Testimony of

Ann Yerger

Executive Director

Council of Institutional Investors

before the

Committee on Financial Services

September 27, 2007

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Table of Contents

TABLE OF CONTENTS

Prepared Statement

Full Text of Statement

Attachments

1. Council of Institutional Investors ("Council") General Members
2. Council Corporate Governance Policies
3. Council Board of Directors
4. Council Responses to the Proposals

**Testimony of
Ann Yerger
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before the
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Prepared Statement

Chairman Frank, Ranking Member Bachus, and Members of the Committee:

Good morning. I am Ann Yerger, Executive Director, of the Council of Institutional Investors, an association of more than 130 public, labor and corporate employee benefit plans with assets exceeding $3 trillion. I appreciate the opportunity to appear before you today on behalf of the Council. I respectfully request that the full text of my statement and all supporting materials be entered into the public record.

Members of the Council are responsible for safeguarding assets used to fund the retirement benefits of millions throughout the US. They have a significant commitment to the US capital markets, with the average Council member investing about 75 percent of its portfolio in stocks and bonds of US public companies. And they are long-term, patient investors due to their heavy commitment to passive investment strategies. As a result, US corporate governance issues are of great interest to our members.

The ability to file shareowner proposals is particularly important to Council members and others who are unable to exercise the "Wall Street walk" and sell their shares when they are dissatisfied. Shareowner proposals provide investors an opportunity to present their concerns to management and the board, to communicate with other investors, to encourage reforms, and to improve performance. And these resolutions have motivated profound improvements to boardroom performance in particular and the US corporate governance model in general.

Under debate today is whether the shareowner proposal rule, in general, should be changed and whether, in particular, shareowners should have the right to file resolutions suggesting or mandating processes to include shareowner-suggested director candidates on company proxy cards.

I'll tackle the second issue first. Because directors are the cornerstone of the US corporate governance model, and the primary role of shareowners is limited to electing and removing directors, the Council believes owners should have the ability to file access resolutions and the marketplace at large should have the opportunity to vote on whether those resolutions are in the best interests of the companies.

It is important to note that the Council isn't alone in its support for meaningful proxy access. So far in 2007, three shareowner-sponsored access resolutions came to votes and all received significant support exceeding 40 percent of the votes cast for and against. These results are proof positive of broad marketplace support for proxy access.

The Council applauds the Securities and Exchange Commission for again taking up the very important issue of proxy access. We very much appreciate the many hours of hard work that the SEC Staff and Commission have devoted to developing the two most recent proposals. Unfortunately, the Council strongly opposes both proposals as currently drafted.

The Commission's "shorter" non-access proposal would obliterate the current rights of shareowners to submit binding or non-binding access resolutions. The only circumstance in which the Council could possibly support the adoption of this flawed proposal would be if it was accompanied by the adoption of another rule that provided an alternative meaningful approach to proxy access. Unfortunately, this hasn't happened.

The Commission's "longer" proposal imposes such onerous requirements on shareowners simply interested in sponsoring access resolutions that the proposal is empty and unworkable.

More specifically, the proposed five (5) percent threshold for submitting a proposed bylaw amendment is too high a barrier for shareowners who routinely file resolutions. Even the ten (10) largest public pension funds combined would be unlikely to meet this threshold at a public company of any size—whether it be a large-, mid-, or small-cap company.

In addition, the proposed disclosures are unnecessary and overly burdensome and for some inexplicable reason are far more extensive than currently required even for shareowners planning a hostile takeover of a public company.

Also inexplicable are the Commission's reasons for imposing such excessive requirements on proposals that ultimately would have to face the test of the marketplace and be approved by a majority or even, in some cases, a supermajority of the outstanding shares.

The Council believes the end result of these onerous requirements would be that few, if any, shareowners would ever again have the ability to exercise what we believe is a fundamental shareowner right.

Speaking of fundamental rights, the Council strongly opposes a shift from the current SEC rules governing shareowner proposals in general to a state-by-state, company-by-company model. We believe the uniformity and consistency provided by the current federal oversight model is in the best interests not only of Council members, but also other shareowners, companies, and the capital markets.

Notwithstanding our strong opposition to both of the SEC's proposals, we stand ready to work cooperatively with the Commission, this Committee, my fellow panelists, and other interested parties to develop meaningful proxy access reforms that best serve the needs of investors, companies, and the US capital markets. Thank you, Mr. Chairman for inviting me to participate at this hearing. I look forward to the opportunity to respond to any questions.

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Ann Yerger
Executive Director
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Full Text of Statement

Chairman Frank, Ranking Member Bachus, and Members of the Subcommittee:

Good morning. I am Ann Yerger, executive director, of the Council of Institutional Investors ("Council"). I am pleased to appear before you today on behalf of the Council.

My testimony includes a brief overview of the Council followed by a discussion of the Council's views on the United States ("US") Securities and Exchange Commission's ("SEC" or "Commission") August 3, 2007: (1) amendments to the rules under the Securities Exchange Act of 1934 ("34 Act") concerning shareholder resolutions and electronic shareowner communications, as well as to the disclosure requirements of Schedule 14A and Schedule 13G ("Amendments"),[1] and (2) the interpretative 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 34 Act ("Release")[2] (Amendments and Release collectively, the "Proposals").

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[1] Shareholder Proposals, Exchange Act Release No. 56,160, Investment Company Act Release No. 27,913, 72 Fed. Reg. 43,466 (proposed Aug. 3, 2007) ("Amendments"), *available at* http://www.sec.gov/rules/proposed/2007/34-56160fr.pdf.
[2] 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) ("Release"), *available at* http://www.sec.gov/rules/proposed/2007/34-56161fr.pdf.

The Council

The Council is a not-for-profit association of more than 130 public, labor and corporate pension funds with assets exceeding $3 trillion.[3] Council members are responsible for investing and safeguarding assets used to fund the pension benefits of millions of participants and beneficiaries throughout the US. Since the average Council member invests approximately seventy (70) percent of its entire pension portfolio in US stocks and bonds,[4] issues relating to US corporate governance are of great interest to our members.

Council Corporate Governance Policies[5]

An important part of the Council's activities involves the development of corporate governance policies. The policies set standards or recommended practices that the Council members believe companies and boards of directors should adopt. They are a living document that is constantly reviewed and updated.

The Council's policies neither bind members nor corporations. They are designed to provide guidelines that the Council has found to be appropriate in most situations.

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[3] *See infra* Attachment 1 for a listing of the general members of the Council of Institutional Investors ("Council").
[4] *See* Council, *Pension Fund Performance Survey 2004*, 2 (Aug. 23, 2004).
[5] *See infra* Attachment 2 for the Council corporate governance policies.

Council staff uses the policies to determine whether and how the Council can respond to certain issues, including regulations proposed by the SEC, accounting standards proposed by the standards setting bodies, and actions taken by publicly traded companies. Council policies also have been used to decide whether the Council should file an *amicus* brief in a lawsuit or help fund litigation. Council staff may without additional approval, take action on an issue that falls within its policies realm and also within budgetary limits, although oversight of those actions by the Council's board is common.

The nine non-officers on the Council's board of directors serve as the policies committee and suggest subjects for policies, review staff policy drafts and decide which policies should be submitted to the full board.[6] All general members of the Council are invited to submit ideas for policies to Council staff or Council directors.

The full board votes on whether to approve a proposed policy. Once approved by the board, the policy is either subject to a vote by the full membership at the next meeting or by mail ballot if the board believes time is of the essence.

[6] *See infra* Attachment 3 for a list of the Council's board of directors.

Council Responses to the Proposals[7]

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."[8] We believe that far too many director elections, however, remain a done deal, 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.

The Council has to-date submitted four letters to the SEC providing the Council's views in response to the Proposals.[9] The Council's two most recent letters, dated September 18, 2007, were presented to the Council's general members for a vote at a meeting on September 18, 2007, and were unanimously approved by the general members at that meeting.[10]

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[7] *See infra* Attachment 4 for the Council responses to the Amendments and the Release.
[8] *See infra* Attachment 2, Part I.
[9] *See infra* Attachment 4.
[10] *Id.* at pp. 9-27.

The following are the Council's views on those specific issues or questions that the staff of the Committee on Financial Services has indicated that we should address in connection with our testimony:

Does the shareholder proposal process need to be changed?

The Council does not believe that the shareholder proposal process needs to be dramatically changed as proposed in the Amendments. On balance, Council members believe the existing federal securities laws and proxy rules generally work quite well with respect to the shareowner proposal process.

According to data provided by Institutional Shareholder Services ("ISS"), over the past three years, Council members have filed approximately forty-six (46) percent of all corporate governance-related shareowner proposals submitted to US companies.[11] The ability to file shareowner proposals is particularly important to Council members and many other long-term investors who—due to their commitment to passive investment strategies—are unable to exercise the "Wall Street walk" and simply sell their shares when they are dissatisfied. Shareowner proposals provide long-term investors the opportunity to present their concerns to management and the board of directors, to communicate with other shareowners, to encourage reforms, and to improve performance.

[11] According to Institutional Shareholder Services ("ISS"), at least 158 separate proponents were responsible for submitting the 688 governance-related shareowner proposals that were filed for the 2006 proxy season at companies in the United States ("US"). Approximately 280 of the 688 resolutions (40.7%) were filed by Council members.

Those Council members who file shareowner resolutions are generally comfortable with the existing federal securities laws and proxy rules, including the thirteen substantive bases for excluding shareowner proposals contained in Rule 14a-8.[12] Those exclusions do not prevent Council members from submitting proposals on most of the best practices contained in the Council's corporate governance policies.[13] Council members also appreciate the professionalism and dedication of the SEC staff in handling the related no-action process.

While there is debate from time to time about the scope of the thirteen exclusions in Rule 14a-8, there is little debate about the wisdom of the overall regulatory model that gives shareowners notice as to matters that will come before the meeting without requiring a company to print proposals that violate state law or satisfy one of the other general categories of exclusions. This is a tradeoff that most shareowners find more than acceptable, particularly when the Rule creates a single unified set of standards for all companies. It is difficult to imagine how things would work and how Council members, other shareowners, and the long-term performance of companies and the capital markets would benefit if the Commission were to permit the significantly more complex, less uniform procedures for binding and non-binding proposals suggested by the Amendments.

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[12] Shareholder Proposals, 17 C.F.R 240.14a-8(i) (Jan. 29, 2007), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=4fd16addf3b7e8add81721d908e2b4c6&rgn=div8&view=text&node=17:3.0.1.1.1.2.78.199&idno=17.

[13] *See Infra* Attachment 2.

We, however, believe there may be some merit to the Commission reconsidering a potential change to Rule 14a-8 first suggested in a 1997 SEC Proposed Rule.[14] That Proposed Rule provided an "Override Mechanism" requiring a company to include any resolution put forth by shareowners of at least three (3) percent of the company's outstanding voting shares even if the resolution could have been excluded under Rule 14a-8(i)(5)(Relevance) or (i)(7)(Management Functions).[15] As described by the SEC, such a potential change has some appeal because it

> would broaden the spectrum of proposals that may be included in companies' proxy materials where a certain percentage of the shareholder body believes that all shareholders should have an opportunity to express a view on the proposal . . . [and] provide shareholders an opportunity to decide for themselves which proposals are sufficiently important and relevant to all shareholders - - and, therefore, to the company - - to merit space in the company's proxy materials.[16]

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[14] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39,093, Investment Company Act Release No. 22,828, at 16-20 (proposed Sept. 18, 1997), *available at* http://www.sec.gov/rules/proposed/34-39093.htm.
[15] *Id*. at 16.
[16] *Id*.

Should there be restrictions on the types of shareholder proposals that must be included on a management proxy? Does it make a difference if the proposal is binding or non-binding?

As indicated in response to the previous question, the Council generally supports the restrictions contained in the existing federal proxy rules that govern binding and non-binding shareowner proposals submitted for inclusion on a management proxy. We do not believe that Council members, other shareowners, and the long-term performance of companies and the capital markets would benefit if the Commission were to permit the significantly more complex, less uniform procedures for binding or non-binding proposals suggested by the Amendments.

Should shareholders be allowed to include matters related to director nominations on a management proxy? Does it make a difference if the proposal is a bylaw amendment regarding nomination process, rather than a director nominee or nominees?

The Council believes that shareowners should be allowed to include matters related to the process for director nominations on a management proxy. As previously indicated, the Council's corporate governance policies have long stated that shareowners should have meaningful opportunities to put forward or nominate director candidates and to suggest processes and criteria for director selection and evaluation.

The Council's support for meaningful proxy access is shared by an impressive 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.).[17] According to ISS, the other two resolutions received 45.25 percent (UnitedHealth Group) and 43.0 percent (Hewlett-Packard Company) of the vote, respectively. Those shareowners generally agree with the Council that meaningful proxy access reforms would make boards more thoughtful about whom they nominate, more responsive to shareowners concerns, and more vigilant in their oversight of companies.

The Council also believes that that companies and shareowners would generally agree that a bylaw amendment regarding the nomination process is very different from running a candidate or candidates for the board of directors. The former simply allows owners to vote on a proposed bylaw provision regarding the procedures by which a board election may be conducted. The latter, however, seeks to replace one or more directors in a specific election—a very significant step given the fact that the board of directors is the centerpiece of the US corporate governance model.

[17] 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.

Consistent with the Council's view, the SEC Staff has acknowledged a distinction under the federal proxy rules between a shareowner resolution about board of director nomination procedures and a shareowner resolution about a specific election of directors.[18] Under Rule 14a-8(i)(8), the SEC staff has long issued "no-action" letters allowing companies to omit shareowner proposals from their proxy materials that relate to "an election" of directors.[19] In contrast, the SEC staff has frequently (although admittedly, not consistently) denied no-action relief under the Rule with respect to a range of resolutions that would not affect the outcome of a specific election, but that relate to the procedures by which directors are elected.[20]

The Release attempts to reinterpret Rule 14a-8(i)(8) in a way that would eliminate the previously recognized distinction between a shareowner resolution about board of director nomination procedures and a shareowner resolution about a specific election of directors.[21] We strongly oppose the reinterpretation because it would effectively bar shareowners from filing shareowner resolutions about director nomination procedures without providing shareowners an alternative meaningful approach to proxy access.[22]

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[18] *See* Brief for Council as *Amicus Curiae* in support of Plaintiff-Appellant at 15-16, American Federation of State, County & Municipal Employees Pension Plan v. American International Group, No. 05-2825 (2nd Cir. Aug. 2005) (on file with Council).
[19] *Id.* at 14.
[20] *Id.* at 15.
[21] Release, 72 Fed. Reg. at 43,490-93.
[22] *See infra* Attachment 4, pp. 25-27.

Should the proxy rules be changed to exclude non-binding shareholder proposals from management proxies? If there is no such change in the proxy rules, should companies have the ability to "opt-out" of the requirement to include non-binding shareholder proposals on their proxies?

The Council strongly opposes changes to the proxy rules that would exclude non-binding or precatory proposals from management proxies. We would also strongly oppose changes to the proxy rules that would allow companies the ability to "opt-out" of the requirement to include non-binding shareowner proposals on their proxies. As previously indicated, the Council believes that the existing proxy rules generally work quite well with respect to binding and non-binding shareowner proposals.

