

Via Email

February 24, 2022

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

Re: File No. S7-07-15

Dear Madam Secretary:

The Council of Institutional Investors (CII or Council), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to the reopening of “the comment period for its proposal to implement Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010”¹ (Dodd-Frank)² (Reopening Release).³

CII is a nonprofit, nonpartisan association of 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.⁴

¹ Reopening of Comment Period for Pay Versus Performance, Exchange Act Release No. 94,074, 87 Fed. Reg. 5,751, 5,751 (reopening of proposal Jan. 27, 2022), <https://www.federalregister.gov/documents/2022/02/02/2022-02024/reopening-of-comment-period-for-pay-versus-performance>.

² Dodd-Frank Wall Street Reform and Consumer Protection Act § 953(a), Pub. L. No. 111–203, 124 Stat. 1376 (2010), <https://www.govinfo.gov/content/pkg/STATUTE-124/pdf/STATUTE-124-Pg1376.pdf#page=1> (“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. The disclosure under this subsection may include a graphic representation of the information required to be disclosed.’”).

³ See 87 Fed. Reg. at 5,751.

⁴ 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>.

CII believes that executive compensation is the most critical and visible aspect of a company's corporate governance.⁵ Directors' decisions about executive pay speak volumes about the board's accountability to shareowners.⁶ That 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.⁷

As described in CII's 2015 comment letter (2015 Letter)⁸ in response to the SEC's 2015 Pay Versus Performance proposal (Proposing Release):⁹

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. The legislative history of Section 953(a) explicitly references the testimony of CII's Executive Director before the Subcommittee on Securities, Insurance, and Investment of the Committee on Banking, Housing, and Urban Affairs In that testimony, the Executive Director stated:

Of primary concern to the Council is full and clear disclosure of executive pay. As U.S. Supreme Court Justice Louis Brandeis noted, "sunlight is the best disinfectant." Transparency of executive pay enables shareowners to evaluate the performance of the compensation committee and board in setting executive pay, to assess pay-for-performance links and to optimize their role of overseeing executive compensation through such means as proxy voting. . . . We believe the disclosure regime in the U.S. would be substantially improved if companies would have to disclose the quantitative measures used to determine incentive pay. Such disclosure . . . would eliminate a major impediment to the market's ability to analyze and understand executive compensation programs and to appropriately respond.¹⁰

While CII generally supports the provisions of the Proposing Release as modified by the Reopening Release, we believe that in order for the Commission to fully capture the original intent of Section 953(a) of Dodd-Frank, the final implementing rule *must* revise Item 402 of

⁵ See Council of Institutional Investors, CII Advocacy Priorities, Corporate Disclosure (2022), https://www.cii.org/corporate_disclosure ("Executive compensation is the most critical and visible aspect of a company's corporate governance.").

⁶ *Id.* ("Directors' decisions about CEO pay speak volumes about the board's accountability to shareowners").

⁷ *Id.* ("That is why CII urges the SEC to finalize pay-for-performance rules as mandated in the 2010 Dodd-Frank Act.").

⁸ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission 10 (June 25, 2015), [https://www.cii.org/files/issues_and_advocacy/correspondence/2015/06_25_15_letter%20to%20SEC%20on%20953\(a\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2015/06_25_15_letter%20to%20SEC%20on%20953(a).pdf).

⁹ Pay Versus Performance, Exchange Act Release No. 74,835, 80 Fed. Reg. 26,330 (proposed May 7, 2015) <http://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-10429.pdf>.

¹⁰ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 2 (footnotes omitted).

Regulation S-K¹¹ to explicitly require registrants to disclose all of the quantitative metrics, targets, and thresholds the registrant actually uses in determining the “named executive officers” (NEO)¹² incentive compensation paid for the current year.¹³

In addition, given the increase in the disclosure of financial compensation metrics in the Compensation, Discussion & Analysis (CD&A) section of a company’s proxy statement that are not based on generally accepted accounting principles (Non-GAAP), we believe the final rulemaking should also incorporate CII’s 2019 SEC rulemaking petition (2019 Petition).¹⁴ The 2019 Petition would amend Item 402(b) of Regulation S-K¹⁵ to close a loophole that permits the use of non-GAAP measures in the CD&A without providing a quantitative reconciliation of those metrics to the most directly comparable GAAP financial measures.¹⁶ The quantitative reconciliation would provide an important new source of information to investors in evaluating those executive compensation packages based on Non-GAAP metrics.¹⁷

More details about our recommendations, including responses to select requests for comment in the Reopening Release are set forth below. The SEC questions to which we are responding appear in italics.

