

Via E-Mail

March 16, 2023

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

Re: File No. S7-24-22

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.¹

This letter is in response to the Securities and Exchange Commission’s (SEC or Commission) invitation to comment on its semiannual regulatory agenda (Agenda).² In responding to the Agenda, we note that 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.³

¹ 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>.

² Regulatory Flexibility Agenda, Securities Act Release No. 11,118, Exchange Act Release No. 96,009, Investment Adviser Act Release No. 6,165, Investment Company Act Release No. 34,725, 88 Fed. Reg. 11,376 (Feb. 21, 2023), <https://www.federalregister.gov/documents/2023/02/22/2023-02043/regulatory-flexibility-agenda>.

³ See CII Advocacy Priorities (as of Mar. 16, 2023), https://www.cii.org/advocacy_priorities.

1. Investor Rights and Protections

We include under this heading our general support for the Commission’s recent issuance of final rules on “Listing Standards for Recovery of Erroneously Awarded Compensation,”⁴ and “Proxy Voting Advice.”⁵

Listing Standards for Recovery of Erroneously Awarded Compensation

CII applauds the SEC’s recent issuance of a final rule on “Listing Standards for Recovery of Erroneously Awarded Compensation.”⁶ We advocated for Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).⁷ In addition, for almost a decade we have advocated for the Commission’s adoption of a rule to implement the provisions of Section 954 that require clawbacks of unearned executive compensation in certain circumstances.⁸

We generally agree with a recent law firm analysis indicating that the final rule will, appropriately in our view, “reinforce recent regulatory and law enforcement emphasis on using executive compensation to promote desirable corporate behavior.”⁹

⁴ Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 11,126, Exchange Act Release No. 96,159, Investment Company Act Release No. 34,732, 87 Fed. Reg. 73,076 (Nov. 28, 2022), <https://www.federalregister.gov/documents/2022/11/28/2022-23757/listing-standards-for-recovery-of-erroneously-awarded-compensation>.

⁵ Proxy Voting Advice, Exchange Act Release No. 95,266, Investment Adviser Act Release No. 6,068, 87 Fed. Reg. 43,168 (July 19, 2022), <https://www.federalregister.gov/documents/2022/07/19/2022-15311/proxy-voting-advice>.

⁶ 88 Fed. Reg. at 11,376-77; *see* 87 Fed. Reg. at 73,076.

⁷ *See, e.g.*, Letter from Jeff Mahoney, General Counsel, CII et al., to The Honorable Nancy Pelosi, Speaker of the House (Dec. 2, 2008) (on file with CII); *see generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954 (July 21, 2020), <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf> (“(a) LISTING STANDARDS.—The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section. . . .(b) RECOVERY OF FUNDS.—The rules of the Commission under subsection (a) shall require each issuer to develop and implement a policy providing—“(1) for disclosure of the policy of the issuer on incentive based compensation that is based on financial information required to be reported under the securities laws; and “(2) 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.”).

⁸ *See, e.g.*, Letter from Jeff Mahoney, General Counsel, CII to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 4 (Aug. 27, 2015), <https://www.sec.gov/comments/s7-12-15/s71215-8.pdf> (“In light of our past and present policies and related public positions on clawbacks, CII generally supports the Proposal.”).

⁹ SEC Adopts Final Rule 10D-1 Regarding Clawbacks of Executive Compensation, Cahill (Jan. 20, 2023), https://www.cahill.com/publications/firm-memoranda/2023-01-20-sec-adopts-final-rule-10d-1-regarding-clawbacks-of-executive-compensation/_res/id=Attachments/index=0/SEC%20Adopts%20Final%20Rule%2010D-1%20Regarding%20Clawbacks%20of%20Executive%20Compensation..pdf.