As previously indicated, Council members have filed on average about forty-six (46) percent of all corporate governance-related resolutions submitted to U.S. companies. They have filed shareowner resolutions for many years, and have done so with much success.

For the most part, Council members file non-binding or precatory resolutions. This is consistent with how most resolutions are structured. As indicated in the following chart, according to data provided by ISS, the vast majority of all shareowner resolutions over the last four years (more than ninety-six (96) percent) have been precatory:

	2004	**2005**	**2006**	**2007**
Governance Proposals (# filed)	751	731	690	823
Binding Proposals (# filed)	17	15	19	31
Binding Proposals (# voted)	8	6	13	11*
Percentage (filed)	2.3%	2.1%	2.8%	3.8%

* According to data obtained from ISS on September 10, 2007, vote tallies are currently available on 11 of the 14 binding shareowner proposals that are or will be included on company ballots.

Council members and other shareowners file precatory resolutions for a number of reasons, but perhaps the most important one is that they have been an extremely effective tool for having a dialogue with management about important corporate governance issues.[23] Precatory proposals give the marketplace at large the opportunity to weigh in on an issue and communicate the broader market views to directors and management.

[23] *See, e.g.,* Edward Iwata, *Boardrooms open up to investors' input*, USA Today, Sept. 6, 2007, at 1, *available at* http://www.usatoday.com/money/companies/management/2007-09-06-shareholders-fight_N.htm (shareowner resolutions have resulted in a "new willingness by companies to discuss boardroom topics" with shareowners). Also of note, many Council members have obligations under the Employee Retirement Income Security Act of 1974 ("ERISA") to manage fund assets in accordance with U.S. Department of Labor ("DOL") directives. The DOL has issued interpretative bulletins relating to ERISA that effectively approve pension funds' use of shareowner resolutions as a means of communicating with portfolio companies. *See* Pension and Welfare Benefits Administration, U.S. Dept. of Labor, Interpretative Bulletin No. 94-2, Relating to ERISA 329 (July 29, 1994); *available at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/cfr_2002/julqtr/29cfr2509.94-2.htm.

Precatory resolutions have contributed to some very significant governance reforms in recent years, including: majority voting standards for directors; expensing of stock options; and virtually ending classified boards.[24] There are many reasons why precatory proposals have been so effective. One is that they are used by proponents to promote communication rather than to force change.

Many view a precatory proposal as a "door knocker." From our perspective, a precatory proposal is an invitation to a conversation with management that, if successful, could lead to a dialogue on the subject; if not successful, the matter may be raised with shareowners as a group at the annual meeting.

In contrast, in light of their highly prescriptive nature, binding proposals are often viewed as more of a "hammer." Hammers tend to put people on the defensive. That has been the experience of Council members, who have generally found that non-binding proposals tend to lead to more meaningful dialogue with companies. Dialogue is very important for Council members, since they withdraw about a third (1/3) of the resolutions they file following discussions with companies.[25]

[24] *See, e.g.,* Patrick McGurn, *Proxy Season 007: Shaken and Stirred,* 33 Directorship 6, at 6-8 (2007) (Commenting on the 2007 proxy season and proposals relating to majority voting and classified boards).
[25] According to ISS, 28.9% of shareowner proposals filed by Council members for the 2006 proxy season were withdrawn.

Precatory proposals can be useful for another reason as well. Namely, they provide the board with general guidance as to shareowner wishes at a policy level, while leaving questions of implementation and the like to management. For example, shareowner resolutions dealing with executive "golden parachutes" are very popular among shareowners and regularly command a majority of the shareowner votes. However, it is very difficult in only 500 words to craft a bylaw on severance packages in the kind of detail that is appropriate for an individual company. The ability of shareowners to submit a precatory proposal, while leaving it up to the board to craft an appropriate bylaw reflecting the approved policy, is often an effective means to improving corporate governance and maximizing shareowner value.

Of note, in a 1982 proposed rulemaking the Commission considered, among several alternatives to Rule 14a-8, whether to permit companies and their security holders to adopt their own procedures "as to what proposals should be included in the . . . proxy statement . . . ."[26] There was significant opposition to that proposal.[27]

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[26] Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19,135, Public Utility Holding Company Act Release No. 22,666, Investment Company Act Release No. 12,734, at 5 (proposed Oct. 14, 1982), *available at* http://content.lawyerlinks.com/default.htm/library/sec/sec_releases/34-19135.htm.

[27] Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 20,091, at 3 (Aug. 16, 1983), *available at* http://content.lawyerlinks.com/default.htm/library/sec/sec_releases/34-20091.htm.

The Commission rejected the proposal citing those commentators who had concluded that permitting companies and their security holders to adopt their own procedures governing access to the company's proxy statement

> [w]ould create serious problems of administration as there would be no uniformity or consistency in determining the inclusion of security holder proposals. Exacerbating the problem generated by provisions individual to each issuer would be the effect of the fifty state judicial systems administering the process.[28]

We believe that that conclusion is as valid today as it was in 1983.[29]

Is the proposed 5% ownership threshold reasonable? If not, why not? Should there be other limits on shareholder access to management proxies, such as holding periods or dollar thresholds.

We believe that the more than five (5) percent ownership threshold is too high a barrier for shareowners submitting resolutions. While institutional investors may collectively own more than sixty (60) percent of outstanding U.S. equities, approximately one-half (1/2) of those shares are held by mutual funds and insurance companies.[30] Those institutional investors generally do not sponsor shareowner resolutions, including those they support.

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[28] *Id.*

[29] Of note, the Amendments fail to address why the concerns about "administration" that appear to have been the basis for rejecting the alternative approach to Rule 14a-8 in 1982 would not be a "serious problem" if, as suggested in the Amendments, the proxy rules were revised to permit companies the ability to "opt-out" of the requirement to include non-binding shareowner proposals on their proxies. Amendments, 72 Fed. Reg. at 43,478 (Instead discussing "developments in the last 25 years that may have diminished the concerns about shareholders' ability to act as a group . . . .").

[30] *See, e.g.,* The Conference Board, Institutional Investment Report 29 (2007) (Indicating that investment companies and insurance companies hold 22.8% and 7.4%, respectively, of the total U.S. equity market).

Public and union pension funds that currently engage portfolio companies using tools such as shareowner resolutions account for less than ten (10) percent of the total U.S. equity market.[31] As a result of those funds' obligations to diversify their portfolios and manage risk, the level of holdings that those funds may have in any single company is relatively small. For example, one of the Council's largest members—The California State Teachers' Retirement System ($149,008 million in total assets)[32]—generally owns only about 0.3 percent of the outstanding stock of any company in the Russell 3000.[33]

The ability to aggregate individual pension funds for a shareowner resolution is a difficult exercise. For example, earlier this year the Council's largest member—the California Public Employees' Retirement System ("CalPERS") ($218,214 million in total assets)[34]—tried without success to find co-sponsors for its proxy access resolution at UnitedHealth Group Incorporated. CalPERS, with approximately 0.5 percent of the company's outstanding shares, ended up as the sole sponsor.[35] Even so, as indicated, the resolution garnered more than 45.25 percent of the shares cast for-and-against—a high rate of shareowner support for a first-time resolution.

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[31] *Id*. (Indicating that state and local pension funds hold 9.8% of the total U.S. equity market).
[32] *Special Report—World's Largest Pension Funds*, Pensions and Investments, Sept. 3, 2007, at 15.
[33] E-mail from Christopher J. Ailman, Chief Investment Officer, CalSTRS, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 3:09 PM EST) (On file with Council). Similarly, Council member—The Florida State Board of Administration—typically owns only about 0.33% of the outstanding stock of any company in the Russell 3000. E-mail from Tracy Stewart, Corporate Governance Manager, Florida State Board of Administration, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 5:55 PM EST) (On file with Council).
[34] *Special Report—World's Largest Pension Funds*, *supra*, at 15.
[35] *See* UnitedHealth Group Incorporated, Proxy Statement for Annual Meeting of Shareholders to be Held May 29, 2007 (Schedule 14A), at 100 (Apr. 30, 2007), *available at* http://www.unitedhealthgroup.com/invest/2007/Proxy_Stmt_2007.pdf.

Our research indicates that even if CalPERS and nine (9) of the other largest public pension funds were to successfully aggregate their holdings of a single public company's securities, those funds combined would likely be unable to clear the more than five (5) percent hurdle. Moreover, the more than five (5) percent threshold would likely be too high a barrier regardless of whether the funds' aggregate holdings are in a large-cap, mid-cap or small-cap company. For example, based on information compiled from FactSet Research Systems, Inc., if the ten (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.

Thus, many more funds and other investors would need to collaborate to hit the more than five percent threshold in most circumstances. As indicated, 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.[36]

[36] 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 more than 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*.

The Council has not established any policies regarding whether the federal proxies rules should be changed to provide additional or alternative limits on shareowner access to management proxies. The Council, however, stands ready to work with the Commission to develop meaningful proxy access reforms that include appropriate limits on shareowner access.

Thank you, Mr. Chairman, for inviting me to participate at this hearing. I look forward to the opportunity to respond to any questions.

Testimony of
Ann Yerger
Executive Director
Council of Institutional Investors
before the
Committee on Financial Services
September 27, 2007

Attachment 1

Council General Members

Council of Institutional Investors

General Members*

AFL-CIO Pension Plan
AFSCME Employees Pension Plan
Agilent Technologies Benefit Plans
Alameda County Employees' Retirement Association
Alaska Permanent Fund Corporation
Altria Corporate Services Pension Plan
American Federation of Teachers Pension Plan
Arkansas Public Employees Retirement System
Arkansas Teacher Retirement System
Bank of America Pension Plans
BP America
Bricklayers & Trowel Trades Pension Fund
Building Trades Pension Trust Fund-Milwaukee and Vicinity
California Public Employees' Retirement System
California State Teachers' Retirement System
Campbell Soup Retirement & Pension Plans
Carpenters United Brotherhood Local Unions & Councils Pension Fund
Carpenters Pension Fund Chicago District Council
CERES Defined Contribution Retirement Plan
Chevron
CIGNA Pension Fund
Coca-Cola Retirement Plan
Colgate-Palmolive Employees’ Retirement Income Plan
Colorado Fire and Police Pension Association
Colorado Public Employees' Retirement Association
Communications Workers of America Pension Fund
Connecticut Retirement Plans and Trust Funds
Contra Costa County Employees' Retirement Association
CWA/ITU Negotiated Pension Plan
Dallas Employees' Retirement Fund
Delaware Public Employees Retirement System
Detroit General Retirement System
Disney (Walt)
District of Columbia Retirement Board
ELCA Board of Pensions
EMC
Fairfax County Educational Employees’ Retirement System
Florida State Board of Administration

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*General membership in the Council is open to any employee benefit plan, state or local agency officially charged with the investment of plan assets, or non-profit endowment funds and non-profit foundations. General Members participate in all meetings and seminars sponsored by the Council and are the only voting members of the Council. Annual dues are $1.30 per $1 million in fund assets, but no less than $3,000 and no more than $30,000.

Gap
General Mills Retirement Plan
General Motors Investment Management
Hartford Municipal Employees Retirement Fund
Hewlett-Packard
Houston Firefighters' Relief & Retirement Fund
I.A.M. National Pension Fund
IBEW Pension Benefit Fund
Idaho Public Employee Retirement System
Illinois State Board of Investment
Illinois State Universities Retirement System
Illinois Teachers' Retirement System
Iowa Municipal Fire & Police Retirement System
Iowa Public Employees Retirement System
ITT Industries Pension Fund Trust
IUE-CWA Pension Fund
Jacksonville Police and Fire Pension Fund
Jeffrey Company Pension Plan
Johnson & Johnson
Kentucky Retirement Systems
Kern County Employees' Retirement Association
KeyCorp Cash Balance Pension Plan
Laborers' Central Pension Fund
Lens Foundation for Corporate Excellence
LIUNA Local Union & District Council Pension Fund
Los Angeles City Employees' Retirement System
Los Angeles County Employees Retirement Association
Los Angeles Fire and Police Pension System
Los Angeles Water and Power Employees' Retirement Plan
Lucent Technologies Pension Plan
Maine State Retirement System
Marin County Employees' Retirement Association
Maryland, State Retirement Agency
Massachusetts Bay Transportation Authority Retirement Fund
Massachusetts PRIM
McDonald's Employee Benefits Plan
Microsoft
Milwaukee Employees' Retirement System
Minnesota State Board of Investment
Missouri Public School & Non-Teacher School ERS
Missouri State Employees' Retirement System
Montgomery County Employees' Retirement System
Nathan Cummings Foundation
National Education Association Employee Retirement Plan
Navy-Marine Corps Relief Society
New Hampshire Retirement System
New Jersey Division of Investment
New York City Employees' Retirement System

New York City Pension Funds
- New York City Board of Education Retirement System
- New York City Fire Department Pension Fund
- New York City Police Pension Fund

New York City Teachers' Retirement System
New York State and Local Retirement Systems
New York State Teachers' Retirement System
New York Times Company Pension Plan
North Carolina Retirement System
Ohio Police & Fire Pension Fund
Ohio Public Employees Retirement System
Ohio School Employees Retirement System
Ohio State Teachers' Retirement System
Operating Engineers Central Pension Fund
Orange County Employees Retirement System
Pennsylvania Public School Employees' Retirement System
Pennsylvania State Employees' Retirement System
Pfizer
Pitney Bowes Pension Plan
Plumbers & Pipefitters National Pension Fund
Prudential Employee Savings Plan
Sacramento County Employees' Retirement System
San Diego City Employees' Retirement System
San Francisco City & County Employees' Retirement System
San Jose City Retirement Funds
Santa Barbara County Employees' Retirement System
Schering-Plough Employees' Savings Plan
Sealed Air Retirement Plans
SEIU Union Pension Fund
Sheet Metal Workers' Local 19 Pension Plan
Sheet Metal Workers' National Pension Fund
South Carolina Retirement System
Sunoco
Target
Teamster Affiliates Pension Plan
Tennessee Consolidated Retirement System
Texas Employees Retirement System
Texas Municipal Retirement System
Texas Teacher Retirement System
UAW
UFCW Staff Trust Fund
ULLICO Pension Plan Trust
UNITE HERE Laundry & Dry Cleaning Workers Pension Fund
UNITE HERE National Retirement Fund
UNITE HERE Textile Workers Pension Fund
UnitedHealth Group Retirement Plans
United States Steel and Carnegie Pension Fund
Vermont Pension Investment Committee
Washington State Investment Board

West Virginia Investment Management Board
Wisconsin State Investment Board
World Bank Staff Retirement Plan

Rev. 08/29/07

Testimony of
Ann Yerger
Executive Director
Council of Institutional Investors
before the
Committee on Financial Services
September 27, 2007

Attachment 2

Council Corporate Governance Policies

The Council of Institutional Investors
Corporate Governance Policies

CONTENTS:

- **I. Introduction**
- **II. The Board of Directors**
- **III. Shareowner Voting Rights**
- **IV. Shareowner Meetings**
- **V. Executive Compensation**
    - **Role of Compensation Committee**
    - **Salary**
    - **Annual Incentive Compensation**
    - **Long-Term Incentive Compensation**
    - **Perquisites**
    - **Employment Contracts, Severance and Change-of-Control Payments**
    - **Retirement Arrangements**
    - **Stock Ownership**
- **VI. Non-Employee Director Compensation**
- **VII. Independent Director Definition**

I. Introduction

The Council expects that corporations will comply with all applicable federal and state laws and regulations and stock exchange listing standards.

