Council of Institutional Investors®
The voice of corporate governance

Via E-Mail

December 13, 2018

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

Re: File Number S7-20-18

Dear Mr. Secretary:

I am writing in response to the Securities and Exchange Commission's (SEC or Commission) invitation to comment on its semiannual regulatory agenda.[1] We respectfully reiterate our requests that the following two individual agenda items currently listed under the "Division of Corporation Finance—Long Term Actions" be advanced to "Division of Corporation Finance—Final Rule Stage:" "Universal Proxy" and "Listing Standards for Recovery of Erroneously Awarded Compensation."[2]

In addition, we also respectfully reiterate our request that the Commission add to its "Division of Corporation Finance—Long Term Actions" amendments to Rule 10b5-1 trading plans.[3] In making these requests, we are mindful of the Commission's limited resources and believe prioritizing the three rulemaking initiatives described in more detail below would have a positive impact on long-term investors.

The Council of Institutional Investors ("CII") is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their

[1] Regulatory Flexibility Agenda, Securities Act Release No. 10,527, Exchange Act Release No. 83,787, Investment Adviser Act Release No. 4,978, Investment Company Act Release No. 33,194, 83 Fed. Reg. 58,168 (Nov. 16, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-11-16/pdf/2018-23929.pdf.

[2] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission 1 (July 11, 2018) ("We respectfully reiterate our prior requests that the following two individual agenda items currently listed under the "Division of Corporation Finance—Long Term Actions" be promptly advanced to the Final Rule Stage: "Universal Proxy" and "Listing Standards for Recovery of Erroneously Awarded Compensation."), https://www.cii.org/files/July%2011%202018%20SEC%20Reg%20Flex%20Letter%20Final.pdf.

[3] *Id.* ("In addition, we also respectfully reiterate our request that the Commission add to its agenda for rulemaking action amendments to Rule 10b5-1 trading plans.").

families. Our associate members include a range of asset managers with more than $25 trillion in assets under management.[4]

Universal Proxy

CII and many or our member funds[5] believe the SEC should promptly adopt a final rule largely consistent with the 2016 SEC proposal on Universal Proxy (2016 Proposal),[6] and fix a major long-standing problem that affects the most consequential and contested proxy votes.[7]

Under the existing bona fide nominee rule,[8] one party in a proxy contest may not include the other party's nominees for corporate director on its proxy card unless the other party's nominees consent.[9] For a variety of reasons, consent is rarely granted.[10] As a result, shareowners usually have no practical ability through proxy voting to "split their ticket" and vote for the combination of dissident and management nominees that they believe best serve their economic interests.[11]

Investors frequently have an interest in splitting their tickets, and there is no good reason they should be required to attend meetings to do so. A shareholder voting by proxy should have the same voting options as a shareholder who votes in person.[12]

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[4] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org.

[5] *See* Council of Institutional Investors, Corporate Governance Policies, § 3.3 Voting Rights ("Each share of common stock should have one vote [and] [c]orporations should not have classes of common stock with disparate voting rights.") (updated Oct. 24, 2018), https://www.cii.org/files/10_24_18_corp_gov_policies.pdf ; *see also* Letter from Aeisha Mastagni, Interim Co-Director of Corporate Governance, California State Teachers' Retirement System 3 (Nov. 30, 2018) ("It is critical that the SEC move forward to finalize Universal Proxy rules that would permit shareholders to vote by proxy for any combination of candidates for the board of directors, as if they attended the shareholder meeting in person."), https://www.sec.gov/comments/4-725/4725-4715668-176690.pdf.

[6] Universal Proxy, Exchange Act Release No. 79,164, Investment Company Act Release No. 32,339, 81 Fed. Reg. 79,122 (proposed rule Oct. 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-11-10/pdf/2016-26349.pdf.

