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Testimony of Amy Borrus
Executive Director
of the
Council of Institutional Investors
before the
Subcommittee on Capital Markets
of the
Committee on Financial Services
November 2, 2023

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Chair Wagner and Ranking Member Sherman and Members of the Subcommittee:

I am Amy Borrus, the Executive Director of the Council of Institutional Investors (CII). I am pleased to appear before you on behalf of CII. My oral testimony will include brief prepared remarks and I would respectfully request that this entire written statement be entered into the public record.

CII is a non-partisan, not-for-profit association of more than 130 public, corporate and labor employee benefit plans with combined assets exceeding $5 trillion. Our focus and expertise are on corporate governance and shareholder rights.

CII members are long-term shareowners responsible for safeguarding assets used to fund the employee benefit plans of millions of workers and retirees throughout the United States. Since CII members invest much of their funds' portfolios in U.S. company stocks, issues relating to U.S. corporate governance are of great interest to our members.[1]

Two-and-a-half years into his term as chair of the Securities and Exchange Commission (SEC or Commission), Gary Gensler has pursued a sweeping regulatory revamp that spans corporate disclosure, equity market structure and crypto assets.

From CII's perspective, Chair Gensler's leadership has greatly advanced the SEC's tripartite mission of protecting investors; maintaining fair, orderly and efficient markets; and capital formation.

And CII and its members are especially heartened that many of the reforms Chair Gensler has spearheaded align with longstanding CII policies[2] that strengthen corporate governance of U.S. public companies.[3] The remainder of this written statement will

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[1] For more information about the Council of Institutional Investors ("CII"), including its members, please visit CII's website at http://www.cii.org.

[2] *See* CII, CII policies (last updated Mar. 6, 2023), https://www.cii.org/policies.

[3] Recent United States Securities and Exchange (SEC) reforms that align with CII corporate governance policies include: 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; Insider Trading Arrangements and Related Disclosures, Securities Act Release No. 11,138, Exchange Act Release No. 96,492, 87 Fed. Reg. 80,362 Dec. 29, 2022), https://www.federalregister.gov/documents/2022/12/29/2022-27675/insider-trading-arrangements-and-related-disclosures; 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-oferroneously-awarded-compensation; 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-versusperformance; 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; Universal Proxy, Securities Act Release No. 93,596, Investment Company Act Release No. 34,419, 86 Fed. Reg. 68,330 (Dec. 1, 2021), https://www.federalregister.gov/documents/2021/12/01/2021-25492/universal-proxy; *see* Letter from

briefly highlight just six of those critical reforms and why they benefit CII members and other long-term investors.

1. Universal Proxy

In November 2021, the Commission adopted a rule to require the use of a "universal proxy card" in director election contests.[4] The rule established a more level playing field for shareholders voting by proxy rather than in person at a company's annual meeting. It requires that when there is a contest for board seats, the names of *all* candidates must appear on the proxy cards that the company and the nominating shareholder distribute. This allows all shareholders to vote for the combination of director candidates they believe best serves their economic interests.

The SEC final rule was responsive to a rulemaking petition that CII submitted to the SEC in January 2014.[5] That petition was based on our policies on director elections, which state that "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 . . . ."[6]

CII and many market participants agree that the SEC final rule appropriately provides shareholders voting by proxy the same options available to other shareholders to express their view on who they believe are the best candidates to serve on corporate boards.[7]

Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC 2-7 (Aug. 28, 2023), https://www.cii.org/files/issues_and_advocacy/correspondence/2023/August%2028%202023%20Reg%20Flex%20Letter%20(final).pdf (discussing CII's general support for SEC final rules on Listing Standards for Recovery of Erroneously Awarded Compensation, Insider Trading Arrangements and Related Disclosures, and Share Repurchase Disclosure Modernization); Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC 2-6 (Mar. 16, 2023), https://www.cii.org/files/issues_and_advocacy/correspondence/2023/March%2016%202023%20Reg%20Flex%20Letter%20(final).pdf (discussing CII's general support for SEC final rules on Listing Standards for Recovery of Erroneously Awarded Compensation, Pay Versus Performance, and Proxy Voting Advice); Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC 5-7, 12-13 (Sept. 7, 2022), https://www.cii.org/files/issues_and_advocacy/correspondence/2022/September%207%202022%20Reg%20Flex%20Letter%20(final).pdf (discussing CII's general support for SEC final rules on Pay Versus Performance and Universal Proxy).

