Via E-Mail

January 31, 2019

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE.,
Washington, DC 20549-1090

Re: File Number 4-725 Roundtable on the Proxy Process

Dear Mr. Secretary:

We are writing in response to the Securities and Exchange Commission's (SEC or Commission) solicitation of comments on the proxy process and related SEC rules in connection to the roundtable held on Nov. 15, 2018.[1] This letter supplements our initial comment submitted Nov. 8, 2018, and focuses primarily on concrete steps the Commission can take to improve the proxy system infrastructure on a fundamental level. We also provide brief comments on critical, immediate steps the SEC should take to improve proxy voting in the near-term with regard to vote confirmation and universal proxy.

A broad range of participants at the Nov. 15, 2019, SEC Roundtable on the Proxy Process (Roundtable), including the Council of Institutional Investors (CII), asserted the need for SEC leadership on improvements to the proxy process. In this letter, we suggest specific regulatory relief the SEC could provide to foster the use of innovative technology by permitting issuers to elect to place their equity securities on a private, permissioned blockchain. Such a system, as we explain, would differ from the current system of share immobilization and fungible bundles. We also believe the SEC should use its authority over disclosure of accurate voting results to require that issuers ensure their agents pre-reconcile positions, thus enabling end-to-end vote confirmation. And again, we reiterate that the SEC should enact its pending proposal on universal proxy. We believe the SEC should focus its efforts fundamentally on proxy system mechanics, rather than on policy issues related to shareholder proposals and proxy advisors.

CII is a nonprofit, nonpartisan association of public, corporate, and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than $25 trillion in assets under management.[2]

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[1] "Roundtable on the Proxy Process," Nov. 15, 2018, Securities and Exchange Commission.
[2] For more information about the Council of Institutional Investors (CII), including its members, please visit CII's website at http://www.cii.org/members.

Moving Towards Fundamental Change

CII has encouraged the SEC to take the lead on meaningfully modernizing the proxy voting infrastructure, which we believe will likely require changes at a more fundamental level with respect to share ownership and clearance.[3] The current system, built over decades and composed of layers of intermediaries, is antiquated. Technological change now offers the opportunity to construct a better system of share ownership based on traceable shares, with the potential to fix a panoply of problems associated with proxy voting. We have proposed private, permissioned blockchains as one technology the SEC should consider.[4] We recognize that "blockchain" has become a buzzword and that it cannot solve every problem present in the financial system. But share ownership is an area where the technology matches the use cases particularly well, presenting an opportunity to improve investors' experience with share ownership and voting.

We believe that pursuing the promising pathway of a blockchain solution enabling traceable shares will require the SEC to offer regulatory relief from the current system of share immobilization and national clearance and settlement established over decades of regulation. To be clear, that relief entails setting regulatory standards that issuers and their agents must meet in order to take advantage of the regulatory relief.

Since the Roundtable, CII has met with firms developing blockchain-based solutions to share ownership and voting. These innovators are waiting at the gates of the public capital markets, eager to enter but obstructed by outdated regulations. We believe the SEC should work directly with private sector innovators, alongside issuers willing to adopt these technologies, to develop case-by-case regulatory relief, which may include individual guidance, no-action letters, and/or exemptive orders. Accordingly, we recommend that the SEC initiate a formal comment process with respect to potential blockchain-related rulemaking.

In engaging with market participants, considering comments, and crafting regulatory relief, the SEC should consider the following principles, on which we elaborate below.[5]

1. A blockchain solution can and should ensure a similar or superior level of privacy as currently exists by creating a shareholder opt-in/opt-out mechanism for the disclosure of investors' identities and holdings, as well as provide information to regulators to enhance their oversight and enforcement efforts.

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[3] Letter from Ken Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission, November 8, 2018: "In the past, [CII has] favored an approach of incremental improvement over ambitious, systemic change. We believe the current moment is different—that technological innovation makes it worthwhile now to consider fundamental reform, even while we make continued efforts at short-term improvements to the present system."

[4] Bertsch Letter: "We believe that a reconceptualization of the system should look first to key principles, and remain open to various alternatives…our sense now is that an approach based on a private, permissioned blockchain…may prove to be the best approach, and should receive substantial attention."

