Comments on behalf of
The Association of Corporate Treasurers on:

Fostering an Appropriate Regime for Shareholders' Rights

Second Consultation by the Services of the European Commission
Internal Market Directorate General, May 2005

Introduction

The Association of Corporate Treasurers (ACT)

Established in the UK in 1979, The Association of Corporate Treasurers (ACT) is a centre of excellence for professionals in treasury, risk and corporate finance operating in the international marketplace. It has over 3,300 members from both the corporate and financial sectors, and its membership, working in companies of all sizes, includes representatives from 95 of the FTSE 100 companies.

The ACT has 1,500 students in more than 40 countries. Its examinations are recognised by both practitioners and bankers as the global standard setters for treasury education and it is the leading provider of professional treasury education. The ACT promotes study and best practice in finance and treasury management. It represents the interests of non-financial sector corporations in financial markets to governments, regulators, standards setters and trade bodies.

Contact details are provided on the last page of these comments.

This consultation

The ACT is pleased to be able to comment on this important topic.

These comments are on the record and may be freely quoted.

London July 2005

General comment

Practices vary from Member State to Member State. Our broad preference is that any directive should concentrate on removal of barriers to exercise of shareholder rights, rather than prescriptive rules as to how they are to be exercised.

Response to questions:

Q.1 Scope

Do you agree with the proposed scope for any future measure at EU level, if any, establishing minimum standards for shareholders' rights?

A.1 Yes. But, after experience has been gained with implementation and efficient, cost-effective channels have been created for compliance with the requirements, consideration should be given to including all companies with shares traded on any EU market, not just regulated markets, (but not companies whose only traded securities are debt instruments).

Q.2 The "ultimate investor" or "ultimate account holder"

Q.2.1 Do you consider, contrary to the views expressed above, 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?

Q.2.2 If so do you agree with the following proposal, based on the works of UNIDRIOT: "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"?

A.2 We do not believe that a "legal enforceable right to direct" is a pre-requisite.

We agree that granting such a right, at least vis a vis the company, is impracticable.

Whatever the contractual arrangements are at each level of the chain of ownership, these should continue to be viewed as a private matter between each set of contracting parties and should not affect the company. We see no harm in the law strengthening the position of the end investor, perhaps by creating an implied term in each link of the contractual chain that the holder of the share (or the right to the share) will vote it or not vote it (or require it to be voted or not voted) as the person on whose behalf he is holding it wishes, so long as the company is not bound by that obligation and need only look, therefore, to how the registered shareholder actually votes the share (even if he happens to do so in breach of his obligations to the person on whose behalf he holds it).

It follows that we disagree with the wording in 2.2, as drafted. If adopted, it should make it clear that it creates an obligation that applies only as between the two contracting parties and not on the company, even if the company is aware that the obligation is not being observed.

Our comments on issuers' need for certainty and the question of liability in A.9, page 17, below, are relevant here.

Q.3. Stock lending and depositary receipt

Q.3.1 Stock lending

Do you agree with the following minimum standard?

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.

2. Where an intermediary enters into such an agreement in relation to shares which the intermediary holds on behalf 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.

A.3.1 No – in respect of both parts.

Share lending is a way of enhancing the return on the investment in the shares. It is a right of the property in the shares and should not be fettered. Investors should expect to inform themselves about their decisions, and to make appropriate contractual arrangements as regards share lending – none, unrestricted, or with right of recall. It should be open to the parties to enter into whatever agreement they wish.

More generally, if there is a difficulty here, it is better tackled by the kind of educational effort being made by the Securities Lending and Repo Committee, the International Securities Lending Association and others through publications like *Securities Lending and Corporate Governance* (2005) and *An Introduction to Securities Lending* (2004) [1]. There is no need for regulatory intervention.

We would not object, however, to intermediaries acting for private (i.e. non-business) customers to have to explain to the customers that they will not have the right to vote; nor will they have the right to direct how the intermediaries vote, in the absence of an agreement to the contrary.

Q.3.2 Depositary receipts

Do you agree with the following minimum standard?
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.