[7] *See, e.g.*, Tom Buerkle, "Proxy Plumbing Is Bigger Problem than Advisers," Reuters, Oct. 2, 2018 ("Regulators would do better to focus on creaky proxy mechanics, starting with the ballot."), https://www.nasdaq.com/article/proxy-plumbing-is-bigger-problem-than-advisers-20181002-00779.

[8] Requirements as to Proxy, 17 C.F.R §240.14a–4(d)(4) (2010) ("A person shall not be deemed to be a bona fide nominee and he shall not be named as such unless he has consented to being named in the proxy statement and to serve if elected."), *available at* https://www.law.cornell.edu/cfr/text/17/240.14a-4.

[9] *See, e.g.*, 81 Fed. Reg. at 79,124 ("Although the current proxy rules allow a soliciting party to provide shareholders with the full selection of nominees if all such nominees have consented to being named on its proxy card, aspects of the current proxy rules and the parties' strategic interests typically result in limiting shareholders' choice to the slates of nominees chosen by the soliciting parties.").

[10] *Id.* at 79,128 (describing the reasons why consent is "rarely provided").

[11] *Id.* at 79,147 ("because of the bona fide nominee rule and state law provisions regarding the submission of multiple proxies, currently shareholders voting by proxy are typically limited to voting only for registrant nominees or voting only for the dissident's nominees (or, in the case of certain short slate elections, for the dissident's nominees and certain registrant nominees chosen by the dissident")).

[12] *See, e.g.*, Letter from Aeisha Mastagni at 3 ("Voting by proxy should always be the same as voting in person.").

We believe adopting a final rule generally consistent with the 2016 Proposal would reduce confusion among both institutional and individual investors that results from current multiple and incomplete ballots.[13]

CII submitted extensive comments in response to the 2016 Proposal.[14] We have provided additional comments on several occasions since then, most recently in our November 8, 2018 letter in connection with the November 15, 2018 SEC staff roundtable ("Roundtable").[15]

At the Roundtable "*many* panelists recommended implementing the 2016 Proposal for universal proxy"[16] noting that it would "solve *many* voting issues in" proxy contests,[17] including "eliminat[ing] shareholder confusion."[18] One Roundtable participant, David A. Katz, partner at law firm Wachtell, Lipton, Rosen & Katz, agreed that a universal proxy can be helpful, but that details, such as the order in which names appear on the ballot, will be crucial.[19]

We believe the 2016 Proposal fully and appropriately addresses the "details" identified by Mr. Katz.[20] More specifically, the 2016 Proposal includes the following requirements:

> To help ensure that universal proxies clearly and fairly present information so that shareholders can effectively exercise their voting rights, proposed Rule 14a–19(e) would include the following presentation and formatting requirements for all universal proxy cards used in contested elections:
> - The proxy card must clearly distinguish between registrant nominees, dissident nominees, and any proxy access nominees;

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[13] *Id.* ("We believe adopting a final rule may reduce confusion among both institutional and retail investors that results from current multiple and incomplete ballots.").
[14] Letter from Ken Bertsch, Executive Director, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission 3 (Dec. 28, 2017) ("With minor enhancements, the proposed framework will provide for a constructive universal proxy regime that gives greater effect to existing shareholder rights."), https://www.cii.org/files/issues_and_advocacy/correspondence/2016/12_28_16_comment_letter_SEC_universal_proxy.pdf.
[15] Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Brent J. Fields, Secretary, Securities and Exchange Commission 7-10 (Nov. 8, 2018), https://www.cii.org/files/20181108%20CII%20Letter%20for%20SEC%20Proxy%20Roundtable.pdf.
[16] Adé Heyliger et al., Key Takeaways from the SEC's Proxy Process Roundtable: Is Proxy Voting Reform on the Horizon?, Weil, Gotshal & Manges LLP 2 (Nov. 20, 2018) (emphasis added), https://www.jdsupra.com/legalnews/key-takeaways-from-the-sec-s-proxy-45650/.
[17] Matt Orsagh, SEC Holds Proxy Process Roundtable – Will Reforms Follow?, CFA Institute (Nov. 30, 2018) (emphasis added), https://blogs.cfainstitute.org/marketintegrity/2018/11/30/sec-holds-proxy-process-roundtable-will-reforms-follow/.
[18] Brian Croce, Improving Proxy-Voting System Discussed at SEC Roundtable, Pensions & Invs., Nov. 15, 2018 (referencing the comments of Sherry Moreland, president and chief operations officer of Mediant Communications), https://www.pionline.com/article/20181115/ONLINE/181119902/improving-proxy-voting-system-discussed-at-secroundtable.
[19] *Id.*
[20] Letter from Ken Bertsch, Executive Director, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 4 (Dec. 28, 2017) ("We support the proposed presentation and formatting requirements for all universal proxy cards used in contested elections, including requiring that the card clearly distinguish between registrant, dissident and proxy access nominees, that such nominees be listed alphabetically by last name, and that the same font type, style and size be used.").

