



Council of Institutional Investors  
The Voice of Corporate Governance

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# **PROXY ACCESS: BEST PRACTICES**

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The Council of Institutional Investors (CII) believes that proxy access is a fundamental right of long-term shareowners. Proxy access—a mechanism that enables shareowners to place their nominees for director on a company’s proxy card—gives shareowners a meaningful voice in board elections.

CII’s members-approved policy on proxy access states, in part:

***Companies should provide access to management proxy materials for a long-term investor or group of long-term investors owning in aggregate at least three percent of a company’s voting stock, to nominate less than a majority of the directors. Eligible investors must have owned the stock for at least two years.***

CII also generally supported a similar approach to proxy access that the Securities and Exchange Commission (SEC) adopted in 2010 but later vacated after a court challenge.

Given the many shareowner proposals seeking proxy access that received majority support during the 2015 proxy season, dozens of U.S. public companies have implemented access bylaw or charter amendments. More are considering adopting access mechanisms.

But some of those companies have included, or are considering including, in proxy access mechanisms provisions that could significantly impair shareowners’ ability to use proxy access, or even render access unworkable.

The chart on the following pages highlights the most troublesome provisions that are of concern to CII and many of our members, and CII’s position on them based on existing CII policies and related public statements.

CII urges companies that decide to adopt access mechanisms to talk to their shareowners about the approach they prefer and to avoid requirements that make access difficult to use or toothless.

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Proxy Access Bylaw Provision	CII Public Position	Explanation/Basis
Ownership threshold of 5%	CII policies support a 3% ownership threshold and we have publicly opposed a 5% or higher ownership threshold.	<p>CII research from 2009 indicated that even if the 10 largest public pension funds were to aggregate their holdings of a single public company’s securities, those funds combined would not be able to clear the 5% hurdle. Our review of current research found the same conclusion.</p> <p>CII’s position is generally consistent with view of SEC, which in 2010 concluded that proxy access may not be consistently and realistically viable, even by a group of shareowners, if a uniform ownership threshold were set at 5% or higher.</p>
Percent or number of board members that may be elected could result in fewer than two candidates	CII has publicly opposed limitations on the percent or number of shareowner director nominees that would prevent shareowners from nominating at least two candidates.	CII believes that it is important that shareowner nominees have meaningful representation on the board and that one director is insufficient to achieve that goal. Having at least two nominees helps ensure that the nominees, if elected, can serve on multiple committees and have greater opportunities to bring an independent perspective into board decisions.
Aggregation of shareowners limited to a specified number (up to 20 is currently most common, but some bylaws impose a cap of 10 or fewer)	CII policies and related public positions do not endorse limits or caps on the number of shareowners in the nominating group.	<p>CII believes that shareowners should be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors.</p> <p>The ability to aggregate holdings is crucial to the effectiveness of proxy access—without it, a proxy access provision would not be viable.</p> <p>We note that without the ability to aggregate holdings even CII’s largest members would be unlikely to meet a 3% ownership requirement to nominate directors. Our review of current research found that even if the 20 largest public pension funds were able to aggregate their shares they would not meet the 3% criteria at most of the companies examined.</p> <p>CII’s position is generally consistent with the view of the SEC. In 2010, the SEC considered, but rejected imposing a cap on the permitted number of members in a nominating group. The SEC found that individual shareowners at most companies would not be able to meet the minimum threshold of 3% ownership for proxy access unless they could aggregate their shares with other shareowners.</p>

Proxy Access Bylaw Provision	CII Public Position	Explanation/Basis
Lack of clarity on whether loaned securities count toward the ownership threshold during the holding period	CII has publicly stated that loaned securities should be counted toward the ownership threshold if certain conditions are met.	<p>CII believes that there are reasons why, consistent with its fiduciary obligations, a shareowner may lend securities to third parties, while retaining the right to recall and vote those securities.</p> <p>We believe that loaned securities should be counted as belonging to a nominating shareowner if certain conditions are met.</p> <p>More specifically, CII has supported a requirement that nominating shareowners or each member of nominating group may include securities that have been loaned to a third party, provided that the participant represents that it has the legal right to recall those securities for voting purposes and will vote the securities at the shareowner meeting, accompanied by a representation that the participant will hold those securities through the date of the annual meeting.</p> <p>The SEC found that share lending is a common practice, and that loaning securities to a third party is not inconsistent with a long-term investment in a company.</p>
Must continue to hold required percentage of shares after annual meeting	CII has publicly opposed a requirement that a nominator provide a statement of its intent to continue to hold the required percentage of shares after the annual meeting.	<p>CII believes that as a practical matter, nominating shareowners may not know their intent to hold, sell or buy shares until after the election. We believe that depending on the outcome of a particular election, the nominator may purchase more stock or sell stock.</p> <p>CII has publicly stated that a pre-filing holding period, coupled with a requirement to hold shares until the date of the meeting, should suffice to achieve the goal of limiting proxy access to longer-term shareowners.</p> <p>CII's position is generally consistent with the view of the SEC, which in 2010 decided not to require nominating shareowners to hold the required percentage of shares after the annual meeting. The SEC did require a statement with regard to a nominating shareowner's, or group member's, intended ownership of the securities after the election of directors (which could be contingent on the results of the election of directors).</p>

Proxy Access Bylaw Provision	CII Public Position	Explanation/Basis
Restrictions on re-nominations when nominee fails to receive a specific percentage of votes	CII has publicly opposed restrictions on re-nominations when a nominee fails to receive a specific percentage of votes.	<p>CII believes that since resubmission requirements aren't applicable to management's candidates, they shouldn't apply to candidates suggested by shareowners.</p> <p>CII's position is generally consistent with the view of the SEC, which in 2010 considered, but rejected, imposing such restrictions. The SEC did not believe it was necessary or appropriate to include a limitation on the use of proxy access by nominating shareowners or groups that have previously used proxy access. The SEC also found that such a limitation would not facilitate shareowners' traditional state law rights and would add unnecessary complexity.</p>
Nominee can have no compensation arrangement with any party other than the corporation, including compensation arrangements regarding service as a nominee	CII policies oppose onerous requirements that limit the pool of eligible candidates based on a compensation arrangement with a party other than the corporation.	<p>CII believes the core objective of establishing eligibility requirements for director nominations is to ensure an orderly nominating process. To the extent possible, companies should defer decisions about the suitability of candidates to shareowner votes. More specifically, we believe limiting the pool of eligible board candidates by excluding those who receive candidacy fees would be an unduly onerous requirement.</p> <p>We, however, would support requiring additional disclosure about compensation arrangements with parties other than the corporation.</p>