***SEC Request for Comment 1.** Should disclosure of additional financial performance measures beyond TSR be required? Specifically, would investors find it useful to have pre-tax net income and net income presented in tabular format alongside the other metrics that would be required by the Proposing Release? Would these two additional metrics help investors to appropriately*

¹¹ See Executive Compensation, 17 C.F.R. § 229 (Item 402) (2019), available at <https://www.law.cornell.edu/cfr/text/17/229.402>.

¹² *Id.* (Item 402(a)(3)).

¹³ See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 7 (“Consistent with our membership-approved policies, we believe requiring such quantitative information to be disclosed may be the single most important improvement the Commission could make to the Proposal”).

¹⁴ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission 1 (Apr. 29, 2019), <https://www.sec.gov/rules/petitions/2019/petn4-745.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.”).

¹⁵ See 17 C.F.R. § 229 (Item 402(b)) (“Compensation discussion and analysis.”).

¹⁶ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 1; see also Council of Institutional Investors, CII Advocacy Priorities, Corporate Disclosure (“CII is also pressing the SEC 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.”).

¹⁷ See Council of Institutional Investors, CII Advocacy Priorities, Corporate Disclosure (“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 [and]. [i]nvestors often struggle to make sense of how companies assess performance in approving large compensation packages.”).

*evaluate the relationship between executive compensation actually paid and the financial performance of the registrant? Would the inclusion of these measures alleviate concerns previously raised by commenters on the proposed rules about including only TSR and peer group TSR in this disclosure? Would their inclusion complicate the disclosure such that its usefulness could be reduced? Should we also require that these measures, if any, be discussed in the required description (which may be, e.g., narrative or graphical) that accompanies the tabular disclosure? Instead of requiring additional financial performance measures, should we instead include pre-tax net income and net income as examples of additional measures registrants could elect to disclose if they believed such disclosure would be beneficial for them? What would the benefits or drawbacks be of that approach?*¹⁸

CII Response. CII generally supports the SEC requiring additional financial performance measures beyond total shareholder return (TSR). As indicated in the 2015 Letter, “CII believes that TSR standing alone may not provide sufficient information about a registrant’s performance in all circumstances.”¹⁹

We believe that many investors would find it useful to have pre-tax net income and net income presented in tabular format alongside the other metrics that would be required by the Reopening Release.²⁰ We generally agree with the SEC that pre-tax net income and net income provide “additional important measures of company financial performance that may be relevant to investors in evaluating executive compensation.”²¹

We also generally agree with the SEC that “a company’s pre-tax net income and net income could complement the market-based performance measure required in the Proposing Release by also providing accounting-based measures of financial performance.”²² We also generally agree with the SEC that “including pre-tax net income and net income as additional measures of performance in the proposed table may lower the burden of analysis for those investors by presenting this existing information together in a way that could make it easier to understand how pay relates to performance.”²³

SEC Request for Comment 3. *How should we define the Company-Selected Measure, if we were to require its disclosure? We are considering defining the Company Selected Measure as the measure that in the registrant’s assessment represents the most important performance*

¹⁸ 86 Fed. Reg. at 5,755 (emphasis added).

¹⁹ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 10.

²⁰ See, e.g., Letter from Marc Hodak, Hodak Value Advisors to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission 12 (July 2, 2015), <https://www.sec.gov/comments/s7-07-15/s70715-34.pdf> (“Nevertheless, given the limitations of TSR and relative TSR as measures of management performance, it’s worth considering comparing actual pay (either the ‘alignment’ or ‘cost’ version) against an accounting-based measure, such as profit, return on capital, etc.”).

²¹ 87 Fed. Reg. at 5,753; see, e.g., Letter from Marc Hodak, Hodak Value Advisors to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission at 9 (“It is far better to reward management against accounting-based metrics that presumably represent value creation, and to which managers have a clearer line of sight [and] [m]anagers are generally comfortable focusing on tangible operating results in the faith that improved profitability over time will eventually be reflected in the stock price [and] [t]heir investors are generally comfortable with that, as well.”).

²² 87 Fed. Reg. at 5,753.

²³ *Id.*

*measure (that is not already included in the table) used by the registrant to link compensation actually paid during the fiscal year to company performance. Would such a definition provide sufficient clarity to a registrant as to what to disclose? What computations or considerations would be required in determining the Company-Selected Measure and what would be the associated costs for registrants? Should we require registrants to disclose the methodology used to calculate the Company-Selected Measure? Should that consideration depend on whether the measure is already disclosed in the Company's financial statements?*²⁴

CII Response. CII generally supports the SEC defining the “Company-Selected Measure”²⁵ as the measure that in the registrant’s assessment represents the most important performance measure (that is not already included in the table) used by the registrant to link compensation actually paid during the fiscal year to company performance.²⁶ Generally consistent with the 2015 Letter²⁷ and our membership approved policies,²⁸ we believe that the Reopening Release’s definition of the Company-Select Measure may be improved if the definition includes the registrant’s assessment that the measure will assist investors in better understanding how the registrant’s pay programs contribute to the company’s long-term shareholder return.²⁹