As described on CII’s website, and as derived, in part, from our membership-approved corporate governance policies:¹⁰

[C]ompanies will have to put in place written policies providing that in the event that an accounting restatement is required, they will recover incentive-based compensation paid to current or former executives based on any misstated financial reporting measures. This applies to compensation received during the three-year period preceding the date the company is required to prepare the accounting restatement. The recoverable amount is the amount of incentive-based compensation received in excess of the amount that otherwise would have been received had it been determined based on the restated financial measure.¹¹

The stock exchanges have issued proposed listing standards to implement the SEC’s final rule.¹² CII currently plans to review and comment on those proposals.

Proxy Voting Advice

CII welcomes the SEC’s recent issuance of a final rule on “Proxy Voting Advice.” (2022 PVA Rule).¹³ We had long opposed certain federal regulations of proxy voting advice’ providers that are opposed by most institutional investors, including proposed requirements that “could create an inherent conflict that may undermine the independence of [a proxy voting advice research report, or] . . . could cause unnecessary and costly delays in the distribution of the report.”¹⁴ Those long-standing views led us to (1) strongly oppose to SEC’s 2020 final rule on

¹⁰ See CII, Policies on Corporate Governance, § 5.7 Compensation Recovery (updated Mar. 6, 2023), https://www.cii.org/corp_gov_policies (“Clawback policies should ensure that boards can refuse to pay and/or 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 [and] [c]ompanies should disclose such policies and decisions to invoke their application.”).

¹¹ CII Advocacy Priorities, Investor Rights & Protections (as of Mar. 16, 2023),

https://www.cii.org/investor_rights_protections.

¹² See Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Adopt New Section 303A.14 of the NYSE Listed Company Manual To Establish Listing Standards Related to Recovery of Erroneously Awarded Incentive-Based Executive Compensation, Exchange Act Release No. 97,055, 88 Fed. Reg. 15,480 (Mar. 13, 2023),

<https://www.federalregister.gov/documents/2023/03/13/2023-05035/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>; Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Establish Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation, Exchange Act No. 97,060, 88 Fed. Reg. 15,500 (Mar. 13, 2023), <https://www.federalregister.gov/documents/2023/03/13/2023-05040/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

¹³ 88 Fed. Reg. at 11,377-78; see 87 Fed. Reg. at 43,168.

¹⁴ Statement of Ann Yerger, Executive Director, CII, to the Subcommittee on Capital Markets and Government Sponsored Enterprises of the Committee on Financial Services, United States House of Representatives 6 (June 5, 2013),

https://www.cii.org/files/publications/misc/06_05_13_cii_proxy_advisor_hearing_submission_ann_yerger.pdf.

“Exemptions From the Proxy Rules for Proxy Voting Advice,”¹⁵ and (2) generally support the 2022 PVA Rule.¹⁶

As further explained on CII’s website:

The SEC on July 13, 2022, rescinded key provisions in its **2020 rules** that were adopted in July 2020 but never enforced. CII had advocated strenuously against the rules. Those provisions required proxy advisory firms to 1) make their advice available to companies that are the subject of their advice at, or before, they make the advice available to their clients; and 2) provide their clients with notice of any written statements by subject companies regarding the proxy advisory firms’ voting advice.

Shortly after the SEC proposed the rules in 2020, Institutional Shareholder Services (ISS), a leading proxy advisory firm, sued the SEC to overturn them and CII and several member funds filed an **amicus brief** in support of that suit. The suit is still pending because it addresses a provision in the rules that the SEC left intact. That provision classifies proxy voting advice as a “solicitation” subject to proxy rules under federal securities law.^[17] Classifying proxy advice as a solicitation potentially subjects proxy advisory firms to burdensome filing rules and challenges their independence and free speech rights in conducting the financial analysis that informs their advice.

