

Via E-Mail

August 19, 2021

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

*Re: File No. S7-06-21*

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII). 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 – 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>1</sup>

This letter is in response to the Securities and Exchange Commission’s (SEC or Commission) invitation to comment on its semiannual regulatory agenda (Agenda).<sup>2</sup> CII’s current SEC rulemaking priorities fall into the following three categories: (1) Investor Rights and Protections; (2) Corporate Disclosure; and (3) Market Systems & Structure.<sup>3</sup>

## **1. Investor Rights and Protections**

We include under this heading our support for completed action on “Listing Standards for Recovery of Erroneously Awarded Compensation.”<sup>4</sup> We are pleased that the Commission has

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<sup>1</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>2</sup> Regulatory Flexibility Agenda, Securities Act Release No. 10,942, Exchange Act Release No. 91,852, Investment Adviser Act Release No. 5,734, Investment Company Act Release No. 34,269, 86 Fed. Reg. 41,372 (July 30, 2021), <https://www.federalregister.gov/documents/2021/07/30/2021-14888/regulatory-flexibility-agenda>.

<sup>3</sup> See CII Advocacy Priorities – 2021 (last visited Aug. 16, 2021), [https://www.cii.org/2021\\_priorities](https://www.cii.org/2021_priorities).

<sup>4</sup> See CII Advocacy Priorities – 2021, Investor Rights & Protections (last visited Aug. 16, 2021), [https://www.cii.org/investor\\_rights\\_protections](https://www.cii.org/investor_rights_protections).

moved this agenda item from being categorized as within “Long-Term Actions”<sup>5</sup> to the “Proposed Rule Stage,” but believe this long-standing project should be advanced to the “Final Rule Stage” and a final rule promptly issued.<sup>6</sup>

### Listing Standards for Recovery of Erroneously Awarded Compensation

As described on CII’s website:

CII believes that boards should 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, which may include personal misconduct or ethical lapses that cause, or could cause, material reputational harm to the company and its shareholders.

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act [Dodd-Frank] directed the SEC to adopt a rule to require claw backs of unearned executive compensation in certain circumstances. In 2015, the SEC proposed a claw back rule that CII believes provides a floor for such policies. But the SEC has not taken final action on the rule proposal.<sup>7</sup>

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.”<sup>8</sup> We also

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<sup>5</sup> Regulatory Flexibility Agenda, Securities Act Release No. 10,873, Exchange Act Release No. 91,131, Investment Adviser Act Release No. 5,610, Investment Company Act Release No. 34,047, 86 Fed. Reg. 17,040, 17,043 (Oct. 8, 2020), <https://www.federalregister.gov/documents/2021/03/31/2021-04360/regulatory-flexibility-agenda>.

<sup>6</sup> 86 Fed. Reg. at 41,372.

<sup>7</sup> CII Advocacy Priorities – 2021, Investor Rights & Protections.

<sup>8</sup> 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. at n.50 (June 21, 2018), <https://www.sec.gov/news/testimony/testimony-oversight-us-securities-and-exchange-commission>; see Joshua A. Agen, of Counsel, Foley & Lardner LLP, Compensation Clawbacks: Trends and Lessons Learned, Emp. Benefit Insights (Oct. 21, 2020), <https://www.foley.com/en/insights/publications/2020/10/compensation-clawbacks-trends-and-lessons-learned> (“there has been a notable trend in these voluntarily-adopted compensation clawback policies to broaden them to apply in more circumstances and cover additional types of compensation and conduct”); Lane Ringlee & John Ellerman, Recent SEC Action – Clawbacks and Proxy Advisory Firm Regulations (Aug. 12, 2020), <https://www.paygovernance.com/viewpoints/recent-sec-actions-clawbacks-and-proxy-advisory-firm-regulations> (“many clawback policies adopted by companies over the past several years cover a broader group of executives and include trigger events that are more expansive than the proposed rules”); Jonathan Ocker et al., The State of Play on Clawbacks and Forfeitures Based on Misconduct, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (July 7, 2019), <https://corpgov.law.harvard.edu/2019/07/07/the-state-of-play-on-clawbacks-and-forfeitures-based-on-misconduct/> (“While many companies are adopting or modifying their existing clawback policies in a manner intended to meet the proposed Dodd-Frank clawback rules, some companies also go beyond these minimum requirements and include additional clawback triggers in their clawback policies and forfeiture provisions, such as detrimental behavior and violation of restrictive covenants”); Proxy Process and Rules: Examining Current Practices and Potential Changes: Hearing before the S. Comm. on Banking, Hous. & Urban Affairs, 115<sup>th</sup> 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 at 8), <https://www.banking.senate.gov/imo/media/doc/Garland%20Testimony%202012-6-18.pdf> (indicating that the 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

acknowledge that there are some legal and practical reasons that can limit the effectiveness of existing clawbacks.<sup>9</sup> And we would not object if the SEC permits those issues to be raised in connection with a notice for proposed rulemaking.<sup>10</sup> 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 based on the Commission's 2015 proposal<sup>11</sup> would improve corporate governance by finally implementing the requirements of section 954 of Dodd-Frank<sup>12</sup> and thereby establishing a common floor for clawback policies at listed companies.<sup>13</sup> 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, broader, or a higher floor for clawback policies at listed companies.

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by 5,300 lower-level employees and cost Wells Fargo \$185 million in fines and penalties"); Kathryn Neel et al., *The Business Case for Clawbacks*, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (May 6, 2018), <https://corpgov.law.harvard.edu/2018/05/06/the-business-case-for-clawbacks/> (listing Cognizant Technology Solutions, Wells Fargo, Zions Bancorp, and EBay as companies that have adopted "detrimental conduct" clawback policies).

<sup>9</sup> See Sabjai Bhagat & Charles M. Elson, *Executive Compensation, Why Executive Compensation Clawbacks Don't Work*, Harv. Bus. Rev. (Mar. 22, 2021), <https://hbr.org/2021/03/why-executive-compensation-clawbacks-dont-work> (Noting two problems with existing practice for clawbacks: "First, the legal requirement for recovering monies already paid to an executive typically involve the notion of "cause" — unless convicted of a crime, an executive will argue the company has no legal right to reclaim the cash [and] [s]econd, and just as important, once the money is out the door, the burden is on the party without the cash to get it back."); Financial Stability Board, *FAS Work Shop on Compensation Practices 2021*, 18 – 19 May 2021, Summary of Discussion (Aug. 9, 2021) (on file with CII) (describing obstacles internationally to the use of clawbacks).

