



Via Facsimile

November 2, 2009

The Honorable Barney Frank
Chairman, House Committee on Financial
Services
United States House of Representatives
2129 Rayburn House Office Building
Washington, DC 20515

The Honorable Spencer Bachus
Ranking Member, House Committee on
Financial Services
United States House of Representatives
B371a Rayburn House Office Building
Washington, DC 20515

The Honorable Paul E. Kanjorski
Chairman, Subcommittee on Capital
Markets, Insurance, and Government
Sponsored Enterprises
United States House of Representatives
2129 Rayburn House Office Building
Washington, DC 20515

The Honorable Scott Garrett
Ranking Member, Subcommittee on
Capital Markets, Insurance, and
Government Sponsored Enterprises
United States House of Representatives
B371a Rayburn House Office Building
Washington, DC 20515

Dear Chairman Frank, Subcommittee Chairman Kanjorski, Ranking Member Bachus and
Subcommittee Ranking Member Garrett:

I am writing on behalf of the Council of Institutional Investors (“Council”), a nonprofit association of public, union and corporate pension funds with combined assets that exceed \$3 trillion. Member funds are major shareowners with a duty to protect the retirement assets of millions of American workers.

As a leading voice for long-term, patient capital, the Council express its appreciation for the Committee on Financial Services’ (“Committee”) support of the amendment offered by Representatives Waters and Peters to reaffirm the authority of the United States Securities and Exchange Commission (“Commission”) to prescribe rules on shareholder access in connection with last week’s mark-up of the “Investor Protection Act of 2009” (“Act”). We wish to reiterate our support for the Waters/Peters amendment when it comes before the Committee for a roll call vote later his week.

We also wish to take this opportunity to clarify three points regarding the Waters/Peters amendment. First, the amendment *does not* establish a federal proxy access rule.

The amendment merely reaffirms the Commission’s authority, first assigned to the agency in 1934, to issue a proxy access rule after completing extensive public due process procedures required by federal law.¹ The reaffirmation of Commission authority is appropriate to limit unnecessary, costly and time-consuming litigation threatened by some public companies that oppose efforts of the Commission to facilitate shareowners’ ability to exercise their fundamental right to elect directors of public companies.

¹ *Facilitating Shareholder Director Nominations*, Securities Act Release No. 9,046, Exchange Act Release No. 60,089, Investment Company Act Release No. 28,765, 74 Fed. Reg. 29,024, 29,025 (proposed June 18, 2009), <http://www.sec.gov/rules/proposed/2009/33-9046fr.pdf> (“Regulation of the proxy process and disclosure is a core function of the Commission and is one of the original responsibilities that Congress assigned to the Commission in 1934.”).

Second, proxy access generally does not impact small businesses. Only public companies would be subject to a Commission proxy access rule and less than 1,500 public companies defined as small businesses under federal law would potentially be impacted by such a rule.² Of those companies, the Commission has found that “smaller companies tend to receive relatively fewer shareholder proposals . . . [and, thus a proxy access rule] would have little impact on small entities.”³ Finally, as indicated, before establishing a proxy access rule the Commission would first be required to complete a rigorous public due process that includes consideration of the impact of the rule on public companies that are small businesses in accordance with federal law. Those federal laws include the Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act.⁴

Third, institutional investors’ need for a Commission proxy access rule to facilitate the exercise of their shareowner rights has not been diminished by recent changes to Delaware corporate law. It is true that Delaware recently adopted a change to its statute that allows companies to adopt a proxy access rule. That change, however, is unlikely to result in any significant proxy access reform for shareowners.

More specifically, to the extent that any Delaware public company adopts a proxy access bylaw under the revised statute, it is widely expected that the eligibility criteria required by the bylaw would be set so high that few, if any, institutional investors would be eligible to have access to the proxy. For example, subsequent to Delaware’s adoption of its revised statute, a prominent corporate law firm sent out a memorandum advising public companies that adopt a bylaw under the revised statute to limit proxy access to shareowners who own at least five percent of company shares.⁵ A five percent ownership threshold for proxy access is virtually unattainable for Council members even if ten of the largest public pension funds were to aggregate their shares.⁶

Finally, leaving proxy access reform to Delaware and other states will result in a hodge-podge of different proxy access standards that vary from company-to-company and from state-to-state. Such a system of multiple proxy access rules unnecessarily increases the costs and complexities imposed on shareowners to determine on a company-by-company basis whether they qualify for proxy access. This would be a potentially huge and burdensome task for institutional investors with large portfolios of public companies subject to many different bylaw provisions and many different state corporate laws.

² *Id.* at 29,079 (“We estimate that there are approximately 1,229 issuers that may be considered small entities.”).

³ *Id.* at 29,077.

⁴ *Id.* at 29,078-79; 29,080.

⁵ Theodore Mirvis, Wachtell, Lipton, Rosen & Katz, *Strategies for the New Reality of Shareholder Proxy Access* 1 (May 14, 2009), <http://blogs.law.harvard.edu/corpgov/2009/05/14/strategies-for-the-new-reality-of-shareholder-proxy-access/> (“Our model permits shareholders holding at least 5% of a company’s common stock for at least a year to nominate a limited number of independent director candidates using the company’s proxy statement and card.”).

⁶ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Elizabeth Murphy, Secretary, Securities and Exchange Commission § C.1. (Aug. 4, 2009), [http://www.cii.org/UserFiles/file/resource%20center/correspondence/2009/August%204%202009%20SEC%20Proxy%20Access%20Comment%20Letter%20Attachment%20\(Final\).pdf](http://www.cii.org/UserFiles/file/resource%20center/correspondence/2009/August%204%202009%20SEC%20Proxy%20Access%20Comment%20Letter%20Attachment%20(Final).pdf) (“Our examination of the holdings of the ten largest public pension funds in a sample of five accelerated filers and five non-accelerated filers indicates that if a group of the ten largest holders were to aggregate shares, they would not be able to meet a five percent threshold and would be unlikely to meet even a three percent threshold.”).

November 2, 2009

Page 3 of 3

We again very much appreciate your support of this important amendment to the Act. If you have any questions, please feel free to contact me at (202) 261-7081 or jeff@cii.org, or Council analyst Jonathan Urick at (202) 261-7096 or jonathan@cii.org.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style with a large, stylized "J" and "M".

Jeff Mahoney
General Counsel

CC: The Honorable Maxine Waters
The Honorable Gary Peters