

21 July 2005

DG MARKT F2
The European Commission
B-1049 Brussels
Belgium

Via email

Re: Fostering an Appropriate Regime for Shareholders' Rights (Ref. MARKT/13.05.2005)

Dear Commission Representatives:

The Capital Markets Policy Council (the "Council") of the CFA Institute's CFA Centre for Financial Market Integrity (the "Centre")¹ is pleased to comment on the consultation, *Fostering an Appropriate Regime for Shareholders' Rights* (the "Consultation"), prepared by the Internal Market Directorate General of the European Commission (the "Commission"). The Centre, through the experience in international markets and different investment disciplines of the 12 CFA Institute members on the Council, represents the interests of investors and investment professionals to standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis, investment management, and the efficiency of global financial markets.

General Comments

Support for the Consultation

The Council supports the efforts of the European Commission to resolve issues relating to the exercise of shareowner voting rights and the proposals made in the Consultation (the "Standards") to achieve these resolutions. Such rights, as noted in the Consultation, are a fundamental aspect of shareownership and one whose value is often explicitly recognized in the price of shares.

¹ With headquarters in Charlottesville, VA and regional offices in New York, Hong Kong and London, CFA Institute (formerly, the Association for Investment Management and Research[®]) is a non-profit professional association of 78,000 financial analysts, portfolio managers, and other investment professionals in 119 countries of which 63,000 are holders of the Chartered Financial Analyst[®] (CFA[®]) designation. The CFA Institute membership also includes 132 Member Societies and Chapters in 52 countries and territories. The CFA Centre develops, promulgates, and maintains the highest ethical standards for the investment community including the CFA Institute *Code of Ethics and Standards of Professional Conduct*.

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Eliminating the remaining barriers that prevent true owners from exercising their voting rights on company resolutions and board member elections could have three notable benefits to E.U.-based investors and companies. First, it will enable cross-border ownership among investors not only located within EU Member States but elsewhere in the world. Second, it will increase investor interest in the shares of companies which were previously covered by laws that prevented shareowners to exercise their voting rights. Finally, this effort could act as a template to reduce similar barriers that prevent cross-border ownership and voting in jurisdictions outside the European Union.

The Council also agrees with the Commission's determination that ownership of voting rights should reside with the natural or legal person whose economic interests are at risk in the company. Physically holding the shares of a company on behalf of others does not give institutions such as custodians or depositaries the authority to vote those shares without direct instruction from those persons whose economic interests are at risk.

In fact, there is a real possibility that the interests of such institutions may conflict significantly with the interests of the shares' ultimate economic owners. For example, a bank subsidiary acting as depositary for the company's shares or another subsidiary acting as underwriter for the company's commercial paper program may vote to retain the company's nominated board members, even though those nominees may not have served in the best interests of shareowners and may have even produced inferior results.

While strongly supportive of the Proposals, there are areas in which the Council believes clarification is necessary not only to explain the position of the Commission, but also to ensure that any resulting rules are as useful as possible. These instances are noted below in response to specific questions. In cases where the Council has not responded directly to a question in the Consultation, it is indicative of strong approval for the Proposal contained in that specific question.

Other Suggestions

The Commission should include some recourse by which shareowners can enforce their full rights of ownership when their voting rights are abused or denied by issuers or as a result of Member States not enacting or enforcing these Standards. While this recourse could take the form of access to legal or regulatory mechanisms to enforce their rights, it is important that shareowners have a mechanism to ensure they can exercise their rights. Otherwise, it is possible that companies will continue to impose barriers to cross-border investors as a means of preventing their participation in corporate votes.

Specific Comments

1. Scope

Do you agree with the proposed scope for any future measure at EU level, if any, establishing minimum standards for shareholders' rights? If not, please give your reasons.

Any potential measure at EU level establishing minimum standards for shareholders' rights should apply solely to companies formed under the laws of a Member State and whose securities are admitted to trading on a regulated market in one or more Member States within the meaning of Council Directive 2004/39/EC.

