



Via e-mail

June 12, 2015

Keith F. Higgins  
Director  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Request for Staff guidance and rulemaking

Dear Mr. Higgins:

I am writing on behalf of the Council of Institutional Investors (CII) to request interpretive guidance and rulemaking to clarify or enhance certain disclosure requirements in connection with proxy solicitations and other reports filed with the Commission.

CII is a non-profit association of corporate, public and union employee benefit plans with combined assets in excess of \$3 trillion. CII members are large, long-term shareowners responsible for safeguarding the retirement savings of millions of American workers.<sup>1</sup>

In the interest of improving transparency and clarity, CII requests the following:

- Staff guidance regarding proxy statement disclosure of voting requirements for items on the ballot and the presentation of voting options on proxy cards;
- Staff guidance regarding the descriptions of proposals on the proxy card;
- Rulemaking to enhance the report on submission of matters to a vote of security holders.

**Guidance regarding proxy statement disclosure of voting requirements and the presentation of voting options on proxy cards**

Federal proxy rules call for companies to disclose the voting requirement for each voting item, including the election of directors, with one exception – the vote to approve the auditor. These rules explicitly require companies to disclose “the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes...”<sup>2</sup>

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

<sup>2</sup> 17 CFR 240.14a.-101 Schedule 14A – Information required in proxy statement, Item 21.

CII believes some disclosures make it difficult for shareholders to understand the voting requirements for the items on which they are voting. We believe shareholders would benefit from plain English disclosures, without cross-references to external sources, of the voting requirement for each item on the ballot, including a concise description of every component in the denominator used for the vote tabulation.

The following disclosure by AES in its 2015 annual meeting proxy statement exemplifies the problem. Shareholders must consult a myriad of external resources—including the charter, the bylaws and Delaware law—to understand the voting requirements.

*For any proposal, except as otherwise provided by law, rule, [the charter] or [the bylaws], the affirmative vote of a majority of the shares of common stock present in person or represented by Proxy at the meeting and entitled to vote on the matter is required for approval, including for the election of Directors (in accordance with Section 216 and subject to Section 141(b) of the Delaware General Corporation Law).<sup>3</sup>*

Guidance is particularly warranted for voting requirement disclosures for the election of directors. CII believes the quality of some companies' disclosure of their plurality standard is especially concerning given the changing landscape of the method by which directors are elected. Ten years ago plurality voting was the universal method of electing directors. By 2014, 86 percent of S&P 500 companies, 56 percent of MidCap companies and 28 percent of SmallCap companies had a majority vote standard.<sup>4</sup> In this environment, clarity surrounding the vote requirement is critically important.

CII is concerned that companies are characterizing as “majority voting” or “a majority vote standard” a vote standard that is more accurately categorized as “plurality plus”, under which a director is duly elected by a plurality vote but is expected to submit a resignation letter for board consideration in the event he or she receives more votes withheld than votes cast in favor. We note shareholders generally favor a majority standard, as evidenced by the average voting support on shareholder proposals seeking adoption of a majority vote standard in 2014 and 2013 of 59 percent and 60 percent, respectively.<sup>5</sup>

The proxy statement for Harley Davidson's 2015 annual meeting provides an example of such obfuscation. The company first provides the following disclosure regarding the voting requirement for director elections:

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<sup>3</sup> See AES 2015 DEF 14A at

<http://www.sec.gov/Archives/edgar/data/874761/000087476115000021/a2015proxystatement1.htm>

<sup>4</sup> ISS Governance Exchange WebCast: *A Closer Look at U.S. Board Practices*, March 17, 2015

<sup>5</sup> See Sullivan and Cromwell 2014 Proxy Season Review at

[http://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_2014\\_Proxy\\_Season\\_Review.pdf](http://www.sullcrom.com/siteFiles/Publications/SC_Publication_2014_Proxy_Season_Review.pdf)

