

Via Email

October 1, 2021

The Honorable Maxine Waters  
Chairwoman  
Committee on Financial Services  
United States House of Representatives  
Washington, DC 20515

The Honorable Patrick T. McHenry  
Ranking Member  
Committee on Financial Services  
United States House of Representatives  
Washington, DC 20515

*Re: H.R.\_\_\_\_, To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes.*<sup>1</sup>

Dear Madam Chairwoman and Ranking Member McHenry:

The purpose of this letter is to express our strong support for “H.R.\_\_\_\_, To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes” (Draft Bill).<sup>2</sup> We understand the Draft Bill has been publicly issued in connection with your October 5, 2021, Full Committee hearing entitled: “Oversight of the Securities and Exchange Commission: Putting Investors and Market Integrity First” (Committee Hearing).<sup>3</sup> We respectfully request that this letter be included in the public record of the Committee Hearing.

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of United States (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

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<sup>1</sup> To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R.\_\_\_\_, 117<sup>th</sup> Cong. (discussion draft Sept. 24, 2021), <https://docs.house.gov/meetings/BA/BA00/20211005/114113/BILLS-117pih-ImprovingGovernanceatMulti-classStockCompanies.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Oversight of the Securities and Exchange Commission: Putting Investors and Market Integrity First: Hearing Before H. Comm. Fin. Serv., 117<sup>th</sup> Cong. (notice of hearing Sept. 28, 2021), <https://docs.house.gov/meetings/BA/BA00/20211005/114113/HHRG-117-BA00-20211005-SD001.pdf>.

– 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.<sup>4</sup>

As the leading voice for corporate governance, CII believes the Draft Bill is consistent with U.S. corporate governance principles<sup>5</sup> and reflects the sound, “near-term,” legislative policy recommendations of the U.S. Securities and Exchange Commission’s (SEC) Office of the Investor Advocate (Office).<sup>6</sup> Those recommendations include establishing minimum listing standards for the stock exchanges in two important areas of corporate governance: (1) multiple classes of stock with unequal voting rights,<sup>7</sup> and (2) board diversity.<sup>8</sup> The Draft bill also importantly reallocates the division of authority between the SEC and the exchanges for adopting future corporate governance listing standards in light of the exchanges’ “inherent conflict of interest” resulting from their for-profit status.<sup>9</sup>

The following is a section-by-section analysis of the substantive provisions of the Draft Bill.

## **Section 2<sup>10</sup>**

Section 2 of the Draft Bill would implement the following policy recommended by the Office:

If a company chooses to issue multiple classes of stock with differing voting rights, then the dual-class stock must contain a “sunset” provision. While we prefer the principle behind “one share, one vote” for the long-term protection of investors, some companies express reluctance to go public when the founding management team may still be executing a long-term strategy that may not appear profitable in

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<sup>4</sup> 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>.

<sup>5</sup> See Council of Institutional Investors, Corporate Governance Policies § 3.3 Voting Rights (updated Sept. 22, 2021), [https://www.cii.org/files/09\\_22\\_21\\_corp\\_gov\\_policies.pdf](https://www.cii.org/files/09_22_21_corp_gov_policies.pdf) (“Each share of common stock should have one vote [and] [c]orporations should not have classes of common stock with disparate voting rights”); § 2.8b Board Diversity (“The Council supports a diverse board [and] [t]he Council believes a diverse board has benefits that can enhance corporate financial performance, particularly in today’s global market place.”); Council of Institutional Investors, CII Policies, Investor Expectations for Newly Listed Companies, [https://www.cii.org/ipo\\_policy](https://www.cii.org/ipo_policy) (“Upon going public, a company should have a “one share, one vote” structure . . . [and] CII expects newly public companies without such provisions to commit to their adoption over a reasonably limited period through sunset mechanisms.”).

<sup>6</sup> U.S. Securities and Exchange Commission, Office of the Investor Advocate, Report of Activities, Fiscal Year 2020 at 2, 10-11 (filed Dec. 29, 2020), <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2020.pdf>.

