

Via Email

October 26, 2016

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE.
Washington, DC 20549-1090

Re: Release No. 33-10198; 34-78687; File No. S7-18-16. Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters¹

Dear Mr. Secretary:

The Council of Institutional Investors (CII) is pleased to respond to the request of the Securities and Exchange Commission (SEC or Commission) for comments regarding Subpart 400 of Regulation S-K, per the above referenced release.

We are a nonpartisan, nonprofit association of employee benefit plans, foundations and endowments with combined assets under management exceeding \$3 trillion. Our general member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate (non-voting) members include a range of asset managers with more than \$20 trillion in assets under management.²

We understand that you are seeking comment on “Subpart 400 of Regulation S-K,” in part, to obtain input “on potential disclosure issues that commentators believe the rules should address.”³ With that goal in mind, we offer the following comments:

Item 402 – Executive Compensation

CII believes that executive compensation is a critical and visible aspect of a company’s governance.⁴ We have long endorsed “reasonable, appropriately structured pay-for-performance programs that reward executives for sustainable, superior performance over the long-term,

¹ 81 Fed. Reg. 59,927 (Aug. 31, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-31/pdf/2016-20906.pdf>.

² For more information about the Council of Institutional Investor (Council or CII) and our members, please visit the Council’s website at <http://www.cii.org/members>.

³ 81 Fed. Reg. at 59,928.

⁴ CII, Corporate Governance Policies §5.1 Introduction (updated Sept. 30, 2016), available at http://www.cii.org/files/policies/09_30_16_corp_gov_policies.pdf.

consistent with a company's investment horizon.”⁵ Our membership approved policies also emphasize the importance of several compensation committee related disclosures including:

- The compensation committee should establish performance measures for executive compensation that are agreed to ahead of time and publicly disclosed.⁶
.....
- 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. . . . The mechanisms and policies should be publicly disclosed.⁷
.....
- The compensation committee 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.⁸
.....
- Compensation committees should disclose the size, distribution, vesting requirements, other performance criteria and grant timing of each type of long-term incentive award granted to the executive oversight group. Compensation committees also should explain how each component contributes to the company's long-term performance objectives.⁹

Compensation Discussion and Analysis

Consistent with our policies, we believe the disclosures required by Item 402(b) could be significantly improved by providing that a compensation committee shall describe *why* it chose to use certain (1) qualitative and quantitative performance measures or metrics, and (2) benchmarks, including peer groups, to determine executive compensation. As the use of relative metrics becomes more prevalent, the absence of this disclosure creates a major impediment to institutional investors' and the market's ability to analyze and understand the effectiveness of compensation programs awarded.

Pay Versus Performance

In addition, we continue to support the SEC's proposed new Item 402(v) "that would require a registrant to provide a clear description of . . . the relationship between executive compensation actually paid to the registrant's NEOs [Named Executive Officers] and the total shareholder

⁵ *Id.*

⁶ §5.5d Pay for Performance.

⁷ *Id.*

⁸ 5.5h Disclosure Practices.

⁹ §5.8f Award Specifics.

return (TSR) of the registrant.”¹⁰ We believe the proposal, as modified based on our comments, would also greatly facilitate evaluation of a company’s executive compensation plan, particularly for smaller institutional investors who may not have resources to subscribe to outside vendors to obtain this type of information.¹¹

Clawbacks

Finally, we continue to support the SEC’s proposed amendments to Item 402, including new Item 402(w), relating to clawbacks.¹² As we stated in our comment letter in response to the proposal:

CII generally agrees with the Commission that the proposed Item 402(w) disclosure of the “listed issuer’s activity to recover excess incentive-based compensation during its last completed fiscal year . . . would inform shareholders’ voting and investment decisions.” We believe, consistent with our membership-approved policies, that executive compensation is a critical and visible aspect of a company’s governance and that pay decisions, including decisions relating to the issuer’s clawback activities, are one of the most direct ways for shareowners to assess the performance of the board. Thus, the Item 402(w) disclosures would likely be useful to institutional investors when casting votes for the election of directors generally.¹³

Item 403 – Security Ownership of Certain Beneficial Owners and Management

CII supports equity structures that abide by the “one share, one vote” principle.¹⁴ Specifically, our membership-approved policies state:

Each share of common stock should have one vote. Corporations should not have classes of common stock with disparate voting rights. Authorized, unissued preferred shares that have voting rights to be set by the board should not be issued without shareowner approval.¹⁵

¹⁰ Pay Versus Performance, Exchange Act Release No. 74,835, 80 Fed. Reg. 26,330, 26,331 (proposed May 7, 2015), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-10429.pdf>.