- *Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card;*
- The same font type, style and size must be used to present all nominees on the proxy card;
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.[21]

Finally, the 2016 Proposal provides for a critically important new cost-effective disclosure requirement relating to the *uncontested* election of directors.[22] More specifically, the 2016 Proposal "expressly requires disclosure in the proxy statement about the treatment and effect of a 'withhold' vote in a director election."[23]

We agree with the Commission that this proposed disclosure, which presumably could be complied with in a single sentence, "would provide shareholders with a better understanding of the effect of their 'withhold' votes on the outcome of the election."[24] Because many shareowners, particularly many retail investors, do not understand that most U.S. public corporations employ a plurality voting standard for the uncontested election of directors,[25] the proposed disclosure is critical.

Under a plurality voting standard in an uncontested election of directors, a "withhold" vote has no legal significance on the outcome of the election.[26] We believe that the proposed disclosure "would make it crystal clear to investors that uncontested plurality elections guarantee victory for all nominees."[27]

Consistent with long-standing membership approved policies,[28] CII continues to actively advocate the adoption by all U.S. public companies of a majority, rather than a plurality, voting

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[21] 81 Fed. Reg. at 79,141 (emphasis added & footnotes omitted).
[22] *Id.* at 79,144.
[23] *Id.*
[24] *Id.*
[25] *See* Council of Institutional Investors, FAQ: Majority Voting for Directors 1 (Jan. 4. 2017) ("Although nearly 90 percent of S&P 500 companies use majority voting in some form, just 29 percent of Russell 2000 companies use a majority vote standard in uncontested elections, according to FactSet."), http://www.cii.org/files/issues_and_advocacy/board_accountability/majority_voting_directors/CII%20Majority%20Voting%20FAQ%201-4-17.pdf; *see also* Jeff Green & Alicia Ritcey, With 'Zombie Directors,' It's the Board of the Living Dead, Bloomberg, Aug. 10, 2017 (under a plurality voting standard in the election of directors, "since board members often run unopposed, just one positive vote could be enough"), https://www.bloomberg.com/news/articles/2017-08-10/with-zombie-directors-it-s-the-board-of-the-living-dead.
[26] FAQ: Majority Voting for Directors at 1 ("Withholding a vote allows shareholders to communicate their dissatisfaction with a given nominee, but it has no legal effect on the outcome of the election.").
[27] *Id.* at 5.
[28] § 2.2 Director Elections ("Directors in uncontested elections should be elected by a majority of the votes cast.").

standard for the uncontested election of directors.[29] Under a majority voting standard, the "withhold" vote is replaced by an "against" vote, helping make board members more responsive to the people they represent.[30]

We believe the proposed disclosure as set forth in the 2016 Proposal, when finalized by the Commission, would encourage more U.S. public companies to voluntarily adopt a majority voting standard. The result would be improved corporate governance and a positive impact on long-term shareowner value.[31]

Listing Standards for Recovery of Erroneously Awarded Compensation

CII also continues to support prompt completed action on the SEC's required response to Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) entitled, "Recovery of Erroneously Awarded Compensation."[32]