The Council believes every company should also have written disclosed governance procedures and policies, an ethics code that applies to all employees and directors, and provisions for its strict enforcement. The Council posts its corporate governance policies on its web site (www.cii.org); it hopes corporate boards will meet or exceed these standards and adopt similarly appropriate additional policies to best protect shareowners' [1] interests.

In general, the Council believes that corporate governance structures and practices should protect and enhance accountability to, and ensure equal financial treatment of, shareowners. An action should not be taken if its purpose is to reduce accountability to shareowners.

The Council also believes shareowners should have meaningful ability to participate in the major fundamental decisions that affect corporate viability, and meaningful opportunities to suggest or nominate director candidates and to suggest processes and criteria for director selection and evaluation.

The Council believes companies should adhere to responsible business practices and practice good corporate citizenship. Promotion, adoption and effective implementation of guidelines for the responsible conduct of business and business relationships are consistent with the fiduciary responsibility of protecting long-term investment interests.

[1] At the February 2006 meeting of the Council's Policies Committee, it was decided that Council policies should use the term "shareowner" instead of "shareholder," reflecting the Council's belief that the former term is a better descriptor.

The Council believes good governance practices should be followed by publicly traded companies, private companies and companies in the process of going public. As such, the Council believes that, consistent with their fiduciary obligations to their limited partners, the general members of venture capital, buyout and other private equity funds should use appropriate efforts to encourage companies in which they invest to adopt long-term corporate governance provisions that are consistent with the Council's policies.

The Council believes that U.S. companies should not reincorporate offshore because corporate governance structures there are weaker and therefore reduce management accountability to shareowners.

Council policies neither bind members nor corporations. They are designed to provide guidelines that the Council has found to be appropriate in most situations.

II. The Board of Directors

Annual election of directors. All directors should be elected annually (no classified boards).

Director elections: When permissible under state law, companies' charters and by-laws should provide that directors in uncontested elections are to be elected by a majority of the votes cast. In contested elections, plurality voting should apply. An election is contested when there are more director candidates than there are available board seats.

Boards should adopt policies asking that directors tender their resignations if they fail to win majority support in uncontested elections, and providing that such directors will not be renominated after expiration of their current term in the event they fail to tender such resignation.

Independent board. At least two-thirds of the directors should be independent (i.e., their only non-trivial professional, familial or financial connection to the corporation, its chairman, CEO or any other executive officer is their directorship). The company should disclose information necessary for shareowners to determine whether directors qualify as independent, whether or not the disclosure is required by state or federal law. This information should include all financial or business relationships with and payments to directors and their families and all significant payments to companies, non-profits, foundations and other organizations where company directors serve as employees, officers or directors. (See Council definition of independent director.)

All-independent board committees. Companies should have audit, nominating and compensation committees, and all members of these committees should be independent.

The board (not the CEO) should appoint the committee chairs and members. Committees should be able to select their own service providers. Some regularly scheduled committee meetings should be held with only the committee members (and, if appropriate, the committee's independent consultants) present. The process by which committee members and chairs are selected should be disclosed to shareowners.

Board accountability to shareowners

Majority shareowner votes. Boards should take actions recommended in shareowner proposals that receive a majority of votes cast for and against. If shareowner approval is required for the action, the board should submit the proposal to a binding vote at the next shareowner meeting.

Interaction with shareowners. Directors should respond to communications from shareowners and should seek shareowner views on important governance, management and performance matters. All directors should attend the annual shareowners' meeting and be available, when requested by the chair, to answer shareowner questions.

Shareowner – director communication, interaction & meeting conduct. Directors should respond to communications from shareowners and should seek shareowner views on important governance, management and performance matters. To accomplish this goal, all companies should establish a mechanism by which shareowners with non-trivial concerns could communicate directly with all directors, including independent directors. Policies requiring that all director communication go through a member of the management team should be avoided unless they are for record-keeping purposes. In such cases, procedures documenting receipt, delivery to the board and response must be maintained and made available upon request to shareowners.

During the annual general meeting, shareowners should have the right to ask questions, both orally and in writing, and expect answers and discussion where appropriate from the board of directors. Such discussion should take place regardless whether those questions have been submitted in advance. All directors should attend the annual shareowners' meetings and be available, when requested by the chair, to answer shareowner questions. While reasonable time limits to questions asked might be acceptable, the board should not ignore or skip hearing questions because a shareowner has a smaller number of shares or has not held those shares for a certain amount of time.

Independent chair/lead director. The board should be chaired by an independent director. The CEO and chair roles should only be combined in very limited circumstances; in these situations, the board should provide a written statement in the proxy materials discussing why the combined role is in the best interests of shareowners, and it should name a lead independent director who should have approval over information flow to the board, meeting agendas, and meeting schedules to ensure a structure that provides an appropriate balance between the powers of the CEO and those of the independent directors.

Other roles of the lead independent director should include chairing meetings of non-management directors and of independent directors, presiding over board meetings in the absence of the chair, serving as the principle liaison between the independent directors and the chair, and leading the board/director evaluation process. Given these additional responsibilities, the lead independent director should expect to devote a greater amount of time to board service than the other directors.

Board/director evaluation. Boards should evaluate themselves and their individual members on a regular basis. Board evaluation should include an assessment of whether the board has the necessary diversity of skills, backgrounds, experiences, ages, races and genders appropriate to the company's ongoing needs. Individual director evaluations should include high standards for in-person attendance at board and committee meetings and disclosure of all absences or conference call substitutions.

Boards should review the performance and qualifications of any director from whom at least 10 percent of the votes cast are withheld.

Absent compelling and stated reasons, directors who attend fewer than 75 percent of board and board-committee meetings for two consecutive years should not be renominated. Companies should disclose individual director attendance figures for board and committee meetings. Disclosure should distinguish between in-person and telephonic attendance. Excused absences should not be categorized as attendance.

'***Continuing directors***.' Corporations should not adopt so-called "continuing director" provisions (also known as "dead-hand" poison pills) that allow former directors who have left office to take action on behalf of the corporation.

Board size and service. Absent compelling, unusual circumstances, a board should have no fewer than 5 and no more than 15 members (not too small to maintain the needed expertise and independence, and not too large to be efficiently functional). Shareowners should be allowed to vote on any major change in board size.

Companies should establish and publish guidelines specifying on how many other boards their directors may serve. Absent unusual, specified circumstances, directors with full-time jobs should not serve on more than two other boards. Currently serving CEOs should only serve as a director of one other company, and then only if the CEO's own company is in the top half of its peer group. No person should serve on more than five for-profit company boards.

Board operations. Directors should receive training from independent sources on their fiduciary responsibilities and liabilities. Directors have an affirmative obligation to become and remain independently familiar with company operations; they should not rely exclusively on information provided to them by the CEO to do their jobs.

Directors should be provided meaningful information in a timely manner prior to board meetings, and should be allowed reasonable access to management to discuss board issues. Directors should be allowed to place items on board agendas.

Non-management directors should hold regularly scheduled executive sessions without the CEO or staff present. The independent directors should also hold regularly scheduled in-person executive sessions without non-independent directors and staff present.

The board should approve and maintain a CEO succession plan.

Auditor independence. As prescribed by law, the audit committee has the responsibility to hire, oversee and, if necessary, fire the company's outside auditor.

The audit committee should seek competitive bids for the external audit engagement no less frequently than every five years. The company's external auditor should not perform any non-audit services for the company, except those required by statute or regulation to be performed by a company's external auditor, such as attest services.

The proxy statement should also include a copy of the audit committee charter and a statement by the audit committee that it has complied with the duties outlined in the charter.

Companies should not agree to limit the liability of outside auditors.

Audit committee charters should provide for annual shareowner votes on the board's choice of independent, external auditor. Such provisions ought to state that if the board's selection fails to achieve the support of a majority of the for-and-against votes cast, the audit committee should: (1) take the shareowners' views into consideration and reconsider its choice of auditor; and (2) solicit the views of major shareowners in order to determine why broad levels of shareowner support were not achieved.

The audit committee should publicly provide to shareowners a plain-English explanation of the reasons for a change in the company's external auditors. At a minimum, this disclosure should be contained in the same Securities and Exchange Commission filing that companies are required to submit within four days of an auditor change.

Charitable and political contributions. The board of directors should monitor, assess and approve all charitable and political contributions (including trade association contributions) made by the company. The board should ensure that only contributions consistent with and aligned to the interests of the company and its shareowners are approved. The terms and conditions of such contributions should be clearly defined and approved by the board. The board's guidelines for contribution approval should be publicly disclosed as a corporate contributions policy.

The board should disclose on an annual basis the amounts and recipients of all monetary and non-monetary contributions made by the company during the prior fiscal year. If any expenditures earmarked for political or charitable activities were provided to or through a third-party, then those expenditures should be included in the report.

III. Shareowner Voting Rights

The shareowners' right to vote is inviolate and should not be abridged.

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 5 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 three years. Company proxy materials and related mailings should provide equal space and equal treatment of nominations by qualifying investors.

One share, one vote. Each share of common stock should have one vote. Corporations should not have classes of common stock with disparate voting rights. Authorized unissued common shares that have voting rights to be set by the board should not be issued with unequal voting rights without shareowner approval.

Confidential voting. All proxy votes should be confidential, with ballots counted by independent tabulators. Confidentiality should be automatic and permanent and apply to all ballot items. Rules and practices concerning the casting, counting and verifying of shareowner votes should be clearly disclosed.

Voting requirements. A majority vote of common shares outstanding should be sufficient to amend company bylaws or take other action requiring or receiving a shareowner vote. Supermajority votes should not be required.

A majority vote of common shares outstanding should be required to approve:

*Major corporate decisions concerning the sale or pledge of corporate assets that would have a material effect on shareowner value. Such a transaction will automatically be deemed to have a material effect if the value of the assets exceeds 10 percent of the assets of the company and its subsidiaries on a consolidated basis.

*The corporation's acquiring 5 percent or more of its common shares at above-market prices other than by tender offer to all shareowners.

*Poison pills.

*Abridging or limiting the rights of common shares to (i) vote on the election or removal of directors or the timing or length of their term of office, or (ii) make nominations for directors or propose other action to be voted on by shareowners, or (iii) call special meetings of shareowners or take action by written consent or affect the procedure for fixing the record date for such action.

*Provisions resulting in the issuance of debt to a degree that would excessively leverage the company and imperil the long-term viability of the corporation.

Broker votes. Broker non-votes and abstentions should be counted only for purposes of a quorum.

Bundled voting. Shareowners should be allowed to vote on unrelated issues separately. Individual voting issues, particularly those amending a company's charter, bylaws or anti-takeover provisions, should not be bundled.

IV. Shareowner Meetings

Corporations should make shareowners' expense and convenience primary criteria when selecting the time and location of shareowner meetings.

Appropriate notice of shareowner meetings, including notice concerning any change in meeting date, time, place or shareowner action, should be given to shareowners in a manner and within time frames that will ensure that shareowners have a reasonable opportunity to exercise their franchise. To promote the ability of shareowners to make informed decisions regarding whether to recall loaned shares: (1) shareowner meeting record dates should be disclosed as far in advance of the record date as possible; and (2) proxy statements should be disclosed before the record date passes whenever possible.

Polls should remain open at shareowner meetings until all agenda items have been discussed and shareowners have had an opportunity to ask and receive answers to questions concerning them.

Companies should not adjourn a meeting for the purpose of soliciting more votes to enable management to prevail on a voting item. Extending a meeting should only be done for compelling reasons such as vote fraud, problems with the voting process or lack of a quorum.

Companies should hold shareowner meetings by remote communication (so-called electronic or "cyber" meetings) only as a supplement to traditional in-person shareowner meetings, not as a substitute.

As noted in Section II, "The Board of Directors," all directors should attend the annual shareowners' meeting and be available, when requested by the chair, to respond directly to oral or written questions from shareowners.

V. Executive Compensation

The Council believes that executive compensation is a critical and visible aspect of a company's governance. Pay decisions are one of the most direct ways for shareowners to assess the performance of the board. And they have a bottom line effect, not just in terms of dollar amounts, but also by formalizing performance goals for employees, signaling the market and affecting employee morale.

The Council endorses reasonable, appropriately structured pay-for-performance programs that reward executives for sustainable, superior performance over the "long-term," consistent with a company's investment horizon and generally considered to be five or more years for mature companies and at least three years for other companies. While the Council believes that executives should be well paid for superior performance, it also believes that executives should not be excessively paid. It is the job of the board of directors and the compensation committee to ensure that executive compensation programs are effective, reasonable and rational with respect to critical factors such as company performance, industry considerations and compensation paid to other employees inside the company.

It is also the job of the compensation committee to ensure that elements of compensation packages are appropriately structured to enhance the company's short- and long-term strategic goals and to retain and motivate executives to achieve those strategic goals. Compensation programs should not be driven by competitive surveys, which have become excessive and subject to abuse. They should recognize that it is shareowners, not executives, whose money is at risk. Since executive compensation must be tailored to meet unique company needs and situations, compensation programs must always be structured on a company-by-company basis. However, the Council believes that certain principles apply to all companies. For example, all companies should provide annually for advisory shareowner votes on the compensation of senior executives.

ROLE OF COMPENSATION COMMITTEE

The compensation committee is responsible for structuring executive pay, evaluating executive performance within the context of the pay structure of the entire company, subject to approval of the board of directors. To best handle this role, the Council believes that compensation committees should adopt the following principles and practices:

Structure

- ***Committee composition***: All members of the compensation committee should be independent. Committee membership should rotate periodically among the board's independent directors. Members should be or take responsibility to become knowledgeable about compensation and related issues. They should exercise due diligence and independent judgment in carrying out their committee responsibilities. They should represent diverse backgrounds and professional experiences.

Responsibilities

- ***Executive pay philosophy***: The compensation philosophy should be clearly disclosed to shareowners in annual proxy statements. In developing, approving and monitoring the executive pay philosophy, the compensation committee should consider the full range of pay components, including structure of programs, desired mix of cash and equity awards, goals for distribution of awards throughout the company, how executive pay relates to the pay of other employees, use of employment contracts, and policy regarding dilution.
- ***Oversight***: The compensation committee should vigorously oversee all aspects of executive compensation for a group composed of the CEO and other highly paid executives, as required by law, and any other highly paid employees, including executives of subsidiaries, special purpose entities and other affiliates, as determined by the compensation committee. The committee should ensure that the structure of employee compensation throughout the company is fair, non-discriminatory and forward-looking, and that it motivates, recruits and retains a workforce capable of meeting the company's strategic objectives. To perform its oversight duties, the committee should approve, comply with and fully disclose a charter detailing its responsibilities.
- ***Pay for performance***: Compensation of the executive oversight group should be driven predominantly by performance. The compensation committee should establish performance measures for executive compensation that are agreed to ahead of time and publicly disclosed. Performance measures applicable to all performance-based awards (including annual and long-term incentive compensation) should reward superior performance—based predominantly on total stock return measures and key operational measures—at minimum reasonable cost and should reflect downside risk.
- ***Annual approval and review***: Each year, the compensation committee should review performance of individuals in the oversight group and approve any bonus, severance, equity-based award or extraordinary payment made to them. The committee should understand all components of executive compensation and annually review total compensation potentially payable to the oversight group under all possible scenarios, including death/disability, retirement, voluntary termination, termination with and without cause and changes of control. The committee should also ensure that the structure of pay at different levels (CEO and others in the oversight group, other executives and non-executive employees) is fair and appropriate in the context of broader company policies and goals and fully justified and explained.
- ***Committee accountability***: In addition to attending all annual and special shareowner meetings, committee members should be available to respond directly to questions about executive compensation; the chair of the committee should take the lead. In addition, the committee should regularly report on its activities to the independent directors of the board, who should review and ratify committee decisions. Committee members should take an active role in preparing the compensation committee report contained in the annual proxy materials, and be responsible for the contents of that report.