A.3.2 No.

We agree that voting rights should appertain to the holder rather than the depository. As depositary receipts may themselves be held by nominees, there is no reason why voting rights should not be passed up the chain as for holdings of shares. EU level requirements should, at most, simply prevent the blocking of rights by EU depositaries, arrangements for exercise being a matter of contract between the parties in the chain. However, this area may better be covered by an industry code of conduct. This is because depositary

[1] Both of which may be downloaded from the ACT's website at http://www.treasurers.org/technical/index.cfm

receipts in EU companies could be issued by, for example, Swiss or US entities and be governed by relevant Swiss or US regulations. Unique EU requirements could cause cost pressures encouraging migration of depositary business away from EU domiciled institutions.

Q.4 Pre General Meeting Communications[2]

Q.4.i Notice period for convening a general meeting

Do you agree with the following minimum standards?

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

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

A.4.i Language apart, perhaps, we do not believe that especial arrangements are required for non-resident shareholders.

Indeed, the intention of widening cross-border access to capital markets is to make markets more efficient and adding complexity or delay to accommodate cross-border investors would go against that.

Arrangements for electronic communication to and voting by direct shareholders – and for intermediaries to pass on such communications where shares are not held directly - are discussed in other parts of the consultation. If that is put in place, non-resident shareholders do not need longer notice periods than resident shareholders.

The UK *Combined Code* period of 20 business days for AGMs does not cause difficulty, and we would see no reason to move that up to 21 days and suggest that 20 business days be substituted for 21 business days.

A minimum of 10 business days for other GMs is satisfactory and caters for urgent items, but best practice would be to give more, even considerably more, than 10 days particularly in cases involving "special resolutions".

"business days" need some definition as different Member States can have different business days in any period. Accordingly, we suggest that "business days" refer to the greater elapsed time according to the place of incorporation or the place of primary listing.

"days" should be taken as "clear days" – i.e. the days on which the notice is served or deemed to be served[3] and the day on which the meeting is to be held are excluded.

Q.4.ii Content of the notice

Do you agree with the following minimum standard with regard to the time at which GM-related documents should be made available?

---

[2] Sub-sections of section 4 are unnumbered in the consultation paper but have been given roman numerals here, for convenience.

[3] In the UK, notice is deemed to have been served on the day of sending for electronic communication (Companies Act s.369(4A)). Otherwise it varies with provisions in the Company's Articles of Incorporation, the model Articles in the Statute, Table A, providing that notice sent by post is deemed to have been served 48 hours after posting.

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 requirement 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.

A.4.ii This might be acceptable as a *minimum* standard. Best practice would certainly demand more.

Since we are dealing here with listed companies and assuming we are dealing with a registered shares system, stock exchange listing rules should require a full circular with all the material information, as well as formal resolutions, to be actually sent to shareholders, not merely to be made available for inspection. It would be retrogressive if all that was transmitted was a notice of where the major matter could be found.

And, in a cross-border situation, it would be unsatisfactory if where the matter was to be obtained were a physical location. It surely must be or include a website or similar for remote access.

We believe that anonymously registered or bearer shares are anathema to good corporate governance and open markets (see A.7.ii, page 14, below). However, if they are permitted in any jurisdiction, the proposed provisions may be appropriate for them – subject to the point about the information being remotely obtainable.

Q.4.iii Information relevant to the General Meeting
Do you agree with the following minimum standard with regard to the time at which GM-related documents should be made available?
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 least 10 business days before any other General Meeting.

A.4.iii Probably not.

We find this very difficult to understand.

We commented on "made available" in A.4.ii, above. Our comments on anonymously registered or bearer shares in the last paragraph of A.4.ii, above, are also pertinent.

Where the issuer is the originator of the resolutions and documents, they should be despatched to registered shareholders in full with the notice of the Meeting (as in 4.ii, above). The issuer should not call the meeting until it has all the necessary material, surely?

In any case, the consultation paper proposes (see Q.4.v, page 7, below) that the documents etc. be on the website at the time of the giving of notice – so they are to be available then and why should they be delayed?

