



Via Email

August 4, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F St. NE
Washington DC 20549-1090

Re: Facilitating Director Nominations (File No. S7-10-09)

Dear Ms. Murphy:

I am writing on behalf of the Council of Institutional Investors (“Council”), an association of public, corporate, and union pension funds with combined assets of over \$3 trillion. As a leading voice for long-term investors responsible for the retirement savings of millions of American workers and retirees, the Council welcomes the opportunity to provide comments on the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rule *Facilitating Shareholder Director Nominations* (“Proposed Rule”).

The Council strongly supports the Proposed Rule. We wholeheartedly agree with the Commission that there is an urgent need to amend the proxy rules to better facilitate the exercise of shareowners’ fundamental rights to nominate and elect directors. Nevertheless, the Council respectfully offers for your consideration several modest changes, summarized below and described in more detail in the attachment to this letter, which we believe would enhance the Proposed Rule consistent with the Council and Commission’s shared objective of removing “impediments to the exercise of shareholders’ rights to nominate and elect directors to company boards of directors.”

Nearly seventy years have passed since the Commission first considered whether shareowners should be able to include director candidates in management’s proxy materials. This reform, which has been studied and considered on and off for decades, is long overdue. Its adoption would be one of the most significant and important investor reforms put in place by any regulatory body in decades—a desperately needed boost to investor confidence amid still troubled financial markets. The Council applauds the SEC for its leadership on this important issue.

The financial crisis highlighted a longstanding concern—some directors are simply not doing the jobs expected by their employers, the shareowners. Compounding the problem is that in too many cases the director nomination process is flawed, largely due to limitations imposed by companies and the securities laws.



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Some boards are dominated by the chief executive officer, who often plays the key role in selecting and nominating directors. All-independent nominating committees ostensibly address this concern, but problems persist. Some companies simply do not have nominating committees; others refuse to accept shareowner nominations for directors. Council members' sense is that shareowner-suggested candidates—whether or not submitted to all-independent nominating committees—are rarely given serious consideration.

Shareowners can now only ensure that their candidates get full consideration by launching an expensive and complicated proxy fight—an unworkable alternative for most investors, particularly fiduciaries who must determine whether the very significant costs of a proxy contest are in the best interests of plan participants and beneficiaries. While corporations can freely tap company coffers to fund campaigns for board-recommended candidates, shareowners must spend their own money to finance such efforts. Companies further often erect various obstacles, including expensive litigation, to thwart investors running proxy fights for board seats. This skewed playing field discourages investors from undertaking valuable steps to hold management and boards accountable and enhance long-term shareowner value.

The Council believes reasonable access to corporate proxy materials for long-term shareowners would address some of the problems surrounding director elections. We believe such access would significantly enhance the U.S. corporate governance model and contribute to the health and long-term value of U.S. public companies by making boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight responsibilities.

In light of these benefits, Council members approved the following policy endorsing shareowner access to the proxy:

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. Company proxy materials and related mailings should provide equal space and equal treatment of nominations by qualifying investors.

To allow for informed voting decisions, it is essential that investors have full and accurate information about access mechanism users and their director nominees. Therefore, shareowners nominating director candidates under an access mechanism should adhere to the same SEC rules governing disclosure requirements and prohibitions on false and misleading statements that currently apply to proxy contests for board seats.



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While the specific numeric formulation of the Council's policy—3% ownership for 2 years—differs from that of the Proposed Rule—1%, 3%, or 5% ownership for 1 year depending on net asset value—the underlying principles are essentially the same:

- Only large, long term shareowners or groups of shareowners should have a reasonable degree of access to company proxy materials to nominate director candidates,
- The access mechanism should not be used to affect a change of control, and
- Full and accurate disclosures about the access mechanism users and the director nominees should be required.

As previously indicated, detailed responses to many of the specific questions raised in the Proposed Rule are contained in the attachment to this letter. The following is a summary of the Council's views on key aspects of the Proposed Rule including some of the areas that we believe can and should be improved:

Application of the Rule

The Council generally supports the application of Rule 14a-11 as proposed. We believe that, consistent with the Commission's regulation of other features of the proxy solicitation process, long-term investors, companies, and the U.S. capital markets would benefit from a uniform proxy access rule.

The Council generally supports the prompt issuance and implementation of a final rule. We oppose including any triggering events in the final rule as this would overly complicate the proxy access mechanism, undermine investor confidence, and inhibit long-term shareowners from acting quickly if they have concerns with a company's board.

We also oppose any exemption or delay in the implementation of a final rule for smaller issuers. The costs of including shareowner director candidates on management's proxy as proposed are minimal and should not disproportionately burden smaller issuers, particularly given the much more restrictive shareowner eligibility criteria for those issuers with net assets of less than \$75 million.

Shareowner Eligibility Criteria

The Council believes that the Commission's proposed shareowner eligibility criteria for Rule 14a-11, although not identical to the Council's policy, are appropriate and workable. Whatever the criteria, it is crucial that shareowners be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors, as proposed.



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While the Council generally supports the Commission's proposed eligibility threshold based on the percentage of securities owned and entitled to vote on the election of directors, we note that our members' percentage of securities owned and entitled to vote for the many companies in which they invest is not static. Although Council members are long-term, passive investors, their holdings can vary throughout the year due to rebalancing, share lending, and other routine investment activities. We therefore encourage the Commission to clarify the computation of the percentage of securities owned and entitled to vote to address those routine and common fluctuations in ownership.

The Council agrees with the Commission that there should be a restriction on shareowner eligibility based on the length of time the securities have been held, because like the Commission, we believe that long-term investors are most likely to have interests aligned with all shareowners and are less likely to use the proxy access rule for short term benefit. Although the Council's policy currently provides for a holding period of "at least two years," we do not disagree with the Commission's analysis and conclusion that a one year holding requirement should be sufficient to limit the access mechanism to long-term shareowners.

Nominee Eligibility Criteria

The Council believes the Proposed Rule is generally consistent with our view that shareowner nominees for director should qualify as independent under relevant objective stock exchange listing standards. We agree with the Commission that nominating shareowners should also be required to represent that no relationships or agreements between the nominee or the nominating shareowner or group and the company and its management exist. Additional limitations on nominee eligibility beyond those currently included in the Commission's proposal would be inappropriate and would undermine the stated purposes of the proposed rule by imposing unnecessary burdens on the nominating shareowner or shareowner group.

The Council strongly opposes requiring shareowner-suggested nominees to be independent of the nominating shareowner or group. Instead, the Council recommends requiring companies and nominating shareowners to fully disclose all relationships between director candidates and the company, company executives, and in the case of candidates nominated by shareowners, the nominating shareowners. Corporate concerns over "special interest" representation are exaggerated, since candidates will ultimately only be added to the board if the shareowners—the directors' bosses—vote to do so. Full and meaningful information about each candidate will ensure that shareowners can make reasoned, informed voting decisions.



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Shareowner Nomination Limits

The Council believes that a proxy access mechanism should not be structured to permit a shareowner or group to unseat an entire board or facilitate a change in control. Our policy advocates that the access mechanism be used to nominate less than a majority of a company's directors. Incumbent directors nominated pursuant to proposed Rule 14a-11 should thus only be counted for purposes of determining the maximum number of shareowner nominees in cases when use of the proxy access mechanism could potentially result in shareowner nominees accounting for one-half or more of the board.

While our proxy access policy only specifies that shareowners should have the right to nominate less than a majority of the board in management's proxy materials, the Council nevertheless believes that any maximum percentage limiting the amount of nominations should ensure that shareowners can nominate at least two candidates in all cases. The Council is aware of too many situations where a lone "dissident" director faced a hostile board, was blackballed from key committees and was effectively cut out of key discussions. Thus, from a practical standpoint, giving shareowners the opportunity to nominate at least two candidates would improve the possibility that dissident directors might, for example, have at least one director willing to second their motions.

First-in Approach

The Council opposes a "first-in" approach for determining which nominees are to be included in the company proxy materials as this would likely cause a pointless and potentially harmful race to be the first to file. What matters most is not who is the fastest to nominate but what investor or group has the greatest stake in the director election and ultimately, the long term performance of the company. The Council instead favors an approach based on largest beneficial ownership along the lines included in the Commission's 2003 proposed proxy access rules. Under such an approach, the shareowner or shareowner group with the largest beneficial ownership would have the right to nominate the maximum number of director candidates allowed under the rule.

Shareowner Proposals Relating to Director Elections

Finally, the Council believes that adoption of proposed Rule 14a-11 would go a long way towards meeting the Commission's stated objectives to remove impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors. We, however, also strongly support the proposed amendment to Rule 14a-8(i)(8) as a critical supplement to Rule 14a-11. In our view, shareowners should be permitted the opportunity to pursue non-binding proposals or mandatory bylaw amendments supporting a stronger proxy access mechanism than the baseline offered by Rule 14a-11.



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The Council appreciates the opportunity to express its views on this matter. Please feel free to contact me at (202) 261-7081 or jeff@cii.org, or Council Analyst Jonathan Urick at (202) 261-7096 or jonathan@cii.org.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel
Council of Institutional Investors

Attachment

Council of Institutional Investors (“Council”)
Attachment to Comment Letter
File Number S7-10-09
Questions and Responses
August 4, 2009

A.1. Does the Commission need to facilitate shareholder director nominations or remove impediments to help make the proxy process better reflect the rights a shareholder would have at a shareholder meeting?

The Council generally believe it is essential that the United States (“US”) Securities and Exchange Commission (“SEC” or “Commission”) facilitate shareowner director nominations and remove the existing impediments to make the proxy process better reflect the rights a shareowner would have at a shareowner meeting. We applaud the SEC for its leadership on this important issue.

Far too many boards of directors remain dominated by the chief executive officer, who often plays the key role in selecting and nominating directors.¹ All-independent nominating committees ostensibly address this concern, but problems persist. Some companies simply do not have nominating committees; others refuse to accept shareowner nominations for directors. Council members’ sense is that shareowner-suggested candidates—whether or not submitted to all-independent nominating committees—are rarely given serious consideration.²

Shareowners in the US, unlike most of Europe, can now only ensure that their candidates get full consideration by launching an expensive and complicated proxy fight—an unworkable alternative for most investors, particularly fiduciaries who must determine whether the very significant costs of a proxy contest are in the best interests of their plan participants and beneficiaries.³ While corporations can freely tap company coffers to fund campaigns for board-recommended candidates, shareowners must spend their own money to finance such efforts. Companies further often erect various obstacles, including expensive litigation, to thwart investors running proxy fights for board seats.

¹ Commenting earlier this year on how chief executive officers continue to influence the selection of compliant board members, legendary investor Warren Buffett stated: “These people [chief executive officers] aren’t looking for Dobermans . . . They’re looking for cocker spaniels.” *Restraints on Executive Pay, Attacking the corporate gravy train*, Economist, May 30, 2009, at 72, http://www.economist.com/displaystory.cfm?story_id=13726705.

² See *Facilitating Shareholder Director Nominations*, Securities Act Release No. 9,046, Exchange Act Release No. 60,089, Investment Company Act Release No. 28,765, 74 Fed. Reg. 29,024, 29,028 (proposed June 18, 2009), <http://www.sec.gov/rules/proposed/2009/33-9046fr.pdf> (“While shareholders can recommend an individual for nomination as director to a company’s nominating committee, we understand these recommendations are rarely accepted by nominating committees.”).

³ See A Report by the Investors’ Working Group, *U.S. Financial Regulatory Reform, The Investors’ Perspective 23* (July 2009), [http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20\(July%202009\).pdf](http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20(July%202009).pdf) [hereinafter IWG Report] (“In the United States, unlike most of Europe, the only way that shareowners can run their own candidates is by waging a full-blown election contest, printing and mailing their own proxy cards to shareowners. For most investors, that is onerous and prohibitively expensive.”).

This skewed playing field discourages investors from undertaking valuable steps to hold management and boards accountable and enhance long-term shareowner value.

We generally believe reasonable access to corporate proxy materials for long-term shareowners would address some of the problems surrounding director elections. We, and many other investors, believe such access would significantly enhance the US corporate governance model and contribute to the health and long-term value of US public companies by making boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight responsibilities.⁴ In light of these benefits, the Council's corporate governance policies have long emphasized the need for "shareowners . . . [to] have . . . meaningful opportunities to suggest or nominate director candidates and to suggest processes and criteria for director selection and evaluation."⁵

Council members have also approved the following policy specifically endorsing limited shareowner access to the proxy for certain long-term investors:

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. Company proxy materials and related mailings should provide equal space and equal treatment of nominations by qualifying investors.

To allow for informed voting decisions, it is essential that investors have full and accurate information about access mechanism users and their director nominees. Therefore, shareowners nominating director candidates under an access mechanism should adhere to the same SEC rules governing disclosure requirements and prohibitions on false and misleading statements that currently apply to proxy contests for board seats.⁶

While the specific numeric formulation of the Council's proxy access policy—3% ownership for 2 years—differs from that of the proposed rule—1%, 3%, or 5% ownership for 1 year depending on net asset value—the underlying principles are essentially the same:

⁴ See, e.g., *id.* ("A measured right of access would invigorate board elections and make boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight of companies.").

⁵ The Council of Institutional Investors, Corporate Governance Policies, § 1.5 *Shareowner Participation* (updated May 1, 2009), [http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20\(July%202009\).pdf](http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20(July%202009).pdf) [hereinafter Council Policies].

⁶ *Id.* at § 3.2 *Access to Proxy*.

- Only large, long term shareowners or groups of shareowners should have a reasonable degree of access to company proxy materials to nominate director candidates,
- The access mechanism should not be used to affect a change of control, and
- Full and accurate disclosures about the access mechanism users and the director nominees should be required.

The financial crisis underscores the urgency of facilitating shareowner director nominations. In applauding the Commission’s issuance of the proposed rule, the Council’s Chairman Joseph A. Dear, CIO of California Public Employees’ Retirement System, recently stated:

The credit debacle represents a massive failure of oversight Investors must have the tools to hold directors accountable so they will do a better job of monitoring and, if necessary, reining in management.⁷

Similarly, the Investors’ Working Group, an independent taskforce sponsored by the CFA Institute Centre for Financial Market Integrity and the Council to consider issues relating to the financial crisis and US financial regulatory reform (“IWG”), concluded:

The financial crisis represents a massive breakdown in oversight at many levels, including at corporate boards. Investors need better tools to hold directors accountable so they will be motivated to challenge executives who pursue excessively risky strategies. Measures to make it easier for shareowners to nominate and elect directors are a good place to start.⁸

In our view, and the view of many other investors, meaningful proxy access is perhaps the single most important tool the Commission can provide to investors to assist them in holding corporate directors more accountable.⁹ More accountable directors allow for more cost-effective oversight of our financial system,¹⁰ and more importantly, provides investors with greater confidence in the integrity of the US capital markets.¹¹

A.2. Should the Commission adopt revisions to the proxy rules to facilitate the inclusion of shareholder nominees in company proxy materials, or are the existing means that

⁷ Press Release, *Council of Institutional Investors, CII Applauds the SEC for Championing Proxy Access* (May 20, 2009), <http://www.cii.org/UserFiles/file/press%20release%20sec-access%2005-20-09.pdf> [hereinafter May Release].

⁸ IWG Report, *supra* note 3, at 2.

⁹ *See id.* at 22 (“In particular, shareowners’ ability to . . . nominate and elect directors, must be enhanced.”).

¹⁰ *Id.* (Arguing that vigorous regulation combined with shareowner-driven market discipline is critical to addressing the “abuses that paved the way to financial disaster.”). In a Business Week interview about financial regulatory reform conducted earlier this year, Nell Minow, editor and co-founder of The Corporate Library, stated: “I’ve given up on any other reform other than the ability to replace directors who do a bad job.” Maria Bartiromo, *Facetime—Nell Minow on Outrageous CEO Pay—And Who’s to Blame*, Bus. Wk., Mar. 2, 2009, at 016.

¹¹ *Schumer, Cantwell Bill Would Give Shareholders Vote on Compensation*, BNA, Inc. Daily Rep. For Executives, May 20, 2009, at EE-5 (Reporting Senator Maria Cantwell as stating that “[a]ccountability to shareholders and investors is key to restoring confidence in our capital markets. . . .”).

are available to shareholders to exercise their rights to nominate directors adequate? How have changes in corporate governance over the past six years, including the move by many companies away from plurality voting to majority voting, affected a shareholder's ability to place nominees in company proxy materials? How have other developments, as well as ongoing developments such as some states adopting statutes allowing companies to reimburse shareholders who conduct director election contests and enabling companies to include in their bylaws provisions for inclusion of shareholder director nominees in company proxy materials, affected a shareholder's ability to nominate directors? Have other changes in law or practice created a greater or lesser need for such a rule?

For the reasons discussed in our response to question A.1., we believe the Commission should promptly adopt revisions to the proxy rules to facilitate the inclusion of shareowner nominees in company proxy materials. We agree with the Commission that in recent years there have been some positive developments "in the governance landscape" including:

[A] significant movement by larger companies toward majority voting rather than plurality voting in director elections, and . . . changes to . . . rules, including enhanced disclosure requirements concerning nominating committees¹²

In our view, however, none of the recent corporate governance developments cited by the Commission effectively provide shareowners, in the words of the Commission, with "an avenue to exercise the rights they have to effect change on the boards of the companies in which they invest"¹³

Only meaningful access to the proxy can break the link between management and the selection and election of directors by providing long-term US shareowners with the ability to fully "exercise their basic rights to nominate and elect directors."¹⁴ Finally, as indicated, the need for this important governance reform is particularly relevant and timely given that the financial crisis was caused, at least in part, by a massive failure in board oversight and a corresponding loss of investor confidence.¹⁵

¹² 74 Fed. Reg. at 29,029. Of note, although there have been some positive developments with regard to the adoption of majority voting by companies in the S&P 500, much of corporate America continues to resist this important governance reform. As indicated in the proposed rule, the "plurality voting standard is still the standard at the majority of smaller companies in the Russell 1000 and 3000 indices, with 54.5 percent of companies in the Russell 1000 and 74.9 percent of the companies in the Russell 3000 still using a straight plurality voting standard." *Id.* at 29,029 n.69.

¹³ *Id.* at 29,031.

¹⁴ *Id.* at 29,027; see IWG Report, *supra* note 3, at 22 ("The primary role of shareowners is to elect and remove directors, but major roadblocks bar the way" . . . [including] [f]ederal proxy . . . rules prohibit shareowners from placing the names of their own director candidates on proxy cards.").

¹⁵ See May Release, *supra* note 7; IWG Report, *supra* note 3, at 22.

A.3. Would the proposed amendments enable shareholders to effect change in a company's board of directors? Please explain and provide any empirical data in support of any arguments or analyses.