. . . Although the rescission went into effect on September 18, the battle over proxy advisor rules is expected to continue in the courts and Congress.¹⁸

2. Corporate Disclosure

We include under this heading our support for the Commission’s recent issuance of a final rule on “Pay Versus Performance,”¹⁹ and our support for adding a new project to the Agenda to close

¹⁵ Exemptions From the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 89,372, 85 Fed. Reg. 55,082 (Sept. 9, 2020), <https://www.federalregister.gov/documents/2020/09/03/2020-16337/exemptions-from-the-proxy-rules-for-proxy-voting-advice>; see Press Release, CII, Leading Investor Group Dismayed by SEC Proxy Advice Rules (July 22, 2020), https://www.cii.org/july22_sec_proxy_advice_rules (“we are concerned that the rules and guidance the SEC approved today could result in delays in distribution of proxy advice, driving up costs for investors, impairing the independence of proxy advice and causing uncertainty for institutional investors.”).

¹⁶ See Press Release, CII, Leading Investor Group Applauds SEC Rollback of Onerous Proxy Advice Rules (July 13, 2022), [https://www.cii.org/files/07_13_22_sec_rescinds_proxyadvice_provisions\(2\).pdf](https://www.cii.org/files/07_13_22_sec_rescinds_proxyadvice_provisions(2).pdf) (“The Council of Institutional Investors applauds the Securities and Exchange Commission’s elimination today of onerous provisions in rules the Commission adopted in 2020 that could have harmed the independence, cost and timeliness of proxy voting advice.”).

¹⁷ Cf. Sarah C. Haan, Voting Rights in Corporate Governance: History and Political Economy, S. Cal. L. Rev. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4299462 (discussing the history of proxy solicitation that may support the view that “solicitation” under the federal securities law has a narrow meaning).

¹⁸ CII Advocacy Priorities, Investor Rights & Protections.

¹⁹ 88 Fed. Reg. at 11,376, 11,378; see Pay Versus Performance, Exchange Act Release No. 95,607, 87 Fed. Reg. 55,134 (Sept. 8, 2022), <https://www.federalregister.gov/documents/2022/09/08/2022-18771/pay-versus-performance>.

a loophole in the regulation governing the use of non-Generally Accepted Accounting Principles (GAAP) metrics.²⁰

Pay Versus Performance

CII commends the SEC's recent issuance of a final rule on "Pay Versus Performance."²¹ We had long advocated for implementation of Section 953(a) of Dodd-Frank²² to provide additional quantitative information illustrating the relationship between executive compensation and the financial performance of the issuer.²³ As described on CII's website, and as derived, in part, from with our membership-approved corporate governance policies:²⁴

The SEC August 25 adopted final rules implementing pay-versus-performance disclosure requirements for companies. The new rules, required under the 2010 Dodd-Frank Act, give firms discretion in what they report as the most significant measures considered when gauging performance and tying it to pay. Importantly, this information will supplement, not supplant, the disclosure of performance as measured by total shareholder return.²⁵

CII generally agrees with SEC Chair Gensler "that this rule will help investors receive the consistent, comparable, and decision-useful information they need to evaluate executive compensation policies."²⁶ That said, CII is disappointed that the final rule includes language that may expand the use of non-GAAP financial measures for determining executive compensation²⁷

²⁰ See CII Advocacy Priorities, Corporate Disclosure (as of Mar. 16, 2023), https://www.cii.org/corporate_disclosure ("Transparency of executive compensation").

²¹ 87 Fed. Reg. at 55,134.

²² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(a) ("DISCLOSURE OF PAY VERSUS PERFORMANCE.—Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n), as amended by this title, is amended by adding at the end the following: '(i) DISCLOSURE OF PAY VERSUS PERFORMANCE.—The Commission shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer a clear description of any compensation required to be disclosed by the issuer under section 229.402 of title 17, Code of Federal Regulations (or any successor thereto), including information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions [and] [t]he disclosure under this subsection may include a graphic representation of the information required to be disclosed.'").

²³ See, e.g., Letter from Jeff Mahoney, General Counsel, CII to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission 1-2 (Aug. 16, 2013), https://www.cii.org/files/issues_and_advocacy/correspondence/2013/08_16_13_cii_letter_to_sec_pay_vs_performance.pdf (indicating that CII was an active proponent of Section 953(a) of Dodd-Frank Act and had an interest in how the Securities and Exchange Commission intended to implement the rule).

