COLORADO
PERA®

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October 1, 2007

Via Email and First Class Mail

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Shareholder Proposals (File Number: S7-16-07)

Dear Ms. Morris:

I am writing on behalf of the Public Employees' Retirement Association of Colorado, (Colorado PERA), an association with assets of over $41 Billion. Colorado PERA welcomes the opportunity to provide additional comments on the Securities and Exchange Commission's (SEC or Commission) proposed amendments to the rules under the Securities Exchange Act of 1934 concerning shareowner resolutions and electronic shareowner communications, as well as to the disclosure requirements of Schedule 14A and Schedule 13G (proposed amendments).

I had the distinct pleasure of meeting with Chairman Cox earlier this summer, and I enjoyed the opportunity to discuss issues of importance to both Colorado PERA and the SEC. I applaud the Commission's accessibility and please extend my personal appreciation for the time Chairman Cox spent with us.

Colorado PERA was actively involved in drafting the letters recently submitted to the Commission by the Council of Institutional Investors (CII). A copy of the Council's letter is attached hereto and incorporated as a part of this letter. Without reiterating the details, we join with the Council in voicing strong opposition to the amendments in the proposed form. Our concerns go to the practical impact of such a high threshold for access and the chilling effect of the onerous disclosure requirements. Even with our large size, the diversification of our investments results in our holding only a fraction of a percentage point in ownership in any one publicly traded company. Considering the complexities and costs of gathering a team of shareholders capable of meeting the threshold, the amendments in their present form effectively deny access to the proxy by institutional long term shareholders. We welcome the opportunity to work with the Commission to arrive at amendments which grant effective and appropriate access to the proxy for shareholders committed to long term shareholder value

Finally, in light of the recent departure of Commissioner Roel Campos, Colorado PERA would respectfully ask that the Commission not make any final determination on the proposed amendments until a full contingent is present at the SEC.

Colorado PERA appreciates the opportunity to express our views on this matter. Please feel free to contact me with any questions.

Sincerely,

Meredith Williams
Executive Director

MWW/dma

COUNCIL OF INSTITUTIONAL INVESTORS

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Via Email

September 18, 2007

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Shareholder Proposals (File Number: S7-16-07)

Dear Ms. Morris:

I am writing on behalf of the Council of Institutional Investors ("Council"), an association of more than 130 public, corporate and union pension funds with combined assets of over $3 trillion. As a leading voice for long-term, patient capital, the Council welcomes the opportunity to provide additional comments on the Securities and Exchange Commission's ("SEC" or "Commission") proposed amendments to the rules under the Securities Exchange Act of 1934 concerning shareowner resolutions and electronic shareowner communications, as well as to the disclosure requirements of Schedule 14A and Schedule 13G ("Proposed Amendments").[1]

First and foremost, the Council applauds the Commission for again taking up the very important investor rights issue of proxy access. We very much appreciate the many hours of hard work that the SEC Staff and Commission have devoted to the development of the Proposed Amendments.

The Council generally supports the Commission's objectives of "vindicating shareholders' state law rights to nominate directors . . . and ensuring full disclosure in election contests . . . ."[2] Unfortunately, for the reasons summarized below and described in more detail in the Attachment to this comment letter, the Council can not support the Proposed Amendments as currently drafted. We, however, stand ready to continue to work with the Commission to develop meaningful proxy access reforms.

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[1] See August 24, 2007, letter from Jeff Mahoney, General Counsel, Council of Institutional Investors ("Council"), to Nancy M. Morris, Secretary, Securities and Exchange Commission, *available at* http://www.cii.org/proxy/pdf/August%2024,%202007%20comment%20letter%20on%20file%20no.%20S7-16-07%20and%20S7-17-07%20_final_.pdf, for the Council's initial comments on the Shareholder Proposals, Exchange Act Release No. 56,160, Investment Company Act Release No. 27,913, 72 Fed. Reg. 43,466 (proposed Aug. 3, 2007), *available at* http://www.sec.gov/rules/proposed/2007/34-56160fr.pdf.

[2] Shareholder Proposals, 72 Fed. Reg. at 43,469.

The Council's corporate governance policies have long stated that "shareowners should have . . . meaningful opportunities to suggest or nominate director candidates and to suggest processes and criteria for director selection and evaluation."[3] Far too many director elections, however, remain a *fait accompli,* regardless of how troubled a company may be. As a result, the only way that individual director nominees may be effectively challenged at some companies is if a shareowner is willing and able to assume the risk and expense of nominating a slate of candidates and running a full-blown election contest. Such ventures are onerous and cost-prohibitive—even in today's world of e-proxy. The Council, therefore, strongly supports reforms that would permit meaningful shareowner access to company-prepared proxy materials relating to the nomination and election of directors. We believe such reforms would make boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight of companies.