- ***Outside advice***: The compensation committee should retain and fire outside experts, including consultants, legal advisers and any other advisers when it deems appropriate, including when negotiating contracts with executives. Individual compensation advisers and their firms should be independent of the client company, its executives and directors and should report solely to the compensation committee. The compensation committee should develop and disclose a formal policy on compensation adviser independence. In addition, the committee should annually disclose an assessment of its advisers' independence, along with a description of the nature and dollar amounts of services commissioned from the advisers and their firms by the client company's management. Companies should not agree to indemnify or limit the liability of compensation advisers or the advisers' firms.
- ***Clawbacks***: The compensation committee should develop and disclose a policy for recapturing unearned bonus and incentive payments that were awarded to senior executives due to fraudulent activity, incorrectly stated financial results, or some other cause. At a minimum, the policy should apply to Named Executive Officers, and boards should require repayment in the event of malfeasance involving the executive.

Proxy statement disclosure

- ***Disclosure practices***: The compensation committee is responsible for ensuring that all aspects of executive compensation are clearly, comprehensively and promptly disclosed, in plain English, in the annual proxy statement regardless of whether such disclosure is required by current rules and regulations. The compensation committee should disclose all information necessary for shareowners to understand how and how much executives are paid and how such pay fits within the overall pay structure of the company. It should provide annual proxy statement disclosure of the committee's compensation decisions with respect to salary, short-term incentive compensation, long-term incentive compensation and all other aspects of executive compensation, including the relative weights assigned to each component of total compensation. Other recommended disclosures relevant to specific elements of executive compensation are detailed below.
- ***Benchmarking***: Benchmarking at median or higher levels is a primary contributor to escalating executive compensation. Although benchmarking can be a constructive tool for formulating executive compensation packages, it should not be relied on exclusively. If benchmarking is used, compensation committees should commit to annual disclosure of the companies in peer groups used for benchmarking and/or other comparisons. If the peer group used for compensation purposes is different from that used to compare overall performance, such as the five-year stock return graph required in the annual proxy materials, the compensation committee should describe the differences between the groups and the rationale for choosing between them. In addition to disclosing names of companies used for benchmarking and comparisons, the compensation committee should disclose targets for each compensation element relative to the peer/benchmarking group and year-to-year changes in companies composing peer/benchmark groups.

SALARY

Since salary is one of the few components of executive compensation that is not "at risk," it should be set at a level that yields the highest value for the company at least cost. In general, salary should be set to reflect responsibilities, tenure and past performance, and to be tax efficient—meaning no more than $1 million. The compensation committee should publicly disclose its rationale for paying salaries above the median of the peer group.

ANNUAL INCENTIVE COMPENSATION

Cash incentive compensation plans should be structured to appropriately align executive interests with company goals and objectives and to reasonably reward superior performance that meets or exceeds well-defined and clearly disclosed performance targets that reinforce long-term strategic goals set and approved by the board and written down in advance of the performance cycle.

Structure

- ***Formula plans***: The compensation committee should approve formulaic bonus plans containing specific qualitative and quantitative performance-based operational measures designed to reward executives for superior performance related to operational/strategic/other goals set by the board. Such awards should be capped at a reasonable maximum level. These caps should not be calculated as percentages of accounting or other financial measures (such as revenue, operating income or net profit), since these figures may change dramatically due to mergers, acquisitions and other non-performance-related strategic or accounting decisions.
- ***Targets***: When setting performance goals for "target" bonuses, the compensation committee should set performance levels below which no bonuses would be paid and above which bonuses would be capped.
- ***Changing targets***: Except in unusual and extraordinary situations, the compensation committee should not "lower the bar" by changing performance targets in the middle of bonus cycles. If performance targets must be lowered, amended or changed in the middle of a performance cycle, reasons for the change and details of the initial targets and adjusted targets should be disclosed.

Proxy statement disclosure

- ***Transparency***: The compensation committee should commit to provide full descriptions of the qualitative and quantitative performance measures and benchmarks used to determine annual incentive compensation, including the weightings of each measure. At the beginning of a period, the compensation committee should calculate and disclose the maximum compensation payable if all performance-related targets are met. At the end of the performance cycle, the compensation committee should disclose actual targets and details on the determination of final payouts.

Shareowner approval

Shareowners should approve the establishment of, any material amendments to, annual incentive compensation plans covering the oversight group.

LONG-TERM INCENTIVE COMPENSATION

Well-designed compensation programs can lead to superior performance. Long-term incentive compensation, generally in the form of equity-based awards, can be structured to achieve a variety of long-term objectives, including retaining executives, aligning executives' financial interests with the interests of shareowners, and rewarding the achievement of long-term specified strategic goals of the company and/or the superior performance of company stock.

But long-term incentive compensation comes at a cost, and poorly structured awards permit excessive or abusive pay that is detrimental to the company and to shareowners.

To maximize effectiveness and efficiency, compensation committees should carefully evaluate the costs and benefits of long-term incentive compensation, ensure that long-term compensation is appropriately structured and consider whether performance and incentive objectives would be enhanced if awards were distributed throughout the company, not simply to top executives.

Companies may rely on a myriad of long-term incentive vehicles—including, but not limited to, performance-based restricted stock/units, phantom shares, stock units and stock options—to achieve a variety of long-term objectives. While the technical underpinnings of long-term incentive awards may differ, the Council believes that the following principles and practices apply to all long-term incentive compensation awards. And, as detailed below, certain policies are relevant to specific types of long-term incentive awards.

Structure

- ***Size of awards***: Compensation committees should set appropriate limits on the size of long-term incentive awards granted to executives. So-called "mega-awards" or outsized awards should be avoided except in extraordinary circumstances, because they may result in rewards that are disproportionate to performance.
- ***Vesting requirements***: Meaningful performance periods and/or cliff vesting requirements—consistent with a company's investment horizon, but no less than three years—should attach to all long-term incentive awards, followed by pro rata vesting over at least two subsequent years for senior executives.
- ***Grant timing***: Except in extraordinary circumstances, such as a permanent change in performance cycles, long-term incentive awards should be granted at the same time each year. Companies should not coordinate stock award grants with the release of material non-public information. The grants should occur whether recently publicized information is positive or negative, and stock options should never be backdated.
- **Hedging**: Compensation committees should prohibit executives and directors from hedging (by buying puts and selling calls or employing other risk-minimizing techniques) equity-based awards granted as long-term incentive compensation or other stock holdings in the company. And, they should strongly discourage other employees from hedging their holdings in company stock.

Proxy statement disclosure

- ***Philosophy/strategy***: Compensation committees should have a well-articulated philosophy and strategy for long-term incentive compensation, which should be fully and clearly disclosed in the annual proxy statement.
- ***Award specifics***: Compensation committees should disclose the size, distribution, vesting requirements, other performance criteria and grant timing of each type of long-term incentive award granted to the executive oversight group and how each component contributes to long-term performance objectives of a company.
- ***Ownership targets***: Compensation committees should disclose whether and how long-term incentive compensation may be used to satisfy meaningful stock ownership requirements. Disclosure should include whether compensation committees impose post-exercise holding periods or other requirements to ensure that long-term incentive compensation is appropriately used to meet ownership targets.

Shareowner approval
Shareowners should approve all long-term incentive plans, including equity-based plans, any material amendments to existing plans or any amendments of outstanding awards to shorten vesting requirements, reduce performance targets or otherwise change outstanding long-term incentive awards to benefit executives. Plans should have expiration dates and not be structured as "evergreen," rolling plans.

DILUTION

Dilution measures how much the additional issuance of stock may reduce existing shareowners' stake in a company. Dilution is particularly relevant for long-term incentive compensation plans since these programs essentially issue stock at below-market prices to the recipients. The potential dilution represented by long-term incentive compensation plans is a direct cost to shareowners.

Dilution from long-term incentive compensation plans may be evaluated using a variety of techniques including, but not limited to, the reduction in earnings per share and voting power resulting from the increase in outstanding shares.

Proxy statement disclosure

- ***Philosophy/strategy***: Compensation committees should develop and disclose the philosophy regarding dilution including definition(s) of dilution, peer group comparisons and specific targets for annual awards and total potential dilution represented by equity compensation programs for the current year and expected for the subsequent four years.
- ***Stock repurchase programs***: Stock buyback decisions are a capital allocation decision and should not be driven solely for the purpose of minimizing dilution from equity-based compensation plans. The compensation committee should provide information about stock repurchase programs and the extent to which such programs are used to minimize the dilution of equity-based compensation plans.
- ***Tabular disclosure***: The annual proxy statement should include a table detailing the overhang represented by unexercised options and shares available for award and a discussion of the impact of the awards on earnings per share.

STOCK OPTION AWARDS

Stock options give holders the right, but not the obligation, to buy stock in the future. Options may be structured in a variety of ways. The Council considers some structures and policies preferable because they more effectively ensure that executives are compensated for superior performance. Other structures and policies are inappropriate and should be prohibited.

Structure—preferred practices

- ***Performance options***: Stock option prices should be indexed to peer groups, performance-vesting and/or premium-priced to reward superior performance based on the attainment of challenging quantitative goals.
- ***Dividend equivalents***: To ensure that executives are neutral between dividends and stock price appreciation, dividend equivalents should be granted with stock options, but distributed only upon exercise of the option.
- ***Stock option expensing***: Since stock options have a cost, companies should include these costs as an expense on their reported income statements and disclose valuation assumptions.

Structure—inappropriate practices

- ***Discount options***: No discount options should be awarded.
- ***Reload options***: Reload options should be prohibited.
- ***Option repricing:*** "Underwater" options should not be repriced or replaced (either with new options or other equity awards), unless approved by shareowners. Repricing programs, for shareowner approval, should exclude directors and executives, restart vesting periods and mandate value-for-value exchanges in which options are exchanged for a number of equivalently valued options/shares.

STOCK AWARDS/UNITS

Stock awards/units and similar equity-based vehicles generally grant holders stock based on the attainment of performance goals and/or tenure requirements. These types of awards are more expensive to the company than options, since holders generally are not required to pay to receive the underlying stock, and therefore should be limited in size.

Structure

Stock awards should be linked to the attainment of specified performance goals and in some cases to additional time-vesting requirements. Stock awards should not be payable based solely on the attainment of tenure requirements.

Proxy statement disclosure

- ***Transparency***: The compensation committee should provide full descriptions of the qualitative/quantitative performance measures and benchmarks used and the weightings of each component. Whenever possible, disclosure should include details of performance targets.

PERQUISITES

Company perquisites blur the line between personal and business expenses. The Council believes that executives, not companies, should be responsible for paying personal expenses—particularly those that average employees routinely shoulder, such as family and personal travel, financial planning, club memberships and other dues. The compensation committee should ensure that any perquisites are warranted and have a legitimate business purpose, and it should consider capping all perquisites at a de minimis level. Total perquisites should be described, disclosed and valued.

EMPLOYMENT CONTRACTS, SEVERANCE AND CHANGE-OF-CONTROL PAYMENTS

Various arrangements may be negotiated to outline terms and conditions for employment and to provide special payments following certain events, such as a termination of employment with/without cause and/or a change in control. The Council believes that these arrangements should be used on a limited basis.

Structure

- ***Employment contracts***: Companies should only provide employment contracts to executives in limited circumstances, such as to provide modest, short-term employment security to a newly hired or recently promoted executive. Such contracts should have a specified termination date (not to exceed three years); contracts should not be “rolling” on an open-ended basis.

- ***Severance payments***: Executives should be entitled to severance payments in non-control change situations only in the event of wrongful termination, death or disability. Termination for poor performance, resignation under pressure or failure to renew the contract should not qualify as wrongful termination.
- ***Change-in-control payments***: Any provisions providing for compensation following a change-in-control event should be "double-triggered," stipulating that compensation is payable only (1) after a control change actually takes place and (2) if a covered executive's job is terminated because of the control change.

Limitations

- ***Gross-ups***: Companies should not compensate executives for any excise or additional taxes payable upon the receipt of severance, change-in-control or similar payments.

Proxy statement disclosure

- ***Transparency***: The compensation committee should fully and clearly describe the terms and conditions of employment contracts and any other agreements/arrangements covering the executive oversight group and reasons why the compensation committee believes the agreements are in the best interests of shareowners.
- ***Tabular disclosure***: The compensation committee should provide tabular disclosure of the dollar value payable, including gross-ups and all related taxes payable by the company, to each member of the executive oversight group under each scenario covered by the contracts/agreements/arrangements, including change-in-control, death/disability, termination with/without cause and resignation.
- ***Timely disclosure***: New executive employment contracts or amendments to existing contracts should be immediately disclosed in 8-K filings and promptly disclosed in subsequent 10-Qs.

Shareowner ratification

Shareowners should ratify all employment contracts, side letters or other agreements providing for severance, change-in-control or other special payments to executives exceeding 2.99 times average annual salary plus annual bonus for the previous three years.

RETIREMENT ARRANGEMENTS

Deferred compensation plans, supplemental executive retirement plans, retirement packages and other retirement arrangements for highly paid executives can result in hidden and excessive benefits. The Council believes that special retirement arrangements, including ones structured to permit employees whose compensation exceeds IRS limits to fully participate in similar plans covering other employees, should be consistent with programs offered to the general workforce, and they should be reasonable.

Structure

- ***Supplemental executive retirement plans (SERPs)***: Supplemental plans should be an extension of the retirement program covering other employees. They should not include special provisions, such as above-market interest rates and excess service credits, not offered under plans covering other employees. Payments such as stock and stock options, annual/long-term bonuses and other compensation not awarded to other employees and/or not considered in the determination of retirement benefits payable to other employees should not be considered in calculating benefits payable under SERPS.

- ***Deferred compensation plans***: Investment alternatives offered under deferred compensation plans for executives should mirror those offered to employees in broad-based deferral plans.

Limitations

- ***Deferred compensation plans***: Above-market returns should not be applied to executive deferrals, and executives should not receive "sweeteners" for deferring cash payments into company stock.
- ***Post-retirement exercise periods***: Executives should be limited to three-year post-retirement exercise periods for stock option grants.
- ***Retirement benefits***: Executives should not be entitled to special perquisites—such as apartments, automobiles, use of corporate aircraft, security, financial planning—and other benefits upon retirement. Executives are highly compensated employees who should be more than able to cover the costs of their retirements.

