COUNCIL OF INSTITUTIONAL INVESTORS

Suite 500 • 888 17th Street, NW • Washington, DC 20006 • (202) 822-0800 • Fax (202) 822-0801 • www.cii.org

Via Email

August 24, 2007

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Shareholder Proposals (File Number: S7-16-07) and Shareholder Proposals Relating to the Election of Directors (File Number: S7-17-07)

Dear Ms. Morris:

I am writing on behalf of the Council of Institutional Investors ("Council"), an association of more than 130 public, corporate and union pension funds with combined assets of over $3 trillion. As a leading voice for long-term, patient capital, the Council welcomes the opportunity to provide our initial comments on the Securities and Exchange Commission's ("SEC" or "Commission"): (1) proposed amendments to the rules under the Securities Exchange Act of 1934 ("1934 Act") concerning shareowner resolutions and electronic shareowner communications, as well as to the disclosure requirements of Schedule 14A and Schedule 13G ("Proposed Amendments"); and (2) interpretive and proposing release to clarify the meaning of the exclusion for shareowner resolutions relating to the election of directors that is contained in Rule 14a-8(i)(8) under the 1934 Act ("Proposed Release") (collectively, the "Proposals").

The Council's corporate governance policies have long stated that "shareowners should have . . . meaningful opportunities to suggest or nominate director candidates and to suggest processes and criteria for director selection and evaluation."[1] Unfortunately, far too many director elections remain a *fait accompli*, regardless of how troubled a company may be. As a result, the only way that individual director nominees may be effectively challenged at some companies is if a shareowner is willing and able to assume the risk and expense of nominating a slate of candidates and running a full-blown election contest. Such ventures are onerous and cost-prohibitive—even in today's world of e-proxy. The Council, therefore, strongly supports reforms that would permit meaningful shareowner access to company-prepared proxy materials relating to the nomination and election of directors. We believe such reforms would make boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight of companies.

[1] Council of Institutional Investors ("Council"), Annual Report 34 (Jan. 2007).

The Council's support for meaningful proxy access is shared by a growing number of shareowners. During the 2007 proxy season, three proxy access shareowner resolutions were presented for a vote and all received significant support. One resolution was approved by the shareowners (Cryo-Cell International, Inc.).[2] According to Institutional Shareholder Services, the other two resolutions received 45.3 percent (UnitedHealth Group) and 43.0 percent (Hewlett-Packard Company) of the vote, respectively.

The Council applauds the Commission for again considering the very important shareowner issue of proxy access.[3] Unfortunately, the Council can not support the Proposals as currently drafted.

The following is a brief summary of some of our initial concerns in response to the Proposed Amendments and the Proposed Release, respectively. The Council plans on filing a more detailed comment letter prior to the expiration of the Proposals' comment period.

Proposed Amendments

The Proposed Amendments include provisions providing that shareowner bylaw resolutions would be required to be included in the company's proxy materials if certain conditions are met.[4] Those conditions include:

(1) the shareowner (or group of shareowners) that submits the proposal must file a Schedule 13G that includes specified public disclosures regarding its background and its interactions with the company; and

(2) the proposal must be submitted by a shareowner (or group of shareowners) that has continuously beneficially owned more than 5% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the shareowner submits the proposal.[5]

Setting aside for the purposes of this letter our reservations about the voluminous and burdensome disclosures required of shareowners by the first condition, our initial concern with the Proposed Amendments focuses on the five percent threshold required by the second condition.[6]

---

[2] Press Release, Cryo-Cell International Inc., Cryo-Cell Announces Certified Results of Annual Shareholders Meeting (Aug. 1, 2007), *available at* http://www.cryo-cell.com/investor_relations/subpage_noad.asp?ID=204.

[3] Shareholder Proposals, Exchange Act Release No. 56,160, Investment Company Act Release No. 27,913, 72 Fed. Reg. 43,466 (proposed Aug. 3, 2007), *available at* http://www.sec.gov/rules/proposed/2007/34-56160fr.pdf; Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,161, Investment Company Act Release No. 27,914, 72 Fed. Reg. 43,488 (proposed Aug. 3, 2007), *available at* http://www.sec.gov/rules/proposed/2007/34-56161fr.pdf.

[4] Shareholder Proposals, 72 Fed. Reg. at 43,470.

[5] *Id.*

[6] We agree with the comments of Securities and Exchange Commission ("SEC") Roel C. Campos that the "high threshold may make [the rule] useless." Subodh Mishra, *The SEC Splits on Proxy Access*, Institutional Shareholder Services, Corporate Governance Blog, Jul. 30, 2007, at 1, *available at* http://blog.issproxy.com/2007/07/the_sec_splits_on_proxy_access.html. Of note, the Council's policies for *nominating* directors include a five percent threshold. Council, Annual Report at 37. In our view, and as described in more detail in this letter, getting five percent of a company's outstanding shares to nominate a director candidate is far easier to achieve than obtaining five percent of the shareowners to *sponsor* a shareowner resolution since few investors have historically chosen to sponsor resolutions.

In the interest of providing at least some preliminary input for the Commission's consideration, the Council consulted with member funds that have an active governance program that includes regular submission of shareowner resolutions. From that perspective, the five percent threshold appears to be unworkable.[7]

While institutional investors may collectively own more than sixty percent of outstanding U.S. equities, the funds that currently engage portfolio companies using tools such as shareowner resolutions account for a much smaller percent of the total U.S. equity market.[8] To be sure, a fund's willingness to file a shareowner resolution is not a perfect indicator of a fund's willingness to join a group proposing a director nomination bylaw. However, the current record is a useful starting point for assessing the practical impact of establishing a five percent threshold.