<sup>7</sup> *Id.* at 10 (“If a company chooses to issue multiple classes of stock with differing voting rights, then the dual-class stock must contain a ‘sunset’ provision.”).

<sup>8</sup> *Id.* at 11 (“To make fully informed investment decisions, investors generally would benefit from greater insight into the diversity characteristics of a company’s current board, as well as its policies designed to promote diversity in board composition going forward.”).

<sup>9</sup> *Id.* at 10 (“The primary listing exchanges are now for-profit entities that, unlike their prior mutual ownership structure, have an inherent conflict of interest between protecting investors and generating business revenue from listed issuer fees”).

<sup>10</sup> To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R.\_\_\_\_, 117<sup>th</sup> Cong. § 2.

the short term. As a compromise to allow retail investors access to these companies at an earlier stage, a sunset provision would provide a visionary founder a reasonable length of time to execute his or her initial vision as a public company, while ensuring that a disciplined governance mechanism provides long-term protection to investors.<sup>11</sup>

The provision would apply to any person who, after the effective date of the Draft Bill, seeks to register, and list on an exchange, classes of securities that have different levels of votes per share. The provision would not apply to any classes of securities that were registered prior to the effective date of the Draft Bill.<sup>12</sup>

Academic research<sup>13</sup> and developing market practice<sup>14</sup> suggest that any benefits of holding multi-class stock decline over time and a seven-year or less sunset can prevent investors and markets from suffering long-term damage from perpetual or long-lasting unaccountability.<sup>15</sup>

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<sup>11</sup> U.S. Securities and Exchange Commission, Office of the Investor Advocate, Report of Activities, Fiscal Year 2020 at 10-11 (footnote omitted); Rick Fleming, Investor Advocate, Dual-Class Shares: A Recipe for Disaster, Speech at ICGN Miami Conference, Miami, Fl. (Oct. 15, 2019), <https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster> (supporting “the sun-setting of super-voting rights, which would protect a visionary founder from activist investors for a reasonable length of time while preventing the harms that may occur over the long term due to poor corporate governance”).

<sup>12</sup> See To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R.\_\_\_\_, 117<sup>th</sup> Cong. § 2(a).

<sup>13</sup> See, e.g., Lindsay Baran, Arno Forst & M. Tony Via, “Dual Class Share Structure and Innovation,” (Dec. 8, 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3183517](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183517) (“[o]ur findings lend credence to the recent call from shareholder advocacy groups that if dual class structures should be allowed at all, they should face rigorous sunset provisions and be eliminated in a certain period post-IPO.”).

<sup>14</sup> See, e.g., Council of Institutional Investors, Companies with Time-Based Sunsets on Dual-Class Stock (updated, June 22, 2021), [https://www.cii.org/Files/issues\\_and\\_advocacy/DualClassStock/7-22-21%20Time-based%20Sunsets.pdf](https://www.cii.org/Files/issues_and_advocacy/DualClassStock/7-22-21%20Time-based%20Sunsets.pdf); cf. Victory Board Approves Plan to Eliminate Dual-Class Share Structure, BusinessWire (Sept. 27, 2021), <https://www.businesswire.com/news/home/20210927005170/en/Victory-Board-Approves-Plan-to-Eliminate-Dual-Class-Share-Structure> (“David Brown, Chairman and CEO of Victory Capital, said, ‘We believe all shareholders will benefit from the elimination of the dual-class share structure by aligning voting rights with the economic interests of all shareholders [and] [s]implifying the Company’s capital structure such that all shareholders of the Company own a single class of common stock will also reduce the cost and complexity associated with the Company’s current capital structure.’”).