We note that Section 954 was responsive to the recommendations of the Investors' Working Group (IWG).[33] In its seminal report on U.S. Financial Regulatory Reform, the IWG concluded:

> **Federal clawback provisions on unearned executive pay should be strengthened**. Clawback policies discourage executives from taking questionable actions that temporarily lift share prices but ultimately result in financial restatements. Senior executives should be required to return unearned bonus and incentive payments that were awarded as a result of fraudulent activity, incorrectly stated financial results or some other cause. The Sarbanes-Oxley Act of 2002 required boards to go after unearned CEO income, but the Act's language is too narrow. It applies only in cases where misconduct is proven—which occurs rarely because most cases result in settlements where charges are neither admitted nor denied—and only covers CEO and CFO compensation. Many courts, moreover, have refused to allow this provision to be enforced via private rights of action.[34]

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[29] *See* Council of Institutional Investors, Majority Voting for Directors (last visited December 13, 2018) (describing CII "**campaign urging companies to adopt majority voting for directors**" in the uncontested election of directors), http://www.cii.org/majority_voting_directors; *see also* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury 9-12 (Aug. 23, 2017) (describing CII's continuing advocacy efforts in support of a listing standard requiring majority voting in the uncontested election of directors"), http://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf.

[30] *See, e.g.*, FAQ: Majority Voting for Directors at 1-2.

[31] *See, e.g.*, Interim Report of the Committee on Capital Markets Regulation 93 (Nov. 30, 2006) ("Even ignoring the entry and exit decisions of firms, public capital markets will be smaller as a result of inadequate shareholder rights [including lack of majority voting], given the reduced valuations resulting from higher agency costs.") (on file with CII).

[32] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 954 (2010), https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm.

[33] S. Rep. No. 111-176, at 136 (Apr. 30, 2010) ("The Investor's Working Group wrote 'federal clawback provisions on unearned executive pay should be strengthened.'"), https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf.

[34] Report of the Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective 23 (July 2009), http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf.

The SEC's proposed rule to implement Section 954 (2015 Proposal) is generally consistent with CII's membership approved corporate governance policies.[35] Those policies 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.[36]

Consistent with our policies, we believe the final SEC rule should, as proposed,[37] apply broadly to the compensation of all current or former executive officers, whether or not they had control or authority over the company's financial reporting.[38] As we explained in our comment letter to the SEC in response to the 2015 Proposal:

> In our view, establishment of a broad clawback arrangement is an essential element of a meaningful pay for performance philosophy. If executive officers are to be rewarded for "hitting their numbers"—and it turns out they failed to do so—the unearned compensation should generally be recovered notwithstanding the cause of the revision.[39]

We agree with legal experts that broad clawback arrangements may "keep executive officers focused on sound accounting company-wide."[40] Moreover, requiring a broad clawback policy would appear to be consistent with the "Commonsense Principles of Corporate Governance 2.0" endorsed in October 2018 by a number of prominent leaders of U.S. public companies, including: Jamie Dimon, JPMorgan Chase; Alex Gorsky, Johnson & Johnson; Brian Moynihan,

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[35] Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 9,861, Exchange Act Release No. 75,342, Investment Company Act Release No. 31,702, 80 Fed. Reg. 41,144 (proposed rule July 2015), https://www.federalregister.gov/articles/2015/07/14/2015-16613/listing-standards-for-recovery-of-erroneously-awarded-compensation.

[36] § 5.5 Pay for Performance.

[37] *See* 80 Fed. Reg. at 41,153 ("the compensation recovery provisions of Section 10D apply without regard to an executive officer's responsibility for preparing the issuer's financial statements").

[38] *See* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 5 (Aug. 27, 2015), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/08_27_15_letter_to_SEC_clawbacks.pdf.

[39] *Id.* (footnotes omitted).