Proxy statement disclosure

- ***Transparency***: The terms of any deferred compensation, retirement, SERP or other similar plans covering the executive oversight group should be fully disclosed, in plain English, along with a description of any additional perquisites or benefits payable to executives after retirement.
- ***Tabular disclosure***: A single table should be provided detailing the expected dollar value payable to each member of the executive oversight group under any deferred compensation, retirement, SERP or similar plan, along with a dollar value of any additional perquisites of benefits payable after retirement.

STOCK OWNERSHIP

Structure

- ***Stock ownership***: Executives and directors should own, after a reasonable period of time, a meaningful position in the company's common stock. Executives should be required to own stock—excluding unexercised options and unvested stock awards—equal to a multiple of salary, scaled based on position, such as two times salary for lower-level executives and up to six times salary for the CEO.

Limitations

- ***Stock sales***: Executives should be required to sell stock through pre-announced program sales or by providing a minimum 30-day advance notice of any stock sales.
- ***Post-retirement holdings***: Executives should be required to continue to satisfy the minimum stock holding requirements for at least six months after leaving the company.

Proxy statement disclosure

- ***Transparency***: Companies should disclose stock ownership requirements and whether any members of the executive oversight group are not in compliance.

VI. Non-Employee Director Compensation

Given the vital importance of the responsibilities assigned to directors, the Council expects that non-employee directors will devote significant time to their boardroom duties.

The Council believes that policy issues related to director compensation are fundamentally different from executive compensation. The Council is supportive of director compensation policies that accomplish the following goals: 1) attract highly qualified candidates; 2) retain highly qualified directors; 3) align directors' interests with those of the long-term owners of the corporation; and 4) provide complete disclosure to shareowners regarding all components of director compensation including the philosophy behind the program and all forms of compensation.

To accomplish these goals, director compensation should consist solely of a combination of cash retainer and equity-based compensation. The cornerstone of director compensation programs should be alignment of interests through the attainment of significant equity holdings in the company meaningful to each individual director. The Council believes that equity obtained with an individual's own capital provides the best alignment of interests with other shareowners. However, compensation plans can provide supplemental means of obtaining long-term equity holdings through equity compensation, long-term holding requirements and ownership requirements.

The Council believes that companies should have flexibility within certain broad policy parameters to design and implement director compensation plans that suit their unique circumstances. To support this flexibility, investors must have complete and clear disclosure of both the philosophy behind the compensation plan as well as the actual compensation awarded under the plan. Without full disclosure, it is increasingly difficult to earn investors' confidence and support for compensation plans, including both director and executive plans.

Although non-employee director compensation is generally immaterial to a company's bottom line and small relative to executive pay, the Council believes that director compensation is an important piece of a company's governance. Because director pay is set by the board and has inherent conflicts of interest, care must be taken to ensure there is no appearance of impropriety. Companies should pay particular attention to managing these conflicts.

ROLE OF THE COMPENSATION COMMITTEE IN DIRECTOR COMPENSATION

The compensation committee (or alternative committee comprised solely of independent directors) is responsible for structuring director pay, subject to approval of all the independent directors, so that it is aligned with the long-term interests of shareowners. The unique fact that directors are setting their own compensation necessitates additional emphasis on the following practices:

Responsibilities

- ***Total compensation review***: The compensation committee should understand and value each component of director compensation and annually review total compensation potentially payable to each director.
- ***Outside advice***: The Council believes that committees should have the ability to utilize a compensation consultant for assistance on director compensation plans. In cases where the compensation committee does utilize a consultant, it should always retain an independent compensation consultant or any other advisors as deemed appropriate to assist with the evaluation of the structure and value of director compensation. A summary of the pay consultant's advice should be provided in the annual proxy statement in plain English. The compensation committee should disclose all instances where the consultant is also retained (by the committee) to provide advice on executive compensation. In no circumstances should the committee utilize a consultant for director compensation or executive compensation who is also retained by management.

Proxy statement disclosure

- ***Tabular disclosure***: Annual proxy statement disclosure should include a table with columns valuing each component of compensation paid to each director during the previous year. The table should also include a column estimating the total value, including the present value of equity awards, of each director's annual pay package and any other relevant information. The table should include the number of board meetings and committee meetings attended by the director.
- ***Compensation committee report***: The annual director compensation disclosure included in the proxy materials should include a discussion of the philosophy for director pay and the processes for setting director pay levels. Reasons for changes in director pay programs should be explained in plain English. Peer group(s) used to compare director pay packages should be fully disclosed, along with differences, if any, from the peer group(s) used for executive pay purposes. While the Council recognizes the value of peer analysis, we do not believe that peer-relative justification should dominate the rational for (higher) pay levels. Rather, compensation programs should be appropriate for the circumstances of the company. The report should disclose how many committee meetings involved discussions of director pay.

The following sections provide Council policy positions on specific components of director compensation and related issues.

RETAINER

The annual retainer should be the sole form of cash compensation paid to non-employee directors. Ideally, it should reflect an amount appropriate for a director's expected duties, including attending meetings, preparing for meetings/discussions and performing due diligence on sites/operations (which should include routine communications with a broad group of employees.) The Council recognizes that in some combination, the retainer and the equity component combined also reflect the director's contribution from experience and leadership.

The Council opposes meeting attendance fees—whether for board meetings or committee meetings—since meeting attendance is the most basic expectation of a non-employee director.

Retainer amounts may be differentiated to recognize that certain non-employee directors, possibly including independent board chairs, independent lead directors, committee chairs or members of certain committees, are expected to spend more time on board duties than other directors.

The board should have a clearly defined attendance policy. In cases where the committee utilizes any form of financial consequences (loss of a portion of the retainer or equity) as part of the director compensation program, this should be fully disclosed. Financial consequences for poor attendance, while perhaps appropriate in some circumstances, should not be considered in lieu of examining the attendance record, commitment (time spent on director duties) and contribution as integral criterion in director performance and re-nomination decisions.

EQUITY-BASED COMPENSATION

To complement the annual retainer and align director-shareowner interests, non-employee directors shall receive stock awards or stock-related awards such as phantom stock or share units. Equity-based compensation to non-employee directors should be fully vested on the grant date. This point is a marked difference to the Council's policy on executive compensation which calls for performance-based vesting of equity-based awards. While views on this topic have been mixed, the Council believes that the benefits of immediate vesting outweigh the complications. The obvious benefits stem from the immediate alignment of interests with shareowners and the maintenance of independence and objectivity for the director.

The Council believes that equity-based compensation can be an important component of director compensation. These tools are perhaps best suited to accomplish optimal long-term perspective and alignment of interests with shareowners. To accomplish this objective, the Council believes that director compensation should contain an ownership requirement or incentive and minimum holding period requirements.

The Council suggests ownership requirements of at least three to five times annual compensation. However, the Council is sensitive to situations where qualified director candidates may not have financial means to obtain immediate ownership thresholds. For this reason, companies may adopt unique approaches to providing either a minimum threshold for ownership or incentive to build ownership. This concept should be an integral component of the committee's disclosure related to the philosophy of director pay. It is appropriate to provide a reasonable period of time for directors to meet ownership requirements or guidelines.

Separate from ownership requirements, the Council believes companies should adopt holding requirements for a significant majority of equity-based grants. These policies should require that directors retain a significant portion (such as 80% for example) of equity grants until after they are retired from the board. These policies should also prohibit the use of any transactions or arrangements that mitigate the risk or benefit of ownership to the director. The Council believes that these transactions and arrangements will inhibit the alignment of interests obtained from providing equity compensation and ownership requirements.

The Council does not advocate a specific split between equity-based and cash compensation. Rather, we believe that companies should have the flexibility to set and adjust this ratio as may be appropriate for the circumstances. Accordingly, the rational behind this decision is an important element of disclosures related to the overall philosophy of director compensation.

Proxy statement disclosure

- ***Transparency***: The present value of equity awards paid to each director during the previous year and the philosophy and process used in determining director pay should be fully disclosed in the proxy statement.

Shareowner approval

- Current listing standards require shareowner approval of equity-based compensation plans and material amendments to plans (with limited exceptions). The Council strongly supports this concept and advocates that companies adopt conservative interpretations of approval requirements when confronted with choices. (For example, this may include material amendments to the plan).

PERFORMANCE-BASED COMPENSATION

While the Council is a strong advocate of performance-based concepts in executive compensation, we do not support performance measures in director compensation. Performance-based compensation for directors has significant potential to conflict with the director's primary role as an independent representative of shareowners.

PERQUISITES

Aside from meeting-related expenses such as airfare, hotel accommodations and modest travel/accident insurance, the Council believes that directors should receive no other perquisites. Health, life and other forms of insurance, matching grants to charities, financial planning, automobile allowances and other similar perquisites cross the line as benefits offered to employees. The Council believes that charitable awards programs are an unnecessary benefit; directors interested in posthumous donations can do so on their own via estate planning. Infrequent token gifts of modest value are not considered perquisites.

REPRICING AND EXCHANGE PROGRAMS

The Council believes that under no circumstances should directors participate in or be eligible for repricing or exchange programs.

EMPLOYMENT CONTRACTS, SEVERANCE AND CHANGE-OF-CONTROL PAYMENTS

Non-employee directors should not be eligible to receive any change-in-control payments or severance arrangements of any kind.

RETIREMENT ARRANGEMENTS

Since non-employee directors are elected representatives of shareowners and not company employees, they should not be offered retirement benefits such as defined benefit plans or deferred stock awards nor should they be entitled to special post-retirement perquisites.

The Council does not object to allowing directors to defer cash pay via a deferred compensation plan for directors. However, the Council believes that such investment alternatives offered under deferred compensation plans for directors should mirror those offered to employees in broad-based deferral plans. Non-employee directors should not receive “sweeteners” for deferring cash payments into company stock.

DISGORGEMENT

Directors should be required to repay compensation to the company in the event of malfeasance or a breach of fiduciary duty involving the director.

VII. Independent Director Definition

Members of the Council of Institutional Investors believe that the promulgation of a narrowly drawn definition of an independent director (coupled with a policy specifying that at least two-thirds of board members and all members of the audit, compensation and nominating committees should meet this standard) is in the corporation's and all shareowners' ongoing financial interest because:

— independence is critical to a properly functioning board,

— certain clearly definable relationships pose a threat to a director's unqualified independence in a sufficient number of cases that they warrant advance identification,

— the effect of a conflict of interest on an individual director is likely to be almost impossible to detect, either by shareowners or other board members, and

— while an across-the-board application of *any* definition to a large number of people will inevitably miscategorize a few of them, this risk is sufficiently small that it is far outweighed by the significant benefits.

Thus, the members of the Council approved the following basic definition of an independent director:

- an independent director is someone whose only nontrivial professional, familial or financial connection to the corporation, its chairman, CEO or any other executive officer is his or her directorship.

Stated most simply, an independent director is a person whose directorship constitutes his or her only connection to the corporation.

The members of the Council recognize that independent directors do not invariably share a single set of qualities that are not shared by non-independent directors. Consequently, no clear rule can unerringly describe and distinguish independent directors. However, the independence of the director depends on all relationships the director has, including relationships between directors, that may compromise the director's objectivity and loyalty to shareowners. It is the obligation of the directors to consider all relevant facts and circumstances, to determine whether a director is to be considered independent. The notes that follow are supplied to give added clarity and guidance in interpreting the specified relationships.

A director will not be considered independent if he or she:

(a) is, or in the past 5 years has been, or whose relative is, or in the past 5 years has been, employed by the corporation or employed by or a director of an affiliate; An "affiliate" relationship is established if one entity either alone or pursuant to an arrangement with one or more other persons, owns or has the power to vote more than 20 percent of the equity interest in another, unless some other person, either alone or pursuant to an arrangement with one or more other persons, owns or has the power to vote a greater percentage of the equity interest. For these purposes, joint venture partners and general partners meet the definition of an affiliate, and officers and employees of joint venture enterprises and general partners are considered affiliated. A subsidiary is an affiliate if it is at least 20 percent owned by the corporation.

Affiliates include predecessor companies. A "predecessor" is an entity that within the last 5 years was party to a "merger of equals" with the corporation or represented more than 50 percent of the corporation's sales or assets when such predecessor became part of the corporation.

"Relatives" include spouses, parents, children, step-children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, aunts, uncles, nieces, nephews and first cousins, and anyone sharing the director's home.

(b) is, or in the past 5 years has been, or whose relative is, or in the past 5 years has been, an employee, director or **greater-than-20-percent** owner of a firm that is one of the corporation's or its affiliate's paid advisers or consultants or that receives revenue of at least $50,000 for being a paid adviser or consultant to an executive officer of the corporation;

NOTES: Advisers or consultants include, but are not limited to, law firms, auditors, accountants, insurance companies and commercial/investment banks. For purposes of this definition, an individual serving "of counsel" to a firm will be considered an employee of that firm.

The term "executive officer" includes the chief executive, operating, financial, legal and accounting officers of a company. This includes the president, treasurer, secretary, controller and any vice-president who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policymaking function for the corporation.

(c) is, or in the past 5 years has been, or whose relative is, or in the past 5 years has been, employed by or has had a 5 percent or greater ownership interest in a third-party that provides payments to or receives payments from the corporation **and either (i) such payments account for 1 percent of the third-party's or 1 percent of the corporation's consolidated gross revenues in any single fiscal year, or (ii) if the third-party is a debtor or creditor of the corporation and the amount owed exceeds 1 percent of the corporation's or third party's assets.** Ownership means beneficial or record ownership, not custodial ownership.

(d) has, or in the past 5 years has had, or whose relative has paid or received more than $50,000 in the past 5 years under, a personal contract with the corporation, an executive officer or any affiliate of the corporation;

NOTES: Council members believe that even small personal contracts, no matter how formulated, can threaten a director's complete independence. This includes any arrangement under which the director borrows or lends money to the corporation at rates better (for the director) than those available to normal customers -- even if no other services from the director are specified in connection with this relationship.

(e) is, or in the past 5 years has been, or whose relative is, or in the past 5 years has been, an employee or director of a foundation, university or other non-profit organization that receives significant grants or endowments from the corporation, one of its affiliates or its executive officers or has been a *direct* beneficiary of *any* donations to such an organization;

NOTES: A “significant grant or endowment” is the lesser of $100,000 or 1 percent of total annual donations received by the organization.

(f) is, or in the past 5 years has been, or whose relative is, or in the past 5 years has been, part of an interlocking directorate in which the CEO or other employee of the corporation serves on the board of a third-party entity (for-profit or not-for-profit) employing the director **or such relative**;

(g) has a relative who is, or in the past 5 years has been, an employee, a director or a 5 percent or greater owner of a third-party entity that is a significant competitor of the corporation; or

(h) is a party to a voting trust, agreement or proxy giving his/her decision making power as a director to management except to the extent there is a fully disclosed and narrow voting arrangement such as those which are customary between venture capitalists and management regarding the venture capitalists’ board seats.

The foregoing describes relationships between directors and the corporation. The Council also believes that it is important to discuss relationships between directors on the same board which may threaten either director’s independence. A director’s objectivity as to the best interests of the shareowners is of utmost importance and connections between directors outside the corporation may threaten such objectivity and promote inappropriate voting blocks. As a result, directors must evaluate all of their relationships with each other to determine whether the director is deemed independent. The board of directors shall investigate and evaluate such relationships using the care, skill, prudence, and diligence that a prudent person acting in a like capacity would use.

