



July 15, 2005

Commissioner Charlie McCreevy  
European Commission  
DG Market F2  
B-1049 Brussels  
Belgium

*Re: Second Consultation Paper on Shareholder Rights and Cross-Border Voting*

Dear Mr. McCreevy:

The Investment Company Institute<sup>1</sup> is writing to comment on the Commission's second consultation paper on shareholder rights and cross-border voting. As we stated in our comment letter on the first consultation paper,<sup>2</sup> the Institute supports fully the Commission's efforts to improve shareholder rights and the ability of shareholders to vote cross border. The Commission's efforts in this area are extremely important to our members, who manage 931 U.S. funds (with over \$768 billion in assets) that have a global or international focus, many of which invest in Europe.<sup>3</sup> Many of our members also manage investment companies and pension funds outside the United States, including mutual funds domiciled in the European Union that are sold under the EU UCITS Directive, for which the issue of cross-border voting is important.

We are pleased that the Commission reexamined several proposals in the first consultation paper (*e.g.*, shareblocking requirements, information provided to shareholders regarding a General Meeting) to reflect public comments. We believe the changes made to these proposals, together with the proposed minimum standards as a whole, could bring significant benefits to investors by increasing protection for the rights of minority shareholders in EU-listed companies and by lowering costs due to greater efficiencies in the area of cross-border voting. We believe, however, that these benefits will be compromised, and possibly lost, for investors that hold shares through intermediaries unless the Commission adopts a formal definition of the "ultimate investor" who would be legally entitled to control voting rights. Our comments on this issue, and other technical matters, follow.

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<sup>1</sup> The Investment Company Institute is the national association of the U.S. investment company industry. More information about the Institute is available at the end of this letter.

<sup>2</sup> Letter from Mary S. Podesta, Senior Counsel, Investment Company Institute, to Pierre Delsaux, Head of Unit, European Commission, dated December 15, 2004.

<sup>3</sup> Investment Company Institute, *Trends in Mutual Fund Activity*, May 2005.

## **Persons Entitled to Control Voting Rights**

The Institute strongly supports, and urges the Commission to revisit, the adoption of a formal definition of a person entitled to control the voting rights attached to its shares of a company. In the first consultation paper, the Commission considered introducing the concept of the “ultimate investor” in order to provide the rights and benefits of shareholders to investors that may hold shares through a chain of intermediaries and may not legally be the shareholder of record. The current consultation paper states that the Commission has determined that introducing a definition of the ultimate investor may be better pursued at a later time. The paper also states that while a legal entitlement of investors to control voting rights would bring added benefits, its absence does not seem to give rise to acute difficulties in practice and that granting an ultimate investor such a legal entitlement at the EU level is not a pre-requisite to facilitating cross-border voting. We disagree on both counts.

A strong legal definition of “ultimate investor” is the foundation for an effective system of shareholder rights. For non-EU investors that hold EU-listed securities through non-EU intermediaries, the lack of a legal entitlement creates difficulties in investing in EU securities because of, for example, the uncertainties surrounding the right to vote. Our members report that they often are unable to vote cross border in the securities they own, or forego the right to vote due to the inordinate costs associated with complying with current cross-border voting requirements. Legally defining the ultimate investor and granting him/her a legal entitlement to control voting rights is therefore very much a prerequisite to facilitating the cross-border exercise of shareholders rights. Otherwise, there is no guarantee the benefits derived from the minimum standards proposed by the Commission would be conferred upon the large number of shareholders that hold through intermediaries.

The paper discusses the possibility of adopting a simpler definition of the “ultimate investor” in response to reservations expressed by commenters in the first consultation paper. Specifically, the paper notes that the definition of the ultimate investor could be derived from an approach in a UNIDROIT working paper and could be defined as “the legal or natural person that holds a securities account for its own account.” While we believe such a definition could be a good first step in strengthening rights for shareholders, we believe this proposal requires further scrutiny in order to ensure that it would accomplish the goals of providing voting rights to all types of shareholders. We also urge the Commission to continue to examine other ways to define the “ultimate investor” to ensure that they receive control of the voting rights to which they are entitled.

## **Shareblocking**

As the Institute discussed in its comment letter on the first consultation paper, shareblocking requirements are a key barrier to the exercise of voting rights and eliminating the practice of shareblocking in the EU would represent one of the most significant advances in facilitating the ability of shareholders to exercise those rights. We therefore strongly support the Commission’s determination to abolish provisions making the right to vote in a General Meeting conditional, or allowing the right to vote to be made conditional, on the immobilization of the corresponding shares for any period of time prior to a meeting. Similarly, we strongly

support the Commission's decision to require a record date system where the right to vote at a General Meeting will be made conditional upon qualifying as a shareholder on a given date prior to the relevant meeting (*i.e.*, a date set at least two weeks before a General Meeting).

### **Voting In Absentia**

The Institute believes that the ability to vote in absentia is critical to European companies attracting investors from around the world. We strongly support the proposed minimum standards that Member States ensure that shareholders of listed companies have the possibility to vote by correspondence and that Member States remove existing requirements, and not impose new requirements, on companies that would hinder or prohibit voting by electronic means at General Meetings.

Similarly, we support the proposed minimum standards to further facilitate the use of proxy voting across Member States and to eliminate requirements in Member States that either make it difficult to vote by proxy (*e.g.*, wet signature requirements) or marginalize votes by proxy (*e.g.*, permitting vote by show of hands at the meeting). As the Commission notes, there are many constraints at present which still make proxy voting unduly cumbersome in some Member States. We believe the proposed minimum standards could alleviate many of these constraints.

