Council of Institutional Investors®
The voice of corporate governance

Via E-Mail

August 28, 2023

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

Re: File No. S7-09-23

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. 11,178, Exchange Act Release No. 97,286, Investment Adviser Act Release No. 6,281, Investment Company Act Release No. 34,884, 88 Fed. Reg. 48,694 (July 27, 2023), https://www.govinfo.gov/content/pkg/FR-2023-07-27/pdf/2023-14566.pdf; *see generally,* Soyoung Ho, SEC Plans to Finalize 30 Proposed Rules in Near Term, Tax & Acct. Thomson Reuters (Aug. 22, 2023), https://tax.thomsonreuters.com/news/sec-plans-to-finalize-30-proposed-rules-in-near-term/#:~:text=The%20agenda%20reflects%20the%20priorities,on%20its%20short%2Dterm%20agenda (analyzing the "Securities and Exchange Commission's semiannual update to its rulemaking agenda").
[3] *See* CII Advocacy Priorities (as of Aug. 22, 2023), https://www.cii.org/advocacy_priorities.

1. Investor Rights and Protections

We include under this heading[4] our support for the "Division of Corporation Finance – Completed Actions"[5] in connection with SEC's November 2022 issuance of final rules on "Listing Standards for Recovery of Erroneously Awarded Compensation" (Clawback Rule).[6]

Clawback Rule

CII commends the SEC for issuance of the Clawback Rule. We actively advocated, generally consistent with CII's membership-approved policies,[7] for Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[8] That section of Dodd-Frank mandated that the Commission issue the Clawback Rule.[9] Moreover, for nearly a decade we

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[4] *See* CII Advocacy Priorities, Investor Rights & Protections (as of Aug. 22, 2023), https://www.cii.org/investor_rights_protections https://www.cii.org/advocacy_priorities (discussing CII advocacy of "**Claw backs of unearned executive compensation**").

[5] 88 Fed. Reg. 48,695.

[6] 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.

[7] *See* CII, Policies on Corporate Governance, § 5.5d Pay for Performance (2009) (on file with CII) ("The compensation committee should ensure that sufficient and appropriate mechanisms and policies (for example, bonus banks and clawback policies) are in place to recover erroneous bonus and incentive awards paid out to executive officers, and to prevent such awards from being paid out in the first instance [and][a]wards can be erroneous due to fraud, financial results that require restatement or some other cause that the committee believes warrants withholding or recovering incentive pay [and] [t]he mechanisms and policies should be publicly disclosed."); *cf.* CII, Policies on Corporate Governance, § 5.7 Compensation Recovery (updated Mar. 6, 2023), https://www.cii.org/corp_gov_policies#exec (replacing § 5.5d Pay for Performance with: "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.").

[8] *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.'").

[9] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954.

advocated for the Commission's adoption, with CII's proposed improvements,[10] of its July 2015 proposed rule to implement the provisions of Section 954.[11]

As described on CII's website:

> Under the new rule, to stay listed on the exchanges, companies 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.
> These policies will have to appear in companies' annual reports and be provided in tagged data format. Annual reports also will have to include information about whether companies applied the policy, the date they were required to prepare a restatement, the aggregate dollar amount of erroneously awarded compensation attributable to the restatement, the aggregate amount that remains outstanding, and any outstanding amounts due from any former or current executives for 180 days or more.[12]

[10] *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.").
[11] *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 (proposed July 14, 2015), https://www.federalregister.gov/documents/2015/07/14/2015-16613/listing-standards-for-recovery-of-erroneously-awarded-compensation.
[12] CII Advocacy Priorities, Investor Rights & Protections.