<sup>15</sup> See Letter from Amy Borrus, Executive Director, Council of Institutional Investors to Capital Markets Policy Financial Conduct Authority (Sept. 14, 2021), <https://www.cii.org/files/September%20UK%20FCA%20Dual%20Class%20Consultation%20final.pdf> (providing an overview of the basis for CII’s opposition to dual class share structures and support for time-based sunsets in response to United Kingdom Financial Conduct Authority’s “Consultation Paper 21/21: Primary Markets Effectiveness Review”); Commissioner Robert J. Jackson Jr., Perpetual Dual-Class Stock: The Case Against Corporate Royalty, Speech, San Francisco, Cal. (Feb. 15, 2018), <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty> (describing multi-class stock structures without sunsets as undermining “accountability: management can outvote ordinary investors on virtually anything”); see generally CFA Institute, DUAL-CLASS SHARES: THE GOOD, THE BAD, AND THE UGLY, A Review of the Debate Surrounding Dual-Class Shares and Their Emergence in Asia Pacific 93 (2018), <https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx> (“We have been urging exchanges that have DCS structures in place to consider mandating time-based sunset provisions, which means super voting rights will automatically convert to regular voting rights on a “one-share, one-vote” basis after a period agreed upon between management and investors [and] [i]n our view, the single most important safeguard is a mandatory time-based sunset of not more than five years.”).

The provision also includes a safety valve: If a founder can make the case to shareholders for extending the seven-year or less sunset period, the section provides for unlimited extensions of the multi-class structure, assuming each such an extension of seven years or less is approved by each class of shares, voting separately.<sup>16</sup>

The provision is generally consistent with a 2018 rulemaking petition that CII submitted to the NASDAQ Stock Market<sup>17</sup> and the Intercontinental Exchange.<sup>18</sup> Those petitions, which were never pursued by the exchanges, were supported by many investors including: State Board of Administration of Florida,<sup>19</sup> California State Teachers' Retirement System,<sup>20</sup> Hermes Equity Ownership Services,<sup>21</sup> Los Angeles County Employees Retirement Association,<sup>22</sup> a coalition of institutional investors with \$1.7 trillion of assets under management, and The Association of Capital Market Investors.<sup>23</sup>

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<sup>16</sup> See To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R. \_\_\_\_, 117<sup>th</sup> Cong. § 2(a)(2).

<sup>17</sup> See Letter from Ash Williams, Chair, CII et al., John Zecca, Senior Vice President, General Counsel North America and Chief Regulatory Officer, NASDAQ Stock Market (Oct. 24, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf).

<sup>18</sup> See Letter from Ash Williams, Chair, CII et al. to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange (Oct. 24, 2018) (on file with CII).

<sup>19</sup> See Letter from Ashbel Williams, Executive Director & Chief Investment Office, STATE BOARD OF ADMINISTRATION OF FLORIDA to John Zecca, Senior Vice President, General Counsel North America and Chief Regulatory Office, NASDAQ Stock Market (Nov. 9, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/Florida%20SBA%20Letter%20to%20NASDAQ%20re%20Listing%20Standard%20on%20Dual%20Class%20Shares%20November%202018.pdf](https://www.cii.org/files/issues_and_advocacy/Florida%20SBA%20Letter%20to%20NASDAQ%20re%20Listing%20Standard%20on%20Dual%20Class%20Shares%20November%202018.pdf); Ashbel Williams, Executive Director & Chief Investment Officer, STATE BOARD OF ADMINISTRATION OF FLORIDA to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc. (Nov. 9, 2018), <https://www.cii.org/files/Florida%20SBA%20Letter%20to%20NYSE%20re%20Listing%20Standard%20on%20Dual%20Class%20Shares%20November%202018.pdf>.

<sup>20</sup> See Letter from Aeisha Mastagni, Interim Co-Director of Corporate Governance, California State Teachers' Retirement System to John Zecca, Senior Vice President, General Counsel North America & Chief Regulatory Officer, Nasdaq Stock Market (Nov. 30, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/Calstrs-sunsets-NASDAQ.pdf](https://www.cii.org/files/issues_and_advocacy/Calstrs-sunsets-NASDAQ.pdf); Letter from Aeisha Mastagni, Interim Co-Director of Corporate Governance, California State Teachers' Retirement System to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc. (Nov. 30, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/Calstrs-sunsets-NYSE.pdf](https://www.cii.org/files/issues_and_advocacy/Calstrs-sunsets-NYSE.pdf).