Perhaps this is intended to apply to agenda items and resolutions raised by members (shareholders) after the issuer originated matter has been transmitted

(Q.6.3, page 9, below). In which case why is the time allowed different for the AGM and other GMs?

Q.4.iv Dissemination, and language, of the meeting notice and materials

Do you agree with the following minimum standard?
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.

A.4.iv No.

A single market implies openness and accessibility. As an English language based organisation, it would be easy for us to agree with this proposal. But this would impact companies based in other countries.

For the issuer, translation can be expensive and take considerable time to achieve. Complete texts, for example directors' reports and accounts which are to approved by the GM, or documents pertaining to corporate actions or some remuneration schemes can be substantial documents.

In the context of a situation where members have the right to table resolutions for consideration at Annual General Meetings, the extension of the timetable for notice etc. for AGMs to accommodate translation needs could also be significant.

Would the logical conclusion of the ideas behind the proposal lead to mandatory requirements for simultaneous translation at General Meetings?

Companies wishing to attract non-resident investors can undertake, or simply decide to provide translations if they so choose. Companies could be required to provide translation if more than a certain percentage of members vote in general meeting in support of a resolution requiring it. Once translation has been adopted, however, there should be a resolution at a GM to reverse such an undertaking – and shareholders' decision at a GM could, of course, only apply to *future* GMs.

A general *requirement* for translation should only be introduced if there is a definite need and a substantial public good arising, which we do not currently perceive. We appreciate that the Prospectus Directive requires a prospectus to be in, or translated into, a language customary in international finance, but it may be argued that a prospectus, being a money-raising document, useable anywhere within the EU, involves more exacting disclosure standards.

Q.4.v Specific section of the issuer's website dedicated to the General Meeting

Do you agree with the following minimum standards?
1. Member States shall ensure that issuers post on their websites the information relevant to General Meetings at the same time as such notices are published and/or sent to the issuers' shareholders.
2. Such information shall include at least: the notice of the meetings, the full text of the resolutions intended to be submitted to the General Meeting and other documents relevant to the General Meeting, a precise description of the means given to shareholders to participate in the General Meeting, and cast their vote and the forms to be used to vote by correspondence and/or by proxy.

A.4.v Yes, but it should be clarified. Furthermore we have qualifications as set out below.

"their websites" should include designated websites, not necessarily operated by the issuers themselves.

"precise description", in 2, seems odd. It would be appropriate to set out clearly the means given etc. This is not implied by "precise description".

"information relevant" and "documents relevant" are also odd. They are presumably intended to refer to documents intended to be submitted" in Q.4.ii, page 4, above. However it could also refer to any number of other documents. More precise language should be used.

The company's website could presumably be one of the places, or even the place, where the full text of resolutions and documents to be submitted is available (see 4.ii "content of the notice"), and in any case, for non-resident shareholders may be the only practical source (see A.4.ii, page 5, above).

We are concerned that a requirement to post information on a website which is generally available, rather than being appropriately restricted, could open the company and its directors and officers to liability to or suit by persons resident in jurisdictions claiming extra-territorial jurisdiction.

In the context of financings, companies are normally advised that the use of websites for offering materials should be restricted to persons who have proved to the company that, for example, they are not resident in proscribed jurisdictions, e.g. the USA, and who can only access the website through a password. It is possible that similar concerns could apply to other information posted on a company's website, such as offer documents in takeover situations, especially where the consideration consists of or includes securities.

It may be that, a self certification by website users that they are permitted by their own legislation to view the General Meeting material or that they accept that it does not constitute an offer for securities may be adequate. This is an area where international agreement between regulators would help market transparency and access.

We are also concerned that unscrupulous persons could use unfortunate downtime of the website servers – or denial of service attacks – to block access. Similar concerns apply to remote electronic means of voting etc. for General Meetings. Challenges by affected shareholders – or allegations by disaffected shareholders – could give rise to periods of uncertainty for issuers (see A.9, Certainty and Liability, page 17, below). Great care in implementation is necessary in this area.