(updated Sept. 18, 2007)

Testimony of
Ann Yerger
Executive Director
Council of Institutional Investors
before the
Committee on Financial Services
September 27, 2007

Attachment 3

Council Board of Directors

Council Board

Council Officers

Jack Ehnes
Board Chair
California State Teachers' Retirement System

Peggy Foran
Co-Chair
Pfizer Retirement Annuity Plan

Bruce Raynor
Co-Chair
UNITE HERE National Retirement Fund

Kathy-Ann Reissman
Co-Chair
Employees Retirement System of Texas

Gail Stone
Treasurer
Arkansas Public Employees' Retirement System

Warren Mart
Secretary
I.A.M. National Pension Fund

Ann Yerger
Executive Director (*non-board member)*
Council of Institutional Investors

Board Members

Mary Collins
The District of Columbia Retirement Board

Joe Dear
Washington State Investment Board

Benny Hernandez
Sheet Metal Workers' National Pension Fund

Dennis Johnson
California Public Employees' Retirement System

Richard Metcalf
LIUNA Staff and Affiliates Pension Plan

D. Craig Nordlund
Agilent Technologies Benefit Plans

Jody Olson
Idaho Public Employees Retirement System

Michael Travaglini
Massachusetts Pension Reserves Investment Management Board

Meredith Williams
Colorado Public Employees' Retirement Association

Testimony of
Ann Yerger
Executive Director
Council of Institutional Investors
before the
Committee on Financial Services
September 27, 2007

Attachment 4

Council Responses to the Proposals

Council of Institutional Investors

Council Responses to the Proposals

1. Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors ("Council"), to The Honorable Christopher Cox, Chairman, Securities and Exchange Commission ("SEC") (Aug. 8, 2007).

2. Letter from Jeff Mahoney, General Counsel, Council, to Nancy M. Morris, Secretary, SEC (Aug. 24, 2007).

3. Letter from Jeff Mahoney, General Counsel, Council, to Nancy M. Morris, Secretary, SEC (Sept. 18, 2007) (File Number: S7-16-07).

4. Letter from Jeff Mahoney, General Counsel, Council, to Nancy M. Morris, Secretary, SEC (Sept. 18, 2007) (File Number S7-17-07).

COUNCIL OF INSTITUTIONAL INVESTORS

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Via Hand Delivery

August 8, 2007

The Honorable Christopher Cox
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: July 25, 2007, Securities and Exchange Commission ("SEC" or "Commission") Open Meeting: "Meeting the Competitive Challenges of the Global Marketplace" ("July 25th Meeting")

Dear Mr. Chairman:

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 has long advocated a policy that "shareowners should have meaningful opportunities to suggest or nominate director candidates and to suggest processes and criteria for director selection and evaluation."[1] Thus, the SEC's July 25th Meeting and the resulting proposed rules: (1) Shareholder Proposals (File Number S7-16-07) and (2) Shareholder Proposals Relating to the Election of Directors (File Number S7-17-07) are of great interest to our members.

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

In observing the July 25th Meeting, it was our understanding that, in response to questions raised by Commissioner Roel C. Campos, the SEC staff indicated that they would maintain the status quo and *would not* resume issuing no-action letters permitting the exclusion of shareowner resolutions on proxy statement access for board nominations *unless* a final rule is adopted which makes exclusions of such resolutions permissible. We, therefore, were surprised and concerned by Commissioner Paul S. Atkins' recent remarks on this issue before the Federal Reserve Bank of Chicago. Those remarks include the following statement about the July 25th Meeting:

> We specifically adopted a current interpretation of the director election exclusion that is consistent with the SEC's long-standing interpretation and the interpretation that we put forward to the Second Circuit. As directed by the court, we have provided a thorough explanation for that position. This interpretation, *which now governs our administration of that provision,* will provide the necessary clarity and uniformity for both investors and companies alike *until an amendment is adopted in the future*.[2]

Commissioner Atkins' remarks appear to be in direct conflict with statements made by the SEC staff at the July 25th Meeting. Given the importance of this issue to the Council and its members,[3] we would respectfully request that you please clarify whether the SEC staff will resume issuing no-action letters permitting the exclusion of shareowner resolutions on proxy statement access for board nominations in the absence of a final rule on the Commission's proposals.

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[2] Commissioner Paul S. Atkins, Remarks Before the Federal Reserve Bank of Chicago Seventh Annual Private Equity Conference 6 (Aug. 2, 2007), *available at* http://www.sec.gov/news/speech/2007/spch080207psa.htm (emphasis added).

[3] As you may be aware, the Council filed a brief as *amicus curiae* in support of Plaintiff-Appellant in American Federation of State, County & Municipal Employees Pension Plan v. American International Group, Inc. (2d Cir. 2005) (No. 05-2825).

Thank for your attention to this matter. We look forward to your reply.

Sincerely,

Jeff Mahoney
General Counsel

CC: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Kathleen L. Casey
Commissioner Annette L. Nazareth
Director John W. White, Division of Corporation Finance
General Counsel Brian G. Cartwright, Office of General Counsel
Senator Christopher J. Dodd, Chairman, Committee on Banking, Housing, and Urban Affairs
Senator Richard C. Shelby, Ranking Member, Committee on Banking, Housing, and Urban Affairs
Representative Barney Frank, Chairman, Committee on Financial Services
Representative Spencer Bachus, Ranking Member, Committee on Financial Services

COUNCIL OF INSTITUTIONAL INVESTORS
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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."[4] 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.

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.).[5] 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.

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[4] Council of Institutional Investors ("Council"), Annual Report 34 (Jan. 2007).
[5] 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.

The Council applauds the Commission for again considering the very important shareowner issue of proxy access.[6] 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.[7] 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.[8]

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.[9]

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.[10]

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[6] 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.
[7] Shareholder Proposals, 72 Fed. Reg. at 43,470.
[8] *Id.*
[9] 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.
[10] 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.

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.[11] 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.[12] 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.[13]

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.[14] The SEC argues that this broader reinterpretation is "consistent with" the Commission's longstanding view of the purpose of Rule 14a-8(i)(8).[15]

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

[12] 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.

[13] 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.

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

[15] *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.[16] 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.[17]

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;[18] and (2) shareowner support for meaningful proxy access is strong and continues to grow.[19]

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

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[16] *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.

[17] *Id*.

[18] 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.

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

COUNCIL OF INSTITUTIONAL INVESTORS

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Via Email

September 18, 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)

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 additional comments on the Securities and Exchange Commission's ("SEC" or "Commission") proposed amendments to the rules under the Securities Exchange Act of 1934 concerning shareowner resolutions and electronic shareowner communications, as well as to the disclosure requirements of Schedule 14A and Schedule 13G ("Proposed Amendments").[20]

First and foremost, the Council applauds the Commission for again taking up the very important investor rights issue of proxy access. We very much appreciate the many hours of hard work that the SEC Staff and Commission have devoted to the development of the Proposed Amendments.

The Council generally supports the Commission's objectives of "vindicating shareholders' state law rights to nominate directors . . . and ensuring full disclosure in election contests . . . ."[21] Unfortunately, for the reasons summarized below and described in more detail in the Attachment to this comment letter, the Council can not support the Proposed Amendments as currently drafted. We, however, stand ready to continue to work with the Commission to develop meaningful proxy access reforms.

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[20] See August 24, 2007, letter from Jeff Mahoney, General Counsel, Council of Institutional Investors ("Council"), to Nancy M. Morris, Secretary, Securities and Exchange Commission, *available at* http://www.cii.org/proxy/pdf/August%2024,%202007%20comment%20letter%20on%20file%20no.%20S7-16-07%20and%20S7-17-07%20_final_.pdf, for the Council's initial comments on the 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.

[21] Shareholder Proposals, 72 Fed. Reg. at 43,469.

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."[22] Far too many director elections, however, 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.

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: (1) a non-binding resolution approved by shareowners of Cryo-Cell International, Inc;[23] (2) a non-binding resolution that, according to Institutional Shareholder Services ("ISS"), received 45.25 percent of the votes cast for-and-against by shareowners of UnitedHealth Group Incorporated ("UnitedHealth"); and (3) a binding resolution, that according to ISS, received 42.95 percent of the votes cast for-and-against by shareowners of Hewlett-Packard Company.

In the face of growing support by shareowners for meaningful proxy access, the Proposed Amendments would permit certain shareowners to include in company proxy materials proposals for amendments to bylaws that would mandate procedures to allow shareowners to nominate board of director candidates. The Proposed Amendments, however, fail to reflect a practical understanding of the ways that institutional investors approach proxy access issues. As a result, the Commission appears to have severely underestimated the workability of the Proposed Amendments.

More specifically, the Council believes that (1) the proposed more than five percent threshold for submitting a bylaw resolution would be too high a barrier; and (2) the proposed related disclosure requirements would be too burdensome. In addition, we note that the Proposed Amendments include a discussion about the potential adoption of new rules that would permit a company to propose—and its shareowners to adopt—a bylaw restricting the ability of shareowners to offer non-binding or precatory shareowner resolutions. If such rules were adopted, we believe they would unduly restrict the use of precatory resolutions—a fundamental shareowner right—with negative consequences for the quality of corporate governance practices and the long-term performance of companies.

More than Five Percent Requirement

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.[24] Those conditions include that the proposal must be submitted by a shareowner (or group of shareowners) that has continuously and beneficially owned more than five percent 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.[25]

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[22] Council, Annual Report 34 (Jan. 2007).
[23] 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.
[24] Shareholder Proposals, 72 Fed. Reg. at 43,470.
[25] *Id.*

We believe that the more than five percent threshold would be too high a barrier. While institutional investors may collectively own more than sixty percent of outstanding U.S. equities, approximately one-half of those shares are held by mutual funds and insurance companies.[26] The Commission should acknowledge that those institutional investors generally do not sponsor shareowner resolutions, even those they support.

Those institutional investors, largely public and union pension funds, that currently engage portfolio companies using tools such as shareowner resolutions account for less than ten percent of the total U.S. equity market.[27] As a result of those funds' obligations to diversify their portfolios and manage risk, the level of holdings that those funds may have in any single company is relatively small. For example, one of the Council's largest members—The California State Teachers' Retirement System—generally owns only about 0.3 percent of the outstanding stock of any company in the Russell 3000.[28]

The ability to aggregate individual pension funds for a shareowner resolution is a difficult exercise. For example, earlier this year the Council's largest member—the California Public Employees' Retirement System ("CalPERS")—tried without success to find co-sponsors for its proxy access resolution at UnitedHealth. CalPERS, with approximately 0.5 percent of the company's outstanding shares, ended up as the sole sponsor.[29] Even so, as previously indicated, the resolution garnered more than 45.25 percent of the shares cast for-and-against—a high rate of shareowner support for a first-time resolution.

Our research indicates that even if CalPERS and nine of the other largest public pension funds were to successfully aggregate their holdings of a single public company's securities, those funds combined would likely be unable to clear the more than five percent hurdle. 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 shareowner groups would be approximately 3.01, 3.59, and 3.56, respectively.

Disclosure Requirements

A second condition for submitting a shareowner bylaw resolution under the Proposed Amendments is that the shareowner or group of shareowners that submit the proposal must (1) be eligible to file a Schedule 13G; (2) actually file the Schedule 13G; and (3) include in the filed Schedule 13G the specified public disclosures regarding its background and its interactions with the company.[30]

[26] The Conference Board, Institutional Investment Report 29 (2007) (Indicating that investment companies and insurance companies hold 22.8% and 7.4%, respectively, of the total U.S. equity market).
[27] *Id.* (Indicating that state and local pension funds hold 9.8% of the total U.S. equity market). Of note, 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.
[28] E-mail from Christopher J. Ailman, Chief Investment Officer, CalSTRS, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 3:09 PM EST) (On file with Council). Similarly, Council member—The Florida State Board of Administration—typically owns only about 0.33% of the outstanding stock of any company in the Russell 3000. E-mail from Tracy Stewart, Corporate Governance Manager, Florida State Board of Administration, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 5:55 PM EST) (On file with Council).
[29] *See* UnitedHealth Group Incorporated, Proxy Statement for Annual Meeting of Shareholders to be Held May 29, 2007 (Schedule 14A), at 100 (Apr. 30, 2007), *available at* http://www.unitedhealthgroup.com/invest/2007/Proxy_Stmt_2007.pdf.
[30] Shareholder Proposals, 72 Fed. Reg. at 43,470.

The Council does not object to the imposition of additional filing and disclosure requirements for shareowners accessing the proxy. The level of disclosure, however, required by the Proposed Amendments appears overly burdensome going beyond even those disclosures that would be required of shareowners filing a Schedule 13D who may be attempting a hostile takeover of a company.

As indicated above, the practical effect of the more than five percent requirement would be that numerous institutional investors would have to aggregate their holdings to form a qualifying shareowner group. To the extent that the Proposed Amendments contemplate detailed disclosures about each and every member of that group, there would be a corresponding increase in the amount of recordkeeping that would be required regarding each investor's contacts with a given company.

There would also be significant efforts required in terms of compiling the proposed disclosures into an initial Schedule 13G filing, not to mention the burden of the additional requirements that appear to be contemplated for amended Schedule 13G filings. We simply do not believe that the Commission has provided an adequate basis justifying what would appear to be an extraordinary level of detailed disclosure resulting from the exercise of a fundamental shareowner right.

Precatory Proposals

Finally, the Proposed Amendments include an inquiry into whether the Commission should consider adopting new rules under which the existing federal proxy rules that govern the ability of shareowners to offer precatory proposals would be replaced by a generally more restrictive regime governed by state law and a company's governing documents.[31] The Proposed Amendments suggest that such restrictions are appropriate "in light of developments in the last 25 years that may have diminished the concerns about shareholders' ability to act as a group . . . ."[32] The Council disagrees.

We believe the "developments in the last 25 years" evidence the growing number of shareowners willing to vote for precatory resolutions and that many such resolutions are being adopted. We are concerned that the Proposed Amendments could hinder the ability of shareowners *as a whole* to communicate with management and the board at the only forum each year where such communication is possible. We are surprised and disappointed that at a time when companies are improving their corporate governance policies in response to shareowner precatory resolutions in record numbers,[33] the Proposed Amendments appear designed to inhibit shareowners from pursuing those proposals.

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[31] *Id*. at 43,477-78.
[32] *Id*. at 43,478.
[33] *See, e.g.,* Edward Iwata, *Boardrooms open up to investors' input*, USA Today, Sept. 6, 2007, at 1, *available at* http://www.usatoday.com/money/companies/management/2007-09-06-shareholders-fight_N.htm (Noting that a record 23% of shareholder resolutions proposed in 2007 "were withdrawn by shareowners after companies agreed to adopt new policies, or to sit down and discuss the issues").

We appreciate the opportunity to express our views on this matter. Please feel free to contact me with any questions.