**Our By-laws currently have a majority vote standard for Proposal 1, the election of directors.** *The director nominees receiving the greatest number of votes will be elected. However, a nominee who receives more “withheld” votes than “for” votes must tender his or her resignation to the Board of Directors. The Nominating and Corporate Governance Committee will promptly consider that resignation and will recommend to the Board of Directors whether to accept the tendered resignation or reject it, and the Board will then act on that recommendation. [Emphasis added.]*<sup>6</sup>

In the same proxy materials, Harley Davidson’s management “ask[s] shareholders to approve a proposed amendment to the company’s Restated Articles of Incorporation (the “Articles”) to allow for a majority voting standard for uncontested elections of directors.” The company’s supporting statement for the proposal includes the following:

*The Wisconsin Business Corporation Law requires that, unless otherwise provided in a company's articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote at a meeting. In this context, "plurality" means that the nominees for election as directors with the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the election, assuming a quorum is present. The Articles currently also provide for a plurality voting standard for elections of directors. As a result, implementing a majority voting standard for director nominees running in an uncontested election requires that the shareholders approve an amendment to the Articles after the Board of Directors has adopted that amendment. **The proposed amendment to the Articles would allow the company's By-laws to provide for a majority voting standard, and the Board of Directors has approved amendments to the company's By-laws that will provide for a majority voting standard if shareholders approve the Articles amendment.** Under the proposed majority voting standard, for an individual to be elected to the Board of Directors in an "uncontested election," the number of votes cast favoring the individual's election must exceed 50% of the number of votes cast with respect to the individual's election. [Emphasis added.]*<sup>7</sup>

We believe a shareholder reading Harley Davidson’s proxy statement could have difficulty understanding (a) the existing voting standard for director elections at the company and (b) why a charter amendment providing for majority voting would be necessary, given that the voting standard was already being described as “majority.” We believe that plain English disclosure of the voting requirement to duly elect directors would prevent obfuscation and help ensure that shareholders are informed.

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<sup>6</sup> See Harley-Davidson DEF 14A at

<http://www.sec.gov/Archives/edgar/data/793952/000079395215000015/harleydavidsonproxy2015.htm> .

<sup>7</sup> Ibid.

As well, variance between the vote requirement description in the proxy statement and what is found on the company proxy card creates confusion over director election voting standards. For example, Spirit Realty Capital's proxy card for its 2015 annual meeting gives shareholders the choice of voting "for" or withholding support from directors. There is no option on the card to vote "against" one or more directors. Yet the company's description of the voting requirement in the proxy statement gives every indication that directors are elected by a majority of votes cast, even going so far as to describe vote choices that do not exist on the proxy card:

*Pursuant to our Bylaws, in uncontested elections (which is the case for the Annual Meeting), a majority of votes cast is required for the election of each director. The number of votes cast "for" a director-nominee must exceed the number of votes cast "against" that nominee. Abstentions and broker non-votes are not counted as votes "for" or "against" a director-nominee and, therefore, will have no effect. [Emphasis added.]*<sup>8</sup>

We believe shareholders would benefit from Staff guidance clarifying the need for alignment between the voting options on the proxy card for the election of directors and the voting requirement for a director to be elected. Specifically, CII believes companies with plurality vote standards (including so-called "plurality plus" standards) should not include "against" options on their proxy cards, and companies with majority standards should not include "withhold" options on their proxy cards.

### **Guidance regarding the description of proposals on the card**

Federal proxy rules require the proxy card to "identify clearly and impartially each matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the registrant or security holders."<sup>9</sup> However, some companies' proxy cards take inconsistent approaches to the identification of voting items to be presented at the meeting. Shareholder proposals are identified using vague language while management proposals are identified with more precise language.