More recently, we generally supported the SEC's June 2023[13] approval of the stock exchanges' proposed clawback listing standards to implement the Clawback Rule.[14] In our April 2023 letter to the SEC we noted:

> Generally consistent with the basis for our policy, CII strongly agrees with the NYSE that the implementation of the SEC Rule:
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> > [I]s consistent with the protection of investors and the public interest because it furthers the goal of ensuring the accuracy of the financial disclosure of listed issuers. Specifically, . . . the recovery requirement may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which we expect will further discourage such behavior. . . . [T]hese increased incentives may improve the overall quality and reliability of financial reporting, which further benefits investors.
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> Similarly, CII strongly agrees with the NASDAQ that the implementation of the SEC Rule:
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> > [P]rotect[s] investors and the public interest by requiring companies . . . that, in the event the company is required to prepare an accounting restatement, the company will recover reasonably promptly erroneously awarded incentive-based compensation paid to its current or former executive officers based on any misstated financial reporting measure. . . . [T]hese new requirements will help facilitate effective oversight of executive compensation and promote accountability to investors by not allowing executive officers to retain compensation that they were awarded erroneously.

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[13] *See* Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Establish Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation, Exchange Act Release No. 97,687, 88 Fed. Reg. 39,295, 39,300 (June 14, 2023), https://www.federalregister.gov/documents/2023/06/15/2023-12757/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-amendment-no-1-and ("*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASDAQ– 2023–005), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis."); Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, 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. 97,688, 88 Fed. Reg. 38,907, 38,913 (June 14, 2023), https://www.federalregister.gov/documents/2023/06/14/2023-12758/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-amendment-no-1-and ("*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NYSE–2023–12), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.").

[14] *See* Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 2 (Apr. 3, 2023), https://www.cii.org/Files/Correspondence/04-03-2023-Nasdaq-NYSE-letter-final.pdf ("CII generally supports the Exchange Proposals").

> Finally, . . . the recovery requirement may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which . . . will further discourage such behavior.[15]

2. Corporate Disclosure

We include under this heading[16] our support for the "Division of Corporation Finance – Completed Actions"[17] in connection with SEC's issuance of final rules in December 2022 on "Insider Trading Arrangements and Related Disclosures" (Rule 10b5-1 Amendments)[18] and in June 2023 on "Share Repurchase Disclosure Modernization," (Share Buyback Rules), respectively[19] We also include under this heading our continued support for adding a new project to the Agenda to close a loophole in the regulation governing the use financial measures based on something other than Generally Accepted Accounting Principles (GAAP) (Non-GAAP Financial Measures).[20]

Rule 10b5-1 Amendments

CII "applauds the SEC's unanimous approval" of the Rule 10b5-1 Amendments.[21] We had long advocated for reforms to SEC Rule 10b5-1 trading plans.[22] As explained on CII's website:

> More than 20 years ago, the SEC implemented Rule 10b5-1 to let executives buy or sell company shares at a predetermined time on a scheduled basis. Although it was intended to prevent executives from running afoul of the prohibition on trading on material non-public information, over the years loopholes in the rule's coverage emerged. Press reports and empirical evidence suggested that insiders were adopting, amending and canceling these plans easily and without disclosure—a recipe for fortuitously timed trades while in possession of material, non-public

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[15] *Id.* at 2-3 (footnotes omitted).
[16] *See* CII Advocacy Priorities, Corporate Disclosure (as of Aug. 22, 2023), https://www.cii.org/corporate_disclosure (discussing CII advocacy of "**Transparency and safeguards around executive trading in company stock**" and "**Enhanced transparency of share buybacks**").
[17] 88 Fed. Reg. at 48,695.
[18] Insider Trading Arrangements and Related Disclosures, Securities Act Release No. 11,138, Exchange Act Release No. 96,492, 88 Fed. Reg. 80,662 (Dec. 29, 2022), https://www.federalregister.gov/documents/2022/12/29/2022-27675/insider-trading-arrangements-and-related-disclosures.
[19] Share Repurchase Disclosure Modernization, Exchange Act Release No. 97,424, Investment Company Act Release No. 34,906, 88 Fed. Reg. 36,002 (June 1, 2023), https://www.federalregister.gov/documents/2023/06/01/2023-09965/share-repurchase-disclosure-modernization.
[20] *See* CII Advocacy Priorities, Corporate Disclosure (discussing "**Transparency of executive compensation**").
[21] Press Release, CII, CII Hails SEC for Closing Rule 10b5-1 Insider Trading Loopholes (Dec. 14, 2022), https://www.cii.org/dec2022_10b5-1_final_rules.
[22] S*ee, e.g.,* Letter from Jeff Mahoney, General Counsel, CII to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission 4 (Dec. 28, 2012), https://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%20_10b5-1_trading_plans.pdf ("As indicated, we believe that action by the Commission is needed to address the alleged abuses of Rule 10b5-1 described by the WSJ Article, and the suggestions outlined above provide a good starting point.").