[4] *See* 86 Fed. Reg. at 68,330.

[5] *See* Letter from Glenn Davis, Director of Research, CII to Ms. Elizabeth Murphy, Secretary, SEC (Jan. 8, 2014), https://www.sec.gov/rules/petitions/2014/petn4-672.pdf ("Petition for Rulemaking to Amend Section 14 of the Securities Exchange Act of 1934 to Facilitate the Use of Universal Proxy Cards in Contested Elections").

[6] CII, Policies on Corporate Governance, § 2.2 Director Elections ("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.").

[7] *See* David A. Hunker, Universal Proxies: What boards should know and how companies can prepare, EY (May 17, 2022), https://www.ey.com/en_us/board-matters/universal-proxies-what-boards-should-know-and-how-companies-can-prepare ("The change will provide a more even playing field for those voting by proxy and give investors more options to express their view on who should be on the board."); Martin Lipton, Wachtell, Lipton, Rosen & Katz, Dealing with Activist Hedge Funds and Other Activist Investors, Harv. L. Sch. F. on Corp. Governance (posted Sept. 2, 2022), https://corpgov.law.harvard.edu/2022/09/02/dealing-with-activist-hedge-funds-and-other-activist-

2. Proxy Voting Advice

In July 2022, the Commission adopted "amendments to its rules governing proxy voting advice as proposed in November 2021."[8] "The final amendments aim to avoid burdens on proxy voting advice businesses that may impair the timeliness and independence of their advice"[9] to the firms' clients. "The amendments also address misperceptions about liability standards applicable to proxy voting advice while also preserving investors' confidence in the integrity of such advice."[10]

The SEC final amendments were generally responsive to CII's comment letter submitted in response to the November 2021 proposal.[11] Our comment letter explained that the proposal appropriately rescinded several provisions in the SEC's 2020 rule[12] that created uncertainties that unnecessarily increased litigation risk to proxy advisors and potentially increased the cost and impaired the independence of proxy voting advice.[13] We, however, also indicated that we believed a superior alternative to the proposal would have been to rescind the 2020 rule entirely.[14] We explained that the 2020 rule was built on an unsettled legal foundation— the SEC's questionable determination that proxy voting advice delivered to an investor that voluntarily pays for that advice constitutes a "solicitation" under the federal securities laws.[15]

CII and many market participants agree that the SEC final amendments benefit investors by appropriately rescinding key provisions of the SEC's 2020 rule.[16] The 2020

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investors-5/ ("The indisputable fact about the universal proxy card (UPC) is that it is a far superior way for shareholders to exercise their voting franchise than the two-card system that has dominated proxy contests for decades.").

[8] Press Release, SEC, SEC Adopts Amendments to Proxy Rules Governing Proxy Voting Advice (July 13, 2022), https://www.sec.gov/news/press-release/2022-120; *see also* Proxy Voting Advice, Exchange Act Release No. 93,595, 86 Fed. Reg. 67,383 (proposed rule Nov. 17, 2021), https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25420.pdf.

[9] Press Release, SEC, SEC Adopts Amendments to Proxy Rules Governing Proxy Voting Advice.

[10] *Id.*

[11] *See* Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC (Dec. 23, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/December%2023%202021%20PAF%20comment%20letter%20(final)%20LN.pdf.

[12] Exemptions From the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 89,372, 85 Fed. Reg. 55,082 (Sept. 1, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf.