We generally believe that the proposed amendments would enable shareholders to effect change in a company's board of directors by establishing a meaningful federal proxy process that removes existing impediments to the exercise of shareholders' rights under state law to nominate directors. Existing alternatives to effect change in a company's board of directors, such as conducting election contests, submitting shareholder proposals under Securities Exchange Act of 1934 ("Exchange Act") Rule 14a-8, submitting candidates to an issuer's nominating committee, or engaging an issuer's management in private or public dialogue continue to be largely ineffective.¹⁶ We agree with the Commission that "the proposed rule changes will provide shareholders with a greater voice and an avenue to exercise the rights they have to effect change on the boards of the companies in which they invest that they no longer can exercise effectively through attending a shareholder meeting in person."¹⁷

A.4. What would be the costs and benefits to companies and shareholders if the Commission adopted new proxy rules that would facilitate the inclusion of shareholder director nominees in company proxy materials? What would be the costs and benefits to companies if the Commission adopted the proposed amendment to Rule 14a-8(i)(8)?

We generally agree with the Commission that the benefits to companies and shareowners if the Commission adopted the new proxy rules and proposed amendment include:

(1) a reduction in the cost to shareholders of soliciting votes in support of a nominated candidate for election to the board of directors; (2) improved disclosure of shareholder nominated director candidates; (3) potential improved board performance; and (4) enhanced ability for shareholders and companies to adopt their preferred shareholders nomination procedures.¹⁸

More broadly, as indicated in response to question A.1., we believe the adoption of the Commission's proposed rule will provide benefits in the form of more cost-effective oversight of our financial system and, more importantly, greater investor confidence in the integrity of the US capital markets.

¹⁶ Cf. *Summary of Comments: In Response to the Commission's Proposed Rules Relating to Security Holder Director Nominations*, Exchange Act Release No. 48,626, Investment Company Act Release No. 26,206, at 31 (Mar. 5, 2004), <http://www.sec.gov/rules/extra/s71903summary.htm> [hereinafter Comments] ("A number of commentators . . . expressed dissatisfaction with the effectiveness of the current alternatives to effect changes in corporate governance, such as conducting election contests, submitting shareholder proposals under Exchange Act Rule 14a-8, submitting candidates to an issuer's nominating committee, or engaging an issuer's management in private and/or public dialogue.").

¹⁷ 74 Fed. Reg. at 29,031.

¹⁸ *Id.* at 29,072.

We note that the Commission also identifies three potential areas of cost resulting from the proposed rule:

[C]osts related to (1) potential adverse effects on company and board performance; (2) potential complexity of the proxy process; and (3) preparing the required disclosures, printing and mailing, and costs of additional solicitations.¹⁹

With respect to the first item, “Costs Related to Potential Adverse Effects on Company and Board Performance,” the Commission indicates that those costs may encompass the following areas:

- “[C]osts associated with [companies] re-examining [director nomination] procedures, especially if the company is subject to, or thinks it likely will be subject to, shareholder nominated director candidates.”²⁰
- Costs resulting from “lower quality boards.”²¹
- Costs from “[c]ompanies . . . expend[ing] more resources on efforts to defeat the election of shareholder nominees for director.”²²
- Costs resulting from the “nomination procedure [being] used by shareholders to promote an agenda that conflicts with other shareholders’ interests.”²³

While we acknowledge that the proposal may result in companies incurring costs as a result of a re-examination of their nomination procedures, we question whether the other three items referenced by the Commission are legitimate costs of the proposed rule.

First, we strongly disagree that lower quality boards will be a result or cost of the proposed rule. We note that Council members have a fiduciary duty to act in the best interests of plan participants and beneficiaries. Thus, the tools provided by the proposed rule will be used by Council members and other long-term investors to strengthen the quality of boards by ensuring that the board’s “interests are better aligned with shareholders’ interests.”²⁴

Second, we strongly disagree that costs incurred by companies to defeat the election of shareowner nominees should be considered a cost of the proposed rule. It should be noted that such costs are not mandated by the proposed rule, but are discretionary and, therefore, not relevant to the analysis of the costs and benefits of the proposal. Even if it were determined that such discretionary costs were relevant, the costs would likely only be temporary, because proxy access would provide shareowners the ability to eliminate this practice by replacing those directors who advocate it.

¹⁹ *Id.* at 29,074.

²⁰ *Id.* at 29,075.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 29,074.

Finally, we strongly disagree that the proposed rule will create costs resulting from an agenda that conflicts with other shareowner interests. A duly nominated and elected director under this proposed rule is one who presumably reflects the views and interest of most shareowners; otherwise he or she would not have been elected. If that is not the case, the selection and election process is designed to address the conflict in the next election.

With respect to the second item, “Costs Related to Potential Complexity of Proxy Process,” we acknowledge that the proposed rule, if adopted, will result in some additional costs because of some potential “complexity and any uncertainty that may arise in implementing the proposed amendments.”²⁵ We, however, generally believe that most of the complexity related costs described by the Commission will decline over time as companies and shareowners become more familiar with the requirements. In other cases, the proposed rule should reduce complexity related costs. As one example, the Commission indicates, and we agree, that the proposed amendments to Rule 14a-8 “could decrease [costs] to the extent that proposed Rule 14a-8 provides a clearer indication of which proposals are excludable.”²⁶

Finally, with respect to “Costs Related to Preparing Disclosure, Printing and Mailing and Costs of Additional Solicitations,” we acknowledge that the proposed rule “may impose additional direct costs on companies and shareholders subject to the new rules, related to the preparation of required disclosure, printing and mailing costs and costs of additional solicitations that may be undertaken as a result of including one or more shareholder nominees for director in the company proxy materials.”²⁷ We, however, generally agree with the Commission that such additional costs must be compared to the very significant costs of a proxy contest for both shareowners and the related company. As the Commission explains in the proposed rule:

[T]his may result in a decrease in costs to shareholders that would have to conduct proxy contests in the absence of proposed Rule 14a-11, but may increase the costs for companies. The increased costs for companies may not be as much as would otherwise result if that shareholder engaged in a proxy contest.²⁸

A.5. What direct or indirect effect, if any, would the proposed changes to the proxy rules have on companies’ corporate governance policies relating to the election of directors?

Please see our response to question A.1.

A.6. Could the proposed amendments to the proxy rules be modified to better meet the Commission’s stated intent? If so, how? Please explain and provide empirical data

²⁵ *Id.* at 29,075.

²⁶ *Id.* at 29,076.

²⁷ *Id.*

²⁸ *Id.* (footnotes omitted).

or other specific information in support of any arguments or analyses. Please identify and discuss any other rules that would need to be amended.

We generally believe the proposed amendments to the proxy rules meet the Commission’s stated intent. Nevertheless, this attachment respectfully offers for your consideration several modest modifications which we believe would enhance the proposed amendments consistent with the Council and Commission’s shared objective of removing “impediments to the exercise of shareholders’ rights to nominate and elect directors to company boards of directors.”²⁹

Perhaps the most significant modification to the proposed amendments that we believe is necessary is to the “first-in standard.”³⁰ Under that standard, “[w]here the first nominating shareholder or group from which the company receives timely notice does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the next nominating shareholder or group from which the company receives timely notice of intent to nominate a director pursuant to the rule would be included in the company’s proxy materials, up to and including the total number of shareholder nominees required to be included by the company.”³¹

Our proposed modification is to replace the first-in standard with an approach based on the largest beneficial ownership along the lines contained in the Commission’s 2003 proposed rules. Under such an approach, “the largest shareholder or group would have their nominee or nominees included in the company proxy materials”³²

If the largest shareowner or group chooses to nominate less than the maximum of allowed candidates, the second largest shareowner or group would have the right to have their own nominees included, and so on until the maximum number of allowed candidates is reached. All nominating shareowners or groups would be required to rank their director nominees in order of preference in the event that, based on the size of their beneficial ownership, they are only able to nominate a fraction of the maximum number of investor nominees allowed under the proxy access rule.

We believe the largest beneficial ownership standard is preferable to the first-in standard for several reasons. First, it is more consistent with Council’s proxy access policy that focuses on large, long-term shareowners or groups of shareowners that have the greatest stake in the director election and ultimately, the long-term performance of the company.³³

Second, it appears to avoid the gamesmanship, administrative challenges, and potentially harmful race to be the first to nominate that would likely accompany the first-in standard. Third, it appears to have been generally supported by those who commented on the issue

²⁹ *Id.* at 29,024.

³⁰ *Id.* at 29,044.

³¹ *Id.*

³² *Id.* at 29,044 n.106.

³³ Council Policies, *supra* note 5, § 3.2 *Access to Proxy* (“Companies should provide access to management proxy materials for a long-term investor or group of long-term investors owning in aggregate at least 3 percent of a company’s voting stock”).

in connection with Commission's 2003 proposed rules.³⁴ Finally, in contrast to the Commission's view that the first-in standard provides greater certainty, we believe the largest beneficial ownership approach provides more than sufficient certainty, in part, because the number of shares of the largest shareowner or group can be verified from the Schedule 14N filing.

A.7. We note concerns regarding investor confidence. Would amending the proxy rules as proposed help restore investor confidence? Why or why not? Please explain and provide empirical data or other specific information in support of any arguments or analyses.

As indicated in our response to question A.1., we generally believe amending the proxy rules as proposed will help restore investor confidence. We note that the Rasmussen Investor Index, which began measuring the economic confidence of investors on a daily basis in 2001, was at 76.6 on Monday, July 27, 2009.³⁵ That represents a 21.9 point improvement from the low of 54.7 reached on March 9, 2009, but remains 36.6 points below the 2008 high of 113.2, and 50.4 points below the high of 127.0 on January 6, 2004.³⁶

We believe the existing historically low level of investor confidence is, in part, the result of the global financial crisis which has unmasked weaknesses in US regulation of the capital markets and has badly shaken trust in the fairness of those markets. In order to restore trust and reduce the possibility that a similar crisis will reoccur, we believe that investors must be given the tools necessary to improve their oversight of corporate boards and provide for more meaningful accountability of corporate managers.

In our view, perhaps the most prominent and cost-effective tool that can be provided to investors to give them the means for enhancing their oversight of corporate boards is meaningful access to management proxy materials to nominate directors. We are confident that the Commission's adoption of such a widely recognized corporate governance improvement will go a long ways to increasing the current historically low level of investor confidence.

A.8. We also note concerns about board accountability and shareholder participation in the proxy process. Would the proposed amendments to the proxy rules address concerns about board accountability and shareholder participation on the one hand, and board dynamics, on the other? If so, how? If not, why not? Please explain and provide empirical data in support of any arguments or analyses.

As indicated in our response to question A.1., we generally believe that the proposed amendments to the proxy rules address many of the concerns shareowners and others have raised, including concerns about board accountability and shareholder participation.

³⁴ 74 Fed. Reg. at 29,044 (Noting "the limited number of shareholders that commented did not generally object to such a standard.").

³⁵ *Rasmussen Consumer Index*, Rasmussen Reports 1 (July 27, 2009), http://www.rasmussenreports.com/public_content/business/indexes/rasmussen_consumer_index.

³⁶ *Id.*

We are not aware of any evidence indicating that the proposed amendments will cause “disruptions or polarization in boardroom dynamics.”³⁷ On the contrary, as we commented in response to the Commission’s 2003 proxy access proposed rules:

Groups such as boards of directors benefit from members’ diverse perspectives and different experiences. An emphasis on boardroom collegiality—a focus of the business community—can be harmful when it leads to ‘groupthink,’ a term introduced by Irving Janis in 1971 to refer to situations when an emphasis on group cohesion and unity outweighs efforts to realistically evaluate alternative courses of action. Groupthink can lead to poor judgments and bad decisions. The Council does not believe that adding new viewpoints would harm boardroom operations. Indeed, such fresh perspectives may protect against groupthink and invigorate boardroom discussions.³⁸

A.9. Would adoption of only proposed Rule 14a-11 meet the Commission’s stated objectives? If so, why? If not, why not? What modifications to the proposed rule and related disclosure requirements would be necessary, if any?

In our view, the adoption of only proposed Rule 14a-11 would go a long way towards meeting the Commission’s stated objectives. We, however, also strongly support the proposed amendment to Rule 14a-8(i)(8) as a critical supplement to Rule 14a-11.

We generally agree with the Commission that the proposed amendment is important because (1) it facilitates “shareholders’ ability to exercise their rights to determine their own additional shareholder nomination proxy disclosure and related procedures;”³⁹ and (2) it would provide shareowners a vehicle for obtaining the benefits of Rule 14a-11 if a company’s governing documents were to prohibit shareowners from accessing the company’s proxy to nominate candidates for the board of directors.⁴⁰ We generally believe shareowners should be permitted to submit non-binding proposals or mandatory bylaw amendments supporting a stronger proxy access mechanism than the baseline offered by Rule 14a-11.

A.10. Would adoption of only the proposed amendment to Rule 14a-8(i)(8) and the related disclosure requirements meet the Commission’s stated objectives? If so, why? If not, why not? What modifications to the proposed rule amendment and related disclosure requirements would be necessary, if any?

We generally do not believe that the adoption of only the proposed amendment to Rule 14a-8(i)(8) and the related disclosure requirements would meet the Commission’s stated objectives. In our view, adoption of only the proposed amendment would fail to fully

³⁷ 74 Fed. Reg. at 29,075.

³⁸ Letter from Sarah A.B. Teslik, Council et al, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission app. (Dec. 12, 2003), <http://idea.sec.gov/rules/proposed/s71903/ciinasranctr121203.htm> [hereinafter 2003 Letter].

³⁹ *Id.* at 29,056.

⁴⁰ *Id.* at 29,032.

remove the impediments that prevent shareowners from effectively exercising their rights to nominate and to elect directors, and would also fail to address the governance shortcomings described in our response to question A.1. The proposed amendment to Rule 14a-8(i)(8) should be viewed as a supplement to proposed Rule 14a-11, not as a sufficient outcome all by itself.

A.11. Would other revisions to our proxy rules achieve the same or similar objectives as the Commission’s proposal? For example, regardless of what other action the Commission may take in this area, should we adopt new disclosure requirements and liability provisions to address recent changes in some state laws concerning the inclusion of shareholder nominees for director in company proxy materials pursuant to a company’s governing documents?

We generally are not currently aware of other revisions to the existing proxy rules that would achieve the same or similar objectives as the Commission’s proposal to adopt Rule 14a-11. We, therefore, would not support replacing the adoption of proposed Rule 14a-11 with disclosure requirements and liability provisions.

A.12. Are there any states that prohibit, or permit companies to prohibit, shareholders from nominating a candidate or candidates for election as director?

We have not conducted an exhaustive review and analysis of state corporation law, but we generally are not currently aware of any states that prohibit or permit companies to prohibit shareowners from nominating a candidate or candidates for election as directors.⁴¹

B.1. Would adoption of Rule 14a-11 conflict with any state law, federal law, or rule of a national securities exchange or national securities association? To the extent you indicate that the rule would conflict with any of these provisions, please be specific in your discussion of those provisions that you believe would conflict. How should the Commission address these conflicts? Should the rule also address conflicts with a company’s country of incorporation where the company is organized in a non-U.S. jurisdiction but does not meet the definition of foreign private issuer? Should the rule also explicitly refer to conflicts with laws of U.S. possessions or territories?

We are not currently aware of any reason why the adoption of Rule 14a-11 would conflict with any state law, federal law, or other rule. The Commission’s authority to adopt the proposed rule is firmly rooted in its broad power under Section 14(a) of the Exchange Act to issue rules regarding the solicitation of proxies “as necessary or appropriate in the public interest or for the protection of investors.”⁴²

⁴¹ Cf. Sullivan & Cromwell LLP, *Shareholder Proxy Access* 15 (June 16, 2009), <http://www.sullcrom.com/publications/detail.aspx?pub=623> (“[N]o state prohibits shareholders from nominating directors and provisions in public company governing documents eliminating this right would likely not be enforceable.”).

⁴² 15 U.S.C. 78n(a), <http://trac.syr.edu/laws/15/15USC00078n.html>.

In our view, arguments against the Commission’s authority to issue the proposed rule fundamentally misread both the text and the Congressional intent of the Exchange Act. As the SEC noted in its 2007 shareholder proposals concerning proxy access, “[r]egulation of the proxy process is a core function of the Commission and is one of the original responsibilities that Congress assigned to the agency in 1934.”⁴³ The Commission further noted as follows, and we agree, that Congress’ clearly intended to empower the SEC to regulate the mechanics of proxy solicitation as well as required disclosures:

Section 14(a) of the Exchange Act stemmed from a Congressional belief that ‘fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange.’ The Congressional committees recommending passage of Section 14(a) proposed that ‘the solicitation and issuance of proxies be left to regulation by the Commission.’ Congress intended that Section 14(a) give the Commission the ‘power to control the conditions under which proxies may be solicited’ and that this power would be exercised ‘as necessary or appropriate in the public interest or for the protection of investors.’ Because the Commission’s authority under Section 14(a) encompasses both disclosure and proxy mechanics, the proxy rules have long governed not only the information required to be disclosed to ensure that shareholders receive full disclosure of all information that is material to the exercise of their voting rights under state law and the corporation’s charter, but also the procedure for soliciting proxies.⁴⁴

Even as the US Court of Appeals for the District of Columbia struck down the SEC’s “one-share, one vote” rule in *Business Roundtable v. SEC*, the court acknowledged that disclosure is not necessarily the “sole subject” of Section 14 of the Exchange Act.⁴⁵ The court noted that SEC rules affirmatively regulate the procedures for soliciting proxies, for example, by requiring that proxy cards give shareowners a mechanism to withhold authority to vote for each director individually, thus barring companies from requiring that shareowners give a proxy for a slate of directors as a whole.

Claims that the adoption of proposed Rule 14a-11 would go beyond the procedural or informational nature of what Section 14 allows are, in our view, unfounded. The proposed rule would make no substantive change to the balance of power between companies and their shareowners. On the contrary, the Commission’s proposed rule would empower investors to exercise their existing rights under state law to nominate director candidates and provide the disclosures needed for an informed vote.

⁴³ *Shareholder Proposals Relating to the Election of Directors*, Exchange Act Release No. 56,161, Investment Company Act Release No. 27,914, 72 Fed. Reg. 43,488, 43,489 (proposed August 3, 2007), <http://edgar.sec.gov/rules/proposed/2007/34-56161fr.pdf>.

⁴⁴ *Id.* (citations omitted).

⁴⁵ *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990), <http://openjurist.org/905/f2d/406>.

A proxy access rule is conceptually similar to SEC Rule 14a-8, which currently requires companies to print and solicit proxies including shareowner proposals on significant matters that a company knows will be brought before the annual meeting. Rule 14a-8 regulates how significant those matters must be and draws distinctions between shareowners by limiting the right to submit a proposal only to those shareowners that have held \$2,000 worth of stock for at least a year, even though all shareowners of a company may have the right under state law to present proposals at an annual meeting.