[5] These principles conform with CII's member-approved statement on Effective and Efficient Proxy Voting, updated in October 2018: "Technology should be used to improve the proxy voting process, including through the adoption of private blockchains…that promote each of the above five objectives [timeliness, accessibility, accuracy, certainty and cost-effectiveness] while safeguarding the identities, holdings and voting decisions of individual shareholders."

2. A blockchain solution can and should deliver numerous benefits to investors and issuers by reducing inefficiencies and costs, strengthening the reliability of proxy voting, better enabling compensation for rehypothecation,[6] improving certain securities litigation processes, and enhancing competition in a notoriously monopolistic space.

CII believes a blockchain-based system of share provenance better fulfills the principle that the rights of share ownership, including economic entitlements and voting decisions, belong to beneficial owners, not intermediaries. Changing the proxy system for the better requires a fundamental rethink of its infrastructure, including certain outdated regulations that have created inefficiencies, rather than adding incremental technological improvements atop the existing web of intermediaries.

Moving Past Share Immobilization

In the late 1960s, Wall Street experienced a crippling paperwork crisis as the prevailing process of manual clearance and settlement with paper certificates could not keep pace with accelerating trading activity. In response, Congress passed the Securities Acts Amendments of 1975, which directed the SEC to facilitate the establishment of a national system for securities clearance and settlement and to end the physical movement of securities certificates.[7] Over the next several decades, the SEC issued regulations and approved rules proposed by self-regulatory organizations (SROs) that cemented this policy of share immobilization.

In the wake of the paperwork crisis, NYSE created a central clearing agency and depository that emerged as the Depository Trust & Clearing Corporation (DTCC) and its subsidiaries, including the Depository Trust Company (DTC).[8] In implementing Congress's directive to create a national clearance and settlement system, the SEC developed regulations for, and required the registration of, clearing agencies. The SEC registered four clearing agencies in 1983,[9] including the DTC, which now remains the only SEC-registered clearing agency and provides book-entry services for the vast majority of U.S. trading activity.

The SEC envisioned a system that discouraged holding securities in the form of paper certificates. Instead, a clearing agency and central depository, i.e. the DTC, holds the securities of its participants, which are buy-side banks and brokers, in a fungible bundle. At the end of each business day, the DTC records net changes in the positions of its participant banks and brokers, which in turn record changes in the accounts of their customers, who are the beneficial owners. Beneficial owners generally hold their securities in street name, which bears the DTC's nominee name Cede & Co. in the books of the issuer's transfer agent. As the SEC has observed:

> Holding securities positions in book-entry form at securities depositories reduces the physical movement of publicly traded securities in the U.S. markets and significantly

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[6] Rehypothecation is the practice by banks and brokers of using, for their own purposes, assets that have been posted as collateral by their clients.
[7] 15 U.S.C. 78q–1.
[8] NYSE created the Central Certificate Service in 1968, which changed its name to the DTC in 1973.
[9] *See* Securities Exchange Act Release No. 20221 (September 23, 1983), 48 FR 45167 (October 3, 1983).

> improves efficiencies and safeguards in processing securities certificates, which in turn reduces the costs of those transactions to investors and market professionals alike.[10]

While share immobilization resolved the immediate paperwork crisis (although paper certificates remain in use), it also laid the foundation for numerous second-order inefficiencies and anomalies.[11] Over time, the SEC concentrated more control in the national clearance and settlement system it created, approving rules proposed by the seven major stock exchanges in the 1990s that effectively required issuers to consent to making their securities depository-eligible for DTC book-entry services as a condition of listing on an exchange.[12] In 2003, the SEC approved a rule proposed by the DTC that allowed it to refuse requests from issuers to withdraw their securities from the DTC.[13] The SEC further adopted a rule in 2004 prohibiting issuers from enacting bylaw amendments that made their securities ineligible for DTC ownership and services.[14] These issuers sought to implement a system of certificated transfer whereby clearance and settlement would take place manually—and apart from the DTC—by the issuer's transfer agent using paper certificates.

The SEC intended these rules to preserve its system of national clearance and settlement and to prevent a reversion to the use of paper certificates. The Commission contended, "Transactions settled outside of a registered clearing agency have to be certificated and then processed manually on a transaction-by-transaction basis, which creates inefficiencies, risks, and added costs in clearing and settling securities transactions and in transferring securities ownership."[15] In effect, the SEC's rule precludes any alternative system of share provenance apart from the DTC, even as technology has evolved to offer electronic alternatives to paper certificates.