[40] *See, e.g.*, Financial CHOICE Act of 2017, Hearing Before the H. Comm. on Fin. Servs., 115th Cong. 15 (Apr. 26, 2017) (Testimony of Michael S. Barr, The Roy F. and Jean Humphrey Proffitt Professor of Law, University of Michigan Law School), https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-mbarr-20170426.pdf.

Bank of America; and David Taylor, Proctor & Gamble.[41] Those principles state that "[c]ompanies should maintain clawback policies for both cash and equity compensation."[42]

We believe the Commission should consider the empirical studies indicating that the adoption of clawback provisions is generally associated with improved financial reporting quality, enhanced investor and auditor confidence in the quality of financial reporting, and reduced audit fees.[43] We note that one of the more recent studies indicates clawbacks generally protect accounting integrity while maintaining and even enhancing the advantages of performance based CFO pay.[44]

We acknowledge SEC Chair Jay Clayton's observation that "several companies . . . [have clawback] policies [that] go beyond what would be required under Dodd-Frank."[45] However, we believe that there are a multitude of potential benefits to long-term investors from the SEC requiring *all* companies to adopt, at a minimum, clawback policies consistent with the 2015 Proposal mandated by the U.S. Congress.

Rule 10b5-1 Trading Plans

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[41] Press Release, AT&T, Bank of America, Coca-Cola, IBM, Johnson & Johnson, P&G and Other Leaders Sign on to Updated Commonsense Corporate Governance Principles (Oct. 18, 2018), https://www.businesswire.com/news/home/20181018005402/en/ATT-Bank-America-Coca-Cola-IBM-Johnson-Johnson.

[42] Commonsense Corporate Governance Principles 2.0 VII(g) (2018), http://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf.

[43] *See* Gregory L. Prescott & Carol E. Vann, Implications of Clawback Adoption in Executive Compensation Contracts: A Survey of Recent Research, 29 J. Corp. Acct. & Fin. 59, 67 (Jan. 2018) (providing a summary of recent research in the field), https://onlinelibrary.wiley.com/doi/full/10.1002/jcaf.22312.

[44] *See* Peter Kroos et al., Voluntary Clawback Adoption and the Use of Financial Measures in CFO Bonus Plans, 93 Acct. Rev. 213-235 (May/June 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312762; *see also* Ben Hiamowitz, Adoption of Clawbacks Means Stronger Link Between Firm Performance and CFO Pay, CPA PracticeAdvisor, June 7, 2018, http://www.cpapracticeadvisor.com/news/12416039/adoption-of-clawbacks-means-stronger-link-between-firm-performance-and-cfo-pay.

[45] U.S. Securities and Exchange Commission, Chairman Jay Clayton, Testimony on "Oversight of the U.S. Securities and Exchange Commission," Before the Comm. on Fin. Servs., U.S. H.R. n.50 (June 21, 2018), https://www.sec.gov/news/testimony/testimony-oversight-us-securities-and-exchange-commission; s*ee* Proxy Process and Rules: Examining Current Practices and Potential Changes: Hearing before the S. Comm. on Banking, Hous. & Urban Affairs, 115th Cong. (Dec. 6, 2018) (statement of Michael Garland, Assistant Comptroller, for Corp. Governance and Responsible Inv., In the Office of the N.Y.C. Comptroller Scott Stringer) (indicating that the a successful negotiation of a broad clawback policy at Wells Fargo "enabled the Wells Fargo Board of directors to announce in September 2016 that it would recoup $60 million from two senior executives in order to hold them financially accountable for the fake account scandal that involved the loss of jobs by 5,300 lower-level employees and cost Wells Fargo $185 million in fines and penalties"), https://www.banking.senate.gov/imo/media/doc/Garland%20Testimony%2012-6-18.pdf; Kathryn Neel et al., The Business Case for Clawbacks, Harv. L. Sch. Forum on Corp. Governance & Fin. Regulation (May 6, 2018) (listing Cognizant Technology Solutions, Wells Fargo, Zions Bancorp, and EBay as companies that have adopted "detrimental conduct" clawback policies), https://corpgov.law.harvard.edu/2018/05/06/the-business-case-for-clawbacks/; *see also* Michael S. Melbinger, Update on Clawback Policy Issues, Executive Compensation Blog, Winston & Strawn (Oct. 19, 2017) (recommending that "directors should protect themselves and their companies by adopting a strong policy"), https://www.winston.com/en/executive-compensation-blog/update-on-clawback-policy-issues.html.