<sup>21</sup> See Letter from Tim Goodman, Director, Hermes Equity, Ownership Services Limited, to John Zecca, Senior Vice President, General Counsel North America and Chief Regulatory Officer, NASDAQ Stock Market (Dec. 17, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/Hermes-sunsets-NASDAQ.pdf](https://www.cii.org/files/issues_and_advocacy/Hermes-sunsets-NASDAQ.pdf); Letter from Tim Goodman, Director, Hermes Equity, Ownership Services Limited, to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc (Dec. 17, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/Hermes-sunsets-NYSE.pdf](https://www.cii.org/files/issues_and_advocacy/Hermes-sunsets-NYSE.pdf).

<sup>22</sup> See Letter from Jonathan Grabel, Chief Investment Officer, Los Angeles County Employees Retirement Association to John Zecca, Senior Vice President, General Counsel North America and Chief Regulatory Officer, NASDAQ Stock Market (May 20, 2019), <https://www.cii.org/files/LACERA%20NASDAQ%20comment%20letter%20re%20CII%20petition%20multiclass%20share%20structures%205%202019.pdf>; Letter from Jonathan Grabel, Chief Investment Officer, Los Angeles County Employees Retirement Association to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc. (May 20, 2019), <https://www.cii.org/files/LACERA%20NYSE%20comment%20letter%20re%20CII%20petition%20multiclass%20share%20structures%205%202019.pdf>.

<sup>23</sup> See Letter from MAURO RODRIGUES DA CUNHA, CEO, THE ASSOCIATION OF CAPITAL MARKETS – AMEC to John Zecca, Senior Vice President, General Counsel North America and Chief Regulatory Officer, NASDAQ Stock Market (Dec. 18, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/Amec%20letter-sunsets-](https://www.cii.org/files/issues_and_advocacy/Amec%20letter-sunsets-)

### Section 3<sup>24</sup>

Section 3 of the Draft Bill would implement the following policy recommended by the Office:

To make fully informed investment decisions, investors generally would benefit from greater insight into the diversity characteristics of a company's current board, as well as its policies designed to promote diversity in board composition going forward. Thus, to be listed on a national exchange, a company should be required to provide more fulsome disclosure regarding the composition of its board of directors, nominees for director positions, and executive officers. The company should also provide greater transparency around its nominating process for director and officer selection, and any initiatives it has in place to increase board diversity. Voluntary disclosures in this regard have been useful, but listing standards could help ensure that more companies make this information publicly available on a basis that enables investors to draw comparisons. We believe that robust policies of this nature should be a minimum standard for listing on any exchange, and we support efforts in Congress to advance this type of disclosure.<sup>25</sup>

The provision would require disclosure by listed companies of data, based on voluntary self-identification, on the racial, ethnic and gender composition of a company's board of directors and nominees for a board seat, as well as executive officers; disclosure of voluntary self-identification as a veteran, disabled, or LGBTQ+ would also be required.<sup>26</sup> The provision would also require disclosure of any policy, plan or strategy adopted by the board of directors (or board committee) to promote racial, ethnic and gender diversity at the company.<sup>27</sup>

The provision builds on the SEC's recent approval of new listing rules of The Nasdaq Stock Market LLC to advance board diversity<sup>28</sup> by incorporating, with some modest revisions, the disclosure provisions of the Improving Corporate Governance Through Diversity Act of 2021 (Diversity

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[NASDAQ.pdf](#); Letter from MAURO RODRIGUES DA CUNHA, CEO, THE ASSOCIATION OF CAPITAL MARKETS – AMEC to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc (Dec. 18, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/Amec%20letter%20sunsets-NYSEE.pdf](https://www.cii.org/files/issues_and_advocacy/Amec%20letter%20sunsets-NYSEE.pdf); see also Press Release, Council of Institutional Investors, Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies (Oct. 24, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20Release%20Oct%2024,%202018.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20Release%20Oct%2024,%202018.pdf) (quoting supporters of petition, including BlackRock Co-founder and Vice Chairman Barbara Novick, and Donna Anderson CFA, vice president and head of corporate governance at asset manager T. Rowe Price).