Certain aspects of the securities clearance and settlement process that have developed around share immobilization are not compatible with a blockchain-based system of traceable shares. Traceable shares do not require a central counterparty to execute trades, and the custodial records for each trade must clear as an individual transaction in the blockchain.[16] These processes obviate the need

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[10] *See* Securities Exchange Act Release No. 49804 (June 4, 2004), 69 FR 32783 (June 10, 2004).
[11] These inefficiencies and anomalies, which are discussed in greater detail on pages 7–8, result from chain of custody opacities since shares are held in fungible bundles with no particularized connection to individual beneficial owners.
[12] *See* Securities Exchange Act Release No. 49405 (March 11, 2004), 69 FR 12922 (March 18, 2004): "The Commission also approved rules of the exchanges and the NASD that require their members to use the facilities of a securities depository for the book-entry settlement of all transactions in depository-eligible securities and to require that before any security can be listed for trading it must have been made depository-eligible if possible."
[13] *See* Securities Exchange Act Release No. 47978 (June 4, 2003), 68 FR 35037 (June 11, 2003): "DTC will process withdrawal requests submitted by participants in the ordinary course of business but will not effectuate withdrawals based upon a request from the issuer." Several issuers attempted to withdraw their securities from the DTC to combat naked short selling, which the issuers claimed the DTC neglected to prevent and caused harm to their share price.
[14] *See* Securities Exchange Act Release No. 49804 (June 4, 2004), 69 FR 32783 (June 10, 2004): "Registered transfer agents are prohibited from effecting any transfer of any equity security… if such security is subject to any restriction or prohibition on transfer to or from a securities intermediary."
[15] Securities Exchange Act Release No. 49804 (June 4, 2004), 69 FR 32783 (June 10, 2004).
[16] *See* George S. Geis, "Traceable Shares and Corporate Law," *Northwestern University Law Review*, Vol. 113, No. 2, 2018: "If we could snap our fingers and create an ideal stock clearing platform, we would probably abandon paper share certificates—along with the complicated, and multi-layered, distinction between record and beneficial owners. A share of stock would trade electronically, perhaps through brokers and exchanges, but the details of each transfer would be processed by a secured and trusted protocol that specifically identifies *each share* being exchanged. This

for the National Securities Clearing Corporation (NSCC), a DTCC subsidiary, to novate and net the securities transactions of its participants.[17] The settlement of trades with traceable shares can also conceivably occur near real-time, substantially faster than the current two business day delay (T+2).[18] Because the process of clearance and settlement operates differently under a blockchain solution than under share immobilization, blockchain-based securities transactions may not fulfill the current legal requirements of final settlement.

New technologies offer multiple solutions to the SEC's concerns about moving beyond an intermediated system of share ownership, clearance, and settlement, but old rules prevent their deployment in the public capital markets. In many ways, a blockchain solution of traceable shares represents a fully electronic version of paper certificates but lacks the associated costs and risks that prompted the paperwork crisis. Under a blockchain-based system of share ownership, existing issuers could elect to recall their fungible bundle of securities from the DTC and instead record share ownership digitally on the blockchain, with each share uniquely identified cryptographically as belonging to a beneficial owner.[19] Newly public companies could elect to refrain from making their securities depository-eligible and use the blockchain from the outset.[20] In both cases, before taking the steps necessary to implement a blockchain-based system of share ownership, issuers would need clarity through regulatory relief from requirements including the following:

- The requirement to consent to making their securities depository-eligible for clearing agency book-entry services as a condition of listing on an exchange[21]

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information would be rapidly updated (ideally in real-time) and accessible by appropriate parties with the right clearance…In short, we would have immediate clearing of stock transfers in a way that preserves a precise chain of title."

[17] For all of the second-order inefficiencies created by share immobilization, one definitive efficiency is the netting of trades. In theory, a blockchain-based system of clearance and settlement eschews netting since each individual transaction is recorded in the ledger. But there are conceptions of the blockchain that could harness netting efficiencies by recording each transaction but waiting until the end of the trading day to effectuate transfers of shares and payment. This way, the "movement" of shares remains minimized but each transaction would become traceable.