Finally, for the benefit of both institutional and retail investors, CII continues to believe the Commission should make a priority of proposing amendments to improve Rule 10b5-1 trading plans.[46] We wrote letters on January 18, 2018, to Chair Clayton,[47] May 9, 2013, to Chair Mary Jo White,[48] and December 28, 2012, to Chair Elisse Walter[49] regarding our concerns about these plans. Those letters respectfully requested that the Commission should consider pursuing amendments to Rule 10b5-1 that would *require* Rule 10b5-1 plans to adopt the following protocols and guidelines:

- Companies and company insiders should only be permitted to adopt Rule 10b5-1 trading plans when they are permitted to buy or sell securities during company-adopted trading windows, which typically open after the announcement of the financial results from a recently completed fiscal quarter and close prior to the close of the next fiscal quarter;
- Companies and company insiders should be prohibited from adopting multiple, overlapping Rule 10b5-1 plans;
- Rule 10b5-1 plans should be subject to mandatory delay, preferably of three months or more, between the adoption of a Rule 10b5-1 plan and the execution of the first trade pursuant to such a plan;
- Companies and company insiders should not be allowed to make frequent modifications or cancellations of Rule 10b5-1 plans;
- Companies and company insiders should disclose Rule 10b5-1 program adoptions, amendments, terminations and transactions; and
- Boards of companies that have adopted Rule 10b5-1 plans should (1) adopt policies covering plan practices, (2) periodically monitor plan transactions and (3) ensure that company policies discuss plan use in the context of guidelines or requirements on equity hedging, holding and ownership.[50]

If the above protocols had been in place, the widely reported $39 million sale of Intel stock by CEO Brian Krzanich on November 29, 2017, within 30 days of revising his trading plan for the

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[46] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 13 (July 11, 2018) ("Finally, for the benefit of both institutional and retail investors, we continue to believe the Commission should make a priority of proposing amendments to improve Rule 10b5-1 trading plans.").

[47] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission 1 (Jan. 18, 2018), http://www.cii.org/files/issues_and_advocacy/correspondence/2018/January%2018%202018%20Rule%2010b5-1%20(finalI).pdf.

[48] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Mary Jo White, Chairman, U.S. Securities and Exchange Commission 1-2 (May 9, 2013), http://www.cii.org/files/issues_and_advocacy/correspondence/2013/05_09_13_cii_letter_to_sec_rule_10b5-1_trading_plans.pdf.

[49] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission 3 (Dec. 28, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%20_10b5-1_trading_plans.pdf.

[50] Letter to The Honorable Mary Jo White at 1; *see* § 5.15b Stock Sales ("10b5-1 program adoptions, amendments, terminations and transactions should be disclosed immediately, and boards of companies using 10b5-1 plans should: (1) adopt policies covering plan practices, (2) periodically monitor plan transactions and (3) ensure that company policies discuss plan use in the context of guidelines or requirements on equity hedging, holding and ownership.").

second time during the year, would have been a clear violation of Rule 10b5-1.[51] We are confident that most retail investors would agree with us that Mr. Krzanich's stock sale, just weeks prior to the public announcement of a design flaw in Intel chips, was unfair to other market participants.