> information.
> . . . . To prompt SEC action on the issue, CII . . . submitted a **rulemaking petition** in 2012 urging the commission to adopt amendments that would place restrictions on the trading that companies and company insiders could conduct under the rule.[23]

Generally consistent with our 2012 rulemaking petition[24] and our current membership-approved Statement on Stock Sales by Insiders,[25] we believe the long overdue provisions of Rule 10b5-1 Amendments appropriately "close loopholes and enhance the transparency of executive trading plans in company stock."[26]

Share Buyback Rules

CII's membership-approved Statement on Stock Sales also addresses disclosure of stock buybacks[27] and was a basis for our general support of the Share Buyback Rules.[28] For many years, CII advocated for improvements to the disclosure of share buybacks.[29] As explained on CII's website, we generally supported the Share Buyback Rules because consistent with the Statement on Stock Sales:

> [They require] companies to disclose more granular information about stock repurchases. Currently, companies report a summary of buyback activity for each month. Going forward, investors will have daily data provided on a quarterly basis. That extra information could help investors and researchers monitor the timing and

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[23] CII Advocacy Priorities, Corporate Disclosure.
[24] S*ee* Letter from Jeff Mahoney, General Counsel, CII to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission at 3 ("Providing greater disclosure regarding the adoption, amendment, and termination of Rule 10b5-1 plans will provide long-term shareowners with reasonable access to information about insider trades that complete the partial picture provided by Section 16 and Rule 144 filings [and] . . . imposing a minimum period between the adoption of a Rule 10b5-1 plan and the execution of trades pursuant to such plan, as well as restricting plan modifications and cancellations, will ensure that insiders are not in a position to take advantage of their access to material non-public information in connection with their trades pursuant to Rule 10b5-1 plans.").
[25] *See* Policies on Other Issues, Statement on Stock Sales by Insiders (adopted Mar. 10, 2020), https://www.cii.org/policies_other_issues#insider_trading ("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.").
[26] Press Release, CII, CII Hails SEC for Closing Rule 10b5-1 Insider Trading Loopholes.
[27] *See* Policies on Other Issues, Statement on Stock Sales by Insiders ("Both to improve market efficiency and reduce the likelihood of abuses, companies should disclose share repurchases at a frequency and level of detail on par with their disclosure of insider stock sales.").
[28] See Letter from Glenn Davis, Deputy Director, CII to Secretary Vanessa A. Countryman, Securities and Exchange Commission 4 n.14, 5 n.16 (Mar. 31, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20121907-274603.pdf.
[29] *See, e.g.,* Letter from Jeffrey P, Mahoney, General Counsel, CII to The Honorable Carolyn B. Maloney, Chair, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, Committee on Financial Services, United States House of Representatives et al. 5 (Oct. 23, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/October%2023%202019%20Letter%20to%20Subcommittee.pdf ("That is why we advocate for strong corporate governance practices at public companies 'guiding how the decisions about stock buybacks . . . are made, to ensure they are made with the long-term interests in mind[] [and] [w]e believe those practices may be advanced by requiring more robust disclosure of buybacks.").