[13] *See* Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 1-2 (discussing CII support for rescinding proposed amendments to Rule 14a-2(b)(9) and 14a-9).

[14] *See id.* at 3 ("We believe there is a superior alternative to the Release's proposed amendments to mitigate the potential adverse affects on proxy voting associated with the Conditions, the Guidance, and the Rule 14a-9 liability: Rescind, in its entirety, the September 1, 2020, SEC Release No. 34–89,372, Exemptions From the Proxy Rules for Proxy Voting Advice (2020 Final Rule).").

[15] *See id.* ("We note that the 2020 Final Rule is built on an unsettled foundation— the SEC's determination that proxy voting advice delivered to an investor requesting that advice constitutes a –'solicitation' under Section 14(a) of the Securities Exchange Act of 1934 (34 Act)."); *see also* Proxies, 15 U.S.C. § 78n(a) (2012), *available at* https://www.law.cornell.edu/uscode/text/15/78n ("Solicitation of proxies in violation of rules and regulations").

[16] *See, e.g.,* Letter from Donna F. Anderson, Vice President, Head of Corporate Governance, T.RowePrice et al. to Vanessa A. Countryman, Secretary, SEC 1-2 (Dec. 21, 2021), https://www.sec.gov/comments/s7-17-21/s71721-

rule was intended to permit issuers to oversee the accuracy of proxy voting advice, but there was no empirical evidence that such oversight was needed, would help improve the quality of the advice, or was requested by the sophisticated paying customers of that advice—institutional investors.[17]

3. Pay Versus Performance

In August 2022, the Commission adopted amendments to its rules to require registrants to disclose information reflecting the relationship between executive compensation actually paid by a registrant and the registrant's financial performance.[18] The rules implement a requirement mandated by Congress in Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[19] "The Commission proposed pay versus performance disclosure rules in 2015 and reopened the comment period . . . [in January 2022]."[20]
]
CII had long advocated for implementation of Section 953(a) of Dodd-Frank to provide additional quantitative information illustrating the relationship between executive compensation and the financial performance of the issuer.[21] Consistent with our membership approved policies on "Transparency in Compensation,"[22] CII generally

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20110165-264411.pdf ("As we said in our 2020 comment letter, it is our informed belief, based on years of experience working with proxy advisory firms as both an issuer and an institutional investor, that proxy advisors do not need oversight by issuers in order to provide accurate research reports.").

[17] *Id.* at 2 ("We have not seen any empirical evidence of widespread market abuse or failure that warranted the Rule 14a-2(b)(9)(ii) conditions, and accordingly we are not concerned with the idea of removing those conditions [and] [i]n our view, this was – and remains – a solution in search of a problem.").

[18] Press Release, SEC, SEC Adopts Pay Versus Performance Disclosure Rules (Aug. 25, 2022), https://www.sec.gov/news/press-release/2022-149.

[19] *See id.* ("The rules implement a requirement mandated by the Dodd-Frank Act."); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(a) (July 21, 2020), *available at* https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf ("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.'").

[20] Press Release, SEC, SEC Adopts Pay Versus Performance Disclosure Rules.

[21] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, CII to Keith F. Higgins, Director, Division of Corporation Finance, SEC 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 SEC intended to implement the rule)..

[22] CII, CII Policies on Corporate Governance, § 5.3 Transparency of Compensation ("Descriptions of metrics and goals in the proxy statement should be at least as clear as disclosures described in other investor materials and calls {and] [t]o 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.").

supported the 2015 proposal in comment letters in June 2015,[23] and again in February 2022.[24]

CII and many market participants agree that the SEC final rule benefits investors by enhancing their "understand[ing] how . . . pay and performance are aligned."[25] And we agree with the statement of SEC Commissioner Mark T. Uyeda that "it [was] . . . unacceptable for more than twelve years to elapse before fulfilling a Congressional mandate."[26]

