

Via E-Mail

April 3, 2023

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

*Re: File No. SR-NYSE-2023-12 & SR-NASDAQ-2023-005.*

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII). CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.<sup>1</sup>

This letter is in response to the Securities and Exchange Commission’s (SEC or Commission) solicitation of comments in response to the New York Stock Exchange LLC (NYSE) 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 (NYSE Proposal)<sup>2</sup> and the Nasdaq Stock Market LLC (NASDAQ or Nasdaq) Notice of Filing of Proposed Rule Change To Establish Listing Standards Related To Recovery of Erroneously Awarded Executive Compensation (NASDAQ Proposal)<sup>3</sup> (NYSE Proposal and NASDAQ Proposal, collectively the Exchange Proposals).

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<sup>1</sup> 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>.

<sup>2</sup> 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 (Mar. 13, 2023), <https://www.federalregister.gov/documents/2023/03/13/2023-05035/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>.

<sup>3</sup> Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Establish Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation, Exchange Act Release No. 97,060, 88 Fed. Reg. 15,500 (Mar. 13, 2023), <https://www.federalregister.gov/documents/2023/03/13/2023-05040/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

CII generally supports the Exchange Proposals. We note that we supported the SEC’s underlying rule on “Listing Standards for Recovery of Erroneously Awarded Compensation” (SEC Rule).<sup>4</sup> We also were actively involved in the drafting of, and advocacy for, the language that became Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).<sup>5</sup>

Section 954 of Dodd Frank mandated the SEC Rule and the Exchange Proposals.<sup>6</sup> Our support for the Exchange Proposals, the SEC Rule, and Section 954 of Dodd-Frank is based, in part, on CII’s membership-approved policies.<sup>7</sup> Those policies currently include the following language:

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, . . . . Companies should disclose such policies and decisions to invoke their application.<sup>8</sup>

Generally consistent with the basis for our policy, CII strongly agrees with the NYSE that the implementation of the SEC Rule:

[I]s consistent with the protection of investors and the public interest because it furthers the goal of ensuring the accuracy of the financial disclosure of listed issuers. Specifically, . . . the recovery requirement may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent

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<sup>4</sup> See, e.g., Letter from Jeff Mahoney, General Counsel, CII to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 4 (Aug. 27, 2015), <https://www.sec.gov/comments/s7-12-15/s71215-8.pdf> (“In light of our past and present policies and related public positions on clawbacks, CII generally supports the Proposal.”).

<sup>5</sup> See Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before S. Subcomm. on Securities, Insurance, & Invest. of the Comm. on Banking, Hous. & Urb. Affairs, 111th Cong. 52 (July 29, 2009) (Testimony of Ann Yerger, Exec. Dir. of CII), <https://www.govinfo.gov/content/pkg/CHRG-111shrg55479/pdf/CHRG-111shrg55479.pdf> (“the governance improvements that the Council believes would have the greatest impact and, therefore, should be contained in any financial markets regulatory reform legislation include: . . . stronger clawback provisions”); see also Rep. S. Comm. on Banking, Hous. & Urb. Affairs, S. 3217, S. Rep. No. 111-176, at 136 (Apr. 30, 2010), <https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf> (“The Investor’s Working Group wrote ‘federal clawback provisions on unearned executive pay should be strengthened.’”).

<sup>6</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954 (July 21, 2010), <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf> (“(a) LISTING STANDARDS.—The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section . . . (b) RECOVERY OF FUNDS.—The rules of the Commission under subsection (a) shall require each issuer to develop and implement a policy providing— “(1) for disclosure of the policy of the issuer on incentive based compensation that is based on financial information required to be reported under the securities laws; and “(2) that, in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, the issuer will recover from any current or former executive officer of the issuer who received incentive based compensation (including stock options awarded as compensation) during the 3-year period preceding the date on which the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.””).

<sup>7</sup> See CII, Corporate Governance Policies (updated Mar. 6, 2023), [https://www.cii.org/corp\\_gov\\_policies](https://www.cii.org/corp_gov_policies).

<sup>8</sup> *Id.* § 5.7 Compensation Recovery.

misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which we expect will further discourage such behavior. . . . [T]hese increased incentives may improve the overall quality and reliability of financial reporting, which further benefits investors.<sup>9</sup>

Similarly, CII strongly agrees with the NASDAQ that the implementation of the SEC Rule:

[P]rotect[s] investors and the public interest by requiring companies . . . that, in the event the company is required to prepare an accounting restatement, the company will recover reasonably promptly erroneously awarded incentive-based compensation paid to its current or former executive officers based on any misstated financial reporting measure. . . . [T]hese new requirements will help facilitate effective oversight of executive compensation and promote accountability to investors by not allowing executive officers to retain compensation that they were awarded erroneously. Finally, . . . the recovery requirement may provide executive officers with an increased incentive to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which . . . will further discourage such behavior.<sup>10</sup>

We note that there is a substantive difference in the NYSE Proposal and the NASDAQ Proposal with respect to delisting procedures.<sup>11</sup> As explained in a legal analysis of the Exchange Proposals:

With respect to delisting procedures, while Nasdaq’s proposal takes a one-size-fits-all approach to all forms of noncompliance, the procedures under NYSE’s proposed listing standards vary depending on whether the noncompliance is a failure to adopt a Clawback Policy by the required adoption date (a “Delayed Policy Adoption”). For a Delayed Policy Adoption, NYSE has proposed a procedure that is substantially the same as its procedures for delinquencies in the filing of SEC periodic reports, which require a listed company to issue a press release regarding the delinquency within five days of NYSE’s notification and allow NYSE, in its discretion, to grant the listed company an initial six-month grace period and an additional six-month grace period to adopt its Clawback Policy before suspension and delisting procedures are commenced. Any other type of noncompliance would result in the immediate suspension of trading in the listed company’s securities and the immediate commencement of delisting procedures, subject to the company’s right to request a review of the delisting determination by a committee of NYSE’s board of directors.

Nasdaq’s proposed delisting procedures, on the other hand, would apply generally the same suspension and delisting procedures that apply to corporate governance deficiencies and delinquencies in the filing of SEC periodic reports to all forms of

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<sup>9</sup> 88 Fed. Reg. at 15,483.

<sup>10</sup> *Id.* at 15,502.

<sup>11</sup> *Cf. id.* (“Compliance With Recovery Compensation Policy”), with *id.* at 15,482-83 (“Delisting”).

noncompliance with its Clawback Policy listing standards. In general, this procedure would require a listed company to issue a press release regarding the delinquency within four business days of receiving Nasdaq's notice of noncompliance and afford the company the opportunity to provide a plan to regain compliance for Nasdaq's review generally within 45 days of Nasdaq's notice of noncompliance. Upon review of such plan, Nasdaq may, in its discretion, grant the listed company an extension of up to 180 days from the date of Nasdaq's notice of noncompliance to regain compliance before suspension and delisting procedures are commenced. A listed company would have the right to request a review of any Nasdaq staff delisting determination by a Nasdaq hearings panel, which may grant up to an additional 180-day extension from the date of such delisting determination. The decision of a hearings panel may also be subject to further review under Nasdaq's administrative procedures.<sup>12</sup>

In comparing the two different approaches, the lack of investor participation in the NYSE delisting process makes us less confident that the NYSE procedures will be executed in a manner that protects investors and the public interest.<sup>13</sup> As one example, we are concerned that in knowing that immediate suspension will be the outcome for noncompliance under the NYSE Proposal, NYSE staff would be more likely to determine that the required recovery of erroneously awarded compensation was performed "reasonably promptly" even when most investors would conclude otherwise.<sup>14</sup>

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<sup>12</sup> Alert, NYSE and Nasdaq Propose Listing Standards for the Clawback of Erroneously Awarded Executive Compensation, Ropes & Gray (Mar. 6, 2023), <https://www.ropesgray.com/en/newsroom/alerts/2023/03/nyse-and-nasdaq-propose-listing-standards-for-the-clawback-of-erroneously>.

<sup>13</sup> The Nasdaq Stock Market LLC (Nasdaq) delisting process involves use of Listing Qualifications Panels (Panels) and a Listing and Hearing Review Council (Council). For more than a decade investors or investor representatives, including CII staff, have participated on the Panels and Council. *See* Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Establish Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation, Exchange Act Release No. 97,060, 88 Fed. Reg. 15,500 (Mar. 13, 2023) (Exhibit 5), available at <https://www.sec.gov/rules/sro/nasdaq/2023/34-97060-ex5.pdf> (Nasdaq rules regarding the role of the Panels and Council in the delisting process include: "5815. Review of Staff Determinations by Hearings Panel" and "5820. Appeal to the Nasdaq Listing and Hearing Review Council"); *see also* Nasdaq Listing and Hearing Review Council Charter, Nasdaq (Mar. 11, 2019), [https://listingcenter.nasdaq.com/assets/NLHRC\\_Charter.pdf](https://listingcenter.nasdaq.com/assets/NLHRC_Charter.pdf) ("The Council shall further Nasdaq's Mission by: • Making recommendations to the Nasdaq Board relating to listing rules and policy changes that will protect investors and enhance Nasdaq's integrity. • Considering appeals from Companies of decisions of Nasdaq Listing Qualifications Panels (the "Panels") concerning initial or continued listing on Nasdaq. • Reviewing decisions of the Panels for the consistent and fair application and enforcement of the rules, procedures, and policies relating to listed companies.").

<sup>14</sup> *See, e.g.*, 88 Fed. Reg. at 15,483 ("Pursuant to proposed Section 802.01F(a), a listed issuer would be subject to immediate suspension and delisting without eligibility for cure periods if the Exchange has determined that the listed issuer has failed to recover reasonably promptly erroneously-awarded compensation as required [sic] by its Recovery Policy.").

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Thank you for consideration of CII's views. If we can answer any questions or provide additional information regarding this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style with a large, stylized "J" and "M".

Jeffrey P. Mahoney  
General Counsel