<sup>10</sup> See 86 Fed. Reg. at 41,372.

<sup>11</sup> See 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 (July 14, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-07-14/html/2015-16613.htm>.

<sup>12</sup> DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, Pub. L. No. 111-203, § 954 (July 21, 2010), <https://www.govinfo.gov/content/pkg/PLAW-111publ203/html/PLAW-111publ203.htm> ("The rules of the Commission under subsection (a) shall require each issuer to develop and implement a policy providing - . . . that, in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, the issuer will recover from any current or former executive officer of the issuer who received incentive-based compensation (including stock options awarded as 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.").

<sup>13</sup> We note that some public companies have adopted clawback policies that include provisions generally consistent with the 2015 Securities and Exchange Commission proposal and whose policies are viewed favorably by some CII members. Those companies include: Lincoln Electric Holdings, Inc., Schedule 14A at 61 (Mar. 19, 2021), <https://www.sec.gov/Archives/edgar/data/59527/000117120021000116/0001171200-21-000116-index.htm>; J.B. Hunt Transport Services, Inc., Schedule 14A at 47 (Mar. 18, 2021), <https://www.sec.gov/Archives/edgar/data/728535/000143774921006495/0001437749-21-006495-index.htm>; Domino's Pizza, Inc., Schedule 14A at 43 (Mar. 18, 2021), <https://www.sec.gov/Archives/edgar/data/1286681/000119312521084940/0001193125-21-084940-index.htm>; Equifax Inc., Schedule 14A at 55-56 (Mar. 25, 2021), [https://www.sec.gov/Archives/edgar/data/33185/000130817921000102/lefx2021\\_def14a.htm](https://www.sec.gov/Archives/edgar/data/33185/000130817921000102/lefx2021_def14a.htm); and Microsoft Corporation, *Executive Compensation Policy* (updated July 1, 2017), <https://view.officeapps.live.com/op/view.aspx?src=https://c.s-microsoft.com/en-us/CMSFiles/Executive%20Compensation%20Recovery%20Policy.docx?version=0685b846-89dd-eef2-bc22-dca3407e96ca>.

## 2. Corporate Disclosure

We include under this heading our support for Commission action on CII’s rulemaking petitions to reform and improve disclosure of Rule 10b5-1 trading plans<sup>14</sup> and improve disclosure of the reconciliation to Generally Accepted Accounting Principles (GAAP) of non-GAAP metrics used to determine executive compensation.<sup>15</sup> While we are disappointed that the Agenda does not identify either of CII’s rulemaking petitions, we are pleased with the June 7 announcement by SEC Chair Gary Gensler directing SEC staff to consider both tougher restrictions on securities trading by corporate insiders pursuant to Rule 10b5-1 plans and increased transparency for such trading.<sup>16</sup> We were also impressed that the SEC’s more comprehensive regulatory agenda released on June 11 included Rule 10b5-1 among the areas in which the Commission plans to propose rulemaking.<sup>17</sup>

The Agenda’s identification of a date for “Final Action” on the Commission’s project on “Rule 144 Holding Period and Form 144 Filing”<sup>18</sup> is also promising. We believe the issuance of that final rule could result in some near-term improvements to disclosures relating to Rule 10b5-1 trading plans.<sup>19</sup>

### Rule 10b5-1 Trading Plans

As described on CII’s website:

Under SEC Rule 10b5-1, executives, directors and other top company insiders are able to establish a written plan that details when they will be able to buy or sell shares at a predetermined time on a scheduled basis. But press reports and empirical

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<sup>14</sup> See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission (Dec. 28, 2012), [http://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2012/12\\_28\\_12\\_cii\\_letter\\_to\\_sec\\_rule%2010b5-1\\_trading\\_plans.pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%2010b5-1_trading_plans.pdf).

<sup>15</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission 1 (Apr. 29, 2019), [https://www.cii.org/Files/issues\\_and\\_advocacy/correspondence/2019/20190426%20CII%20Petition%20revised%20on%20non-GAAP%20financials%20in%20proxy%20statement%20CDAs.pdf](https://www.cii.org/Files/issues_and_advocacy/correspondence/2019/20190426%20CII%20Petition%20revised%20on%20non-GAAP%20financials%20in%20proxy%20statement%20CDAs.pdf).

<sup>16</sup> See Chair Gary Gensler, SEC, Prepared Remarks, CFO Network Summit. Washington, DC (June 7, 2021), <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07> (“I’ve asked staff to make recommendations for the Commission’s consideration on how we might freshen up Rule 10b5-1.”).

<sup>17</sup> See Securities and Exchange Commission, Agency Rule List – 2021, ORIA, OMB (last visited Aug. 16, 2021), [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf\\_token=7CE97CC2D49C9B6B70868F7B2752E582C86F1945A4A46F34426C18AF1ABE101E611318F64B67159C3A36E7556BD0FB872C8F](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=7CE97CC2D49C9B6B70868F7B2752E582C86F1945A4A46F34426C18AF1ABE101E611318F64B67159C3A36E7556BD0FB872C8F) (identifying “Rule 10b5-1” as in the “Proposed Rule Stage”).

<sup>18</sup> 86 Fed. Reg. at 41,374.