The Council's support for meaningful proxy access is shared by a growing number of shareowners. During the 2007 proxy season, three proxy access shareowner resolutions were presented for a vote and all received significant support: (1) a non-binding resolution approved by shareowners of Cryo-Cell International, Inc;[4] (2) a non-binding resolution that, according to Institutional Shareholder Services ("ISS"), received 45.25 percent of the votes cast for-and-against by shareowners of UnitedHealth Group Incorporated ("UnitedHealth"); and (3) a binding resolution, that according to ISS, received 42.95 percent of the votes cast for-and-against by shareowners of Hewlett-Packard Company.

In the face of growing support by shareowners for meaningful proxy access, the Proposed Amendments would permit certain shareowners to include in company proxy materials proposals for amendments to bylaws that would mandate procedures to allow shareowners to nominate board of director candidates. The Proposed Amendments, however, fail to reflect a practical understanding of the ways that institutional investors approach proxy access issues. As a result, the Commission appears to have severely underestimated the workability of the Proposed Amendments.

More specifically, the Council believes that (1) the proposed more than five percent threshold for submitting a bylaw resolution would be too high a barrier; and (2) the proposed related disclosure requirements would be too burdensome. In addition, we note that the Proposed Amendments include a discussion about the potential adoption of new rules that would permit a company to propose—and its shareowners to adopt—a bylaw restricting the ability of shareowners to offer non-binding or precatory shareowner resolutions. If such rules were adopted, we believe they would unduly restrict the use of precatory resolutions—a fundamental shareowner right—with negative consequences for the quality of corporate governance practices and the long-term performance of companies.

More than Five Percent Requirement

The Proposed Amendments include provisions providing that shareowner bylaw resolutions would be required to be included in the company's proxy materials if certain conditions are met.[5] Those conditions include that the proposal must be submitted by a shareowner (or group of shareowners) that has continuously and beneficially owned more than five percent of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the shareowner submits the proposal.[6]

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[3] Council, Annual Report 34 (Jan. 2007).
[4] Press Release, Cryo-Cell International Inc., Cryo-Cell Announces Certified Results of Annual Shareholders Meeting (Aug. 1, 2007), *available at* http://www.cryo-cell.com/investor_relations/subpage_noad.asp?ID=204.
[5] Shareholder Proposals, 72 Fed. Reg. at 43,470.
[6] *Id.*

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 shares are held by mutual funds and insurance companies.[7] 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.[8] 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.[9]

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.[10] 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.

Disclosure Requirements

A second condition for submitting a shareowner bylaw resolution under the Proposed Amendments is that the shareowner or group of shareowners that submit the proposal must (1) be eligible to file a Schedule 13G; (2) actually file the Schedule 13G; and (3) include in the filed Schedule 13G the specified public disclosures regarding its background and its interactions with the company.[11]

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[7] The Conference Board, Institutional Investment Report 29 (2007) (Indicating that investment companies and insurance companies hold 22.8% and 7.4%, respectively, of the total U.S. equity market).

[8] *Id.* (Indicating that state and local pension funds hold 9.8% of the total U.S. equity market). Of note, according to Institutional Shareholder Services, at least 158 separate proponents were responsible for submitting the 688 governance-related shareowner proposals that were filed for the 2006 proxy season. Approximately 280 of the 688 resolutions were filed by Council members.

[9] E-mail from Christopher J. Ailman, Chief Investment Officer, CalSTRS, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 3:09 PM EST) (On file with Council). Similarly, Council member—The Florida State Board of Administration—typically owns only about 0.33% of the outstanding stock of any company in the Russell 3000. E-mail from Tracy Stewart, Corporate Governance Manager, Florida State Board of Administration, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 5:55 PM EST) (On file with Council).

[10] *See* UnitedHealth Group Incorporated, Proxy Statement for Annual Meeting of Shareholders to be Held May 29, 2007 (Schedule 14A), at 100 (Apr. 30, 2007), *available at* http://www.unitedhealthgroup.com/invest/2007/Proxy_Stmt_2007.pdf.

[11] Shareholder Proposals, 72 Fed. Reg. at 43,470.

The Council does not object to the imposition of additional filing and disclosure requirements for shareowners accessing the proxy. The level of disclosure, however, required by the Proposed Amendments appears overly burdensome going beyond even those disclosures that would be required of shareowners filing a Schedule 13D who may be attempting a hostile takeover of a company.