[18] Self-executing smart contracts could replace many of these central counterparty and central depository functions in the securities clearance and settlement process. For example, smart contracts can help mitigate counterparty and settlement risk by executing a change in custody of a security only when both parties have met their obligations. The DTC appears to recognize this potential, albeit cautiously. *See* "Embracing Disruption: Tapping the Potential of Distributed Ledgers to Improve the Post-Trade Landscape," DTCC, January 2016: "The introduction of smart contract technology that could provide every firm with the same validation rules 'in advance' would result in only quality, validated data entering the distributed ledger, which should simplify processing and reduce exception correction timeliness…Use of the distributed ledger platform for the netting, clearing and settlement of a trade…crosses the threshold from distributed validation and information sharing purposes to the area that many proponents argue is the real value of the distributed ledger—asset for value transfer, in near real time, independent of a trusted third party."

[19] Alternatively, as a transition stage until market participants gain confidence, a blockchain-based system could initially reflect DTC's position, with the position shrinking over time as investors are attracted to the manifest benefits of holding and transferring shares through the blockchain option and elect to do so (in the same manner that some investors elect to hold securities through a book-entry direct registration system).

[20] As a starting point, it may make sense for the SEC to first grant the regulatory relief contemplated here to an issuer going public for the first time, rather than one that has already issued securities owned by a broad base of beneficial owners and deposited at the DTC.

[21] Securities Exchange Act Release No. 32455 (June 11, 1993), 58 FR 33679 (June 18, 1993) and Securities Exchange Act Release No. 35798 (June 1, 1995), 60 FR 30909 (June 12, 1995).

- The inability to withdraw their securities from the clearing agency, even with the approval of the board of directors and shareholders[22]
- The prohibition on adopting bylaws that provide for alternative securities transfer, clearance, and settlement mechanisms apart from other securities intermediaries [23]
- The prescriptive process of clearance and settlement through securities intermediates involving novation, netting, and T+2 final settlement[24]
- The requirement to register with the SEC as a transfer agent or clearing agency, to the extent that issuers or their agents perform these duties while using the blockchain[25]

One of Congress's findings in passing the Securities Acts Amendments of 1975 was that "New data processing techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement." Just as electronic book-entry services through a central clearing agency marked a technological improvement over paper certificates in that age, blockchain-based traceable shares offer the next innovative stride past share immobilization today.

Protecting Investor Privacy and Enhancing Regulatory Oversight

Since the 1980s, beneficial owners have possessed the ability to opt out of having their names, addresses, and holdings disclosed to issuers by taking affirmative steps to become "objecting beneficial owners" (OBOs). Issuers can see a list of their non-objecting beneficial owners (NOBOs) with this information for those shareholders who do not wish to remain anonymous. While the OBO/NOBO regulations have proved effective at protecting investors who prize their privacy—most institutions are OBOs while most retail investors are NOBOs —a blockchain-based system of share ownership would disrupt the layers of intermediaries through which OBO/NOBO operates.

Even so, CII understands that the technology can essentially replicate the OBO/NOBO opt-in/opt-out mechanism and ensure a similar or superior level of investor privacy as currently exists. Under a system of share ownership using a private, permissioned blockchain,[26] it is readily possible to obscure the identities, holdings, and voting decisions of beneficial owners through cryptography. Any of this information transmitted to the blockchain by beneficial owners or intermediaries acting on their behalf can appear pseudonymously as an encrypted string of numbers, such that only those to whom the beneficial owner has granted permission can decrypt the information to see the underlying identity and holdings. Therefore, shareholders would not have to reveal any more