<sup>19</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 2, 6 (March 18, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/March%2018%202021%20Rule%20144%20letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/March%2018%202021%20Rule%20144%20letter.pdf) (recommending that the proposal be revised to require: “(1) Form 4 and Form 5 to indicate via a check box whether their reported transactions were made pursuant to Rule 10b5-1(c) rather than provide it as an option for the filer; (2) disclosure of the adoption date of the respective Rule 10b5-1 plan on the forms; and (3) mandatory direct electronic filing of Form 144”).

research suggest that corporate insiders may have used 10b5-1 trading plans as cover for improper stock trades. Insiders can adopt, amend and cancel these plans easily and without disclosure, a recipe for fortuitously timed trades while in possession of material, non-public information. In 2012, CII submitted a rulemaking petition [2012 Petition] to the SEC recommending improvements to Rule 10b5-1 and we have urged the commission repeatedly to **close the loopholes** that invite plan abuse.<sup>20</sup>

We are pleased that the Rule 10b5-1 reforms contained in the 2012 Petition<sup>21</sup> and reflected in CII's membership-approved policies are continuing to gain support.<sup>22</sup> We note that in April the U.S. House of Representatives passed H.R. 1528, the Promoting Transparent Standards for Corporate Insiders Act, with no opposition under a suspension of the rules.<sup>23</sup> H.R. 1528 requires the SEC to carry out a study, issue a report and pursue rulemaking to limit abuses of Rule 10b5-1 trading plans.<sup>24</sup> H.R. 1528 also suggests several amendments to Rule 10b5-1 derived from the CII Petition, that would:

(A) limit the ability of issuers and issuer insiders to adopt a plan described under paragraph (c)(1)(i)(A)(3) of Rule 10b5-1 (“trading plan”) to a time when the issuer or issuer insider is permitted to buy or sell securities during issuer-adopted trading windows;

(B) limit the ability of issuers and issuer insiders to adopt multiple trading plans;

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<sup>20</sup> CII Advocacy Priorities – 2021, Corporate Disclosure (last visited Aug. 16, 2021), [https://www.cii.org/corporate\\_disclosure](https://www.cii.org/corporate_disclosure).

<sup>21</sup> See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission at 3 (“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 a 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; and • Companies and company insiders should not be allowed to make frequent modifications or cancellations of Rule 10b5-1 plans.”).

<sup>22</sup> CII, Statement on Stock Sales by Insiders (adopted Mar. 10, 2020), [https://www.cii.org/insider\\_stock\\_sales\\_statement](https://www.cii.org/insider_stock_sales_statement) (“For Rule 10b5-1 plans to fulfill their legitimate purpose, they should be: publicly disclosed; adopted when the participant is not in possession of material, non-public information; inactive for at least three months following adoption; and ineligible for substantive modification. Participants should not be party to concurrently active 10b5-1 plans, and companies should avoid frequently cancelling and adopting new plans [and] [b]oards should periodically monitor plan transactions and adopt written policies covering plan practices, including how plans may be used in the context of guidelines or requirements on equity hedging, holding and ownership; and suspend trading under such plans upon internal awareness of an M&A transaction or tender offer involving the company.”).

<sup>23</sup> See Promoting Transparent Standards for Corporate Insiders Act, H.R. 1528, 117<sup>th</sup> Cong. (2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/1528/all-actions>.

<sup>24</sup> See Promoting Transparent Standards for Corporate Insiders Act, H.R. 1528, 117<sup>th</sup> Cong. §2 (2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/1528/text>.



(C) establish a mandatory delay between the adoption of a trading plan and the execution of the first trade pursuant to such a plan . . . ;

(D) limit the frequency that issuers and issuer insiders may modify or cancel trading plans;

(E) require issuers and issuer insiders to file with the Commission trading plan adoptions, amendments, terminations and transactions; or

(F) require boards of issuers that have adopted a trading plan to—

(i) adopt policies covering trading plan practices;

(ii) periodically monitor trading plan transactions; and

(iii) ensure that issuer’s policies discuss trading plan use in the context of guidelines or requirements on equity hedging, holding, and ownership.<sup>25</sup>

H.R. 1528 has been referred to the Committee on Banking, Housing & Urban Affairs of the U.S. Senate (Banking Committee).<sup>26</sup> And more recently, Senators Chris Van Hollen (D-Md.) of the Banking Committee and Deb Fisher (R-Neb.) “reintroduced their bipartisan [companion bill to H.R. 1528] to bring greater transparency to corporate stock trading.”<sup>27</sup>

As indicated, on June 7 during prepared remarks at the CFO Network Summit, SEC Chair Gary Gensler shared some thoughts regarding Rule 10b5-1 plans and how the SEC might “freshen up” the rule.<sup>28</sup> Chair Gensler’s recommended improvements to Rule 10b5-1 were consistent with reforms contained in the 2012 CII Petition and included:

- “mandat[ing] . . . cooling-off periods . . .
- limit[ing] when 10b5-1 plans can be canceled . . .
- disclos[ing] . . . the adoption, modification, and terms of Rule 10b5-1 plans by individuals and companies . . . [and]
- limit[ing] . . . the number of 10b5-1 plans.”<sup>29</sup>

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<sup>25</sup> See *id.* §2(a)(1)(A) – (F).

<sup>26</sup> See Promoting Transparent Standards for Corporate Insiders Act, H.R. 1528, 117<sup>th</sup> Cong. (2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/1528/all-actions>.

<sup>27</sup> Press Release, Van Hollen, Fischer Introduce Bipartisan Bill to Require Transparency in Corporate Stock Trading (June 24, 2021), <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-fischer-introduce-bipartisan-bill-to-require-transparency-in-corporate-stock-trading>.

<sup>28</sup> U.S. Securities and Exchange Commission, Speech, Chair Gary Gensler, Prepared Remarks at CFO Network Summit (June 7, 2021), <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>.

<sup>29</sup> *Id.*

In June, the SEC's Investor Advisory Committee held a panel discussion regarding Rule 10b5-1 plans.<sup>30</sup> I joined Dan Taylor, Associate Professor at the Wharton School of the University of Pennsylvania, and Keir Gumbs, then Vice President Deputy General Counsel and Deputy Corporate Secretary for Uber Technologies, as a participant on the panel.<sup>31</sup>

In prepared remarks prior to the Rule 10b5-1 panel discussion, SEC Chair Gary Gensler repeated the four proposed reforms to "freshen up Rule 10b5-1" that he described at the CFO Network Summit.<sup>32</sup> He concluded his remarks describing, consistent with CII's views, the need for Rule 10b5-1 reform stating:

Many companies may already do these things as they're considered best practices for 10b5-1 plans. I believe, though, that our capital markets might be better served if these practices were consistently required.