Unfortunately, Mr. Krzanich's sale was not an unusual occurrence. There is a compelling body of empirical evidence indicating that Rule 10b5-1 plans have been regularly abused in various ways to facilitate trades based on inside information.[52]

Our view that Rule 10b5-1 should be improved was recently adopted by the U.S. House of Representatives. In July of this year, Representatives Maxine Waters sponsored, and Representative Patrick McHenry co-sponsored, H.R. 6320, the "Promoting Transparency Standards for Corporate Insiders Act. (Transparency Act)."[53]

Among other factors, the Transparency Act would require, generally consistent with our request, the SEC to study whether to:

- Restrict multiple, overlapping trading plans,
- Establish a mandatory delay between the adoption of a trading plan and the execution of the first trade, and
- Limit how often issuers and insiders can modify or cancel a plan.[54]

The Commission would have to report to Congress within one year of the Transparency Act's enactment, then revise Rule 10b5-1 accordingly after public notice and comment.[55]

In a press release supporting the provisions of the Transparency Act, Representative Waters stated:

> For years, we have heard stories about executives abusing their power by using loopholes in the securities laws to personally gain from confidential information. This bill would require the SEC to study whether to amend antifraud provisions

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[51] *See, e.g.*, Stephen Gandel, SEC Needs to Quit Taking Executives' Word on Stock Sales: Gadfly, Wash. Post, Jan. 9, 2017, https://www.washingtonpost.com/business/sec-needs-to-quit-taking-executives-word-on-stock-sales-gadfly/2018/01/09/92cfc61a-f542-11e7-9af7-a50bc3300042_story.html?utm_term=.9e9842673c11.

[52] *See* John Shon & Stanley Veliotis, Insiders' Sales Under Rule 10b5-1 Plans and Meeting or Beating Earnings Expectations, 59(9) Mgmt. Sci. iv (Sept. 2013) ("One interpretation of our results is that CEOs and CFOs who sell under these plans may be more likely to engage in strategic behavior to meet or beat expectations in an effort to maximize their proceeds from plan sales."), https://pubsonline.informs.org/doi/abs/10.1287/mnsc.1120.1669?journalCode=mnsc; *see also* Susan Pulliam & Rob Barry, Executives' Good Luck in Trading Own Stock, Wall. St. J., Nov. 27, 2012 (investigation finding that 1,418 executives, including some with 10b5-1 plans, had made beneficial trades), https://www.wsj.com/articles/SB10000872396390444100404577641463717344178.

[53] Promoting Transparency Standards for Corporate Insiders Act., H.R. 6320, 115th Cong. (as reported by House, Aug. 3. 2018), https://www.congress.gov/bill/115th-congress/house-bill/6320.

[54] *Id.* §2(a)(1).

[55] *Id.* §2(b)-(c).

> that are used to combat illegal insider trading, report to Congress and write rules consistent with the results of the study.[56]

The Transparency Act was subsequently approved by a voice vote of the Committee on Financial Services with no member objecting and was incorporated into S. 488, the "JOBS and Investor Confidence Act of 2018 (JOBS Act)."[57] On JOBS Act was overwhelmingly approved by the U.S. House of Representatives by a vote of 406 to 4.[58]

We believe the Commission should promptly propose amendments to Rule 10b5-1 along the lines we and the U.S. House of Representatives have suggested to stop this long-running abuse of the spirit of the rule.

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Thank you for consideration of our views. If we can answer any questions or provide additional information on the Commission's regulatory agenda, please do not hesitate to contact me at 202.822.0800 or jeff@cii.org.

Sincerely,

Jeffrey P. Mahoney
General Counsel

[56] Press Release, Rep. Maxine Waters, Ranking Member, Waters Statement at Bipartisan Committee Markup (July 11, 2018), https://democrats-financialservices.house.gov/news/email/show.aspx?ID=GKZYR5TW676T4.
[57] JOBS and Investor Confidence Act of 2018, S. 488, 115th Cong. Title XXVII (engrossed in House, July 17, 2018), https://www.congress.gov/bill/115th-congress/senate-bill/488/text/eah.
[58] *Id.* (Actions Overview).