

Remarks of Jeffrey P. Mahoney
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U.S. Securities and Exchange Commission
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Director Hinman, Mr. Bates and other members of the Securities and Exchange Commission (SEC) staff, thank you for the opportunity to participate as a panelist at today's meeting.

I represent the Council of Institutional Investors (CII), whose core membership includes asset owners with assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds and defined contribution plans with more than 15 million participants – true “Main Street” investors through their plans. Our associate members include a range of asset managers with more than \$40 trillion in assets under management.¹

My brief remarks will include my assigned topic of “[c]hoosing which matters to write on and which to communicate by chart entry.”² I would also like to offer some comments on the intersection of Rule 14a-8 and virtual meetings, and conclude with a request regarding the mechanism for proposal submissions.

Choosing which matters to write on and which to communicate by chart entry

As you are aware, back on September 19, 2019, CII and several other shareholder-based membership organizations sent a letter to Director Hinman (Joint September Letter)³ raising concerns and including recommendations about the Division of Corporation Finance's September 6, 2019, no-action process announcement (September Announcement).⁴ We are

¹ For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII's website at <http://www.cii.org>.

² See Email from Hughes Bates, Special Counsel, Division of Corporation Finance, Office of Chief Counsel, U.S. Securities & Exchange Commission to Jeff Mahoney et al. (Aug. 11, 2020, 7:56 AM) (on file with CII).

³ Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Mr. William Hinman, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission (Sept. 19, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/Final_no_action_orgs_letter.pdf.

⁴ U.S. Securities and Exchange Commission, Announcement Regarding Rule 14a-8 No-Action Requests (Sept. 6, 2019), <https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests>.

pleased that some of our fears about the process described in the September Announcement have not materialized.⁵ Moreover, we acknowledge that in some respects the resulting chart enhances visibility around the staff's responses.⁶

CII supported the staff's modification of the process for responding orally referenced in the September Announcement.⁷ That modification involved notifying "both the proponent and the company by email when it is issuing its response," and directing both parties to the chart.⁸ Unfortunately, at least one of our members, a frequent shareholder proponent, did not receive email notification from the staff in most cases. We are hopeful that we can work with the staff to resolve this issue prior to the 2021 proxy season.

More broadly, we respectfully recommend for reconsideration two of the recommendations in our Joint September Letter that the staff did not adopt: (1) communication by oral decision with only a chart entry should be the exception rather than the norm;⁹ and (2) the staff should develop and issue some guidelines or criteria for determining when to issue a written no-action decision.¹⁰

In our view, if the no action request is uncontested, it is probably not controversial to issue an oral decision with only a chart entry. But when the parties have expended significant resources fleshing out the issues on both sides of the matter, they look to the staff for a decision as between the positions advocated, and a rationale for the determination. Merely posting a decision to the chart without a rationale diminishes the effectiveness of the process the SEC has established and that CII has historically supported.

As indicated, we believe it may be appropriate for the staff to establish criteria or guidelines that include, for example, consideration of the importance to long-term investors and the capital

⁵ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Mr. William Hinman, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission at 3 (raising concerns about the agency declining to issue a no-action decision).

⁶ See Elizabeth Ising et al., SEC Process for Responding to Shareholder Proposal No-Action Requests, Harv. L. Sch. F. Corp. Governance (Dec. 12, 2019), <https://corpgov.law.harvard.edu/2019/12/12/sec-process-for-responding-to-shareholder-proposal-no-action-requests/> ("The Response Chart does much to alleviate concerns over the Division's new approach for responding to no-action requests, and in many ways actually enhances visibility around the Staff's responses.").

⁷ U.S. Securities and Exchange Commission, Announcement Regarding Rule 14a-8 No-Action Requests.

⁸ Elizabeth Ising et al., SEC Process for Responding to Shareholder Proposal No-Action Requests, Harv. L. Sch. F. Corp. Governance ("it appears that the Division has modified the process that was previewed as part of its September announcement and will not, as originally stated, provide responses orally [and] [i]nstead, it has been reported that the Division will notify both the proponent and the company by email when it is issuing its response, and direct them to the Response Chart").

⁹ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Mr. William Hinman, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission at 3 ("the new options will not be routinely or widely utilized, but instead will be deployed on a few pilot decisions until the implications are better understood").

