



Via Email

August 4, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F St. NE
Washington DC 20549-1090

Re: Facilitating Director Nominations (File No. S7-10-09)

Dear Ms. Murphy:

I am writing on behalf of the Council of Institutional Investors (“Council”), an association of public, corporate, and union pension funds with combined assets of over \$3 trillion. As a leading voice for long-term investors responsible for the retirement savings of millions of American workers and retirees, the Council welcomes the opportunity to provide comments on the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rule *Facilitating Shareholder Director Nominations* (“Proposed Rule”).

The Council strongly supports the Proposed Rule. We wholeheartedly agree with the Commission that there is an urgent need to amend the proxy rules to better facilitate the exercise of shareowners’ fundamental rights to nominate and elect directors. Nevertheless, the Council respectfully offers for your consideration several modest changes, summarized below and described in more detail in the attachment to this letter, which we believe would enhance the Proposed Rule consistent with the Council and Commission’s shared objective of removing “impediments to the exercise of shareholders’ rights to nominate and elect directors to company boards of directors.”

Nearly seventy years have passed since the Commission first considered whether shareowners should be able to include director candidates in management’s proxy materials. This reform, which has been studied and considered on and off for decades, is long overdue. Its adoption would be one of the most significant and important investor reforms put in place by any regulatory body in decades—a desperately needed boost to investor confidence amid still troubled financial markets. The Council applauds the SEC for its leadership on this important issue.

The financial crisis highlighted a longstanding concern—some directors are simply not doing the jobs expected by their employers, the shareowners. Compounding the problem is that in too many cases the director nomination process is flawed, largely due to limitations imposed by companies and the securities laws.



August 4, 2009

Page 2 of 6

Some boards are dominated by the chief executive officer, who often plays the key role in selecting and nominating directors. All-independent nominating committees ostensibly address this concern, but problems persist. Some companies simply do not have nominating committees; others refuse to accept shareowner nominations for directors. Council members' sense is that shareowner-suggested candidates—whether or not submitted to all-independent nominating committees—are rarely given serious consideration.

Shareowners can now only ensure that their candidates get full consideration by launching an expensive and complicated proxy fight—an unworkable alternative for most investors, particularly fiduciaries who must determine whether the very significant costs of a proxy contest are in the best interests of plan participants and beneficiaries. While corporations can freely tap company coffers to fund campaigns for board-recommended candidates, shareowners must spend their own money to finance such efforts. Companies further often erect various obstacles, including expensive litigation, to thwart investors running proxy fights for board seats. This skewed playing field discourages investors from undertaking valuable steps to hold management and boards accountable and enhance long-term shareowner value.

The Council believes reasonable access to corporate proxy materials for long-term shareowners would address some of the problems surrounding director elections. We believe such access would significantly enhance the U.S. corporate governance model and contribute to the health and long-term value of U.S. public companies by making boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight responsibilities.

In light of these benefits, Council members approved the following policy endorsing shareowner access to the proxy:

Companies should provide access to management proxy materials for a long-term investor or group of long-term investors owning in aggregate at least three percent of a company's voting stock, to nominate less than a majority of the directors. Eligible investors must have owned the stock for at least two years. Company proxy materials and related mailings should provide equal space and equal treatment of nominations by qualifying investors.

To allow for informed voting decisions, it is essential that investors have full and accurate information about access mechanism users and their director nominees. Therefore, shareowners nominating director candidates under an access mechanism should adhere to the same SEC rules governing disclosure requirements and prohibitions on false and misleading statements that currently apply to proxy contests for board seats.



August 4, 2009

Page 3 of 6

While the specific numeric formulation of the Council's policy—3% ownership for 2 years—differs from that of the Proposed Rule—1%, 3%, or 5% ownership for 1 year depending on net asset value—the underlying principles are essentially the same:

- Only large, long term shareowners or groups of shareowners should have a reasonable degree of access to company proxy materials to nominate director candidates,
- The access mechanism should not be used to affect a change of control, and
- Full and accurate disclosures about the access mechanism users and the director nominees should be required.

As previously indicated, detailed responses to many of the specific questions raised in the Proposed Rule are contained in the attachment to this letter. The following is a summary of the Council's views on key aspects of the Proposed Rule including some of the areas that we believe can and should be improved:

Application of the Rule

The Council generally supports the application of Rule 14a-11 as proposed. We believe that, consistent with the Commission's regulation of other features of the proxy solicitation process, long-term investors, companies, and the U.S. capital markets would benefit from a uniform proxy access rule.

The Council generally supports the prompt issuance and implementation of a final rule. We oppose including any triggering events in the final rule as this would overly complicate the proxy access mechanism, undermine investor confidence, and inhibit long-term shareowners from acting quickly if they have concerns with a company's board.

