



INVESTMENT COMPANY INSTITUTE

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SENIOR COUNSEL

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Gianluigi Campogrande
Head of Unit
DG MARKT G3
European Commission
B-1049
Brussels

Dear Mr. Campogrande:

The Investment Company Institute¹ appreciates the opportunity to comment on the Commission Action Plan on "Modernising Company Law and Enhancing Corporate Governance in the European Union" (Action Plan). The Investment Company Institute is the national association of the US investment company industry. There are more than 1,000 US funds (with over \$413 billion in assets) that have a global or international focus, and many of these global and international funds invest in Europe.

The Institute has been at the forefront of efforts to combat restrictions and impediments on the rights of mutual funds to vote shares on a cross-border basis. In 2000, we published a study of corporate governance rules and practices in eleven jurisdictions around the world (including three Member States of the European Union) to provide a better understanding of shareholder rights issues that mutual funds face internationally.² That study showed that there are significant obstacles to the ability of institutional investors to exercise their rights as shareholders.

We believe that, to attract global investors to a European securities market, it is important to create a framework that (1) enables and facilitates the ability of investors (both domestic and foreign) to exercise their rights as shareholders, (2) protects the rights of minority investors, and (3) dismantles national barriers or impediments that prevent the effective exercise of those rights. Our comments reflect this perspective.

Strengthening Shareholders' Rights

We agree with the Commission that one of the fundamental elements of shareholder rights is access to information. For this reason, we fully support the

¹ The Institute's membership includes 8,673 open-end investment companies ("mutual funds"), 588 closed-end investment companies, 106 exchange-traded funds, and 6 sponsors of unit investment trusts. Its mutual fund members have assets of about \$6.801 trillion, accounting for approximately 95% of total US industry assets, and over 90.2 million individual shareholders.

² See Investment Company Institute, *Global Corporate Governance Issues for Mutual Funds* (2000), at http://www.ici.org/pdf/rpt_corp_gov.pdf.

Commission's efforts to facilitate access to information by shareholders. We further believe that the proposals in the Commission's Transparency Directive that would require Member States to allow issuers to use electronic means for conveying information to shareholders under certain conditions are consistent with the goal of strengthening shareholder rights. We also would support other initiatives that would assist shareholders to gain access to information about issuers.

Moreover, we appreciate the Commission's recognition of the need to enhance other elements of the exercise of shareholder rights, including assuring that shareholders have the right to ask questions, to table resolutions, and to vote in absentia. We fully agree that these facilities should be offered to shareholders across the EU and that specific problems relating to cross-border voting should be solved immediately.

With respect to requiring participation in general meetings via electronic means (*e.g.*, webcast), the Commission should take the same approach that it has taken with regard to the use of electronic means in communicating with shareholders. We are of the view that permitting but not requiring issuers to use electronic medium is the correct approach. The incorporation of advanced technologies into business practice should be driven by the market and not by regulators.³

We support the Commission's efforts to develop the necessary framework for enhancing shareholder rights in a Directive as a priority for the short term, and we support the Commission's intention to undertake a study on the consequences of promoting the one share/one vote principle.

Role of Institutional Investors

We believe that there is an urgent need to solve problems related to cross-border voting. We agree with the Commission that it should only undertake to study the need to require disclosure of information about the role played by institutional investors after the problems related to cross-border voting have been resolved. Institutional investors increasingly invest across borders and obtaining for them the ability to exercise their rights as shareholders (without significant burdens) is a prerequisite for EU-wide rules to encourage institutional investors to exercise their franchise.

³ As a general matter, before considering requiring all listed companies to use certain advanced technologies (such as electronic media), the Commission should consider the impact of the costs involved. The market and technology generally should be the promoters of these types of initiatives rather than the Commission. Depending on the current state of practice or technology, it may be more appropriate to promote best practices in a certain area for issuers rather than imposing new requirements. Of course, the cost-benefit calculus can and will change as circumstances and cost considerations change over time, and it would be appropriate to review periodically whether certain practices should be required of all issuers.

As a general matter, we fully support the Commission's plans to require disclosure of information from all institutional investors including banks, securities firms, mutual fund managers, and insurance companies. We believe that imposing an obligation on only certain institutional investors would create an un-level playing field among institutional investors – a result that the European Union has made every attempt to avoid in various other contexts.

With respect to the specific obligations the Commission is considering, we support the proposal to require institutional investors to disclose their policies on the exercise of voting rights in the portfolio companies in which they invest. Requiring disclosure of policies and procedures could encourage thoughtful consideration of policies that are in the best interest of beneficiaries. Moreover, making available information about the procedures for voting proxies can help those who are interested to better understand the proxy voting process of institutional investors.

We, however, would caution the Commission against adopting a requirement that would obligate institutional investors to disclose to their beneficial holders at their request how voting rights have been exercised in a particular case. As you know, there was a significant debate in the United States this year regarding the extent to which mutual funds should be required to disclose their actual proxy votes. The Institute was of the view that a requirement to disclose actual proxy votes would not provide any material benefits to fund shareholders and in fact could be harmful to shareholders by depriving funds of the ability to vote confidentially, increasing conflict of interest situations for funds, and subjecting funds to political pressure from special interest groups with agendas that are different from the interests of fund shareholders. Although the US Securities and Exchange Commission ultimately decided to adopt this requirement, it remains to be seen whether the rule will have the benefits the rule's proponents believe. In addition, we would agree with the EU Commission that the "EU must define its own European corporate governance approach, tailored to its own cultural and business traditions."

Board Composition

We fully support the Commission's goal of bolstering the role of independent directors in listed companies, especially with respect to areas where executive directors may have conflicts of interest. We hope that the Commission will take care, however, in developing the minimum standards of independence. Specifically, we are concerned about the statement in the Action Plan that "particular attention will be paid to the issue of the number of mandates that may be held concurrently." We believe that the number of boards on which a person serves is not in itself indicative of a lack of independence. In fact, it is not the *number* of boards on which a person serves but the person's relationship with the company and/or its related persons that may impair the person's independence on the board.

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Coordinating Corporate Governance Efforts of Member States

Finally, we support the Commission's proposal to coordinate actively the corporate governance efforts of Member States through, among other things, their company laws, securities laws, listing rules, and codes. We agree with the Commission that the coordination process should include strong involvement of market participants, and we hope that the Commission would not restrict participation only to EU investors but also would include global investors.

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If you have any questions or would like additional information on any of these matters, please contact me at 202 326-5826 or at podesta@ici.org or Jennifer S. Choi at (202) 326-5810 or jchoi@ici.org.

Sincerely,



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cc: Dominique Thienpont