> terms of buybacks in relation to equity compensation or the timing of performance milestones.[30]

We generally agree with the analysis of corporate law firm Gibson Dunn that the adopted provisions of the Share Buyback Rules "reflect a significant paring back from the SEC's initial proposal, which would have required daily reporting of repurchases on a next-day basis [and] . . . reflect[s] the SEC's responsiveness to constructive and pragmatic comments received on its rule proposals . . . ."[31]

Non-GAAP Financial Measures

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 (1) quantitative reconciliation to GAAP of Non-GAAP Financial Measures used to determine executive compensation; and (2) a qualitative description of why the Non-GAAP Measures are better for determining executive pay than GAAP financial measures.[32] As explained on CII's website, and as derived, in part, from our membership-approved corporate governance policies:[33]

> CII is also pressing . . . 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

[30] CII Advocacy Priorities, Corporate Disclosure.
[31] SEC Adopts Amendments to Enhance Company Stock Repurchase Disclosure Requirements, Gibson Dunn (May 5, 2023), https://www.gibsondunn.com/sec-adopts-amendments-to-enhance-company-stock-repurchase-disclosure-requirements/.
[32] *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").
[33] *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.").

> why non-GAAP measures are better for determining executive pay than GAAP, and that they include a quantitative reconciliation (or a hyperlink to reconciliation in another SEC filing) of these two sets of numbers.[34]

We note that "[n]on-GAAP disclosures are one of the most common issues in financial reporting."[35] And "almost all large publicly traded companies make them, and such disclosures typically paint a more positive picture of corporate performance than comparable GAAP disclosures."[36] And many of these same companies use non-GAAP earnings as a key criterion in setting executive compensation.[37]

A 2023 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.[38] The paper recommends, 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.[39]

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, 2022, and 2023 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.[40] Based on our review, it does not appear that any of

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[34] CII Advocacy Priorities, Corporate Disclosure.
[35] *See* Olga Usvyatsky, Understanding Changes to Non-GAAP Reporting, Calcbench (Aug. 21, 2023), https://www.calcbench.com/blog/post/7262820543749816 32/understanding-changes-to-non-gaap-reporting.
[36] *See id.*; Nicholas Guest et al., How Do Large Positive Non-GAAP Earnings Adjustments Predict Abnormal High CEO Pay?, Harv. L. Sch. F. on Corp. Governance (Feb. 16, 2023), https://corpgov.law.harvard.edu/2023/02/16/why-do-large-positive-non-gaap-earnings-adjustments-predict-abnormally-high-ceo-pay/ ("About two-thirds of S&P 500 firms announce non-GAAP earnings, which are 23% larger than GAAP earnings on average.").
[37] *See* Nicholas Guest et al., How Do Large Positive Non-GAAP Earnings Adjustments Predict Abnormal High CEO Pay?, Harv. L. Sch. F. on Corp. Governance ("Moreover, many of these same companies use non-GAAP earnings as a key criterion in setting CEO pay").
[38] *See id.* ("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").
[39] Nicholas Guest et al., How Do Large Positive Non-GAAP Earnings Adjustments Predict Abnormal High CEO Pay? 37 (forthcoming Acct. Rev. 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030953.
[40] *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.

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, 2022 or 2023 CD&As.[41]

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[41] *See* Abbott Laboratories, Schedule 14A at 34 (Mar. 17, 2023), https://www.bamsec.com/filing/130817923000247/1?cik=1800&hl=102375:103025&hl_id=e1nxs029r (indicates use of adjusted metrics for "Sales", "Diluted EPS", "Return on Assets", "Free Cash Flow", "Total Shareholder Return", "3-year LTI Contribution Metrics", and "Return on Equity"); Advanced Micro Devices, Inc., Schedule 14A at 59 (Mar. 31, 2023), https://www.bamsec.com/filing/119312523088096/1?cik=2488&hl=211479:212538&hl_id=4jkcoan5r (provides a nonquantitative description of the calculation of "adjusted non-GAAP net income" and "adjusted free cash flow"); Altice USA, Inc., Schedule 14A at 19 (Apr. 27, 2023), https://www.bamsec.com/filing/162828023013656/1?cik=1702780&hl=83514:84320&hl_id=nyuqna2qa (provides a nonquantitative description of "Adjusted EBITA"); Cogent Communications Holdings, Inc., Schedule 14A at 38 (Mar. 15, 2023), https://www.bamsec.com/filing/110465923032758/1?cik=1158324&hl=224056:224090&hl_id=ey421kp5c (provides a nonquantitative reference to '"adjusted EBITDA'[] as defined in the Company's earnings releases'"); 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-fb7ea08cacae.pdf (adjusted EBITDA & adjusted EBITDA CapEx); Cisco Systems, Inc., Schedule 14A at 37, 42 (Oct. 18, 2022), https://www.bamsec.com/filing/110465922109711/1?cik=858877&hl=167149:167185&hl_id=nyjvjttkr (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/dat,/1702780/000162828021008291/a2021proxystatement.htm#idf1a5efed63a409097f239df52ce09ef_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),