Q.5 Admission to the General Meeting – share blocking

Do you agree with the following minimum standards?

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.

A.5 Yes.

However we are concerned that the record date should be as close as is practical to the date of the GM.

We would also be happy, as an alternative to having a record date, for the relevant registered holders to be those registered on the date of the meeting itself. This is normally quite adequate for smaller companies, as the voting scrutineers check the shareholders attending in person as they arrive at the meeting and, under UK practice, have 48 hours before the meeting to verify the claimed number of proxy votes. Accordingly, we suggest that 2 is amended to read "…listed company on the date of, or on a given date prior to, the relevant General Meeting".

Q.6 Shareholders in relation to the General Meeting

Q.6.1 Electronic participation in General Meetings

Do you agree the following minimum standard?
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.

A.6.1 Yes.

We support use of electronic means as the norm for communications for the advantage of both resident and non-resident remote shareholders.

But the ability of remote persons to speak and to vote at meetings can be difficult to manage, and suitable systems expensive in operation. Companies need certainty in their proceedings (see A.9, Certainty and Liability, page 17, below).

Accordingly removal of prohibitions is appropriate now, allowing companies to move at their own pace in implementing remote participation until best practice is established.

As time goes by and the reliability and costs of remote participation fall, consideration should be given to making it compulsory.

Our concerns about electronic services generally, mentioned in 4.v above, are relevant.

Q.6.2 Right to ask questions

Do you agree with the following minimum standard?
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.

A.6.2 We support the practice (but not a right) of members (shareholders) to ask questions at any time. And companies should not ignore those questions.

At General Meetings, members should only be able to ask questions relevant to the GM and the business being conducted there – but this is matter normally governed by practice rather than right, and is controlled by the chairman of the meeting, who will invite questions and ensure they are confined to the business of the meeting.

We do not think that members should have a *right* to ask questions or to "obtain responses". Sometimes, the only correct or sensible response is "We will not answer that question" or "That question is not relevant to the business of the Meeting and will not be answered". Whether it would be legally acceptable to give such a response, if there were a *right* to ask or receive a response to a question is, debateable. Such a right would create an open invitation for troublemaking. Of course, investors will discriminate against companies they do not consider sufficiently open.

A further problem in entitling shareholders to ask written questions and to receive an answer, is the shortage of time that might be available and the volume of questions that might be forthcoming, e.g. from political pressure groups.

In short, although the spirit of the "without prejudice" wording in the second sub-paragraph is comforting, we strongly oppose the proposal to create a right to ask and receive a response to a question, whether before or at a shareholders' meeting. Reliance should be placed on good corporate practice and the opprobrium that the company would attract if it failed to abide by such practice.

The requirement for issuers to publish questions and answers for all members to see, or perhaps to provide to members if they so request, would be a new burden for some issuers. We note that many companies already provide access to analyst briefings and question and answer sessions on their websites and a similar approach could be taken as regards General Meetings. Perhaps implementation measures could allow reports or summaries rather than full transcripts – particularly as many questions asked at AGMs are irrelevant and immaterial. This would also help avoid mischief making – especially by persons trying to get band-wagons moving in perverse directions.

Overall, we think this area is best left to voluntary action at present.

It follows from our position above – to delete the first paragraph of the proposal – that the second paragraph should also be deleted.

Q.6.3 Rights to add items to the agenda and table resolutions

Do you agree with the following minimum standard?

1. Shareholders, acting individually or collectively, shall have the right to add items on the agenda of General Meetings and table resolutions at General Meetings. Such rights may be subject to the condition precedent that the relevant shareholder or shareholders hold a minimum stake in the share capital of the issuer.

2. Such minimum stake shall not exceed 5% of the share capital of the issuer or a value of €10 million, whichever is the lower.

3. Such rights must be exercised sufficiently in advance of the date of the General Meeting, to enable other shareholders to receive or have access to the revised agenda or the proposed resolutions ahead of the General Meeting

A.6.3 Not entirely.

