Vereinigung Institutionelle Privatanleger e.V.

association of institutional shareholders
association des actionnaires institutionnels

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Elizabeth M. Murphy, Secretary
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17.11.2010

re: File Number S7-14-10 (Release on the U.S. Proxy System)
its 34-62495

Dear Ms. Murphy,

VIP eV has for three years been the market leader for personal shareholder representation (physical proxy agent), with €6.85 billion in assets under voting in 2010. This individual form of proxy is undoubtedly the only safe and logical mechanism, certainly when the voting is cross-border. Here VIP (along with Proxinvest, Paris) is the only agent whose services are rewarded by owners only – whom we believe are the only persons who can be billed without conflicts of interest. For the same reason VIP has no in-house asset management. VIP is audited for its services according to SAS70 (or in the German context PS 951), and can keep to its concept probably only because of decades of practical experience with all major assets. Since 2005, VIP has sponsored corporate-governance information from www.VIPsight.EU (previously www. ICGN.biz).

With this background and our Europe-wide (non-US) experience, we would like to state our position on the adjustments to the U.S. proxy system mentioned in the subject line, in the belief that any action in this connection makes sense only if addressed globally. In that regard, and in all other comments, we wish to support the presentation of 11 October 2010 from the ICGN – of which the undersigned has been a member for 9 years. In addition, we wish to analyze one experience and go deeper into three points we feel it is important to appreciate.

VIP was the initiator of the non-discharge of the deputy chairman of the supervisory board of Deutsche Lufthansa (ISIN DE0008232125) based on conflict of interest, and in 2003 won the vote battle

(proxy fight) 2/3; in 2007 VIP was the only defender of corporate-governance objectives against the newly-created secondment right of a minority shareholder at ThyssenKrupp (ISIN DE0007500001) but was below the necessary quorum by 0.01% of counted attendance. VIP was asked for help and support just before the 2010 AGM by shareholders of INFINEON (ISIN DE0006231004) wishing to constructively replace the administration proposal for next supervisory board chairman.

All these cases, especially the last, show the great importance of vote confirmation. All opinions in this context we have so far seen talk timidly and with greater or lesser perplexity about possible inaccuracies – but we say clearly that the lack of voting confirmation is the very reason why the shareholder vote can be reinterpreted or altered. At INFINEON in 2010 that happened with the majority of the AGM votes (impersonally) represented (about 220 million shares); and the shareholders received no reports because they did not ask for any. Both (management and shareholders) are equally "responsible", and subject to no legal obligation in this connection. A 56% majority of opposition shareholders was thus turned into a 27% defeat. This may conserve the sysem, but is contrary to basic rules of democracy and corporate governance.

Re 1:
VERY rightly, stock lending is often seen as a problem. Let us respectfully mention that even major players take organizational steps to get the loan back before the AGM! Quite apart from that, however, it might be stipulated that borrowed stocks also vote – but it must made clear WHO has to take the voting decision. Instead, however, even pan-European model provisions for stock borrowing contain not even hints as to who is entitled to vote – and loans of different sizes sink into this vacuum. One cannot rely on the resulting accounting errors being regularly rescued by the collapse of big players such as Lehman Brothers. Rather, one should be concerned that jurisdictions with attendance payments show capital presence increases in proportion to the payment amount, with values even above 100% being logged and "tolerated" – as happened in the proxy fight over ENDESA (ISIN ES0130670112) in 2007 with a 103% figure, although we knew of other 7-digit, non-represented holdings.

It would be best to turn back the loan (before the AGM), but it is important to codify the rules for the entitlement (and obligation) to vote.

Re 2:
It is a good step – which many national laws have not yet taken – to make the exercise of votes normally mandatory. This is, however – as in the case of the USA – completely ineffective, or remains left up to chance, if no confirmatory vote receipt is regulated; this is so both in the ordinary case when the instruction has simply been implemented, as well as in the case of a short-term adjustment to instructions (for example, by shareholder or management proposals and motions, which depending on the country may be made even during the AGM itself) by the beneficiary.

Logically, there are two ways of transmitting votes: through a so-called platform – with variable experiences of reliability – or through the certainly more expensive agent. In both cases, fees are incurred, the costs of which may be borne either by the issuer (but since they hardly take part in consultations, these costs will be mostly "imposed") or the beneficial owner). It must be accepted that the volume of conflicts of interest will increase significantly if the issuer (and not the interested party, the shareholders!) bears these costs. According to the guiding principles of corporate governance, therefore, the investors must bear these costs of the custody chain.

An issuer may, with varying administration and generosity, influence reimbursement in terms of level and speed – which could conceivably affect the voting details. If today strategic majorities are looked for, then strategic budgets could (at the expense of all shareholders) be formed by the issuer. Especially valuable are the remarks of the Securities Transfer Association ("STA") in their white paper – we are considering research in greater depth and comprehensiveness on this.

Also, it would seem reasonable to put the burden of the costs on those who can influence their amount and incidence – thus, the costs of long-chain deposits or more intensive agent representation or of changing or adapting instructions etc. may vary.

Proxy voting is subject to such a large and systematic scale effect that the emergence of a monopoly must be considered in good time; in particular, the parallel utilization of the monopoly of knowledge and the resulting monopoly of experience must be taken into account in order not to allow insurmountable entry costs for new entrants to arise.

Unfortunately, confidence in the responsibility of the investor acting as trustee for the beneficial owner has not yet shown the desired effect: worldwide, 30% figures for attendance even with highly dispersed holdings and on major indices are not uncommon. So, unfortunately, legal pressure can help – and the United States in particular has accumulated good experience here already.

Re 3:
On the overall context of so-called "empty voting," we would cite a legal rule whose roots lie in the century before last:

"(3) An offense is also committed by whoever

1 ... ..

6. asks for, has promised or accepts special benefits in return for not voting or voting in a particular way at a shareholders' meeting or a separate meeting, or

7. offers, promises or grants special benefits in exchange for having someone not vote or vote in a particular way at a shareholders' meeting or a separate meeting."

(§ 405 Offenses, Companies Act, Federal Republic of Germany)

- a rule that is not well known, and has had judicial interpretation, if at all, only on special issues:
http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=29132&pos=0&anz=1

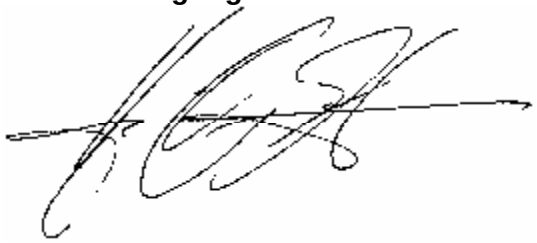
http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=46699&pos=0&anz=1

It is obviously not sufficient to codify the context without making it graspable and transparent in application.

The observations by ICGN (and others) on the overall target direction should be recalled; it remains to be hoped for the market that the North American legislators will take successful steps here.

Best regards

V I P Vereinigung Institutionelle Privatanleger e.V.



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