¹¹ See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission 4-14 (June 25, 2015) (generally supporting the proposal and offering several improvements to the proposal’s provisions), available at [http://www.cii.org/files/issues_and_advocacy/correspondence/2015/06_25_15_letter_sec_953\(a\).pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2015/06_25_15_letter_sec_953(a).pdf).

¹² Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 9861, Exchange Act Release No. 75,342, Investment Company Act Release No. 31,702, 80 Fed. Reg. 41,144 (proposed July 14, 2015), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-16613.pdf>.

¹³ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission 8 (Aug. 27, 2015) (footnotes omitted), available at http://www.cii.org/files/issues_and_advocacy/correspondence/2015/08_27_15_letter_to_SEC_clawbacks.pdf.

¹⁴ §3.3 Voting Rights.

¹⁵ *Id.*

Consistent with our policy, we generally would support an amendment to Item 403(a) requiring registrants with multiple classes of outstanding common stock, and disparate voting rights for two or more classes, to indicate separately the holder's equity stake and control of total voting power in the existing beneficial ownership table.¹⁶ We believe that such a disclosure would clarify appropriately for investors the extent to which multi-class equity structures may be distorting the relationship between economic interests and voting power.¹⁷ We note that currently, some companies without a "one share, one vote" equity structure do not provide a means for investors to independently calculate holders' control of total voting power, while other companies voluntarily provide useful disclosure.¹⁸

Similarly, we generally would support an amendment to Item 403(a) requiring registrants to disclose derivative or other economic instruments used by holders to reduce their economic exposure to the registrant's securities. We believe that market pricing efficiency would be served by mandating the disclosure, so that investors can more easily discern key shareowners' net economic stake in the registrant's stock performance and the extent that such net economic stake differs from reported beneficial ownership.

Item 407 – Corporate Governance

Board Meetings and Committees; Annual Meeting Attendance

CII's membership-approved policy on board and committee meeting attendance states:

Absent compelling and stated reasons, directors who attend fewer than 75 percent of board and board-committee meetings for two consecutive years should not be renominated. Companies should disclose individual director attendance figures for board and committee meetings. Disclosure should distinguish between in person and telephonic attendance. Excused absences should not be categorized as attendance.¹⁹

¹⁶ See 17 CFR 229.403(a) (1982 as amended), available at <https://www.law.cornell.edu/cfr/text/17/229.403>.

¹⁷ See, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Mr. Edward S. Knight, Executive Vice President, General Counsel & Chief Regulatory Officer, NASDAQ OMX Group 3 (Oct. 2, 2012) (rule-making petition regarding multi-class stock with unequal voting rights providing evidence that such structures can decrease long-term shareowner value), available at http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_02_12_cii_letter_to_nasdaq_dual_class_stock.pdf.

¹⁸ See, e.g., J.M. Smucker Co., Schedule 14A, Security Ownership of Certain Beneficial Owners and Management 79 (2016) (which has a time-phased voting and leaves investors no ability even to independently calculate holders' control of voting power), available at <https://www.sec.gov/Archives/edgar/data/91419/000119312516639146/d188163ddef14a.htm>. But cf. Facebook, Inc., Schedule 14A, Security Ownership of Certain Beneficial Owners and Management 38 (2016) (On a voluntary basis, dual-class Facebook, Inc. discloses each insider's control of total voting power in a separate column.) available at

<https://www.sec.gov/Archives/edgar/data/1326801/000132680116000074/facebook2016definitiveprox.htm>.

¹⁹ §2.8d Board and Committee Meeting Attendance.

Consistent with our policy, we generally would support the following two amendments to Item 407(b):

- First, we propose revising the disclosure requirements to indicate each board member's attendance record for each committee served, as well as each director's attendance record for full board meetings. That is, we believe the requirement should be for disclosure of exact attendance (*e.g.*, "the director attended seven out of eight board meetings and five of six compensation committee meetings in her capacity as a member of that committee"). This proposed revision would enable investors to apply custom thresholds for attendance that may be higher or lower than the existing "fewer than 75 percent of the aggregate" threshold requirement.²⁰ We note our proposed more granular disclosure is common in other markets, and that such disclosure imposes little burden.
- Second, we propose revising the disclosure requirements to distinguish between in-person and remote attendance at board and committee meetings. We believe some boards may function differently when meetings are held via teleconference or other forms of technology enabling remote participation. Although we do not generally object to reliance on some degree of remote participation, it is important that all directors periodically meet in-person, and for shareowners to have information to know whether in-person meeting participation is the norm.

