Speech

# Festivus, Fortnite, and Focus: Remarks before the Council of Institutional Investors Spring Conference

**Commissioner Hester M. Peirce**

**Washington D.C.**

**March 5, 2019**

Thank you, Mary [Francis], for that kind introduction and for the opportunity to be here today. Before I begin, I will give my standard disclaimer. The comments I make today represent my own views and not necessarily those of the Commission or my fellow Commissioners.

I consider it a great honor to have some time with you here this morning. You represent such an important group of participants in our markets with an aggregate of approximately $4 trillion dollars in member assets under management invested in the markets.[1] You bring remarkable sophistication and great wisdom to the job of investing and you do so on behalf of many Americans. Your views, therefore, on how we can make our capital markets function even better than they already do are of real interest to me.

Institutional investors are the market's repeat, long-term, and bulk players. Costs that are not important to the occasional investor add up to amounts that matter greatly to investors that trade frequently or in large size. It is helpful for me to know, for example, the types of information you find to be material in making decisions about where to trade.[2] More generally, your voices are very important in discussions about whether and how to change market structure in both the equity and the fixed income markets. In particular, you have emphasized the importance of market transparency in our thinking about effective market structure.

Institutional investors have a deep interest in the functioning of our proxy system, a matter of great interest to the present Commission. We appreciate your participation in our recent roundtable on the proxy process. As long-term investors, CII members have a particular interest in building effective mechanisms for shareholders to vote and communicate with the boards of companies in which they invest. I am especially interested in how innovation, including innovation in technology, can solve problems. I therefore appreciate CII's suggestions regarding the use of blockchain technology to track proxy voting and address other concerns in that process.[3] In addition to advocating systemic changes, you have made some suggestions for "near term improvements," including recommending changes to assure vote confirmation.[4] I especially welcome your thoughts when they are different from my own. For example, while I remain skeptical of the value of the mandatory use of a universal proxy card, I realize that you, among others, disagree with me and I find your thoughtful advocacy in favor of universal proxy cards to be helpful as I seek to fully think through the issue.[5]

With the engagement of investors of all sizes and types, the Commission is thinking about ways that we can refine our offering and disclosure regime. Just last month, for example, we proposed extending the popular "testing the waters" provision to all issuers, a change we hope will facilitate a more efficient and easily navigable public offering process. Other recent initiatives include extending the Regulation A exemption to all issuers, including reporting companies; expanding the definition of smaller reporting company; and conducting a broad sweep of existing disclosure requirements to weed out those that have become redundant or outdated. While these regulatory efforts, we hope, will help smooth the path for registrants, we expect investors also to reap considerable benefits from reductions in the regulatory costs that issuers pass on to investors and from expanded investment opportunities.

CII is an active participant in our disclosure reform efforts, and your comments on our proposals are consistently well-thought out and therefore valuable in helping to crystalize the issues we are trying to address. In your letter last year, for example, commenting on the SEC's latest strategic plan, you provided helpful feedback on the value of modernizing EDGAR and improving data tagging.[6] Because I have concerns about the costs and drawbacks of embedding specific technology in rules, your positive response to our use of XBRL is especially valuable to me. Does the use of such tagging create efficiencies we should embrace? Does it, for example, make it possible to reduce the duplication of certain types of disclosure?

As you know, our Division of Corporation Finance has been looking hard at ways to streamline the disclosure process, and we have also found useful your input regarding our specific disclosure reform initiatives. Hearing your thoughts about whether a particular disclosure requirement is important to your members in their investment decision-making is helpful as we work through this process. For example, we have proposed rule changes to the disclosures required for guarantors and issuers of guaranteed securities, and you have laid out in a comment letter some of your concerns about the breadth of that rule proposal.[7] We also have proposed changes to the auditor independence rules that we hope will train our regulatory attention on those relationships that actually impair independence while filtering out immaterial transactions. Again, I appreciate your comment letter, which recommends, among other things, that we take an alternative approach to addressing the problem the proposal identifies.[8] Another disclosure

initiative, under the FAST Act, has us rethinking certain disclosure requirements under Regulation S-K, and you have provided some specific feedback on our proposal.