More specifically, our preliminary research indicates that even if the ten largest public pension funds were to aggregate their holdings of a single public company's securities, those funds combined would likely be unable to clear the five percent hurdle. Moreover, the five percent hurdle would likely be too high whether the funds' aggregate holdings are in a large-cap, mid-cap or small-cap company.[9] Much of this relates to the obligation of funds to maintain diverse portfolios, as evidenced by internal policies to limit their holdings in an individual company to a small percentage (generally less than 0.5%) of the company's outstanding shares. Thus, many more funds and other investors would need to collaborate to hit the five percent threshold in most circumstances. Given the small number of investors that traditionally sponsor shareowner resolutions, it is currently difficult to imagine how a sufficiently large coalition could be established.[10]

Proposed Release

The Proposed Release includes language that would reinterpret Rule 14a-8(i)(8) under the 1934 Act more broadly to permit exclusion of any shareowner resolutions seeking access to a company's proxy materials to nominate or elect a company's directors.[11] The SEC argues that this broader reinterpretation is "consistent with" the Commission's longstanding view of the purpose of Rule 14a-8(i)(8).[12]

---

[7] According to Institutional Shareholder Services, at least 158 separate proponents were responsible for submitting the 688 governance-related shareowner proposals that were filed for the 2006 proxy season. Approximately 280 of the 688 resolutions were filed by Council members. Those resolutions were submitted by a total of only 16 member funds.

[8] The Conference Board, Institutional Investment Report 29 (2007).

[9] For example, based on information compiled from FactSet Research Systems, Inc., if the 10 largest public pension fund holders of Exxon Mobil Corporation (a large-cap stock), Precision Castparts Corp. (a mid-cap stock), and The Manitowoc Company, Inc. (a small-cap stock) were to aggregate their ownership interests, the resulting percentage holdings for those groups would be approximately 3.01, 3.59, and 3.56, respectively.

[10] In recent Congressional testimony, SEC Chairman Christopher Cox, in response to a question from Committee on Banking, Housing, and Urban Affairs Chairman Christopher J. Dodd, appeared to concede that the five percent threshold would be difficult for investors to meet. *See The State of the Securities Markets Before the Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. 48 (Jul. 31, 2007) (Draft of hearing transcript). More specifically, Chairman Cox suggested that the proposed amendment to facilitate the use of electronic shareowner forums "would be a way to put together a 5 percent group that does not exist today." *Id*. In our view, it is unclear whether the proposed amendment relating to electronic shareowner forums, if adopted, would assist investors in establishing the five percent threshold. We would also note that the proposal explicitly raises the question whether "shareholders [should] be able to use a forum to solicit other shareholders to form a 5% group in order to submit a bylaw proposal?" Shareholder Proposals, 72 Fed. Reg. at 43,477.

[11] Shareholder Proposals Relating to the Election of Directors, 72 Fed. Reg. at 43,493.

[12] *Id*. at 12.

The Council's analysis of Rule 14a-8(i)(8), contained in our *amicus* brief in support of Plaintiff-Appellant American Federation of State, County & Municipal Employees Pension Plan before the United States Court of Appeals for the Second Circuit, demonstrates that the SEC's current argument might have merit if one only considers how the Commission has interpreted Rule 14a-8(i)(8) since 1990.[13] If, however, one also considers the SEC's interpretation of Rule 14a-8(i)(8) from its initial published interpretation (in 1976) to when it began applying a different interpretation (in 1990), the Commission's argument becomes unconvincing.[14]

It is disappointing that the Commission devotes over two dozen paragraphs of the Proposed Release to constructing a questionable basis for supporting a broader interpretation of Rule 14a-8(i)(8). It is even more troubling when one considers that (1) the broader interpretation, if adopted, would likely shut the door on shareowners' ability to submit binding or advisory resolutions seeking access to the proxy;[15] and (2) shareowner support for meaningful proxy access is strong and continues to grow.[16]

The Council could accept the SEC's analysis of Rule 14a-8(i)(8) if it was accompanied by the promulgation of a new rule providing shareowners an alternative means to meaningfully access the proxy. As described above, however, the proxy access provisions of the Proposed Amendments sadly fail to meet the needs and desires of investors.

* * * *

The Council appreciates the opportunity to provide our initial comments on the Proposals. Please feel free to contact me with any questions.

Sincerely,

Jeff Mahoney
General Counsel

---

[13] *See* Brief for Council as *Amicus Curiae* in support of Plaintiff-Appellant at 20, American Federation of State, County & Municipal Employees Pension Plan v. American International Group, No. 05-2825 (2nd Cir. Aug. 2005); *accord* American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc., at 2 (2d Cir. Dec. 15, 2005), *available at* http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA1LTI4MjVfb3BuLnBkZg==/05-2825_opn.pdf.

[14] *Id*.

[15] We agree with the comments of SEC Commissioner Annette L. Nazareth who described the Shareholder Proposals Relating to the Election of Directors as "the shareholder non-access proposal." Nicholas Rummell, *One body, two minds on proxy access*, Financial Week, Jul. 20, 2007, at 2, *available at* http://www.financialweek.com/apps/pbcs.dll/article?AID=/20070730/REG/70727028/&SearchID=7328981673323.

[16] *See supra* text accompanying note 2.