²⁴ See CII, Policies on Corporate Governance, § 5.3 Transparency of Compensation ("To the extent that compensation is performance-based, it is critical that investors have information to evaluate the choice of metrics, how those metrics relate to key company strategic goals, and how challenging the goals are.").

²⁵ CII Advocacy Priorities, Corporate Disclosure.

²⁶ Press Release, Securities and Exchange Commission, SEC Adopts Pay Versus Performance Rules (Aug. 25, 2022), <https://www.sec.gov/news/press-release/2022-149>.

²⁷ See 87 Fed. Reg. at 55,160 ("we recognize that a registrant's Company-Selected Measure, or additional measures included in the table, may be non-GAAP financial measures [and] [u]nder existing CD&A requirements, if a company discloses a target level that applies a non-GAAP financial measure in its CD&A, the disclosure will not be

without adopting our 2019 recommendation to “amend Item 402(b) of Regulation S-K [28] to close a loophole [by requiring] . . . a quantitative reconciliation of those metrics to the most directly comparable GAAP financial measures.”²⁹

Non-GAAP Financial Measures

As indicated, CII reiterates the request it first made in a 2019 rulemaking petition (2019 Petition) that the Commission add a new project to its Agenda to require disclosure of a quantitative reconciliation to GAAP of non-GAAP measures used to determine executive compensation.³⁰ As explained on CII’s website, and as derived, in part, from our membership-approved corporate governance policies:³¹

CII is also pressing the SEC to close a loophole that permits the use of non-GAAP earnings in the Compensation, Discussion & Analysis (CD&A) section of a company’s proxy statement. While non-GAAP financial measures can be useful in understanding a company’s performance, they can be misused. Since 2003, the SEC has generally **required** companies to give equal prominence to GAAP and non-GAAP financial measures as well as provide a quantitative reconciliation of the numbers. Yet an anomaly exists in that the existing SEC rules currently do not apply to the **target measures for compensation** contained in the CD&A, which is the important source of information investors use to evaluate executive compensation. Investors often struggle to make sense of how companies assess performance in approving large compensation packages. In 2019 CII filed a **petition** with the SEC asking that the CD&A reports include an explanation of why non-GAAP measures are better for determining executive pay than GAAP,

subject to the general rules regarding disclosure of non-GAAP financial measures, but the company must disclose how the number is calculated from its audited financial statements.”).

²⁸ See Executive Compensation, 17 C.F.R. § 229.402(b), Item 5 (last amended Dec. 29, 2022), *available at* <https://www.law.cornell.edu/cfr/text/17/229.402> (“Disclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G (17 CFR 244.100 - 102) and Item 10(e) (§ 229.10(e)); however, disclosure must be provided as to how the number is calculated from the registrant’s audited financial statements.”).

²⁹ Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 3 (Feb. 24, 2022), [https://www.cii.org/files/issues_and_advocacy/correspondence/2022/February%202022%20CII%20P4P%20letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2022/February%202022%20CII%20P4P%20letter%20(final).pdf).

³⁰ See Letter from Kenneth A. Bertsch, Executive Director, CII 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 (“The Council of Institutional Investors respectfully submits this petition to the Securities and Exchange Commission (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 (CD&A) 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”).

³¹ See CII, Policies on Corporate Governance, § 5.5c Performance Based Compensation (“Performance-based compensation plans are a major source of today’s complexity and confusion in executive pay [and] [m]etrics for performance and performance goals can be numerous and wide-ranging.”).

and that they include a quantitative reconciliation (or a hyperlink to reconciliation in another SEC filing) of these two sets of numbers.³²

We note that it has been estimated that about two-thirds of S&P 500 firms announce non-GAAP earnings, which are significantly larger than GAAP earnings on average.³³ And that many of these same companies use non-GAAP earnings as a key criterion in setting executive compensation.³⁴