The Commission's proposed proxy access rule makes similar distinctions between investors. The issue is the level of disclosure required and the procedures that a company must follow in soliciting proxies when the company knows that independent candidates will be nominated at the annual meeting. If shareowners who meet the eligibility criteria advise management of their intent to nominate candidates, and if those shareowners provide the information that the SEC determines is necessary to provide for an informed shareowner vote, the process would operate in much the same way that Rule 14a-8 has operated for over 60 years. Such a regime would be entirely about process and disclosure, and thus, in our view, well within the SEC's statutory authority under Section 14 of the Exchange Act.

B.2. Should Rule 14a-11 apply as proposed? Is it appropriate for proposed Rule 14a-11 to be unavailable where state law or a company's governing documents prohibit shareholders from nominating candidates for director? Would the proposed rule effectively facilitate shareholders' basic rights, particularly the right to nominate directors?

We generally support the application of Rule 14a-11 as proposed. We believe the proposed rule would effectively facilitate shareowners' basic rights, particularly the right to nominate directors.⁴⁶ Consistent with the Commission's regulation of other features of the proxy solicitation process, we believe long-term investors, companies, and the US capital markets would benefit from a uniform proxy access rule applicable to all companies to the maximum extent possible.⁴⁷

B.3. As proposed, Rule 14a-11 would apply to all companies subject to the proxy rules, other than companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12. What effect, if any, will this application have on any particular group of companies (e.g., on smaller reporting companies)? Are there modifications that would accommodate the needs of a particular group of companies (e.g., smaller reporting companies) while accomplishing the goals of the proposal? Would it instead be more appropriate to

⁴⁶ See 74 Fed Reg. at 29,032 (Noting that "[m]uch of the public input . . . received suggests that including shareholder nominees for director in company proxy materials would be the most direct and effective method of facilitating shareholders' rights in connection with the nomination and election of directors.").

⁴⁷ Cf. Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Nancy M. Morris, Secretary, Securities and Exchange Commission att. 8 (Sept. 18, 2007), <http://www.sec.gov/comments/s7-16-07/s71607-200.pdf> [hereinafter 2007 Letter] (Commenting that "[t]he interaction of federal and state laws clearly provides shareowners with rights and opportunities exceeding those available only under state law. From the perspective of Council members who file resolutions and most shareowners, this is a positive result.").

exclude from operation of the procedure smaller reporting companies, either on a temporary basis through staggered compliance dates based on company size, or on a permanent basis? Should any other groups of companies be excluded from operation of the rule (e.g., companies subject to the proxy rules for less than a specified period of time (e.g., one year, two years, or three years))? If so, for what period of time should the companies be excluded from operation of the rule (e.g., one year, two years, three years, permanently)?

We generally support the prompt issuance and implementation of a final rule that would cover all companies subject to the proxy rules. We, therefore, oppose any exemption or delay in the implementation of a final rule for smaller reporting companies. We agree with the Commission that “[e]xempting small entities would not appear to be consistent” with the goals of the proposed rule.⁴⁸ In addition, we believe the costs of including shareowner director candidates on management’s proxy as proposed are minimal and should not disproportionately burden smaller issuers, particularly those issuers with less than \$75 million in assets that are, as proposed, subject to much more restrictive shareowner eligibility criteria than larger issuers.

B.4. Should proposed Rule 14a-11 apply to registered investment companies? Are there any aspects of the proposed nomination procedure that should be modified in the case of registered investment companies?

We generally believe, consistent with Council policies,⁴⁹ that good governance practices, including proxy access, should be required of all companies, including registered investment companies. As we explained in response to the Commission’s 2003 proposed rules on proxy access:

The proposed access mechanism is intended to address situations ‘where there are indications that the proxy process has been ineffective or that security holders are dissatisfied with that process.’ Since such problems aren’t isolated to certain companies, the Council believes the rule should apply to all companies subject to the proxy rules, including investment management firms.⁵⁰

Our views on this issue have not changed. The focus, however, of our comments in this letter is primarily on public traded companies.

B.5. Should companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12 be excluded from application of Rule 14a-11, as proposed? Please explain why or why not.

⁴⁸ 74 Fed. Reg. at 29,080.

⁴⁹ Council policies, *supra* note 5, § 1.7 *Governance Practices at Public and Private Companies* (“The Council believes good governance practices should be followed by publicly traded companies, private companies and companies in the process of going public.”).

⁵⁰ 2003 Letter, *supra* note 38, at app.

Although, as indicated in response to question B.4., we generally support the application of Rule 14a-11 to all companies, we do not oppose the Commission's proposed exclusion of those companies that are subject to the proxy rules because they have a class of debt registered under Exchange Act Section 12.

- B6. As proposed, Rule 14a-11 would apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g). Should companies that have registered on a voluntary basis be subject to Rule 14a-11? If so, should nominating shareholders of these companies be subject to the same ownership eligibility thresholds as those shareholders of companies that were required to register a class of equity securities pursuant to Section 12? Should we adjust any other aspects of Rule 14a-11 for companies that have voluntarily registered a class of equity securities pursuant to Section 12(g)?**

Consistent with our response to question B.4., we generally support the Commission's proposal to subject companies that have registered on a voluntary basis to the requirements of Rule 14a-11.

- B.7. Should proposed Rule 14a-11 be inapplicable to a company that has or adopts a provision in its governing documents that provides for or prohibits the inclusion of shareholder director nominees in the company proxy materials? Should the Commission's rules respond to variations in shareholder director nomination disclosures and procedures adopted, for example, under state corporate laws that specify that a company's governing documents may address the use of a company's proxy materials for shareholder nominees to the board of directors? Would it be more appropriate to only permit companies to comply with governing document provisions or state laws where those provisions or laws provide shareholders with greater nomination or proxy disclosure rights than those provided under proposed Rule 14a-11? Should Rule 14a-11 provide that a company's governing documents may render the rule inapplicable to a company only if the shareholders have approved, as contrasted to the board implementing without shareholder approval, a provision in the company's governing documents addressing the inclusion of shareholder nominees in company proxy materials? Should Rule 14a-11 be inapplicable if such shareholder-approved provisions are more restrictive than Rule 14a-11? Should Rule 14a-11 be inapplicable if such shareholder-approved provisions are less restrictive than Rule 14a-11? Or both?**

We generally believe it would only be appropriate to permit companies to comply with governing document provisions or state laws regarding the inclusion of shareowner director nominees in company proxy materials when those provisions or laws provide shareowners with greater nomination or proxy disclosure rights than those provided under proposed Rule 14a-11. As long as investors have a general right to nominate directors, we believe companies should be required to comply with the minimum uniform proxy access standards of Rule 14a-11 to the maximum extent possible.

B.8. The New York Stock Exchange has filed with the Commission a proposed rule change to amend NYSE Rule 452 and corresponding Section 402.08 of the Listed Company Manual to eliminate broker discretionary voting for the election of directors. The Commission published the proposed rule change, as amended on February 26, 2009, for comment in the Federal Register on March 6, 2009. If the amendment to Rule 452 is approved, what would be its effect on operation of proposed Rule 14a-11? Would any changes to Rule 14a-11 be required? Please be specific in your response.

We generally believe the recently approved amendment to NYSE Rule 452, consistent with Council policy,⁵¹ will serve to make director elections more equitable and thus make proposed Rule 14a-11 more effective. We are unaware of any changes to the proposed rule that are required in light of the amendment to NYSE Rule 452.

B.9. Should proposed Rule 14a-11 exempt companies where state law or the company's governing documents require that directors be elected by a majority of shares present in person or represented by proxy at the meeting and entitled to vote? What specific issues would arise in an election where state law or the company's governing documents provided for other than plurality voting (e.g., majority voting)? What specific issues would arise in an election that is conducted by cumulative voting? Would these issues need to be addressed in revisions to the proposed rule text? If so, how?

We generally believe there is no reason to exempt companies from Rule 14a-11 where state law or the company's governing documents require majority voting. Companies that have adopted majority voting generally include provisions for plurality voting in the event of a contested election. Such a practice is consistent with the Council's corporate governance policies and should ensure that proxy access does not present any electoral burdens.⁵²

B.10. Should companies be able to take specified steps or actions, such as adopting a majority vote standard or bylaw specifying procedures for the inclusion of shareholder nominees in company proxy materials, to prevent application of proposed Rule 14a-11 where it otherwise would apply? If so, what such steps or actions would be appropriate and why would they be appropriate? For example, should companies that agree with a shareholder proponent not to exclude a shareholder proposal submitted by an eligible shareholder pursuant to Rule 14a-8 be exempted from application of the proposed rule for a specified period of time? Should a company that implements any shareholder proposals that receive a majority of votes cast in a given year be exempted?

⁵¹ Council Policies, *supra* note 5, §3.7 *Broker Votes* (“Uninstructed broker votes and abstentions should be counted only for purposes of a quorum.”).

⁵² *Id.* at §2.2 *Director Elections* (“To the extent permitted under state law, companies’ charters and bylaws should provide that directors in uncontested elections are to be elected by a majority of the votes cast. In contested elections, plurality voting should apply.”).

We generally believe that companies should not be able to take specified steps or actions to prevent application of Rule 14a-11 where it otherwise would apply. While adopting a majority voting standard and including shareholder proposals are positive steps, they should not be regarded as substitutes for the broad accountability provided by meaningful proxy access.

Companies should not be permitted to take half-steps to avoid shareholder director nominees. As we indicated in our response to question B.7., we believe it would only be appropriate to exempt companies from compliance with Rule 14a-11 when the governing document provisions provide shareholders with greater nomination or proxy disclosure rights than those provided under proposed Rule 14a-11.

B.11. Should companies subject to Rule 14a-11 be permitted to exclude certain shareholder proposals that they otherwise would be required to include? If so, what categories of proposals? For example, should the company be able to exclude proposals that are non-binding, proposals that relate to corporate governance matters generally, proposals that relate to the structure or composition of boards of directors, or other proposals?

We generally believe the adoption of Rule 14a-11 requires no changes to Rule 14a-8 other than those included in the Commission's proposal regarding shareholder proposals that relate to a nomination or an election of directors. Non-binding shareowner proposals are a useful method of investor engagement and communication and should not be abandoned in light of the adoption of Rule 14a-11.⁵³

B.12. One concern that has been raised about the effectiveness of the present proxy rules is the high cost to a shareholder to conduct a solicitation to nominate a director. Should the proposed rule provide that it does not apply to a company whose governing documents include a provision for reimbursement of expenses incurred by a participant or participants in the course of a solicitation in opposition as defined in Rule 14a-12(c)? If so, should the rule specify what manner of reimbursement would be sufficient for proposed Rule 14a-11 not to apply?

We have no policy on the reimbursement of expenses incurred by investors in the course of a dissident proxy solicitation. Provisions in companies' governing documents providing for such reimbursement should not be regarded as a substitute for the proxy access provided by Rule 14a-11.

B.13. Should Rule 14a-11 be widely available, as proposed, or should application of the rule be limited to companies where specific events have occurred to trigger operation of the rule? If so, what events should trigger operation of the rule?

We strongly oppose limiting the application of Rule 14a-11 to the occurrence of triggering events. As we stated in response to the Commission's 2003 proposed rules on this topic:

⁵³ 2007 Letter, *supra* note 47, at 4-5, att. 7-10 (discussing the many benefits of shareowner proposals).

The Council's policy does not contain any triggers. We believe a long-term shareowner or group of shareowners owning a significant stake in a company should have the ability to act like an owner and participate meaningfully in the director nomination process without facing numerous hurdles.⁵⁴

We generally agree with the Commission that excluding triggering events will assist in eliminating impediments to shareowners exercising their rights under "state law to nominate directors at *all companies*, not only those with demonstrated governance issues."⁵⁵ We also agree with the many commentators to the Commission's 2003 proposed rules who argued that "the multi-year process created by the trigger requirement could make it more difficult for shareholders to efficiently effect change in the composition of boards of directors."⁵⁶ Finally, we generally agree with the Commission's concerns that triggering events would add a layer of complexity and delay to the operation of the rule that would frustrate the objective of "restoring investor confidence to the greatest number of shareholders as quickly as possible"⁵⁷

B.14. If the Commission were to include triggering events in Rule 14a-11, would either of the triggering events proposed in 2003 and described above be appropriate? In responding, please discuss how any changes in corporate governance practices over the past six years have affected the usefulness of the triggering events proposed in 2003. For example, over the past six years many companies have adopted majority voting. If the triggering events proposed in 2003 are not appropriate, are there alternative events that the Commission should consider in place of, or in addition to, the above events? For example, should application of Rule 14a-11 be triggered by other factors such as economic performance (e.g., lagging a peer index for a specified number of consecutive years), being delisted by an exchange, being sanctioned by the Commission or other regulators, being indicted on criminal charges, having to restate earnings, having to restate earnings more than once in a specified period, or failing to take action on a shareholder proposal that received a majority shareholder vote?

Please see our response to question B.13.

B.15. In the 2003 Proposal, the rule proposed would have been triggered by withhold votes for one or more directors of more than 35% of the votes cast. Is it appropriate to apply such a trigger to current proposed Rule 14a-11? If so, what would be an appropriate percentage and why? Would it be appropriate to base this trigger on votes cast rather than votes outstanding? Please provide a basis for any alternate recommendations, including numeric data, where available. Is the percentage of withhold votes the appropriate standard in all cases? For example, what standard is appropriate for companies that do not use plurality voting? If your comments are

⁵⁴ 2003 Letter, *supra* note 38, at app.

⁵⁵ 74 Fed. Reg. at 29,033 (emphasis added).

⁵⁶ *Id.*

⁵⁷ *Id.*

based upon data with regard to withhold votes for individual directors, please provide such data in your response.

Please see our response to question B.13.

B.16. If the Commission were to include a triggering event requirement, for what period of time after a triggering event should Rule 14a-11 apply (e.g., one year, two years, three years, or permanently)? Should there be a means other than the adoption of a provision in the company's governing documents for the company or shareholders to terminate application of the requirement at a company? If so, what other means would be appropriate?

Please see our response to question B.13.

B.17. What would be the possible consequences of the use of triggering events? Would the withhold vote trigger result in more campaigns seeking withhold votes? How would any such consequences affect the operation and governance of companies?

Please see our response to question B.13.

B.18. If the proposed requirement applied only after a specified triggering event, how would the company make shareholders aware when a triggering event has occurred? If the rule became operative based on the occurrence of triggering events, should the rule require additional disclosures in a company's Exchange Act Form 10-Q, 10-K, or 8-K or, in the case of a registered investment company, Form N-CSR? For example, the rule could require the following:

- **A company would be required to disclose the shareholder vote with regard to the directors receiving a withhold vote or a shareholder proposal, either of which may result in a triggering event, in its quarterly report on Form 10-Q for the period in which the matter was submitted to a vote of shareholders or, where the triggering event occurred during the fourth quarter of the fiscal year, on Form 10-K; and**
- **A company would be required to include in that Form 10-Q or 10-K information disclosing that it would be subject to Rule 14a-11 as a result of such vote, if applicable.**

Please see our response to question B.13.

B.19. Should the company's disclosure regarding the applicability of Rule 14a-11 be filed or made public in some other manner? If so, what manner would be appropriate?

As indicated in our response to question A.9, we generally support adoption of Rule 14a-11 as a baseline for proxy access, and thus there should be little need for detailed disclosures about compliance or non-compliance with that rule unless a company has

adopted more generous criteria. That said, should the Commission adopt Rule 14a-11 on a less than uniform basis, we suggest that companies should disclose the pertinent information about its proxy access standards either as a separate item in its proxy statement or as a separate item in a Form 8-K, to provide uniformity of disclosure as to applicable procedures.

B.20. Should companies be exempted from complying with Rule 14a-11 for any election of directors in which another party commences or evidences its intent to commence a solicitation in opposition subject to Rule 14a-12(c) prior to the company mailing its proxy materials? What should be the effect if another party commences a solicitation in opposition after the company has mailed its proxy materials?

We strongly oppose exempting companies facing proxy contests from Rule 14a-11. Such an exemption is fundamentally inconsistent with a stated goal of the proposed rule—“to help make the proxy process better reflect the rights a shareholder would have at a shareholder meeting.”⁵⁸ As the Commission notes, a proxy contest “generally is not used outside the corporate-control context.”⁵⁹ Dissatisfied shareowners not seeking a change in control that otherwise meet the eligibility criteria under Rule 14a-11 would thus be disenfranchised from the proxy access mechanism. Shareowners should not be forced to make the choice between a change in control or business as usual.

B.21. If a triggering event is required and companies are exempted from complying with Rule 14a-11 because another party has commenced or evidenced its intent to commence a solicitation in opposition subject to Rule 14a-12(c), should the period in which Rule 14a-11 applies be extended to the next year? What should be the effect if another party commences a solicitation in opposition after the company has mailed its proxy materials?

Please see our response to question B.20.

B.22. What provisions, if any, would the Commission need to make for the transition period after adoption of a rule based on this proposal? Would it be necessary to adjust the timing requirements of the rule depending on the effective date of the rule (e.g., if the rules are adopted shortly before a proxy season)?

We are generally unaware of any specific provisions that the Commission would need to make for the transition period after adoption of a rule based on the proposal. We, however, note that the initiation of proposed Rule 14a-11 commences with “the nominating shareholder or group provid[ing] a notice on Schedule 14N to the company of its intent to require that the company include that shareholder’s or group’s nominee or nominees in the company’s proxy materials.”⁶⁰ Moreover, under the proposed rule the Schedule 14N must generally be filed “no later than 120 calendar days before the date

⁵⁸ 74 Fed. Reg. at 29,031.

⁵⁹ *Id.* at 29,028.

⁶⁰ *Id.* at 29,045.

that the company mailed its proxy materials for the prior year's annual meeting."⁶¹ Thus, in our view, the effective date of the final rule could simply be for Schedule 14N's filed after the date the final rule is published in the Federal Register. Under that approach, if the final rule is published in the Federal Register before the traditional proxy season then the application of the final rule will begin for most companies in the quarter following the completion of the proxy season.

B.23. Should the Commission consider rulemaking under Section 19(c) of the Exchange Act to amend the listing standards of registered exchanges to require that shareholders have access to the company's proxy materials to nominate directors under the requirements and procedures described in connection with proposed Rule 14a-11 to reflect, for example, changes the Sarbanes-Oxley Act made to director and independence requirements, among other matters?

The Council is unaware of any need for the Commission to consider rulemaking under Section 19(c) of the Exchange Act to amend the listing standards of registered exchanges to require that shareowners have access to the company's proxy materials to nominate directors under the requirements and procedures described in connection with proposed Rule 14a-11 or for other matters.

C.1. Are the proposed shareholder eligibility criteria for Rule 14a-11 necessary or appropriate? If not, why not? Should there be any restrictions regarding which shareholders can use proposed Rule 14a-11 to nominate directors for inclusion in company proxy materials? Should those restrictions be consistent with the requirements of Rule 14a-8 or should they be more extensive than the minimum requirements in Rule 14a-8?