These issues speak to the confidence that investors have in the markets — that everybody, from working families to big institutions to insiders, has a level playing field. Anytime we can increase investor confidence in the markets, that's a good thing.<sup>33</sup>

In connection with the panel discussion, Taylor agreed that some existing Rule 10b5-1 practices, which include (1) the ability to cancel plans while in possession of material non-public information and (2) the lack of disclosure of the adoption, modification, or cancellation of plans, harms investors' confidence in the markets.<sup>34</sup> He also added, and CII agrees, that such practices prevent proactive risk assessments and policing, while also limiting access to information by institutional investors.<sup>35</sup>

Taylor also recommended that the SEC's pending final rule on Rule 144 Holding Period and Form 144 Filing should: (1) require all companies, including foreign issuers, to disclose trades of officers and directors on the Electronic Data Gathering, Analysis, and Retrieval system; (2) make Form 144 filings electronic; and (3) modify Form 4 to require disclosure of trades made pursuant

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<sup>30</sup> See Meeting Agenda, U.S. Securities and Exchange Commission, Investor Advisory Committee, June 10, 2021 (last visited Aug. 19, 2021), <https://www.sec.gov/spotlight/investor-advisory-committee/iac061021-agenda.htm>.

<sup>31</sup> *Id.* ("With regard to trading plans themselves, Dr. Taylor proposed that the SEC require the disclosure of the number of shares covered by a trading plan for each named executive officer in a company's annual proxy statement; requiring disclosure of the adoption, modification, and/or cancellation of trading plans by insiders on a Form 8-K; and adopting former SEC Chair Clayton's suggested four to six month cooling off period.")

<sup>32</sup> U.S. Securities and Exchange Commission, Public Statement, Chair Gary Gensler, Prepared Remarks at the Meeting of SEC Investor Advisory Committee (June 10, 2021), <https://www.sec.gov/news/public-statement/gensler-iac-2021-06-10>.

<sup>33</sup> *Id.*

<sup>34</sup> See Carlos Juarez & Melissa Pfeuffer, Investor Advisory Committee Discusses Rule 10b5-1, Mayer Brown Free Writings + Perspectives (June 11, 2021), available at <https://www.jdsupra.com/legalnews/investor-advisory-committee-discusses-7168505/#:~:text=Taylor%20argued%20that%20these%20attributes,to%20information%20by%20institutional%20investors> ("While covering the mechanics of Rule 10b5-1 plans, Dr. Taylor highlighted the ability for Rule 10b5-1 plans to be cancelled while a holder was in possession of material non-public information (MNPI), and noted that there are no requirements for insiders to disclose the adoption, modification, or cancellation of trading plans [and] Dr. Taylor argued that these attributes undermine investor confidence and prevent proactive risk assessments and policing, while also limiting access to information by institutional investors.").

<sup>35</sup> *Id.*

to 10b5-1 plans.<sup>36</sup> With regard to the SEC's pending proposed rule on trading plans themselves, Taylor suggested that the SEC proposal include requiring: (1) disclosure of the number of shares covered by a trading plan for each named executive officer in a company's annual proxy statement; (2) disclosure of the adoption, modification, and cancellation of trading plans by insiders on a Form 8-K; and (3) the adoption of a four to six month cooling off period.<sup>37</sup>

My prepared remarks in connection with the panel discussion included the following specific recommendations:

CII believes, generally consistent with its membership-approved 2020 Statement, that the IAC should recommend to the SEC the following actions to strengthen Rule 10b5-1:

First, the SEC should enhance the public disclosure of Rule 10b5-1 plans and related transactions. This may be accomplished by:

- Issuing a final rule in connection with the SEC's 2020 proposed rule on "Rule 144 Holding Period and Form 144 Filings" to require:
  - Form 4 and Form 5 indicate, via a mandatory check box, whether their reported transactions were made pursuant to Rule 10b5-1(c) rather than provide it as an option for the filer,
  - Disclosure of the adoption date of the respective Rule 10b5-1 plan on the forms, and
  - Electronic filing of Form 144.
- Propos[ing] a rule requiring that the "compensation discussion and analysis" section of the proxy statement include information on the number of shares covered under named executive officers' Rule 10b5-1 plans.
- Propos[ing] a rule requiring disclosure of Rule 10b5-1 plans, including disclosure of the adoption, modification, or cancellation of those plans, and the number of shares covered, to be filed on Form 8-K.

Second, the SEC should propose rules providing the following additional conditions to qualify for an "affirmative defense" under Rule 10b5-1:

- At least a three month "cooling off" period between plan adoption and initial trade execution; and
- Limitations on:
  - Multiple overlapping plans; and

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<sup>36</sup> *Id.* ("With regard to trades, he recommended requiring all companies, including foreign issuers, to disclose trades of officers and directors on EDGAR; making Form 144 filings electronic, as proposed by the SEC . . . and modifying Form 4 to require disclosure of trades made pursuant to 10b5-1 plans.").

<sup>37</sup> *Id.* ("With regard to trading plans themselves, Dr. Taylor proposed that the SEC require the disclosure of the number of shares covered by a trading plan for each named executive officer in a company's annual proxy statement; requiring disclosure of the adoption, modification, and/or cancellation of trading plans by insiders on a Form 8-K; and adopting former SEC Chair Clayton's suggested four to six month cooling off period.").



- On when and how plans may be cancelled.<sup>38</sup>

CII encourages the Commission to prioritize the issuance of a final rule on Rule 144 Holding Period and Form 144 Filing and a proposed rule on Rule 10b5-1 trading plans.

### CD&A Pay Target Metrics

As described on CII's website:

CII seeks improved transparency across a range of areas. These include the reconciliation to GAAP of non-GAAP metrics used to determine executive compensation. . . .<sup>39</sup>

It is estimated that over 95% of S&P 500 companies disclose a customized version of earnings that is not in accordance with GAAP.<sup>40</sup> These non-GAAP financial measures often exclude costs such as “[s]tock option expenses, write-offs [of] acquired intangibles, and restructuring charges.”<sup>41</sup> Some companies and some investors believe these exclusions are “not important for understanding the future value of the company.”<sup>42</sup>

The onset of COVID-19, appears to have further increased the use of non-GAAP financial measures, and perhaps more significantly, increased the gap between GAAP earnings and non-GAAP earnings.<sup>43</sup> As one legal expert observed earlier this year:

[I]n the sample group [of earnings releases for 2020 issued by companies in the S&P 500 that reported both GAAP and non-GAAP earnings], non-GAAP net income exceeded GAAP net income by \$132.3 billion—more than double the total GAAP net income of \$130.7 billion. By comparison, a 2019 op-ed co-authored by former SEC Commissioner Robert Jackson cited research showing that firms in the S&P 500 announced adjusted earnings that were, on average, 23% higher than GAAP earnings and pointed to 36 companies in the S&P 500 that, in 2015, announced non-GAAP earnings more than 100% higher than the GAAP equivalent, and 57 more companies that reported non-GAAP earnings that were 50% to 100% higher than GAAP. . . .<sup>44</sup>

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<sup>38</sup> Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee 10-11 (June 10, 2021) [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/June%2010%202021%20SEC%20IAC--\(final\)%20LN%20\(005\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/June%2010%202021%20SEC%20IAC--(final)%20LN%20(005).pdf) (footnotes omitted).