As indicated above, the practical effect of the more than five percent requirement would be that numerous institutional investors would have to aggregate their holdings to form a qualifying shareowner group. To the extent that the Proposed Amendments contemplate detailed disclosures about each and every member of that group, there would be a corresponding increase in the amount of recordkeeping that would be required regarding each investor's contacts with a given company.

There would also be significant efforts required in terms of compiling the proposed disclosures into an initial Schedule 13G filing, not to mention the burden of the additional requirements that appear to be contemplated for amended Schedule 13G filings. We 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.

Precatory Proposals

Finally, the Proposed Amendments include an inquiry into whether the Commission should consider adopting new rules under which the existing federal proxy rules that govern the ability of shareowners to offer precatory proposals would be replaced by a generally more restrictive regime governed by state law and a company's governing documents.[12] The Proposed Amendments suggest that such restrictions are appropriate "in light of developments in the last 25 years that may have diminished the concerns about shareholders' ability to act as a group . . . ."[13] The Council disagrees.

We believe the "developments in the last 25 years" evidence the growing number of shareowners willing to vote for precatory resolutions and that many such resolutions are being adopted. We are concerned that the Proposed Amendments could hinder the ability of shareowners *as a whole* to communicate with management and the board at the only forum each year where such communication is possible. We are surprised and disappointed that at a time when companies are improving their corporate governance policies in response to shareowner precatory resolutions in record numbers,[14] the Proposed Amendments appear designed to inhibit shareowners from pursuing those proposals.

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[12] *Id.* at 43,477-78.
[13] *Id.* at 43,478.
[14] *See, e.g.,* Edward Iwata, *Boardrooms open up to investors' input*, USA Today, Sept. 6, 2007, at 1, *available at* http://www.usatoday.com/money/companies/management/2007-09-06-shareholders-fight_N.htm (Noting that a record 23% of shareholder resolutions proposed in 2007 "were withdrawn by shareowners after companies agreed to adopt new policies, or to sit down and discuss the issues").

We appreciate the opportunity to express our views on this matter. Please feel free to contact me with any questions.

Sincerely,

Jeff Mahoney
General Counsel

Attachment

Attachment: Responses to Selected Questions from SEC Shareholder Proposals

As proposed, a bylaw proposal may be submitted by a shareholder (or group of shareholders) that is eligible to and has filed a Schedule 13G that includes specified public disclosures regarding its background and its interactions with the company, that has continuously held more than 5% of the company's securities for at least one year, and that otherwise satisfies the procedural requirements of Rule 14a-8 (e.g., holding the securities through the date of the annual meeting). Are these disclosure-related requirements for who may submit a proposal, including eligibility to file on Schedule 13G, appropriate? If not, what eligibility requirements and what disclosure regime would be appropriate? (page 43,470)

We do not believe these disclosure-related requirements are appropriate. The requirements would appear to be overly burdensome for many members of the Council of Institutional Investors ("Council") and other institutional investors in a number of ways. Perhaps most significantly, the requirements contemplate a highly detailed set of disclosures of participants in a shareowner group filing a proxy access bylaw. There is a paradox here: The Securities and Exchange Commission ("SEC" or "Commission") is proposing to use Schedule 13G as the template, yet the proposed disclosures go far beyond what is currently required of passive investors who must file on Schedule 13G, and, more startling, they appear to require far more detail than would be required of shareowners filing a Schedule 13D who are attempting a hostile takeover of a company. This defies logic.

Proponents of proxy access seek to do nothing more than offer a shareowner resolution (as has been their right for over sixty years) and to do so in the form of a bylaw, a right generally conferred upon shareowners under state law. While some additional disclosures would be appropriate, the proposal does not explain why such a high level of detailed disclosure is required, particularly as to institutional shareowners who may be proposing such a bylaw consistent with their fiduciary obligations to their funds' participants.

The disclosure-related requirements also appear to lack the specificity necessary to properly evaluate whether some elements of the eligibility requirements and the disclosure regime are appropriate. As one example, the requirements are confusingly vague as to the timing of an institution's filing because the proposal appears to be inconsistent with current deadlines for Schedule 13G filings.

More specifically, the disclosure-related requirements appear to contemplate the filing of an initial Schedule 13G no later than the filing of a proxy access bylaw proposal. However, the requirements do not explicitly amend the rule setting out Schedule 13G filing requirements. As a result, the disclosure-related requirements would appear to impose a requirement different from the normal schedule for institutional investors, who under Rule 13d-1(d) are otherwise not required to file a Schedule 13G until forty-five days after the end of the year in which the five percent holding was acquired. Amendments to that Schedule 13G are under Rule 13d-2(b) normally filed forty-five days after the end of the calendar year in which the change occurs. Thus, under the disclosure-related requirements, it would appear that an amendment to Schedule 13G might not be filed until after the annual shareowner meeting has been held.

