ES143782

Council of Institutional Investors
The Voice of Corporate Governance

Via Hand Delivery

March 13, 2013

The Honorable Elisse B. Walter
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Rule 14a-4

Dear Madam Chairman:

I am writing on behalf of the Council of Institutional Investors ("CII"). CII is a nonprofit, nonpartisan association of public, corporation and union pension funds, other employee benefit plans, and foundations and endowments with combined assets of over $3 trillion.[1]

The purpose of this letter is to reiterate our continued long-standing support, consistent with our membership approved policies,[2] of Rule 14a-4 under the Securities Exchange Act of 1934 ("Rule").[3] As you the aware, the Rule requires the unbundling of management proposals so that each proxy card provides for separate votes on each matter presented. As explained in the Securities and Exchange Commission ("Commission" or "SEC") 1992 adopting release, the Rule "'serves not only to ensure informed decision making on each matter presented, but prohibits electoral tying arrangements that restrict shareholder voting choices on matters put before shareholders for approval.'"[4]

[1] For more information about the Council of Institutional Investors ("CII"), including its members, please visit CII's website at http://www.cii.org/members.
[2] Council of Institutional Investors, Corporate Governance Policies, 3.8 Bundled Voting, http://www.cii.org/corp_gov_policies ("Shareowners should be allowed to vote on unrelated issues separately.").
[3] *See e.g.,* Letter from Sarah A.B. Teslik, Executive Director, CII, to Brian Lane, Director, Division of Corporation Finance, Securities and Exchange Commission 1 (Mar. 4, 1998) (on file with CII) (Raising concerns about a "situation at Marriott International in which the company has asked shareholders to approve a single proposal that combines a panoply of matters . . . .").
[4] *Id.*

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Our letter is prompted by the recent decision of Judge Sullivan in the United States District Court of the Southern District of New York in *Greenlight Capital, L.P. v. Apple, Inc.* ("Apple").[5] In that decision, Judge Sullivan preliminarily enjoined Apple from giving effect to the votes on a four-part management proposal included in their definitive proxy statement, finding that the proposal "impermissibly bundles 'separate matters' for shareholder consideration" in violation of the plain language and purpose of the Rule.[6]

We are particularly pleased that Judge Sullivan found unavailing Apple's argument that its bundled proposal did not violate the Rule because the SEC did not take any action when Apple "'specifically highlight[ed]' the proposal in its December 2012 submission to the SEC."[7] In rejecting that argument, Judge Sullivan noted that the "'SEC has made clear . . . that it needs private actions as a supplement to its efforts to enforce Rule 14a-4's separate matter requirement due to its limited staff resources.'"[8] While we agree with Judge Sullivan that the SEC urgently needs more resources, and we plan to continue to advocate for an independent, stable, long-term funding mechanism for the Commission,[9] we believe a relatively modest reallocation of existing resources could reduce what appears to be rampant and blatant violations of the SEC's proxy rules—rules that are critically important to CII members and other investors.[10]

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[5] Greenlight Capital v. Apple, Inc., No. 13 Civ. 900 (S.D.N.Y. Feb. 22, 2013) (on file with CII).
[6] *Id.* at 6. The proposal in question included amendments to Apple, Inc.'s ("Apple") Restated Articles of Incorporation ("Articles") that would (1) eliminate certain language relating to the term of office of directors in order to facilitate the adoption of majority voting for the election of directors; (2) eliminate blank check preferred stock; (3) establish a par value for Apple's common stock of $0.00001 per share; and (4) make other conforming changes including eliminating provisions in the Articles relating to preferred stock of Apple. *Id.* at 2-3.
[7] *Id.* at 7.
[8] *Id.*
[9] *See, e.g.*, Investors' Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective 9 (July 2009) (on file with CII) (Recommending that all federal "[r]egulators should have enhanced independence through stable, long-term funding that meets their needs."). Following its issuance, the Investors' Working Group Report was reviewed, and subsequently endorsed by the CII board and membership.
[10] Greenlight Capital at 7 (Apple's arguments to Judge Sullivan included that it was common proxy practice for company's to bundle "similar proposals in their proxy statements . . . .").

We believe, for example, that violations of the Rule, as evidenced by Apple in this case, should be fairly easy to detect in the first instance from a cursory review of management's proxy card.[11] Establishing a process to more effectively and efficiently detect such obvious noncompliance with the Rule would not appear to require significant resources and would certainly not require the active participation of a lawyer or an experienced member of the SEC staff. We, therefore, would respectfully request that the Commission consider a modest reallocation of its existing resources to establish an effective and efficient process for identifying clear violations of the Commission's proxy rules.

We would welcome the opportunity to discuss this request with you or your staff in more detail at your convenience. As always, please feel free to contact me directly at (202) 261-7081 or jeff@cii.org.

Sincerely,

Jeff Mahoney
General Counsel

cc: Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Lona Nallengara, Acting Director, Division of Corporation Finance

[11] *Id.* at 8 (Judge Sullivan finding that Apple's "proxy materials are plainly noncompliant with the clear requirements of Rule 14a-4.").