We think the intention of (1) is to enable members to put forward resolutions to be added to those *to be considered* at a GM, with appropriate notice to other members as in (3). Members should not be able to spring new proposed resolutions "at General Meetings" as implied by "table[4] resolutions at General Meetings".

We do not agree that the 5% threshold for large companies is unreasonable as implied by the introduction of an alternative, monetary, limit. And, if there should be a monetary limit, we consider the €10 m. unreasonably small as regards large companies. (Presumably the €10m is measured at market value as shares may not have to have a par value.)

In fact we do not believe that a monetary value condition is reasonable at all.

Provided that members are not fettered in communicating with each other, a shareholder should be able to drum up support from 5% of holders for serious matters. On the other hand, where access of members to each other is restricted because of permitting of anonymous shareholders or bearer shares or otherwise, any minimum stake requirement seems unreasonable.

We would therefore support a threshold, thus:
"2. Such minimum stake shall not exceed 5% of the share capital of the issuer and shall not apply (i) where bearer shares or anonymous shareholdings are permitted or (ii) where communication between shareholders is otherwise restricted by law or regulation"

In any case, the added agenda item/proposed resolution should have to relate to the subject matter of the meeting as convened by the company in order to be eligible to be required. Of course, shareholders controlling a qualifying number of shares should have the right to requisition a General Meeting of the company to consider matter they propose.

Q.6.4 Voting[5]

Q.6.4.i Voting by correspondence

Do you agree with the following minimum standard?

1. Member States shall ensure that shareholders of listed companies have the possibility to vote by correspondence.

2. Member states shall remove existing requirements, and shall not impose new requirements, on companies which hinder or prohibit voting by electronic means at General Meetings.

A.6.4.i Yes, subject to the comments below.

[4] We urge that the word "table" is not used. In English English a motion is tabled when it is brought into discussion; in American English when a motion is tabled, it is not and will not be discussed.

[5] Sub-sub-sections of section 6.4 are unnumbered in the consultation paper but have been given roman numerals here, for convenience.

While this section provides for voting by correspondence and by electronic means, and others provide for voting by proxy etc., and Q.5 set conditions on voting, we are unable to see where the consultation provides for shareholders to vote in person at a GM (legal persons voting by proxy in such a case – but see comments in A.6.4.ii, on page 12, about the UK use of "company representatives"). We think this, presumably assumed, should be made explicit. We consider "non-voting" shares to be inimical to good corporate governance.

We would support voting "by correspondence" or electronically only if this is based on the return to the company by post or electronically of a prescribed form of voting card, with two-way voting (ie. either "in favour" or "against") on each resolution contained in the notice of meeting. The word "correspondence" is too vague and could put the company in a difficult position if the shareholder's voting intention was unclear from the correspondence.

It should be appreciated that allowing voting by post (or electronically), rather than in person or through a proxy physically attending the meeting, in theory negates the purpose of a meeting, which is to debate the issues and only then to cast a vote on them. However, in the modern era and given that the issues will have been set out in the company's circular accompanying the notice of meeting, we agree that the desirability of enabling as many shareholders as possible to vote, without having to appoint proxies and instruct them to attend in person, outweighs this theoretical objection to remote voting.

Our concerns about electronic services generally, mentioned in 4.v, page 7, above, and our comments on participation in GMs by electronic means in A.6.1, page 8, above, are relevant.

Q.6.4.ii Proxy voting

Do you agree with any, each, or all of the following minimum standards? In particular where you believe that certain constraints should be maintained, please justify you opinion.

1. Every shareholder shall have the right to appoint any other natural or legal person as a proxy to attend any General Meeting on his behalf.
2. No constraint or limitations shall be imposed other than provisions relating to the legal capacity of the person. In particular there shall be no limitations on the persons who can be appointed as proxies and on the number of proxies any such person may hold.
3. Shareholders shall not be prevented from appointing their representatives by electronic means.
4. Persons appointed as proxies shall enjoy the same rights to speak and ask questions in General Meetings as those to which the shareholders they represent are entitled.

A.6.4.ii.1, 2, 3 and 4

We generally agree.