We also believe, consistent with CII membership-approved policies,³⁰ that the SEC should require registrants to disclose the methodology used to calculate the Company-Select Measure. More specifically, our policies provide that “the proxy statement should clearly explain such plans, including their purpose in context of the business strategy and how . . . performance targets, and the resulting payouts, are determined.”³¹

SEC Request for Comment 7: *Would mandated disclosure of the Company-Selected Measure be useful to investors when placed alongside the metrics that would be required by the Proposing Release? How would these benefits, if any, compare to those of any supplemental financial*

²⁴ *Id.* at 5,755-56 (emphasis added).

²⁵ *Id.* at 5,753 n.15.

²⁶ *Id.* (“We are also considering whether to require registrants to disclose, as an additional column to the above table, a third new measure—the Company Selected Measure—that in the registrant’s assessment represents the most important performance measure (that is not already included in the table) used by the registrant to link compensation actually paid during the fiscal year to company performance, over the time horizon of the disclosure.”).

²⁷ See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 10 (“we believe that it would be in the best interests of registrants and shareowners alike if companies’ voluntarily provide those supplemental measures that, after consultation with their shareowners, they believe will assist investors in better understanding how the pay programs support long-term value creation.”).

²⁸ Council of Institutional Investors, Corporate Governance Policies, § 5.1 Core Objectives of Executive Pay (updated Sept. 22, 2021), https://www.cii.org/files/09_22_21_corp_gov_policies.pdf (“Rewarding executives based on broad measures of performance may be appropriate in cases where doing so logically contributes to the company’s long-term shareholder return.”).

²⁹ See Letter from Marc Hodak, Hodak Value Advisors to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission at 13 (“recommending “[d]efin[ing] ‘performance’ . . . at the discretion of the company, . . . that the company believes is a relevant proxy for shareholder value.”).

³⁰ See Council of Institutional Investors, Corporate Governance Policies, §5.5c Performance-based compensation (updated Sept. 22, 2021), https://www.cii.org/files/09_22_21_corp_gov_policies.pdf (“In addition, the proxy statement should clearly explain such plans, including their purpose in context of the business strategy and how the award and performance targets, and the resulting payouts, are determined.”).

³¹ *Id.*

*performance measures that would voluntarily be disclosed by registrants in the absence of such a mandate? Would there be challenges to registrants to presenting information about the Company Selected Measure in tabular form? If so, how could we elicit comparable disclosure while also allowing registrants flexibility in presenting this information to accommodate their particular facts and circumstances? Is there another format we should consider for the Company-Selected Measure? Should we specifically limit any Company-Selected Measure only to those measures that relate to the financial performance of the registrant? Or should we allow the Company Selected measure to be any measure that could be disclosed under the existing CD&A requirements, including financial performance measures; environmental, social and governance related measures; or any other measures used by the registrant to link compensation actually paid during the fiscal year to company performance?*³²

CII Response. CII generally believes the SEC should allow the Company-Select Measure to include any measure that could be disclosed under the existing CD&A requirements, including financial performance measures; environmental, social and governance related measures; or any other measures used by the registrant to link compensation actually paid during the fiscal year to company performance. We generally agree with SEC Commissioner Caroline A. Crenshaw that “companies are increasingly linking executive pay to environmental, social, and governance (“ESG”) measures. . . .”³³ And to the extent those measures are being used by the registrant to link compensation actually paid during the fiscal year to company performance, we believe those measures should be required to be disclosed.

SEC Request for Comment 8: *We are considering requiring the one Company-Selected Measure that is the most important measure over the time horizon of the disclosure to be identified in the table, and issuers would provide information about that measure, including the numerically quantifiable performance of the issuer with respect to that measure, for all of the years in the table. Would investors find such a presentation useful? Would there be challenges to registrants to presenting this information for all years? Should we instead allow companies to change their Company-Selected Measure from year to year, such that they would disclose in the table a potentially different Company-Selected Measure for each respective year? Would doing so have any impact on investors’ ability to understand how pay relates to performance and compare across different years? If we do require a registrant to disclose one Company Selected Measure to be identified in the table, and that registrant elects to change what that measure is in consecutive years, should we require that registrant to separately disclose in additional columns, or narratively, the Company-Selected Measures used in the table in prior years? How often do registrants change, from year to year, their primary performance measures used by the registrant to link executive compensation during a fiscal year to company performance?*³⁴

CII Response. CII generally believes investors would find useful requiring the one Company-Selected Measure that is the most important measure over the time horizon to be identified in the proposed compensation table, and requiring issuers to provide information about that measure, including the numerically quantifiable performance of the issuer with respect to that measure, for

³² 87 Fed. Reg. at 5,756 (emphasis added).

