



## CII Urges SEC to Require Disclosure of Third-Party Director Compensation

Posted by Sebastian V. Niles, Wachtell, Lipton, Rosen & Katz, on Wednesday May 14, 2014

**Editor's Note:** [Sebastian V. Niles](#) is counsel in the Corporate Department at Wachtell, Lipton, Rosen & Katz, where he focuses on rapid response shareholder activism, takeover defense and corporate governance. This post is based on a Wachtell Lipton firm memorandum by Mr. Niles, [Trevor Norwitz](#), [Andrew R. Brownstein](#), and [David C. Karp](#).

As we [have previously written](#), special compensation arrangements between public company directors and third parties, such as activist hedge funds or other nominating shareholders, pose serious threats to the integrity of boardroom decision-making and have been sharply criticized by commentators and many institutional shareholders. The Council of Institutional Investors (CII), which has previously declared that third-party director incentive schemes “blatantly contradict” CII policies on director compensation, has now taken the [additional step of encouraging the SEC to act](#) to ensure investors are fully informed about such arrangements between nominating shareholders and their director candidates.

We share CII’s “concerns with respect to the transparency of compensation paid to directors or director nominees by nominating shareholders in the context of threatened or completed proxy contests,” agree that existing line-item proxy rules do not clearly “call for disclosure about conflicts of interest presented by compensatory arrangements between a nominee and a nominating shareholder” and concur that current requirements “would not necessarily pick up the many ways in which a compensation arrangement between a nominee and a nominating shareholder can be structured.”

Accordingly, we support CII’s call for the SEC to consider interpretive guidance or amendments to the proxy rules to require shareholder contestants in a proxy contest to disclose, at a minimum:

- the existence of any compensatory arrangements between a board nominee and a nominating shareholder relating to the nominee’s candidacy or board service;
- the specific components of any compensatory arrangements between a board nominee and a nominating shareholder relating to the nominee’s candidacy or board service,

- including: (1) any cash compensation, including salary, non-equity incentive and bonus to be paid to the nominee; (2) any equity compensation to be paid to the nominee; (3) any terms of the compensation, including performance criteria, payout formulas, any peer group companies used, measurement periods and vesting provisions; and (4) the range of total compensation that may be paid under various performance scenarios;
- the goals and objectives of such compensation arrangements, including whether the arrangements relate to the nominee's willingness to be a nominee for the board or for his or her service on the board once elected;
  - any indemnification and similar arrangements between the nominee and the nominating shareholder;
  - disclosure regarding any conflicts of interest presented by such compensation arrangements; and
  - any other material features of the compensation arrangements.

CII has identified a troubling inconsistency between the extensive proxy disclosures and analysis required of publicly traded companies concerning compensation, including director pay, and the minimal disclosures required of shareholders waging a proxy contest. While disclosure is not a fully adequate response to the corrupting influence of dissident investor compensation schemes (also known as "golden leashes"), given [ISS' objections](#) to board-adopted bylaws that go beyond disclosure and establish a default rule against such inappropriate schemes, full transparency would at least enable shareholders to be fully informed when considering a dissident slate.