Via Hand Delivery

January 31, 2018

William H. Hinman
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE.
Washington, DC 20549

Re: The AES Corporation No-Action Relief

Dear Mr. Hinman:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $3.5 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than $25 trillion in assets under management.[1]

The purpose of this letter is to share our views on the Staff's December 19, 2017, no-action determination regarding a shareholder proposal to The AES Corporation (AES) on the threshold required for shareholders to call a special meeting.[2] The proposal that was the subject of the AES no-action request asked the company to amend the "[b]ylaws and each appropriate governing document to give holders in the aggregate of 10% of our outstanding common stock the power to call a special shareowner meeting."[3]

We respectfully disagree with the staff's conclusion that the company should be permitted to omit this proposal on the basis that it conflicts with a management proposal to affirm the current special meeting bylaw that has a 25% threshold. It appears that AES is gaming the system to exclude a vote on a legitimate proposal that receives substantial shareholder support when it is voted on at other companies – to reduce the threshold for calling a special meeting.

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[1] For more information about the Council of Institutional Investors ("CII"), including its members, please visit CII's website at http://www.cii.org/members.
[2] Letter from Matt S. McNair, Senior Special Counsel, Division of Corporation Finance, United States Securities and Exchange Commission, to Brian A. Miller, The AES Corporation (Dec. 19, 2017), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johncheveddenaes121917-14a8.pdf.
[3] Letter from John Chevedden to Mr. Brian A. Miller, Secretary, AES Corp (Revised Nov. 6, 2017), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johncheveddenaes121917-14a8.pdf.

In 2016 to 2017, 34 shareholder proposals to U.S. companies requested boards to take action to reduce the threshold for calling special meetings, and the proposals received average support of 41.6% of shares voted for or against, and median support of 42.1%.[4] Two of the proposals were approved by shareholders.

The threshold for calling a special meeting at public companies is highly material to the utility of a special meeting bylaw, as both investors and corporate boards are well aware. As Simpson Thacher & Bartlett (Simpson Thacher) indicated in a 2016 memo, proposals to create a right to call special meetings typically receive higher votes – averaging between 40.0% and 58.3% annually in proposals voted on in 2012-2016. But support for reducing the threshold where there already is a shareholder right to call special meetings is substantial, averaging between 37.9% and 41.9% annually during the same period. In that period, Simpson Thacher tracked 51 shareholder proposals to reduce thresholds.[5] Most often, these proposals request reducing the threshold from 25% to either 10% (as at AES) or 15%.

Particularly for large and mid-size companies, many observers believe a 25% threshold to be unrealistically high. Indeed, in the United Kingdom, by law the threshold for shareholders to call a special meeting is 5% of voting shares.[6] So the AES proposal, to reduce the threshold to 10%, raises a real issue.

We believe it is highly likely that AES developed its ratification proposal after receiving the shareholder proposal, with the purpose of blocking a shareholder vote to reduce the threshold to 10%. The shareholder proposal likely would have received substantial support and may have been approved. AES put its current special meeting bylaw in effect in November 2015, and did not seek shareholder ratification at its 2016 or 2017 annual meetings, but now found it important to do so. If the proposal is refiled for 2019, it will be interesting to see if the company proposes ratification yet again, and whether the SEC would permit exclusion on a vote to reduce the threshold then and, presumably, every year the company chooses to use this ploy. This is exactly the kind of game-playing that prompted the SEC review that led to Staff Legal Bulletin No. 14H (CF) (SLB 14H) as the appropriate guidance for determining the proper scope of Rule 14a-8(i)(9).[7]

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[4] Based on CII analysis of ISS data and SEC filings. Excluding Ford Motor, which has weighted voting rights, the proposal received average support from 42.1% of shares voted for or against. This data excludes a 2017 proposal at ExxonMobil that, under New Jersey law, provides for a shareholder right to call a special meeting with a showing of "good cause" (the proposal was supported by 40.1% of shares voted). Also excluded are votes on proposals at five companies that in the same annual meetings sought to establish shareholder rights to call special meetings, but at higher thresholds than requested in the proposal. These five shareholder proposals were supported by an average of 46.8% of shares voted.

[5] Simpson Thacher, "Memo Series: The 2016 Proxy Season: Special Meeting Proposals." August 8, 2016, at http://www.stblaw.com/docs/default-source/memos/firmmemo_08_08_16_special-meeting-proposal.pdf, pp. 7-8.

[6] The Companies (Shareholders' Rights) Regulations 2009, at http://www.legislation.gov.uk/uksi/2009/1632/made.