³³ Commissioner Caroline A. Crenshaw, Statement on the Reopening of Pay vs. Performance (Jan. 27, 2022), <https://www.sec.gov/news/statement/crenshaw-statement-pvp-012722>.

³⁴ 87 Fed. Reg. at 5,756-57 (emphasis added).

all of the years in the table. We generally agree with the SEC that this proposed disclosure “may elicit additional useful disclosure while reducing the risk, identified by commenters on the Proposing Release, of misrepresenting or providing an incomplete picture of how pay relates to performance given the differences across companies in terms of performance measures that companies or investors care about and the questions about whether a ‘one size fits all’ benchmark is appropriate for all companies.”³⁵

***SEC Request for Comment 9:** Would a tabular list of a registrant’s five most important performance measures used to determine compensation actually paid be useful to investors in addition to existing disclosures? As in the case of the Company-Selected Measure above, how should we define “importance” and how should performance measures be ranked for this purpose, particularly if multiple performance targets apply to the same elements of compensation? Should we require disclosure of the five most important performance measures or some other number of performance measures? Would the inclusion of an additional tabular list of a registrant’s five most important performance measures dilute the impact of, or otherwise lead to confusion regarding, the table that would be required by the Proposing Release? Should we require that the five measures be listed in order of importance? How could we increase the usefulness of the tabular list of a registrant’s five most important performance measures for investors? Should there be disclosure of the methodology behind those measures?*³⁶

CII Response. CII generally believes a tabular list of a registrant’s five most important performance measures used to determine compensation actually paid would be useful to investors in addition to the existing proposed disclosures. We generally agree with the SEC that the disclosure:

[M]ay be useful to investors in addition to the more detailed disclosure related to the consideration of the registrant’s corporate performance and individual performance in the design of NEO compensation required in the CD&A. This tabular disclosure may enable investors to more easily assess which performance metrics actually have the most impact on compensation actually paid and make their own judgments as to whether compensation appropriately incentivizes management. The disclosure of the five most important performance measures that drove compensation actually paid may also provide investors with context that could be useful in interpreting the remainder of the pay versus performance disclosure.

....

[I]ncluding a tabular list of those performance measures that drove recent compensation actually paid may help address concerns that using only TSR may mislead investors or provide an incomplete picture of performance. In addition, . . . the inclusion of a registrant’s five most important performance measures may better reflect the differences across companies.³⁷

³⁵ *Id.* at 5,753.

³⁶ *Id.* at 5,757 (emphasis added).

³⁷ *Id.* at 5,754.

SEC Request for Comment 13: *Should we, either in addition to or in lieu of the proposed rules and the disclosure of the additional measures we are considering, revise Item 402 of Regulation S-K to explicitly require registrants to disclose all of the performance measures that actually determine NEO compensation? If registrants are already providing this disclosure, are there ways we could improve this disclosure? For example, do investors find current disclosures about executive compensation performance measures complicated or difficult to analyze? If so, how could we make these disclosures less complicated or facilitate their analysis while also meeting the requirements of Section 953(a) of the Dodd-Frank Act?*³⁸

CII Response. CII strongly believes that either in addition to, or in lieu of, the proposed rules and the disclosure of the additional measures the SEC is considering, the SEC must revise Item 402 of Regulation S-K to explicitly require registrants to disclose all of the performance measures that are used to determine named executive officers (NEO) compensation in the current year. More specifically, the information required to be disclosed should include all quantitative metrics, targets, and thresholds that were actually used in the current year to determine NEO compensation. As explained in the 2015 Letter:

[T]he legislative history of Section 953(a) references the testimony of CII's Executive Director before the Subcommittee on Securities. The key message in that testimony, which we believe was an impetus for the pay-for-performance requirement in Dodd-Frank, was the need for more and better disclosure about quantitative measures used to design and determine executive incentive pay. The continued absence of disclosure of this information, more than five years after the testimony was delivered, remains a major impediment to investor's and the market's ability to analyze and understand the compensation programs awarded to PEOs and NEOs. Consistent with our membership-approved policies, we believe requiring such quantitative information to be disclosed may be the single most important improvement the Commission could make to the Proposal.³⁹

The view expressed in the 2015 Letter is generally consistent with our current membership-approved corporate governance best practices on executive compensation that include the following provisions relating to disclosures of performance measures:

5.3 Transparency of Compensation: Compensation committees should make compensation disclosures (including those in the U.S.-style Compensation Disclosure and Analysis), as clear, straightforward and comprehensible as possible. Each element of pay should be clear to shareholders, especially with respect to any goals, metrics for their achievement and maximum potential total cost. Descriptions of metrics and goals in the proxy statement should be at least as clear as disclosures described in other investor materials and calls. To the extent that compensation is performance-based, it is critical that investors have information to evaluate the

³⁸ *Id.* at 5,757 (emphasis added).