<sup>39</sup> CII Advocacy Priorities – 2021, Corporate Disclosure.

<sup>40</sup> See Vijay Govindarajan et al., Finance & Accounting, Mind the GAAP, Harv. Bus. Rev. (May 4, 2021), <https://hbr.org/2021/05/mind-the-gaap> (“95% of S&P 500 companies report both GAAP and non-GAAP earnings, showing its wide prevalence.”).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Cydney Posner, Is There a Resurgence in the Use of Non-GAAP Financial Measures?, Cooley PubCo (May 17, 2021), <https://cooleypubco.com/2021/05/17/resurgence-non-gaap-financial-measures> (“with the onset of COVID-19, there seems to have been something of a resurgence in the use of non-GAAP measures”).

<sup>44</sup> *Id.*

Thus, while non-GAAP financial measures may be useful in understanding a company's performance, they also may be misused to "opportunistically report higher profits."<sup>45</sup>

Since 2003 the SEC has generally required companies to give equal prominence to GAAP and non-GAAP financial measures, and explanation of why non-GAAP measures are better than GAAP, as well as provide a quantitative reconciliation of the numbers.<sup>46</sup> Yet an anomaly exists in that the SEC rules currently do not apply to the target measures for compensation contained in the Compensation, Discussion & Analysis (CD&A) section of a corporation's proxy statement.<sup>47</sup>

One analysis revealed that that in 2018, more than two-thirds of the S&P 500 companies used non-GAAP financial measures to establish compensation targets in the CD&A.<sup>48</sup> That same analysis indicated that about 30% of S&P 500 companies that used non-GAAP financial measures in the CD&A used identically labeled non-GAAP metrics in their earnings releases *but calculated the measures differently*.<sup>49</sup> Other research has indicated that non-GAAP metrics determined a significant percentage of CEO's annual cash bonuses, long-term stock awards, or both.<sup>50</sup>

CII believes that the CD&A is the most important source of information used by investors in evaluating executive compensation.<sup>51</sup> Investors often struggle to make sense of how companies assess performance when approving large compensation packages.<sup>52</sup>

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<sup>45</sup> Vijay Govindarajan et al., Finance & Accounting, Mind the GAAP, Harv. Bus. Rev.

<sup>46</sup> See Conditions for Use of Non-GAAP Financial Measures, Securities Act Release No. 8,176, Exchange Act Release No. 47,226 (Jan. 23, 2002), <https://www.sec.gov/rules/final/33-8176.htm> ("Regulation G contains a general disclosure requirement and a specific requirement of a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure.").

<sup>47</sup> See, e.g., Kevin Douglas, Navigating the Maze: Which SEC Rules Apply to Your Non-GAAP Financial Measure Disclosures, Bass Berry & Sims, Sec. L. Exch. (Oct. 24, 2019), <https://www.bassberrysecuritieslawexchange.com/non-gaap-financial-measures-disclosure/> ("where non-GAAP financial measures are disclosed as a target metric for compensatory purposes, the applicable non-GAAP requirements . . . reconciliation, equal prominence, etc. . . do not apply").

<sup>48</sup> See Olga Usvyatsky, Pros and Cons of Using Non-GAAP Metrics for Executive Compensation, Including ESG Considerations, Audit Analytics (June 11, 2019), <https://blog.auditanalytics.com/pros-and-cons-of-using-non-gaap-metrics-for-executive-compensation-including-esg-considerations/> ("In 2018, more than two-thirds of the S&P 500 companies used non-GAAP to establish compensation targets.").

<sup>49</sup> *Id.* ("some firms will double-adjust executive compensation metrics by identically labeling metrics in both earnings releases and executive pay but calculating the metrics differently").

<sup>50</sup> See Nicholas Guest et al., High Non-GAAP Earnings Predict Abnormally High CEO Pay\*, MIT, Sloan Sch. of Mgmt. 10 (May 2018), <https://www.hbs.edu/faculty/Shared%20Documents/conferences/2018-imo/GKP%20Non-GAAP%20Compensation%20Paper%20May%202018.pdf> ("For example, 38% of FirstEnergy's 2013 target CEO pay was granted for meeting a non-GAAP earnings target, 20% as an annual cash bonus and 18% as restricted stock.").

<sup>51</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 10 (Apr. 22, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/April%202021%20SEC%20Reg%20Flex%20Letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/April%202021%20SEC%20Reg%20Flex%20Letter%20(final).pdf) ("The CD&A is the most important source of information used by investors in evaluating executive compensation.").

<sup>52</sup> *Id.* ("Investors often struggle to make sense of how companies assess performance in approving large compensation packages.").

CII also believes the need for clarity is especially appropriate in the CD&A context because shareholders cast advisory votes on executive compensation regularly—every year at most public companies.<sup>53</sup> The CD&A also informs investors’ understanding of a corporation’s governance more generally, and in voting on the election of its directors.<sup>54</sup>

In 2019, CII filed a petition with the SEC asking that CD&A reports include an explanation of why non-GAAP measures are better for determining executive pay than GAAP, and that they include a quantitative reconciliation (or a hyperlink to a reconciliation in another SEC filing) of these two sets of numbers (2019 Petition).<sup>55</sup> More specifically, the 2019 Petition requests that the Commission: (1) initiate a rule change to amend Item 402(b) of Regulation S-K to eliminate Instruction 5; and (2) revise the Division of Corporation Finance’s Compliance & Disclosure Interpretations on Non-GAAP Financial Measures to be consistent with the aforementioned amendment and to provide that all non-GAAP financial measures presented in the proxy statement CD&A are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K and (3) require that the reconciliation be included within the proxy statement or made accessible through a hyperlink in the CD&A.<sup>56</sup>