Your voice in other areas of debate is similarly valuable. For example, I have been interested to hear your thoughts in the ongoing debate over the use of dual-class shares.[9] I am typically reluctant to interfere in the relationship between shareholders and issuers unless necessary. Your objections to the use of dual-class shares will undoubtedly echo loudly in the ears of issuers contemplating such an offering; given your position, you wield considerable influence and therefore will be essential in shaping the ongoing debate.

Your joint op-ed with the Business Roundtable yesterday in the *New York Times* on stock buybacks was similarly welcome.[10] I agree with what you have said elsewhere on the subject: "Tying companies' hands on capital allocation could lead executives to pour money into wasteful businesses that falter or fail to create additional jobs."[11] Of course, as the op-ed points out, the money spent on buybacks does not evaporate; it is often invested by shareholders in other companies that need capital more than the company executing the buyback. That reinvestment in a higher use creates a benefit that inures to investors and to society more broadly. Whether there may be instances in which a buyback is not in the interests of the company as a whole is a different question, and one that I am happy that shareholders like you are taking on. I tend to trust market forces, and shareholders' responses to board decisions are key drivers of capital market efficiency.

Speeches are not very interesting if they only focus on points of agreement and appreciation. I am therefore going to borrow a line from the famous Airing of Grievances scene in Seinfeld's Festivus episode: "I got a lot of problems with you people, and now you're gonna hear about it."[12] When George Costanza's father made that statement, it was clear that he valued the recipients of the critiques he proceeded to mete out. Before delineating my grievances, therefore, I will reiterate my gratitude to you for the role you play in thinking through some of the most difficult issues in financial regulation and corporate governance. I will continue to look to you for advice.

What then do I have to complain about? My concerns are mainly ones of focus. I recently had a conversation with a boy who shares an obsession with many other children his age—the video game Fortnite. He described to me how much he enjoyed long stretches of playing the game, which I found surprising given that he is a great athlete and generally one of the most active boys I have ever met. Indeed, if I had just a tenth of his energy, I would be champing at the bit to reverse every last delegation of authority to the SEC staff just so I would have enough to do. How is it, then, that a boy who has so much energy can sit still in the virtual world of Fortnite? How is it that this simulated environment can drown out the real distractions around him? Clearly, the designers of that game and others like it have figured out how to concentrate the mind on objects of their own making. Indeed, as a child, I whiled away many hours playing the flat, unsophisticated videogames of that era, so I can certainly see how inviting today's games, with their fascinating, multidimensional worlds—and, incidentally, expenditure of real dollars to get a leg-up on competitors—must be.

I see a parallel in today's investment world. Many investors these days seem focused on non-investment matters at the expense of concentration on a sound allocation of resources to their highest and best use. Real dollars are being poured into adhering to an amorphous and shifting set of virtue markers. I do not want the SEC to become an enabler of this shift in focus. The pressure, however, to get on the bandwagon and drag others with us is pretty intense. We are being asked more and more to shift securities disclosure to focus more on matters that do not go to an assessment of how effectively companies are putting investor money to work. Indeed, in some instances, we are being asked to make it harder for companies to use their resources effectively. I will talk about several examples, but my list is only illustrative of a broader trend that concerns me because I do not think it is consistent with investor protection.

To start with a very recent example, I have concerns about CII's position with respect to the Johnson & Johnson shareholder proposal. As you know, a Johnson & Johnson shareholder submitted a proposal that, if approved, would have started the process to shift shareholder disputes with the company to mandatory arbitration.[13] Johnson & Johnson sought the SEC staff's concurrence under Rule 14a-8 with the company's decision not to include the proposal in its proxy. While that request was pending, the New Jersey Attorney General submitted a letter stating that adoption of the proposal would violate New Jersey state law.[14] CII also submitted a letter stating that "shareholder arbitration clauses in public company governing documents reflect a potential threat to principles of sound governance."[15] Deferring to the Attorney General's interpretation of his own State's law, the SEC staff granted the company permission to reject the proposal.[16] The staff did note that the "parties could seek a more definitive determination from a court of competent jurisdiction."[17]