4. Listing Standards for Recovery of Erroneously Awarded Compensation

In October 2022, the Commission adopted a rule and rule amendments to implement Section 954 of Dodd-Frank.[27] Section 954 mandates the Commission to adopt rules directing the national securities exchanges to establish listing standards that require listed issuers to adopt and comply with a compensation recovery policy, often known as a clawback policy.[28] The rules and listing standards also require listed companies to provide disclosure about such policies and how they are being implemented.[29] The

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[23] *See* Letter from Jeff Mahoney, General Counsel, CII to Brent J. Fields, Secretary, SEC 3 (June 25, 2015), https://www.cii.org/files/issues_and_advocacy/correspondence/2015/06_25_15_letter%20to%20SEC%20on%20953(a).pdf ("Consistent with our policies, CII generally supports the Proposal.").

[24] *See* Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC 2 (Feb. 24, 2022), https://www.cii.org/files/issues_and_advocacy/correspondence/2022/February%2024,%202022%20CII%20P4P%20letter%20(final).pdf ("Directors' decisions about executive pay speak volumes about the board's accountability to shareowners [and] [t]hat is why CII was an active proponent of including a provision in Dodd-Frank that would provide disclosure of key metrics that compensation committees use to determine incentive pay, and why CII continues to support the SEC's efforts to finalize a rule to implement Section 953(a) of Dodd-Frank.").

[25] *See, e.g.,* Steven Miller, CBES, SEC Requires Public Companies to Disclose Pay-Versus-Performance Measures, SHRM (Sept. 2, 2022), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/sec-requires-publiccompanies-to-disclose-pay-versus-performance-measures.aspx (quoting Brennan Rittenhouse, a managing director with consulting firm A&M Tax and LLC in Denver).

[26] SEC Commissioner Mark T. Uyeda, Statement on the Final Rule Related to Pay Versus Performance (Aug. 25, 2022), https://www.sec.gov/news/statement/uyeda-statement-final-rule-related-pay-versus-performance-082522.

[27] Press Release, SEC, SEC Adopts Compensation Recovery Listing Standards and Disclosure Rules (Oct. 26, 2022), https://www.sec.gov/news/press-release/2022-192 ("The Securities and Exchange Commission today adopted rules to require securities exchanges to adopt listing standards that require issuers to develop and implement a policy providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officer."); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954 ("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. '[] 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.'").

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

[29] *See* Press Release, SEC, SEC Adopts Compensation Recovery Listing Standards and Disclosure Rules.

Commission proposed compensation recovery rules in 2015[30] and reopened the comment period on the proposal in October 2021[31] and again in June 2022.[32]

CII actively advocated for Section 954 of Dodd-Frank.[33] Section 954 generally aligns with CII membership approved policies on "Compensation Recovery"[34] providing that "[c]lawback policies should ensure that boards can . . . recover previously paid executive incentive compensation in the event of . . . financial restatement."[35] CII supported the 2015 proposal in comment letters in August 2015,[36] November 2021,[37] and June 2022.[38]

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[30] *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.govinfo.gov/content/pkg/FR-2015-07-14/pdf/2015-16613.pdf.

[31] *See* Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 10,998, Exchange Act Release No. 93,331, Investment Company Act Release No. 34,399, 86 Fed. Reg. 58,232 (Oct. 21, 2021), https://www.govinfo.gov/content/pkg/FR-2021-10-21/pdf/2021-22754.pdf.

[32] *See* Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 11,071, Exchange Act Release No. 95,057, Investment Company Act Release No. 34,610, 87 Fed. Reg. 35,938 (June 8, 2022), https://www.federalregister.gov/documents/2022/06/14/2022-12792/reopening-of-comment-period-for-listing-standards-for-recovery-of-erroneously-awarded-compensation.

