

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 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”).¹

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.²

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.”³ 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.

¹ 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”).

² 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).

³ Council, *Annual Report 34* (Jan. 2007).

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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;⁴ (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;⁵ 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.⁶ The SEC argues that this broader reinterpretation is "consistent with" the Commission's longstanding view of the purpose of Rule 14a-8(i)(8).⁷ We disagree.

⁴ 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.

⁵ 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.

⁶ Release, 72 Fed. Reg. at 43,493.

⁷ *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.

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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).⁸ It, therefore, is disappointing that the SEC devotes over two dozen paragraphs of the Release attempting to manufacture a basis for the broader interpretation.⁹ 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.¹⁰

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.¹¹ As, however, we and many other commentators to that proposal have concluded,¹² 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

⁸ 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.

⁹ 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.

¹⁰ 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>.

¹¹ 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>.

¹² See Letter from Jeff Mahoney, General Counsel, Council, to Nancy M. Morris, Secretary, SEC 1 (Sept. 18, 2007) (on file with Council).