The Council concurs with the proposal to restrict these Standards to listed companies. These are the companies whose shareowners are large in number, geographically dispersed and, therefore, in need of improvements to cross-border voting mechanisms.

Transactions in securities of unlisted companies often are the result of negotiated transactions involving investors who have direct access to management and can request relevant information prior to committing funds to the companies. Other typical transactions in the securities of unlisted companies may involve insiders and their families, all of whom should have direct access to management.

UCITS (of the corporate type) falling within the scope of Art. 1(2) of Directive 85/611/EEC, and equivalent funds, should be excluded from the scope of any such measure.

The Council recognizes that Undertakings in Collective Investment Trust Securities (UCITS) are covered by separate regulations and rules at the EU level and, as a consequence, realize that the current Proposal will not affect those rules. However, the Council does suggest that the Commission take steps to ensure that mechanisms exist within such UCITS rules and regulations to permit cross-border voting in the same manner as this Proposal requires for other issuers. Regardless of their structure, it is important that investors have a say in the governance of the companies and how those companies put their investment funds to use.

2. The "Ultimate Investor" or "Ultimate Accountholder"

Do you consider... that granting 'ultimate investors' at EU level a legal enforceable right to direct how votes attached to shares credited to their accounts are cast, is a pre-requisite to facilitating cross-border voting?

The Council strongly believes that the person or persons with economic interests at risk in a security should possess the legally enforceable right to direct how votes attached to those shares are cast. This is a pre-requisite to corporate governance, regardless of whether or not the shareowner is domiciled in a different legal jurisdiction from the issuing company.

2. If so, do you agree with the following proposal, based on the works of UNIDROIT: “the legal or natural person that holds a securities account for its own account shall have the right to determine how votes attached to shares credited to its securities account are to be cast”? Please give your reasons.

Accomplishing the goal of ensuring these rights should be accomplished in the most general and unambiguous language possible to prevent companies from having legal means to circumvent such rules. If the Commission could achieve this goal without having to introduce a new definition at the EU level for who owns the voting rights to shares it would likely serve the interests of those shareowners best. That such relationships already are covered sufficiently by contractual arrangements among issuers, custodians, depositaries, and investors, reduces the need for the Commission to create a new definition. More important is to ensure that the contracts among these parties are enforced.

3. Stock Lending and Depositary Receipts

3.1 Stock Lending

Do you agree with the following minimum standard? If you do not agree or agree only partially, please give your reasons.

1. Agreements providing for the temporary transfer for consideration of shares shall contain provisions informing the relevant parties to the agreement of the effect of the agreement with regard to the voting rights attaching to the transferred shares.

The Council strongly supports this Standard, but encourages supplementing it in two ways. First, the Commission should require that customers acknowledge in writing that they have received this information. And second, these agreements should provide customers with options either to a) require the intermediary to provide notice prior to any lending of stock in the customer's account, or b) acknowledge in writing that the intermediary has authority to lend the customer's shares at any time without prior approval. Customers also should have the right to change their preferred options.

2. Where an intermediary enters into such an agreement in relation to shares which the intermediary holds on behalf of another person, or which are held in a securities account in the name of another person, the intermediary shall, prior to entering into the agreement, duly inform that person or its representatives of its intention to enter into such an agreement and the effects of the agreement with regard to the voting rights attaching to the relevant shares.

The Council supports this Standard, but encourages the Commission to include the stock lending options noted in the immediately preceding question.

3.2 Depositary Receipts

Holders of depositary receipts shall alone have the right to determine how the voting rights attached to underlying shares represented by depositary receipts are exercised.

The Council strongly supports this Standard. To let any legal or natural persons other than the holders of the depositary receipts determine how the shares are voted could produce results that are contrary to the best interests of the persons whose economic interests are at risk. As the Commission suggests, the only way to avoid such conflicts of interest is to require that holders of depositary receipts have the sole right to determine how to vote those shares.

