

**REMARKS BEFORE THE SEC INVESTOR ADVISORY COMMITTEE
COUNCIL OF INSTITUTIONAL INVESTORS EXECUTIVE DIRECTOR KEN BERTSCH
DECEMBER 8, 2016**

Kurt and members of the IAC: thank you for the invitation to join you today, and for your good work. We have seen good outcomes from the thoughtful discussions in, and recommendations from, the IAC.

I want to recognize that members of the Council of Institutional Investors serve on the committee, and would note in particular CII board member Anne Simpson, who joins the IAC effective at this meeting, and your vice chairman, Anne Sheehan, a former CII chair. CII is a member organization of pension funds and other asset owners, with associate members that include many asset managers.

I would like to thank SEC Chair White for your strong and smart leadership of the SEC since 2013. In a difficult environment, we have seen clear gains for investors through policy, guidance and enforcement. Much of the progress has been on block and tackling not in the forefront of political debate, and just in recent months, we have been gratified by such actions as approval for IEX to launch a national exchange, the proposal for universal proxies, and the thoughtful and difficult work on the SEC's disclosure effectiveness project.

The SEC's role is critical in many dimensions. We recognize this includes, in tandem with state law, enabling fair ground rules for private ordering related to shareholder rights (which are reliant on good disclosure). Other elements of the SEC mission that we see as critical include effective oversight of national securities exchanges and other SROs, an area that may become of increasing focus for CII.

I would note that the SEC plays important roles in aspects of some CII priority issues for which key authority also lies elsewhere – including at the state level and with individual companies. These areas include:

- IPOs, where we are distressed at the number of IPOs coming to market with permanent corporate governance provisions meant to shield future management from shareholder accountability, including through dual class structures. A variant of dual class is gaining attention in some quarters – time-phased voting rights – which are troubling for many of our members, based on past experience in the United States and elsewhere.
- Use of a majority vote standard for election of directors in uncontested elections. This effort seems to have foundered on too many corporate policies that give deference to the board on accepting resignations when a director fails to receive majority support (the large majority of failed directors are retained on boards, notwithstanding the shareholder votes).

My thoughts on investor protection priorities for 2017 as they relate to the SEC are as follows. They all go to core missions of the SEC – investor protection and effective disclosure.

1. Follow-Through

We view follow-through on good work by the SEC in recent years as of great importance. I would flag two items in particular.

- a. **Universal proxies and clear disclosure of vote standards for election of directors:** The SEC has put forward a very strong proposal both for universal proxies and for clarity on disclosures around the voting standard used in uncontested elections. Both are critical improvements in process in proxy solicitations.

Our members view boards as the critical fulcrum for effective corporate governance, and accountability to shareholders through the shareholder franchise is essential. Proxy contests are particularly important voting events. Shareholders should be enabled to vote by proxy from a proxy card that includes all candidates. As important is clarity on whether the director vote in an uncontested election is legally consequential, through a majority vote standard, or not.

- b. **Non-GAAP Financial Measures:** We applaud the staff's important May 2016 update of the C&DIs on Non-GAAP Financial Measures. I would pay tribute, by the way, to the good work on this and many other areas by Corporation Finance Director Keith Higgins, who also will be departing the SEC.

We think the staff got this right, including that in presenting non-GAAP financials, which can be useful but by definition are not standard, companies must present the most directly comparable GAAP measure with equal or greater prominence.

Among other strong elements: clearer indication from the SEC staff on potential challenges in exclusion of normal, recurring cash operating expenses. It is essential that there be effective follow-through by the SEC, in review of company filings and if necessary in enforcement.

My guess has been that various elements of this guidance would be resisted by some filers, who like to control their narratives and resist standardization. This inclination is understandable, but undermines comparability that investors need, and can result in misleading disclosures that deceive investors and undercut

accurate, effective pricing. I think it is early to evaluate corporate response to the revised C&DIs, but we believe the SEC monitoring role on corporate response will be important.

I would add that we hope to see the PCAOB and then the SEC approve a strengthened auditor's reporting model, which has been in the works for years and which is overdue. We also would encourage the SEC to complete work on corporate governance elements of the Dodd Frank law that was approved in 2010. Personally, I view the clawback and hedging/pledging disclosure elements as particularly valuable among those items not yet enacted.

Finally, I am pleased that the SEC has made the disclosure effectiveness initiative a productive project. Frankly, there are divisions among CII members, some of whom worry about a potential agenda by some to reduce disclosures, rather than enhance the effectiveness of the disclosure regime. Elimination of duplication and certain disclosures that are no longer relevant can make sense, but this should not be a cover for reduction of sensitive disclosures that are relevant and useful to various investors, who are diverse.

The SEC project has highlighted potential for further strengthening of disclosures around risk, including related to climate change. It also has highlighted areas for reform in presentation of information, particularly through electronic media, which we believe can be win-wins for investors and issuers. We think more thinking should be done on presentation of information. We believe that disclosures also could be improved in practice for investors concerned on boardroom diversity, and that should continue to be on the list of priority reforms.

2. Protecting Investor Protections

Frankly, I am concerned about political efforts that seemed to become more prominent this year to materially hinder effective investor protection, including at the SEC. The SEC must be adequately funded, and some legislative proposals, such as the SEC Regulatory Accountability Act, would in our view potentially cripple the SEC in the guise of a further mandate for effective cost-benefit analysis, which the SEC already is doing well.

I would also note in this regard political efforts at this time for unwise regulatory schemes for proxy advisory firms (with, ironically, no analysis on costs for investors), and extreme modifications of the shareholder proposal rule, which is something everyone complains about but which has worked effectively for many years. The only change we see is that proposals on average get greater support than in years past, with

a significant proportion winning approval, which is what seems to me to be the real cause of more intensified concern on the part of some business lobbies that seek rules favorable to management. A current proposal would raise the holding requirement from \$2000 to a percentage of market capitalization, which, to take the case of Apple, would increase the threshold to \$888 million, limited at that level to a single shareholder. That strikes me as an extreme change.

3. New Opportunities

Proxy plumbing: Arguably one little-noted casualty of the financial crisis was focus on proxy plumbing following the SEC's diligent 2010 concept release. Delay may have been fortuitous, in that distributed ledger technology, including blockchain, offers promise now to build a much simpler, more reliable and secure system, if we use the opportunities wisely. We know from some recent cases – most notably related to the Dell going-private transaction, which resulted in significant unnecessary problems and costs emanating from voting rules and procedures – that the complexity of current systems do cause problems, and impose excessive costs. The current plumbing system is founded in part on work-arounds created as a matter of necessity amidst the Wall Street paperwork crisis of the late 1960s and early 1970s, and based on that era's technology. Fintech offers great opportunity in many areas, and I just want to highlight the potential for proxy plumbing, if a new system is designed well and for benefit of investors.