While a natural person proxy should not have an incapacity such as being an undischarged bankrupt or certified unable to act due to mental incapacity or being a child below a certain age, it should be a

fundamental right of the share owner to be represented by any person, natural or legal, of his choosing and properly appointed.

"representatives" in 3, rather than "proxies" is unhelpful.

It is important that the shareholder be able to include in the appointment of the proxy instructions as to how to vote on any or all matters at the GM. As with the voting cards discussed above (in A.6.4.i, page 10) we think two-way voting proxy forms should be required.

As it is common in the UK for many shareholders to appoint the same person, the chairman of the Meeting, as their proxy, it is important that persons appointed as proxies be able to vote for, or against or abstain in a poll for a particular resolution in different ways for different holders.

We are concerned at the possible creation of opportunities for mischief if any one shareholder is able to appoint more than one proxy where, as in 4. the proxy has the right to speak at the GM. In the UK, at present, a proxy may attend and vote on a poll, but may not comment; this has much to recommend it.

In the UK a company is represented by a "corporate representative", not a proxy, identified by production of a certified copy of the board minute appointing him or her. The corporate representative may speak and vote on a show of hands as well as in a poll. We think this concept would be usefully introduced here if, as we recommend, 4 were deleted.

5. Issuers shall not themselves collect proxies in advance of General Meetings but shall entrust independent third parties with such collection.

A.6.4.ii.5

We do not support this.

We see no reason why companies should not collect proxies, in general. If foul play is suspected at the company, members should have recourse to the courts. We are not aware of any case in the past where prior knowledge by the board of the company of the proxy voting figures has in any sense "altered shareholder democracy". Those shareholders attending the meeting continue to be entitled to cast their votes and to demand a poll, regardless of the proxy voting figures. To provide that shareholders controlling more than a certain percentage of votes should be able to demand independent collection of proxies in advance of a GM would give too many opportunities for mischief and could be expensive and cause delays.

The majority of votes in a poll at a General Meeting are cast by proxy. It does not seem contrary to the interests of the issuer (i.e. of the shareholders) for the collector of the proxies to advise the issuer, as proxies come in, how votes are running. It is probably better that the company's board know if they are facing defeat on a resolution in advance so that orderly handling of the situation is more likely.

In the UK it is customary for the registrar to collect proxies, the deadline for lodging proxy forms with the registrar being 48 hours before the time fixed for the meeting. While outsourcing of registrar services has become more common, some companies still do – and all should have the right – to carry out the function in house. We would certainly consider the registrars to be appropriate to collect proxies, but they are clearly not independent of the company as they act as the company's agent.

We see no reason to introduce a requirement for "independence".

6 All votes cast on each resolution submitted to a General Meeting shall be taken into account, irrespective of the means by which the votes are cast.

A.6.4.ii.6

The intention is clear. However, votes submitted by correspondence despatched by camel from Western Australia and not received in due time should not be taken into account. A distinction needs to be made between how votes are (a) communicated to the company, and (b) cast (ie. either by a show of hands or on a poll).

As regards (a), votes can be communicated under the consultation paper's proposals (i) at the meeting itself by the shareholder voting in person, (ii) by being cast in writing on a voting card sent to the company by post or electronically, (iii) by being cast by a proxy attending in person pursuant to his appointment under a proxy form sent to the company by post or electronically[6] or (iv) by being cast by the appointed attorney. UK practice is for proxy forms to be received by the company or the registrars at least 48 hours before the time fixed for the meeting, failing which they are disregarded. The notice of meeting is required by stock exchange rules or practice to make this clear to shareholders. This system works in practice and we commend it to you for both proxy forms and voting cards ((ii) and (iii) above), whether received by post or electronically.

As regards (b), UK practice (and company charters) contemplate votes being cast first on a show of hands and then, but only if a poll is demanded (because the person demanding it believes that the show of hands does not reflect the voting intentions of the shareholders as a whole), on a poll. On a vote on a show of hands, only hands would be counted. Proxies would be ignored at this stage. On a poll, however, the number of votes cast would equal the number of shares in respect of which votes are cast (whether in person or by proxy).

