Council of Institutional Investors
The Voice of Corporate Governance

Submitting Comments Supporting the SEC's Proxy Access Proposal

On December 14, 2009 the SEC announced that it is re-opening the comment period for its proxy access proposal until January 19, 2010 (see the SEC release for more detail). The commission said in its announcement that it wants to seek views on additional data and related analyses that it received after the close of the original comment period on August 17. The purpose of this memorandum is to assist Council members in drafting their own comments in support of the SEC's proposed proxy access rule and responding to the arguments of some opponents favoring an approach based on "private ordering."

If you have any questions about proxy access or the SEC's proposed rule, please do not hesitate to contact the Council's general counsel Jeff Mahoney at (202) 261-7081 or jeff@cii.org, or analyst Jonathan Urick at (202) 261-7096 or jonathan@cii.org.

Due Date for Comments — Tuesday, January 19, 2010

How to Submit Comments — Comments can be submitted electronically by using either the Commission's internet form or by sending an email to rule-comments@sec.gov with "File Number S7-10-09" in the subject line.

Paper comments should be sent in triplicate to:

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

All comments should refer to File Number S7-10-09.

General Comments Supporting Proxy Access

- There is an urgent need to amend the proxy rules to better facilitate the exercise of shareowners' fundamental rights to nominate and elect directors.
- Adoption of the proposed proxy access rule would be one of the most significant investor reforms in decades—a desperately needed boost to investor confidence.
- The financial crisis has highlighted a longstanding concern of investors—directors not doing the jobs expected by their employers, the shareowners. Exacerbating this underperformance is a deeply flawed director nomination process that impedes genuine board accountability.
- Shareowners can now only ensure that their director candidates get full consideration by launching an expensive and complicated proxy fight. Management, meanwhile, can freely tap company coffers to fund campaigns for board-recommended candidates.
- Companies often erect various obstacles, including expensive litigation, to thwart investors running proxy fights. This skewed playing field discourages investors from undertaking valuable steps to hold management and boards accountable.
- Reasonable access to corporate proxy materials for long-term shareowners would address some of the problems surrounding director elections. Such access would significantly enhance the U.S. corporate governance model.

Responding to Opponents Favoring "Private Ordering"

- A uniform, federalized approach to proxy access is preferable for investors. We oppose a private ordering solution in which companies or shareowners would decide what access structure, if any, is appropriate.
- Like the shareowner proposal rule (Rule 14a-8), proxy access at its core is a disclosure matter most appropriately handled by the SEC, which for the past 75 years has been the gatekeeper responsible for setting uniform disclosure standards for proxy statements.
- If the SEC decides that information should be disclosed in order to allow owners to make an informed voting decision, then this should be disclosed by all companies. We believe an opt-out in this context would be a radical departure from 75 years of investor protection that ultimately would be harmful to the investing public.
- The need for a Commission proxy access rule to facilitate the exercise of shareowner rights has not been diminished by recent changes to state corporate law. While Delaware recently adopted a change to its corporation statute that allows companies or shareowners to adopt a proxy access rule, that change is unlikely to result in any significant proxy access reform for shareowners.
    - The costs of addressing proxy access via individual company petitions would be prohibitive.
    - The 500-word limit for shareowner proposals severely constrains an investors' ability to draft and discuss a proxy access bylaw provision.
    - Many companies have supermajority voting requirements to amend the bylaws. These supermajority requirements would make shareowner-proposed bylaw amendments nearly impossible to implement.
- From a practical standpoint leaving proxy access reform to Delaware and other states could result in a hodge-podge of standards that would differ from company to company and from state to state. This would be burdensome, costly and unnecessarily complex to shareowners, particularly those like Council members with diversified portfolios of thousands of companies.
- Companies most in need of corporate governance improvements are those most likely to opt-out of a proxy access rule. Even if individual companies were to adopt a proxy access by-law, the ownership threshold may be set so high that proxy access could rarely, if ever, be exercised, even by long-term institutional investors.
- A rule that provides for a proxy access opt-out is hardly an "investor choice" model, but rather a "management choice" model that permits public companies to continue to deny their shareowners the fundamental right to nominate and elect directors.