<sup>24</sup> See To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R.\_\_\_\_, 117<sup>th</sup> Cong. § 3.

<sup>25</sup> U.S. Securities and Exchange Commission, Office of the Investor Advocate, Report of Activities, Fiscal Year 2020 at 11 (footnotes omitted).

<sup>26</sup> See To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R.\_\_\_\_, 117<sup>th</sup> Cong. § 3(a)(s)(1)(A)-(B).

<sup>27</sup> See *id.* § 3(a)(s)(1)(C).

<sup>28</sup> Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 92,590 (Aug. 6, 2020), <https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf>.

Act).<sup>29</sup> The Diversity Act was ordered to be reported by voice vote action of the Committee in April.<sup>30</sup> And the Diversity Act, with minor amendments,<sup>31</sup> was subsequently included in Title IX of the Corporate Governance Improvement and Investor Protection Act,<sup>32</sup> which was subsequently passed by the U.S. House of Representatives in June.<sup>33</sup>

In addition to strong support from CII,<sup>34</sup> the Diversity Act was publicly supported by the Investment Company Institute,<sup>35</sup> U.S. Chamber of Commerce, American Bankers Association, Nareit, The Real Estate Roundtable, Retail Industry Leaders Association, Bank Policy Institute, National Investor Relations Institute, National Bankers Association, Financial Services Forum and TechNet.<sup>36</sup>

## Section 4<sup>37</sup>

Section 4 of the Draft Bill would implement the following policy recommended by the Office:

The Commission has an oversight function and reviews whether exchanges' proposed amendments to their listing standards are consistent with the Exchange Act. Courts have noted, however, that corporate governance remains largely the

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<sup>29</sup> Improving Corporate Governance Through Diversity Act of 2021, H.R. 1277, 117th Cong. § 2(s)(1)-(2) (as introduced Feb. 24, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1277/text?r=2&s=1> (the modest revisions include the insertion of the terms and related definitions for “disabled” and “LGBTQ+” in § 3(a)(s)(3)(C)-(D)).

<sup>30</sup> Improving Corporate Governance Through Diversity Act of 2021, H.R. 1277, 117th Cong. (as ordered to be reported by voice vote action of the Comm. Fin. Serv. Apr. 21, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1277/text?r=2&s=1>.

<sup>31</sup> See, e.g., Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Nancy Pelosi, United States House of Representatives et al. 2 (June 14, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/June%2014,%202021%20Amendment%20\(fin.al\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/June%2014,%202021%20Amendment%20(fin.al).pdf) (“The Diversity Disclosure Amendment incorporates, with some modest revisions, the provisions of the Improving Corporate Governance Through Diversity Act of 2021”).

<sup>32</sup> Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong., Title IX (engrossed in H. June 16, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1187/text/eh>.

<sup>33</sup> Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (passed in H. June 16, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1187/actions>.

<sup>34</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Gregory W. Meeks, Chair, Subcommittee on Consumer Protection and Financial Institutions, Committee on Financial Services, United States House of Representatives 1 (Feb. 6, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/February%206%202019%20Representative%20Meeks%20Letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/February%206%202019%20Representative%20Meeks%20Letter.pdf) (“I am writing on behalf of the Council of Institutional Investors . . . to express our strong support for H.R. \_\_\_, the “Improving Corporate Governance Through Diversity Act of 2019 . . .”).