Sincerely,

Jeff Mahoney
General Counsel

Attachment

Attachment: Responses to Selected Questions from SEC Shareholder Proposals

As proposed, a bylaw proposal may be submitted by a shareholder (or group of shareholders) that is eligible to and has filed a Schedule 13G that includes specified public disclosures regarding its background and its interactions with the company, that has continuously held more than 5% of the company's securities for at least one year, and that otherwise satisfies the procedural requirements of Rule 14a-8 (e.g., holding the securities through the date of the annual meeting). Are these disclosure-related requirements for who may submit a proposal, including eligibility to file on Schedule 13G, appropriate? If not, what eligibility requirements and what disclosure regime would be appropriate? (page 43,470)

We do not believe these disclosure-related requirements are appropriate. The requirements would appear to be overly burdensome for many members of the Council of Institutional Investors ("Council") and other institutional investors in a number of ways. Perhaps most significantly, the requirements contemplate a highly detailed set of disclosures of participants in a shareowner group filing a proxy access bylaw. There is a paradox here: The Securities and Exchange Commission ("SEC" or "Commission") is proposing to use Schedule 13G as the template, yet the proposed disclosures go far beyond what is currently required of passive investors who must file on Schedule 13G, and, more startling, they appear to require far more detail than would be required of shareowners filing a Schedule 13D who are attempting a hostile takeover of a company. This defies logic.

Proponents of proxy access seek to do nothing more than offer a shareowner resolution (as has been their right for over sixty years) and to do so in the form of a bylaw, a right generally conferred upon shareowners under state law. While some additional disclosures would be appropriate, the proposal does not explain why such a high level of detailed disclosure is required, particularly as to institutional shareowners who may be proposing such a bylaw consistent with their fiduciary obligations to their funds' participants.

The disclosure-related requirements also appear to lack the specificity necessary to properly evaluate whether some elements of the eligibility requirements and the disclosure regime are appropriate. As one example, the requirements are confusingly vague as to the timing of an institution's filing because the proposal appears to be inconsistent with current deadlines for Schedule 13G filings.

More specifically, the disclosure-related requirements appear to contemplate the filing of an initial Schedule 13G no later than the filing of a proxy access bylaw proposal. However, the requirements do not explicitly amend the rule setting out Schedule 13G filing requirements. As a result, the disclosure-related requirements would appear to impose a requirement different from the normal schedule for institutional investors, who under Rule 13d-1(d) are otherwise not required to file a Schedule 13G until forty-five days after the end of the year in which the five percent holding was acquired. Amendments to that Schedule 13G are under Rule 13d-2(b) normally filed forty-five days after the end of the calendar year in which the change occurs. Thus, under the disclosure-related requirements, it would appear that an amendment to Schedule 13G might not be filed until after the annual shareowner meeting has been held.

The disclosure-related requirements also fail to provide sufficient information about some other potentially important aspects of the requirements including: (1) what would trigger the need to file an amendment to Schedule 13G?; (2) would the requirements be equally applicable to all members of a shareowner group?; (3) would there be a materiality requirement?; (3) would a single incident be a triggering event?; (4) What would be the period of time covered by a filing? We believe that the proposal's lack of specificity with respect to those and other issues may make it difficult for commentators to provide meaningful input, particularly in response to the SEC's request for comments on issues relating to the Paperwork Reduction Act,[34] the Cost-Benefit Analysis,[35] the Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation,[36] and the Initial Regulatory Flexibility Act Analysis.[37]

If the Commission plans to further pursue the disclosure-related requirements, we believe consideration should be given to issuing a supplemental notice for public comment. That notice should include revisions to the requirements to address some of the above issues, including, if necessary, revised estimates of the compliance costs.

For example, should the 5% ownership threshold be higher or lower, such as 1%, 3%, or 10%? Is the 5% level a significant barrier to shareholders making such proposals? Does the impediment imposed by this threshold depend on the size of the company? Should the ownership percentage depend on the size of the company? For example, should it be 1% for large accelerated filers, 3% for accelerated filers and 5% for all others? Should an ownership threshold be applicable to all? (page 43,470)

We believe that the five percent ownership threshold is too high a barrier for shareowners submitting resolutions. While institutional investors may collectively own more than sixty percent of outstanding U.S. equities, approximately one-half of those shares are held by mutual funds and insurance companies.[38] The Commission should acknowledge that those institutional investors generally do not sponsor shareowner resolutions, even those they support.

Those institutional investors, largely public and union pension funds, that currently engage portfolio companies using tools such as shareowner resolutions account for less than ten percent of the total U.S. equity market.[39] As a result of those funds' obligations to diversify their portfolios and manage risk, the level of holdings that those funds may have in any single company is relatively small. For example, one of the Council's largest members—The California State Teachers' Retirement System—generally owns only about 0.3 percent of the outstanding stock of any company in the Russell 3000.[40]

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[34] Shareholder Proposals, Exchange Act Release No. 56,160, Investment Company Act Release No. 27,913, 72 Fed. Reg. 43,466, 43,480-82 (proposed Aug. 3, 2007), *available at* http://www.sec.gov/rules/proposed/2007/34-56160fr.pdf
[35] *Id*. at 43,482-83.
[36] *Id*. at 43,483-84.
[37] *Id*. at 43,484-85.
[38] *See, e.g.,* The Conference Board, Institutional Investment Report 29 (2007) (Indicating that investment companies and insurance companies hold 22.8% and 7.4%, respectively, of the total U.S. equity market).
[39] *Id*. (Indicating that state and local pension funds hold 9.8% of the total U.S. equity market).
[40] E-mail from Christopher J. Ailman, Chief Investment Officer, CalSTRS, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 3:09 PM EST) (On file with Council). Similarly, Council member—The Florida State Board of Administration—typically owns only about 0.33% of the outstanding stock of any company in the Russell 3000. E-mail from Tracy Stewart, Corporate Governance Manager, Florida State Board of Administration, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 5:55 PM EST) (On file with Council).

The ability to aggregate individual pension funds for a shareowner resolution is a difficult exercise. For example, earlier this year the Council's largest member—the California Public Employees' Retirement System ("CalPERS")—tried without success to find co-sponsors for its proxy access resolution at UnitedHealth Group Incorporated. CalPERS, with approximately 0.5 percent of the company's outstanding shares, ended up as the sole sponsor.[41] Even so, the resolution garnered more than 45.25 percent of the shares cast for-and-against—a high rate of shareowner support for a first-time resolution.

Our research indicates that even if CalPERS and nine of the other largest public pension funds were to successfully aggregate their holdings of a single public company's securities, those funds combined would likely be unable to clear the more than five percent hurdle. Moreover, the more than five percent threshold would likely be too high a barrier whether the funds' aggregate holdings are in a large-cap, mid-cap or small-cap company. 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.

Thus, many more funds and other investors would need to collaborate to hit the more than five percent threshold in most circumstances. As indicated, 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.[42]

Moreover, the problem would be compounded by the proposed disclosure-related requirements, particularly if they were to be applied to each and every member of a shareowner group. As indicated, those requirements would appear to be far more detailed than are currently required of shareowners who file a Schedule 13D.

Proposals to establish a procedure for shareholder nominees would be subject to the existing limit under Rule 14a-8 of 500 words in total for the proposal and supporting statement. Is this existing word limit sufficient for such a proposal? If not, what increased word limit would be appropriate? (page 43,471)

The existing word limit under Rule 14a-8 often makes it difficult to draft a bylaw and a related supporting statement given the level of detail that may be necessary. We, therefore, believe that increasing the word limit would be appropriate.

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[41] *See* UnitedHealth Group Incorporated, Proxy Statement for Annual Meeting of Shareholders to be Held May 29, 2007 (Schedule 14A), at 100 (Apr. 30, 2007), *available at* http://www.unitedhealthgroup.com/invest/2007/Proxy_Stmt_2007.pdf.

[42] 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 more than 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 seeking to form a group of shareholders to satisfy the 5% threshold, shareholders may seek to communicate with one another, thereby triggering application of the proxy rules. In order not to impose an undue burden on such shareholders, should such communications be exempt from the proxy rules? If so, what should the parameters of any such exemption be? (page 43,471)

We believe that shareowner communications with one another in seeking to form a group to satisfy any proxy access threshold should be exempt from the proxy rules. Some form of communication between shareowners is almost inevitable before one will even know whether there is enough support to propose a proxy access bylaw. If proponents of such a bylaw at a given company are able to muster a sufficient level of support, then appropriate disclosure requirements at that point should be sufficient to protect investors. We fail to understand the regulatory purpose or public policy basis for imposing disclosure requirements on passive non-control oriented shareowner groups prior to the time such a group is prepared to file a shareowner resolution.

The proposed disclosure standards relate to the qualifications of the shareholder proponent, any relationships between the shareholder proponent and the company, and any efforts to influence the decisions of the company's management or board of directors. To assure that the quality of disclosure is sufficient to provide information that is useful to shareholders in making their voting decisions and to limit the potential for boilerplate disclosure, we have proposed that the disclosure standards require specific information concerning these qualifications, relationships, and efforts to influence the company's management or board of directors. Is the proposed level of required disclosure appropriate? Are any of the proposed disclosure requirements unnecessary to shareholders' ability to make an informed voting decision? If so, which specific requirements are not necessary? Should we require substantially similar disclosure from both the proponent and the company as proposed or should the company be allowed to avoid duplicating disclosure relating to the proponent where the company agrees with the disclosure provided? Is any additional disclosure appropriate? (page 43,474)

As indicated, we believe the proposed level of required disclosure would appear to be too burdensome. As also indicated, we believe the proposed disclosure standards are too vague in some cases making it difficult to fully evaluate what is being proposed.

As one example, suppose that a pension fund's governance staff identifies a poorly performing company that the staff believes might benefit from a proxy access resolution; the proxy access resolution is developed and presented to the fund's board of trustees; the trustees authorize the staff to take steps to identify other investors who might be interested in achieving the requisite ownership threshold and, if there is sufficient interest, to file the proposal. This fairly typical scenario is rife with questions that the proposed disclosure standards never answer, for example: Who are the "person or persons" about whom each of the five enumerated categories of information must be disclosed?[43] The staff person who first formulated the idea? All the members of a fund's board of trustees? Or only those who voted to undertake the action?

[43] Shareholder Proposals, 72 Fed. Reg. at 43,473.

Regardless of what individuals may have to report, what does the proposed disclosure standards mean when they say that there must be disclosure of the "qualifications and background" of those individuals that are "relevant to the plans or proposals"?[44] Is election to a fund's board of trustees by fund participants a "qualification"? Does that confer the relevant "background" necessary for a trustee to endorse a proxy access proposal? If not, what does? And how much about one's "background" must be provided?

Whatever might be the answer to the aforementioned questions, we question the SEC's assumption that shareowners need additional disclosures about the qualifications of proponents in order to make voting decisions on shareowner resolutions. The Commission should identify who these shareowners are and why they need such information.

Would the proposed Schedule 13G disclosure requirements for shareholder proponents be useful to other shareholders in forming their voting decisions? Are the requirements practical? Is any aspect of the proposed disclosure overly burdensome for shareholder proponents to comply with? (page 43,474)

As indicated, the proposed Schedule 13G disclosure requirements would appear to require extensive recordkeeping duties that may be impractical or overly burdensome for shareowner proponents to comply with. As one example, suppose that a pension fund representative speaks with a director of Company A in May 2007 about matters affecting Company A. Suppose too that this director serves on the board of Company B. In March 2008, ten months after the encounter, the fund in question helps file a proxy access proposal at Company B in time for that company's September 2008 annual meeting. Given this fact pattern, under the proposed disclosure requirements it would appear that the following disclosure obligations would be triggered: (a) the pension fund would have to disclose the conversation with the director in "reasonable detail" in a Schedule 13G, which is filed ten months after the conversation took place;[45] and (b) the director would have to recall the conversation in order to assist Company B in preparing its proxy in August 2008 – even though the conversation had nothing to do with Company B.

To take another example, it would appear that the proposed disclosure requirements would require that every participant in a shareowner group calculate not only its holdings in the company being considered for a proxy resolution, but also every other enterprise in the same Standard Industrial Classification Code and add up those figures; if the total exceeds more than five percent on the date the plan to submit a bylaw is formulated, that holding would have to be reported.[46] Finally, we note that the proposed disclosure requirements would appear to be impractical or overly burdensome in some circumstances because the requirements do not appear to be limited to "material" items. For example, there does not appear to be any exceptions to the required disclosure in "[r]easonable detail" of "any meetings or contacts, including direct or indirect communication" with management or a director.[47]

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[44] *Id*.
[45] *Id*. at 43,472.
[46] *Id*. at 43,472 n. 50.
[47] *Id*. at 43,472.

As proposed, the disclosures concerning the shareholder proponent and the company's relationship must be provided for the 12 months prior to forming any plans or proposals, with regard to an amendment to the company bylaws. Is this the appropriate timeframe? If not, should the timeframe be shorter (e.g., 6 or 9 months) or longer (e.g., 18 or 24 months)? Is any federal holding period requirement appropriate? (page 43,474)

The vagueness of the proposed disclosures again makes it difficult to determine whether the timeframe for the disclosures concerning the shareowner proponent are appropriate, particularly when the shareowner group includes pension funds. For example, is the date a plan is "formed" for purposes of determining the timeframe the first date that a representative of a single fund advises management of an intent to file a proxy access proposal? If yes, the result would not appear to be realistic, given that the actual filing of a proposal will occur only if that fund is successful in enlisting numerous other holders with enough shares to meet the more than five percent threshold.

In addition, it would appear that there may be multiple "formation" dates for a single proposal. The provision requiring background information on responsible individuals at a fund appears to require disclosure of the identity of the person at a fund "responsible for the formation of any plan or proposals."[48] That is presumably a different person at each fund. Is the "formation" date the earliest date upon which any fund representative had a conversation with a company official? Would it not make more sense to key any "formation" date to the date that a shareowner group obtains enough participants to exceed the more than five percent threshold and definitively resolves to move forward?

The confusion over the proposed timeframe for disclosures is compounded by references to the "formation" date including the date upon which a shareowner or shareowner group says that it will *not* submit a proxy access bylaw if the company takes certain action. For example, suppose that a shareowner not owning the required threshold makes the following statement to a company: "If this company does not adopt a policy on golden parachutes, then we'll try to round up enough support to submit a proxy access bylaw." Presumably there is no need to file a Schedule 13G if no proxy access bylaw is ultimately filed. Or is there? Or suppose that the shareowner makes the aforementioned statement, but cannot find enough support until two years later. Are shareowners – and directors – required to search their memories and records going back that far?

As indicated, the lack of specificity with respect to the proposed disclosures makes it difficult for affected parties to submit substantive comments in response that do more than point out the many inconsistencies and ambiguities. Part of the problem may be the fact that the Commission is attempting to use Schedule 13G in a manner that it has not previously been used.

[48] *Id*. at 43,473.

We propose to amend Regulation 14A to encourage the development of electronic shareholder forums that could be used by companies to better communicate with shareholders and by shareholders to better communicate both with their companies and among themselves. In addition, the electronic shareholder forum concept could offer shareholders a means of advancing referenda that might otherwise be proposed as non-binding shareholder proposals under Rule 14a-8. Is this appropriate and, if so, how can we further encourage the development of electronic shareholder forums? (page 43,477)

The Council generally supports the continued development of electronic shareowner forums. We do not agree with some of the comments expressed during SEC roundtables in May 2007 indicating that such forums would not do anything more than generate new corporate "chat rooms," and fail to produce significant communications on governance or other issues.[49]

We are optimistic that electronic shareowner forums will prove to be a valuable supplement to the current Rule 14a-8 process by providing shareowners with a means to determine the level of interest with regard to various governance issues and gauge support for potential proposals and initiatives. At this time, however, we would strongly oppose as premature the use of electronic shareowner forums as a substitute for the existing requirements for submitting precatory proposals under Rule 14a-8.

