Council of Institutional Investors®
The voice of corporate governance

Via Email

November 18, 2021

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-12-15: Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation (Reopening Release).[1]

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII or Council), a nonprofit, nonpartisan association of U.S. 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 of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $40 trillion in assets under management.[2]

The purpose of this letter is to respond to the Securities and Exchange Commission's (SEC or Commission) Reopening Release[3] for the proposal to implement the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)[4] (Proposed Rule).[5] As the leading voice for effective corporate governance and strong shareholder rights, and as a primary advocate for Section 954 of Dodd-Frank,[6] we strongly support the

[1] Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 10,998, Exchange Act Release No. 93,331, Investment Company Act Release No. 34,399, 86 Fed. Reg. 58,232 (Oct. 21, 2021), https://www.govinfo.gov/content/pkg/FR-2021-10-21/pdf/2021-22754.pdf.
[2] 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.
[3] 86 Fed. Reg. at 58,232.
[4] Public Law 111-203, 124 Stat. 1900, § 954 (July 21, 2010), *available at* https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.
[5] 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 July 14, 2015), https://www.govinfo.gov/content/pkg/FR-2015-07-14/pdf/2015-16613.pdf.
[6] *See, e.g.*, Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before S. Subcomm. on Sec., Ins., & Invest. of the Comm. on Banking, Hous., & Urb. Aff., 111th Cong. 13 (July

Commission promptly issuing the long overdue rule to "strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors."[7]

We believe, generally consistent with CII membership-approved policies,[8] that the rule should include the provisions of the Proposed Rule together with the following improvements described in the Reopening Release as supplemented by this letter:

- Interpreting the term "an accounting restatement due to material noncompliance" to include *all* required restatements made to correct an error in previously issued financial statements;
- Adding check boxes to the cover page of the Form 10–K that indicate separately (a) whether the previously issued financial statements included in the filing include an error correction, and (b) whether any such corrections are restatements that triggered a clawback analysis during the fiscal year;
- Disclosure of how issuers calculated the recoverable amount, including their analysis of the amount of the executive's compensation that is recoverable under the rule, and the amount that is not subject to the rule; and
- Requiring Inline XBRL detail tagging of all the compensation recovery information required by the rule.

The following are the Council's detailed responses to select questions raised in the Reopening Release:

1. **Accounting Restatements.**[9]

29, 2009) (Testimony of Ann Yerger, Exec. Dir. of CII), https://www.govinfo.gov/content/pkg/CHRG-111shrg55479/html/CHRG-111shrg55479.htm ("The Council believes a tough clawback policy is an essential element of a meaningful 'pay for performance' philosophy [and] [i]f executives are rewarded for 'hitting their numbers'--and it turns out that they failed to so--they should not profit."); Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors et al., to The Honorable Nancy Pelosi, Speaker of the House, United States House of Representatives at al. 2 (Dec. 2, 2008) (on file with CII) ("any financial markets regulatory reform legislation [should include] . . . **Stronger Clawback Provisions:** At a minimum, senior executives should be required to return unearned bonus and incentive payments that were awarded due to fraudulent activity or incorrectly stated financial results").

[7] Chair Gary Gensler, Public Statement: Statement on Rules Regarding Clawbacks of Erroneously Awarded Compensation (Oct. 14, 2021), https://www.sec.gov/news/public-statement/gensler-clawbacks-2021-10-14.

[8] Council of Institutional Investors, Corporate Governance Policies, § 5.7 Compensation Recovery (updated Sept. 22, 2021), https://www.cii.org/files/09_22_21_corp_gov_policies.pdf ("Clawback policies should ensure that boards . . . recover previously paid executive incentive compensation in the event of acts or omissions resulting in fraud, financial restatement or some other cause the board believes warrants recovery . . . [and] [c]ompanies should disclose such policies and decisions to invoke their application.").

[9] Legal Update, SEC Reopens Comment Period for Clawback Listing Standards, Mayer Brown 2 (Oct. 18, 2021), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/10/sec-reopens-comment-period-for-clawback-listing-standard.pdf; *see* 86 Fed. Reg. at 58,234.

CII believes that the Proposed Rule's term "an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement,"[10] "should be interpreted to include *all* required restatements made to correct an error in previously issued financial statements."[11] That change would effectively capture both so-called "Big R restatements"[12] and "little r restatements."[13] We agree with the SEC that such an interpretation "would be an appropriate means of implementing the statute."[14]

The international accounting firm EY explains Big R restatements and the related disclosure requirements as follows:

> When the error is material to the prior period(s) financial statements, the error is corrected through a "Big R restatement". The error also may be material to current period financial statements but that fact is not determinative in assessing whether a "Big R restatement" is appropriate. A "Big R restatement" corrects all material errors including the correction of material errors relating to classification and disclosure. *A "Big R restatement" requires an entity to revise previously issued financial statements (e.g., via a Form 10-K/A filing or in some cases the next Form 10-K filing) to reflect the correction of the error in those financial statements*. When an entity concludes a "Big R restatement" is appropriate, the prior financial statements cannot be relied upon and therefore *the entity must notify users of the financial statements that those financial statements can no longer be relied upon*. See section 6.2.7, *Considerations for error analysis conclusions, for a discussion of the notification of nonreliance requirements, including Form 8-K filing requirements for SEC registrants. The auditor issues a modified opinion upon reissuance of the amended prior period financial statements*.[15]

In contrast, little r restatements and their more limited disclosure requirements are explained by EY as follows:

> In some cases, an error is immaterial to the prior period(s) financial statements; however, correcting the error in the current period would materially misstate the current period financial statements (i.e., the turn-around effect of the error correction is material to the current period income statement or statement of comprehensive income). This situation often occurs when an immaterial error remains uncorrected for multiple periods and *aggregates to a material number*. Because correcting the error in the current year would materially misstate those financial statements, *the prior period(s) financial statements should be corrected*, even though such revision previously was and continues to be immaterial to the

[10] 80 Fed. Reg. at 41,192.
[11] 86 Fed. Reg. at 58,234 (emphasis added).
[12] *See, e.g.*, Financial Reporting Developments, A Comprehensive Guide, Accounting Changes and Error Corrections, EY 70 (Revised May 2021), https://www.ey.com/en_us/assurance/accountinglink/financial-reporting-developments---accounting-changes-and-error- (describing "A 'Big R restatement'").
[13] *Id*. at 71, 73 (describing and including an illustration of "A 'little r restatement'").
[14] 86 Fed. Reg. at 58,234.
[15] Financial Reporting Developments, A Comprehensive Guide, Accounting Changes and Error Corrections, EY at 70 (emphasis added).

> prior period(s) financial statements. However, *correcting prior period(s) financial statements for immaterial errors would not require previous filings to be amended (e.g., no Form 10-K/A required)*. Such correction may be made the next time the registrant files the prior period(s) financial statements. *This type of "Little r restatement" provides for correcting the error in the current period financial statements by adjusting the prior period information and adding disclosure of the error.* Because the prior period financial statements were not materially misstated, *the entity is not required to notify users that they can no longer rely on the prior financial statements and the auditor's opinion is not modified when the prior period information is next presented*.[16]

CII was actively involved in the development of Section 954.[17] Given our level of involvement, we are confident that the language of Section 954[18] was not intended to narrowly limit the required clawback policy to exclude little r restatements.

We note that Section 954 language was derived, at least in part, from CII's membership-approved policy on "Pay for Performance,"[19] and the related Investors' Working Group (IWG) recommendations on "Federal Clawback Provisions."[20] The CII policy, which has since been updated,[21] then included the following best practices with respect to clawback policies:

> 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 out to executive officers*, and to prevent such awards from being paid out in the first instance. Awards can be erroneous due to fraud, *financial results that require restatement* or some other cause that the committee believes warrants withholding or recovering incentive pay. The mechanisms and policies should be publicly disclosed.[22]

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[16] *Id.* at 71 (emphasis added and footnote omitted).
[17] *See, e.g.*, Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before S. Subcomm. on Sec., Ins., & Invest. of the Comm. on Banking, Hous., & Urb. Aff., 111th Cong. at 13; Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors et al., to The Honorable Nancy Pelosi, Speaker of the House, United States House of Representatives et al. at 2.
[18] *See* Public Law 111-203, 124 Stat. 1900, § 954(b)(2) ("[T]the issuer will recover from any current or former executive officer of the issuer who received incentive-based compensation . . . during the 3-year period preceding the date on which the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.'').
[19] *See* Council of Institutional Investors, Policies on Corporate Governance, § 5.5d Pay for Performance (2009) (on file with CII).
[20] *See* Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective 23 (July 2009), https://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf. Following its issuance, the July 2009 report of the Investor's Working Group (IWG) was reviewed and subsequently endorsed by the CII board and membership. For more information about the IWG, please visit CII's website at https://www.cii.org/investors_working_group.
[21] *See* Council of Institutional Investors, Corporate Governance Policies, § 5.7 Compensation Recovery.
[22] Council of Institutional Investors, Policies on Corporate Governance, § 5.5d Pay for Performance (emphasis added).

Similarly, the IWG's recommendation stated:

> 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.[23]

The influence of the CII policy and the IWG recommendation is reflected in legislative history for Section 954, which includes the following language:

> *The Committee believes it is unfair to shareholders for corporations to allow executives to retain compensation that they were awarded erroneously. This proposal will clarify that all issuers must have a policy in place to recover compensation based on inaccurate accounting* so that shareholders do not have to embark on costly legal expenses to recoup their losses or so that executives must return monies that should belong to the shareholders. The Investor's Working Group wrote ''federal clawback provisions on unearned executive pay should be strengthened.''[24]

In addition to being inconsistent with the intent of Section 954, CII believes it would be harmful to investors and the capital markets for the SEC to narrowly limit the required clawback policy to exclude little r restatements. As indicated, under existing requirements little r restatements correct material erroneous financial results in a manner that is less transparent to investors and the markets than Big R restatements.[25] And in recent years there has been a disappointing trend by companies that appear to be "opportunistically" using their discretion to categorize more and more corrections of material financial reporting errors as little r restatements.[26]

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[23] Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective at 23 (emphasis added).
[24] Rep. S. Comm. on Banking, Hous., & Urb. Aff., S. 3217, S. Rep. No. 111-176 at 136 (Apr. 30, 2010), https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf.
[25] *See* Financial Reporting Developments, A Comprehensive Guide, Accounting Changes and Error Corrections, EY at 70-71; Francine McKenna, Part 1: The SEC's Dodd-Frank Clawback Proposal, The Dig 5-6 (Oct. 29, 2021), https://thedig.substack.com/p/part-1-the-secs-dodd-frank-clawback (describing the disclosure differences for Big R and little r statements).
[26] Rachel Thompson, Reporting Misstatements as Revisions: An Evaluation of Managers' Use of Materiality Discretion 5 (Sept. 17, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450828 (finding "that managers may opportunistically use materiality discretion to report *revisions* in order to avoid reporting restatements."); Francine McKenna, Part 1: The SEC's Dodd-Frank Clawback Proposal, The Dig at 6 ("I predicted the trend of fewer and fewer Big 'R' restatements and more stealth little 'r' restatements . . . ."); Jean Eaglesham, Markets, Shh! Companies Are Fixing Accounting Errors Quietly, Wall St. J. (Dec. 5, 2019) (on file with CII) ("Companies are increasingly likely to correct accounting problems by quietly updating past numbers, rather than alerting investors and reissuing financial statements.").

As the *Wall Street Journal* recently reported:

> So-called "little r" [restatements] . . . last year represented 75.7% of all restatements by U.S.-based public companies, up from 34.8% in 2005, according to data provider Audit Analytics. [Big R] restatements, meanwhile, have become less common, comprising 24.3% of all restatements in 2020, down from 65.2% 15 years earlier, data show.[27]

CII believes excluding little r restatements from the required clawback policy would likely not only further exacerbate this opportunist behavior to reduce the transparency of restatements to investors, but more importantly limit the ability of the required clawback policy to recover for shareowners the executive pay that was unearned and erroneously awarded.[28]

2. Three-Year Lookback Period.[29]

CII does not share the view of some commentators that the '"reasonably should have concluded' standard in the [Proposed Rule] adds unnecessary uncertainty to the lookback period determination" and, therefore, should be removed.[30] The Reopening Release notes that in support of that view, one of those commentators, "Exxon Mobil Corporation asserted it is not 'a realistic concern' that issuers would delay issuing a restatement to avoid a clawback."[31] Recent comments reported in the *Wall Street Journal* by Susan Wheeler, vice chair of securities and financial services at law firm Wilmer Cutler Pickering Hale and Dorr LLP,[32] and empirical evidence,[33] indicates that the commentator's assertion is likely unsupportable.[34]

CII continues to believe the "reasonably should have concluded standard" would help to mitigate "incentives to delay the conclusion that a restatement is necessary or to mischaracterize material accounting errors."[35] We, therefore, would retain the "reasonably should have concluded standard." However, if the SEC adopts our recommendation in response to item 1, we would not

