Council of Institutional Investors®
The voice of corporate governance

Testimony of Amy Borrus

Executive Director

of the

Council of Institutional Investors

before the

Subcommittee on Capital Markets

of the

Committee on Financial Services

October 24, 2023

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

Good morning. I am Amy Borrus, the Executive Director of the Council of Institutional Investors (CII). I am pleased to appear before you today on behalf of CII. I have brief prepared remarks and would respectfully request that my entire written statement and all supporting materials referenced therein be entered into the public record.

CII is a non-partisan, not-for-profit association of more than 140 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), 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]

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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 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 Jeffrey P. Mahoney, General Counsel, CII to Vanessa A. Countryman, Secretary, SEC 2-7 (Aug. 28, 2023),

I will briefly highlight just two 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]

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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] Policies on Corporate Governance, § 2.2 Director Elections, CII ("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-investors-5/ ("The indisputable fact about the universal proxy card (UPC) is that it is a far superior way for

2. Insider Trading Arrangements and Related Disclosures -

In December 2022, the SEC adopted amendments to Rule 10b5-1.[8] 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.

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.[9] 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."[10]

The SEC final rule adopted many of the recommendations contained in our rulemaking petition and related policy. CII and many market participants agree that the 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.[11]

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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.

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shareholders to exercise their voting franchise than the two-card system that has dominated proxy contests for decades.").

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

[9] *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).

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

[11] *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.").

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