board, meeting agendas and meeting schedules to ensure a structure that provides an appropriate balance between the powers of the CEO and those of the independent directors."[84]

2. Boards should consider setting up specialized committees to support the full board in performing its functions, particularly in respect to audit, but, depending upon the company's size and risk profile, also in respect to risk management and remuneration**. When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.[85]**

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[82] § **2.7 Board's Role in Risk Oversight.**
[83] Principles, *supra* note 2, at 34.
[84] § **2.4 Independent Chair/Lead Director**; *see also* IWG Report, *supra* note 13, at 23 ("Boards of directors should be encouraged to separate the roles of chair and CEO or explain why they have adopted another method to assure independent leadership of the board.").
[85] Principles, *supra* note 2, at 35.

We generally support the modifications to paragraph 127 of the Principles indicating that board should consider setting up specialized committees to support the full board in performing its functions. We, however, would further modify the language, consistent with CII Policies, to provide that "all members of these committees should be independent."[86] We generally believe that independent audit, nominating and compensation committees are an essential component of responsible corporate goverance.[87]

3. Board members should be able to commit themselves effectively to their responsibilities.[88]

We generally support the modifications to paragraph 128 of the Principles indicating that shareowners should be provided disclosures about a board nominees other board memberships. We, however, believe that the language should be further modified, consistent with CII Policies, to provide that it is a best practice for companies to establish and disclose "guidelines specifying on how many other boards their directors may serve."[89] We generally believe that the establishment and disclosure of such guidelines will better ensure that board members will be able to commit themselves effectively to their responsibilities.

4. Boards of large companies should regularly carry out evaluations to appraise their performance and assess whether they possess the right mix of background and competences.[90]

[86] § **2.5 All-independent Board Committees.**

[87] *See, e.g.,* Letter from Todd W. Noelle, Council of Institutional Investors, to Ms. Catherine Woods, Financial Reporting Council 2 (June 11, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/06_11_14_CII_letter_UK_financial_reporting_council.pdf.

[88] Principles, *supra* note 2, at 36.

[89] §**2.11 Board Size and Service.**

[90] Principles, *supra* note 2, at 36.

We generally support the addition of paragraph 129 of the Principles regarding board evaluations. Board evaluations can be an effective to improve board and company performance.[91] We, however, consistent with CII Policies, would revise the language to specify that board evaluations should "include a review of the performance and qualifications of any director who received 'against' votes from a significant number of shareowners or for whom a significant number of shareowners withheld votes."[92]

We would also recommend that the paragraph 129 language be revised to encourage robust disclosure of the evaluation process.[93] Many CII members and other institutional investors who vote proxies are eager for details about the board evaluation process.[94] Such a disclosure is an indication that a board is willing to think critically about its own performance on a regular basis and tackle any weaknesses.[95] In our view, the board evaluation—and disclosure of the evaluation process—can be a useful catalyst for 'refreshing' the board as new needs arise.[96]

We also generally support new paragraph 130 regarding enhancing gender diversity. On this issue, CII Policies state:

> The Council supports a diverse board. The Council believes a diverse board has benefits that can enhance corporate financial performance, particularly in today's global market place. Nominating committee charters, or equivalent, ought to reflect that boards should be diverse, including such considerations as background, experience, age, race, gender, ethnicity, and culture.[97]

Consistent with the above referenced policy, we would revise the paragraph 130 language to include references to diversity not only in terms of gender, but also in terms of background, experience, age, race, ethnicity and culture.[98]

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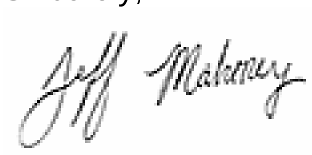
[91] *See, e.g.,* Jordan Temple, Parker Poe, *Re-evaluating the Board Evaluation*, JD Supra Bus.7 Advisor (Oct. 6, 2014), *available at* http://www.jdsupra.com/legalnews/re-evaluating-the-board-evaluation-95208/.
[92] §**2.8c Evaluation of Directors.**
[93] Council of Institutional Investors, Best Disclosure: Board Evaluation 2 (Sept. 2014), *available at* http://www.cii.org/files/publications/governance_basics/08_18_14_Best_Disclosure_Board_Evaluation_FINAL.pdf.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] § **2.8b Board Diversity**.
[98] *Id.*

CII supports the OECD's efforts to ensure the continuing high quality, relevance and usefulness of the Principles and appreciates the opportunity to comment on the proposed changes. Please feel free to contact me with any questions regarding the views expressed in this letter.

Sincerely,



Jeff Mahoney
General Counsel

Attachment