ICGN
International Corporate Governance Network

Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F St. N.E.
Washington
DC 20549
USA

By email: chairmanoffice@sec.gov

22 February 2011

Dear Chairman Schapiro

Re: Lender-Directed Voting

The International Corporate Governance Network (hereafter, ICGN) is a global organization which is dedicated to furthering the cause of improved corporate governance practices worldwide. The ICGN currently numbers over 500 individual members, drawn from the ranks of institutional asset managers, pension funds, their advisors, and other financial intermediaries, in more than 50 countries. The total value of assets managed by the firms these individuals represent is currently approximately $18 trillion, of which a considerable amount is invested in the United States.

We are writing to the Commission to encourage it to give consideration to a proposed new mechanism which would permit the lenders of shares in certain circumstances to vote equivalent shares to those in their holdings as if they had not been lent.

Major investing institutions represented by some of our members have asked us to examine the Lender-Directed Voting initiative (LDV) proposed by Edmon W. Blount, executive director of the Center for the Study of Financial Market Evolution (CFSME) and, if we supported it, to express our support to the SEC.

We have determined that such a mechanism, if it works as proposed, and if potential legal considerations are overcome, may resolve some governance concerns regarding the relationship between lending and voting. This would require a successful trial, thoughtful implementation with operational rigor, and appropriate governance standards to prevent potential abuse.

For large institutional investors share lending is a practical way to enhance returns for their beneficiaries. Additionally, our members are dedicated to pursuing good governance and actively vote its proxies and engage companies. Unfortunately, under the current voting rules our members cannot vote the proxies of shares they have on loan despite the fact they remain the long-term beneficial owner. In order to preserve their governance rights, many ICGN members have implemented a policy of recalling all shares prior to record date and forgoing lending income. Lenders have become quite adept at recalling shares prior to annual meetings, which are generally the same time each year. However, the short window between announcement and record date and the random nature of special meetings makes it much more difficult to recall shares.

Our concerns regarding the practice of stock lending and the resultant inability of lenders to vote lent shares is longstanding. In our Securities Lending Code of Best Practice (2005, rev. 2007) we address the issue and the widespread misconception that it is somehow possible to vote or instruct shares even though they are out on loan. Of course, this is not normally the case, given that most lent shares do not remain in the portfolio of the initial borrower, but are usually sold in the market in order to create a short position, or are substituted for shares which were not available when a trade failed to settle. To ameliorate this situation, we made three concrete proposals, two of which were primarily directed at the United States situation, though with global application. We thank the Commission for having given us the opportunity to present our proposals in testimony before an SEC Roundtable on 29 September 2009.

The first is that the final agenda for a shareholders' meeting be published, at least on a company's website, significantly in advance of the record date for share voting. The purpose of this is to put shareowners who may have shares out on loan on notice of any issues they may wish to vote upon, so that they might have sufficient time to recall them before the record date.

The second was that the record date be moved much closer to the date of the meeting, taking advantage of modern online communications and electronic proxy voting to permit concerned shareholders the possibility of timely voting after a thorough airing of the merits and rationale for a particular resolution.

Third was our recommendation that the record dates for voting and for the dividend be separated by sufficient time so that shares lent solely for the purpose of a dividend arbitrage might still be voted, as the loan period for this purpose is usually brief.

All three proposals have gained considerable institutional support, in the United States. and abroad, as well as favorable comment from many professionals in the lending industry itself. However, to date none of these recommendations have become standard practice, and American institutional lenders are still faced with a stark choice between receiving further income from lending or routinely recalling all shares in order to be able to vote them, whether the issues to be voted upon turn out to be of concern to them or not.

Now, the proposed LDV contractual mechanism affords a partial way around this problem. According to the proposal, lenders and borrowers would enter into a separate, parallel agreement whereby the borrower would make a best-efforts attempt to locate equivalent shares to those lent, but which were in the broker-dealer's proprietary holdings, or were customer shares for which voting instructions had not been received. Such shares, if located, could, in accordance with the agreement, be voted according to the lender's instructions, up to the number of votes represented by those shares which had been lent. According to the sponsors of the proposal, a similar procedure is already being employed successfully by certain shareholders who have margin accounts.

We are of the opinion that LDV could be a useful addition to the resources available to institutional owners of shares, reduce the current detrimental effects upon voting participation at shareholder meetings, and is worth trying on an experimental basis.

However, we wish to re-emphasize that our recommendation encouraging development of the LDV mechanism does not supersede our earlier recommendations regarding record dates and the publication of agendas; viz., that the agenda be communicated to the markets significantly in advance of the record date, that the record date be moved closer to the actual date of the meeting, and that because of dividend arbitrage, the record date for voting be different from the eligibility date for the dividend. We believe these reforms stand on their own merits, involving all shareholders and not merely those institutions with special lending arrangements, and would improve investor participation in proxy voting, as well as the integrity of the shareholders' meeting in the United States, both high priorities of the SEC.

In conclusion, it is our view that the implementation of Lender-Directed Voting could improve how investors manage the trade-off between proxy voting and securities lending and possibly improve institutional participation in proxy voting. We thus encourage the SEC to consider a trial of this mechanism.

Yours sincerely,

Christianna Wood
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