In a December 2020 opinion piece in MarketWatch, Robert Pozen, a senior lecturer at the MIT Sloan School of Management and formerly vice chairman of Fidelity Investments and John Coates, now the General Counsel of the SEC, advocated for making the issues raised by the 2019 Petition a consensus agenda rulemaking item for the Commission.<sup>57</sup> Some might argue that the rulemaking envisioned by the 2019 Petition is unnecessary because companies will voluntarily improve their proxy disclosures to include an explanation of why non-GAAP measures are better for determining executive pay than GAAP and a quantitative reconciliation or a hyperlink to a quantitative reconciliation in another SEC filing. In anticipation of that argument, we reviewed the 2020 and 2021 proxy statements of the seven companies we highlighted in the 2019 Petition as examples of companies in need of better non-GAAP disclosure: Abbott Laboratories, Advanced Micro Devices, Altice USA, Cisco Systems, Cogent Communications Holdings, Oracle Corporation, and Revlon.<sup>58</sup> Per our review, it does not appear that any of the those companies have to-date improved their proxy disclosures to include an explanation of why non-

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 2.

<sup>56</sup> See *id.* at 1 (CII “respectfully submits this petition to the Securities and Exchange Commission . . . requesting that the Commission (1) initiate a rule change to amend Item 402(b) of Regulation S-K [17 CFR 229.402(b)] . . . to eliminate Instruction 5; and (2) revise the Division of Corporation Finance’s Compliance & Disclosure Interpretations on ‘Non-GAAP Financial Measures’ consistent with the aforementioned amendment and to provide that all non-GAAP financial measures presented in the proxy statement Compensation Discussion & Analysis . . . are subject to the requirements of Regulation G [17 CFR 244.101-102] and Item 10(e) of Regulation S-K [17 CFR 10(c)] and that the required reconciliation shall be included within the proxy statement or made accessible through a hyperlink in the CD&A.”).

<sup>57</sup> See John Coates & Robert Pozen, FA Center, Opinion; New SEC Chair Needs to Tackle These Big Issues so the Government Can Do a Better Job for Investors, Mkt.Watch (Dec. 17, 2020), <https://www.marketwatch.com/story/new-sec-chair-needs-to-tackle-these-5-big-issues-so-the-government-can-do-a-better-job-for-investors-2020-12-17> (“It should be a nonpartisan point of agreement to start a rulemaking process on the use of non-GAAP measures in compensation committee reports . . .”).

<sup>58</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 3-4 n.7.

GAAP measures are better for determining executive pay than GAAP. They also have not provided a quantitative Non-GAAP to GAAP reconciliation or even a hyperlink to a Non-GAAP to GAAP quantitative reconciliation in their 2020 or 2021 CD&A.<sup>59</sup>

CII believes it is imperative that the SEC require, at a minimum, that companies include a hyperlink to a GAAP reconciliation for any non-GAAP pay targets contained in their CD&A.<sup>60</sup> We, therefore, request, that the Commission promptly add to its regulatory agenda proposed rules along the lines set forth in the 2019 Petition.

### 3. Market Systems & Structure

We include under this heading our support for “the Commission [to] adopt amendments to the proxy voting rules that would allow a shareholder voting by proxy to choose among duly-nominated candidates in a contested election of directors.”<sup>61</sup> The Agenda categorizes this regulation as “Universal Proxy” in the “Final Rule Stage.”<sup>62</sup> Also included in this category is our

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<sup>59</sup> See Abbott Laboratories, Schedule 14A at 36, 38, 40 (Mar. 12, 2021), <https://www.sec.gov/Archives/edgar/data/1800/000104746921000592/a2242988zdef14a.htm> (various “adjusted” measures); Advance Micro Devices, Inc., Schedule 14A at 48, 56 (Mar. 31, 2021), <https://www.sec.gov/Archives/edgar/data/2488/000119312521102463/d85905ddef14a.htm> (adjusted non-GAAP net income and adjusted non-GAAP free cash flow); Altice USA, Inc., Schedule 14A at 16-17 (Apr. 29, 2021), [https://www.sec.gov/Archives/edgar/data/1702780/000162828021008291/a2021proxystatement.htm#idf1a5efed63a409097f239df52ce09ef\\_160](https://www.sec.gov/Archives/edgar/data/1702780/000162828021008291/a2021proxystatement.htm#idf1a5efed63a409097f239df52ce09ef_160) (adjusted EBITDA); Cisco Systems, Inc., Schedule 14A at 48 (Oct. 21, 2020), <https://www.sec.gov/Archives/edgar/data/858877/000119312520273689/d893355ddef14a.htm> (adjusted revenue and adjusted operating income); Cogent Communications Holdings, Inc., Schedule 14A at 43 (Apr. 28, 2021), [https://www.sec.gov/Archives/edgar/data/1158324/000110465921032599/tm212366-1\\_def14a.htm](https://www.sec.gov/Archives/edgar/data/1158324/000110465921032599/tm212366-1_def14a.htm) (adjusted EBITDA “as defined in the Company’s earnings releases”); Oracle Corporation, Schedule 14A at 40 (Sept. 18, 2020), <https://www.sec.gov/Archives/edgar/data/1341439/000119312520249194/d78987ddef14a.htm> (“non-GAAP pre-tax profit”); Revlon, Inc., Schedule 14A at 21-22 (Apr. 20, 2021), [https://www.sec.gov/Archives/edgar/data/0000887921/000114036121013412/nc10020840x1\\_def14a.htm](https://www.sec.gov/Archives/edgar/data/0000887921/000114036121013412/nc10020840x1_def14a.htm) (adjusted EBITDA and free cash flow); Abbott Laboratories, Schedule 14A at 34-36 (Mar. 13, 2020), <https://sec.report/Document/0001047469-20-001466/> (various “adjusted” measures); Advance Micro Devices, Inc., Schedule 14A at 40-43, 53 (Mar. 26, 2020), available at <https://seekingalpha.com/filing/4902379> (adjusted non-GAAP net income and Non-GAAP adjusted free cash flow); Altice USA, Inc., Schedule 14A at 19 (June 10, 2020), <https://sec.report/Document/0001628280-20-005457/> (Adjusted EBITDA and Capex Adjusted EBITDA); Cisco, Notice of Annual Meeting of Shareholders and Proxy Statement 27 (Oct. 18, 2019), [https://www.cisco.com/c/dam/en\\_us/about/annual-report/cisco-proxy-statement-2019.pdf](https://www.cisco.com/c/dam/en_us/about/annual-report/cisco-proxy-statement-2019.pdf) (adjusted revenue and adjusted operating income); Cogent Communications Holdings, Inc., Schedule 14A at 25 (May 6, 2020), available at <https://www.marketwatch.com/investing/Stock/ccoi/SecFilings?subview=secarticle&sid=1949137&guid=14000964&type=313> (“adjusted EBITDA”) (as defined in the Company’s earnings releases”); Oracle Corporation, Schedule 14A at 36 (Sept. 27, 2019), <https://www.sec.gov/Archives/edgar/data/1341439/000119312519257430/d755300ddef14a.htm> (“non-GAAP pre-tax profit”); Revlon, Inc., Schedule 14A at 22-23, 25-32 (Apr. 22, 2020), <https://sec.report/Document/0001140361-20-009411/> (includes no specific description of GAAP or non-GAAP targets).