We also oppose any exemption or delay in the implementation of a final rule for smaller issuers. The costs of including shareowner director candidates on management's proxy as proposed are minimal and should not disproportionately burden smaller issuers, particularly given the much more restrictive shareowner eligibility criteria for those issuers with net assets of less than \$75 million.

Shareowner Eligibility Criteria

The Council believes that the Commission's proposed shareowner eligibility criteria for Rule 14a-11, although not identical to the Council's policy, are appropriate and workable. Whatever the criteria, it is crucial that shareowners be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors, as proposed.



August 4, 2009

Page 4 of 6

While the Council generally supports the Commission's proposed eligibility threshold based on the percentage of securities owned and entitled to vote on the election of directors, we note that our members' percentage of securities owned and entitled to vote for the many companies in which they invest is not static. Although Council members are long-term, passive investors, their holdings can vary throughout the year due to rebalancing, share lending, and other routine investment activities. We therefore encourage the Commission to clarify the computation of the percentage of securities owned and entitled to vote to address those routine and common fluctuations in ownership.

The Council agrees with the Commission that there should be a restriction on shareowner eligibility based on the length of time the securities have been held, because like the Commission, we believe that long-term investors are most likely to have interests aligned with all shareowners and are less likely to use the proxy access rule for short term benefit. Although the Council's policy currently provides for a holding period of "at least two years," we do not disagree with the Commission's analysis and conclusion that a one year holding requirement should be sufficient to limit the access mechanism to long-term shareowners.

Nominee Eligibility Criteria

The Council believes the Proposed Rule is generally consistent with our view that shareowner nominees for director should qualify as independent under relevant objective stock exchange listing standards. We agree with the Commission that nominating shareowners should also be required to represent that no relationships or agreements between the nominee or the nominating shareowner or group and the company and its management exist. Additional limitations on nominee eligibility beyond those currently included in the Commission's proposal would be inappropriate and would undermine the stated purposes of the proposed rule by imposing unnecessary burdens on the nominating shareowner or shareowner group.

The Council strongly opposes requiring shareowner-suggested nominees to be independent of the nominating shareowner or group. Instead, the Council recommends requiring companies and nominating shareowners to fully disclose all relationships between director candidates and the company, company executives, and in the case of candidates nominated by shareowners, the nominating shareowners. Corporate concerns over "special interest" representation are exaggerated, since candidates will ultimately only be added to the board if the shareowners—the directors' bosses—vote to do so. Full and meaningful information about each candidate will ensure that shareowners can make reasoned, informed voting decisions.



August 4, 2009

Page 5 of 6

Shareowner Nomination Limits

The Council believes that a proxy access mechanism should not be structured to permit a shareowner or group to unseat an entire board or facilitate a change in control. Our policy advocates that the access mechanism be used to nominate less than a majority of a company's directors. Incumbent directors nominated pursuant to proposed Rule 14a-11 should thus only be counted for purposes of determining the maximum number of shareowner nominees in cases when use of the proxy access mechanism could potentially result in shareowner nominees accounting for one-half or more of the board.

While our proxy access policy only specifies that shareowners should have the right to nominate less than a majority of the board in management's proxy materials, the Council nevertheless believes that any maximum percentage limiting the amount of nominations should ensure that shareowners can nominate at least two candidates in all cases. The Council is aware of too many situations where a lone "dissident" director faced a hostile board, was blackballed from key committees and was effectively cut out of key discussions. Thus, from a practical standpoint, giving shareowners the opportunity to nominate at least two candidates would improve the possibility that dissident directors might, for example, have at least one director willing to second their motions.

First-in Approach

The Council opposes a "first-in" approach for determining which nominees are to be included in the company proxy materials as this would likely cause a pointless and potentially harmful race to be the first to file. What matters most is not who is the fastest to nominate but what investor or group has the greatest stake in the director election and ultimately, the long term performance of the company. The Council instead favors an approach based on largest beneficial ownership along the lines included in the Commission's 2003 proposed proxy access rules. Under such an approach, the shareowner or shareowner group with the largest beneficial ownership would have the right to nominate the maximum number of director candidates allowed under the rule.

Shareowner Proposals Relating to Director Elections

Finally, the Council believes that adoption of proposed Rule 14a-11 would go a long way towards meeting the Commission's stated objectives to remove impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors. We, however, also strongly support the proposed amendment to Rule 14a-8(i)(8) as a critical supplement to Rule 14a-11. In our view, shareowners should be permitted the opportunity to pursue non-binding proposals or mandatory bylaw amendments supporting a stronger proxy access mechanism than the baseline offered by Rule 14a-11.



August 4, 2009

Page 6 of 6

* * * *

The Council appreciates the opportunity to express its views on this matter. Please feel free to contact me at (202) 261-7081 or jeff@cii.org, or Council Analyst Jonathan Urick at (202) 261-7096 or jonathan@cii.org.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel
Council of Institutional Investors

Attachment