CII continues to believe 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 Financial Measures contained in their CD&A.[42]

3. Market Systems & Structure

We include under this heading[43] our support for the "Division of Trading and Markets – Final Rule Stage"[44] categorization of the SEC's Agenda projects on "Regulation Best Execution,"[45] and Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders" (Regulation NMS).[46] We also include under this heading[47] a reiteration of our request that the SEC consider giving a higher priority to its Agenda project on "Proxy Process Amendments."[48]

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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).

[42] *See, e.g.,* Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 8 (Mar. 16, 2023), https://www.cii.org/files/issues_and_advocacy/correspondence/2023/March%2016%202023%20Reg%20Flex%20Letter%20(final).pdf ("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.").

[43] *See* CII Advocacy Priorities, Market Systems & Structure (as of Aug. 25, 2023), https://www.cii.org/market_systems_structure (discussing CII advocacy of "**Payment for Order Flow**").

[44] 88 Fed. Reg. at 48,695.

[45] 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.

[46] *See, e.g.,* 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-incrementsaccess-fees-and-transparency-of-better-priced-orders.

[47] *See* CII Advocacy Priorities, Market Systems & Structure (discussing CII advocacy of "**End-to end vote confirmation**").

[48] Agency Rule List – Spring 2023, Securities and Exchange Commission, Off. Info. & Reg. Aff., Off. Mgmt. & Budget (last visited Aug. 24, 2023), https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=202304&showStage=longterm&agencyCd=3235&csrf_token=3E13B827D7AAE695304D96D7A1EE4B7662CD6F7F76D4C51952FF9E1D8C5DE32E318091384D3B9DC2DCF125332A4BC777AD3E (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 ("we believe the SEC should prioritize as a next step improving proxy plumbing by addressing end-to-end vote confirmation").

Regulation Best Execution

Since 1998 CII has had a membership-approved policy that emphasizes the importance of best execution. That policy states in relevant part:

> We . . . have the broader duty to communicate the interests and desires of the institutional investor community to regulators, to the public and to the industry regarding trading practices and commissions.
> . . . [B]rokerage industry practices . . . make it difficult to break out the exact costs of services (for trade execution, research or other things), may be antithetical to the fiduciary obligation of obtaining *best execution*, and hold too much potential for *conflicts of interest* and abuses.
> . . . .
> Clarity and transparency of disclosure of all money management and brokerage arrangements is essential, and it is up to plan sponsors to require it. Simple 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.[49]

As described on CII's website:

> On Dec. 14, 2022, the SEC approved a proposed rule that would require broker-dealers that provide or receive payment for order flow to report on their compliance with a proposed best execution standard established by the commission.
> Under that standard, in any transaction for, or with, a customer or a customer of another broker-dealer, a broker-dealer would be required "to use reasonable diligence to ascertain the best market for the security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions."[50]
> The proposed rule also would require broker-dealers to establish, maintain, and enforce written policies and procedures addressing how they will comply with the SEC's standard and how they will determine the best market and make routing or execution decisions for customer orders. They also would be required to review at least quarterly the execution quality of their customer transactions; compare it with the execution quality that might have been obtained from other markets; revise accordingly their best execution policies and procedures, including order handling practices; and document the results of the review.
> Annual reviews of best execution policies and procedures[,] as well as information about order handling practices[,] also would be required. Broker-dealers would

[49] CII, 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.

[50] 88 Fed. Reg. at 5,555 (§ 242.1100 The best execution standard).