The disclosure-related requirements also fail to provide sufficient information about some other potentially important aspects of the requirements including: (1) what would trigger the need to file an amendment to Schedule 13G?; (2) would the requirements be equally applicable to all members of a shareowner group?; (3) would there be a materiality requirement?; (3) would a single incident be a triggering event?; (4) What would be the period of time covered by a filing? We believe that the proposal's lack of specificity with respect to those and other issues may make it difficult for commentators to provide meaningful input, particularly in response to the SEC's request for comments on issues relating to the Paperwork Reduction Act,[1] the Cost-Benefit Analysis,[2] the Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation,[3] and the Initial Regulatory Flexibility Act Analysis.[4]

If the Commission plans to further pursue the disclosure-related requirements, we believe consideration should be given to issuing a supplemental notice for public comment. That notice should include revisions to the requirements to address some of the above issues, including, if necessary, revised estimates of the compliance costs.

For example, should the 5% ownership threshold be higher or lower, such as 1%, 3%, or 10%? Is the 5% level a significant barrier to shareholders making such proposals? Does the impediment imposed by this threshold depend on the size of the company? Should the ownership percentage depend on the size of the company? For example, should it be 1% for large accelerated filers, 3% for accelerated filers and 5% for all others? Should an ownership threshold be applicable to all? (page 43,470)

We believe that the five percent ownership threshold is too high a barrier for shareowners submitting resolutions. While institutional investors may collectively own more than sixty percent of outstanding U.S. equities, approximately one-half of those shares are held by mutual funds and insurance companies.[5] 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.[6] 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.[7]

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[1] Shareholder Proposals, Exchange Act Release No. 56,160, Investment Company Act Release No. 27,913, 72 Fed. Reg. 43,466, 43,480-82 (proposed Aug. 3, 2007), *available at* http://www.sec.gov/rules/proposed/2007/34-56160fr.pdf
[2] *Id.* at 43,482-83.
[3] *Id.* at 43,483-84.
[4] *Id.* at 43,484-85.
[5] *See, e.g.,* The Conference Board, Institutional Investment Report 29 (2007) (Indicating that investment companies and insurance companies hold 22.8% and 7.4%, respectively, of the total U.S. equity market).
[6] *Id.* (Indicating that state and local pension funds hold 9.8% of the total U.S. equity market).
[7] E-mail from Christopher J. Ailman, Chief Investment Officer, CalSTRS, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 3:09 PM EST) (On file with Council). Similarly, Council member—The Florida State Board of Administration—typically owns only about 0.33% of the outstanding stock of any company in the Russell 3000. E-mail from Tracy Stewart, Corporate Governance Manager, Florida State Board of Administration, to Justin Levis, Senior Analyst, Council (Sept. 7, 2007, 5:55 PM EST) (On file with Council).

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 Group Incorporated. CalPERS, with approximately 0.5 percent of the company's outstanding shares, ended up as the sole sponsor.[8] Even so, 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. Moreover, the more than five percent threshold would likely be too high a barrier whether the funds' aggregate holdings are in a large-cap, mid-cap or small-cap company. 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 groups would be approximately 3.01, 3.59, and 3.56, respectively.

Thus, many more funds and other investors would need to collaborate to hit the more than five percent threshold in most circumstances. As indicated, given the small number of investors that traditionally sponsor shareowner resolutions, it is currently difficult to imagine how a sufficiently large coalition could be established.[9]

Moreover, the problem would be compounded by the proposed disclosure-related requirements, particularly if they were to be applied to each and every member of a shareowner group. As indicated, those requirements would appear to be far more detailed than are currently required of shareowners who file a Schedule 13D.

Proposals to establish a procedure for shareholder nominees would be subject to the existing limit under Rule 14a-8 of 500 words in total for the proposal and supporting statement. Is this existing word limit sufficient for such a proposal? If not, what increased word limit would be appropriate? (page 43,471)

The existing word limit under Rule 14a-8 often makes it difficult to draft a bylaw and a related supporting statement given the level of detail that may be necessary. We, therefore, believe that increasing the word limit would be appropriate.