³⁹ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 7 (footnote omitted).

choice of metrics, how those metrics relate to key company strategic goals, and how challenging the goals are. . . .⁴⁰

5.5c Performance-based compensation

....

The compensation committee should ensure that performance-based programs are not too complex to be well understood by both participants and shareholders, that the underlying performance metrics support the company's business strategy, and that potential payouts are aligned with the performance levels that will generate them. In addition, the proxy statement should clearly explain such plans, including their purpose in context of the business strategy and how the award and performance targets, and the resulting payouts, are determined.⁴¹

SEC Request for Comment 16: *For SRCs, would disclosure of either pre-tax net income or net income be useful to investors when placed alongside the metrics included in the Proposing Release? Are there different measures of financial performance that would be more appropriate for SRCs? Should we require SRCs to disclose a Company-Selected Measure and the list of their five most important performance measures used to set NEO compensation? Why or why not? What would be the burdens on SRCs of providing this additional disclosure and would the benefits of requiring this disclosure for SRCs justify the burdens? Would any such burdens be mitigated by the fact that the Company-Selected Measure and the list of a company's five most important performance measures are by definition measures that the company already uses to link compensation actually paid to financial performance? Is there relevant data on the long-term costs from diminished transparency that we should consider in this regard?*⁴²

CII Response. CII would generally support requiring smaller reporting companies (SRCs) to provide disclosure of (1) pre-tax net income and net income placed alongside the metrics included in the Proposing Release; (2) a Company-Selected Measure and the list of their five most important performance measures used to set NEO compensation; and (3) the actual metrics, targets, and thresholds used for determining the current year NEO compensation. To the extent those disclosures are required for other registrants, we believe the disclosures would also be useful to the investors in SRCs.

As indicated by the SEC, we agree that it would appear that any burden SRCs may incur in disclosing a Company-Selected Measure, the list of their five most important performance measures used to set NEO compensation, and the actual metrics, targets, and thresholds used for determining the current year NEO compensation, would be limited to the extent those measures are by definition measures that the company already uses to link compensation paid to actual performance. We also agree with the SEC that any burden SRCs may incur in disclosing either pre-tax net income and net income would be limited because those amounts "are already provided for under U.S. GAAP."⁴³

⁴⁰ Council of Institutional Investors, Corporate Governance Policies, §5.3 **Transparency of Compensation** (updated Sept. 22, 2021), https://www.cii.org/files/09_22_21_corp_gov_policies.pdf.

⁴¹ *Id.* §5.5c Performance-based compensation.

⁴² 87 Fed. Reg. at 5,757 (emphasis added).

⁴³ *Id.* at 5,755.

In addition, on the benefit side of the equation, as indicated, we believe that executive compensation is the most critical and visible aspect of a company's corporate governance.⁴⁴ Directors' decisions about executive pay speak volumes about the board's accountability to shareowners.⁴⁵ And disclosure about executive compensation can be an important input to investor decisions on proxy votes and allocation of capital.⁴⁶

We also believe it is relevant, as the SEC notes, that approximately 45 percent of registrants subject to the proposed rules would be SRCs, compared to approximately 40 percent at the time of publication of the Proposing Release.⁴⁷ More broadly, and as discussed in the 2015 Letter:

CII generally opposes exempting smaller reporting companies from the proposed pay versus-performance disclosure requirements. We agree with the Commission that shareowners of smaller reporting companies "may benefit from having the proposed pay-versus-performance disclosure when casting their say-on-pay advisory votes and that such disclosure can be provided without imposing undue costs on smaller registrants."

. . . [A]s . . . explained in our comments in response to the Commission's proposed rule, Disclosure of Hedging by Employees, Officers and Directors:

[W]e note that the Council's membership approved policies have long recognized that compensation is a critical and visible aspect of a company's governance. We believe pay decisions are one of the most direct ways for shareowners to assess the performance of the board. And, as indicated, they have a bottom line effect, not just in terms of dollar amounts, but also by formalizing performance goals for employees, signaling the market and affecting employee morale. As a result, the Council has and will continue to oppose exempting SRCs . . . from compensation related disclosures . . . that . . . are useful to investors.⁴⁸

CII's 2022 views about SRCs and executive compensation disclosures have not substantially changed from the views we expressed in the 2015 Letter.