We generally believe, as discussed in our response to question A.1., that the Commission's proposed shareowner eligibility criteria for Rule 14a-11, although different from the Council's policy, are appropriate. As background, we note that the Council's proxy access policy was revised subsequent to the Commission's 2007 proxy access proposals to recommend a uniform three percent ownership threshold and a two-year holding period (the previous policy was a five percent ownership threshold and a three year holding period). The revised policy was based, in part, upon a conclusion that (1) voting results from the 2007 annual meetings of several companies indicating that the three percent for two years formulation enjoyed significant shareowner support; and (2) the uniform five percent threshold contained in the Commission's 2007 proposals would largely be unattainable for Council members.

Of note, the following analysis of the uniform five percent threshold contained in our comment letter in response to the Commission's 2007 proposals stated:

We believe that the more than five percent threshold would be too high a barrier. While institutional investors may collectively own more than sixty percent of outstanding U.S. equities, approximately one-half of those

⁶¹ *Id.*

shares are held by mutual funds and insurance companies. The Commission should acknowledge that those institutional investors generally do not sponsor shareowner resolutions, even those they support.

Those institutional investors, largely public and union pension funds, that currently engage portfolio companies using tools such as shareowner resolutions account for less than ten percent of the total U.S. equity market. As a result of those funds' obligations to diversify their portfolios and manage risk, the level of holdings that those funds may have in any single company is relatively small. For example, one of the Council's largest members—The California State Teachers' Retirement System—generally owns only about 0.3 percent of the outstanding stock of any company in the Russell 3000.

The ability to aggregate individual pension funds for a shareowner resolution is a difficult exercise. For example, earlier this year the Council's largest member—the California Public Employees' Retirement System ("CalPERS")—tried without success to find co-sponsors for its proxy access resolution at UnitedHealth. CalPERS, with approximately 0.5 percent of the company's outstanding shares, ended up as the sole sponsor. Even so, as previously indicated, the resolution garnered more than 45.25 percent of the shares cast for-and-against—a high rate of shareowner support for a first-time resolution.

Our research indicates that even if CalPERS and nine of the other largest public pension funds were to successfully aggregate their holdings of a single public company's securities, those funds combined would likely be unable to clear the more than five percent hurdle. For example, based on information compiled from FactSet Research Systems, Inc., if the 10 largest public pension fund holders of Exxon Mobil Corporation (a large-cap stock), Precision Castparts Corp. (a mid-cap stock), and The Manitowoc Company, Inc. (a small-cap stock) were to aggregate their ownership interests, the resulting percentage holdings for those shareowner groups would be approximately 3.01, 3.59, and 3.56, respectively.⁶²

We have recently updated the research referenced in our 2007 comment letter, and our analysis remains essentially unchanged.⁶³ Our examination of the holdings of the ten largest public pension funds in a sample of five accelerated filers and five non-accelerated filers indicates that if a group of the ten largest holders were to aggregate shares, they would not be able to meet a five percent threshold and would be unlikely to meet even a three percent threshold. The holdings by the ten largest public pension funds

⁶² 2007 Letter, *supra* note 47, at 3 (footnotes omitted).

⁶³ Michael McCauley, Tracy Stewart, and Jacob Williams of the Florida State Board of Administration assisted the Council staff in updating the research. The source data for the research was compiled from FactSet Research Systems, Inc. database of Schedule 13F filings.

in those companies ranged from 0 percent to 2.69 percent, with an average of .872 percent.

By comparison, an examination of the ten largest public pension funds holdings in a sample of fifteen large accelerated filers indicates that a one percent threshold could be met by a group of the ten largest holders if they were to aggregate shares. The holdings of the ten largest public pension funds in those companies ranged from 2.13 percent to 3.98 percent, with an average of 2.58 percent.

Notwithstanding the results of our research and our existing proxy access policy, we have reviewed the Commission's proposed shareowner eligibility criteria carefully and are prepared to generally support the proposed rule's approach. We note that the proposed rule maintains the Commission's 2007 proposals' five percent ownership threshold that we strongly opposed,⁶⁴ but has limited the applicability of that threshold to smaller issuers.⁶⁵

More specifically, the proposed rule balances the highly restrictive threshold for smaller issuers with lower, more realistically attainable ownership thresholds for all other issuers (three percent for accelerated filers and one percent for large accelerated filers) combined with a shorter (one-year) ownership period applicable to all sized issuers.⁶⁶ Thus, we generally believe that the proposed rule's eligibility criteria, taken as a whole, is consistent with the underlying principles of the Council's policy and, if adopted, will achieve the Commission and Council's shared objective of "remov[ing] impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors."⁶⁷

C.2. The proposed eligibility threshold is based on the percentage of securities owned and entitled to vote on the election of directors. This threshold is based on current Rule 14a-8 and reflects our intent to focus on those shareholders eligible to vote for directors. Is the proposed threshold appropriate or could it be better focused to accomplish our objective? For example, should eligibility instead be based on record ownership? Should eligibility be based on the value of shares owned? If so, on what date should the value be measured? What would be an appropriate value amount? Is there another standard or criteria? Is submission of the nomination the correct date on which to make these eligibility determinations? If not, what date should be used?

As indicated in our response to question C.1., we generally believe the proposed eligibility threshold is appropriate and accomplishes the Commission's objective. We, however, would also note that although Council general members are long-term passive investors their percentage of securities owned and entitled to vote for the many

⁶⁴ 2007 Letter, *supra* note 47, at 3 ("We believe that the more than five percent threshold would be too high a barrier.").

⁶⁵ 74 Fed. Reg. at 29,035.

⁶⁶ *Id.*

⁶⁷ *Id.* at 29,024.

companies in which they are invested is not static and may fluctuate throughout the year due to rebalancing, share lending, and other routine investment activities. We, therefore, would encourage the Commission to clarify the computation of the percentage of shares owned and entitled to vote contained in the proposed eligibility criteria to address those routine and common fluctuations in ownership. More specifically, we respectfully request that the Commission adopt the following three clarifications to enhance the workability of the final rule:

First, the Commission should clarify that the lowest number of shares held by the nominating shareowners or each member of the nominating group during the one-year pre-Schedule 14N period be used to calculate the percentage of securities owned and entitled to vote on the election of directors for purposes of the eligibility threshold, accompanied by a representation that the participant will hold *no less* than that amount through the date of the annual meeting. We note that such a baseline should be relatively simple to calculate during the period leading up to the annual meeting.

Second, we urge the Commission to clarify that nominating shareowners or each member of the 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. 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. We believe that loaned securities should be counted as belonging to a nominating shareowner if certain conditions are met. A similar declaration of intent to hold the securities through the date of the annual meeting could be added to Schedule 14N.

Third, the Commission should clarify how to determine the total number of securities outstanding in order to determine whether a shareowner has met the percentage threshold. At present, such information is not readily available on an updated basis. The most reliable source may be the company's definitive proxy material, but that figure can change if, for example, there are stock buybacks or other events. One potential solution would be to require companies to publish information about outstanding securities more frequently, but we do not believe that there is a need to go that far. Instead, we would propose that the Commission adopt an instruction stating that for purposes of computing the total number of outstanding securities, a nominating shareowner may rely upon the number of securities outstanding provided in the company's most recent proxy statement.

To implement these clarifications, we suggest the following amendments to the proposed rule:

A. Amendment to proposed Rule 14a-11(b):

Add the following Instructions 3 and 4:

Instruction 3 to paragraph (b). In determining whether a shareholder or group of shareholders has attained the thresholds set out in paragraph (b) for the one-year period prior to the date of providing notice to the registrant on Schedule 14N, the shareholder or group of shareholders shall base its calculation on the following criteria:

(1) In determining whether a percentage threshold has been satisfied, the shareholder or group of shareholders shall identify the minimum number of securities that were continuously held during that one-year period.

(2) In determining whether a dollar threshold has been satisfied, the shareholder or group of shareholders shall calculate the lowest dollar value of securities that were continuously held during the one-year period.

Instruction 4 to paragraph (b). In determining the number of securities that were continuously owned for the one year period prior to the date of providing notice to the registrant on Schedule 14N, as well as the value of those securities, the shareholder or group of shareholders may include the number of securities that were loaned to another party throughout that one-year period if the shareholder or group of shareholders have a right to recall and vote the securities. Conversely, if the shareholder or group of shareholders has acquired securities in a manner that requires the shareholder to return securities to the lender upon request, the shareholder or group of shareholders is not entitled to count those securities as having been continuously owned for the applicable period.

B. Amendment to proposed Rule 14n-101.

In the Special Instructions, amend Item 5(b) to read as follows, taking into account the issue of borrowed securities and the Council's recommendation to delete the statement regarding intention to hold past the meeting:

(b) Provide a written statement that the nominating shareholder, or each member of the nominating shareholder group, intends to continue to own the requisite securities through the date of the meeting of shareholders and to recall and vote at such meeting any securities that have been loaned to another party.

- C.3. For companies that have more than one class of securities entitled to vote on the election of directors, does the rule provide adequate guidance on how to determine whether a shareholder meets the requisite ownership thresholds? Should the rule specifically address how to make this determination if one class of securities has greater voting rights than another class?**

We generally believe the rule provides adequate guidance on how to determine whether a shareholder meets the requisite ownership thresholds for companies that have more than one class of securities entitled to vote on the election of directors.

C.4. What other criteria or alternatives should the Commission consider to determine the eligibility standards for shareholders to nominate directors?

Please see our response to question C.2.

C.5. Is it appropriate to use a tiered approach to the ownership threshold for reporting companies (other than registered investment companies)? If so, is it appropriate and workable to use large accelerated filer, accelerated filer, and non-accelerated filer to define the three tiers? Are there aspects of the definitions of these groups that do not work with the proposed rule? Should we instead define the tiers strictly by public float or strictly by market capitalization? If so, what should the public float or market capitalization thresholds be (e.g., 5% for companies with less than \$75,000,000 in public float; 3% for companies with more than \$75,000,000 but less than \$700,000,000 in public float; 1% for companies with greater than \$700,000,000 in public float)?

Please see our response to question C.1.

C.6. Is the 1% standard that we have proposed for large accelerated filers appropriate? Should the standard be lower (e.g., \$2,000 or 0.5%) or higher (e.g., 2%, 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 3% standard that we have proposed for accelerated filers appropriate? Should the standard be lower (e.g., 1% or 2%) or higher (e.g., 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 5% standard that we have proposed for non-accelerated filers appropriate? Should the standard be lower (e.g., 1%, 2%, 3%, or 4%) or higher (e.g., 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)?

Please see our response to question C.1.

C.7. Should groups of shareholders composed of a large number of beneficial holders, but who collectively own a percentage of shares below the proposed thresholds, be permitted to have a nominee included in the company proxy materials? If so, what would be a sufficiently large group? Would a group composed of over 1%, 3%, 5% or 10% of the number of beneficial holders be sufficient? Should there be different disclosure requirements for a large shareholder group?

Please see our response to question C.1.

C.8. Is it appropriate to use a tiered approach to the ownership threshold for registered investment companies? Should the tiers and ownership percentages for registered investment companies be similar to those for reporting companies other than registered investment companies, as proposed, or should they be different? Is it

appropriate and workable to base the tiers on a registered investment company's net assets? Should another measure be used instead? Should the determination of which tier a series investment company belongs to be made on a series by series basis, rather than for the company as a whole? Should the levels of net assets for each category be higher or lower? If so, why?

Please see our response to question B.4.

- C.9. Should the determination of which tier a series investment company is in be based on the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting, as disclosed in a Form 8-K filed in connection with the meeting at which directors are to be elected? Should the determination of which tier other registered investment companies are in be based on the net assets of the company as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting, as disclosed in the company's Form N-CSR? If not, as of what date should net assets be determined for these purposes? Should all registered investment companies use a single date for purposes of making this determination?**

Please see our response to question B.4.

- C.10. Should a registered investment company that is a series company be required to file a Form 8-K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of shares of the company that are entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter? If not, how should shareholders of a series company determine whether they meet the applicable ownership threshold?**

Please see our response to question B.4.

- C.11. Is the 1% standard that we have proposed for registered investment companies with net assets of \$700 million or more appropriate? Should the standard be lower (e.g., \$2,000 or 0.5%) or higher (e.g., 2%, 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 3% standard that we have proposed for registered investment companies with net assets of \$75 million or more, but less than \$700 million, appropriate? Should the standard be lower (e.g., 1% or 2%) or higher (e.g., 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 5% standard that we have proposed for registered investment companies with net assets of less than \$75 million appropriate? Should the standard be lower (e.g., 1%, 2%, 3%, or 4%) or higher (e.g., 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Should the determination of whether a shareholder or shareholder group beneficially owns a sufficient percentage of a series company's securities to nominate a director be made on a**

series by series basis, rather than for the company as a whole (i.e., should a shareholder be permitted to take advantage of the nomination process contained in proposed Rule 14a-11 if he or she owns the applicable percentage of shares of a series of the company, but does not own the applicable percentage of the company as a whole)? Should closed-end investment companies be subject to the same standards as open-end investment companies? As proposed, business development companies would be treated in the same manner as reporting companies (other than registered investment companies). Should business development companies be subject to the same tiered approach as reporting companies (other than registered investment companies)? Why or why not?

Please see our response to question B.4.

- C.12. In determining the securities that are entitled to be voted on the election of directors of a registered investment company for purposes of establishing whether the applicable threshold has been met, should the nominating shareholder or group be permitted to rely on information set forth in a Form 8-K filed in connection with the meeting where directors are to be elected (in the case of a series company) or the company's most recent annual or semi-annual report filed with the Commission on Form N-CSR (in the case of other investment companies), unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate?**

Please see our response to question B.4.

- C.13. Voting rights for some registered investment companies are based on the net asset value of the shareholder's securities rather than the number of securities. Does the rule provide adequate guidance on how to determine whether a shareholder meets the requisite ownership threshold in such a case? Should the rule specifically address how to make the ownership threshold determination in cases where different securities of the same investment company have different voting rights on a per share basis?**

Please see our response to question B.4.

- C.14. Should there be a restriction on shareholder eligibility that is based on the length of time securities have been held? If so, is one year the proper standard? Should the standard be longer (e.g., two years, three years, four years, or five years)? Should the standard be shorter (e.g., six months)? Should the standard be measured by a different date (e.g., one year as of the date of the meeting, rather than the date of the notice)?**

We generally agree with the Commission that there should be a restriction on shareowner eligibility based on the length of time the securities have been held. Like the Commission, "we believe that long-term shareholders are more likely to have interests

that are better aligned with other shareholders and are less likely to use the rule solely for short-term gain.”⁶⁸

Although the Council’s policy provides for a holding period of “at least two years,”⁶⁹ and considering the proposed rule as a whole, we generally do not disagree with the Commission’s analysis and conclusion that “a one year holding requirement would be sufficient to appropriately limit use of Rule 14a-11 to long-term shareholders without placing an undue burden on shareholders seeking to use the rule.”⁷⁰ We also generally agree with the Commission’s conclusion that the standard be measured by the date of notice.

C.15. Should eligibility be conditioned on meeting the required ownership threshold by holding a net long position for the required time period? If the Commission were to adopt such a requirement, would this require other modifications to the proposal?

We generally would not oppose this approach, although we favor the proposed approach taken by the Commission with the clarifications suggested in our response to question C.2.

C.16. As proposed, a nominating shareholder would be required to represent its intent to hold the securities until the date of the election of directors. Is it appropriate to include such a requirement? What should be the remedy if the nominating shareholder or group represents its intent to hold the securities through the date of the meeting for the election of directors and fails to do so? Should the company be permitted to exclude any nominations from that nominating shareholder or member of a group for some period of time afterward (e.g., one year, two years, three years)? If the nominating shareholder or group fails to hold the securities through the date of the meeting, what, if anything, should the effect be on the election? Should the nominee submitted by the shareholder or group be disqualified?

We generally support the Commission’s proposal that a nominating shareowner be required to represent its intent to hold the securities until the date of the election of directors. We note that this provision was supported by all but one commentator that responded to this issue in connection with the Commission’s 2003 proposed rules.⁷¹ Consistent with those commentators, we generally agree with the Commission that “a requirement to hold the securities through the date of the meeting is appropriate to demonstrate the nominating shareholder’s commitment to the director nominee and the election process.”⁷²

⁶⁸ *Id.* at 29,037.

⁶⁹ Council Policies, *supra* note 5, § 3.2 *Access to the Proxy* (“Eligible investors must have owned the stock for at least two years.”).

⁷⁰ 74 Fed. Reg. at 29,037.

⁷¹ Comments, *supra* note 16, at 65-66 (“All but one of the commentators believed that a nominating security holder or group should be required to hold the securities at least until the date of the election of directors.”).

⁷² 74 Fed. Reg. at 29,037.

C.17. We are proposing that a nominating shareholder represent an intent to hold through the date of the meeting because we believe it is important that the nominating shareholder or group have a significant economic interest in the company. Is it appropriate to require the shareholder to provide a statement regarding its intent with regard to continued ownership of the securities beyond the election of directors? Should a nominating shareholder be required to represent that it will hold the securities beyond the election if the nominating shareholder's nominee is elected (e.g., for six months after the election, one year after the election, or two years after the election)? Would the answer be different if the nominating shareholder's nominee is not elected?

As indicated in response to question C.16, we generally believe that the Commission's proposal is sufficient to demonstrate the nominating shareowner's commitment to the director nominee and the election process. We, however, generally do not believe it is also necessary to require the shareowner to provide a statement regarding its intent with regard to continued ownership of the securities beyond the election of directors. We note that such a requirement would appear to be unnecessary and unduly restrictive.

C.18. In the 2003 Proposal the Commission solicited comment on whether the rule should include a provision that would deny eligibility for any nominating shareholder or group that has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes. Commenters were mixed in their responses so we have not proposed a requirement in this regard, but are again requesting comment as to whether the rule should include a provision denying eligibility for any nominating shareholder or group who has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes (e.g., 5%, 10%, 15%, 25%, or 35%) within a specified period of time in the past (e.g., one year, two years, three years, four years, five years). If there should be such an eligibility standard, how long should the prohibition last (e.g., one year, two years, three years)? Similarly, we are again requesting comment (see also Request for Comment D.16.) as to whether the rule should include a provision that would deny eligibility for any nominee that has been included in the company proxy materials within a specified period of time in the past (e.g., one year, two years, three year, four years, five years) where that nominee did not receive at least a specified percentage of the votes (e.g., 5%, 10%, 15%, 25%, or 35%). How long should any such prohibition last (e.g., one year, two years, three years)?