In short, the wording of Q.6.4.ii.6 is too simplistic. We recommend a set of rules that distinguish between (a) the votes that qualify to be taken into account if a poll is demanded – i.e. disqualifying any voting cards or proxy forms that are received after a suitable deadline, such as the 48 hours referred to above – and (b) the votes that are actually taken into account in respect of each resolution that is put to the vote,

[6] This ignores the suggestion for powers of attorney made in section 7.iii (page 15, below) of the Consultation Paper, since we suggest in our answer to that question that a proxy appointment should suffice.

depending on whether the vote is taken (i) on a show of hands or (ii) on a poll. We strongly recommend that proxy votes and remote votes (i.e. voting cards) are taken into account only on a poll.

Q.6.4.ii supplementary
Do interested parties consider that it would appropriate to set up 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?

A.6.4.ii supplementary

Use of different forms of proxy in the same Meeting would add to confusion. For companies with dispersed ownership, clearing people (whether members, proxies, corporate representatives, or whatever) is a major processing task which has to be carried out under time pressure.

(Where documents for the meeting have been provided in more than one language, proxy forms in different languages should not here be regarded as "different forms".)

Q.7 Position of intermediaries in the cross-border voting process[7]

Q.7.i Definition of intermediary

Do you agree with the following definition?
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.

A.7.i According to the definition of securities accounts, this seems a practical definition. It has the advantage of excluding collective investment schemes. However, we would add after "regular activity" "by way of business"

Q.7.ii Registration as nominees

Do you agree with the following minimum standard?
Whenever an intermediary is registered as a shareholder in respect of shares which he/she/it actually holds for the account of another legal or natural person, a mention should be added in the relevant companies' shareholders registers that such intermediary holds the shares for the account of another person.

A.7.ii No.

We believe that a company should be obliged only to have regard to members on the register of shareholders and not to have to look to any form of "interest" "behind" the register, such as a different beneficial owner, a mortagee, etc.even if the company is incidentally aware of such an interest – the only exception being pursuant to a court order. This is not incompatible with a companies need to maintain a *separate* register of material interests in the company or with its ability to obtain details of interests in shares, as under UK law (s. 211 and 212).

[7] Sub-sections of section 7 are unnumbered in the consultation paper but have been given roman numerals here, for convenience.

Our comments on issuers' need for certainty in A.9, page 17, below are relevant.

Q.7.iii Being granted a power of attorney

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 is he/she/it were a shareholder.

A.7.iii We do not see why a power of attorney is necessary in the proposals as put forward – why not appoint them proxy for the relevant shares? In the published proposals, a proxy can comment at a GM and vote on a show of hands like a natural person member. As we propose that a proxy can attend but not comment or vote on a show of hands, if that were agreed, then, maybe an attorney has some advantage.

We have concerns about how the process would work in practice: there can be chains of intermediaries. For example, where the nominee company is the registered shareholder, holding on behalf of a clearing house for the account of a broker for the account of an investor, neither the broker not the clearing house can force the nominee to execute the power of attorney or proxy form and so, provided they have requested it, they should not be liable for failing to procure it.

Accordingly, any provision may be for the company to recognise the appointment by a member of an attorney in respect of all or part of the member's shareholding, leaving the right of the ultimate holder to be dealt with in the contracts between the investor and, ultimately, the nominee. (This would be consistent with our response to Q.2.

Furthermore, care would be needed at the implementation stage in view of the need for the position to be clearly and quickly establishable when an attorney turns up at the meeting to take part in person or submits a proxy form or electronic vote.

In any case, the words "in respect of those shares" need to be added at the end.

Where the intermediary is allowed to undertake share lending with the shares in point, the beneficial investor up the chain of financial intermediaries runs the risk that they will not be able to vote if the shares have been lent at the record date for the meeting. Informed investors will need to deal with this (no lending, free lending or lending subject to recall) in the contract with the nominee or, where there is a chain of intermediaries, with the one he deals directly with..

Q.7.iv Voting upon instructions

Do you agree with the following minimum standards?