[7] Division of Corporation Finance, Securities and Exchange Commission, "Shareholder Proposals," Staff Legal Bulletin 14H (CF) (Oct. 22, 2015), https://www.sec.gov/interps/legal/cfslb14h.htm.

We suggest that there are two problems with the guidance and analysis that resulted in the misguided AES no-action decision. First, SLB 14H indicates that staff "will not…view a shareholder proposal as directly conflicting with a management proposal if a reasonable shareholder, although possibly preferring one proposal over the other, could logically vote for both."[8] Contrary to staff's view in the AES letter, AES's shareowners could logically vote for the shareholder proposal and management proposal. In our view, a shareowner vote for both proposals would signal that shareowners favor AES's existing special meeting bylaw generally, but prefer that the "25% of the outstanding shares of common stock" provision be replaced by "10%." If the total votes resulted in both proposals passing, the existing AES bylaw would remain in effect and AES's board and management would presumably know that shareowners preferred a 10% rather than a 25% voting threshold for special meetings.

In fact, shareholders at five companies in 2016-17 voted on nonbinding shareholder proposals to set 10% or 15% thresholds for special meetings, even as management proposals were up for approval to provide for special meeting rights at 25% thresholds. The management proposals were supported by an average of 83% of shares voted, at the same time that two of the shareholder proposals were approved and three received more than 50% support. We believe that boards of the five companies have no reason for confusion on the message from holders of substantial portions of shares that those holders preferred lower thresholds as indicated in the shareholder proposals.

However, notwithstanding that the shareholder proposal was consistent with SLB 14H, we believe that AES, as well as the earlier Illumina no-action letter[9], point to a flaw in SLB 14H. In SLB 14H, the staff rejected suggestions from some commenters that, in the staff's words, "the exclusion should not apply when a shareholder submits his or her proposal before the company approves its proposal." The staff did not explain its reasoning, only providing a conclusion that the approach "would not necessarily prevent a shareholder from submitting a proposal opposing a management proposal," by implication a proposal that management already intended to submit.

We believe that a company seeking no-action relief on 14a-8(i)(9) should be required to provide evidence that it contemplated proposing the relevant management proposal on a date earlier than receipt of the shareholder proposal. To do otherwise is to invite game-playing by corporate issuers such as AES and Illumina -- and Whole Foods, which was creative in seeking to block a vote on a reasonable proxy access shareholder proposal, the situation that led to adoption of SLB 14H. Game-playing is particularly likely on proposals that company management opposes and that it believes may nevertheless win approval from shareholders – that is, issues on which there is a difference of opinion and for which expression of collective views of shareholders is particularly important.

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[8] Ibid. at 3.

[9] Letter from Evan. S. Jacobson, Special Counsel, Office of Chief Counsel, Division of Corporation Finance, to Ilumina, Inc. (Mar. 18, 2017), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/mcritchieyoung031816-14a8.pdf.

As the staff noted in SLB 14H, the 14a-8(i)(9) exclusion was intended "to prevent shareholders from using Rule 14a-8 to circumvent the proxy rules governing solicitations."[10] It is difficult to see how shareholders could use shareholder proposals to circumvent rules on a subject on which the board had no intention of submitting a proposal.

The staff's AES determination effectively forces shareowners into a dilemma in which they only have the management proposal vote opportunity, but no opportunity to express a preference on a different formulation in a related shareowner proposal. Thus, the staff's approach in AES curtails shareowner's ability to suggest different terms for an item currently addressed in a company's bylaws or charter, thereby frustrating "private ordering" that has often proven to be beneficial to all parties.[11] CII views this as a loss for shareowners, companies and the markets.

CII urges the staff to revisit its approach to Rule 14a-8(i)(9) so that it is more consistent with the language and intent of the underlying rule. I would be happy to answer any questions, and would welcome the opportunity to meet to discuss CII's concerns.

Sincerely,

Jeffrey P. Mahoney
General Counsel

CC: Chairman Jay Clayton
Commissioner Kara M. Stein
Commissioner Michael S. Piwowar
Commissioner Robert J. Jackson, Jr.
Commissioner Hester M. Peirce
Brian A. Miller, Executive Vice President, General Counsel & Corporate Secretary, The AES Corporation (via email)

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[10] SLB 14H at 2.
[11] *See, e.g.,* CII Research and Education Fund, "Proxy Access by Private Ordering" (Feb. 2017) (describing the history and status of proxy access through private ordering), http://www.cii.org/files/publications/misc/02_02_17_proxy_access_private_ordering_final.pdf.