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[27] Mark Maurer, CFO Journal, SEC Revives Proposal to Clawback Executive Pay, Wall St. J. (Oct. 14, 2021) (on file with CII).
[28] *See, e.g.*, Rachel Thompson, Reporting Misstatements as Revisions: An Evaluation of Managers' Use of Materiality Discretion at 3 ("I find that managers who are subject to restatement-triggered clawback provisions are significantly more likely to report misstatements as [little r restatements] . . . instead of [Big R] restatements compared to managers who are not subject to clawback provisions.").
[29] Legal Update, SEC Reopens Comment Period for Clawback Listing Standards, Mayer Brown at 21; *see* 86 Fed. Reg. at 58,234-35.
[30] 86 Fed. Reg. at 58,234-35
[31] *Id.* at 58,235 n.9.
[32] Mark Maurer, CFO Journal, SEC Revives Proposal to Clawback Executive Pay, Wall St. J. ("The proposed rule creates the risk that executives who want to avoid a clawback would aggressively push to avoid a restatement, said Susan Schroeder, vice chair of securities and financial services at law firm Wilmer Cutler Pickering Hale and Dorr LLP [and] '[t]o the extent there are companies on the margins that want to push the envelope, this proposal would likely be an incentive for them to not issue a restatement when they otherwise might have,' said Ms. Schroeder.").
[33] *See, e.g.*, Rachel Thompson, Reporting Misstatements as Revisions: An Evaluation of Managers' Use of Materiality Discretion at 3.
[34] *See, e.g.*, Francine McKenna, Part 1: The SEC's Dodd-Frank Clawback Proposal, The Dig at 12 ("The commenters cited . . . are talking their book! [and] [t]he recent Mattel case is a great example of how the company and its auditor allegedly tried everything to avoid a Big 'R' restatement.").
[35] 80 Fed. Reg. at 41,167.

object if the SEC would, as described in the Reopening Release, "revise the trigger to use the earlier of (a) the date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action if board action is not required, concludes that the issuer's previously issued financial statements require a restatement to correct an error in those financial statements that is material to the previously issued financial statements or that would result in a material misstatement if (1) the error was left uncorrected in the current report or (2) the error correction was recognized in the current period; or (b) the date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements for either type of error."[36]

4. Identify Restatements on Form 10-K Cover Page.[37]

CII believes, consistent with our response to item 1, that the SEC should "provide greater transparency around such [little r] restatements."[38] We, therefore, would support "add[ing] check boxes to the cover page of the Form 10–K that indicate separately (a) whether the previously issued financial statements included in the filing include an error correction, and (b) whether any such corrections are restatements that triggered a clawback analysis during the fiscal year."[39] We believe such information would be useful to investors in reducing the transparency gap between Big R and little r restatements.

7. Require Additional Disclosure of the Recoverable Amount.[40]

CII believes investors would "benefit from disclosure of how issuers calculated the recoverable amount, including their analysis of the amount of the executive's compensation that is recoverable under the rule, and . . . the amount that is not subject to the recovery[]."[41] We believe this disclosure, combined with the Proposed Rule's Item 402(w) disclosures,[42] is responsive to our membership-approved policies on compensation recoveries.[43]

CII believes 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 policy and related activities, are one of the most direct ways for shareowners to assess the performance

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[36] 86 Fed. Reg. at 58,235.
[37] S&C Memo, SEC Reopens Comment Period for Clawbacks, Sullivan & Cromwell LLP 3 (Oct. 18, 2021), https://www.sullcrom.com/files/upload/sc-publication-sec-reopens-comment-period-for-clawbacks.pdf; *see* 86 Fed. Reg. at 58,235.
[38] 86 Fed. Reg. at 58,235.
[39] *Id.*
[40] S&C Memo, SEC Reopens Comment Period for Clawbacks, Sullivan & Cromwell LLP at 3.
[41] 86 Fed. Reg. at 58,236.
[42] *See* 80 Fed. Reg. at 41,190-91 (proposed Item 402(w) disclosure); Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 8 (Aug. 27, 2015), https://www.cii.org/files/issues_and_advocacy/correspondence/2015/08_27_15_letter_to_SEC_clawbacks.pdf ("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.'").
[43] *See* Council of Institutional Investors, Corporate Governance Policies, § 5.7 Compensation Recovery.

of the board.[44] Such disclosures could be particularly helpful in assessing the company's executive compensation policies and practices for purposes of shareholder voting on the chair and members of the compensation committee and the advisory vote on executive pay.[45]

9. Expand Inline eXtensible Business Reporting Language (XBRL).[46]

In CII's 2015 letter in response to the Proposed Rule we stated "that the disclosure required by proposed Item 402(w) should be tagged in XBRL format as proposed."[47] We agreed with the "Commission's conclusion that 'requiring the data to be tagged would lower the cost to investors of collecting this information and would permit data to be analyzed more quickly by shareholders, exchanges and other end-users than if the data was provided in a non-machine-readable format.'"[48]