A recent research paper examining non-GAAP earnings and executive pay provides new empirical evidence indicating that companies are engaging in an opportunistic use of non-GAAP earnings to justify higher executive compensation.³⁵ The paper concludes, generally consistent with our 2019 Petition, that:

[C]ompensation committees of all public companies might consider (i) prominently disclosing the amount of difference between the non-GAAP criteria used by the committee and the relevant GAAP numbers; and (ii) providing a justification for why the committee chose to use non-GAAP criteria in setting executive compensation.³⁶

Some might argue that the 2019 Petition is unnecessary because companies will voluntarily improve their proxy disclosures to include a quantitative reconciliation or a hyperlink to a quantitative reconciliation in another SEC filing. In anticipation of that argument, we reviewed the 2020, 2021, and 2022 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.³⁷ Based on our review, it does not appear that any of the companies have to-date provided a quantitative non-GAAP to GAAP reconciliation or even a hyperlink to a quantitative reconciliation in their 2020, 2021, or 2022 CD&As.³⁸

³² CII Advocacy Priorities, Corporate Disclosure.

³³ See Nicholas Guest et al., How Do Large Positive Non-GAAP Earnings Adjustments Predict Abnormal High CEO Pay?, 97(6) Accounting Review 297 (Oct. 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030953 (“About two-thirds of S&P 500 firms announce non-GAAP earnings, which are 23% larger than GAAP earnings on average”).

³⁴ See *id.* at 1 (“Moreover, many of these same companies use non-GAAP earnings as a key criterion in setting CEO pay”).

³⁵ See *id.* at 9 (“it appears likely that an economically meaningful fraction of CEO pay, especially of CEOs with a heightened need to justify their pay, is attributable to opportunistic use of non-GAAP earnings [and] . . . legitimizing high CEO pay appears to be one of potentially multiple reasons for firms to use non-GAAP earnings in contracting.”).

³⁶ *Id.* at 37.

³⁷ See Letter from Kenneth A. Bertsch, Executive Director, CII et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 3-4 n.7.

³⁸ See Abbott Laboratories, Schedule 14A at 35 (Mar. 18, 2022), <https://sec.report/Document/0001206774-22-000778/> (various adjusted measures); Advance Micro Devices, Inc., Schedule 14A at 57 (Mar. 31, 2022), <https://ir.amd.com/sec-filings/filter/proxy-filings/content/0001193125-22-091792/0001193125-22-091792.pdf> (adjusted non-GAAP net income and adjusted free cash flow); Altice USA, Inc., Schedule 14A at 14-16 (Apr. 29, 2022), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001702780/5f1ff5e1-64be-4d60-b0e5-fb7ea08cacaec.pdf> (adjusted EBITDA & adjusted EBITDA CapEx); Cisco Systems, Inc., Schedule 14A at 37, 42 (Oct. 18, 2022),

CII believes it is imperative that the SEC propose a rule to require, at a minimum, that companies include a hyperlink to a GAAP reconciliation for any non-GAAP pay targets contained in their CD&A.³⁹

3. Market Systems & Structure

We include under this heading our repeated requests that the SEC give a higher priority to the Agenda project on “Proxy Process Amendments.”⁴⁰ We would also include under this heading

