



Via Email

June 13, 2014

The Honorable Bryan Townsend
411 Legislative Avenue
Dover, DE 19901

Re: SB 236

Dear Senator Townsend:

I am writing to you on behalf of the Council of Institutional Investors (CII) to express our support for the prompt passage of SB 236. CII is an association of corporate, union, and public employee benefit plans, foundations, and endowments, with combined assets exceeding \$3 trillion.¹ As long-term investors with a significant investment in Delaware corporations, CII members share the view that corporate governance structures and practices should protect and enhance a corporation's accountability to shareowners.²

In light of the Supreme Court of Delaware decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*,³ we strongly agree that the prompt enactment of SB 236 is necessary and appropriate to preempt the potential adoption of provisions in certificates of incorporation or bylaws that would require a shareowner to pay expenses incurred in connection with litigation initiated by the shareowner.⁴ In our view, and the view of many other corporate governance experts, the proliferation of so-called "fee-shifting bylaws" that could result from the *ATP Tour* decision would reduce, rather than protect and enhance, a corporation's accountability to shareowners.⁵

¹For more information about the Council of Institutional Investors (CII) and its members, please visit our website at www.cii.org.

² See CII Policies, § 1.4 **Accountability to Shareowners** (last updated May 9, 2014), http://www.cii.org/corp_gov_policies#intro ("Corporate governance structures and practices should protect and enhance a company's accountability to its shareowners, and ensure that they are treated equally [and] [a]n action should not be taken if its purpose is to reduce accountability to shareowners."); CII, Statement on the Value of Corporate Governance 1 (last updated May 9, 2014), http://www.cii.org/policies_other_issues#value_corp_gov ("Shareowners may employ a variety of tools and tactics, including . . . litigating . . . to encourage companies to adopt good corporate governance practices.")

³ *ATP Tour, Inc. v. Deutscher Tennis Bund*, No. 534, 2013, at 4 (Del. May 8, 2014), http://scholar.google.com/scholar_case?case=6215383868028509797&q=ATP+Tours,+Inc.+v.+Deutsche+r+Tennis+Bund&hl=en&as_sdt=20006&as_vis=1.

⁴ SB 236, 147 Gen. Assembl. 1 (Del. June 3, 2014), <http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/SB+236?Opendocument>.

⁵ See Skadden, 'Fee-Shifting Bylaws: The Delaware Supreme Court Decision in *ATP Tour*, Its Aftermath and the Potential Delaware Legislative Reponse The Decision' 1 (May 22, 2014), <http://www.skadden.com/insights/fee-shifting-bylaws-delaware-supreme-court-decision-atp-tour>; see also Daniel Fisher, Is Delaware Law a Favor to Plaintiff Lawyers, or Shareholder Protection, *Forbes*, June 10, 2014, at 4, <http://www.forbes.com/sites/danielfisher/2014/06/10/is-delaware-law-a-favor-to-plaintiff-lawyers-or-protection-for-capitalists/> ("By pushing to retain the option implied by the *ATP Tour* decision, opponents of SB 236 may be pushing too far.").

As accurately explained by the corporate law firm of Skadden, Arps, Slate Meagher & Flom LLP, if SB 236 or similar legislation is not promptly enacted, there is “the risk that adoption of fee-shifting bylaws could significantly deter, or eliminate, . . . meritorious [shareowner] claims.”⁶ We wholeheartedly agree that the deterrence or elimination of meritorious shareowner claims as the result of fee-shifting bylaws would further insulate Delaware corporations from accountability to shareowners.⁷

If Delaware is to remain a widely respected leader in corporate law, particularly from the perspective of long-term institutional investors, we believe it is imperative that SB 236 be promptly enacted.⁸

Thank you for your consideration, and please feel free to contact me at 202.261.7081 or jeff@cii.org if you wish to discuss this matter further.

Sincerely,



Jeff Mahoney
General Counsel

⁶ See Skadden at 1.

⁷ See, e.g., Meagan Hatcher-Mays, U.S. Chamber of Commerce’s Newest Attack on Investor Class Actions Too Much For Even *Forbes*, Media Matters for Am., June 12, 2014, at 2, <http://mediamatters.org/blog/2014/06/12/us-chamber-of-commerces-newest-attack-on-invest/199701> (“the Delaware Supreme Court’s decision not only runs afoul of the basic concepts of contract law by allowing corporations to unilaterally change the rules of the game on their investors, it makes it ‘far easier for corporations to insulate themselves from accountability if they cheat shareholders or break the law’”).

⁸ CII would also strongly support the introduction and enactment of legislation that would amend Delaware General Corporation Law to require majority voting in the uncontested election of directors at public companies. For more information about why such an amendment is necessary, please see our October 25, 2012 letter to the Council of the Corporate Law Section of the Delaware State Bar Association at http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_25_12_cii_delaware_majority_voting_letter.pdf and related attachment at http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_25_12_cii_delaware_majority_voting_attachment.pdf.