SEC Request for Comment 17: *The Commission proposed to require that registrants use XBRL to tag separately the values disclosed in the required table, and separately block-text tag the*

⁴⁴ See, e.g., Council of Institutional Investors, CII Advocacy Priorities, Corporate Disclosure.

⁴⁵ *Id.*

⁴⁶ See, e.g., Commissioner Caroline A. Crenshaw, Statement on the Reopening of Pay vs. Performance ("I certainly support promoting greater competition and capital formation in our markets, but, as commenters in 2015 noted, disclosure about executive compensation provides information that affects a company's bottom line and can be an important input for investors as they allocate capital.").

⁴⁷ See 87 Fed. Reg. at 5,751 n.5 ("Based on staff analysis of filings in 2019, approximately 45 percent of registrants subject to the Proposed Rules would be SRCs and thus would be exempt from the asterisked disclosure, compared to approximately 40 percent at the time of publication of the Proposed Rules.").

⁴⁸ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 13-14 (footnotes omitted).

disclosure of the relationship among the measures, the footnote disclosure of deductions and additions used to determine executive compensation actually paid, and the footnote disclosure regarding vesting date valuation assumptions. We are considering requiring registrants to also tag specific data points (such as quantitative amounts) within the footnote disclosures that would be block-text tagged. In addition, we are considering requiring registrants to use Inline XBRL rather than XBRL to tag their pay versus performance disclosure. Would additional detail tagging of some or all of those specific data points within the footnote disclosures be valuable to investors? If so, which specific data points within the footnote disclosures should we require registrants to detail tag and why? What would be the incremental costs of such a requirement? Should we require registrants to use Inline XBRL rather than XBRL to tag the proposed new pay versus performance disclosures? Is there an alternative machine-readable language to Inline XBRL that we should consider? Should we enable more flexibility by accommodating other machine-readable languages? If we were to require Inline XBRL detail tagging of the disclosures, should we exempt smaller reporting companies from that requirement? Would the costs be different for smaller reporting companies to comply with such a requirement as compared to other registrants? Should we, as was proposed with respect to the original XBRL tagging requirement, provide a phase-in for smaller reporting companies for any Inline XBRL requirement that includes additional detail tagging?⁴⁹

CII Response: CII generally would support the Commission requiring that all registrants, including SRCs, use Inline eXtensible Business Reporting Language (XBRL) to tag their pay versus performance disclosures, including specific data points (such as quantitative amounts) within footnote disclosures that would be block-text tagged.

In the 2015 Letter, we stated that “CII generally agrees with the Commission that the data resulting from the Proposal should be required to be tagged”⁵⁰ And we agreed with the “Commission’s conclusion that: [R]equiring the data to be tagged would lower the cost to investors of collecting this information and would permit data to be analyzed more quickly by shareholders, exchanges and other end-users than if the data was provided in a non-machine readable format.”⁵¹

In 2018, CII publicly supported the SEC’s “adoption of amendments requiring the use of [Inline] XBRL] . . . format as an important development.”⁵² Our letter explained:

Inline XBRL ‘allows filers to embed XBRL data directly into the document filed on EDGAR.’ This improvement in the functionality of EDGAR makes disclosure documents more valuable and cost-effective for a broad range of users, including market analysts and data vendors that conduct research on smaller companies.⁵³

⁴⁹ 87 Fed. Reg. at 5,757-58 (emphasis added and footnotes omitted).

⁵⁰ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission at 5.

⁵¹ *Id.* at 6.

⁵² Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Nicole Puccio, Branch Chief, Securities and Exchange Commission 2 (July 19, 2018), [https://www.cii.org/files/July%2019%202018%20SEC%20Strategic%20Plan%20final%20\(003\).pdf](https://www.cii.org/files/July%2019%202018%20SEC%20Strategic%20Plan%20final%20(003).pdf).

⁵³ *Id.* at 2-3.

As the SEC notes in the Reopening Release, SRCs are already “subject to the Commission’s Inline XBRL tagging requirements, including detail tagging requirements.”⁵⁴

SEC Request for Comment 22: *Are there any other developments (including with respect to executive compensation practices) since the Proposing Release that should affect our consideration of the proposed rules or their potential economic effects? How have qualitative measures in executive compensation packages changed and/or developed since the Proposing Release? How should we contemplate such changes in our consideration of the disclosures discussed above and in the Proposing Release? How have environmental, social and governance related metrics changed and/or developed since the Proposing Release? How should we contemplate such changes in our consideration of the disclosures discussed above and in the Proposing Release? Are there changes in market practices with respect to disclosures in the CD&A or voluntary disclosures that should affect our approach or affect our consideration of the economic effects of any rule changes? Are there any changes we should consider in the methodologies and estimates used to analyze the economic effects of the proposed rules in the Proposing Release?*⁵⁵

CII Response: CII notes that there has been a recent development with respect to disclosures in CD&A—the proliferation of non-GAAP compensation targets—that we respectfully request the SEC address in this rulemaking.