> have to document these reviews and prepare and present written reports detailing the reviews' results to their boards.[51]

In CII's comment letter in response to the Regulation Best Execution proposal, we stated:

> Consistent with our policy on Guiding Principles for Trading Practices, Commission Levels, Soft Dollars and Commission Recapture, which includes two references to "best execution," we generally agree with Chair [Gary] Gensler that a "best execution standard at the Commission level . . . would lead to better execution for retail and institutional investors." We, however, have concerns with two provisions of the BestEx Proposal and their potential impact on brokers' potential best execution obligations for institutional investors: Proposed exemption for an institutional customer; and omission of a proposed requirement for order-by-order decision making.[52]

In July 2023, we participated in a meeting with SEC Chair Gensler and staff in which our two concerns with the Regulation Best Execution proposal were discussed.[53] We are hopeful that those concerns will be addressed and we look forward to the issuance of the final rule.

Regulation NMS

Our 1998 membership-approved policy emphasizing the importance of best execution has also been a basis for our long-standing concerns that the structure of stock exchange access fees and rebates may present conflicts of interest for broker-dealers affecting their order routing decisions and lowering the execution quality for institutional investors.[54]

As described on CII's website:

> For-profit pressure has also intensified arrangements with brokers to attract order flow. Payment for order flow . . . creates challenges for brokers with a responsibility to deliver "best execution" for their clients.
> . . . .
> . . . .
> . . . .
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[51] CII Advocacy Priorities, Market Systems & Structure.
[52] Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 5 (Mar. 30, 2023) (footnote omitted), https://www.cii.org/Files/Correspondence/03-30-2023-Equity-Market-Structure-final.pdf.
[53] *See* Memorandum, from the Office of Public Engagement to File Nos.: S7-29-22, S7-30-22, S7-32-22 (July 17, 2023), https://www.sec.gov/comments/s7-29-22/s72922-225739-473082.pdf.
[54] *See, e.g.,* Letter from Jeffrey P. Mahoney, General Counsel, CII to Brent J. Fields, Secretary, Securities and Exchange Commission 2 (May 10, 2018), https://www.sec.gov/comments/s7-05-18/s70518-3621501-162362.pdf ("We are particularly troubled by evidence cited by the Commission that 'shows lower execution quality, in terms of reduced probability of execution or increased time to execution, for non-marketable limit orders on exchanges that pay high rebates [and] [t]hus broker-dealers may route orders to exchanges that have the best quoted prices but are suboptimal for customers in other ways because orders are either less likely or take longer to execute.'").

> CII had supported an SEC pilot program to shed light on the degree to which certain rebates that exchanges paid to brokers encourage them to send trade orders to exchanges that pay favorable rebates rather than to those that offer the best results for investors. The exchanges successfully sued the SEC in 2020 and halted the study.[55]

In CII's comment letter in response to the Regulation NMS proposal, we explained:

> Consistent with our policy . . . , CII has long raised concerns that the structure of stock exchange access fees and rebates may present conflicts of interest for broker-dealers affecting their order routing decisions and lowering the execution quality for institutional investors. That continuing concern leads us to generally support the NMS Proposal provisions described as "Lower Access Fee Cap" and "Exchange Fees and Rebates Determinable at the Time of Execution." We agree with SEC Chair Gary Gensler that when "[t]aken together, this transparency and change to access fee caps would drive efficiency, competition, and fairness in our markets" to the benefit of long-term institutional investors.[56]

We generally favor a reduction in the access fee cap to 10 mils for all stocks priced at or more than $1.00 because we believe it will update existing regulation to better reflect current market conditions. We believe a reduction in the access fee cap will also materially reduce costs for investors that need to be able to access exchange quotes and that today bear the costs of high access fees. We generally do not agree with comments from market operators, that use high access fees to fund rebate payments, that lowering the access fee cap will undermine market liquidity or efficiency.