[8] *See* UnitedHealth Group Incorporated, Proxy Statement for Annual Meeting of Shareholders to be Held May 29, 2007 (Schedule 14A), at 100 (Apr. 30, 2007), *available at* http://www.unitedhealthgroup.com/invest/2007/Proxy_Stmt_2007.pdf.
[9] In recent Congressional testimony, SEC Chairman Christopher Cox, in response to a question from Committee on Banking, Housing, and Urban Affairs Chairman Christopher J. Dodd, appeared to concede that the more than five percent threshold would be difficult for investors to meet. *See The State of the Securities Markets Before the Comm. on Banking, Housing, and Urban Affairs,* 110th Cong. 48 (Jul. 31, 2007) (Draft of hearing transcript). More specifically, Chairman Cox suggested that the proposed amendment to facilitate the use of electronic shareowner forums "would be a way to put together a 5 percent group that does not exist today." *Id.*

In seeking to form a group of shareholders to satisfy the 5% threshold, shareholders may seek to communicate with one another, thereby triggering application of the proxy rules. In order not to impose an undue burden on such shareholders, should such communications be exempt from the proxy rules? If so, what should the parameters of any such exemption be? (page 43,471)

We believe that shareowner communications with one another in seeking to form a group to satisfy any proxy access threshold should be exempt from the proxy rules. Some form of communication between shareowners is almost inevitable before one will even know whether there is enough support to propose a proxy access bylaw. If proponents of such a bylaw at a given company are able to muster a sufficient level of support, then appropriate disclosure requirements at that point should be sufficient to protect investors. We fail to understand the regulatory purpose or public policy basis for imposing disclosure requirements on passive non-control oriented shareowner groups prior to the time such a group is prepared to file a shareowner resolution.

The proposed disclosure standards relate to the qualifications of the shareholder proponent, any relationships between the shareholder proponent and the company, and any efforts to influence the decisions of the company's management or board of directors. To assure that the quality of disclosure is sufficient to provide information that is useful to shareholders in making their voting decisions and to limit the potential for boilerplate disclosure, we have proposed that the disclosure standards require specific information concerning these qualifications, relationships, and efforts to influence the company's management or board of directors. Is the proposed level of required disclosure appropriate? Are any of the proposed disclosure requirements unnecessary to shareholders' ability to make an informed voting decision? If so, which specific requirements are not necessary? Should we require substantially similar disclosure from both the proponent and the company as proposed or should the company be allowed to avoid duplicating disclosure relating to the proponent where the company agrees with the disclosure provided? Is any additional disclosure appropriate? (page 43,474)

As indicated, we believe the proposed level of required disclosure would appear to be too burdensome. As also indicated, we believe the proposed disclosure standards are too vague in some cases making it difficult to fully evaluate what is being proposed.

As one example, suppose that a pension fund's governance staff identifies a poorly performing company that the staff believes might benefit from a proxy access resolution; the proxy access resolution is developed and presented to the fund's board of trustees; the trustees authorize the staff to take steps to identify other investors who might be interested in achieving the requisite ownership threshold and, if there is sufficient interest, to file the proposal. This fairly typical scenario is rife with questions that the proposed disclosure standards never answer, for example: Who are the "person or persons" about whom each of the five enumerated categories of information must be disclosed?[10] The staff person who first formulated the idea? All the members of a fund's board of trustees? Or only those who voted to undertake the action?

[10] Shareholder Proposals, 72 Fed. Reg. at 43,473.

Regardless of what individuals may have to report, what does the proposed disclosure standards mean when they say that there must be disclosure of the "qualifications and background" of those individuals that are "relevant to the plans or proposals"?[11] Is election to a fund's board of trustees by fund participants a "qualification"? Does that confer the relevant "background" necessary for a trustee to endorse a proxy access proposal? If not, what does? And how much about one's "background" must be provided?

Whatever might be the answer to the aforementioned questions, we question the SEC's assumption that shareowners need additional disclosures about the qualifications of proponents in order to make voting decisions on shareowner resolutions. The Commission should identify who these shareowners are and why they need such information.

Would the proposed Schedule 13G disclosure requirements for shareholder proponents be useful to other shareholders in forming their voting decisions? Are the requirements practical? Is any aspect of the proposed disclosure overly burdensome for shareholder proponents to comply with? (page 43,474)

As indicated, the proposed Schedule 13G disclosure requirements would appear to require extensive recordkeeping duties that may be impractical or overly burdensome for shareowner proponents to comply with. As one example, suppose that a pension fund representative speaks with a director of Company A in May 2007 about matters affecting Company A. Suppose too that this director serves on the board of Company B. In March 2008, ten months after the encounter, the fund in question helps file a proxy access proposal at Company B in time for that company's September 2008 annual meeting. Given this fact pattern, under the proposed disclosure requirements it would appear that the following disclosure obligations would be triggered: (a) the pension fund would have to disclose the conversation with the director in "reasonable detail" in a Schedule 13G, which is filed ten months after the conversation took place;[12] and (b) the director would have to recall the conversation in order to assist Company B in preparing its proxy in August 2008 – even though the conversation had *nothing* to do with Company B.