As CII policy explains:

Metrics for performance and performance goals can be numerous and wide-ranging. They often are based on non-GAAP “adjusted” measures without reconciliation to GAAP. Investors need sufficient information to understand how the plan works. Performance-based award programs typically are more difficult to understand, more difficult to value and more vulnerable to obfuscation than time-vesting restricted stock.⁵⁶

Since 2003 the SEC has generally required companies to give equal prominence to GAAP and non-GAAP financial measures, and an explanation of why non-GAAP measures are better than GAAP, as well as provide a quantitative reconciliation of the numbers.⁵⁷ Yet an anomaly exists in that the SEC rules currently do not apply to the target measures for compensation contained in CD&A section of a corporation’s proxy statement.⁵⁸

⁵⁴ 87 Fed. Reg. at 5,758 n.26.

⁵⁵ *Id.* at 5758-59 (emphasis added).

⁵⁶ §5.5c Performance-based compensation.

⁵⁷ See Conditions for Use of Non-GAAP Financial Measures, Securities Act Release No. 8,176, Exchange Act Release No. 47,226 (Jan. 23, 2002), <https://www.sec.gov/rules/final/33-8176.htm> (“Regulation G contains a general disclosure requirement and a specific requirement of a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure.”).

⁵⁸ See, e.g., Kevin Douglas, Navigating the Maze: Which SEC Rules Apply to Your Non-GAAP Financial Measure Disclosures, Bass Berry & Sims, Sec. L. Exch. (Oct. 24, 2019), <https://www.bassberrysecuritieslawexchange.com/non-gAAP-financial-measures-disclosure/> (“where non-GAAP financial measures are disclosed as a target metric for compensatory purposes, the applicable non-GAAP requirements . . . reconciliation, equal prominence, etc. . . do not apply”).

One analysis revealed that in 2018, more than two-thirds of the S&P 500 companies used non-GAAP financial measures to establish compensation targets in the CD&A.⁵⁹ That same analysis indicated that about 30% of S&P 500 companies that used non-GAAP financial measures in the CD&A used identically labeled non-GAAP metrics in their earnings releases *but calculated the measures differently*.⁶⁰ Other research has indicated that non-GAAP metrics determined a significant percentage of chief executive officer's annual cash bonuses, long-term stock awards, or both.⁶¹

The onset of COVID-19, appears to have further increased the use of non-GAAP financial measures, and perhaps more significantly, increased the gap between GAAP earnings and non-GAAP earnings.⁶² As one legal expert observed last year:

[I]n the sample group [of earnings releases for 2020 issued by companies in the S&P 500 that reported both GAAP and non-GAAP earnings], non-GAAP net income exceeded GAAP net income by \$132.3 billion—more than double the total GAAP net income of \$130.7 billion. By comparison, a 2019 op-ed co-authored by former SEC Commissioner Robert Jackson cited research showing that firms in the S&P 500 announced adjusted earnings that were, on average, 23% higher than GAAP earnings and pointed to 36 companies in the S&P 500 that, in 2015, announced non-GAAP earnings more than 100% higher than the GAAP equivalent, and 57 more companies that reported non-GAAP earnings that were 50% to 100% higher than GAAP.⁶³

⁵⁹ See Olga Usvyatsky, Pros and Cons of Using Non-GAAP Metrics for Executive Compensation, Including ESG Considerations, Audit Analytics (June 11, 2019), <https://blog.auditanalytics.com/pros-and-cons-of-using-non-gAAP-metrics-for-executive-compensation-including-esg-considerations/> (“In 2018, more than two-thirds of the S&P 500 companies used non-GAAP to establish compensation targets.”).

⁶⁰ *Id.* (“some firms will double-adjust executive compensation metrics by identically labeling metrics in both earnings releases and executive pay but calculating the metrics differently”).

⁶¹ See Nicholas Guest et al., High Non-GAAP Earnings Predict Abnormally High CEO Pay*, MIT, Sloan Sch. of Mgmt. 10 (May 2018), <https://www.hbs.edu/faculty/Shared%20Documents/conferences/2018-imo/GKP%20Non-GAAP%20Compensation%20Paper%20May%202018.pdf> (“For example, 38% of FirstEnergy’s 2013 target CEO pay was granted for meeting a non-GAAP earnings target, 20% as an annual cash bonus and 18% as restricted stock.”).

⁶² See Cydney Posner, Is There a Resurgence in the Use of Non-GAAP Financial Measures?, Cooley PubCo (May 17, 2021), <https://cooleypubco.com/2021/05/17/resurgence-non-gAAP-financial-measures> (“with the onset of COVID-19, there seems to have been something of a resurgence in the use of non-GAAP measures”).