<sup>35</sup> See From The Markets, ICI Applauds Progress Of Bill Promoting Board Diversity, MarketsMedia (Apr. 27, 2021), <https://www.marketsmedia.com/ici-applauds-committee-passage-of-bill-promoting-board-diversity/> (“We are proud to support the Improving Corporate Governance Through Diversity Act and applaud Representative Gregory Meeks’s leadership and hard work, alongside Chairwoman Maxine Waters, to enhance disclosure of board and executive diversity and to advance work to identify strategies that can help improve diversity and inclusion on boards.”).

<sup>36</sup> See Bank Policy Institute, Coalition of Trades Encourage Passage of ‘Improving Corporate Governance Through Diversity Act of 2021’ (Apr. 20, 2021), <https://bpi.com/bpi-coalition-of-trades-encourage-passage-of-improving-corporate-governance-through-diversity-act-of-2021/>.

<sup>37</sup> See To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R. \_\_\_, 117th Cong. § 4.

province of state law. While the Commission has statutory authority to further the Exchange Act's underlying disclosure objectives around the proxy voting process, only the exchanges themselves have broader authority to regulate other substantive aspects of corporate governance for their listed issuers. On this point, the D.C. Circuit Court of Appeals once held that the Commission lacks statutory authority to address the use of dual class shares by publicly listed companies through its own rulemaking, as Congress did not contemplate federal regulation of corporate governance when it passed the Exchange Act in 1934.<sup>[38]</sup> The court noted, however, that the self-regulating exchanges could adopt rules governing this area of corporate governance for issuers seeking to list on the exchanges.

Market developments since that ruling suggest it is time to revisit this allocation of responsibility. The primary listing exchanges are now for-profit entities that, unlike their prior mutual ownership structure, have an inherent conflict of interest between protecting investors and generating business revenue from listed issuer fees. Our Office has long been concerned about an apparent race-to-the-bottom in this area—with the primary listing exchanges proposing to voluntarily lower their qualitative corporate governance standards in an effort to attract issuers, but at the expense of the protections the original standards provided investors.

If these for-profit businesses are to be entrusted with regulatory responsibility for corporate governance standards, . . . *Congress should give the Commission clear statutory authority to set minimum listing standards that apply to all exchanges.*<sup>39</sup>

The provision would clarify that the SEC has the authority to issue rules and regulations to require the stock exchanges to improve the corporate governance of their listed companies in a manner the SEC determines necessary or appropriate in the public interest for the protection of investors.<sup>40</sup>

For all the above reasons, in CII's view, the provisions of the Draft Bill individually, and when combined, would have a positive impact on investor protection, corporate performance, and the efficiency of the U.S capital markets generally.<sup>41</sup>

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<sup>38</sup> See *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990), available at <https://casetext.com/case/the-business-roundtable-v-sec>.

<sup>39</sup> U.S. Securities and Exchange Commission, Office of the Investor Advocate, Report of Activities, Fiscal Year 2020 at 10 (emphasis added).

<sup>40</sup> See To amend the Securities Exchange Act of 1934 to improve the governance of multi-class stock companies, to require issuers to make annual diversity disclosures, and for other purposes, H.R.\_\_\_\_, 117<sup>th</sup> Cong. § 4(e)(1).

<sup>41</sup> See, e.g., Jeffrey P. Mahoney, General Council, Council of Institutional Investors to The Honorable Sherrod Brown, Chairman, Committee on Banking, Housing Committee on Banking, Housing & Urban Affairs, United States Senate et al. 8 (Mar. 18, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/2021%20Investor%20Advocate%20Letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/2021%20Investor%20Advocate%20Letter.pdf) (describing how the provisions of a substantially similar proposed bill would provide, among other benefits, a cost-effective approach to improving corporate performance).

Page 8 of 8  
October 1, 2021

Thank you for your consideration of our views. We are hopeful that this letter is helpful to you and the Committee in its consideration of the Draft Bill. We would welcome the opportunity discuss the Draft Bill with you or your staff at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style with a large, stylized "J" and "M".

Jeffrey P. Mahoney  
General Counsel