4. Pre General Meeting Communications

Do you agree with the following minimum standards? If not, please give your reasons

1. Annual General Meetings of listed companies shall be convened on a first call with no less than 21 business days notice.

The Council concurs that 21 business days notice is sufficient, but the Council also believes this is sufficient only if agenda items and resolutions are included as part of this notice.

Shareowners, particularly large institutional shareowners with widely diversified portfolios, may receive dozens or even hundreds of such notices within a short period of time. In each case, they must have time to carefully consider how resolutions and other agenda items may affect their interests or the interests of their clients. Considering the amount of time it may take for such information to reach these institutions — at least three to four days each way as noted in the Consultation for such information to wade through the chain of intermediaries and back to the issuer — some institutions may have less than two weeks to consider the issues of a large number of meetings. This could harm the interests of investors.

Also, as the Commission recognizes, enabling companies to use technology for voting would reduce the amount of time spent delivering such notices and the related votes back and forth. However, it would not reduce the amount of time investors will need to carefully consider each issue prior to casting a vote. Consequently, the Council believes that the 21 business days should continue to apply even after technological advances reduce the delivery times for this information.

2. Other Shareholders' Meetings shall be convened on a first call with no less than 10 business days notice.

While the Council agrees with the Commission that issuers should have greater flexibility in calling special shareholders' meetings, the minimum time frame of 10 days proposed for convening such a meeting is too short to ensure complete participation. As noted in the Consultation, this is barely enough time for the materials to get sent to shareowners in other Member States and for them to return their votes. Furthermore, this short time frame provides

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shareowners with little time to consider, research, and decide on what is best for them or the clients they represent.

Consequently, the Council suggests that special shareowner meetings convene no sooner than 15 business days after notice is initially sent to shareowners.

Do you agree with the following minimum standards? If you do not agree or agree only partially, please give your reasons.

Any notice convening a General Meeting shall at least:

- indicate precisely the place, time and agenda of the meeting and give a clear and precise description of participation and voting procedures and requirements for voting at the General Meeting. Alternatively, it may indicate where such information may be obtained.

- indicate where the full, unabridged text of the resolutions and the documents intended to be submitted to the General Meeting may be obtained.

The Council suggests that the Commission include additional information in such notices. Particularly relevant to such meetings is a list of those individuals who will preside over the meeting. This should include specifically the names of individual board members, relevant background information on their business experience and judgment, and their personal shareholdings in the company, any member of the company's group, or its holding company.

Do you agree with the following minimum standard with regard to the time at which GM-related documents should be made available? If not, please give your reasons.

The full text of the resolutions and documents related to the agenda items and intended to be submitted to the General Meeting shall be made available at the latest 15 business days before any Annual General Meeting, and at latest 10 business days before any other General Meeting.

The Council suggests that the Commission require that issuers include resolutions and related documents with the original notice of the General Meeting, which, as noted above, should occur no later than 21 business days before such meeting. To delay dissemination of such documents until 15 business days prior to the meeting could prevent all shareowners from having time to review, analyse and decide on what vote is best for the shareowner or its clients.

Do you agree with the following minimum standard? If not, please give your reasons.

Any notice convening a General Meeting and any document intended to be submitted to the General Meeting shall be made available in a language customary in the sphere of international finance, unless the General Meeting decides to the contrary.

The Council is concerned that companies could use this Standard to delay informing non-resident shareowners about a meeting or a resolution prior to an important vote.

For example, if management or insiders of an Italian company were worried that German or French investors might launch a takeover of the company within six months, they could call a special meeting to consider a resolution against translation. They could then borrow shares from shareowners to get the resolution approved and use the decision to hamper non-Italian investors from launching a takeover bid, or even from acquiring an interest in the company in the first place.

If the German investors wished to translate the documents on their own, they would have to bear the full expense and the delay translation would create. Ultimately, this could prevent the investors from having access to, analysing, and deciding on how to vote on various resolutions prior to the meeting.