To take another example, it would appear that the proposed disclosure requirements would require that every participant in a shareowner group calculate not only its holdings in the company being considered for a proxy resolution, but also every other enterprise in the same Standard Industrial Classification Code and add up those figures; if the total exceeds more than five percent on the date the plan to submit a bylaw is formulated, that holding would have to be reported.[13] Finally, we note that the proposed disclosure requirements would appear to be impractical or overly burdensome in some circumstances because the requirements do not appear to be limited to "material" items. For example, there does not appear to be any exceptions to the required disclosure in "[r]easonable detail" of "any meetings or contacts, including direct or indirect communication" with management or a director.[14]

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[11] *Id.*
[12] *Id.* at 43,472.
[13] *Id.* at 43,472 n. 50.
[14] *Id.* at 43,472.

As proposed, the disclosures concerning the shareholder proponent and the company's relationship must be provided for the 12 months prior to forming any plans or proposals, with regard to an amendment to the company bylaws. Is this the appropriate timeframe? If not, should the timeframe be shorter (e.g., 6 or 9 months) or longer (e.g., 18 or 24 months)? Is any federal holding period requirement appropriate? (page 43,474)

The vagueness of the proposed disclosures again makes it difficult to determine whether the timeframe for the disclosures concerning the shareowner proponent are appropriate, particularly when the shareowner group includes pension funds. For example, is the date a plan is "formed" for purposes of determining the timeframe the first date that a representative of a single fund advises management of an intent to file a proxy access proposal? If yes, the result would not appear to be realistic, given that the actual filing of a proposal will occur only if that fund is successful in enlisting numerous other holders with enough shares to meet the more than five percent threshold.

In addition, it would appear that there may be multiple "formation" dates for a single proposal. The provision requiring background information on responsible individuals at a fund appears to require disclosure of the identity of the person at a fund "responsible for the formation of any plan or proposals."[15] That is presumably a different person at each fund. Is the "formation" date the earliest date upon which any fund representative had a conversation with a company official? Would it not make more sense to key any "formation" date to the date that a shareowner group obtains enough participants to exceed the more than five percent threshold and definitively resolves to move forward?

The confusion over the proposed timeframe for disclosures is compounded by references to the "formation" date including the date upon which a shareowner or shareowner group says that it will *not* submit a proxy access bylaw if the company takes certain action. For example, suppose that a shareowner not owning the required threshold makes the following statement to a company: "If this company does not adopt a policy on golden parachutes, then we'll try to round up enough support to submit a proxy access bylaw." Presumably there is no need to file a Schedule 13G if no proxy access bylaw is ultimately filed. Or is there? Or suppose that the shareowner makes the aforementioned statement, but cannot find enough support until two years later. Are shareowners – and directors – required to search their memories and records going back that far?

As indicated, the lack of specificity with respect to the proposed disclosures makes it difficult for affected parties to submit substantive comments in response that do more than point out the many inconsistencies and ambiguities. Part of the problem may be the fact that the Commission is attempting to use Schedule 13G in a manner that it has not previously been used.

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[15] *Id.* at 43,473.

We propose to amend Regulation 14A to encourage the development of electronic shareholder forums that could be used by companies to better communicate with shareholders and by shareholders to better communicate both with their companies and among themselves. In addition, the electronic shareholder forum concept could offer shareholders a means of advancing referenda that might otherwise be proposed as non-binding shareholder proposals under Rule 14a-8. Is this appropriate and, if so, how can we further encourage the development of electronic shareholder forums? (page 43,477)

The Council generally supports the continued development of electronic shareowner forums. We do not agree with some of the comments expressed during SEC roundtables in May 2007 indicating that such forums would not do anything more than generate new corporate "chat rooms," and fail to produce significant communications on governance or other issues.[16]

We are optimistic that electronic shareowner forums will prove to be a valuable supplement to the current Rule 14a-8 process by providing shareowners with a means to determine the level of interest with regard to various governance issues and gauge support for potential proposals and initiatives. At this time, however, we would strongly oppose as premature the use of electronic shareowner forums as a substitute for the existing requirements for submitting precatory proposals under Rule 14a-8.

Would it be appropriate for the Commission to provide that the substance of the procedure for non-binding proposals contained in a bylaw amendment would not be defined or limited by Rule 14a-8, but rather by the applicable provisions of state law and the company's charter and bylaws? For example, the Commission could provide that the framework could be more permissive or more restrictive than the requirements of existing Rule 14a-8 (e.g., the framework could specify different eligibility requirements than provided in current Rule 14a-8, different subject matter criteria, different time periods for submitting non-binding proposals to the company, or different submission thresholds; or it could specify that non-binding proposals would not be eligible for inclusion in the company's proxy materials or alternatively that all non-binding proposals would be included in the company's proxy materials without restriction, if these approaches were consistent with state law and the company's charter and bylaws). (page 43,478)

We believe that all shareowner resolutions, whether binding or precatory, should continue to be uniformly regulated under Rule 14a-8. Thus, we believe it would be inappropriate for the Commission to provide that the substance of the procedure for precatory proposals contained in a bylaw amendment be defined or limited by the provisions of state law and the company's charter and bylaws.