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[22] Securities Exchange Act Release No. 47978 (June 4, 2003), 68 FR 35037 (June 11, 2003).
[23] Securities Exchange Act Release No. 49804 (June 4, 2004), 69 FR 32783 (June 10, 2004).
[24] Securities Exchange Act Release No. 80295 (March 22, 2018), 82 FR 15564 (March 29, 2017).
[25] Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 4192 (July 1, 1980).
[26] We envision that the participants in such a private blockchain would likely include issuers and their agents, banks and brokers, other depositories, institutional investors and their agents, and regulators and state governments. While the blockchain system may disrupt the back-office operations of banks and brokers related to post-trade execution and record keeping, we do not envision such a system supplanting their core business. We expect that retail investors would largely continue to use banks and brokers to hold their shares and execute transfers, and we do not envision retail investors having to directly participate in a blockchain system unless they elect to do so. We do not suggest that the SEC endorse any single, particular blockchain system, but we recognize that any blockchain system used for this purpose, and the protocols for participation, must be proven and robust. CII is exploring, and encourages the SEC to consider, the key design features and appropriate requirements of such a system.

identifying information than they do now, and beneficial owners would retain the ability to hold shares through their bank or broker or though anonymous and inexpensive nominee accounts. The blockchain-based opt-in/opt-out mechanism can also offer efficiency and cost benefits over OBO/NOBO, which largely relies on price opacities and third parties. Currently, issuers can face steep costs and long delays to receive their NOBO lists, which themselves do not contain particularly actionable contact information. NYSE determines the fees for obtaining NOBO lists, and third parties that issuers do not choose but must nonetheless reimburse facilitate a majority of the communication with shareholders on corporate matters. In addition to providing an immutable distributed ledger for securities transfer, clearing, and settlement, the blockchain offers a platform for communication. Whether shareholders opt to share their information or remain anonymous to other blockchain participants, the technology can distribute proxy materials and other important communications to entitled beneficial owners quickly and inexpensively.

Because this blockchain-based opt-in/opt-out mechanism would be functionally similar to OBO/NOBO but logistically—and therefore legally—distinct, market participants like issuers, transfer agents, and brokers and banks may need the SEC to provide case-by-case clarity and relief from regulations pertaining to investor privacy and communication.[27] In so doing, however, the Commission should ensure that issuers cannot ascertain information that investors want kept private and that is not otherwise disclosed under existing securities regulations.

Information transmitted to and recorded on the blockchain can also help enhance the oversight and enforcement activities of regulators like the SEC. The system could conceivably allow the SEC to operate a "node" on each issuer's blockchain and, as appropriate, collect information about certain transactions that implicate a regulatory action. For example, the SEC could receive a notification when an investor has crossed an ownership threshold that triggers mandatory reporting obligations. Likewise, the SEC could use traceable shares to track the stock sales of corporate insiders and improve their enforcement efforts on insider trading. This real-time access to information can enable the SEC to automate certain oversight functions and pivot from a retrospective to a concurrent enforcement regime, helping contain the harms of capital markets abuses.

Delivering Benefits to Investors

CII has outlined many of the potential benefits of blockchain technology in its previous letter and during the Roundtable. A principle worth reiterating is that investors large and small ultimately bear the costs of inefficiencies in the current system. If the SEC provides regulatory relief to market participants exploring blockchain solutions, benefits will accrue to investors as the costs and frictions of securities ownership, clearance, settlement, and voting decrease. Investors will indirectly benefit as issuers realize benefits from the application of smart contract technology once securities have a nexus with a blockchain. Several areas of the current system fraught with inefficiencies that blockchain technology can improve include:

- The two business day delay (T+2) in the settlement of equity securities transactions

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[27] 17 CFR 240.14b–1; *See* Alan L. Beller and Janet L. Fisher, "The OBO/NOBO Distinction in Beneficial Ownership: Implications for Shareowner Communications and Voting," Council of Institutional Investors, February 2010.

- The excessively early record date for determining voting rights ahead of annual meetings
- The laborious, lengthy process of position reconciliation ahead of annual meetings
- The costly and complex processes surrounding shareholder communication and solicitation
- Anomalies in share ownership, such as naked short selling and over-traded shares
- Anomalies in share voting, such under and over-voting
- Uncertainties resulting from the lack of reliable end-to-end vote confirmation
- Uncertainties in close shareholder votes that can trigger long, manual tabulations
- The difficulty of achieving share identification for Section 11 claims and appraisal rights
- The manual processes surrounding blackout periods, stock splits, and recapitalizations
- The costs of monopolistic firms and SROs setting fees for elements of the proxy process

Beyond the cost savings, blockchain-based traceable shares can deliver tangible returns to investors in the form of compensation for rehypothecation. The potential for the above anomalies is heightened when banks and brokers lend shares they hold on behalf of beneficial owners to third parties, and beneficial owners ultimately bear those risks. Banks and brokers and many institutional investors earn income from share lending, but retail investors whose shares the banks and brokers are lending largely do not. A blockchain-based system of share provenance links shares in the banks' and brokers' accounts to individual beneficial owners. When banks and brokers lend shares, therefore, the blockchain enables the retail investor owners of those shares to receive compensation. This opportunity strengthens the principle that the rights of share ownership belong to beneficial owners, not intermediaries.