We also note that our general support for provisions of the Regulation NMS proposal is consistent with a recent survey of over 200 institutional investors.[57] That survey found:

- "87% of institutional investors agree that modest updates to Regulation NMS will create a more transparent, efficient, and competitive marketplace;"[58]
- "83% of institutional investors would be in favor of a simple access fee cap structure that would have a uniform 10 mil fee cap for all symbols (reduced from the current cap of 30 mils);"[59]
- "75% of institutional investors agree that exchange rebates are not a deciding factor in their decision on where to route their orders, and that routing is left for their broker to decide," and[60]

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[55] CII Advocacy Priorities, Market Systems & Structure.
[56] Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 2-3 (footnotes omitted).
[57] Ronan Ryan, Survey: What the Buyside Really Thinks About the SEC's Reg NMS Proposal, IEX Square Edge (June 5, 2023), https://www.iex.io/article/survey-what-the-buyside-really-thinks-about-the-secs-reg-nms-proposal.
[58] *Id*.
[59] *Id.*
[60] *Id.*

- "80% of institutional investors agree that rebates . . . create negative distortions in the competitive landscape, and markets would be more competitive if their impact was reduced."[61]

We look forward to the issuance of the final rule that includes our favored provisions on "Lower Access Fee Cap"[62] and "Exchange Fees and Rebates Determinable at the Time of Execution."[63]

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.[64] Since the "Universal Proxy" rule has now been successfully implemented,[65] we believe the SEC should prioritize as a next step improving proxy plumbing by addressing end-to-end vote confirmation.[66]

As described on CII's website:

> As shareholder voting is a core 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.

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[61] *Id.*
[62] *See, e.g.,* 87 Fed. Reg. at 80,326 ("The proposal would lower the access fee cap from $0.003 per share (30 mils) to $0.001 per share (10 mils) for NMS stocks priced $1.00 or greater and having a minimum pricing increment greater than $0.001, from $0.003 (30 mils) to $0.0005 (5 mils) for NMS stocks priced $1.00 or greater and a minimum pricing increment of $0.001, and from 0.3% to 0.05% of the share price for stocks with prices less than $1.00.").
[63] *Id.* at 80,329 ("The proposal requires that exchange fees and rebates be determinable at the time of execution.").
[64] Agency Rule List – Spring 2023, Securities and Exchange Commission, Off. Info. & Reg. Aff., Off. Mgmt. & Budget (last visited Aug. 24, 2023), https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=202304&showStage=longterm&agencyCd=3235&csrf_token=3E13B827D7AAE695304D96D7A1EE4B7662CD6F7F76D4C51952FF9E1D8C5DE32E318091384D3B9DC2DCF125332A4BC777AD3E.
[65] *See* 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 (The rules became effective January 31, 2022.).
[66] *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).

> In December 2021, a working group co-chaired by the Society for Corporate Governance and CII **agreed** to provide vote confirmation for 2022 annual shareholder meetings of Fortune 500 companies. Participants included banks, broker-dealers, public companies, tabulators, transfer agents and others in the proxy service community. Broadridge Financial Solutions, Computershare, EQ and Mediant also agreed to provide vote confirmation for all annual meetings for which they tabulate votes, bringing the total covered to more than 2,000 meetings. While well-intentioned, the mechanism they collaborated on proved cumbersome and time-consuming. Working group participants have committed to providing a more automated mechanism for most shareholder meetings in time for the 2024 proxy season.[67]

If the working group effort fails to result in a shareholder-friendly, automated mechanism for vote confirmation for the 2024 proxy season, CII strongly believes that the Commission should issue a proposal before year end requiring end-to-end vote confirmations to end-users, potentially with a phase-in approach starting with the largest companies. The proposed rule could simply 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 how a particular shareholder's shares were voted."[68] We believe proposing such a rule is responsive to SEC Chair Gensler's reported urging that stakeholders not '"wait for the proposal [on process amendments] but rather to 'engage,"[69] and, more importantly, could provide a basis for continuously uncovering and remediating the many long-standing flaws in the proxy plumbing system.

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[67] CII Advocacy Priorities, Market Systems & Structure.

[68] 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.").

[69] *See* Cydney S. Posner, Cooley LLP, SEC Spring 2023 Reg-Flex Agenda — Not Much New But Lots Left To Do, Cooley PubCo (June 20, 2023), https://cooleypubco.com/2023/06/20/sec-spring-2023-reg-flex-agenda/.

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,

Jeffrey P. Mahoney
General Counsel