[33] *See* Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before S. Subcomm. on Sec., Ins., & Invest. of the Comm. on Banking, Hous., & Urb. Aff., 111th Cong. 13 (July 29, 2009) (Testimony of Ann Yerger, Exec. Dir. of CII), https://www.govinfo.gov/content/pkg/CHRG111shrg55479/html/CHRG-111shrg55479.htm ("The Council believes a tough clawback policy is an essential element of a meaningful 'pay for performance' philosophy [and] [i]f executives are rewarded for 'hitting their numbers'--and it turns out that they failed to so--they should not profit."); Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors et al., to The Honorable Nancy Pelosi, Speaker of the House, United States House of Representatives at al. 2 (Dec. 2, 2008) (on file with CII) ("any financial markets regulatory reform legislation [should include] . . . Stronger Clawback Provisions: At a minimum, senior executives should be required to return unearned bonus and incentive payments that were awarded due to fraudulent activity or incorrectly stated financial results").

[34] CII, CII Policies on Corporate Governance, § 5.7 Compensation Recovery ("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.").

[35] *Id.*

[36] *See* Letter from Jeff Mahoney, General Counsel, CII to Brent J. Fields, Secretary, SEC 4 (Aug. 27, 2015), https://www.cii.org/files/issues_and_advocacy/correspondence/2015/08_27_15_letter_to_SEC_clawbacks.pdf (In light of our . . . policies and related public positions on clawbacks, CII generally supports the Proposal.").

[37] Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC 1-2 (Nov. 18, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/November%2018%202021%20SEC%20clawback%20letter%20(final).pdf ("As the leading voice for effective corporate governance and strong shareholder rights, and as a primary advocate for Section 954 of Dodd-Frank, we strongly support the Commission promptly issuing the long overdue rule to "strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors.").

[38] *See* Letter from Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC Commission 1-2 (June 24, 2022), https://www.cii.org/files/issues_and_advocacy/correspondence/2022/June%2024%202022%20SEC%20clawback%20letter%20(final).pdf ("As the leading voice for effective corporate governance and strong shareholder rights, and

CII and many market participants agree that the SEC final rule benefits investors and the markets generally by increasing the incentives of executive officers to improve the overall quality and reliability of financial reporting.[39]

5. Insider Trading Arrangements and Related Disclosures -

In December 2022, the Commission adopted amendments to Rule 10b5-1.[40] That rule was originally intended to prevent executives from running afoul of the prohibition on trading on material non-public information if they bought or sold stock in their companies at a predetermined time on a scheduled basis.

However, within 10 years after the rule's adoption in 2000, loopholes in its operation emerged. And press reports and empirical evidence suggested that some corporate executives were using Rule 10b5-1 plans to pursue fortuitously timed trades in company stock while in possession of material non-public information.[41]

As a result, in December 2012, CII submitted a rulemaking petition to the SEC requesting amendments to Rule 10b5-1 to close existing loopholes and enhance disclosure of these trading plans.[42] The petition was generally consistent with CII policies, which state that 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."[43]

The SEC final amendments adopted many of the recommendations contained in our rulemaking petition and related policy. CII and many market participants agree that the

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as a primary advocate for Section 954 of Dodd-Frank, we continue to strongly support the Commission promptly issuing the long overdue rule to 'strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors.'").

[39] *See, e.g.,* 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, 15,483 (Mar. 13, 2023), https://www.federalregister.gov/documents/2023/03/13/2023-05035/selfregulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change ("the Exchange believes 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 [and] [t]he Exchange believes that these increased incentives may improve the overall quality and reliability of financial reporting, which further benefits investors").

[40] *See* 87 Fed. Reg. at 80,362.

[41] *See, e.g.,* Susan Pulliam & Rob Barry, Executives' Good Luck in Trading Own Stock, Wall St. J., Nov. 27, 2012, http://online.wsj.com/article/SB10000872396390444100404577641463717344178.html (indicating that many executives at public companies have adopted practices with respect to Rule 10b5-1 plans that are inconsistent with the spirit, if not the letter of Rule 10b5-1).

[42] *See* Letter from Jeff Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC (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 (petition for rulemaking to amend Rule 10b5-1 trading plans).