We generally do not believe, consistent with the view of many of the commentators to the Commission's 2003 proposed rules,⁷³ that the rule should include a provision that would deny eligibility for any shareowner or shareowner group that has had a nominee that has been included in the company proxy materials where that nominee did not receive a sufficient percentage of the votes. As we stated in response to the Commission's 2003 proposed rules regarding resubmission related requirements generally:

⁷³ *Id.* at 66.

The Council does not believe a candidate should be subject to resubmission requirements. Similar resubmission requirements aren't applicable to management's candidates, so they shouldn't apply to candidates suggested by shareowners.⁷⁴

C.19. As proposed, shareholders may aggregate their holdings in order to meet the ownership eligibility requirement. The shares held by each member of a group that are used to satisfy the ownership threshold must meet the minimum holding period. Should shareholders be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors?

We generally believe, consistent with Council policy,⁷⁵ shareowners should be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors.⁷⁶ As explained in our response to question C.1., without the ability to aggregate holdings even our largest members would be unlikely to meet the ownership eligibility requirements to nominate directors. The ability to aggregate holdings is thus crucial to the effectiveness of the proposed rule—without it, the rule would not achieve its stated intent.

C.20. If shareholders should be able to aggregate their holdings, is it appropriate to require that all members of a nominating shareholder group whose shares are used to satisfy the ownership threshold to meet the minimum holding period individually? If aggregation is not appropriate, what ownership threshold would be appropriate for an individual shareholder?

We generally believe, consistent with Council policy,⁷⁷ that all members of a nominating shareholder group whose shares are used to satisfy the ownership threshold should meet the minimum holding period requirements.⁷⁸

C.21. If a nominating shareholder sells any shares of the company that are in excess of the amount needed to satisfy the ownership threshold, should that shareholder not be eligible under the rule? Would it matter when the nominating shareholder sold the shares in relation to the nomination process?

We generally believe that a nominating shareowner who sells shares of the company that are in excess of the amount needed to satisfy the ownership threshold should continue to be eligible under the rule to the extent that the shareowner meets the other eligibility requirements under the rule. We believe that any concerns about a nominating shareowner's sale of shares during the nomination process would be ameliorated by the

⁷⁴ 2003 Letter, *supra* note 38, at app.

⁷⁵ Council Policies, *supra* note 5, § 3.2 *Access to Proxy* (“Companies should provide access to management proxy materials for a long-term investor or group of long-term investors . . .” (emphasis added)).

⁷⁶ 2003 Letter, *supra* note 38, at app.

⁷⁷ Council Policies, *supra* note 5, § 3.2 *Access to Proxy* (“Eligible investors must have owned the stock for at least two years.”).

⁷⁸ 2003 Letter, *supra* note 38, at app.

proposed rule's disclosure requirements⁷⁹ and our proposed clarification to the eligibility threshold requirements set forth in our response to question C.2.

C.22. Would shareholder groups effectively be able to form to satisfy the ownership thresholds? If not, what impediments exist? What, if anything, would be appropriate to lessen or eliminate such impediments?

We generally believe shareowners would be able to effectively form shareholder groups to satisfy the ownership thresholds. As, however, indicated in our response to question C.1., it will be no easy feat for Council members to satisfy the proposed ownership thresholds, particularly when the issuer is a non-accelerated filer. As indicated in response to Question C.2., we would encourage the Commission to consider clarifying the computation of the percentage of securities owned and entitled to vote to address fluctuations in share ownership that result from rebalancing, share lending, and other common investment activities.

C.23. What would be an appropriate method of establishing the beneficial ownership level of a nominating shareholder or group? What would be sufficient evidence of ownership? For example, if the nominating shareholder is not the registered holder of the securities, should the nominating shareholder be required to provide a written statement from the "record" holder of the securities (usually a broker or bank), verifying that at the time the nominating shareholder submitted its notice to the company, the nominating shareholder continuously held the securities for at least one year?

We would not oppose a requirement that the nominating shareowner be required to provide a written statement from the "record" holder of the securities verifying ownership. There, however, is one technical amendment that we would recommend, namely, that the letter from the record holder be dated more than seven days prior to the date of submission to the company. The reason is that, as a logistical matter, it may be difficult for a shareowners or group of shareowners to obtain such letters from the record holder on the exact same day that they will be submitting the nomination to the company and filing a Schedule 14N. This has proven to be a problem under Rule 14a-8, with submitters frequently obtaining letters from the bank or broker a day or two prior to the date upon which the shareholder proposal is mailed to the company, and the company then requests a supplemental letter attesting to the fact that the submitter has not sold the shares during the intervening twenty-four or forty-eight hours. This exercise does nothing but create busywork, which should be avoided.

Under the proposed rules, the shareowner or group of shareowners is required to state in a Schedule 14N, which will be publicly filed, that they have continuously owned the shares, and they are required to maintain a certain level of holdings continuously and to report any material changes. Under the circumstances, the goal of verifying continuous ownership is more than satisfied by this alternative approach, which avoids nitpicking exchanges and possible requests for no-action relief.

⁷⁹ 74 Fed. Reg. at 29,037.

We would thus propose amending the second sentence in Item 5(b) of the Special Instructions to proposed Rule 14n-101 to state:

Otherwise, attach to Schedule 14N a written statement from the ‘record’ holder of the nominating shareholder’s shares (usually a broker or bank), which shall be dated no more than one week prior to the date of submission of the shareholder notice to the registrant on Schedule 14N, that the nominating shareholder continuously held the securities being used to satisfy the applicable ownership threshold for a period of at least one year prior to the date of that written statement.

C.24. Should the Commission limit use of the rule, as proposed, to shareholders that are not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors? Why or why not? Would it be appropriate to require the shareholder to represent that it will not seek to change the control of a company or to gain more than a limited number of seats on the board for a period of time beyond the election of directors? How should the rules address the possibility that a nominating shareholder’s or group’s intent may change over time?

We generally agree that the Commission, consistent with Council policy,⁸⁰ should limit the use of the rule to shareowners that are not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors. As indicated in our comment letter in response to the 2003 proposed rules:

Council members approved the Council’s policy with the understanding that an access mechanism should not be structured to permit a shareowner or group to unseat an entire board or facilitate a change in control.⁸¹

Our view on this issue has not changed.

D.1. Is it appropriate to use compliance with state law, federal law, and listing standards as a condition for eligibility?

We generally do not oppose the proposed rule’s requirement that “[a] company would not be required to include a shareholder nominee in its proxy materials if the nominee’s candidacy or, if elected, board membership would violate controlling state law, federal law, or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors), and such violation could not be cured.”⁸² We believe the proposed rule is generally consistent with the Council’s view, expressed in our comment letter in response to the Commission’s 2003 proposed rules,

⁸⁰ Council Policies, *supra* note 5, § 3.2 *Access to Proxy* (“Companies should provide access to management proxy materials . . . to nominate *less than a majority of directors*” (emphasis added)).

⁸¹ 2003 Letter, *supra* note 38, at app.

⁸² 74 Fed. Reg. at 29,040 (footnotes omitted).

which stated, “shareowner-suggested candidates should qualify as independent under relevant non-subjective stock exchange listing standards”⁸³

D.2. Should there be any other or additional limitations regarding nominee eligibility? Would any such limitations undercut the stated purposes of the proposed rule? Are any such limitations necessary? If so, why?

We generally believe that additional limitations on nominee eligibility beyond those currently included in the Commission’s proposed rule would be inappropriate and would undermine the stated purposes of the proposal by imposing unnecessary burdens on the nominating shareowner or shareowner group.

D.3. Should there be requirements regarding independence of the nominee and nominating shareholder or group and the company and its management? If so, are the proposed limitations appropriate? What other or additional limitations would be appropriate? If these limitations generally are appropriate, are there instances where they should not apply? Should the fact that the nominee is being nominated by a shareholder or group, combined with the absence of any agreement with the company or its management, be a sufficient independence requirement?

As indicated in our response to question D.1., we generally believe that shareowner-suggested candidates should qualify as independent under relevant non-subjective stock exchange listing standards. Nominating shareowners should also be required to represent that they do not have any direct or indirect agreements with companies.⁸⁴ In our view, additional limitations beyond those requirements would generally be both unnecessary and inappropriate.

D.5. Where a company is subject to an independence standard of a national securities exchange or national securities association that includes a subjective component (e.g., subjective determinations by a board of directors or a group or committee of the board of directors), should the shareholder nominee be subject to those same requirements as a condition to nomination?

We generally believe that shareowner-suggested candidates should be required to qualify only as independent under relevant non-subjective stock exchange listing standards. Shareowner nominees should not be required to meet the subjective independence components of relevant listing standards.

D.6. As proposed, a nominating shareholder or group would be required to represent that the shareholder nominee satisfies generally applicable objective standards of a national securities exchange or national securities association that are applicable to directors of the company generally and not any particular definition of independence applicable to members of the audit committee of the company’s board

⁸³ 2003 Letter, *supra* note 38, at app.

⁸⁴ *See id.*

of directors. Should the proposal clarify that the nominee must meet the applicable objective standards of the company's primary listing exchange?

We generally would not oppose, consistent with our response to question D.1., the proposal clarifying that the nominee must meet the applicable objective standards of the company's primary listing exchange.

D.7. Should the company or its nominating committee have any role in determining whether a shareholder nominee satisfies the generally applicable objective standards for director independence of any exchange on which the company's securities are listed?

We generally do not oppose allowing companies to request clarifying information from the nominating shareowner as to a candidate's qualifications. We hope and expect that this could be done on an informal basis without the need to adopt a rule dealing with that situation. We believe that if a company believes that a candidate does not meet the eligibility requirements, it could raise that issue with the Commission staff in giving notice of intent to omit the candidate's name and information.⁸⁵ The nominating shareowner would then have an opportunity to explain why the candidate is independent, assuming that it has not provided that information previously to the company's satisfaction.

D.8. If a company has more stringent independence requirements than the listing standards applicable to the company, should the company's requirements apply? Or should the listing standards apply?

We generally are not aware of many independence standards that are more stringent than the listing standards, so this may not be an issue, at least, as a practical matter. To the extent, however, that any such standards may be identified during the comment period, we would not oppose allowing the more stringent standards to apply, provided that they are publicly available. Also, it is important to stress that any more stringent standards must be entirely objective.⁸⁶

D.9. If a company is not subject to an independence standard, should shareholder nominees to the board of directors under Rule 14a-11 be required to provide disclosure concerning whether they would be independent? If so, what standard should apply? Should the nominating shareholder or group be able to select the standard?

We generally agree with the Commission that when a company is not subject to the standards of a national securities exchange or national securities association, the

⁸⁵ *Cf. id.* ("The final rule should include an SEC-handled mechanism to mediate shareowner concerns that companies are overstepping their rights to request additional information or to review shareowner objections of decisions to exclude shareowner candidates from management's proxy card.").

⁸⁶ *Id.* ("The Council agrees that shareowner-suggested candidates should qualify as independent under relevant non-subjective stock listing standards . . .").

nominating shareowner or group should not be required to provide disclosure concerning whether shareowner nominees would be independent.

- D.10. Should we apply the “interested person” standard of Section 2(a)(19) of the Investment Company Act with respect to the representation that a shareholder nominee be independent from a company that is a registered investment company? Should the “interested person” standard also apply to shareholder nominees for election to the board of directors of a business development company? Should we instead apply a different independence standard to registered investment companies or business development companies, such as the definition of independence in Exchange Act Rule 10A-3?**

Please see our response to question B.4.

- D.11. As proposed, the rule includes a safe harbor providing that nominating shareholders will not be deemed “affiliates” solely as a result of using Rule 14a-11. This safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that the nominating shareholder or group does not have an agreement or relationship with that director otherwise than relating to the nomination. Is it appropriate to provide such a safe harbor for shareholder nominations? Should the safe harbor continue to apply where the nominee is elected? If so, should the nomination and election of the shareholder’s nominee be a consideration in determining whether the shareholder is an affiliate, or should the safe harbor be “absolute”?**

We generally believe that the Commission’s approach in the proposed rule is sound. Nominating shareowners will be undertaking the task of nominating and seeking to elect a director candidate only if they are dissatisfied with the company’s performance. Thus, we share the Commission’s view that “the mere use of proposed Rule 14a-11, by itself, should not be deemed to establish a relationship between the nominating shareholder or group and the company that would result in that holder or group being deemed an ‘affiliate’ of the company for purposes of the federal securities laws.”⁸⁷

We also generally believe that the safe harbor should continue as to the nominating shareowners. For example, it is not clear whether an independently nominated candidate who is elected to the board will be nominated by the board’s nominating committee, and that director may have to stand for re-election as an independent nominee. The Council generally believes that the goals of the rule are enhanced by not treating nominating shareowners as affiliates.

- D.12. Should the Commission include a similar safe harbor provision for nominating shareholders that submit a nominee for inclusion in a company’s proxy materials pursuant to an applicable state law provision or a company’s governing documents rather than using proposed Rule 14a-11? Why or why not?**

⁸⁷ 74 Fed. Reg. at 29,042.

We generally believe a similar safe harbor provision would be warranted for nominating shareowners that submit a nominee for inclusion in a company's proxy materials pursuant to an applicable state law provision or a company's governing documents.

D.13. Should the eligibility criteria include a prohibition on any affiliation between nominees and nominating shareholders or groups? If so, what limitations would be appropriate? For example, should there be a prohibition on the nominee being the nominating shareholder or a member of the nominating shareholder group, a member of the immediate family of the nominating shareholder or any member of the nominating shareholder group, or an employee of the nominating shareholder or any member of the nominating shareholder group? Would such a limitation unnecessarily restrict access by shareholders to the proxy process?

We generally believe requiring shareowner-suggested nominees to be independent of the nominating shareowner or group is unnecessary. Corporate boards are currently free to nominate candidates with a range of special interests, such as individuals from firms that provide investment banking, legal and other professional services, relatives of company executives and directors and other individuals with various links to the company and its executives.

Instead, we recommend requiring companies and nominating shareowners to fully disclose all relationships between director candidates and the company, company executives, and in the case of candidates nominated by shareowners, the nominating shareowners. Full and meaningful information about each candidate will ensure that shareowners can make reasoned, informed voting decisions.

Corporate concerns over "special interest" representation are exaggerated, since candidates will ultimately only be added to the board if the shareowners—the directors' bosses—vote to do so. Once shareowners have full information about relationships between all nominees—including board-nominated and shareowner-nominated candidates—they can make a reasoned and informed voting decision.

D.14. Should eligibility criteria include a prohibition on agreements between companies and its management and nominating shareholders, as proposed? Would such a prohibition inhibit desirable negotiations between shareholders and boards or nominating committees regarding nominees for directors? Should the prohibition provide an exception to permit such negotiations, as proposed? If so, what should the relevant limitations be?

We generally agree that nominating shareowners should be required to represent that no relationships or agreements between the nominee or the nominating shareowner or group and the company and its management exist. We also generally support, consistent with the commentators to the 2003 proposed rules, the Commission's proposed accompanying instruction clarifying "that negotiations with the nominating committee of the company to have the nominee included on the company's proxy card as a management nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the

company is required to include the shareholder nominee for director on the company's proxy card in accordance with Rule 14a-11, would not be considered a direct or indirect agreement with the company for purposes of the rule."⁸⁸

D.15. Should the nominee be required to make any of the representations (e.g., the independence representation), either in addition to or instead of, the nominating shareholder or group? If so, should these representations be included in the shareholder notice on Schedule 14N or in some other document?

We generally do not believe it is necessary for nominees to make any representations either in addition to or instead of the nominating shareowner or group.

D.16. Should there be a nominee eligibility criterion that would exclude an otherwise eligible nominee where that nominee has been included in the company's proxy materials as a candidate for election as director but received a minimal percentage of the vote? If so, what would be the appropriate percentage (e.g., 5%, 10%, 15%, 25%, or 35%)? If so, for how long should the nominee be excluded (e.g., 1 year, 2 years, 3 years, 4 years, 5 years, permanently)?

Please see our response to question C.18.

E.1. Is it appropriate to include a limitation on the number of shareholder director nominees? If not, how would the proposed rules be consistent with our intention not to allow Rule 14a-11 to become a vehicle for changes in control?

We generally believe that an access mechanism should not be structured to permit a shareowner or group to unseat an entire board or facilitate a change in control. Our policy advocates that the access mechanism be used to nominate less than a majority of the directors.⁸⁹ Nevertheless, we generally believe that any limitation on the number of shareholder director nominees should ensure that shareowners can nominate at least two candidates in all cases.⁹⁰

We are aware of too many situations where a lone "dissident" director faced a hostile board, was blackballed from key committees and was effectively cut out of key discussions. From a practical standpoint, giving shareowners the opportunity to nominate at least two candidates would improve the possibility that dissident directors might have one director willing to second their motions.

E.2. If there should be a limitation, is the proposed maximum percentage of shareholder nominees for director that we have proposed appropriate? If not, should the maximum percentage be higher (e.g., 30%, 35%, 40%, or 45%) or lower (e.g., 10%, 15%, or 20%)? Should the percentage vary depending on the size of the board?

⁸⁸ 74 Fed. Reg. at 29,041.

⁸⁹ Council Policies, *supra* note 5, § 3.2 *Access to Proxy* ("Companies should provide access to management proxy materials . . . to nominate less than a majority of directors" (emphasis added)).

⁹⁰ 2003 Letter, *supra* note 38, at app.

Should the limitation be the greater or lesser of a specified number of nominees or percentage of the total number of directors on the board? Is it appropriate to permit more than one shareholder nominee regardless of the size of the company's board of directors?

We generally do not oppose the Commission's proposed 25% maximum percentage of shareowner nominees for director. We, however, generally would support, as indicated in our response to question E.1., permitting shareowners to nominate at least two candidates in all cases.

E.3. In instances where 25% of the board does not result in a whole number, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%. Is it appropriate to round down in this instance? Should we instead round up to the nearest whole number above 25%? Is a rounding rule necessary?

We generally do not oppose the Commission's proposal to round down in instances where 25% of the board does not result in a whole number. We, however, generally would support, as indicated in our response to question E.1., permitting shareowners to nominate at least two candidates in all cases.

E.4. Should the proposed rule address situations where the governing documents provide a range for the number of directors on the board rather than a fixed number of board seats? If so, what changes to the rule would be necessary?

If the Commission determines that it is necessary to address situations where governing documents provide a range for the number of directors on the board, the final rule should not put nominating shareowners in a less favorable position than would exist if the number of board members was fixed. We, therefore, suggest that in applying any percentage limitation, any final rule should use as the denominator the number of directors elected as of the most recent annual meeting, subject to our recommendation that at least two nominees should be eligible for inclusion in the proxy materials.

E.5. The proposal contemplates taking into account incumbent directors who were nominated pursuant to proposed Rule 14a-11 for purposes of determining the maximum number of shareholder nominees. Is that appropriate? Should there be a different means to account for such incumbent directors?