https://www.bamsec.com/filing/110465922109711/1?cik=858877&hl=167149:167185&hl_id=nyjvjttr (non-GAAP revenues, operating income, and earnings per share); Cogent Communications Holdings, Inc., Schedule 14A at 27 (Mar. 14, 2022), https://www.cogentco.com/files/docs/about_cogent/investor_relations/reports/proxy_statement_2022.pdf (“adjusted EBITDA”) (as defined in the Company’s earnings releases”); Oracle Corporation, Schedule 14A at 37, 42-43, 45-47 (Sept. 23, 2022), https://www.bamsec.com/filing/119312522250158/1?cik=1341439&hl=138234:138270&hl_id=ey861fykc (non-GAAP revenues, gross margin, and operating income); Revlon, Inc., Schedule 14A at 20 (Apr. 21, 2022), <https://sec.report/Document/0001140361-22-015295/> (adjusted EBITD); 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#idf1a5fed63a409097f239df52ce09ef_160 (adjusted EBITDA); Cisco Systems, Inc., Schedule 14A at 25 (Oct. 22, 2021), https://www.sec.gov/Archives/edgar/data/858877/000119312521306708/d174342ddef14a.htm#toc174342_22 (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 (adjusted EBITDA “as defined in the Company’s earnings releases”); Oracle Corporation, Schedule 14A at 34 (Sept. 24, 2021), https://www.sec.gov/Archives/edgar/data/1341439/000119312521282422/d162163ddef14a.htm#toc162163_25 (“non-GAAP pre-tax profit”, “non-GAAP operating income”); Revlon, Inc., Schedule 14A at 21-22 (Apr. 20, 2021), 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 (adjusted revenue and adjusted operating income); Cogent Communications Holdings, Inc., Schedule 14A at 25 (May 6, 2020), <https://www.sec.gov/Archives/edgar/data/0001158324/000104746920001415/a2240954zdef14a.htm> (“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”); cf. 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).

³⁹ See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, CII 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.”).

⁴⁰ Agency Rule List - Fall 2022, Securities and Exchange Commission, Off. Info. & Reg. Aff., Off. Mgmt. & Budget (last visited Mar. 16, 2023),

https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤t

our appreciation for the Commission’s recent issuance of a proposed rule in connection with the Agenda project on “Equity Market Structure Modernization.”⁴¹

Proxy Process Amendments

As indicated, we are disappointed that the Commission’s project on “Proxy Process Amendments” continues to remain categorized under “Long-Term Actions” on the Agenda.⁴² Since the “Universal Proxy” rule has been finalized and is now being implemented,⁴³ we believe the SEC should prioritize as a next step to improving proxy plumbing addressing end-to-end vote confirmation.⁴⁴ 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 and for a decade, a mechanism for confirming that votes were counted as intended has eluded market participants.

[PubId=202210&showStage=longterm&agencyCd=3235&csrf_token=C8939C11BAA1D4BD935DE555B47B2763C2DFBD38CE2AB36A391382CED21A07FA27D1C7B8A26D7E9E30EAB55DCE0FEC520876](https://www.cii.org/files/issues_and_advocacy/correspondence/2022/September%207%202022%20Reg%20Flex%20Letter%20(final).pdf) (categorizing “Proxy Process Amendments” in “Long-Term Actions”); *see, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 13 (Sept. 7, 2022), [https://www.cii.org/files/issues_and_advocacy/correspondence/2022/September%207%202022%20Reg%20Flex%20Letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2022/September%207%202022%20Reg%20Flex%20Letter%20(final).pdf) (“we believe the SEC should prioritize as a next step improving proxy plumbing by addressing end-to-end vote confirmation”).

⁴¹ Agency Rule List - Fall 2022, Securities and Exchange Commission, Off. Info. & Reg. Aff., Off. Mgmt. & Budget (last visited Mar. 16, 2023),

https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=C8939C11BAA1D4BD935DE555B47B2763C2DFBD38CE2AB36A391382CED21A07FA27D1C7B8A26D7E9E30EAB55DCE0FEC520876 (categorizing “Equity Market Structure Modernization” in the “Proposed Rule Stage”).

⁴² Agency Rule List - Fall 2022, Securities and Exchange Commission, Off. Info. & Reg. Aff., Off. Mgmt. & Budget (last visited Mar. 16, 2023),

https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=202210&showStage=longterm&agencyCd=3235&csrf_token=427569BD6023A77521C18F989594918AC0612D72348B8C426E3DB402BDFE8BB2CEE5C0F33527B60D53AC3BB0FB653D98DBB.

⁴³ Universal Proxy, Exchange Act Release No. 93,596, 86 Fed. Reg. 68,330 (Dec. 1, 2021),

<https://www.federalregister.gov/documents/2021/12/01/2021-25492/universal-proxy>.