According to Institutional Shareholder Services ("ISS"), over the past three years, Council members have filed on average about forty-six percent of all corporate governance-related resolutions submitted to U.S. companies.[17] They have filed shareowner resolutions for many years, and have done so with much success.

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[16] *See, e.g.,* L. Reed Walton, *Online Communication Grows,* Institutional Shareholder Services ("ISS"), Corporate Governance Blog, June 8, 2007, http://blog.issproxy.com/2007/06/online_communications_growssub.html.

[17] Of note, according to ISS, at least 158 separate proponents were responsible for submitting the 688 governance-related shareowner proposals that were filed for the 2006 proxy season. Approximately 280 of the 688 resolutions (40.7%) were filed by Council members.

For the most part Council members file precatory resolutions, which is consistent with how most resolutions are structured. As indicated in the following chart, according to ISS, the vast majority of all shareowner resolutions over the last four years (more than ninety-six percent) have been precatory:

	2004	**2005**	**2006**	**2007**
Governance Proposals (# filed)	751	731	690	823
Binding Proposals (# filed)	17	15	19	31
Binding Proposals (# voted)	8	6	13	11*
Percentage (filed)	2.3%	2.1%	2.8%	3.8%

* According to data obtained from ISS on September 10, 2007, vote tallies are currently available on 11 of the 14 binding shareowner proposals that are or will be included on company ballots.

Council members file precatory resolutions for a number of reasons, but perhaps the most important one is that they have been an extremely effective tool for having a dialogue with management about important corporate governance issues.[18] Precatory proposals give the marketplace at large the opportunity to weigh in on an issue and communicate the broader market views to directors and management.

Precatory resolutions have contributed to some very significant governance reforms in recent years, including: majority voting standards for directors; expensing of stock options; and ending classified boards. There are many reasons why precatory proposals have been so effective. One is that they are used by proponents to promote communication rather than to force change.

Many institutional investors view a precatory proposal as a "door knocker." From our perspective, a precatory proposal is an invitation to a conversation with management that, if successful, could lead to a dialogue on the subject; if not successful, the matter may be raised with shareowners as a group at the annual meeting.

In contrast, in light of their highly prescriptive nature, binding proposals are viewed as more of a "hammer." Hammers tend to put people on the defensive. That has been the experience of Council members, who have generally found that non-binding proposals tend to lead to more meaningful dialogue with companies. Dialogue is very important for Council members, since they withdraw about a third of the resolutions they file following discussions with companies.[19]

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[18] *See, e.g.*, Edward Iwata, *Boardrooms open up to investors' input*, USA Today, Sept. 6, 2007, at 1, *available at* http://www.usatoday.com/money/companies/management/2007-09-06-shareholders-fight_N.htm. Also of note, many Council members have obligations under the Employee Retirement Income Security Act of 1974 ("ERISA") to manage fund assets in accordance with U.S. Department of Labor ("DOL") directives. The DOL has issued interpretative bulletins relating to ERISA that effectively approve pension funds' use of shareowner resolutions as a means of communicating with portfolio companies. *See* Pension and Welfare Benefits Administration, U.S. Dept. of Labor, Interpretative Bulletin No. 94-2, Relating to ERISA 329 (July 29, 1994); *available at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/cfr_2002/julqtr/29cfr2509.94-2.htm.

[19] According to ISS, 28.9% of shareowner proposals filed by Council members for the 2006 proxy season were withdrawn.

Precatory proposals can be useful for another reason as well, namely, to provide the board with general guidance as to shareowner wishes at a policy level, while leaving questions of implementation and the like to management. For example, shareowner resolutions dealing with executive "golden parachutes" are very popular among shareowners and regularly command a majority of the shareowner votes. However, it is very difficult in 500 words to craft a bylaw on severance packages in the kind of detail that is appropriate for an individual company. The ability of shareowners to submit a precatory proposal, while leaving it up to the board to craft an appropriate bylaw reflecting the approved policy, is often an effective means to improving corporate governance and maximizing shareowner value.

The 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, that is a positive result.

At the most basic level, we are not aware of any state laws that compel companies to print shareowner proposals in their proxies. That result is not surprising, given that this is an area where federal rules have held sway for over sixty years. We believe the existence of federal rules provides clarity and uniformity that would not be available under state law alone.