Without engaging on the issue of any particular state's law, I will say that the New Jersey A.G.'s letter does not help us to confront how *federal* law would interact with a bylaw provision like the one proposed. Since 1925, arbitration in the U.S. has been subject to the Federal Arbitration Act. This law, according to the U.S. Supreme Court, "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration."[18] Although states have periodically challenged the Act's preemption when applied to mandatory arbitration clauses in other contexts, in the dozen or so such cases that have come before the Supreme Court, the Court has consistently held that the Act forbids states from holding arbitration clauses unenforceable.[19] Were the matter at hand to make its way through the courts, given the Supreme Court precedent, the Federal Arbitration Act might be held to preempt any state law prohibiting mandatory arbitration provisions.

I will leave the judges to decide that question, but what of the policy of mandatory arbitration? CII argues that "shareowner arbitration clauses in public company governing documents represent a potential threat to principles of sound corporate governance that balance the rights of shareowners against the responsibility of corporate managers to run the business."[20] Among your worries is the non-public nature of arbitration and thus the absence of a "deterrent effect."[21] Other observers likewise have argued that arbitration deprives shareholders of the full panoply of options available in a judicial forum and, depending on how such clauses are crafted, can deprive them of the ability to join together in a class action.[22] Arbitration is also conducted privately with no publication of how the case was decided and on what grounds.

The problem is that these class actions are rarely decided on the merits. Instead, the cost of litigating is so great that companies often settle to be free of the cost and hassle of the lawsuit.[23] Settlements are rarely public and certainly involve no publication of broadly applicable legal findings. Additionally, such suits can depress shareholder value since they often result in costly payouts to make the suit go away that do not inure to the benefit of shareholders.[24] Indeed, the cost of defending and settling these suits is a substantial cost of being a public company. The result is that the company's shareholders are ultimately harmed by the very option intended to protect them: first by the company's diversion of resources to defend

often meritless litigation, and second by the resulting decline in the value of their shares. Case law remains untouched, and the shareholders not involved in the process have no idea what happened. A big chunk of shareholder money typically goes to nice payouts for the lawyers involved.

All that is not to say that I would insist on mandatory arbitration provisions for all companies. That would not be an appropriate exercise of our investor protection mandate. If shareholders value the ability to bring class actions, they can divert their investments to companies that offer such options. I am sure that CII's preferences will be well-attended by issuers seeking your investment money. I trust that shareholders like you are more than capable of handling the matter without our intervention.

Let us turn now to the broader question of shareholder proposals. CII has recently argued against changing our current Rule 14a-8.[25] By contrast, I see a clear need for reform in this area. The current thresholds permit, indeed encourage, a handful of shareholders to put forward proposals that incur considerable costs borne by all shareholders. Shareholders are able to submit losing proposals over and over again. In recent years, many of these proposals are not even related to core corporate governance issues, but instead promote a tiny group of shareholders' personal political and social preferences.[26] Ultimately, many companies faced with a proposal, even one that reflects the idiosyncratic preferences of a small number of shareholders, may resort to negotiating backroom deals with the proponents. These deals may not be in the best interest of the company and thus of the other shareholders who have not been part of the process.

In other instances, companies come to us, as Johnson & Johnson did, for our staff's assent to the company's exclusion of a shareholder proposal from their proxy. The opportunity cost of our staff's having to deal with these proposals is enormous. The staff must review and respond to company requests to reject numerous proposals that have no chance of succeeding were they put to a vote. The time staff spend on such activities must necessarily detract from time they could otherwise spend on more useful endeavors, such as rulemaking and reviewing disclosures, both of which provide more benefit to a greater number of investors. Moreover, the 14a-8 process foists staff into an inappropriate policymaking role. For these reasons, I believe fundamental reform in this area is important.