⁴⁴ *See* Commissioner Allison Herren Lee, Statement, Protecting the Independence of the Proxy Voting Process: Statement on Amendments Governing Proxy Voting Advice (July 13, 2022),

<https://www.sec.gov/news/statement/lee-statement-amendments-governing-proxy-voting-advice-071322> (“We know . . . that many shareholders are unable to confirm their shares are voted in accordance with their instructions, a concern that could be addressed through required end-to-end vote confirmations”); 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> (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, JDSUPRA (Feb. 3, 2021), <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).

. . . [I]n December 2021, a working group of banks, broker-dealers, public companies, tabulators, transfer agents and others in the proxy service community [agreed](#) to provide vote confirmation for 2022 annual shareholder meetings of Fortune 500 companies.⁴⁵

More specifically, Broadridge Financial Solutions, Computershare, EQ and Mediant agreed to provide vote confirmation for all annual meetings for which they tabulate votes. And CII co-chaired the working group with the Society for Corporate Governance.

Unfortunately, the voting confirmation process that the working group attempted to put in place proved unworkable for investors. The process was so cumbersome and time-consuming that asset owners and asset managers declined to use it, with limited exceptions.

We note that a legal commentator's recent analysis of the status the Proxy Process Amendments project stated:

Proxy Process Amendments—Corp Fin may recommend that the SEC propose amendments to the proxy rules to facilitate improvements in the proxy system with respect to the . . . processing of shareholder votes (including proxy vote confirmation) . . . otherwise referred to as proxy plumbing issues. There has been substantial criticism of the current byzantine system of share ownership and intermediaries that has accreted over time. Shareholder voting is viewed as fundamental to keeping boards and managements accountable, and the current system of proxy plumbing has been criticized as inefficient, opaque and, all too often, inaccurate. . . . [SEC Chair Gary] Gensler is quoted at a Society for Corporate Governance conference in 2022 as advising companies that are “unhappy with the shareholder voting mechanics” to “suggest fixes to the SEC.” The SEC apparently hasn’t finished proposals related to proxy plumbing and “would benefit from hearing from companies about how to improve proxy plumbing, even if the agency isn’t ready to propose changes.” According to the article, Gensler urged companies not to “wait for the proposal,” but rather to “engage.”⁴⁶

The aforementioned working group experience and SEC Chair Gensler's potential interest in related rulemaking has led CII to conclude that the Commission should consider promptly issuing a proposal requiring end-to-end vote confirmations to end-users, potentially with a phase-in approach starting with the largest companies. The proposed rule could require, as former SEC Commissioner Allison Herren Lee has suggested, “all participants in the voting chain to grant to issuers, or their transfer agents or vote tabulators, access to certain information relating to voting records, for the limited purpose of enabling a shareholder or securities intermediary to confirm

⁴⁵ CII Advocacy Priorities, Market Systems & Structure (as of Mar. 16, 2023), https://www.cii.org/market_systems_structure.

⁴⁶ Cydney Posner, SEC Crams Much into Packed Fall 2022 Agenda, Cooley (Jan. 9, 2023), https://cooleypubco.com/2023/01/09/packed-sec-fall-2022-agenda/?utm_source=mondaq&utm_medium=syndication&utm_term=CorporateCommercial-Law&utm_content=articleoriginal&utm_campaign=article.

how a particular shareholder's shares were voted."⁴⁷ We believe proposing such a rule could provide a basis for continuously uncovering and remediating some of the long-standing flaws in the proxy plumbing system.