The consultation paper requests comment whether it would be appropriate to prepare or work towards an EU proxy form that would have to be accepted by all issuers in all Member States (while not excluding the use of other formats allowed for under Member States' laws). The Institute supports such an initiative. Given the significance of the proposed minimum standards to facilitate the use of proxy voting across Member States, we believe the standardization of proxy forms would further promote the Commission's goals in this area.

### **Exercise of Voting Rights**

The Institute supports the proposed minimum standards that are intended to ensure that shareholders can exercise the entitlement to control voting rights. Most significantly, we support minimum standards providing shareholders the right to be given a power of attorney by the intermediary to attend the General Meeting (and therefore act at the General Meeting as if he/she were a shareholder) and providing intermediaries with the right to cast votes upon their clients' express instructions.

### **Stock Lending**

As the Institute noted in its comment letter on the first consultation paper, we believe there is no policy reason to consider restricting the practice of securities lending at the time of the annual meeting, although it would be helpful to clarify at the EU level the rights and responsibilities of the lender and borrower of securities with respect to the voting of securities. We support the Commission's decision to increase transparency in the securities lending process, most significantly, by proposing a minimum standard that would require stock lending agreements to contain provisions regarding the voting rights attaching to transferred shares. In

addition, we support requiring an intermediary that enters into 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) to 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.

### **Depository Receipts**

The Institute strongly supports explicitly recognizing holders of depository receipts as holding the rights attached to the underlying shares and prohibiting EU listed companies from entering into depository agreements that specifically exclude or limit voting rights of depository receipt holders. We therefore support the proposed minimum standard that holders of depository receipts will alone have the right to determine how the voting rights attached to underlying shares represented by depository receipts are exercised. We believe many of the issues with respect to voting by holders of depository receipts, such as holders not being provided voting materials in sufficient time to be able to exercise their voting rights effectively, would be alleviated by such a standard.

### **Communication of Information of General Meetings**

The Institute believes it is important to the exercise of voting rights that investors receive information about the General Meetings and the items on which the investor will be asked to vote. The Institute supports the Commission's proposals on communicating information on General Meetings that seek to ensure that shareholders, no matter where they are based, are in a position to make informed decisions. Most significantly, we support the Commission's decision to establish notice periods for convening General Meetings, in particular, that General Meetings of listed companies be convened with no less than 21 business days notice. We recommend, however, that the minimum standard for other shareholder meetings be the same as the General Meeting (as opposed to the proposed minimum standard of no less than 10 business days notice).

Similarly, we support the proposed minimum standards relating to the contents of the notice of General Meetings, in particular, minimum standards that would require any notice of General Meetings to include certain minimum information regarding the meeting itself, a description of participation and voting procedures for the meeting, minimum standards relating to the availability of the full text of resolutions and documents related to meeting agenda items,<sup>4</sup> and minimum standards requiring any notice convening a meeting and any document intended to be submitted to the meeting to be made available "in a language customary in the sphere of international finance." We also support the Commission's establishment of minimum standards that would require that Member States ensure that issuers post on their websites information regarding shareholders' rights in relation to voting and with regard to General Meetings, as well as requirements relating to providing meeting materials on

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<sup>4</sup> The Institute recommends that the Commission extend the time for which documents relating to General Meetings would be made available to investors. Specifically, we recommend that such documents be made available at least 21 business days before General Meetings. Such a timeframe would be consistent with the requirements for providing notice of the meeting and would provide investors with sufficient time to consider the material.

their websites at the same time as the meeting notices are published and/or sent to the issuer's shareholders.

Finally, we strongly support the proposed minimum standards requiring companies to disseminate the results of votes of General Meetings on their websites within a set period of time following these meetings. As the Commission notes, informing voters of the results of the poll seems a logical complement to the voting right itself. We recommend, however, that the Commission similarly require the dissemination of the minutes of General Meetings within the same timeframe.<sup>5</sup>

### **Shareholders' Rights in General Meetings**

As the Institute discussed in its first comment letter, we believe it is very important to establish minimum standards relating to shareholder rights with respect to participation in General Meetings. We therefore support the proposed minimum standards on the way shareholder questions should be filed and dealt with at General Meetings. In addition, we support proposing some form of minimum standards relating to the maximum shareholding threshold that Member States could impose for shareholders to table resolutions and place items on the General Meeting agenda.

### **Scope of Commission Initiatives**

The Commission proposes to apply minimum standards for shareholders' rights 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 (*i.e.*, listed companies). The Commission, however, would exclude listed collective undertakings that fall within the scope of the UCITS Directive (or that represent an equivalent undertaking) from the scope of any such measure. The Institute supports these proposals.

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The Institute appreciates the opportunity to comment on the consultation paper. Any questions regarding our comments may be directed to the undersigned at 202-326-5826 or to Ari Burstein at 202-371-5408.

Sincerely,

/s/ Mary S. Podesta

Mary S. Podesta  
Senior Counsel

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<sup>5</sup> The Institute continues to believe that a single location where investors of EU-listed securities can find information of General Meeting information for all EU-listed companies would be helpful. Specifically, we recommend that the central depository being designed for the information required of issuers under the Transparency Directive also be used to store information about EU-listed issuers for General Meeting information.

*About the Investment Company Institute*

The Investment Company Institute's membership includes 8,521 open-end investment companies ("mutual funds"), 651 closed-end investment companies, 144 exchange-traded funds and 5 sponsors of unit investment trusts. Its mutual fund members manage assets of about \$8.036 trillion. These assets account for more than 95% of assets of all U.S. mutual funds. Individual owners represented by ICI member firms number 87.7 million, representing 51.2 million households. Many of the Institute's investment adviser members render investment advice to both investment companies and other clients. In addition, the Institute's membership includes 188 associate members, which render investment management services exclusively to non-investment company clients. These Institute members and associate members manage a substantial portion of the total assets managed by registered investment advisers.