Via Hand Delivery

July 8, 2014

Keith F. Higgins
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Addressing the "zombie director" phenomenon

Dear Mr. Higgins:

The purpose of this letter is to provide you with the views of the Council of Institutional Investors ("CII") on the recent recommendation of the Committee on Capital Markets Regulation ("Committee") "that the Securities and Exchange Commission [("SEC")] adopt regulations such that a board that decides to retain a losing director would be required to disclose publicly in some form the specific reasons why the company's board chose not to accept any 'unelected' director's resignation."[1]

As you are aware, CII is an association of corporate, union, and public employee benefit plans, foundations, and endowments, with combined assets exceeding $3 trillion. Our members include long-term shareowners with a duty to protect the retirement savings of millions of American workers and retirees.[2]

As an initial matter, we note that the results of the Committee's empirical research—finding that the vast majority of "losing directors remain on the board"[3] at U.S. public corporations—is consistent with our own research and other similar studies.[4]

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[1] Committee on Capital Markets Regulation, Annual Shareholder Meetings and the Conundrum of "Unelected" Directors 2 (June 24, 2014), *available at* http://capmktsreg.org/wp-content/uploads/2014/06/CCMR-Unelected-Directors-Statement-2014-06-23.pdf.

[2] For more information about the Council of Institutional Investors (CII) and its members, please visit our Web site at http://www.cii.org/about_us.

[3] Committee on Capital Markets Regulation at 2.

[4] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, to Mr. John Carey, Vice President—Legal 5 n.21 (June 20, 2013) (describing the results of a 2012 study by IRRC Institute & GMI Ratings, and the results of CII staff's own research), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/06_20_13_cii_letter_nyse_majority_voting.pdf [hereinafter June 2013 Letter to Carey].

In addition, we wholeheartedly agree with the Committee that the failure of unelected or so-called "zombie" directors to relinquish their seats on U.S. corporate boards:

- "[l]gnor[es] the standard corporate democratic process;"[5]
- May lead to "investors . . . refraining from voting against or withholding votes from directors due to the likelihood that such votes would not result in any change to board compositions or have any consequences for the companies in question;"[6] and most importantly,
- Is in direct conflict with "the desired goals of improving corporate governance by making shareowner votes meaningful."[7]

Our membership-approved policies have long supported the view that electing directors by a majority vote is a basic shareowner right and that directors who lack the support of the shareowners they represent should not serve on the board.[8] Requiring majority voting in the uncontested election of directors and generally precluding zombie directors from serving on corporate boards has long been a top priority for CII members and for many other investors.[9]

Where we part ways with the Committee is with respect to the proposed solution to the zombie director phenomenon. As indicated, the Committee's proposed solution is for the SEC to require mandatory disclosure by boards of specific reasons for retaining zombie directors.[10] The Committee's proposed solution, however, will not resolve the zombie director problem for at least two primary reasons.

First, the Committee's proposed solution would likely have no impact on the majority of U.S. public company boards because most companies have a plurality voting regime.[11] As correctly described by the Committee, under a plurality voting regime, losing directors are elected if they "receive a single supporting vote."[12]

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[5] Committee on Capital Markets Regulation at 7.
[6] *Id.* at 2.
[7] *Id.* at 8.
[8] CII, Policies on Corporate Governance §2.2 Director Elections (last updated May 9, 2014) ("Directors in uncontested elections should be elected by a majority of the votes cast . . . [and] [d]irectors who fail to receive the support of a majority of votes cast in an uncontested election should step down from the board and not be reappointed . . . as soon as practicable."), *available at* http://www.cii.org/corp_gov_policies#BOD.
[9] *See, e.g.,* Investors Working Group, U.S. Financial Regulatory Reform: The Investors' Perspective 22 (July 2009) (Specifically recommending that "[i]n uncontested elections, directors should be elected by a majority of votes cast . . . [t]o ensure[] that shareowners' votes count and [to] make directors more accountable to shareowners."), *available at* http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf.
[10] Committee on Capital Markets Regulation at 2.
[11] Currently more than 57% of the Russell 3000 have a plurality voting system. Approximately 13% of the Russell 3000 have a plurality plus voting system and 29% have a majority voting system. ISS Link Database (last visited July 3, 2014) (on file with CII).
[12] Committee on Capital Markets Regulation at 1.

As a result, zombie directors under a plurality voting regime are generally duly elected and, therefore, do not submit resignations to the board for consideration. Thus, the Committee's proposed disclosure requirement would be of no consequence at most U.S. public companies.