1. Member States shall allow intermediaries to hold shares on behalf of their clients in collective or individual accounts.

2. Intermediaries shall have the right to cast votes upon their clients express instructions.

3. Where intermediaries hold on behalf of their clients shares in collective accounts, they shall be able to cast split votes.

A.7.iv Yes.

Re 1: The clients' security could be affected according to whether shares are held in collective or individual accounts. Intermediaries should be required to hold shares on their own account in separate accounts.

Re 2: Intermediaries should not be able to vote a "client's" shares contrary to express instruction received. Intermediaries should be able to vote shares held on behalf of clients on their own initiative where no express instructions have been received from the client(s) and this is provided in the contract with the client.

References in 2 and 3 to "casting" votes should include directing the casting of votes, as the intermediary may not itself be the registered shareholder.

Q.8 Communications following the General Meeting

Dissemination of voting results

Do you agree with the following minimum standard?

1. Within a reasonable period of time which shall not exceed one month following the General Meeting, the issuer shall make available to all shareholders information on the results of the votes on each resolution tabled at the General Meeting.

2. Such information, which shall include for each resolution, the number of voters, the number of voted shares, the percentages and numbers of votes in favour and against each resolution and the percentages and numbers of abstentions, shall be posted on the issuer's website.

A.8 Yes.

The matter for consideration at the GM will already have been on the website under provisions of Q.4.v, page 7, above. Accordingly, all that is to be added is to list the resolution numbers and give the results and only a short period is needed to achieve this. The main time requirement is, then, for the scrutineers to check the poll or polls – which in a large poll or series of polls can be demanding.

"Issuer's website": our comment in A.4.v, page 7, above, is relevant.

Posting on the designated website, rather than positively communicating to shareholders is reasonable. Free monitoring services, such as provided by Google, can notify shareholders when any change to the designated website is posted.

We do not see the relevance of the number of voters.

"Abstention" is ambiguous. Does it mean the number of shares in issue in respect of which no vote was cast, or does it imply a requirement for voting procedures to allow registration of a specific abstention (necessitating 3-way proxies, etc.)? We prefer deletion of reference to "abstentions".

Q.9 Additional suggestions?

A.9

- Impact analysis
  We believe that the Commission should undertake an impact analysis for each affected country – particular arrangements commonly being different in each Member State. Wherever possible, increases in the cost to issuers or to investors if they are to exercise their rights should be avoided.

- Terminology
  We note that shares are sometimes referred to as "shares", "stock" or, even, "securities". "Shares" should be adopted throughout.

- Costs
  Which party is to bear the costs involved in any of the mechanisms for exercise of shareholder rights (with the exception of costs incurred by the issuer in originating and disseminating information which should remain with the issuer) should not be prescribed but left to the contracts between those involved.

- Certainty
  It is important that issuers and others can, as far as possible, rely on the certainty of resolutions "passed" at General Meetings. Implementation measures need to minimise the opportunities for malicious or vexatious challenges to the proceedings, and thus resolutions, at General Meetings which could arise from any eventual Directive provisions. This requires very careful wording in the provisions.

- Liability
  New liabilities for issuers for consequential losses should not be created or arise from any requirements of any eventual Directive.

- Shareholder rights
  Shareholder rights should of course extend to more than receipt of information and the casting of votes. In some jurisdictions, existing rights in relation to receipt of information and casting of votes may go beyond that which is contemplated in any eventual directive. Such Directive should, accordingly, make it clear that it is without prejudice to any other or more extensive rights pertaining under the law or regulation in Member States.

Contacts:
Richard Raeburn, Chief Executive
(020 7213 0734; rraeburn@treasurers.co.uk)
John Grout, Technical Director
(020 7213 0712; jgrout@treasurers.co.uk)
Martin O'Donovan, Technical Officer
(020 7213 0715; modonovan@treasurers.co.uk)

The Association of Corporate Treasurers
Ocean House
10/12 Little Trinity Lane
London EC4V 2DJ
Telephone: 020 7213 0728
Fax: 020 7248 2591
Website: http://www.treasurers.org