



Via Email

May 6, 2015

The Honorable Bryan Townsend
411 Legislative Avenue
Dover, DE 19901

Re: *Senate Bill No. 75*¹

Dear Senator Townsend:

I am writing to you on behalf of the Council of Institutional Investors (CII) to express our general support for the prompt passage of Senate Bill No. 75 (SB 75). CII is an association of corporate, union, and public employee benefit plans, foundations, and endowments, with combined assets exceeding \$3 trillion.² 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.³

CII strongly supports the enactment of Sections 2 and 3 of SB 75. In light of the Supreme Court of Delaware decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*⁴ (*ATP Tour*) and the subsequent adoption of fee shifting provisions by dozens of companies,⁵ we believe that the language of Sections 2 and 3 invalidating fee shifting provisions in the certification of incorporation and bylaws of Delaware stock corporations, respectively, are necessary and appropriate to limit the proliferation of such provisions by corporations.⁶

¹ S. 75, 148th Gen. Assemb. (Del. Apr. 29, 2015),

<http://legis.delaware.gov/LIS/lis148.nsf/vwLegislation/87E715E89A8C4EE785257E2F00641F25?OpenDocument>

²For more information about the Council of Institutional Investors (CII) and its members, please visit our website at www.cii.org.

³ See CII Policies, § 1.4 **Accountability to Shareowners** (last updated Apr. 1, 2015),

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 (last updated Apr. 1, 2015), 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.")

⁴ *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014),

https://scholar.google.com/scholar_case?case=17378982695927218007&hl=en&as_sdt=6&as_vis=1&oi=scholar.

⁵ See CII, Fee-Shifting Bylaws, Compiled by Lee Rudy of Kessler Topaz Meltzer & Check, LLP (last updated Apr. 20, 2015), http://www.cii.org/files/issues_and_advocacy/legal_issues/4-20-15%20Fee-Shifting%20Bylaws.pdf.

⁶ See, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Norman M. Monhait, Chair, Section of Corporation Law, Delaware State Bar Association 1 (Nov. 25, 2014), http://www.cii.org/files/issues_and_advocacy/correspondence/2014/11_25_14_CII_letter_DCC.pdf (CII supporting amendments to the Delaware General Corporation law "that would overturn or narrow the . . . decision . . .").

In our view, if companies are allowed to continue to unilaterally adopt fee-shifting provisions under the authority of *ATP Tour*, the Delaware judiciary's leadership role will diminish over time as fewer important business disputes will be brought before Delaware courts.⁷ Moreover, if fee-shifting provisions become widespread, the effects on meritorious shareowner litigation would be severe.⁸ As Anne Sheehan, director of corporate governance, California State Teacher's Retirement System, and former CII chair, explains: "If the trend continues, 'it would really stop any shareholder litigation in its tracks It is very troubling.'"⁹

CII continues to believe that the adoption of broad fee-shifting provisions inappropriately stifles the ability of shareowners to seek redress through the pursuit of meritorious claims and, thereby, creates a corporate governance structure that causes the accountability of corporations to long-term investors to decline.¹⁰ We, therefore, strongly support Sections 2 and 3 of SB 75.

For similar reasons, we cannot support the forum selection language contained in Section 5 of SB 75. As you are aware, that section includes language that enables Delaware corporations to include provisions in their certification of incorporation or bylaws that would require shareowner claims for breach of fiduciary duty to be brought exclusively in Delaware courts.

While we acknowledge that the forum selection language in Section 5 is generally consistent with the existing view of the Delaware courts,¹¹ we believe forum selection provisions are in conflict with corporate governance best practices and the following CII membership approved policy:

Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum.¹²

⁷ *Id.* at 2; see, e.g., Gretchen Morgenson, Op-Ed., *Shareholders, Disarmed by a Delaware Court*, N.Y. Times, Oct. 25, 2014, at 3 <http://www.nytimes.com/2014/10/26/business/shareholders-disarmed-by-a-delaware-court.html> (quoting "Lawrence A. Hamermesh, professor of corporate and business law at the Widener Institute of Delaware Corporate and Business Law, . . . [indicating] he was concerned that shareholders, as a result of fee-shifting, would be reluctant to bring important lawsuits related to breaches of fiduciary duties").

⁸ See, e.g., Gretchen Morgenson at 4 ("Shareholders are already at a severe disadvantage when trying to hold corporate executives and directors accountable[] [I]miting their options even further is a giant step in the wrong direction.").

⁹ Hazel Bradford, *Investors, Companies to Fight Over Who Pays Litigation Fees*, P&I, Jan. 12, 2015, at 2, <http://www.pionline.com/article/20150112/PRINT/301129981/investors-companies-to-fight-over-who-pays-litigation-fees>.

¹⁰ Letter from Jeff Mahoney at 2; see Chair Mary Jo White, Tulane University Law School 27th Annual Corporate Law Institute 6 (Mar. 19, 2015), <http://www.sec.gov/news/speech/observations-on-shareholders-2015.html> (Discussing fee-shifting bylaws: "I am concerned about any provision in the bylaws of a company that could inappropriately stifle shareholders' ability to seek redress under federal securities laws.").

¹¹ S. 75 ("New Section 115 confirms, as held in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation* . . . that the certification of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State.").

¹² CII Policies, § **1.9 Judicial Forum**.

Our policy is based on the view that shareowners should not be forced to accept a single court as the sole venue for shareowner claims because doing so could potentially limit investors' ability to succeed in the pursuit of compensation for meritorious claims and, thereby, insulate officers and directors from accountability. While Delaware might indeed be the best place for shareowners to pursue fiduciary duty litigation in many circumstances, we believe it is inappropriate for the Delaware Courts or the Delaware General Assembly to enable corporations to effectively take the forum selection decision out of the hands of shareowners. We, therefore, respectfully request that the forum selection language in Section 5 be removed prior to the enactment of SB 75.

As indicated, on balance, we support the prompt passage of SB 75. We thank you for your consideration of our views. Please feel free to contact me at 202.261.7081 or jeff@cii.org if you wish to discuss this matter further.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney". The signature is written in black ink and is positioned to the left of the typed name and title.

Jeff Mahoney
General Counsel