For example, New York Community Bancorp identifies a shareholder proposal on its card requesting a proxy access mechanism as follows:

*A shareholder proposal, as described in the proxy statement, if properly presented at the Annual Meeting.*<sup>10</sup>

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<sup>8</sup> See Spirit Realty Capital DEF 14A at

<http://www.sec.gov/Archives/edgar/data/1308606/000119312515134520/d852227ddef14a.htm>,

<sup>9</sup> 17 CFR 240.14a-4 (a)(3) Requirements as to proxy

<sup>10</sup> See New York Community Bancorp 2015 DEF 14A at

[http://www.sec.gov/Archives/edgar/data/910073/000119312515146892/d889970ddef14a.htm#toc889970\\_22](http://www.sec.gov/Archives/edgar/data/910073/000119312515146892/d889970ddef14a.htm#toc889970_22).

In contrast, the company identifies its routine management proposal to ratify auditors as follows:

*The ratification of the appointment of KPMG LLP as the independent registered public accounting firm of New York Community Bancorp, Inc. for the fiscal year ending December 31, 2015.*

For another example, FirstMerit describes a compensation-related shareholder proposal as follows:

*To consider a shareholder proposal if properly presented at the meeting.*<sup>11</sup>

By contrast, the company identifies another compensation-related proposal on the card—management’s proposal—as follows:

*To approve, on an advisory basis, the compensation of FirstMerit’s named executive officers.*

The dichotomy illustrated above not only presents challenges to investors’ understanding of the voting items, but also raises questions of impartiality. CII believes shareholders would benefit from Staff guidance clarifying the obligation identify proposals “clearly and impartially.”

### **Rulemaking regarding the submission of matters to a vote of security holders**

CII believes a core element of the shareholder voting franchise is timely access to clear and complete information about the vote tally. Federal proxy rules require final vote results to be filed under Form 8-K Item 5.07 within four business days after the end of a shareholder meeting. Under these rules it is mandatory that the report include certain critical information including:

- the name of each director elected
- a brief description of each other matter voted upon
- the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each matter, including separate tabulation with respect to each nominee for office<sup>12</sup>

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<sup>11</sup> See FirstMerit 2015 DEF 14A at [http://www.sec.gov/Archives/edgar/data/354869/000035486915000019/def14aproxy\\_2015xdoc.htm](http://www.sec.gov/Archives/edgar/data/354869/000035486915000019/def14aproxy_2015xdoc.htm).

<sup>12</sup> SEC Current Report instructions release, at <https://www.sec.gov/about/forms/form8-k.pdf>.

We believe investors would benefit from the inclusion of additional relevant information in the report. We request rulemaking to amend Item 5.07 to require the disclosure of the following information:

- the voting requirement for each proposal, including the treatment votes withheld, abstentions and broker non-votes.
- the percentage support for each nominee or other voting item based on the voting requirement for each proposal
- whether each board nominee was elected or unelected
- whether each other voting item passed or failed to pass
- vote option terminology consistent with vote option terminology used on the proxy card

Currently, shareholders reviewing voting results disclosure must toggle back and forth between the 8-K disclosure of results for each item and the proxy statement's description of the voting standard applicable to that item. Including the vote standard, the percentage support based on the voting requirement and whether each item was approved in the 8-K results would not impose additional burdens on companies, which have that information at hand. We note some companies already provide pieces of this useful information on a voluntary basis.<sup>13</sup>

Thank you for your consideration of this request for interpretive guidance and rulemaking. We believe the reforms contemplated by this letter confer significant advantages on shareholders at minimal cost. If you have any questions regarding this letter, please contact me at 202-261.7097 or [glenn@cii.org](mailto:glenn@cii.org).

Sincerely,



Glenn Davis  
Director of Research

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<sup>13</sup> For example, the IBM 2015 annual meeting 8-K 5.07 affirms that each candidate was elected and provides the percentage support for each proposal other than the election of directors. See [http://www.sec.gov/Archives/edgar/data/51143/000110465915033012/a15-10343\\_18k.htm](http://www.sec.gov/Archives/edgar/data/51143/000110465915033012/a15-10343_18k.htm).