<sup>60</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 11 (“CII and many of its members agree that it is imperative that the SEC require at least the same level of transparency in the proxy statement CD&A as in other public company documents.”).

<sup>61</sup> 86 Fed. Reg. at 41,374.

<sup>62</sup> *Id.* at 41,372.

support for the Commission’s project on “Proxy Process Amendments.”<sup>63</sup> And we are disappointed that that project remains categorized under “Long-Term Actions” on the Commission’s broader regulatory agenda.<sup>64</sup>

### Universal Proxy

As described on CII’s website:

On rare occasions, corporate director elections involve more candidates than available board seats, typically over a dispute about the company’s direction between incumbent board members and an activist investor. In these proxy contests, it makes common sense that shareowners should be able to support whatever combination of nominees they wish to represent them.

But under current rules, shareholders generally have that choice only if they vote in person. Shareholders voting by proxy (the vast majority of investors), have no practical ability to “split their ticket” and vote for the combination of shareowner nominees and management nominees that they believe best serve their economic interests. That is because neither company management nor dissidents are required to include all bona fide candidates on their proxy cards.

To fix this, CII **sought and supported** amending director election rules to require universal proxy cards that ensure “full flexibility” on both management’s and the dissident’s card. The SEC proposed a universal proxy rule in 2016 but has not finalized the rulemaking. CII continues to **advocate** for the adoption of a final rule to get this sensible reform across the finish line.<sup>65</sup>

While CII appreciated the Commission’s reopening of the comment period for universal proxy in May of this year,<sup>66</sup> as indicated in our June comment letter (June Letter):

CII continues to support the universal proxy system put forward in the 2016 Release, as detailed in our above-referenced December 28, 2016, letter.<sup>67</sup> CII believes the 2016 Release, if adopted, would deliver a critical benefit to the market: providing shareholders the ability to use either proxy card to vote for any combination of board nominees they support.<sup>68</sup>

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<sup>63</sup> Securities and Exchange Commission, Agency Rule List – 2021, View Rule, ORIA, OMB (last visited Aug. 16, 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM16>.

<sup>64</sup> *Id.*

<sup>65</sup> CII Advocacy Priorities – 2021, Market Systems & Structure (last visited Aug. 16, 2021), [https://www.cii.org/market\\_systems\\_structure](https://www.cii.org/market_systems_structure).

<sup>66</sup> Reopening of Comment Period for Universal Proxy, Exchange Act Release No. 91,603, Investment Company Act Release No. 34,246, 86 Fed. Reg. 24,364 (May 6, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-05-06/pdf/2021-08301.pdf>.

<sup>67</sup> *See, e.g.*, Letter from Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System 5 (June 7, 2021), <https://www.sec.gov/comments/s7-24-16/s72416-8888202-240904.pdf> (“OPERS appreciates the opportunity to repeat and reinforce its support for the Commission’s 2016 proposal.”).

<sup>68</sup> Letter from Glenn Davis, Deputy Director, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 2-3 (June 2, 2021),



The June Letter included as an appendix an August 2020 letter to the then SEC Director of Corporation Finance William Hinman (2020 Letter).<sup>69</sup> The 2020 Letter included a number of modest improvements to the 2016 Release.<sup>70</sup> Those modest improvements were developed by an “informal committee of market participants who share an interest in optimizing proxy voting logistics for non-exempt solicitations in connection with contested corporate director elections.”<sup>71</sup> The “Universal Proxy Working Group” was co-chaired by David A. Katz of Wachtell, Lipton, Rosen & Katz and Glenn Davis of CII staff.<sup>72</sup>

CII agrees with Chair Gary Gensler’s recent comments that a universal proxy would make proxy voting “more efficient.”<sup>73</sup> And we are unaware of any substantive issues that would prevent the Commission from promptly issuing a final rule. We, therefore, respectfully request that the Commission finalize the universal proxy rule without any further delay.

### Proxy Process Amendments

As described on CII’s website:

As shareholder voting is a core and essential element of corporate governance, shareholders have a keen interest in a reliable, transparent and cost-effective system for voting proxies. Yet the U.S. system of proxy voting is extraordinarily complex and inefficient. Many CII members lack confidence that their shares are always fully and accurately voted. Since 2010, market intermediaries have worked to develop a system to provide vote confirmation on request. But vote confirmation is not routine, easy or efficient. CII **believes** the SEC should explore steps it could take to require the various intermediaries that process proxy votes to cooperate to ensure that shareholders’ votes are counted accurately, and that proxy voters can confirm vote execution with a few clicks on a keyboard.<sup>74</sup>

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[https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/06-02-21%20CII%20letter%20to%20SEC%20Release%20No%2034-91603.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/06-02-21%20CII%20letter%20to%20SEC%20Release%20No%2034-91603.pdf).

<sup>69</sup> See *id.* at 1 (app.).

<sup>70</sup> See Universal Proxy, Exchange Act Release No. 79,164, Investment Company Act Release No. 32,339, 81 Fed. Reg. 79,122 (Oct. 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-11-10/pdf/2016-26349.pdf>.

<sup>71</sup> Letter from Glenn Davis, Deputy Director, Council of Institutional Investors to Vanessa A. Countryman, Secretary Securities and Exchange Commission at 1 (app.).