Now let us turn to another area where we may not see eye to eye—the push for new types of disclosure. While I much prefer our disclosure-based regime for capital markets regulation over other potential models, such as a regime based on merit-review, the opportunity to, in the words of former SEC Commissioner Dan Gallagher, "hijack" our disclosure apparatus for unintended purposes, can cause considerable mischief.[27]

CII, for example, has supported efforts to require companies to disclose information about board members' personal characteristics. The SEC staff did just that a couple weeks ago. The Division of Corporation Finance put out new compliance and disclosure guidance related to disclosures of board qualifications.[28] In its Compliance and Disclosure Interpretations, the staff states that:

> To the extent a board or nominating committee in determining the specific experience, qualifications, attributes, or skills of an individual for board membership has considered the self-identified diversity characteristics referred to above (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background) of an individual who has consented to the company's disclosure of those characteristics, we would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered. Similarly, in these circumstances, we would expect any description of diversity policies followed by the company under Item 407 would include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.[29]

Despite the emphasis on self-identification, I worry that this staff "expectation" will work with other pressures to force reticent board members and nominees to divulge personal details they would prefer to keep private. I hope that I am wrong.

A person who does not want to share his sexual orientation, religion, or ethnic background with the world may face pressure to do just that in order to allow the company to get "credit" for having a diverse board. What happens when a person decides to convert to a different religion or discovers that she has a different ethnic or cultural heritage than she previously understood?[30] Would these changes require her to notify the board for potential reconsideration of her board membership? Will decisions that are, for some people, of an intensely personal nature suddenly become the stuff of 8-Ks?

I hope that I do not have to say that I believe that there are immensely qualified people of all backgrounds who make excellent corporate directors. Our corporations, along with the rest of our institutions, benefit from being able to draw from a population that is rich in its diversity. I am simply worried that making directors' personal characteristics an item of expected disclosure may have unintended consequences, among them invasion of board members' privacy and an undue focus on personal features that may have little relation to talent as a director.

Institutional investors also have been a strong voice in favor of regulation that supports the incorporation of environmental, social, and governance ("ESG") in investing. The International Organization of Securities Commissions, or "IOSCO," issued a statement on ESG investing in January.[31] The statement directed issuers to consider whether ESG factors—which are not defined—should be included in their disclosures, endorsed the use of private disclosure frameworks purportedly designed to get at these factors, and suggested that some disclosures now being made voluntarily under these frameworks should be incorporated into these disclosures. You may have noticed that the SEC did not vote on the statement and so did not sign on.

As I said at the beginning of my remarks, I do not speak for the Commission or for my fellow commissioners, but I found the statement to be an objectionable attempt to focus issuers' on a favored subset of matters, as defined by private creators of ESG metrics, rather than more generally on material matters. The U.S. securities laws already provide for material disclosures. Explicit consideration of ESG factors must therefore require something more than what is already contemplated by our laws and by our long-standing definition of "materiality." Issuers already spend considerable amounts of money complying with existing disclosure requirements. Requiring disclosures aimed at items identified by organizations that are not accountable to investors unproductively distracts issuers.

When the SEC is asked to concentrate on issues other than protecting investors, facilitating capital formation, and fostering fair, orderly, and efficient markets, our focus shifts away from our mission. We have important work to do. We still have rulemaking to complete under Title VII of Dodd-Frank related to the securities-based swaps markets. As I mentioned earlier, we have proxy reform on our agenda. We have proposed Regulation Best

Interest to finalize. We are working on updating our regulation of transfer agents. We have more work to do in the public offering and IPO markets and on market structure reforms. These are all hefty rulemakings and require considerable effort on the part of our talented and dedicated staff and those of you outside the agency who share your thoughts and experiences with us. We are fully engaged focusing on our existing mission. I do not believe that investors are best-served when our staff is distracted by matters unrelated to our core mission.

Thank for your patience in listening to me today. I suspect that I have not convinced at least some of you, but I want to reiterate how grateful I am that you are willing to have these kinds of conversations with me and my fellow regulators. I enjoy hearing from people with interesting ideas that do not always match squarely with my own. Even when we do not agree, I learn from you. To that end, I now would like to hear what you have to say. I am happy to take questions, comments, and critiques. In other words, it is now time for the Feats of Strength portion of the holiday—until you pin me, metaphorically of course, Festivus is not over.