As indicated in our response to question E.1., we generally believe that an access mechanism should not be structured to permit a shareowner or group to unseat an entire board or facilitate a change in control. In our view, incumbent directors who were nominated pursuant to proposed Rule 14a-11 should thus only be counted for purposes of determining the maximum number of shareowner nominees in cases when use of the proxy access mechanism could result in shareowner nominees accounting for one-half or more of the board.

- E.6. Should the procedure address situations in which, due to a staggered board, fewer director positions are up for election than the maximum permitted number of shareholder nominees? If so, how? Should the maximum number be based on the number of directors to be elected rather than to the overall board size?**

We generally believe that the maximum number of shareowner nominees for director that companies should be required to include in its proxy materials should be based on total board size, regardless of whether a company has a staggered board.

- E.7. Should any limitation on shareholder nominees take into account incumbent directors who were nominated outside of the Rule 14a-11 process, such as pursuant to an applicable state law provision, a company's governing documents, or a proxy contest? If so, should such directors be counted as "shareholder nominees" for purposes of determining the 25%?**

We generally believe that incumbent directors should only be counted as shareowner nominees if they have been nominated through the Rule 14a-11 process.

- E.8. Should any limitation on shareholder nominees take into account shareholder nominees for director that a company includes in its proxy materials other than pursuant to Rule 14a-11 (e.g., voluntarily)?**

We generally believe that any limitation on shareowner nominees should *not* take into account shareholder nominees for director that a company includes in its proxy materials other than pursuant to Rule 14a-11, as we agree that this would create the "potential risk of nominating shareholders or groups acting merely as a surrogate for the company or its management in order to block usage of the rule by another nominating shareholder or group."⁹¹

- E.9. Should Rule 14a-11 provide an exception for controlled companies or companies with a contractual obligation that permits a certain shareholder or group of shareholders to appoint a set number of directors? Should a nominating shareholder or group only be permitted to submit nominees for director based upon the number of director seats the nominating shareholder is entitled to vote on? For example, if a board consists of 10 directors and the company is contractually obligated to permit a certain shareholder or shareholders to appoint five directors to the board, should shareholders entitled to vote on the remaining five director slots be limited to submitting nominees based on a board size of five rather than 10, meaning that a nominating shareholder may submit one nominee for inclusion in the company's proxy materials?**

We generally believe that the maximum number of shareowner nominees for director that companies should be required to include in its proxy materials should be based on total board size, regardless of whether a company has a contractual obligation permitting a certain shareowners to appoint a set number of directors.

⁹¹ 74 Fed. Reg. at 29,042.

E.10. We have proposed a limitation that permits the nominating shareholder or group that first provides notice to the company to include its nominee or nominees in the company's proxy materials where there is more than one eligible nominating shareholder or group. Is this appropriate? If not, should there be different criteria for selecting the shareholder nominees (e.g., largest beneficial ownership, length of security ownership, random drawing, allocation among eligible nominating shareholders or groups, etc.)? Rather than using criteria such as that proposed, should companies have the ability to select among eligible nominating shareholders or groups? If so, what criteria should the company be required to use in doing so?

Please see our response to question A.6.

E.11. If the Commission adopts a "first-in" approach, should the first shareholder or group get to nominate up to the total number of nominees required to be included by the company or, where there is more than one nominating shareholder or group and more than one slot for nominees, should the slots be allocated among proposing shareholders according to, for example, the order in which the shareholder or group provided notice to the company?

Please see our response to question A.6.

E.12. Under the proposal, where the first nominating shareholder or group to deliver timely notice to the company does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the next nominating shareholder or group to deliver timely notice of intent to nominate a director pursuant to the rule would be included in the company's proxy materials, up to and including the total number of shareholder nominees required to be included by the company. Should the rule specify how to determine which of a second nominating shareholder's or group's nominees are to be selected where there are more nominees than available spots under the rule? Should Rule 14a-11 provide that only one nominating shareholder or group may have their nominee or nominees included in the company proxy materials, regardless of whether they nominate the maximum number allowed under the rule?

Please see our response to question A.6.

E.13. Would the "first-in" approach result in an undue advantage to the first shareholder or group to submit a nomination? Would such an approach result in a race to be the first in?

Please see our response to question A.6.

F.1. Are the proposed content requirements of the shareholder notice on Schedule 14N appropriate? Are there matters included in the notice that should be eliminated (e.g., should the nominating shareholder be required to provide disclosure of its

intention with regard to continued ownership of the shares after the election, as is proposed)?

We generally believe that the proposed contents of Schedule 14N are appropriate and achieve the Commission's goal of providing disclosures to shareholders that are comparable to other situations where a candidate is nominated by non-management parties. That said, we disagree with the requirement that the nominator must provide a statement of its "intent with respect to continued ownership after the election."⁹²

As a practical matter, the nominating shareowners may not know their intent at the time the Schedule 14N is filed. Indeed, depending on the outcome of the director election, the nominator may purchase more stock or sell some stock. We believe that the pre-filing holding period, coupled with the requirement to hold shares until the date of the meeting, should suffice to achieve the Commission's goal of limiting proxy access to longer-term shareholders.

F.2. Are there additional matters that should be included? For example, is there additional information that should be included with regard to the nominating shareholder or group or with regard to the shareholder nominee?

We generally do not believe that additional information should be required. The current proposal is superior to the Commission's 2007 proposals, which would have required significant disclosures of marginal utility to shareowners.⁹³ The current proposed rules provide significant information and should be workable from a nominator's perspective.

F.3. Are the required representations appropriate? Should there be additional representations (e.g., should the nominee be required to make a representation concerning their understanding of their duties under state law if elected and their ability to act in the best interest of the company and all shareholders)? Should any of the proposed representations be eliminated?

We generally believe that the required representations are appropriate and that additional representations are not needed. As a practical matter, nominating shareholders and candidates alike are likely to be advised by counsel, so more extensive disclosures are unlikely to add value.

F.4. Is five years a sufficient time period for information about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding? Should it instead be ten years?

We generally believe the five year period is appropriate, drawn as it is from similar requirements in Regulation S-K and Rule 14a-101.

⁹² *Id.* at 29,037.

⁹³ 2007 Letter, *supra* note 47, at 4 (Commenting that "[w]e simply do not believe that the Commission has provided an adequate basis justifying what would appear to be an extraordinary level of detailed disclosure resulting from the exercise of a fundamental shareowner right.").

- F.5. What should be the consequence of a nominating shareholder or group including materially false information or a materially false representation in the nominating shareholder's or group's notice on Schedule 14N to the company, whether before inclusion of a nominee in the company's proxy materials, after inclusion of a nominee in the company's proxy materials but before the election, or after a nominee has been included in the company's proxy materials and elected? Should it make a difference whether the false information or representation was provided knowingly? Should it make a difference whether the false information or representation was material?**

We generally believe the matter should be handled in the same way as materially false statements or omissions in a Schedule 14A or other soliciting material that is filed by an independent shareholder who is nominating candidates for the board. The situation may vary, depending on the timing and the nature of the violation, and different sanctions may be appropriate depending on different circumstances.

- F.6. What should be the consequence to the nominating shareholder or group of submitting the notice on Schedule 14N to the company after the deadline? What should be the consequence of filing the notice on Schedule 14N with the Commission after the deadline? Should a late submission to the company or late filing with the Commission render the nominating shareholder or group ineligible to have a nominee included in the company's proxy materials under Rule 14a-11 with respect to the upcoming meeting, as is currently proposed?**

We generally would not oppose giving the company discretion to exclude nominations that are submitted to a company after a properly disclosed deadline. That is the procedure followed for shareowner proposals under Rule 14a-8; we believe that it is understood by shareowners and companies alike and could work here.

- F.7. The proposed instructions to Rule 14a-11 address how to provide disclosure where the nominating shareholder is a "general or limited partnership, syndicate or other group." Is this sufficiently broad to address any nominating shareholders that may use the rule?**

We generally believe the proposed instructions to Rule 14a-11 are sufficiently broad to address any nominating shareowners that may use the rule.

- F.8. Should a company's advance notice provision govern the timing of the submission of shareholder nominations for directors? If not, should the Commission adopt a specific deadline instead? Should the Commission make no reference to advance notice provisions as they may apply to proxy solicitations and adopt a generally applicable federal standard? Would such an approach better enable consistent exercise by shareholders of their voting and nominating rights across public companies? If the Commission were to establish a federal standard, would 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting be appropriate? Should it be longer (e.g., 150 or 180**

calendar days before the date that the company mailed its proxy materials for the prior year’s annual meeting), or shorter (e.g., 90 calendar days before the date that the company mailed its proxy materials for the prior year’s annual meeting)?

We generally believe that the Commission should establish a uniform date, such as 120 days prior to the release of the preceding year’s proxy materials. This should provide enough time for the company to respond to any nomination, and it provides uniformity.

We generally see value in a uniform deadline, particularly in light of the recent wave of “advance notice bylaws” that purport to affect proposals under Rule 14a-8 as well as setting separate disclosure requirements and deadlines for independent solicitations not involving access to the company’s proxy. Although some advance notice bylaws are careful to make clear that these are two separate regimes, some bylaws are not as well drafted and impose requirements on Rule 14a-8 proposals that are at odds with the Rule, e.g., a requirement that a Rule 14a-8 proposal cannot be submitted before 150 days prior to the release of the prior year’s proxy materials.⁹⁴

We generally believe that the schedule for proxy access nominations should track the schedule for shareowner proposals. There would be advantages in keeping the nomination process moving on the same schedule as other matters that shareowners are advising the board they intend to bring before the meeting, and would like to have included in the company’s proxy materials.

F.9. In the absence of an advance notice provision, the nominating shareholder or group would be required to submit the notice to the company and file with the Commission no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year’s annual meeting. Is this deadline appropriate and workable? If not, what should be the deadline (e.g., 80, 90, 100, 150, or 180 calendar days before the date that the company mailed its proxy materials for the prior year’s annual meeting)?

Please see our response to question F.8.

F.10. Should there be a specified range of time in which a shareholder is permitted to submit a nominee (e.g., no earlier than 150 days before and no later than 120 days before the date the company mailed its proxy materials the previous year)? Should a different range be used (e.g., should the submission of nominations be limited to no earlier than 120 days and no later than 90 days; no earlier than 180 days and no later than 150 days; or no earlier than 180 days and no later than 120 days before the date the company mailed its proxy statement the previous year)? Does permitting submission of a nominee at any time prior to 120 days before the company mailed its proxy materials the previous year skew the process in favor of

⁹⁴ Cf. Skadden, *SEC Publishes Proposed Rules on Proxy Access 2* (June 16, 2009), <http://www.skadden.com/Index.cfm?contentID=51&itemID=1808> (Commenting that “[m]ost advance notice bylaws, however, set a nominations deadline that is much shorter [than the timetable under the proposed rules] and would not afford companies sufficient time to avail themselves of the new no-action process.”).

certain shareholders? If so, why? If not, why? If a different date range would be more workable, please tell us the range and why.

As noted in our response to question F.8., we generally believe that the deadlines should track those in Rule 14a-8. We note that the Commission is proposing a “first in standard” to determine which of any competing nominations would be incorporated into a proxy. As indicated in our response to question A.6., we do not support such a standard and would favor having the final rule give primacy to the nominating shareholder(s) who have the largest beneficial ownership in the company, as reported on Schedule 14N. Should the Commission decide to adopt the first-in standard as proposed, then we would not oppose putting a “front end” deadline around this process, say, with no nomination being eligible if it is received more than 30 days from the 120-day deadline in the draft rule.

- F.11. The proposed notice requirements address both regularly scheduled annual meetings and circumstances where a company may not have held an annual meeting in the prior year or has moved the date of the meeting more than 30 days from the prior year. Under these circumstances, what is the appropriate date by which a nominating shareholder must submit the notice to the company? Should the Commission adopt a specific deadline for non-regularly scheduled meetings, or rely on a “reasonable time” standard? If a “reasonable time” standard is adopted, should the company be required to file the Form 8-K announcing the deadline any minimum number of days in advance of the deadline? If so, how many days notice should the company provide and why? What deadline should apply when a company holds a special meeting in lieu of an annual meeting?**

We are uncertain whether there is a need for guidance more specific than the “reasonable time” standard proposed here.⁹⁵ It is not always possible for a company to predict several months in advance exactly when the event that prompted postponement of the meeting (*e.g.*, a financial restatement) will be resolved. Moreover, it may be in everyone’s interest for the company to schedule the meeting as soon as it can be scheduled. Under the circumstances, we see no need for a more specific regime than exists in other areas where shareowners intend to bring matters before a meeting that has been postponed.

- F.12. As proposed, an instruction to Form 8-K would specify that a company would be required to file a report pursuant to Item 5.07 within four business days of determining the anticipated meeting date if the company did not hold an annual meeting the previous year or if the annual meeting has been changed by more than 30 calendar days from the date of the previous year’s meeting. Is such an instruction necessary? Should the company be required to file the Item 5.07 Form 8-K in less than four business days (e.g., two business days) or more than four business days (e.g., seven business days, 10 business days)?**

Please see our response to question F.11.

⁹⁵ 74 Fed. Reg. at 29,037.

- F.13. Should a registered investment company be required to disclose on Form 8-K the date by which a shareholder or shareholder group must submit the notice to the company of its intent to require its nominees on the company's proxy card? Should this date also be required to be disclosed on the company's Web site, if it has one? Should registered investment companies instead be permitted to provide this disclosure in a different manner?**

Please see our response to question B.4.

- F.14. As proposed, a shareholder's or group's notice of intent to submit a nomination for director is required to be filed with the Commission on Schedule 14N. Is such a filing appropriate? Should additional or lesser information be filed with the Commission? Should a shareholder or group be required to send the notice to the company without filing the notice on Schedule 14N?**

Except as to the proposal discussed in our response to question F.1 that shareholders state their intent to hold past the meeting date, we generally believe that the Schedule 14N approach is sound.

- F.15. When should the notice on Schedule 14N be filed with the Commission? Is it sufficient to require the Schedule 14N to be filed at the time it is provided to the company? Should an abbreviated version of the Schedule 14N be filed sooner, before the nominating shareholder or group provides notice to the company, such as at the time a shareholder or group first decides to make a nomination, when the nominating shareholder first identifies a nominee for director, or some other time? Should it be filed later?**

We generally believe that filing the Schedule 14N at the same time as the notice to the company is the most appropriate time. To the extent that shareholders may be discussing possible candidates with management, the situation may be fluid prior to the time that the shareowner decides actually to nominate a candidate or candidates. We believe that there should be sufficient flexibility for preliminary processes to play themselves out, with disclosure to begin at the time that a notice of intent is formally provided to the company.

- F.16. The notice on Schedule 14N would be required to be amended promptly for any material change in the facts set forth in the originally-filed Schedule 14N. Should the nominating shareholder or group be required to amend the Schedule 14N for any material change in the facts? Why or why not?**

We generally do not oppose the proposal requiring an additional filing if there is a material change in the facts. Material facts may be of interest to shareholders generally, and additional disclosure is therefore appropriate.

- F.17. The nominating shareholder or group would be required to file a final amendment to the Schedule disclosing, within 10 days of the final results of the election being announced by the company, the nominating shareholder's or group's intention with**

regard to continued ownership of their shares. Should the nominating shareholder or group be required to amend the Schedule 14N to disclose their intent regarding continued ownership? Why or why not?

We generally believe that such a “final amendment” is unnecessary and that the need for any additional disclosures can be satisfied by requiring filing of any material changes. As noted in our response to question F.1, we disagree with the proposal to require statements regarding continued ownership past the election date.

F.18. In situations where a nominating shareholder or group beneficially owns more than 5% of the company’s securities, should we permit a combined Schedule 13G/Schedule 14N filing? Should we permit a combined Schedule 13D/Schedule 14N filing? Why or why not?

We generally have no preference as to whether there should be separate or combined filings.

F.19. Should a nominating shareholder or group be required to file Schedule 14N on EDGAR, as proposed?

We generally believe a nominating shareowner or group should be required to file Schedule 14N on EDGAR, as proposed.

F.20. Should the notice be required to include a description of the following items that occurred during the 12 months prior to the formation of any plans or proposals with respect to the nomination, or during the pendency of any nomination: (i) any material transaction of the shareholder with the company or any of its affiliates, and (ii) any discussion regarding the nomination between the shareholder and a proxy advisory firm?

We generally have no objection to requiring disclosure of the first item. We would oppose inclusion of information about discussions with proxy advisory firms. Disclosures of such information are not required in other contexts, and we see no reason for singling out shareowner-nominated candidates as an area where additional disclosure is needed. Moreover, any such information would be of little value to shareowners generally. Proxy advisory firms tend not to make their recommendations to clients until shortly before the meeting. Moreover, any discussions that a nominating shareowner may have with a proxy advisory firm are unlikely to convey material information about the candidate that would not be made available to shareowners in the proxy. Thus, a disclosure requirement regarding proxy advisory firms would likely yield little information other than the fact that the firm was briefed about a given candidate’s background and perceived strengths.

F.21. Should the nominating shareholder or group and/or nominee be required to disclose any holdings of more than 5% of the securities of any competitor of the company (i.e., any enterprise with the same SIC code)?

We generally would not oppose requiring the nominating shareowner or group and/or nominee to disclose any holdings of more than 5% of the securities of any competitor of the company.

F.22. Should the nominating shareholder or group and/or nominee be required to disclose any meetings or contacts, including direct or indirect communication by the shareholder, with the management or directors of the company that occurred during the 12-month period prior to the formation of any plans or proposals with respect to a nomination?

We generally do not believe the nominating shareowner or group and/or nominee should be required to disclose any meetings or contracts, including direct or indirect communication by the shareowner, with the management or directors of the company. There are advantages in terms of companies and shareowners being able to engage in “quiet diplomacy” prior to any decision by a shareowner to nominate a candidate or slate and that activity should not be discouraged by the proposed rule.

G.1. Under proposed Rule 14a-11(a) a company would not be required to include a shareholder nominee where: (1) applicable state law or the company’s governing documents prohibit the company’s shareholders from nominating a candidate for director; (2) the nominee’s candidacy or, if elected, board membership, would violate controlling state law, federal law or rules of a national securities exchange or national securities association; (3) the nominating shareholder or group does not meet the rule’s eligibility requirements; (4) the nominating shareholder’s or group’s notice is deficient, (5) any representation in the nominating shareholder’s or group’s notice is false in any material respect, or (6) the nominee is not required to be included in the company’s proxy materials due to the proposed limitation on the number of nominees required to be included. Proposed Rule 14a-11(f)(1) provides that the company shall determine whether any of these events have occurred. Will companies be able to make this determination? Why or why not?

We generally believe that companies will be able to determine the qualifications of candidates, as well as the nominator’s compliance with technical filing requirements. There is not a lot of law that disqualifies people from serving as corporate directors, so to some extent concerns about state law barriers is a red herring. The objective independence standard for candidates provides a benchmark that both companies and shareowners would likely find useful.