Shareowner Communications

We propose amending Item 407(f)(2)(i) to require disclosure of the name, title and address (postal or e-mail) for written communication to the board. We note that the existing requirement to "[d]escribe the manner in which security holders can send communication to the board" does not always provide useful contact information, particularly for written shareowner communications.²¹ For example, some registrants provide a phone number that sends investors directly to voicemail, with no instructions for written communication.²² Our proposed revision is consistent with the growing importance of communication between investors and board members generally.²³

²⁰ 17 CFR 229.407(b)(1) (2006 as amended), available at <https://www.law.cornell.edu/cfr/text/17/229.407>.

²¹ 17 CFR 229.407(f)(2)(i).

²² See, *e.g.*, WGL Holdings, Inc., Schedule 14A, Communications with the Board 14 (2016), available at https://www.sec.gov/Archives/edgar/data/1103601/000155278116001227/e00019_wgl-def14a.htm. But cf. CII, Best Disclosure: Company-Shareholder Engagement 5 (Dec. 2015) (highlighting EMC's proxy statement inclusion of a graphic guiding shareowners on how they can communicate in writing to the board), available at http://www.cii.org/files/about_us/press_releases/2015/12_2_15_best_disclosure_shareholder_engagement.pdf.

²³ See, *e.g.*, Christopher P. Skroupa, 2017 Proxy Season Roll Out -- What's Next for Shareholder Engagement?, *Forbes* 4 (Oct. 11, 2016) (discussing the importance of multiple forms of communications with shareowners), available at <http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/christopherskroupa/2016/10/11/2017-proxy-season-roll-out-whats-next-for-shareholder-engagement/&refURL=https://www.google.com/&referrer=https://www.google.com/>.

Nominating Committee

Our membership-approved policies identify diversity as an important factor for nominating committees to consider when recommending nominees for a position on the registrant's board of directors.²⁴ Specifically, our policy states:

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.²⁵

We share the views of SEC Chair Mary Jo White²⁶ and many of our members²⁷ that the quality of existing disclosures regarding board diversity should be improved to better serve and inform investors. It is our understanding that the SEC staff is preparing a recommendation to the Commission to propose rule amendments "to require companies to include in their proxy statements more meaningful board diversity disclosures on their board members and nominees where that information is voluntarily self-reported by directors."²⁸ We look forward to reviewing and commenting on that proposal.

Annual Reporting Requirements

We generally do not support replacing the existing annual disclosure requirements with a "requirement to only provide disclosures of any material changes to these items on an annual basis."²⁹ Considering the importance placed upon governance practices by CII members, the uncertainty of registrants' future exchange listing status and the potential for differing practices even among registrants in full compliance with the same exchange listing requirements, we support continued mandatory annual disclosure of the governance information required under Item 407.

²⁴ 17 CFR 229.407(c)(2)(v).

²⁵ §2.8(b) Board Diversity.

²⁶ Chair Mary Jo White, Keynote Address via videoconference International Corporate Governance Network Annual Conference 3-5 (June 27, 2016), available at <https://www.sec.gov/news/speech/chair-white-icgn-speech.html>.

²⁷ Comment Letter of Janet Cowell, Treasurer of the State of North Carolina, to Mr. Brent J. Fields, Secretary, United States Securities and Exchange Commission (Oct. 17, 2016) (including attached rulemaking petition signed by nine CII members), available at <https://www.sec.gov/comments/s7-18-16/s71816-3.pdf>.

²⁸ Chair Mary Jo White at 4-5.

²⁹ Comment letter of Fenwick & West LLP 4 (Sept. 20, 2016), available at <https://www.sec.gov/comments/s7-18-16/s71816-1.pdf>.

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If the staff would care to discuss any the comments that we have provided in this letter, please feel free to contact me, CII Executive Director Kenneth Bertsch, or CII Director of Research Glenn Davis at 202.822.0800.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney". The signature is written in black ink and is positioned above the typed name.

Jeff Mahoney
General Counsel