[43] Policies on Other Issues, Statement on Stock Sales by Insiders (adopted Mar. 10, 2020), https://www.cii.org/policies_other_issues#insider_trading.

rule benefits investors by better protecting them from misuse of Rule 10b5-1 trading plans and by enhancing public confidence in corporate management and the fairness of the capital markets.[44]

6. Share Repurchase Disclosure Modernization

In May 2023, the Commission adopted amendments to modernize and improve the information investors receive about repurchases of an issuer's equity securities, enabling them to better assess the efficiency of, and motives behind, such stock buybacks..[45] Among other things, the amendments require information regarding the structure of an issuer's repurchase program and its daily share repurchases.[46] The amendments also add new quarterly disclosure in certain periodic reports related to an issuer's adoption and termination of certain trading arrangements.[47]

The SEC final amendments were generally responsive to the comments CII submitted in March 2023[48] in response to the SEC's 2022 proposal,[49] including addressing our "concerns that [the proposed] . . . one business day turnaround to furnish [certain information about Rule 10b5-1 plans] could present compliance challenges, including in cases where trade orders fail to settle."[50] We note that our general support for the final amendments was derived from our membership approved "Statement on Stock Sales by Insiders,"[51] which provides that "[b]oth 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."[52]

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[44] *See, e.g.,* 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 ("The new rules close gaps in the SEC's enforcement regime that allow executives to use 10b5-1 plans as cover for insider trading," . . . [and] [t]he SEC amendments will better protect public investors from misuse of these plans and strengthen confidence in corporate management teams and the capital markets generally.").

[45] *See* Press Release, SEC, SEC Adopts Amendments to Modernize Share Repurchase Disclosure (May 3, 2023), https://www.sec.gov/news/press-release/2023-85 ("The Securities and Exchange Commission today adopted amendments to modernize the disclosure requirements relating to repurchases of an issuer's equity securities, including requiring issuers to provide daily repurchase activity on a quarterly or semi-annual basis, depending on the type of issuer. The amendments will improve disclosure and provide investors with enhanced information to assess the purposes and effects of share repurchases.").

[46] *See id.* ("The amendments will require issuers to disclose daily quantitative share repurchase information either quarterly or semi-annually.").

[47] *See id.* ("New Item 408(d) will require quarterly disclosure in periodic reports on Forms 10-Q and 10-K about an issuer's adoption and termination of Rule 10b5-1 trading arrangements.")

[48] *See* Glenn Davis, Deputy Director, CII to Secretary, Vanessa A. Countryman, SEC (Mar. 31, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20121907-274603.pdf

[49] *See* Share Repurchase Disclosure Modernization, Exchange Act Release No. 93,783, Investment Company Act Release No 34,444, 87 Fed. Reg. 8,443 (Feb. 15, 2022), https://www.federalregister.gov/documents/2022/02/15/2022-01068/share-repurchase-disclosure-modernization.

[50] Glenn Davis, Deputy Director, CII to Secretary, Vanessa A. Countryman, Securities and Exchange Commission at 4.

[51] CII, Policies on Other Issues, Statement on Stock Sales (adopted Mar. 10, 2020), https://www.cii.org/policies_other_issues#Company_disclosure.

[52] *Id.*

CII and many market participants agree with SEC Chair Gensler that "[t]hrough these disclosures, investors will be able to better assess issuer buyback programs [and] [t]hat's good for investors, issuers, and the markets."[53]

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In closing, CII looks forward to continuing to work cooperatively with the SEC, the Committee on Financial Services and its Capital Markets Subcommittee and other interested parties to further improve the corporate governance of U.S. public companies. Our aim is always to provide constructive input to ensure that the SEC and the federal securities laws continue to evolve to better serve the needs of U.S. investors and the U.S. capital markets generally.

Thank you for inviting me to participate in the hearing. I would be pleased to respond to any questions.

[53] Press Release, SEC, SEC Adopts Amendments to Modernize Share Repurchase Disclosure.