It should be noted that, as a practical matter, when this release is adopted in final form, shareowners are likely to devote serious efforts to assuring that qualified candidates are nominated. Even if a candidate’s name is not required to be printed in the company’s proxy materials, shareowners generally would seek to put forward strong candidates whose credentials are not in doubt. Thus, we believe that any concerns along those lines are likely overstated.

G.2. As proposed, neither the composition of a nominating shareholder group nor a shareholder nominee could be changed as a means to correct a deficiency identified

in the company's notice to the nominating shareholder or group. Should we permit the nominating shareholder group to change its composition to correct an identified deficiency, such as a failure of the group to meet the requisite ownership threshold? Should the nominating shareholder or group be permitted to submit a replacement shareholder nominee in the event that it is determined that a nominee does not meet the eligibility criteria?

We generally believe the Commission should permit the nominating shareowner group to change its composition to correct an identified deficiency, such as a failure of the group to meet the requisite ownership threshold.

- G.3. As proposed, inclusion of a shareholder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a shareholder nominee would not be deemed a "solicitation in opposition." Is this appropriate or should the inclusion of a nominee instead be viewed as a solicitation in opposition that would require a company to file its proxy statement in preliminary form? Should we view inclusion of a shareholder nominee as a solicitation in opposition for other purposes (e.g., expanded disclosure obligations)?**

We generally agree with the proposed rule that the inclusion of a shareholder nominee in a company's proxy materials would not be deemed a "solicitation in opposition."⁹⁶

- G.4. Under the proposal, companies would not be able to provide shareholders the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide that option to shareholders? Are any other revisions to the form of proxy appropriate? Would a single ballot or "universal ballot" that includes both company nominees and shareholder nominees be confusing? Would a universal ballot result in logistical difficulties? If so, please specify.**

We generally agree with the proposal not to allow voting for all company nominees as a bloc. The current option of "elect all directors" may be warranted as a convenience in uncontested director elections. Providing that option when there are more candidates than board seats tilts the scales unduly in favor of management. It should not be difficult for a shareowner who wants to support management to determine who the management candidates are.

We generally disagree that a ballot listing all nominees would be unduly confusing. A legend such as "There are six candidates. Vote for no more than five." or the like should address those concerns.

- G.5. Is it appropriate to require that the company include in its proxy statement a supporting statement by the nominating shareholder or group? If so, should this requirement be limited to instances where the company wishes to make a statement**

⁹⁶ *Id.* at 29,049 n.215.

opposing the nominating shareholder’s nominee or nominees or supporting company nominees? Is it appropriate to limit the nominating shareholder’s or group’s supporting statement to 500 words? If not, what limit, if any, is more appropriate (e.g., 250, 750, or 1000 words)? Should the limit be 500 words per nominee, or some other number (e.g., 250, 750, or 1000 words)? Should the company’s supporting statement be similarly limited? Why or why not?

We generally believe that the nominator should be allowed to make the case for the independent candidate and that a 500-word statement is an appropriate baseline.⁹⁷ As a practical matter, in a serious solicitation for an independent nominee, the nominating shareowner is likely to circulate other solicitation materials that explain in greater detail why the nominator believes that shareowners should support an independent candidate. To the extent that a company intends to devote more than 500 words to supporting its own candidates or opposing the independent candidates, the company should provide notice to the nominating shareowners and an opportunity to amend the latter’s statement to be equal in length.⁹⁸

G.6. Should the rule explicitly state that the nominating shareholder’s or group’s supporting statement may contain statements opposing the company’s nominees? Would it be appropriate to require a company to include a nominating shareholder’s or group’s statement of opposition in its proxy materials?

We generally believe that the rule should explicitly state that the nominating shareowner’s or group’s supporting statement may contain statements opposing the company’s nominees. In addition, we believe those opposing statements can be included in the nominator’s 500-word or more statement.

G.7. Is the 14-day time period for the company to respond to a nominating shareholder’s notice or for the nominating shareholder to respond to a company’s notice of deficiency sufficient? Should the time period be longer (e.g., 20 days, 25 days, 30 days) or shorter (e.g., 10 days, 7 days, 5 days)? Should the rule explicitly set out the effect of a company providing the notice late (e.g., the company may not exclude the nominee) or of a shareholder responding to this notice late (e.g., the nominee may be excluded)?

We generally believe fourteen days is appropriate in both instances. It would probably be useful to spell out the effect of a late notice or response, although that could probably be addressed in the final release and not necessarily in the text of the rule.

G.8. Is the 80-day requirement for submission of the company’s notice to the Commission sufficient? If not, should the requirement be increased (e.g., 90 days, 100 days, 120 days, or more) or decreased (e.g., 75 days, 60 days, or less)? Is the

⁹⁷ Cf. 2003 Letter, *supra* note 38, at app. (Commenting that “[a]t a minimum, a supporting statement of at least 500 words should be permitted.”).

⁹⁸ *Id.* (Commenting that “[i]f companies devote more than 500 words to supporting their candidates or opposing shareowners’ candidates, shareowners should be given equal space.”).

proposed provision under which the staff could permit the company to make its submission later than 80 days before filing its definitive proxy statement where the company demonstrates good cause appropriate? If not, why not? Should the rule more explicitly discuss the effect of such a late filing?

We generally believe the eighty days requirement for submission of the company's notice to the Commission is sufficient.

G.9. Is the 14-day time period for the nominating shareholder to respond to the receipt of a company's notice to the Commission of its intent to exclude the nominee sufficient? Should it be longer (e.g., 20 days, 25 days, 30 days) or shorter (e.g., 10 days, 7 days, 5 days)? Should the rule explicitly set out the effect of a shareholder responding to the company's notice late (e.g., the nominee may be excluded)?

We generally believe the fourteen day time period for the nominating shareowner to respond should be sufficient. A statement as to the consequences of failing to respond would be useful, either in the rule or explanatory statement.

G.10. Is the requirement that the company notify the nominating shareholder or group of whether it will include or exclude the nominating shareholder's or group's nominee or nominees no later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the Commission appropriate and workable? If not, what should the deadline be (e.g., 40 calendar days before filing definitive proxy materials, 35 days before filing definitive proxy materials, 25 calendar days before filing definitive proxy materials, 20 calendar days before filing definitive proxy materials)? Should the rule explicitly set out the effect of a company sending this notice late?

We generally believe notification thirty calendar days before the company files its definitive proxy statement and form of proxy with the Commission should be sufficient if the company intends to publish the materials as submitted. If the company has a problem with the submission or wants to exclude the proposal, more time would be necessary.

G.11. Would the timing requirements overall allow a company to comply with the requirements of e-proxy?

We generally do not have significant experience with e-proxy preparation, but are aware of no reason why the proposal's timing requirements would pose a problem.

G.12. Do the proposed timing requirements, in the aggregate, allow sufficient time for the informal staff review process? How far in advance of filing definitive proxy materials do companies typically begin printing those materials? If the proposed timing requirements do not allow sufficient time for the informal staff review process, please tell us specifically which timing requirements pose a problem and suggest a specific alternative time that would be sufficient.

We generally believe that to the extent the rules proposed track Rule 14a-8, the process should be workable.

G.13. What should happen if one of the deadlines specified in the proposed process in Rule 14a-11(f) falls on a Saturday, Sunday, or federal holiday? Should the deadline be counted from the preceding or succeeding federal work day?

We generally believe the deadline should go to the next working day if one of the deadlines falls on a Saturday, Sunday, or federal holiday.

G.14. Should the informal staff review process be the same for reporting companies (other than registered investment companies), registered investment companies, and business development companies? Should there be unique procedures for different types of entities? If so, what is unique to a particular type of entity that would require a unique process?

Please see our response to question B.4.

G.15. Should there be a method for a company to obtain follow-up information after a nominating shareholder or group submits an initial response to the company's notice of determination? If so, should that follow-up method have similar time frames as those related to the initial request and response? What adjustments to timing might be required for the nominating shareholder or group to respond to any such follow-up request?

We are uncertain whether additional rules are required, and generally believe the matter can likely be handled informally between the nominating shareowner and the company. If the company believes that there is a problem warranting exclusion of the candidate or materials, the nominating shareowner has an incentive to work with the company to address the issue.

G.16. The proposed requirement for a legal opinion regarding state law is modeled on the requirement in Rule 14a-8. Is such a requirement necessary and appropriate in the context of proposed Rule 14a-11? Should it be changed in any way (e.g., should it be revised to require a legal opinion regarding foreign law for those instances where there may be a conflict with a company's country of incorporation where the company is organized in a non-U.S. jurisdiction but does not meet the definition of foreign private issuer)?

We generally do not oppose requiring the company to submit a legal opinion on state law issues, though we oppose imposition of a similar requirement on the nominating shareowner. The matter could be treated in the same manner that the Commission staff treats state law objections under Rule 14a-8, with the company having the burden of proof.

As far as foreign law is concerned, we note that foreign law is treated as a question of fact under the Federal Rules of Civil Procedure, so the submission of a legal opinion from foreign counsel may or may not occupy the same position as domestic legal opinions.

G.17. What process would be appropriate for addressing disputes concerning a company’s determination? Is the proposed staff review process an appropriate means to address disputes concerning the company’s determination? If not, by what other means should a company’s determination be subject to review? Exclusively by the courts? Are there other processes we should consider?

We generally believe an SEC staff mechanism for addressing disputes concerning a company’s determination is appropriate.⁹⁹ We continue to believe that “[w]ithout such a mechanism, shareowners will be forced to undertake expensive litigation that would effectively render the access mechanism useless.”¹⁰⁰

More specifically, we would support the Commission following the no-action process used as to Rule 14a-8, with the possibility that currently exists as to company determination letters, namely that a nominating shareowner could treat the company’s determination as a violation of federal securities law and pursue litigation against the company to compel inclusion of the materials in the company-prepared proxy.

G.18. In the absence of a staff review process, what would be the potential litigation cost associated with the resolution of disputes concerning company determinations? Would shareholder meetings be delayed due to such litigation or threat of litigation?

Experience with the shareowner proposal process – and the absence of litigation regarding specific proposals – suggests that the no-action process (described in our response to question G.17) would be respected by proponents and companies alike. The absence of such a process would likely invite litigation in many instances, with the uncertainty and cost that that creates.

G.19. Are there certain types of company determinations that should or should not be subject to the staff review process (e.g., whether a nominating shareholder or group meets the required ownership threshold)? Please provide specific examples in your response.

We generally do not favor excluding various types of determinations from staff review.

G.20. How should we address the situation where a nominating shareholder qualifies,

⁹⁹ *Id.* (Commenting that “[t]he final rule should include an SEC-handled mechanism to mediate shareowner concerns that companies are overstepping their rights to request additional information or to review shareowner objections of decisions to exclude shareowner candidates from management’s proxy card.”).

¹⁰⁰ *Id.*

provides its notice, and submits all of the nominees a company is required to include, then becomes ineligible under the rule? Under what circumstances should a second shareholder or group be able to nominate directors? If the second nominating shareholder or group provided a notice before the first shareholder became ineligible? Should it matter whether a company had notified the second nominating shareholder or group that it intended to exclude their nominee or nominees?

The failure of a nominating shareowner to maintain eligibility during the pre-meeting period would presumably require disclosure on a Schedule 14N. While we generally believe that the nominating shareowner should have a short window within which to add a shareowner who would meet all eligibility requirements, a lapse that cannot be cured in that fashion should be remedied by going to the “second” candidate(s). If the company believes that it has an objection to the second candidate(s) as well, it can issue what would effectively be a conditional determination letter and seek no-action review in the same manner that companies seek no-action review of competing shareowner proposals.

H.1. Should the Commission provide a new exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group pursuant to Rule 14a-11? If so, is the proposed exemption appropriate? If not, why not? What specific changes to the exemption would be appropriate? Should the rule require that a shareholder meet any of the requirements of Rule 14a-11 to rely on the exemption (e.g., have held the securities they seek to aggregate for the required holding period)? Is it appropriate to require filing with the Commission on the date of first use, as proposed?

We generally believe that solicitations should be exempt with no filing requirement prior to giving the company notice and filing a Schedule 14N. (This would include an exemption during this period from the obligation to file a “notice of exempt solicitation” under Rule 14a-6(g), as some potential nominating shareholders may meet the \$5 million threshold). There should be a suitable opportunity for “testing the waters.” Solicitations to form a nominating group will likely involve experienced investors as to whom there is less need for disclosure of the contents of a solicitation, the contents of which can be investigated during a shareowner’s due diligence consideration of whether to join the group. Also, given the fact that the contents will likely be made public later on (e.g., in the supporting statement, in a separate “Dear shareholder” solicitation), there is not the same need for disclosure at an earlier stage.

H.2. Should the Commission expand the proposed exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group pursuant to Rule 14a-11 to apply also to oral communications? If so, what amendments to the proposed exemption would be necessary?

We generally believe that oral communications should be exempt, as they are in other contexts. Oral communications are difficult to monitor and regulate, and there are sufficient disclosure requirements otherwise.

H.3. What requirements should apply to soliciting activities conducted by a nominating shareholder or group? In particular, what filing requirements and specific parameters should apply to any such solicitations? For example, we have proposed a limited content exemption for certain solicitations by shareholders seeking to form a nominating shareholder group. Is this content-based limitation appropriate? Should shareholders, for example, also be permitted to explain their reasons for forming a nominating shareholder group? Should shareholders be permitted to identify any potential nominee, as proposed, and why that person was chosen? If not, what, if any, limitations would be more appropriate? For example, should an exemption for certain solicitations by shareholders seeking to form a nominating shareholder group be limited to no more than a specified number of shareholders, but not limited in content (e.g., fewer than 10 shareholders, 10 shareholders, 20 shareholders, 30 shareholders, 40 shareholders, more than 40 shareholders)?

As indicated in our response to questions H.1. and H.2., we generally believe that all pre-filing communications should be exempt. To require disclosure otherwise would be logistically difficult and require shareholders contemplating a nomination to operate in a fishbowl before a determination is made as to whether a nomination is feasible. There are sufficient safeguards elsewhere in the rule if and when a nominating group is formed.

H.4. Should communications made to form a group be permitted to identify a possible or proposed nominee or nominees, as proposed?

For reasons stated in response to question H.3., we generally believe communications made to form a group should be permitted to identify a possible or proposed nominee or nominees.

H.5. Is the requirement that the nominating shareholder or group provide a description of his or her direct or indirect interests, by security holdings or otherwise, sufficiently clear? Do we need to provide additional guidance as to what interests would be required to be disclosed?

We generally believe that the proposed requirement that the nominating shareholder group provide a description of his or her direct or indirect interests is sufficiently clear.

H.6. Should all written soliciting materials be filed with the Commission on the date of first use? If not, how much later should they be filed (e.g., two business days after first use; four business days after first use, some other date)? Should the materials be filed before the date of first use?

We generally do not oppose requiring a filing of all written soliciting materials with the Commission on the date of first use.

H.7. Should we provide a similar exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group other than in

connection with Rule 14a-11 (e.g., in connection with a nomination under applicable state law provisions or a company's governing documents)?

We generally believe the Commission should provide a similar exemption for soliciting activities undertaken by shareowners seeking to form a nominating shareowner group other than in connection with Rule 14a-11, for reasons stated in response to question H.3.

H.8. Should solicitations by or on behalf of a nominating shareholder or group in support of a nominee included in the company's proxy statement and form of proxy pursuant to Rule 14a-11 be exempt? Why or why not?

We generally are comfortable with requiring disclosure of such solicitations, which shareholders are likely to want to disseminate widely in any event.

H.9. Should the exemption be conditioned on the soliciting materials including a legend about the shareholder's nominee being included in company proxy materials and a statement about where shareholders can find the proxy statement, soliciting material, and other relevant documents, as proposed? Should any other conditions be included in the exemption?

We generally do not oppose the inclusion of a legend on the soliciting materials as a condition of the exemption as proposed.

H.10. Should a nominating shareholder or group be required to file any soliciting material published, sent or given to shareholders in accordance with the exemption no later than the date the material is first published, sent or given to shareholders, as proposed?

We generally are comfortable with the proposal requiring that a nominating shareowner or group be required to file any soliciting material published, sent or given to shareowners in accordance with the exemption no later than the date the material is first published.

H.11. Should solicitations by the nominating shareholder or group be limited or prohibited? If so, why?

We generally believe there should be no limitation. Solicitations by nominating shareowners after notice to the company should be treated in the same manner as disclosures required of companies opposing a shareowner proposal.

H.12. Should we provide a similar exemption for soliciting activities undertaken by a nominating shareholder or group in support of their nominee or nominees, where those nominees are included in a company's proxy materials pursuant to applicable state law provisions or a company's governing documents?

We generally believe the Commission should provide a similar exemption for solicitation

activities undertaken by a nominating shareowner or group in support of their nominee or nominees, where those nominees are included in a company's proxy materials pursuant to applicable state law provisions or a company's governing documents.

I.1. Should the Commission amend Rule 14a-8(i)(8), as proposed, to allow proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a-11? Should the rule instead require such proposals to be included only in particular circumstances? For example, should inclusion of such proposals be required only when a company already has a provision in place regarding the inclusion of shareholder director nominees, or disclosure about those nominees, in company proxy materials?

We generally favor the Commission's proposal to amend the (i)(8) exclusion as proposed. The reasons for our view are consistent with the following reasons set forth in our comment letter in opposition to the 2007 Commission amendment that barred proxy access proposals:

The Proposed Release includes language that would reinterpret Rule 14a-8(i)(8) under the 1934 Act more broadly to permit exclusion of any shareowner resolutions seeking access to a company's proxy materials to nominate or elect a company's directors. The SEC argues that this broader reinterpretation is 'consistent with' the Commission's longstanding view of the purpose of Rule 14a-8(i).

The Council's analysis of Rule 14a-8(i)(8), contained in our *amicus* brief in support of Plaintiff-Appellant American Federation of State, County & Municipal Employees Pension Plan before the United States Court of Appeals for the Second Circuit, demonstrates that the SEC's current argument might have merit if one only considers how the Commission has interpreted Rule 14a-8(i)(8) since 1990. If, however, one also considers the SEC's interpretation of Rule 14a-8(i)(8) from its initial published interpretation (in 1976) to when it began applying a different interpretation (in 1990), the Commission's argument becomes unconvincing.

It is disappointing that the Commission devotes over two dozen paragraphs of the Proposed Release to constructing a questionable basis for supporting a broader interpretation of Rule 14a-8(i)(8). It is even more troubling when one considers that (1) the broader interpretation, if adopted, would likely shut the door on shareowners' ability to submit binding or advisory resolutions seeking access to the proxy; and (2) shareowner support for meaningful proxy access is strong and continues to grow.¹⁰¹

¹⁰¹ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Nancy M. Morris, Secretary, Securities and Exchange Commission 3-4 (Aug. 24, 2007), <http://www.cii.org/UserFiles/file/resource%20center/key%20governance%20issues/proxy%20access/August%2024>.