¹⁰ *Id.* ("Describe the criteria for determining when the agency will . . . issue an "oral" determination[;] . . . [a]n overarching set of guidelines seems necessary to guide staff decision-making and inform the market").

markets of the subject matter of the proposal and whether the proposal elicits novel issues or arguments.

One subject matter that we believe is important to many long-term investors and the capital markets generally is climate change risk.¹¹ As Commissioner Allison Herren Lee recently stated:

Much has changed in the last decade with respect to what we know about climate change and the financial risks it creates for global markets. The science is largely undisputed and the effects increasingly visible and dire; the looming economic threat to markets worldwide is more and more apparent”¹²

The 2020 proxy season included a number of proposals related to climate change risk.¹³ Notably, at least three climate change proposals were excluded based on the staff concurring that “Rule 14a-8(i)(10) provides a basis to exclude.”¹⁴

¹¹ See, e.g., Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 7 (July 8, 2016), <https://www.sec.gov/comments/s7-06-16/s70616-49.pdf> (commenting on “the importance in recent years [of climate change risk] from the perspective of mainstream investors.”)

¹² Commissioner Allison Herren Lee, “Modernizing” Regulation S-K Ignoring the Elephant in the Room (Jan. 30, 2020), <https://www.sec.gov/news/public-statement/lee-mds-2020-01-30>.

¹³ See, e.g., Amy Borrus, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission 2 (Appendix 1) (July 29, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/Group%20Comment%20Letter%20on%20Evidence%20from%202020%20Proxy%20Season%20%20Final_Corrected.pdf (16 proposals on climate change were voted on during the 2020 proxy season).

¹⁴ U.S. Securities and Exchange Commission, 2019-2020 Shareholder Proposal No-Action Response 3, 7 (last updated June 19, 2020), <https://www.sec.gov/divisions/corpfin/shareholder-proposals-2019-2020.pdf> (Hess Corporation, Chevron Corporation, and Exxon Mobil Corporation).

In our view, those three proposals presented novel arguments or issues¹⁵ reflected in a robust level of correspondence back and forth between the companies and the shareholder proponents.¹⁶

Notwithstanding the importance of the subject matter to long-term investors and the capital markets, the presence of novel arguments or issues and the related robustness of the correspondence between the parties, in all three cases the staff chose not to provide a written decision. We believe that the principles of transparency, accountability, and effectiveness suggest the need for some criteria or guidelines that would result in written decisions on the matters presented by those three proposals and more broadly that would result in written decisions being the norm rather than the exception.

Virtual meetings

As you are aware, Rule 14a-8(h) provides that a shareholder proponent must present the proposal at the shareholder meeting.¹⁷ As indicated in our July 6 joint letter with several other shareholder-based membership organizations (Joint July Letter), despite the staff's April 7

¹⁵ See Letter from David Johansen, White & Case LLP to Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission 3-4 (Mar. 23, 2020), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/asyouowetalhess040920-14a8.pdf> (“The Proponents argue in the Response Letter that [(1)] the Proposal ‘requires a statement of intent to align, or not, with the [well below 2°C Goal]’ and that the [Hess Corporation] Company has not substantially implemented the proposal because the Company does not answer with a ‘simple yes or no’ whether it plans to align with the Paris Agreement’s central aim . . . [and (2)] that the Company must address whether the measures undertaken ‘would *be capable of achieving a scale, pace, and level of ambition* that will reduce the Company’s full carbon footprint in alignment with [the well below 2°C Goal] (emphasis added)’ and the Company needs to ‘plot a trajectory to achieving the Paris [goal] alignment’ or to include disclosures to allow investors to determine if the Company ‘*is capable of achieving (emphasis added)*’ alignment with the well below 2°C Goal.”); Letter from Sanford J. Lewis, Attorney to Office of Chief Counsel, Division of Corporation Finance, U.S. Securities and Exchange Commission 7 (Mar. 23, 2020), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/parkfoundationchevron032020-14a8.pdf> (“The fact that a company provides information that addresses the broad subject matter of a Proposal (here [Chevron Corporation and] GHG reductions), but obscures and avoids the central question of the proposal (if it intends to reduce GHG's aligned with the Paris goal) cannot be said to have substantially implemented the Proposal.”); James E. Parsons, Executive Counsel, Exxon Mobil Corporation to Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission 2 (Feb. 25, 2020), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/asyouowbeharexxon032020-14a8.pdf> (Proponent arguments included the following issues: (1) “whether the Company has stated that it will or will not ‘align’ with the Paris Agreement . . . ; and [(2) whether] the lack of disclosure of Scope 3 emissions shows that the Proposal has not been substantially implemented, because one item of information requested by the Proposal is ‘the relative benefits and drawbacks of . . . disclosing Scope 3 emissions.’”).