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[1] Letter from Jeffrey P. Mahoney, General Counsel, CII, to Michael D. Crapo, Chairman, and Sherrod Brown, Ranking Member, Committee on Banking, Housing, and Urban Affairs, United States Senate, Feb. 27, 2019, *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2019/February%2027%202019%20Letter%20to%20Senate%20Banking%20Committee.pdf.

[2]*See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, CII to Brent J. Fields, Secretary, SEC, Feb. 15, 2019 (calling on SEC to require disclosure of "all-in" trading costs on exchanges) *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2019/February%2015,%202019%20SEC%20Letter%20on%20Market%20Data%20(final).pdf.

[3] Kenneth A. Bertsch, Remarks to the SEC Investor Advisory Committee, "U.S. Proxy Voting Infrastructure," Sept. 13, 2018, *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac091318-opening-remarks-ken-bertsch.pdf.

[4] Letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, CII to Brent J. Fields, Secretary, SEC, Nov. 8, 2018, *available at* https://www.sec.gov/comments/4-725/4725-4630831-176413.pdf.

[5] Letter from Kenneth A. Bertsch, Executive Director, CII, to Brent J. Fields, Secretary, SEC, Dec. 28, 2016, *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2016/12_28_16_comment_letter_SEC_universal_proxy.pdf.

[6] Letter from Jeffrey P. Mahoney, General Counsel, CII, to Nicole Puccio, Branch Chief, SEC, July 19, 2018, *available at* https://www.cii.org/files/July%2019%202018%20SEC%20Strategic%20Plan%20final%20(003).pdf.

[7] Letter from Jeffrey P. Mahoney, General Counsel, CII, to Brent J. Fields, Secretary, SEC, Nov. 26, 2018, *available at* https://www.sec.gov/comments/s7-19-18/s71918-4678579-176564.pdf.

[8] Letter from Jeffrey P. Mahoney, General Counsel, CII, to Brent J. Fields, Secretary, SEC, June 28, 2018, *available at* https://www.sec.gov/comments/s7-10-18/s71018-3969965-167120.pdf.

[9] Letter from Jeffrey P. Mahoney, General Counsel, CII, to Michael D. Crapo, Chairman, and Sherrod Brown, Ranking Member, Committee on Banking, Housing, and Urban Affairs, United States Senate, Feb. 27, 2019, *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2019/February%2027%202019%20Letter%20to%20Senate%20Banking%20Committee.pdf.

[10] Joshua Bolten and Ken Bertsch, "Restricting Stock Buybacks Will Hurt the Economy," New York Times (March 4, 2019).

[11] Press Release, CII, CII Statement on Share Buybacks, Feb. 5, 2019, *available at* https://www.cii.org/content.asp?contentid=258.

[12] *Seinfeld: The Strike*, NBC television broadcast Dec. 18, 1997.

[13] Letter from Hal Scott, Trustee, Doris Behr 2012 Irrevocable Trust, to Thomas J. Spellman III, Assistant General Counsel and Corporate Secretary, Johnson & Johnson, Nov. 9, 2018, *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/dorisbehr121118-14a8-incoming.pdf.

[14] Letter from Gurbir S. Grewal, Attorney General, State of New Jersey, to Division of Corporation Finance, SEC, Jan. 29, 2019.

[15] Letter from Jeffrey P. Mahoney, General Counsel, to Jay Clayton, Chairman, SEC, Jan. 31, 2019, *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2019/January%2031%202019%20SEC%20letter%20on%20mandatory%20arbitration.pdf.

[16] Jacqueline Kaufman, Attorney-Advisor, Response of the Office of Chief Counsel, Division of Corporation Finance, SEC, *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf. *See also* Jay Clayton, Chairman, SEC, "Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions," Feb. 11, 2019, *available at* https://www.sec.gov/news/public-statement/clayton-statement-mandatory-arbitration-bylaw-provisions.

[17] Kaufman, *supra* n. 15.