Would it be appropriate for the Commission to provide that the substance of the procedure for non-binding proposals contained in a bylaw amendment would not be defined or limited by Rule 14a-8, but rather by the applicable provisions of state law and the company's charter and bylaws? For example, the Commission could provide that the framework could be more permissive or more restrictive than the requirements of existing Rule 14a-8 (e.g., the framework could specify different eligibility requirements than provided in current Rule 14a-8, different subject matter criteria, different time periods for submitting non-binding proposals to the company, or different submission thresholds; or it could specify that non-binding proposals would not be eligible for inclusion in the company's proxy materials or alternatively that all non-binding proposals would be included in the company's proxy materials without restriction, if these approaches were consistent with state law and the company's charter and bylaws). (page 43,478)

We believe that all shareowner resolutions, whether binding or precatory, should continue to be uniformly regulated under Rule 14a-8. Thus, we believe it would be inappropriate for the Commission to provide that the substance of the procedure for precatory proposals contained in a bylaw amendment be defined or limited by the provisions of state law and the company's charter and bylaws.

According to Institutional Shareholder Services ("ISS"), over the past three years, Council members have filed on average about forty-six percent of all corporate governance-related resolutions submitted to U.S. companies.[50] They have filed shareowner resolutions for many years, and have done so with much success.

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[49] *See, e.g.,* L. Reed Walton, *Online Communication Grows,* Institutional Shareholder Services ("ISS"), Corporate Governance Blog, June 8, 2007, http://blog.issproxy.com/2007/06/online_communications_growssub.html.

[50] Of note, according to ISS, 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 (40.7%) were filed by Council members.

For the most part Council members file precatory resolutions, which is consistent with how most resolutions are structured. As indicated in the following chart, according to ISS, the vast majority of all shareowner resolutions over the last four years (more than ninety-six percent) have been precatory:

	2004	**2005**	**2006**	**2007**
Governance Proposals (# filed)	751	731	690	823
Binding Proposals (# filed)	17	15	19	31
Binding Proposals (# voted)	8	6	13	11*
Percentage (filed)	2.3%	2.1%	2.8%	3.8%

* According to data obtained from ISS on September 10, 2007, vote tallies are currently available on 11 of the 14 binding shareowner proposals that are or will be included on company ballots.

Council members file precatory resolutions for a number of reasons, but perhaps the most important one is that they have been an extremely effective tool for having a dialogue with management about important corporate governance issues.[51] Precatory proposals give the marketplace at large the opportunity to weigh in on an issue and communicate the broader market views to directors and management.

Precatory resolutions have contributed to some very significant governance reforms in recent years, including: majority voting standards for directors; expensing of stock options; and ending classified boards. There are many reasons why precatory proposals have been so effective. One is that they are used by proponents to promote communication rather than to force change.

Many institutional investors view a precatory proposal as a "door knocker." From our perspective, a precatory proposal is an invitation to a conversation with management that, if successful, could lead to a dialogue on the subject; if not successful, the matter may be raised with shareowners as a group at the annual meeting.

In contrast, in light of their highly prescriptive nature, binding proposals are viewed as more of a "hammer." Hammers tend to put people on the defensive. That has been the experience of Council members, who have generally found that non-binding proposals tend to lead to more meaningful dialogue with companies. Dialogue is very important for Council members, since they withdraw about a third of the resolutions they file following discussions with companies.[52]

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[51] *See, e.g.,* Edward Iwata, *Boardrooms open up to investors' input*, USA Today, Sept. 6, 2007, at 1, *available at* http://www.usatoday.com/money/companies/management/2007-09-06-shareholders-fight_N.htm. Also of note, many Council members have obligations under the Employee Retirement Income Security Act of 1974 ("ERISA") to manage fund assets in accordance with U.S. Department of Labor ("DOL") directives. The DOL has issued interpretative bulletins relating to ERISA that effectively approve pension funds' use of shareowner resolutions as a means of communicating with portfolio companies. *See* Pension and Welfare Benefits Administration, U.S. Dept. of Labor, Interpretative Bulletin No. 94-2, Relating to ERISA 329 (July 29, 1994); *available at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/cfr_2002/julqtr/29cfr2509.94-2.htm.

[52] According to ISS, 28.9% of shareowner proposals filed by Council members for the 2006 proxy season were withdrawn.

Precatory proposals can be useful for another reason as well, namely, to provide the board with general guidance as to shareowner wishes at a policy level, while leaving questions of implementation and the like to management. For example, shareowner resolutions dealing with executive "golden parachutes" are very popular among shareowners and regularly command a majority of the shareowner votes. However, it is very difficult in 500 words to craft a bylaw on severance packages in the kind of detail that is appropriate for an individual company. The ability of shareowners to submit a precatory proposal, while leaving it up to the board to craft an appropriate bylaw reflecting the approved policy, is often an effective means to improving corporate governance and maximizing shareowner value.

The interaction of federal and state laws clearly provides shareowners with rights and opportunities exceeding those available only under state law. From the perspective of Council members who file resolutions and most shareowners, that is a positive result.

At the most basic level, we are not aware of any state laws that compel companies to print shareowner proposals in their proxies. That result is not surprising, given that this is an area where federal rules have held sway for over sixty years. We believe the existence of federal rules provides clarity and uniformity that would not be available under state law alone.

The Commission considered similar proxy access questions in a 1982-83 rulemaking.[53] In that rulemaking the Commission proposed three options:

(1) make certain revisions to Rule 14a-8, notably the adoption of minimum holding requirements ($1000 for one year);

(2) allow companies and shareowners to adopt their own procedures for what goes into the proxy, subject to certain minimum standards; and

(3) require companies to include any proposal that was lawful under state law, except those involving the election of directors, with limitations on the number of proposals to be offered by one shareowner and hold a lottery to avoid duplication of proposals.

There was significant opposition to the latter two options. The Commission ultimately concluded that those two options would create serious problems of administration as there would be no uniformity or consistency in determining the inclusion of proxy proposals. Exacerbating the problem generated by provisions individual to each issuer would be the effect of the fifty state judicial systems administering the process. Those conclusions are as valid today as they were in 1983. We believe that any gains in terms of permitting additional resolutions that might be valid under state law would be offset by the significant complexity and transactional costs in chartering a new system based on state law.

[53] *See* Shareholder Proposals, 72 Fed. Reg. at 43,478 n. 71.

In summary, we believe that the existing federal proxy rules continue to fulfill the original intent of the Commission in promulgating those rules: (1) providing shareowners (a) with adequate notice as to important matters that will come before the annual meeting so shareowners can cast an informed vote; and (b) a voice on major policy decisions of the companies in which they have an investment; and (2) preventing management from using discretionary voting authority to effectively shut out shareowners from being able to propose alternative courses of company action. That first essential element—notice to shareowners about what will come before the meeting—is qualified by the exclusions in Rule 14a-8 that permit a company to omit proposals that are contrary to state law, that are impossible to implement, that are moot or duplicative, that are beyond a shareowner's powers (such as declaring dividends) or that are not deemed to have sufficient policy significance to warrant inclusion.

While there is debate from time to time about the scope of the exclusions in Rule 14a-8, there is little debate about the wisdom of the overall regulatory model that gives shareowners notice as to matters that will come before the meeting without requiring a company to print proposals that violate state law or satisfy one of the other general categories indicated above. This is a tradeoff that most shareowners find more than acceptable, particularly when, as indicated, the Rule creates a single unified set of standards for all companies. It is difficult to imagine how things would work and how Council members, other shareowners, and the long-term performance of companies would benefit if the Commission were to permit significantly more complex, less uniform procedures for precatory proposals than are currently required by Rule 14a-8.

Are there additional changes to Rule 14a-8 that would improve operation of the rule? If so, what changes would be appropriate and why? For example, should the Commission amend the rule to change the existing ownership threshold to submit other kinds of shareholder proposals? If so, what should the threshold be? Would a higher ownership threshold, such as $4,000 or $10,000, be appropriate? Should the Commission amend the rule to alter the resubmission thresholds for proposals that deal with substantially the same subject matter as another proposal that previously has been included in the company's proxy materials? If so, what should the resubmission thresholds be—10%, 15%, 20%? Are there any areas of Rule 14a-8 in which changes or clarifications should be made (e.g., Rule 14a-8(i)(7) and its application with respect to proposals that may involve significant social policy issues)? If so, what changes or clarifications are necessary? (page 43,479)

As indicated, Council members generally are comfortable with Rule 14a-8, including the existing substantive bases for exclusion of resolutions. Those exclusions have generally not hampered members' ability to submit resolutions on issues of importance to them. Council members also appreciate the professionalism and dedication of the SEC staff in handling the no-action process.

We, however, believe there may be some merit to the Commission reconsidering a potential change to Rule 14a-8 first proposed in a 1997 SEC Proposed Rule.[54] That Proposed Rule provided an "Override Mechanism" requiring a company to include any resolution put forth by shareowners of at least three percent of the company's outstanding voting shares even if the resolution could have been excluded under Rule 14a-8(i)(5)(Relevance) or (i)(7)(Management Functions).[55] As described by the SEC, such a potential change has some appeal because it

> would broaden the spectrum of proposals that may be included in companies' proxy materials where a certain percentage of the shareholder body believes that all shareholders should have an opportunity to express a view on the proposal . . . [and] provide shareholders an opportunity to decide for themselves which proposals are sufficiently important and relevant to all shareholders - - and, therefore, to the company - - to merit space in the company's proxy materials.[56]

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[54] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39,093, Investment Company Act Release No. 22,828 (proposed Sept. 18, 1997), *available at* http://www.sec.gov/rules/proposed/34-39093.htm.
[55] *Id*. at 16.
[56] *Id*.

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Via Email

September 18, 2007

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

Re: 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 additional comments on the Securities and Exchange Commission's ("SEC" or "Commission") 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 Securities Exchange Act of 1934 ("Release").[57]

The Council strongly opposes the Release. The Release effectively bars shareowner proxy access resolutions without providing investors any meaningful alternative approach to proxy access. As the "investor's advocate" the Commission should not adopt the Release unless and until a proxy access approach can be developed and adopted that protects rather than erodes investors' rights.[58]

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."[59] 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.

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[57] See August 24, 2007, letter from Jeff Mahoney, General Counsel, Council of Institutional Investors ("Council"), to Nancy M. Morris, Secretary, Securities and Exchange Commission ("SEC"), *available at* http://www.cii.org/proxy/pdf/August%2024,%202007%20comment%20letter%20on%20file%20no.%20S7-16-07%20and%20S7-17-07%20_final_.pdf, for the Council's initial comments on the 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) ("Release").

[58] SEC, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml (last visited Sept. 9, 2007).

[59] Council, Annual Report 34 (Jan. 2007).

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.

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: (1) a non-binding resolution approved by shareowners of Cryo-Cell International, Inc;[60] (2) a non-binding resolution that, according to Institutional Shareholder Services ("ISS"), received 45.25 percent of the for-and-against votes cast by shareowners of UnitedHealth Group Incorporated;[61] and (3) a binding resolution, that according to ISS, received 42.95 percent of the for-and-against votes cast by shareowners of Hewlett-Packard Company.

In the face of growing shareowner support for meaningful proxy access, the Release reinterprets Rule 14a-8(i)(8) to exclude any shareowner resolutions seeking access to company-prepared proxy materials relating to the nomination and election of directors.[62] The SEC argues that this broader reinterpretation is "consistent with" the Commission's longstanding view of the purpose of Rule 14a-8(i)(8).[63] We disagree.

[60] 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.

[61] Of note, the resolution was filed by the California Public Employees' Retirement System as beneficial owners of approximately 0.5% of the shares of the common stock of UnitedHealth Group Incorporated. *See* UnitedHealth Group Incorporated, Proxy Statement for Annual Meeting of Shareholders to be Held May 29, 2007 (Schedule 14A), at 100 (Apr. 30, 2007), *available at* http://www.unitedhealthgroup.com/invest/2007/Proxy_Stmt_2007.pdf.

[62] Release, 72 Fed. Reg. at 43,493.

[63] *Id.* at 43,488. Of note, by hand delivered letter dated August 8, 2007, the Council requested that SEC Chairman Cox "clarify whether the SEC staff will resume issuing no-action letters permitting the exclusion of shareowner resolutions on proxy statement access for board nominations in the absence of a final rule . . . ." Letter from Jeff Mahoney, General Counsel, Council, to Nancy M. Morris, Secretary, SEC 2 (Aug. 8, 2007), *available at* http://www.cii.org/proxy/pdf/August%208,%202007%20Letter%20to%20Chairman%20Cox%20_final_%20WORD.pdf. We have not received a response to the letter.

The Council's analysis of Rule 14a-8(i)(8), contained in our 2005 *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 has had anything but a "consistent" view of Rule 14a-8(i)(8).[64] It, therefore, is disappointing that the SEC devotes over two dozen paragraphs of the Release attempting to manufacture a basis for the broader interpretation.[65] It is even more troubling when one considers that the broader interpretation, if adopted, would likely shut the door on shareowners' ability to submit binding or precatory resolutions seeking access to the proxy.[66]

The Council is aware that the Commission has issued a separate proposal that, if adopted, would permit shareowners to request access to the company-prepared proxy under certain circumstances.[67] As, however, we and many other commentators to that proposal have concluded,[68] the proposal's requirements have sadly failed to meet the needs and demands of investors for meaningful proxy access reforms.

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The Council appreciates the opportunity to provide our views on this matter. Please feel free to contact me with any questions.

Sincerely,

Jeff Mahoney
General Counsel

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[64] Brief for Council as *Amicus Curiae* in support of Plaintiff-Appellant at 18-25, American Federation of State, County & Municipal Employees Pension Plan v. American International Group, No. 05-2825 (2nd Cir. Aug. 2005) (on file with Council); *accord* American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc., at 2-3 (2d Cir. Dec. 15, 2005), *available at*
http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA1LTI4MjVfb3BuLnBkZg==/05-2825_opn.pdf.

[65] Release, 72 Fed. Reg. at 43,491-93. We also note that, notwithstanding that most shareowners oppose the Release, the Commission's "Cost-Benefit Analysis" indicates that shareowners receive a number of benefits from the Release, including "that they would not incur additional costs to determine the appropriate scope of the exclusion." *Id*. at 43,494. The SEC's analysis reminds us of the story of the teenager who takes an unauthorized joyride with their parent's new car and carelessly crashes into a telephone pole. In an effort to put the best spin on the careless act, the teenager explains that the accident actually benefits the family by lowering their monthly fuel costs.

[66] We agree with the comments of SEC Commissioner Annette L. Nazareth who described the Release 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.

[67] 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.

[68] *See* Letter from Jeff Mahoney, General Counsel, Council, to Nancy M. Morris, Secretary, SEC 1 (Sept. 18, 2007) (on file with Council).