Certain claims in securities litigation require shareholders to demonstrate provenance of shares that the current system of share immobilization and fungible bundles renders procedurally difficult. Under Delaware law, investors who vote their shares in favor of a merger cannot later seek appraisal rights for those shares, but the current system generally does not provide for vote confirmation. Similarly, investors bringing Section 11 claims fall susceptible to chain of custody opacities when they cannot demonstrate, as is required, that they purchased shares that were issued in connection with a misrepresented registration statement. These practical obstacles present in the current system needlessly delay or prevent investors from proceeding with legitimate claims and receiving compensation, which harms the health and fairness of the capital markets.[28] Intuitively, blockchain-based traceable shares would provide an immutable chain of custody ledger and enable investors to supply evidence of their provenance and voting decisions as necessary.

Finally, investors of all statures have become inured to a proxy system bereft of competition and susceptible to a concentrated risk of system failure. Through a combination of regulatory action, natural monopolistic forces, and anticompetitive behavior, single firms have come to dominate essential functions in the clearance, settlement, and proxy processes. Blockchain technology offers an opportunity to streamline a system that yielded to concessions once considered necessary but

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[28] Geis, "Traceable Shares;" Delaware Vice Chancellor J. Travis Laster, "The Blockchain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote," speech to CII, Sept. 29, 2016: "Delaware corporate law is not built to accommodate the nominee system. It assumes that stockholders own shares directly and treats any deviation from direct ownership as a voluntary choice by the stockholder, which it is not."

now deemed dysfunctional. Where natural monopolies must exist, the Commission should regulate them appropriately as utilities. But by providing regulatory relief (informed by a comment process) to market participants willing to improve that system with new technologies, the SEC would make meaningful progress toward reducing the barriers to entry into this billion-dollar market to the clear benefit of investors, innovators, and the capital markets generally.

Comments on Other Roundtable Issues

We were generally pleased with the takeaways from the roundtable, including the broad support expressed for facilitating vote confirmation and adopting universal proxy, the evidence provided that the shareholder proposal process works well for market participants, and the apparent consensus reached that onerous regulations for proxy advisory firms are unnecessary.

Vote Confirmation

We recognize that the existing clearance and settlement systems and technologies will continue to undergird proxy voting even as some issuers begin to use blockchain-based alternatives (or other approaches). As such, as stated in our Nov. 8, 2018 letter, it is critical for the SEC to take steps within the current system to improve the experience of proxy voting for investors.

Most importantly, investors need end-to-end vote confirmation, and to fulfill that objective, early reconciliation of vote entitlements. The SEC possesses the authority to facilitate these solutions, largely based on the Form 8K requirement for accurate and complete disclosures. The SEC could require early reconciliation of vote entitlements as necessary for accurate Form 8K vote disclosure. Industry pilots conducted by Broadridge and transfer agents in 2014 and 2015 validated the steps required to facilitate vote confirmation, including steps involving early validation of vote entitlements. Broadridge has described to us these specific steps, and we believe the SEC should issue guidance to implement them. Pre-reconciliation will eliminate many of the inefficiencies and anomalies described above. More fundamentally, end-to-end vote confirmation provides beneficial owners—those with the right to vote—the assurance that their votes are counted and the ability to correct any errors.

Universal Proxy

In a Dec. 13, 2018, comment letter submitted in response to the SEC's regulatory agenda, we addressed what we view as unconvincing criticisms of universal proxy raised at the roundtable.[29] These criticisms focused on formatting issues in designing a universal proxy card, but the SEC's 2016 proposal, in our view, already fully and appropriately addresses these issues. In our letter, we cited the proposal's formatting requirements, which include distinguishing between company and dissident nominees, listing nominees alphabetically in each group, using uniform font styles and sizes, and disclosing the maximum number of electable nominees, among other specifications.