The Commission considered similar proxy access questions in a 1982-83 rulemaking.[20] In that rulemaking the Commission proposed three options:

(1) make certain revisions to Rule 14a-8, notably the adoption of minimum holding requirements ($1000 for one year);

(2) allow companies and shareowners to adopt their own procedures for what goes into the proxy, subject to certain minimum standards; and

(3) require companies to include any proposal that was lawful under state law, except those involving the election of directors, with limitations on the number of proposals to be offered by one shareowner and hold a lottery to avoid duplication of proposals.

There was significant opposition to the latter two options. The Commission ultimately concluded that those two options would create serious problems of administration as there would be no uniformity or consistency in determining the inclusion of proxy proposals. Exacerbating the problem generated by provisions individual to each issuer would be the effect of the fifty state judicial systems administering the process. Those conclusions are as valid today as they were in 1983. We believe that any gains in terms of permitting additional resolutions that might be valid under state law would be offset by the significant complexity and transactional costs in chartering a new system based on state law.

[20] *See* Shareholder Proposals, 72 Fed. Reg. at 43,478 n. 71.

In summary, we believe that the existing federal proxy rules continue to fulfill the original intent of the Commission in promulgating those rules: (1) providing shareowners (a) with adequate notice as to important matters that will come before the annual meeting so shareowners can cast an informed vote; and (b) a voice on major policy decisions of the companies in which they have an investment; and (2) preventing management from using discretionary voting authority to effectively shut out shareowners from being able to propose alternative courses of company action. That first essential element—notice to shareowners about what will come before the meeting—is qualified by the exclusions in Rule 14a-8 that permit a company to omit proposals that are contrary to state law, that are impossible to implement, that are moot or duplicative, that are beyond a shareowner's powers (such as declaring dividends) or that are not deemed to have sufficient policy significance to warrant inclusion.

While there is debate from time to time about the scope of the exclusions in Rule 14a-8, there is little debate about the wisdom of the overall regulatory model that gives shareowners notice as to matters that will come before the meeting without requiring a company to print proposals that violate state law or satisfy one of the other general categories indicated above. This is a tradeoff that most shareowners find more than acceptable, particularly when, as indicated, the Rule creates a single unified set of standards for all companies. It is difficult to imagine how things would work and how Council members, other shareowners, and the long-term performance of companies would benefit if the Commission were to permit significantly more complex, less uniform procedures for precatory proposals than are currently required by Rule 14a-8.

Are there additional changes to Rule 14a-8 that would improve operation of the rule? If so, what changes would be appropriate and why? For example, should the Commission amend the rule to change the existing ownership threshold to submit other kinds of shareholder proposals? If so, what should the threshold be? Would a higher ownership threshold, such as $4,000 or $10,000, be appropriate? Should the Commission amend the rule to alter the resubmission thresholds for proposals that deal with substantially the same subject matter as another proposal that previously has been included in the company's proxy materials? If so, what should the resubmission thresholds be—10%, 15%, 20%? Are there any areas of Rule 14a-8 in which changes or clarifications should be made (e.g., Rule 14a-8(i)(7) and its application with respect to proposals that may involve significant social policy issues)? If so, what changes or clarifications are necessary? (page 43,479)

As indicated, Council members generally are comfortable with Rule 14a-8, including the existing substantive bases for exclusion of resolutions. Those exclusions have generally not hampered members'ability to submit resolutions on issues of importance to them. Council members also appreciate the professionalism and dedication of the SEC staff in handling the no-action process.

We, however, believe there may be some merit to the Commission reconsidering a potential change to Rule 14a-8 first proposed in a 1997 SEC Proposed Rule.[21] That Proposed Rule provided an "Override Mechanism" requiring a company to include any resolution put forth by shareowners of at least three percent of the company's outstanding voting shares even if the resolution could have been excluded under Rule 14a-8(i)(5)(Relevance) or (i)(7)(Management Functions).[22] As described by the SEC, such a potential change has some appeal because it

> would broaden the spectrum of proposals that may be included in companies' proxy materials where a certain percentage of the shareholder body believes that all shareholders should have an opportunity to express a view on the proposal . . . [and] provide shareholders an opportunity to decide for themselves which proposals are sufficiently important and relevant to all shareholders - - and, therefore, to the company - - to merit space in the company's proxy materials.[23]

[21] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39,093, Investment Company Act Release No. 22,828 (proposed Sept. 18, 1997), *available at* http://www.sec.gov/rules/proposed/34-39093.htm.
[22] *Id.* at 16.
[23] *Id.*