<sup>72</sup> *Id.* at 3 (app.)

<sup>73</sup> CNBC News Releases, CNBC Exclusive: CNBC Transcript: SEC Chair Gary Gensler Speaks with CNBC’s ‘Squawk Box’ Today (Aug. 4, 2021), <https://www.cnbc.com/2021/08/04/cnbc-exclusive-cnbc-transcript-sec-chair-gary-gensler-speaks-with-cnbc-squawk-box-today.html>; see, e.g., Letter from Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System at 5 (“We view the universal proxy as a good corporate governance reform and a commonsense step toward introducing additional fairness, clarity, and efficiency into the proxy voting process.”).

<sup>74</sup> CII Advocacy Priorities – 2021, Market Systems & Structure.



In a public statement in June, SEC Commissioners Hester Peirce and Elad Roisman indicated that “revisit[ing] proxy plumbing”<sup>75</sup> was an “important” agenda project.<sup>76</sup> We agree.

After first finalizing a rule on universal proxy, we believe the SEC should prioritize as a next step to improving proxy plumbing<sup>77</sup> addressing end-to-end vote confirmation.<sup>78</sup> As you are aware, many CII members continue to lack confidence that their shares are always fully and accurately voted. This is largely due to the complex daisy chain of the proxy voting infrastructure.

A nominee bank may have a larger share position on its books than is entitled to vote (often as a result of shares being out on loan). Institutional investors generally vote on electronic platforms and should be able to promptly get vote confirmations of how, and how many shares in each account, were voted on each voting item.

For several years, an informal group of issuers, institutional investors, custodian banks, broker-dealers and proxy service providers (including Broadridge and transfer agents) have worked on a protocol to provide end-to-end vote confirmation. But it appears to be stalled, largely over how to reconcile discrepancies between the issuer’s entitlement records and records reported by nominee banks and brokers.

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<sup>75</sup> U.S. Securities and Exchange Commission, Public Statement, Commissioner Hester M. Peirce & Commissioner Elad L. Roisman, Moving Forward or Falling Back? Statement on Chair Gensler’s Regulatory Agenda (June 14, 2021), <https://www.sec.gov/news/public-statement/moving-forward-or-falling-back-statement-chair-genslers-regulatory-agenda>.

<sup>76</sup> *Id.*; cf. Christina Thomas, Updates from the SEC’s Acting Director of the Division of Corporation Finance, Mayer Brown Free Writings + Perspectives (Apr. 8, 2021), available at <https://www.jdsupra.com/legalnews/updates-from-the-sec-s-acting-director-9823287/> (“Acting Director Coates, when asked about his priorities at the SEC, mentioned three items: the ‘unprecedented surge’ in special purpose acquisition company (SPAC) filings, reporting company ESG disclosures (including disclosure of climate change and potentially political spending), and improvement of the proxy voting system (commonly referred to as ‘proxy plumbing’”)); see also Transcript of U.S. Securities and Exchange Commission Investor Advisory Committee Meeting (Mar. 13, 2021) (on file with CII) (member of Investor as Owner Subcommittee stating that “we’d love to see some progress on that front [proxy plumbing] in 2021”).

<sup>77</sup> CII believes other steps should include pursuing rulemaking to require or permit the use of new technologies that would address, among other proxy plumbing issues, the traceability of shares. See Petition of Council of Institutional Investors for Review of an Order, Issued by Delegated Authority, Granting Approval of a Proposed Rule, Exchange Act Release No. 898 at 11 (Sept. 8, 2020), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2020/20200908%20Letter%20to%20SEC%20w%20attachments.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2020/20200908%20Letter%20to%20SEC%20w%20attachments.pdf) (“The Council believes – and has long believed – that traceability problems of the sort raised here should impel the Commission to update its ‘proxy plumbing’ regulations . . . .”); see also Rutgers Cent. for Corp. L. & Gov. et al., Report of the 2020 Multi-Stakeholder Working Group on Practices for Virtual Shareholder Meetings 3 (Dec. 10, 2020), [https://cclg.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12\\_10\\_2020.pdf](https://cclg.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12_10_2020.pdf) (“the 2020 Working Group [which included CII] was in strong agreement that solutions to proxy plumbing-related issues are essential for all shareholders entitled to vote . . . at shareholder meetings . . . to maintain the integrity of corporate governance in the U.S.”).

<sup>78</sup> See John Coates & Robert Pozen, FA Center, Opinion; New SEC Chair Needs to Tackle These Big Issues so the Government Can Do a Better Job for Investors, Mkt.Watch (opining that in recent years the Securities and Exchange Commission could have mandated “end-to-end vote confirmation that could improve proxy ‘plumbing,’ [but instead] the SEC set out examples of how proxy advisors could be sued.”); see also Cydney Posner, Blog: Coates named Acting Director of Corp Fin, Cooley PubCo (Feb. 3, 2021), available at <https://www.jdsupra.com/legalnews/blog-coates-named-acting-director-of-9232130/> (providing background on John Coates and the proxy plumbing issue, including end-to-end vote confirmation).

More specifically, many banks and brokers prefer to reconcile after the vote, to give their investor clients maximum ability to vote and as much time as possible to get loaned shares back. Many institutional investors prefer this leeway, too, especially if they lend out their shares. In contrast, transfer agents prefer to reconcile before the vote (or at least they think doing so is necessary to have end-to-end vote confirmation).

At the very least, CII would welcome some cajoling by SEC staff to prod the parties to work out a solution within a designated period (say, 90 days) or face SEC guidance or rulemaking. If the cajoling and prodding is ineffective, SEC staff should issue guidance or a proposed rulemaking that effectively requires issuers and their agents to exchange information about securities positions. This would allow them to correct any discrepancies sufficiently in advance of the annual meeting so that issuers could confirm votes back to nominees, who in turn would confirm votes with beneficial owners. The result would be an important advancement in proxy plumbing and responsive to the agenda's "proxy process amendments."<sup>79</sup>

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

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney". The signature is written in black ink and is positioned below the word "Sincerely,".

Jeffrey P. Mahoney  
General Counsel

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<sup>79</sup> Securities and Exchange Commission, Agency Rule List – 2021, View Rule, ORIA, OMB.