[18] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

[19] Jon O. Shimabukuro, Legislative Attorney, and Jennifer A. Staman, Legislative Attorney, Congressional Research Service, "Mandatory Arbitration and the Federal Arbitration Act," Sept. 20, 2017 (citing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, (1996); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995); *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984)) *available at* https://fas.org/sgp/crs/misc/R44960.pdf. The Court's most recent cases addressing the question have similarly found in favor of the enforceability of arbitration agreements. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 (2019); *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612

(2018). *Cf., New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019) (a court should determine whether an agreement falls under the FAA's exclusion of "contracts of employment of certain transportation workers" before ordering arbitration).

[20] Letter from Jeffrey P. Mahoney, General Counsel, CII, to Jay Clayton, Chairman, SEC, Jan. 31, 2019, *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2019/January%2031%202019%20SEC%20letter%20on%20mandatory%20arbitration.pdf.

[21] *Id.*

[22]*See, e.g.*, Barbara Roper, Director of Investor Protection, Micah Hauptman, Financial Services Counsel, Consumer Federation of America, "A Settled Matter: Mandatory Shareholder Arbitration is Against the Law and the Public Interest," Aug. 15, 2018, *available at* https://secureoursavings.com/wp-content/uploads/2018/08/CFA-Mandatory-Shareholder-Arbitration-White-Paper-8.15.18.pdf.

[23] *See* Bradley J. Bondi, "Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation," Harvard Journal of Law and Public Policy, Vol. 33, pp. 607-638, 2010.

[24] *See, e.g.*, John C. Coffee, Jr., "Reforming the Securities Class Action: An Essay on Deterrence and Its Implication," Columbia Law School, The Center for Law and Economic Studies, Working Paper No. 293, at 5 (arguing that the current structure effectively punishes the shareholders who were already the victims of the alleged corporate wrongdoing, "because the costs of securities class actions – both the settlement payments and the litigation expenses of both sides – fall largely on the defendant corporation, its shareholders ultimately bear these costs indirectly and often inequitably."), Oct. 2006. Additionally, a recent paper by Elisabeth Kempf of the University of Chicago's Booth School of Business and Oliver Spalt of Tilburg University finds that, while 40 percent of all publicly listed companies faced shareholder class actions in the period between 1996 and 2017, a disproportionate number of these suits were brought against the most innovative companies, resulting in what is in effect a "tax" on innovation. Elisabeth Kempf and Oliver Spalt, "Litigating Innovation: Evidence from Securities Class Action Lawsuits," Feb. 1, 2019, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143690.

[25]Letter from Jeffrey P. Mahoney, General Counsel, CII, to Michael Crapo, Chairman, and Sherrod Brown, Ranking Member, Committee on Banking, Housing, and Urban Affairs, United States Senate, Dec. 5, 2018, *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2018/December%205%202018%20Letter%20to%20Senate%20Banking.pdf.

[26] *See, e.g.*, Gabriel T. Rubin, "Show Us Your Climate Risks, Investors Tell Companies," *The Wall Street Journal*, Feb. 28, 2019; Gabriel T. Rubin, "Companies, Large Investors Weigh Ways to Curb Activist Shareholders," *The Wall Street Journal*, Nov. 15, 2018.

[27] Testimony of Daniel M. Gallagher, Hearing Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, "Proxy Process and Rules: Examining Current Practices and Potential Changes," Dec. 6, 2018, *available at* https://www.banking.senate.gov/imo/media/doc/Gallagher%20Testimony%2012-6-18.pdf.

[28] Division of Corporate Finance, SEC, Compliance & Disclosure Interpretation, Regulation S-K, Question 116.11, Feb. 6, 2019, *available at* https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

[29] *Id.*

[30] *See, e.g.*, Amy Dockser Marcus, "Two Sisters Bought DNA Kits. The Results Blew Apart Their Family." *The Wall Street Journal*, Feb. 1, 2019, *available at* https://www.wsj.com/articles/two-sisters-bought-dna-kits-the-results-blew-apart-their-family-11549037904?mod=searchresults&page=2&pos=2.

[31] IOSCO, Statement on Disclosure of ESG Matters by Issuers, Jan. 18, 2019, *available at* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf.