Council of Institutional Investors®
The voice of corporate governance

Via E-Mail

February 12, 2018

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

Re: File Number S7-07-17

Dear Mr. Secretary:

I am writing in response to the Securities and Exchange Commission's (SEC or Commission) invitation to comment on its semiannual regulatory agenda.[1] We respectfully reiterate our prior request that the following three individual agenda items currently listed under the "Division of Corporation Finance—Long Term Actions" be given a higher priority: "Universal Proxy," "Listing Standards for Recovery of Erroneously Awarded Compensation," and "Disclosure of Hedging by Employees, Officers and Directors."[2] In addition, we also respectfully request that the Commission add to its agenda for rulemaking actions amendments to Rule 10b5-1 trading plans.

The Council of Institutional Investors (CII), is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $3.5 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than $25 trillion in assets under management.[3]

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[1] Regulatory Flexibility Agenda, Securities Act Release No. 10,424, Exchange Act Release No. 81,838, Investment Adviser Act Release No. 4,789, Investment Company Act Release No. 32,857, 83 Fed. Reg. 2,022 (Jan. 12, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-01-12/pdf/2017-28247.pdf.

[22] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission (Sept. 7, 2017), http://www.cii.org/files/issues_and_advocacy/correspondence/2017/September%207,%202017%20SEC%20Reg%20Flex%20Letter%20(final).pdf.

[3] 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.

Universal Proxy

For the benefit of both institutional and retail investors, we believe the Commission should make a priority of finalizing a rule on universal proxy.

As you are aware, on October 2016, the SEC issued for public comment a proposal that would require proxy contestants for corporate board seats to provide shareowners with a universal proxy card that includes the names of both management and dissident director nominees.[4] The universal proxy proposal seeks to address a long-standing problem, was highly careful and well-thought-out, and was responsive to two CII detailed rule making petitions.[5]

The comment period for the universal proxy proposal ended on January 9, 2017.[6] Forty-one comment letters were received in response to the proposal.[7]

A large majority of commentators supported the universal proxy proposal. In addition to CII,[8] the Investment Company Institute[9] and the CFA Institute,[10] commentators supporting the proposal included the following investors:

Almitas Capital[11]

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[4] Press Release, SEC Proposes Amendments to Require Use of Universal Proxy Cards (Oct. 26, 2016), https://www.sec.gov/news/pressrelease/2016-225.html.

[5] Letter from Glenn Davis, Director of Research, Council of Institutional Investors, to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission (June 12, 2015), https://www.sec.gov/rules/petitions/2015/petn4-686.pdf; Letter from Glenn Davis, Director of Research, Council of Institutional Investors, to Ms. Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission (Jan. 8, 2014), https://www.sec.gov/rules/petitions/2014/petn4-672.pdf.

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

[7] U.S. Securities and Exchange Commission, Comments on Proposed Rule: Universal Proxy (last viewed Feb. 12, 2018), https://www.sec.gov/comments/s7-24-16/s72416.htm.

[8] Letter from Ken Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission 3 (Dec. 28, 2017) ("With minor enhancements, the proposed framework will provide for a constructive universal proxy regime that gives greater effect to existing shareholder rights."), http://www.cii.org/files/issues_and_advocacy/correspondence/2016/12_28_16_comment_letter_SEC_universal_proxy.pdf.

[9] Letter from Dorothy M. Donohue, Deputy General Counsel, Investment Company Institute 9 (Dec. 19, 2016) ("In general, the adoption of a mandatory universal proxy for operating companies would serve the public interest in giving all shareholders the same voting options, whether they vote by proxy or in person."), https://www.sec.gov/comments/s7-24-16/s72416-1431117-129844.pdf.

[10] Letter from James Allen, CFA, Head, Capital Markets Policy, CFA Institute et al. 1 (Jan. 29, 2017) ("We commend the SEC for addressing this shortcoming of the board voting process by introducing a new Universal Proxy ballot rule that will allow shareowners to effectively split their voting ticket if they chose to do so – without having to attend a company's annual meeting in person."), https://www.sec.gov/comments/s7-24-16/s72416-1473944-130452.pdf.

[11] Letter from Ron Mass, Managing Director, Almitas Capital 1 (Feb. 3, 2017) ("I support the Commission's proposal to require the use of universal proxies for all contested elections of directors . . . ."), https://www.sec.gov/comments/s7-24-16/s72416-1574799-131790.pdf.

California State Teachers' Retirement System[12]
California Public Employees' Retirement System[13]
Colorado Public Employees' Retirement Association[14]
Fidelity Investments[15]
Florida State Board of Administration[16]
Hermes Equity Ownership Services Limited[17]
Ohio Public Employees Retirement System[18]
Comptroller, State of New York[19]
Trian Fund Management,[20]and

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[12] Letter from Anne Sheehan, Director of Corporate Governance, California State Teacher's Retirement System 1 (Jan. 9, 2017) ("We thank the Commission for the opportunity to support and comment on the well-researched, prudent and attentive proposed rule on Universal Proxy."), https://www.sec.gov/comments/s7-24-16/s72416-1471415-130426.pdf.

[13] Letter from Marcie Frost, Chief Executive Officer, CalPERS 2 (Jan. 9, 2017) ("We support the proposed amendments which would require proxy contestants to furnish shareowners a universal proxy card; one that includes the names of both management and dissident director nominees in an election contest in a manner that reflects, as closely as possible, the voting process available in-person."), https://www.sec.gov/comments/s7-24-16/s72416-1470820-130402.pdf.

[14] Letter from Gregory W. Smith, Executive Director, Colorado PERA 2 (Jan. 9, 2017) ("The universal proxy cards for all contested elections would guarantee that shareholders are able to choose from among all board nominees, regardless of whether they voted in person or by proxy."), https://www.sec.gov/comments/s7-24-16/s72416-1471329-130425.pdf.

[15] Letter from Marc R. Bryant, Senior Vice President, Deputy General Counsel, Fidelity Investments 2 (Jan. 9, 2017) ("Fidelity support universal proxy as a logical way to fully accommodate shareholder voting preferences."), https://www.sec.gov/comments/s7-24-16/s72416-1471250-130420.pdf.

[16] Letter from Michael P. McCauley, Senior Officer Investment Programs and Governance, Florida State Board of Administration (SBA) 1 (Jan. 11, 2017) ("The SBA staff strongly supports the Commission's effort to provide shareowners with equivalent voting opportunities, whether they vote in person or by proxy."), https://www.sec.gov/comments/s7-24-16/s72416-1481390-130533.pdf.

[17] Letter from Tim Goodman, Director, Hermes Equity Ownership Services Limited 1 (Dec. 23, 2016) ("Our experience is that we would often, possibly usually, prefer to recommend votes for candidates from both the board's and the dissident's slates. This opportunity is currently denied in practice to our clients."), https://www.sec.gov/comments/s7-24-16/s72416-1440887-129987.pdf.

[18] Letter from Karen Carraher, Executive Director, Ohio Public Employees Retirement System et al. 3 (Jan. 4, 2017) ("OPERS believes that the Universal Proxy Requirement should be mandated as proposed, since it more effectively replicates in-person attendance at a shareowners' meeting, which permits shareowners to vote for their preferred combination of nominees from both slates"), https://www.sec.gov/comments/s7-24-16/s72416-1471224-130416.pdf.

[19] Letter from Thomas P. DiNapoli, State Comptroller, State of New York 1 (Jan. 9, 2017) ("I am writing as Trustee of the New York State Common Retirement Fund . . . and administrative head of the New York State and Local Retirement System . . . to express support for the proposed amendments to the federal proxy rules published by the Securities and Exchange Commission . . . in its Release No. 34-79164 pertaining to universal proxies . . . ."), https://www.sec.gov/comments/s7-24-16/s72416-1470796-130406.pdf.

[20] Letter from Brian L. Schorr, Chief Legal Officer and Partner, Trian Fund Management LLP 1 (Jan. 9, 2017) ("We are writing in support of the proposed amendments to the Federal proxy rules published by the U.S. Securities and Exchange Commission . . . in the Release . . . providing for the use of universal proxy cards in contested director elections."), https://www.sec.gov/comments/s7-24-16/s72416-1471095-130411.pdf.

Washington State Investment Board.[21]

The universal proxy proposal is important for good corporate governance because it removes a long-standing flaw in the U.S. proxy system. That flaw effectively disenfranchises shareowners who vote by proxy cards—the vast majority of shareowners—instead of voting in person.

Currently, shareowners have no practical ability through proxy voting to "split their ticket" and vote for the combination of shareowner and management nominees that they believe best serve their economic interests.[22] As explained by a former SEC Director of Corporation Finance:

> What I haven't heard is a good answer to this simple question: *Why shouldn't a shareholder who votes by proxy have the same voting options as a shareholder who votes in person? Unless someone comes up with a good answer to that question, I think the Commission should move forward with the proposal. . . .*[23]

The universal proxy proposal also is consistent with CII's corporate governance best practices for director elections that states:

> To facilitate the shareholder voting franchise, the opposing sides engaged in a contested election should utilize a proxy card naming all management-nominees and all shareholder-proponent nominees, providing every nominee equal prominence on the proxy card.[24]

While proxy contests are rare events, the right of shareowners to elect directors is a fundamental right of share ownership.[25] Contested elections are pivotal events for companies and for shareowners, since board seats, and in some cases, board control, are at stake. The dissident group usually advances a specific strategic, operational or financial agenda, so it is important for shareowners to be able to participate fully, regardless of how they vote.

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[21] Letter from Theresa Whitmarsh, Executive Director, Washington State Investment Board 1 (Jan. 5, 2017) ("The WSIB strongly supports the U.S. Securities and Exchange Commission's proposed release regarding the use of universal proxy cards in contested elections of directors."), https://www.sec.gov/comments/s7-24-16/s72416-1463856-130298.pdf.

[22] Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots 2-4 (adopted July 25, 2013), http://www.sec.gov/spotlight/investor-advisorycommittee-2012/universal-proxy-recommendation-072613.pdf.

[23] Keith F. Higgins, Keynote Address at the Practicing Law Institute, Corporate Governance – A Master Class 2 (Mar. 9, 2017) (emphasis added) (on file with CII).

[24] CII, Corporate Governance Policies § 2.2 Director Elections (updated Sept. 15, 2017), http://www.cii.org/files/policies/09_15_17_corp_gov_policies.pdf.

[25] *See, e.g.*, Letter from Jack Ehnes, Chief Executive Officer, CalSTRS, to The Honorable Maxine Waters, Ranking Member, Committee on Financial Services 4 (June 5, 2017) ("Voting for director nominees is a fundamental right, and as a long-term investor, CalSTRS supports the ability to choose among the best suited candidates to represent its interests inside the boardroom."), https://www.calstrs.com/sites/main/files/file-attachments/06-05-2017_maxine_financial_choice_act.pdf.

Importantly, requiring a universal proxy would benefit retail investors and institutional investors with relatively smaller positions by allowing them to choose among all board nominees without attending the shareholder meeting, which can involve travel and other costs that may be prohibitive. Moreover, the current system of competing slates of nominees may be disproportionately confusing to retail investors, who are presented with multiple conflicting proxy cards and may not realize that tabulators count only the most recently submitted card.

In addition, we note that empirical evidence indicates universal proxies do not favor dissidents over management.[26] On this point, a 2016 study by Harvard Law School Professor Scott Hirst of proxy contests between 2001 to 2016 found that more than 15% might have turned out differently with a universal proxy.[27] The study provides empirical evidence that a universal proxy rule would eliminate negative consequences of the current system. The author explains:

> The unilateral proxy system results in distorted vote outcomes, which disenfranchise shareholders. Distorted outcomes are an important problem in a significant subset of proxy contests. 7% of proxy contests between 2001 and 2016 can be expected to have had distorted outcomes, and 10% of contests at large corporations, based on conservative assumptions. As many as 15% of contests may be distorted. By eliminating these distorted outcomes, universal proxies would significantly enfranchise shareholders.
>
> This analysis permits further inferences that illuminate the debate over a universal proxy rule. *A universal proxy rule can be expected to have benefitted management nominees twice as often as dissident nominees at recent proxy contests. Contrary to the claims of many commentators, a universal proxy rule is therefore unlikely to benefit dissidents . . . .*[28]

We acknowledge that universal proxies will not resolve all the vote collection and counting issues that were laid bare last year in the contested election of directors at Proctor & Gamble Co.[29] We, however, believe requiring universal proxies would simplify the proxy voting system and lead to voting results that better reflect the intent of retail and institutional shareowners.

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[26] *See* Scott Hirst, Harvard Law School, Program on Corporate Governance, Universal Proxies, 35(2) Yale J. on Reg. 71 (forthcoming last updated Sept. 25, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805136; *see also* Gail Weinstein, Fried Frank Harris Shriver & Jacobson LLP et al., Expert Analysis, A Practical Assessment of the 'Universal Proxy Card' Plan, Law360, at 4 (Dec. 14, 2016) ("In our view, the universal proxy card mandate, if adopted, would not significantly affect the outcome of . . . activist situations."), http://www.friedfrank.com/siteFiles/Publications/A%20Practical%20Assessment%20Of%20The%20'Universal%20Proxy%20Card'%20Plan.pdf.

[27] *See* Scott Hirst at 1.

[28] *Id.* at 71 (emphasis added).

[29] *See, e.g.*, Alexander Coolidge, How Did P&G Get the Initial Proxy Vote Wrong?, Cincinnati.com, Nov. 16, 2017, https://www.cincinnati.com/story/money/2017/11/16/q-a-nelson-peltz-p-g-and-whats-next-the-snake-pit/870021001/.

Finally, the universal proxy proposal also provides for a critically important new cost-effective disclosure requirement relating to the *uncontested* election of directors.[30] More specifically, the proposal "expressly requires disclosure in the proxy statement about the treatment and effect of a 'withhold' vote in a director election."[31]

We agree with the Commission that this proposed disclosure, which presumably could be complied with in a single sentence, "would provide shareholders with a better understanding of the effect of their 'withhold' votes on the outcome of the election."[32] The proposed disclosure is critical because many shareowners, particularly many retail investors, do not understand that most U.S. public corporations employ a plurality voting standard for the uncontested election of directors.[33]

Under a plurality voting standard in an uncontested election of directors, a "withhold" vote has no legal significance on the outcome of the election.[34] We believe that the proposed disclosure "would make it crystal clear to investors that uncontested plurality elections guarantee victory for all nominees."[35]

Consistent with long-standing membership approved policies,[36] CII continues to actively advocate the adoption by all U.S. public companies of a majority, rather than a plurality, voting standard for the uncontested election of directors.[37] Under a majority voting standard, the "withhold" vote is replaced by an "against" vote, helping make board members more responsive to the people they represent.[38]

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[30] 81 Fed. Reg. at 79,143-44.
[31] *Id.* at 79,144.
[32] *Id.*
[33] *See* Council of Institutional Investors, FAQ: Majority Voting for Directors 1 (Jan. 4. 2017) ("Although nearly 90 percent of S&P 500 companies use majority voting in some form, just 29 percent of Russell 2000 companies use a majority vote standard in uncontested elections, according to FactSet."), http://www.cii.org/files/issues_and_advocacy/board_accountability/majority_voting_directors/CII%20Majority%20Voting%20FAQ%201-4-17.pdf; *see also* Jeff Green & Alicia Ritcey, With 'Zombie Directors,' It's the Board of the Living Dead, Bloomberg, Aug. 10, 2017, at 2 (under a plurality voting standard in the election of directors, "since board members often run unopposed, just one positive vote could be enough"), https://www.bloomberg.com/news/articles/2017-08-10/with-zombie-directors-it-s-the-board-of-the-living-dead.
[34] FAQ: Majority Voting for Directors at 1 ("Withholding a vote allows shareholders to communicate their dissatisfaction with a given nominee, but it has no legal effect on the outcome of the election.").
[35] *Id.* at 5.
[36] § 2.2 Director Elections ("Directors in uncontested elections should be elected by a majority of the votes cast.").
[37] *See* Council of Institutional Investors, Majority Voting for Directors (last visited Feb. 12, 2018) (describing CII "**campaign urging companies to adopt majority voting for directors**" in the contested election of directors), http://www.cii.org/majority_voting_directors; *see also* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Mr. Craig S. Phillips, Counselor to the Treasury, U.S. Department of Treasury 9-12 (Aug. 23, 2017) (describing CII's continuing advocacy efforts in support of a listing standard requiring majority voting in the uncontested election of directors"), http://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf.
[38] *See, e.g.*, FAQ: Majority Voting for Directors 1-2.

We believe the proposed disclosure in the universal proxy proposal, if finalized by the Commission, would encourage more U.S. public companies to voluntarily adopt a majority voting standard. The result would be improved corporate governance and potentially higher long-term shareowner value and greater growth in the U.S. public capital markets.[39]

Listing Standards for Recovery of Erroneously Awarded Compensation

We also support prompt completed action on the SEC's required response to Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) entitled, "Recovery of Erroneously Awarded Compensation."[40]

We note that Section 954 was responsive to the recommendations of the Investors' Working Group (IWG).[41] In their seminal report on U.S. Financial Regulatory Reform, the IWG concluded:

> Federal clawback provisions on unearned executive pay should be strengthened. Clawback policies discourage executives from taking questionable actions that temporarily lift share prices but ultimately result in financial restatements. Senior executives should be required to return unearned bonus and incentive payments that were awarded as a result of fraudulent activity, incorrectly stated financial results or some other cause. The Sarbanes-Oxley Act of 2002 required boards to go after unearned CEO income, but the Act's language is too narrow. It applies only in cases where misconduct is proven—which occurs rarely because most cases result in settlements where charges are neither admitted nor denied—and only covers CEO and CFO compensation. Many courts, moreover, have refused to allow this provision to be enforced via private rights of action.[42]

The SEC's proposed rule to implement Section 954 is generally consistent with CII's membership approved corporate governance policies.[43] Those policies state:

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[39] *See* Interim Report of the Committee on Capital Markets Regulation 93 (Nov. 30, 2006) ("Even ignoring the entry and exit decisions of firms, public capital markets will be smaller as a result of inadequate shareholder rights [including lack of majority voting], given the reduced valuations resulting from higher agency costs."), http://www.capmktsreg.org/wp-content/uploads/2014/08/Committees-November-2006-Interim-Report.pdf.

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

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

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

[43] Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 9,861, Exchange Act Release No. 75,342, Investment Company Act Release No. 31,702, 80 Fed. Reg. 41,144 (proposed

> The compensation committee should ensure that sufficient and appropriate mechanisms and policies (for example, bonus banks and clawback policies) are in place to recover erroneous bonus and incentive awards paid in cash, stock or any other form of remuneration to current or former executive officers, and to prevent such awards from being paid out in the first instance. Awards can be erroneous due to acts or omissions resulting in fraud, financial results that require restatement or some other cause that the committee believes warrants withholding or recovering incentive pay. Incentive-based compensation should be subject to recovery for a period of time of at least three years following discovery of the fraud or cause forming the basis for the recovery. The mechanisms and policies should be publicly disclosed.[44]

Consistent with our policies, we believe the final SEC rule should, as proposed,[45] apply broadly to the compensation of all current or former executive officers whether or not they had control or authority over the company's financial reporting.[46] As we explained in our comment letter to the SEC:

> In our view, establishment of a broad clawback arrangement is an essential element of a meaningful pay for performance philosophy. If executive officers are to be rewarded for "hitting their numbers"—and it turns out they failed to do so—the unearned compensation should generally be recovered notwithstanding the cause of the revision.[47]

We agree with legal experts that broad clawback arrangements may "keep executive officers focused on sound accounting company-wide."[48] We also note that requiring a broad clawback policy appears to be consistent with the "Commonsense Principles of Corporate Governance" endorsed in 2016 by a number of prominent leaders of U.S. public companies, including Mary Barra, General Motors Company; Jamie Dimon, JPMorgan Chase; Jeff Immelt, GE; and Lowell

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rule July 2015), *available at* https://www.federalregister.gov/articles/2015/07/14/2015-16613/listing-standards-for-recovery-of-erroneously-awarded-compensation.

[44] § 5.5 Pay for Performance.

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

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

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

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

McAdam, Verizon.[49] Those principles state that "companies should maintain clawback policies for both cash and equity compensation" of management.[50]

We accept Chairman Clayton's recent observation that "several companies . . . have [clawback] policies that go beyond what would be required under Dodd-Frank."[51] However, we believe there should be a strong baseline rule for all companies, so that investors see effective clawback policies in place at more than just among a handful of corporate thought leaders, and without expensive private ordering through shareholder proposal campaigns. We believe problems are more likely at companies that are less thoughtful and rigorous on financial reporting and corporate governance. So, we reject the implied conclusion that finalizing the SEC rule should be given a low priority.[52] Prompt completion of a broad clawback rule would lead to the establishment of a meaningful, necessary, and long-overdue floor for clawback provisions at public companies.

Disclosure of Hedging by Employees, Officers and Directors

We support prompt completed action on the SEC's required response to Section 955 of Dodd-Frank entitled, "Disclosure Regarding Employee and Director Hedging."

The SEC's proposed rule to implement Section 955[53] has important implications for CII's long-standing membership approved corporate governance policies on hedging of compensation.[54] Those policies state:

> Compensation committees should prohibit executives and directors hedging (by buying puts and selling calls or employing other risk-minimizing techniques) equity based awards granted as long-term incentive compensation or other stock holdings in the company. And they should strongly discourage other employees from hedging their holdings in company stock.[55]

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[49] Commonsense Corporate Governance Principles VII(g) (July 2016), http://www.governanceprinciples.org/.
[50] *Id.*
[51] Chairman Jay Clayton, Opening Remarks at the Securities Regulation Institute 3 (Jan, 22, 2018), https://www.sec.gov/news/speech/speech-clayton-012218; s*ee* Francine McKenna, Senators Press SEC Chairman on Dodd-Frank Clawbacks, but Equifax Execs Ineligible 3 (Sept. 26, 2017) ("In Wells Fargo's case . . . [a] stricter policy . . . allowed it to justify a clawback based on reputational damage to the bank and poor risk management."), https://www.marketwatch.com/story/senators-press-sec-chairman-on-dodd-frank-clawbacks-but-equifax-execs-ineligible-2017-09-26; *see also* Michael S. Melbinger, Update on Clawback Policy Issues, Executive Compensation Blog, Winston & Strawn (Oct. 19, 2017) (Recommending that "directors should protect themselves and their companies by adopting a strong policy"), https://www.winston.com/en/executive-compensation-blog/update-on-clawback-policy-issues.html.
[52] Chairman Jay Clayton at 3 ("Our rulemaking priorities . . . should reflect these observable developments.").
[53] Disclosure of Hedging by Employees, Officers, and Directors, Securities Act Release No. 9,723, Exchange Act Release No. 74,232, Investment Company Act Release No. 31,450, 80 Fed. Reg. 8,486 (proposed rule Feb. 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-02-17/pdf/2015-02948.pdf.
[54] § 5.8d Hedging.
[55] *Id.*

For those companies that have not yet fully adopted our policy, we believe that a final SEC rule, as proposed, would provide our members and other investors with a more complete understanding regarding the persons permitted to engage in hedging transactions and the types of hedging transactions allowed. Armed with the proposed disclosure, our members and other investors would be in a better position to make more informed investment and voting decisions, including voting decisions on proposals to adopt hedging policies, advisory votes on executive compensation and voting decisions in connection with the election of directors.

Finally, we believe the proposed disclosure also would benefit our members and other investors because the public nature of the required disclosure would result in more U.S. public companies adopting our hedging policy and potentially enhancing long-term shareowner value.

Rule 10b5-1 Trading Plans

Finally, for the benefit of both institutional and retail investors, we believe the Commission should make a priority of proposing amendments to improve Rule 10b5-1 trading plans. We have issued letters on January 18, 2018, to Chairman Clayton,[56] May 9, 2013, to Chairman Mary Jo White,[57] and December 28, 2012, to Chairman Elisse Walter[58] regarding Rule 10b5-1 trading plans. Those letters respectfully requested that the Commission should consider potentially pursuing amendments to Rule 10b5-1 that would *require* trading plans to adopt the following protocols and guidelines:

- Companies and company insiders should only be permitted to adopt Rule 10b5-1 trading plans when they are permitted to buy or sell securities during company-adopted trading windows, which typically open after the announcement of the financial results from a recently completed fiscal quarter and close prior to the close of the next fiscal quarter;
- Companies and company insiders should be prohibited from adopting multiple, overlapping Rule 10b5-1 plans;
- Rule 10b5-1 plans should be subject to mandatory delay, preferably of three months or more, between the adoption of a Rule 10b5-1 plan and the execution of the first trade pursuant to such a plan;
- Companies and company insiders should not be allowed to make frequent modifications or cancellations of Rule 10b5-1 plans;

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

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

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

- Companies and company insiders should disclose Rule 10b5-1 program adoptions, amendments, terminations and transactions; and
- Boards of companies that have adopted Rule 10b5-1 plans should (1) adopt policies covering plan practices, (2) periodically monitor plan transactions and (3) ensure that company policies discuss plan use in the context of guidelines or requirements on equity hedging, holding and ownership.[59]

If the above protocols had been in place, the widely reported $39 million sale of Intel stock by CEO Brian Krzanich on November 29, 2017, within 30 days of revising his trading plan for the second time during the year, would have been a clear violation of Rule 10b5-1.[60] We are confident that most retail investors would agree with us that Mr. Krzanich's stock sale, just weeks prior to the public announcement of a design flaw in Intel chips, was at best inherently unfair to other market participants.

Unfortunately, Mr. Krzanich's sale was not an unusual occurrence. There is a body of empirical evidence indicating that Rule 10b5-1 plans have been regularly abused in various ways to facilitate trades based on inside information.[61]

The Commission should promptly proposed amendments to Rule 10b5-1 along the lines we have suggested to stop this long-running abuse of the spirit of the rule.

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

Sincerely,

Jeffrey P. Mahoney
General Counsel

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[59] Letter to The Honorable Mary Jo White at 1; *see* § 5.15b Stock Sales ("10b5-1 program adoptions, amendments, terminations and transactions should be disclosed immediately, and boards of companies using 10b5-1 plans should: (1) adopt policies covering plan practices, (2) periodically monitor plan transactions and (3) ensure that company policies discuss plan use in the context of guidelines or requirements on equity hedging, holding and ownership.").
[60] *See, e.g.,* Stephen Gandel, SEC Needs to Quit Taking Executives' Word on Stock Sales; Gadfly, Wash. Post, Jan. 9, 2017, https://www.washingtonpost.com/business/sec-needs-to-quit-taking-executives-word-on-stock-sales-gadfly/2018/01/09/92cfc61a-f542-11e7-9af7-a50bc3300042_story.html?utm_term=.9e9842673c11.
[61] *See, e.g.,* John Shon & Stanley Veliotis, Insiders' Sales Under Rule 10b5-1 Plans and Meeting or Beating Earnings Expectations, 59(9) Mgmt. Sci. 1988 (Mar. 4, 2013), https://pubsonline.informs.org/doi/abs/10.1287/mnsc.1120.1669.