The Commission's 2007 amendment was adopted as a stopgap measure until a full proxy access rule was adopted, and we generally believe the time has come to repeal that limitation. We further believe that shareowners should be permitted to submit non-binding proposals or mandatory bylaw amendments supporting a stronger proxy access mechanism than what is offered by Rule 14a-11. Nevertheless, as discussed in our response to question A.10., we believe changes to the shareowner proposal rule alone would not be sufficient to remove the impediments that prevent shareowners from effectively exercising their rights to nominate and to elect directors.

- I.2. Should the Commission amend Rule 14a-8(i)(8) to allow proposals that would amend, or that request an amendment to, a company's governing documents to provide for or prohibit inclusion of shareholder nominees for director in company proxy materials? Should such an amendment operate separately from proposed Rule 14a-11? Should such an amendment be adopted regardless of whether proposed Rule 14a-11 is adopted? If so, under what circumstances should such proposals be permitted? For example, should shareholder proposals be included where they propose or request amendments to provisions in the company's governing documents to address the inclusion of shareholder nominees for director in the company's proxy materials so long as such amendments are not prohibited under state law? Should such proposals instead be included only if the law of the company's state of incorporation explicitly authorizes a company to have a provision in its governing documents that permits the inclusion of shareholder nominees in the company's proxy materials? Should such proposals instead be limited under Rule 14a-8 to instances when a company already has a provision in its governing documents that addresses the inclusion of shareholder nominees in the company's proxy materials?**

As indicated in our response to question A.9., we generally believe that the Commission's proposed amendment to Rule 14a-8(i)(8) is a critical supplement to the proposed Rule 14a-11, which would set a uniform baseline for proxy access nominations.

- I.3. Should companies be required to include non-binding proposals regarding procedures to include shareholder nominees for director in company proxy materials, as proposed? Should the requirements instead be limited to binding proposals?**

We generally believe that shareowners should have the flexibility to offer both binding and non-binding proposals.¹⁰² To the extent that state law allows shareholders to propose bylaws, we see no reason why the (i)(8) exclusion should be construed to limit the ability of shareowners to have such bylaw proposals included in the company-prepared proxy.

As for non-binding proposals, the Commission has recognized, and Council members

[%202007%20comment%20letter%20on%20file%20no_%20S7-16-07%20and%20S7-17-07%20_final_.pdf](#).(footnotes omitted).

¹⁰² Cf. 2007 Letter, *supra* note 47, att. at 7 (Commenting that "all shareowner resolutions, whether binding or precatory, should continue to be uniformly regulated under Rule 14a-8.").

have experienced, for a number of decades that including such proposals in the company-prepared proxy can result in an important dialogue between shareowners and management.¹⁰³ We see reason to limit that dialogue. As indicated in our response to question A.9., we generally believe shareowners should be permitted to submit non-binding proposals or mandatory bylaw amendments supporting a stronger proxy access mechanism than what is offered by Rule 14a-11.

I.4. Should proposed Rule 14a-8(i)(8) operate independently, even if proposed Rule 14a-11 were not adopted or not in effect? Why or why not? Are there changes or additions to Rule 14a-8(i)(8) as proposed that can or should be made so that it would be better suited or able to operate independently? Please give specific recommendations.

As indicated in our response to question A.9., we generally believe Rule 14a-8(i)(8) should be viewed as a critical supplement to proposed Rule 14a-11. That said, we believe that the Commission should adopt the amendment to the (i)(8) exclusion even if the proxy access rule is not ultimately adopted.

As described in our response to question I.1, the Commission staff has taken inconsistent positions over the years with respect to the permissibility of proposals relating to a proxy access regime. If there is to be no uniform national regulation, then it is important to permit shareowners to be able to have the type of dialogue with individual companies that the proposed amendment would permit.

It is important to note that proxy access is a subject of considerable interest to shareowners. In the three annual meetings conducted in 2007 where proxy access proposals were on the proxy, some forty percent of the voting shares were cast in favor of such proposals at the three companies involved. There is plainly an interest in companies adopting such a regime even if there were to be no Commission rule requiring such a result. We believe that proposed Rule 14a-8(i)(8) would clarify that such proposals are now permissible.

I.5. Is it sufficiently clear that shareholders would have the ability under proposed Rule 14a-8(i)(8) to propose nomination procedures that are different from proposed Rule 14a-11 provided that such procedures would serve as additional methods of accessing the proxy and would not preclude a shareholder or group or shareholders who satisfied the Rule 14a-11 requirements from using the Rule 14a-11 method? If not, what clarification should be made?

We generally believe that the rule is sufficiently clear as proposed. To the extent that the Commission may conclude otherwise, it would be appropriate to include suitable explanatory language in the statement accompanying a final rule.

I.6. As proposed, a shareholder proposal under Rule 14a-8(i)(8) would supplement

¹⁰³ See *id.* att. at 8 (Commenting that it “has been the experience of Council members, . . . that non-binding proposals tend to lead to more meaningful dialogue with companies.”).

proposed Rule 14a-11, not replace it. Should shareholders instead be permitted under Rule 14a-8(i)(8) to propose governing document amendments that would conflict with proposed Rule 14a-11? Please explain how and why. Are there different limitations on such proposals that we should consider? If so, what are they?

We generally believe it is important that a proxy access rule set a baseline for proposed nominations that uniformly applies to all companies. We also believe that the current proposal appropriately permits shareowners to recommend less stringent eligibility standards through shareowner proposals, e.g., a shorter holding period or a smaller holding. This is consistent with governance practices in other areas.

For example, publicly traded companies may be required to have at least a majority of their boards of directors consist of independent directors as defined by exchange listing standards. Rule 14a-8 currently permits shareowners to recommend that a higher percentage of the board be independent or that a more stringent standard of independence be adopted. In those situations there is a generally applicable standard (with enumerated exceptions, such as for controlled companies), but those standards are accepted as a baseline.

I.7. What would be the costs to companies if Rule 14a-8(i)(8) were amended as proposed?

We generally anticipate that the costs would be negligible, confined essentially to any additional costs of printing and distributing the proposal as part of the company-prepared proxy.

I.8. Rule 14a-8 currently requires that a shareholder proponent have held continuously at least \$2,000 in market value or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year as of the date of submission of the proposal. Are these thresholds appropriate? Should the minimum ownership threshold be higher than \$2,000 in market value of the company's securities entitled to be voted on the proposal? Should the minimum ownership threshold be periodically adjusted for inflation? Should these eligibility determinations be made on the date of submission of the proposal, as proposed? If not, what date should be used?

We generally believe that there is no need to adjust the one percent limitation for shareholder proposals, which rarely comes into play. As for the \$2,000 requirement, the dollar amount has been adjusted only once (in 1998) since an ownership limitation was added twenty-five years ago. We believe that the current system works well and provides clear and easy-to-apply standards. To the extent that the Commission may believe that an adjustment is warranted, we believe that the Commission should do so on a spot basis, rather than with automatic periodic adjustments, which are less easy to administer. We generally believe the proposed submission date is also workable.

- I.9. Are there alternative thresholds that would be more appropriate for purposes of submitting a proposal under Rule 14a-8(i)(8) (e.g., 1%, 2%, 3%, 4%, or 5% of the company’s securities)? If so, please explain.**

Please see our response to question I.8.

- I.10. We are not proposing any requirements to disclose information about a shareholder proponent who submits a proposal that seeks to establish a procedure for nominating one or more directors. Should the rule require disclosure about a shareholder proponent who submits a proposal that relates to procedures for nominating directors but does not nominate a director? If so, what disclosures would be appropriate? The disclosures required in a contested election? Disclosure about the proponent’s motives and interactions with the company leading up to the proposal? With respect to requiring disclosure from shareholder proponents, should our rules make a distinction between a proposal relating to a procedure for nominating directors and other proposals on other unrelated subjects?**

We generally do not see a reason to require a separate disclosure regime for shareowners who submit a proxy access proposal that would be any different from the regime affecting all other types of shareowner proposals. Such a requirement would needlessly complicate the shareowner proposal process and unreasonably single out these types of proposals from all other proposals under Rule 14a-8. Questions about “motive” and the like are not easily susceptible of proof, and requiring such disclosures – which might be disputed as between the company and the shareowner – would needlessly complicate the no-action process and require the staff to delve into issues that hitherto the staff has avoided in the context of the (i)(4) personal grievance exclusion. We note too that the company will have ample opportunity (unconstrained by any 500-word limitation of the sort imposed on the shareowner) to provide a full explanation of why it believes that a proposal should not be adopted as part of the company-prepared proxy.

- I.11. Should disclosure consistent with that required in an election contest as defined in Rule 14a-12 be required for shareholder nominations pursuant to applicable state law provisions or a company’s governing documents, as proposed? Why or why not? What additional disclosures should be required, if any? Which of the proposed disclosure requirements, if any, should be deleted or revised?**

We generally believe that there should be uniform disclosure requirements in all situations, whether a candidate is nominated under a Commission rule or state law. Disclosure is a major purpose of Section 14 of the Exchange Act, and it is an area where the Commission’s rules should be consistent. If state law or governing documents require less information than a federal rule, then a company’s shareowners may be deprived of useful information in deciding whether or how to give a proxy. If state law or governing documents require more information than a federal rule, the result may make it unduly burdensome or difficult to nominate candidates.

- I.12. As proposed, the disclosures required for a nomination pursuant to an applicable**

state law provision or a company's governing documents do not include all of the disclosures that would be required for a Rule 14a-11 nomination. Would any of the additional disclosures required under Rule 14a-11 be appropriate with regard to a nomination under an applicable state law provision or a company's governing documents? If so, which ones in particular? Should a nominating shareholder or group submitting a nomination pursuant to an applicable state law provision or a company's governing documents be required to provide a statement regarding the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting? Should the rules require a statement regarding the nominating shareholder's or group's intent with respect to continued ownership of the shares after the election?

Please see our response to question I.10.

- I.13. Should Rule 14a-8(i)(8) be amended to codify the prior staff interpretations of the election exclusion, as proposed? Why or why not? Does the proposed new language best describe the category of proposals that companies should be permitted to exclude? Are there other examples or categories or proposals that should be included in the revised rule (that do not restrict the ability of shareholders to propose nomination procedures)?**

We generally support the proposed new language, although we note that proposed Section 14a-8(i)(8)(ii) may conflict with state laws allowing directors to remove directors from office prior to the expiration of their terms. For example, under Section 141(k) of the Delaware General Corporation Law, directors may be removed without cause at any point during their tenure with exceptions for companies with cumulative voting and for a prohibition on removal contained in the charter of companies with a classified board. Thus, Delaware state law treats the election of directors (under section 141(b)) as being analytically distinct from the removal of directors, yet the (i)(8) exclusion has been interpreted to prohibit proposals removing a director, as the draft rule contemplates here.

As a practical matter, removal proposals are unlikely to be filed often at companies with annual elections of all directors, particularly if the company has a "majority vote" regime as well. However, for companies with classified boards, there may be valid reasons for a shareholder to file a removal proposal before a director's three-year term is up. To deal with this issue, the Commission should add language to proposed Section 14a-8(i)(8)(ii) to state, "unless authorized by state law."

- I.14. Is the proposed new language of Rule 14a-8(i)(8) sufficiently clear? In particular, would the proposed language "or otherwise could affect the outcome of the upcoming election of directors," achieve its goal? Would there be unintended consequences of revising the language as proposed?**

We generally believe that the proposed new language of Rule 14a-8(i)(8) is sufficiently clear.

J.1. The proposal would provide that a shareholder or shareholder group would not, solely by virtue of nominating one or more directors under proposed Rule 14a-11, soliciting on behalf of that nominee or nominees, or having that nominee or nominees elected, lose their eligibility to file as a passive or qualified institutional investor. This provision would then permit those shareholders or groups to report their ownership on Schedule 13G, rather than Schedule 13D. Is this approach appropriate? Should other conditions be required to be satisfied? If so, what other conditions? For example, should a nominating shareholder or group cease to qualify as a passive or qualified institutional investor where the nominee is the nominating shareholder or a member of the group, a member of the immediate family of the nominating shareholder or any member of the group, an employee of the nominating shareholder or any member of the group, or is in any way controlled by the nominating shareholder or any member of the group?

We generally believe that the proposed approach is warranted. The heart of the proposed rule involves efforts by shareowners to affect the governance of a portfolio company so as to enhance the value of the investment, but without efforts to alter control. Under the circumstances, it makes sense to continue treating the investor as eligible to report ownership on Schedule 13G, not Schedule 13D.

J.2. Should nominating shareholders or groups be required to comply with the additional Schedule 13D filing and disclosure requirements under the Exchange Act beneficial ownership reporting standards?

Please see our response to question J.1. If a nominating shareowner is eligible for filing a Schedule 13G, we generally believe that this requirement should continue.

J.3. Should we provide a similar provision for nominating shareholders or groups submitting a nomination pursuant to an applicable state law provision or a company's governing documents? Why or why not?

Should a nomination come forward under state law or a company's governing documents, we generally believe that the Schedule 13G requirements should be the same for any such nominating shareowners.

K.1. Would it be a disincentive to using proposed Rule 14a-11 if shareholders forming a group to nominate a director could become subject to Section 16 once the group's ownership exceeds 10% of the company's equity securities? Why or why not?

We generally support the approach taken under the proposed rule and would not favor an exclusion for a ten percent holder. As a practical matter, Council members who are likely to submit nominations tend to have relatively small holdings (generally under one percent) in many different companies.¹⁰⁴ Thus, even if they were to band together for

¹⁰⁴ Cf. 2007 Letter, *supra* note 47, at 3 (Noting that "one of the Council's largest members—The California State Teacher's Retirement System—generally owns only about 0.3 percent of the outstanding stock of any company in the Russell 3000.").

purposes of nominating a director candidate for inclusion in company-prepared proxy materials, it is unlikely that they would be affected by issues emanating from Section 16.

- K.2. Are there any specific reasons why shareholders forming a group solely to nominate a director pursuant to proposed Rule 14a-11 should not be subject to Section 16 once the group's ownership exceeds 10% of the company's equity securities? If so, should the Commission adopt an exclusion from Section 16? Why, or why not?**

Please see our response to question K.1.

- K.3. If we should amend Rule 16a-1(a)(1), the rule that defines who is a 10% owner for Exchange Act Section 16 purposes, to exclude a Rule 14a-11 nominating shareholder group from the definition, how should such an exclusion be structured? For example, these groups could remain subject to the general condition of the rule that they not have the purpose or effect of changing or influencing control of the issuer, but a note to Rule 16a-1(a)(1) could provide an exception for members of nominating shareholder groups formed solely for the purpose of using proposed Rule 14a-11. Should these conditions or other conditions apply?**

Please see our response to question K.1.

- K.4. Should the Commission consider providing an exclusion to the existing Rule 13d-5 definition of "group" that applies to both the Section 13(d) beneficial ownership reporting requirements and the Section 16 reporting requirements?**

Please see our response to question K.1.

- K.5. If the Commission adopts any such exclusion, should it be based on additional or different conditions? For example, should the Commission provide an exclusion from the definition of "group" in Rule 13d-5(b) for shareholders that agree to act together solely for the purpose of holding their securities in accordance with proposed Rule 14a-11(b)(2)?**

Please see our response to question K.1.

- K.6. Are there reasons that members of nominating shareholder groups formed under proposed Rule 14a-11 should be treated differently than shareholder groups permitted to form and formed to nominate directors under an applicable state law provision, or under provisions in a company's governing documents? If so, why? What distinctions ought to be drawn between groups formed under proposed Rule 14a-11 and an applicable state law provision or a company's governing documents in terms of Rule 13d-5(b) and Rule 16a-1(a)(1)?**

Please see our response to question K.1.

- K.7. Should there be a prohibition on any affiliation between nominees and nominating**

shareholders or groups? If so, what limitations would be appropriate? Would any such prohibitions or limitations make it less likely that in Section 16(b) cases courts would find nominating shareholders to be “deputized” directors in circumstances where liability should not apply? Would the lack of any such prohibitions or limitations increase the likelihood that courts would find nominating shareholders to be “deputized” directors?

As indicated in our response to question K.1., we generally do not believe that our members are likely to anticipate Section 16 issues should they nominate a director candidate. We see no reason for a prohibition on an affiliation between nominees and nominating shareowners. A shareowner-nominated candidate will be elected or defeated based on his or her own merits and will have fiduciary and other obligations if elected to the board. Under the circumstances, there would appear to be no need for an affiliation prohibition.

- L.1. Is an amendment to Rule 14a-9 the appropriate means to assign liability for materially false or misleading information provided by the nominating shareholder or group to the company that is included in the company’s proxy materials? If not, what would be a more appropriate means? Should we characterize the disclosure provided to the company by the nominating shareholder or group and included in the company’s proxy materials as soliciting material of the nominating shareholder or group, as we proposed in 2003? Why or why not? Is it appropriate for proposed Rule 14a-9(c) to apply to nominations made pursuant to Rule 14a-11, an applicable state law provision, and a company’s governing documents?**

We generally believe that Rule 14a-9 should be the standard for assigning liability for false or misleading information provided by a nominating shareowner, whether pursuant to a federal rule, state law or a company’s governing documents. The standards under that rule are well known, and use of that standard in this context would promote uniformity.

We also generally believe that proposed Rule 14a-9(c) is adequate. We would have no objection to allowing a company to note that the information is provided by the nominating shareowner, but do not favor any other characterization.

- L.2. Does the language of proposed new paragraph (c) of Rule 14a-9 make clear that the nominating shareholder or group would be liable for any information included in its Schedule 14N or notice to the company that is included in the company’s proxy materials? If not, what specific changes should be made to the proposed rule text?**

We generally believe that the language of proposed new paragraph (c) of Rule 14a-9 is sufficiently clear as drafted.

- L.3. Does the proposal make clear the company’s responsibilities when it includes such information in its proxy materials? Should the proposal include language otherwise addressing a company’s responsibility for repeating statements that it knows or has reason to know are not accurate? Are there situations where a company should be**

responsible for repeating statements of the nominating shareholder or group? Should the proposal treat disclosure provided in connection with a nomination pursuant to Rule 14a-11, an applicable state law provision, or a company's governing documents differently?

We generally believe that the proposed language regarding the company's responsibilities is sufficiently clear as drafted.

L.4. Should information provided by nominating shareholders or groups be deemed incorporated by reference into Securities Act, Exchange Act, or Investment Company Act filings? Why or why not?

We generally do not see the need for such a step for information provided by nominating shareholders or groups. We generally believe that the proposed rule treats the information appropriately.

L.5. Should information, if incorporated by reference into Securities Act or Exchange Act filings, still be treated as the responsibility of the nominee rather than the company? As proposed, are we creating a disincentive to incorporation by reference?

Please see our response to question L.4.