Consequently, the Council suggests that the Commission eliminate this opt-out possibility. If an opt-out is retained, it should have a threshold for adoption of no less than a three-fourths majority to prevent manipulation, and a threshold for rescission of no more than 51 percent of votes at the General Meeting.

5. Admission to the General Meeting – Share Blocking

Do you agree with the following minimum standard? If not, please give your reasons.

1. Provisions making the right to vote in a General Meeting conditional, or allowing the right to vote to be made conditional, on the immobilisation of the corresponding shares for any period prior to the Meeting shall be abolished.

2. The right to vote at the General Meeting of a listed company shall be made conditional upon qualifying as a shareholder of that listed company on a given date prior to the relevant General Meeting.

The Council strongly supports these Standards to eliminate share blocking — which require shareowners to retain their holdings for a specified period of time prior to a vote to ensure accurate shareowner lists — and to move toward the use of a record-date mechanism. The Council believes that elimination of share blocking will enhance investor interest in the securities of companies located within jurisdictions that currently permit such immobilisation. Furthermore, advances in technology make the use of a record date mechanism more flexible and accurate, and reduces the likelihood that anyone voting at a General Meeting is a bona fide shareowner.

6. Shareholders Rights in Relation to the General Meeting

6.1 Electronic Participation in General Meetings

Do you agree with the following minimum standard? If not, please give your reasons.

Member States shall remove existing requirements, and shall not impose new requirements, that act or would act as a barrier to the development of the participation of shareholders to the general meeting via electronic means.

The Council suggests that the wording of the Standard change from “via electronic means” to “without a physical presence.” The Council is concerned that future technologies may not use electronics to provide access, but that issuers wishing to quell the participation of certain shareowners may use the language as a means of preventing that participation.

6.2 Right to Ask Questions

Do you agree with the following minimum standard? If not, please give your reasons.

Shareholders shall have the right to ask questions at least in writing ahead of the General Meeting and obtain responses to their questions. Responses to shareholders questions in General Meetings shall be made available to all shareholders.

The above principles are without prejudice to the measures which Member States may take, or allow issuers to take, to ensure the good order of General Meetings and the protection of confidentiality and strategic interests of issuers.

The Council is concerned that the wording of the second half of this Standard would enable Member States to override the Commission’s Standards. As a consequence, the Council suggests that the Standard would state the following: “Member States may take measures that do not conflict with these Standards to ensure the good order of General Meetings and the confidentiality and strategic interests of issuers.”

7. Position of Intermediaries in the Cross-Border Voting Process

- **Definition of Intermediary**

Do you agree with the following definition? If not, please give your reasons.

A legal or natural person who, as part of a regular activity, maintains securities accounts for the account of other legal or natural persons shall be considered as an intermediary. An intermediary may also maintain securities accounts for its own account.

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The Council suggests that this definition include reference to activities related to the purchase and sale of such securities, as well.

- **Being Granted a Power of Attorney**

Do you agree with the following minimum standard? If not, please give your reasons.

Where an intermediary is a shareholder in relation to shares which the intermediary holds for the account of another legal or natural person, that other legal or natural person shall have the right to be given a power of attorney by the intermediary to attend the General Meeting and act at the General Meeting as if he/she/it were a shareholder.

The Council suggests that the Commission also state that the persons deemed to have economic interests at risk should have to prove, by reasonable means, that they are the persons on whose behalf the shares are held.

Closing Remarks

The CFA Centre for Financial Market Integrity and its Capital Markets Policy Council appreciate the opportunity to provide comment to CESR's *Advice on Possible Amendment to the Requirements in Commission Regulation (EC) 809/2004 Regarding the Historical Financial Information Which Must be Included in a Prospectus*. If you or your staff have questions or seek amplification of our views, please feel free to contact James C. Allen, CFA, by phone at +1.434.951.5558 or by e-mail at james.allen@cfainstitute.org.

Sincerely,

/s/ Frederic P. Lebel

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Chair
Capital Markets Policy Council

/s/ James C. Allen

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