⁶³ *Id.*

CII filed the 2019 Petition asking that CD&A reports include an explanation of why non-GAAP measures are better for determining executive pay than GAAP, and that they include a quantitative reconciliation (or a hyperlink to a reconciliation in another SEC filing) of these two sets of numbers.⁶⁴ More specifically, the 2019 Petition requests that the Commission:

- Initiate a rule change to amend Item 402(b) of Regulation S-K to eliminate Instruction 5⁶⁵;
- Revise the SEC’s Division of Corporation Finance’s Compliance & Disclosure Interpretations on Non-GAAP Financial Measures to be consistent with the aforementioned amendment and to provide that all non-GAAP financial measures presented in the proxy statement CD&A are subject to the requirements of Regulation G⁶⁶ and Item 10(e) of Regulation S-K⁶⁷; and
- Require that the reconciliation be included within the proxy statement or made accessible through a hyperlink in the CD&A.⁶⁸

In a December 2020 opinion piece in MarketWatch, Robert Pozen, a senior lecturer at the MIT Sloan School of Management and formerly vice chairman of Fidelity Investments and John Coates, the John F. Cogan Professor of Law and Economics at Harvard Law School advocated for making the issues raised by the 2019 Petition a consensus agenda rulemaking item for the Commission.⁶⁹

⁶⁴ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 1.

⁶⁵ See 17 C.F.R. § 229 (Item 402(b), Instruction 5) (“Disclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G (17 CFR 244.100 - 102) and Item 10(e) (§ 229.10(e)); however, disclosure must be provided as to how the number is calculated from the [registrant's](#) audited financial statements.”).

⁶⁶ See Conditions for Use of Non-GAAP Financial Measures, Securities Act Release No. 8,176, Exchange Act Release No. 47,226 (Jan. 24, 2002), <https://www.sec.gov/rules/final/33-8176.htm>.

⁶⁷ General, 17 C.F.R. § 229.10 (Item 10 (e) (2021), available at <https://www.law.cornell.edu/cfr/text/17/229.10> (“Use of non-GAAP financial measures in Commission filings.(1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:(i) The [registrant](#) must include the following in the filing:(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);(B) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP identified in [paragraph \(e\)\(1\)\(i\)\(A\)](#) of this section;(C) A statement disclosing the reasons why the [registrant's](#) management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the [registrant's](#) financial condition and results of operations; and(D) To the extent [material](#), a statement disclosing the additional purposes, if any, for which the [registrant's](#) management uses the non-GAAP financial measure that are not disclosed pursuant to [paragraph \(e\)\(1\)\(i\)\(C\)](#) of this section; . . .”).

⁶⁸ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 1.

⁶⁹ See 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> (“It should be a nonpartisan point of agreement to start a rulemaking process on the use of non-GAAP measures in compensation committee reports . . .”).

Some might argue that the rulemaking envisioned by the 2019 Petition is unnecessary because companies will voluntarily improve their proxy disclosures to include an explanation of why non-GAAP measures are better for determining executive pay than GAAP and a quantitative reconciliation or a hyperlink to a quantitative reconciliation in another SEC filing. In anticipation of that argument, we reviewed the 2020-2022 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.⁷⁰ Based on our review, it does not appear that any of those companies have to-date improved their CD&A disclosures to include an explanation of why non-GAAP measures are better for determining executive pay than GAAP.⁷¹ Moreover, they also do not appear to have provided a quantitative Non-GAAP to GAAP reconciliation or even a hyperlink to a Non-GAAP to GAAP quantitative reconciliation in their 2020 or 2021 CD&A.⁷²

CII believes it is imperative that the SEC require, at a minimum, and as part of this rulemaking, that companies include a hyperlink to a quantitative GAAP reconciliation for any non-GAAP pay targets contained in their CD&A.⁷³

⁷⁰ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission at 3-4 n.7.

⁷¹ See 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/data/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), <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”); 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).

⁷² *Id.*

⁷³ See Council of Institutional Investors, CII Advocacy Priorities, Corporate Disclosure (“CII is also pressing the SEC to close a loophole that permits the use of non-GAAP earnings in the Compensation, Discussion & Analysis

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CII appreciates the opportunity to submit comments on this important matter and is available to provide any additional information the Commission requests.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive, flowing style.

Jeffrey P. Mahoney
General Counsel

(CD&A) section of a company’s proxy statement.”); Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 12 (Aug. 19, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/Reg%20Flex%20Letter.pdf (“CII believes it is imperative that the SEC require, at a minimum, that companies include a hyperlink to a GAAP reconciliation for any non-GAAP pay targets contained in their CD&A.”).