Second, the Committee's own research reveals that specific disclosure of the reasons for rejecting the resignations of zombie directors is likely to have little, if any, impact on changing U.S. board practices. More specifically, the Committee's research indicates that more than 80 percent of boards that rejected the resignations of zombie directors voluntarily provided disclosure of "specific reasons for retaining the losing directors."[13]

In our view, the only viable solution to the zombie director phenomenon is to require public companies to adopt a majority voting regime that imposes reasonable limits on the ability of boards to reject the resignation of losing directors. In that regard, in June 2013 we submitted detailed proposals to the NYSE Euronext ("NYSE") and the NASDAQ OMX ("NASDAQ") requesting that they adopt proposed listing standards for approval by the SEC to accomplish that goal.[14] Despite repeated requests in person and in writing from CII and many other market participants, to date, the NASDAQ and the NYSE have refused to move forward on our proposals.[15]

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[13] *Id*. at 8.

[14] Letter from Jeff Mahoney, General Counsel, to Mr. Edward Knight, Executive Vice President & General Counsel 1 & Attachment (June 20, 2013), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/06_20_13_cii_letter_nasdaq_majority_voting.pdf; June 2013 Letter to Carey, *supra* note 4, at 1 & Attachment.

[15] *See* Letter from Jeff Mahoney, General Counsel, to Mr. Edward Knight, Executive Vice President & General Counsel 1 (Mar. 19, 2014), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_19_14_CII_letter_NASDAQ_majority_voting.pdf; Letter from Jeff Mahoney, General Counsel, to Mr. John Carey, Vice President—Legal 1 (Mar. 19, 2014), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_19_14_CII_letter_NYSE_majority_voting.pdf; *see also* Letter from Donna Anderson, Vice President & Global Corporate Governance Analyst, T. Rowe Price Associates, Inc. et. al., to Mr. Edward Knight, Executive Vice President & General Counsel 1 (Aug. 2, 2013), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/08_02_13_CII_Advisory_Council_letter_NASDAQ_Majority_Voting_Directors.pdf; Letter from Donna Anderson, Vice President & Global Corporate Governance Analyst, T. Rowe Price Associates, Inc. et. al., to Mr. John Carey, Vice President—Legal 1 (Aug. 2, 2013), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2013/08_02_13_CII_Advisory_Council_letter_NYSE_Majority_Voting_Directors.pdf; *see generally* Amy Borrus, Support Builds for CII Petition for Listing Standard on Majority Voting for Directors (July 17, 2013) (listing some of the many market participants that have sent letters to the exchanges generally in support of CII's proposed listing standards), *available at* http://www.cii.org/article_content.asp?article=152.

We note that last month the Toronto Stock Exchange ("TSX") implemented amendments to its listing standards to require companies to adopt majority voting.[16] Similar to CII's proposals, the new TSX rules mandate that losing directors must immediately tender their resignation to the board and the board must accept the resignation "absent exceptional circumstances."[17]

In adopting the new majority voting listing standard the TSX observed:

> The enhanced rules now make directors more accountable to security holders and give security holders a stronger voice in electing directors.
>
> . . . .
>
> TSX has monitored the corporate governance landscape in Canada and other jurisdictions and believes that adopting majority voting will better align Canadian practices with those of other major jurisdictions. Currently, Canadian investors have a less effective voice in electing directors than investors in certain other jurisdictions because neither securities nor corporate law in Canada require issuers to have majority voting for directors in uncontested elections.[18]

As an alternative to the Committee's recommendation, CII recommends that the SEC, consistent with its mission and role as the "investor's advocate,"[19] publicly advocate for the adoption by the NYSE and NASDAQ of CII's proposed listing standards requiring majority voting in the uncontested election of directors and reasonable limits on the ability of boards to reject the resignation of losing directors.

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[16] TMX, Exchange Feed: "Insights from your Exchange" 1 (Apr. 16, 2014), *available at* http://www.tmx.com/en/pdf/listings/ExchangeFeed-issue22-2014.pdf.

[17] *See, e.g.,* McInnes Cooper, Publications, Legal Update: New TSX Rules for Director Elections & Majority Voting Effective June 30, 2014, at 2 (Mar. 31, 2004), *available at* http://www.mcinnescooper.com/publications/new-tsx-rules-for-director-elections-majority-voting-effective-june-30-2014/. We note that the new TMX rules also require the company to "promptly issue and provide to the TSX a news release with the board's decision which, if the board decides not to accept the resignation, must fully state the reasons for the decision." *Id.*

[18] TMX at 1.

[19] U.S. Securities and Exchange Commission, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation 1 (last visited July 7, 2014), *available at* http://www.sec.gov/about/whatwedo.shtml#.U7qxAPldUYM.

Thank you for carefully considering our views on this important corporate governance matter. If you have any questions regarding this letter, please contact me directly at 202-261-7081 or jeff@cii.org.

Sincerely,

Jeff Mahoney
General Counsel