¹⁶ U.S. Securities and Exchange Commission, 2019-2020 Shareholder Proposal No-Action Response at 3, 7 (Hess Corporation: 113 pages; Chevron Corporation: 205 pages; Exxon Mobile Corporation: 196 pages).

¹⁷ See Shareholder Proposals, 17 C.F.R. §240.14a-8 (last amended Sept. 16, 2010), available at <https://www.law.cornell.edu/cfr/text/17/240.14a-8> (“Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. . . [and] [i]f the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.”).

guidance on virtual meetings,¹⁸ several companies effectively prevented shareholders from presenting their proposals.¹⁹

For example, there was at least one company holding a virtual meeting that expressly did not permit shareholder proponents to present at the meeting.²⁰ At another virtual meeting, a proponent was limited to presenting in one virtual “room” but then could not access the other virtual “room” where shareholder Q&A took place. Another company held a virtual meeting, but required a shareholder proponent to travel on an airplane to a particular site to present the proposal.²¹

We believe the SEC should consider what steps can be taken to address these and the many other issues described in our Joint July Letter. The goal should be to improve shareholder proponents’ ability to present their proposals at meetings in 2021 in accordance with Rule 14a-8(h).

Mechanism for submission of proposals

Finally, some shareholder proponents, including some members of CII, have experienced difficulties corresponding with companies during the Covid-19 pandemic, in part, because contact information is often limited to a postal address. Given that the deadlines for proposal submissions for 2021 shareholder meetings will soon be upon us and the potential for continuing delays in postal delivery, we would appreciate any actions by the SEC in the near term to would

¹⁸ U.S. Securities and Exchange Commission, Announcement, Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns (updated Apr. 7, 2020), <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns> (“To the extent an issuer plans to conduct a ‘virtual’ or ‘hybrid’ meeting, the staff expects the issuer to notify its shareholders . . . of such plans in a timely manner and disclose clear directions as to the logistical details of the ‘virtual’ or ‘hybrid’ meeting, including how shareholders can remotely access, participate in, and vote at such meeting.”).

¹⁹ See Letter from Amy Borrus, Council of Institutional Investors et al. to Jay Clayton, Chairman, U.S. Securities and Exchange Commission et al. 2-3 (July 6, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/Virtual%20Meetings%20Letter%20-%20Corrected%20Copy_.pdf; see generally, Jessica DiNapoli and Ross Kerber, U.S. Activists Complain that Virtual Shareholder Meetings Let Companies Silence Them, Thomson Reuters (Aug. 18, 2020), <https://wkzo.com/news/articles/2020/aug/18/us-activists-complain-that-virtual-shareholder-meetings-let-companies-silence-them/1050130/?refer-section=national> (“Virtual meetings provide another tool for companies who don't like dissent to shut it down,” said Doug Chia, the president of corporate governance consulting firm Soundboard Governance LLC.”).

²⁰ See, e.g., Ken Bertsch, Executive Director, Council of Institutional Investors et al. to Randall Stephenson, Chairman & CEO, Matthew Rose, Lead Independent Director, C/O Office of the Secretary, AT&T Inc. 1 (Apr. 21, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/Investor%20letter%20to%20AT&T%20regarding%20shareholder%20proposals%20and%20virtual%20meetings.pdf (“It has come to our attention that AT&T is requiring that shareholders instead provide the company with a 100-word written statement that the company will read to introduce their proposal on their behalf.”).

²¹ See, e.g., Doug Chia, Notes from the Berkshire Hathaway 2020 (Virtual) Annual Meeting, Soundboard Governance LLC (updated June 17, 2020), <https://www.soundboardgovernance.com/post/notes-from-the-berkshire-hathaway-2020-virtual-annual-meeting> (“Buffett explained that they extended an invitation for a representative of the proponent to come in person, but the proponent understandably declined due to the quarantines.”).

encourage companies to provide shareholder proponents an email address (in addition to a postal address) for submission of shareholder proposals.

Thank you again for inviting me to participate at this meeting and for your time and attention.