Equity Market Structure Modernization

CII congratulates the Commission for recently issuing four proposed rules in connection with the Agenda project on "Equity Market Structure Modernization"⁴⁸ As described on CII's website, and as derived, in part, from our membership-approved policies:⁴⁹

In response to an invitation to comment on the SEC's semiannual regulatory agenda, CII sent the commission a **letter** September 7 listing the topics that it hopes the agency will prioritize in its rulemakings. In that letter, CII urged the SEC to issue a proposed rule that includes provisions addressing best execution and stock exchange rebates. It asked the commission to consider proposing a new best execution rule with provisions that allow the commission to enforce a standard under which each investor is entitled to receive the best execution of their orders on an order-by-order basis. The letter also requested that the SEC propose that stock exchange rebate fee schedules be structured so that the total rebate benefit received is more transparent and investors can understand the amount of rebate relating to their order at the time of a trade execution.⁵⁰

⁴⁷ Commissioner Allison Herren Lee, Statement, Protecting the Independence of the Proxy Voting Process: Statement on Amendments Governing Proxy Voting Advice n.6.; cf. Commissioner Allison Herren Lee, Speech at the 2021 ICI Mutual Funds and Investment Management Conference: Every Vote Counts: The Importance of Fund Voting and Disclosure (Mar. 17, 2022), <https://www.sec.gov/news/speech/lee-every-vote-counts> ("Commenters have suggested tackling this issue in a variety of ways, such as requiring intermediaries, including transfer agents, to transmit the necessary information to confirm votes, while others have suggested that we explore use of a permissioned blockchain to record beneficial ownership and execute votes.").

⁴⁸ Agency Rule List – Fall 2022, Securities and Exchange Commission, Off. Info. & Reg. Aff., Off. Mgmt. & Budget; see Regulation Best Execution, Exchange Act Release No. 96,496, 88 Fed. Reg. 5,440 (proposed Jan. 27, 2023), <https://www.federalregister.gov/documents/2023/01/27/2022-27644/regulation-best-execution>; Disclosure of Order Execution Information, Exchange Act Release No. 96,493, 88 Fed. Reg. 3,786 (proposed Jan. 20, 2023), <https://www.federalregister.gov/documents/2023/01/20/2022-27614/disclosure-of-order-execution-information>; Order Competition Rule, Exchange Act Release No. 96,495, 88 Fed. Reg. 128 (proposed Jan. 3, 2023), <https://www.federalregister.gov/documents/2023/01/03/2022-27617/order-competition-rule>; Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Exchange Act Release No. 96,494, 87 Fed. Reg. 80,266 (proposed Dec. 29, 2022), <https://www.federalregister.gov/documents/2022/12/29/2022-27616/regulation-nms-minimum-pricing-increments-access-fees-and-transparency-of-better-priced-orders>.

⁴⁹ See CII Policies, Policies on Other Issues, Guiding Principles for Trading Practices, Commission Levels, Soft Dollars and Commission Recapture (adopted Mar. 31, 1998), https://www.cii.org/policies_other_issues#principles_trading_commission_softdollar ("Clarity and transparency of disclosure of all money management and brokerage arrangements is essential, and it is up to plan sponsors to require it [and] [s]imple reliance on brokers, money managers and consultants for volunteered information is insufficient to discharge the obligations of plan fiduciaries. Plan sponsors should require regular reports and affirmative representations that fiduciaries are pursuing best execution in their trading practices.").

⁵⁰ CII Advocacy Priorities, Market Systems & Structure.

We are pleased that the topics we identified in our September 7 letter appear to be addressed, at least in part, in the SEC's proposals on "Regulation Best Execution"⁵¹ and "Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders."⁵²

We are in the process of carefully reviewing all four SEC proposals. And we currently plan to comment on the topics previously identified and potentially other topics contained in the proposals that are implicated by our membership-approved policies.

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".

Jeffrey P. Mahoney
General Counsel

⁵¹ See, e.g., 88 Fed. Reg. at 5,440 ("Proposed Regulation Best Execution would enhance the existing regulatory framework concerning the duty of best execution by requiring detailed policies and procedures for all broker-dealers and more robust policies and procedures for broker-dealers engaging in certain conflicted transactions with retail customers, as well as related review and documentation requirements.").

⁵² See, e.g., 87 Fed. Reg. at 80,292 (proposing to "Require That All Exchange Fees and Rebates Be Determinable at the Time of an Execution").