In 2018, CII publicly supported the SEC's "adoption of amendments requiring the use of [Inline] . . . XBRL format as an important development."[49] Our letter explained:

> Inline XBRL "allows filers to embed XBRL data directly into the document filed on EDGAR." This improvement in the functionality of EDGAR makes disclosure documents more valuable and cost-effective for a broad range of users, including market analysts and data vendors that conduct research on smaller companies.[50]

CII currently would support the SEC requiring "Inline XBRL detail tagging" of all the compensation recovery information required by the rule.[51] It is our understanding that Inline XBRL has multiple benefits, including being machine-readable and searchable, human-readable, continually adapted to changing technology, and can be generated in multiple forms.

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[44] *See* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission at 8 ("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.").

[45] *Id.* ("The information might be particularly useful to institutional investors when casting votes for the election of the members of the compensation committee."); *see also* Letter from Meredith Miller, Chief Corporate Governance Officer, UA Retiree Medical Benefits Trust et al. to Brent J. Fields, Secretary, Securities and Exchange Commission 3 (Sept. 14, 2015), https://www.sec.gov/comments/s7-12-15/s71215-18.pdf ("Shareholders might weigh the quality of the disclosure—for example, how completely and persuasively the reasons for not pursuing a particular recovery are detailed—in assessing the board's stewardship of compensation [and] . . . enforcement of a clawback policy would likely be considered part of a company's executive compensation policies and practices for purposes of the shareholder advisory vote on pay.").

[46] *See* S&C Memo, SEC Reopens Comment Period for Clawbacks, Sullivan & Cromwell LLP at 4; *see* 86 Fed. Reg. at 58,236.

[47] *See* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission at 9.

[48] *Id.*

[49] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Nicole Puccio, Branch Chief, Securities and Exchange Commission 2-3 (July 18, 2018), https://www.cii.org/files/July%2019%202018%20SEC%20Strategic%20Plan%20final%20(003).pdf.

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

[51] 86 Fed. Reg. at 58,236.

10. Other Developments[52]

CII acknowledges that there have been a number of developments since the Proposed Rule relating to clawbacks, most notably the voluntary adoption by some companies of clawback policies that go beyond the requirements of Section 954 of Dodd-Frank.[53] We, however, continue to believe that it is in the best interests of investors for the Commission to finally bring this long overdue, Congressionally mandated rulemaking to a close by issuing a final rule.[54] As we explained in our most recent response to the SEC's semiannual regulatory agenda:

> We acknowledge the observation of former SEC Chair Jay Clayton that "several companies . . . [have clawback] policies [that] go beyond what would be required under Dodd-Frank." We also acknowledge that there are some legal and practical reasons that can limit the effectiveness of existing clawbacks. . . . *However, in our view, the better course of action is for the Commission is to proceed directly to a final rule.*
>
> We believe a final rule . . . would improve corporate governance by finally implementing the requirements of section 954 of Dodd-Frank and thereby establishing a common floor for clawback policies at listed companies. After experience with a new listing standard based on section 954, investors, listed companies, and other market participants could then determine whether the listing standard should be revised to require a different . . . floor for clawback policies at listed companies.[55]

As indicated, CII strongly agrees with SEC Chair Gary Gensler that a final rule as described in the Proposed Rule, as supplemented by the Reopening Release and this letter, would "strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors."[56]

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[52] S&C Memo, SEC Reopens Comment Period for Clawbacks, Sullivan & Cromwell LLP at 4; s*ee* 86 Fed. Reg. at 58,236 ("Are there any other developments since the Proposing Release that should affect our consideration of the Proposed Rules or their potential economic effects?").
[53] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 2-3 (Aug. 19, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/Reg%20Flex%20Letter.pdf.
[54] *Id.* at 3; *see* Francine McKenna, Part 1: The SEC's Dodd-Frank Clawback Proposal, The Dig at 4 (commenting on the long history of "the Dodd-Frank Clawback rule").
[55] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 2-3 (emphasis added & footnotes omitted).
[56] Chair Gary Gensler, Public Statement: Statement on Rules Regarding Clawbacks of Erroneously Awarded Compensation.

Thank you for consideration of CII's views. If we can answer any questions or provide additional information regarding this letter, please do not hesitate to contact me.

Sincerely,

Jeffrey P. Mahoney
General Counsel