[29] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission, Dec. 13, 2018, noting that "At the roundtable, *many* panelists recommended implementing the 2016 proposal for universal proxy noting that it would solve *many* voting issues in proxy contests," but that some participants cautioned that "details, such as the order in which names appear on the ballot, will be crucial," (internal quotations omitted).

CII continues to believe that the Commission should promptly adopt a final rule largely consistent with its 2016 proposal on universal proxy.[30] A universal proxy will help fix enduring issues affecting the most contested and consequential votes, and allowing investors to split their tickets in proxy contests serves the principle that shareholders voting by proxy should have the same voting privileges as those voting in person.

Shareholder Proposals and Proxy Advisors

In a Dec. 5, 2018, letter to the Senate Committee on Banking, Housing, and Urban Affairs ahead of its Dec. 6, 2018, hearing on the proxy process, we provided detailed comments on the appropriateness of the current shareholder proposal rule and regulations pertaining to proxy advisory firms. On shareholder proposals, we noted that "We generally share the reported view of certain SEC staff members that left the roundtable with the impression that stronger arguments were made in favor of keeping the current Rule 14a–8 eligibility requirements and resubmission thresholds."[31] While we recognize that the existing ownership and resubmission thresholds were set long ago, we believe the current shareholder proposal rules permit investors to express their voices collectively on issues of concern to them, without the cost and disruption of waging proxy contests.[32] And we believe the rule works particularly well in granting retail investors—who lack other avenues to meaningfully engage with management—a voice in the companies they own.

On proxy advisory firms, we highlighted in our letter that "Notably, at the end of the roundtable when the SEC staff asked if proxy advisory firms need additional regulation, no panelist—including those speaking on behalf of the corporate community…—voiced any need for new regulations."[33] Some roundtable participants raised concerns regarding conflicts of interest, factual errors, and overly standardized voting guidelines. While we concede that there is room for improvement on this latter point, SEC Staff Legal Bulletin No. 20, in our estimation, already effectively requires investment advisors to ensure that voting recommendations are based on current and accurate information and to identify and address conflicts of interest. We do not see additional regulation as necessary or beneficial to investors, companies, or the capital markets generally.

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[30] *See* Letter from Ken Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission Dec. 28, 2017, providing extensive comments in response to the 2016 proposal and noting that "With minor enhancements, the proposed framework will provide for a constructive universal proxy regime that gives greater effect to existing shareholder rights;" Letter from Ken Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission Nov. 8, 2018, addressing recent substantive concerns about universal proxy.

[31] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to The Honorable Michael Crapo, Chairman, Senate Committee on Banking, Housing, and Urban Affairs et al., Dec. 5, 2018, (internal quotations omitted).

[32] *Id.*, citing specific improvements in U.S. corporate governance practices that would not have occurred absent a robust shareowner proposal process.

[33] *Id.*

We commend the Commission for convening this roundtable and addressing these critical albeit complicated issues. We believe that working with market participants to craft case-by-case regulatory relief offers a concrete step forward toward meaningfully facilitating fundamental, long-term improvements to the proxy infrastructure. Taking this step may endanger entrenched interests, but those interests constructed the complex and inefficient system that persists today. Harnessing new technological solutions like the blockchain will pay dividends in the form of a more cost-effective, more competitive, and more efficient proxy process for investors large and small.

We would be more than happy to continue discussing any of these issues. If you have any questions or need additional information, please contact Ken Bertsch or Jeff Mahoney at [redacted] ([redacted]).

Sincerely,

Kenneth A. Bertsch
Executive Director

Jeffrey P. Mahoney
General Counsel

cc: The Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission

The Honorable Commissioner Robert J. Jackson, Jr., U.S. Securities and Exchange Commission

The Honorable Commissioner Hester M. Peirce, U.S. Securities and Exchange Commission

The Honorable Commissioner Elad L. Roisman, U.S. Securities and Exchange Commission

Mr. William H. Hinman, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission

Mr. Rick Fleming, Investor Advocate, U.S. Securities and Exchange Commission

Ms. Anne Sheehan, Chairman, SEC Investor Advisory Committee