

25 NOVEMBER 2011

**REPLY TO THE CALL FOR EVIDENCE
OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY
ON EMPTY VOTING**

The Association for Financial Markets in Europe (AFME) through its Post Trade Division¹ is pleased to respond to the call for evidence of the European Securities and Markets Authority (ESMA) on empty voting.

We share ESMA's view, expressed in paragraph 12 of the call for evidence, that it is important to assess issues relating to empty voting as a whole, and we note in particular ESMA's request for views "in a broader context".

In this reply, we shall focus on the vote entitlement process, and the vote execution process, which are two critical parts of the full voting process.

We are aware of the reply to the call for evidence of ISLA dealing with empty voting in the context of borrowed securities.

We would like to stress the importance of (i) the record date (using booked positions at the CSD) as the sole determinant of entitlements to vote, and (ii) the objective of ensuring that record date holders of positions, who do have an economic interest in a company, do have the practical ability to vote, and are not disenfranchised by any measures to reduce empty voting.

More specifically :

1. We take the view that the full elimination of empty voting caused by record date holders of securities having sold shares before the actual holding of the meeting is impossible (unless there is a full, but impractical, prohibition of trading from one or two days before record date – depending on the settlement cycle - until the actual time of the meeting).
2. We take the view that the use of the record date as sole source of entitlement is unavoidable from a practical viewpoint, and is implicitly accepted by the provisions of the Shareholder Rights Directive (Directive

¹ The Post Trade Division is the European post trading centre of competence of the Association for Financial Markets in Europe (AFME). Its members are the major users of international securities markets. Representing its members towards market infrastructure organisations and public authorities, the Post Trade Division acts as an agent for change providing and supporting solutions in the securities clearing, settlement and custody space to reduce risks and costs to market participants.
The AFME Post Trade Division was preceded by the European Securities Services Forum, previously the European Securities Forum (ESF).

2007/36/EC), which stipulates in Article 5(3c): “... state the record date as defined in Article 7(2) and explain that only those who are shareholders on that date shall have the right to participate and vote in the general meeting.” Article 7(2) in turn provides that “Members States shall provide that the rights of a shareholder to participate in a general meeting and to vote in respect of his shares shall be determined with respect to the shares held by that shareholder on a specific date prior to a general meeting (the record date).

3. We would urge ESMA to review, and to incorporate in its deliberations, the Market Standards for General Meetings². These Market Standards are the outcome of work under the aegis of the European Commission’s Clearing and Settlement Advisory and Monitoring Expert group (CESAME) to tackle Giovannini Barrier 3. They have been developed, agreed and endorsed by the relevant constituents, i.e. issuers, market infrastructures and banks. These Market Standards are based on the provisions of the Shareholder Rights Directive, and, once fully implemented, will very significantly improve the vote transmittal and vote execution process.
4. We believe that the objective of minimising empty voting caused by holders as of record date who have sold shares by the time of the meeting is not the only relevant objective. A separate objective is to enable record date holders who have purchased their shares on a date close to the date of the general meeting to participate in the general meeting in an informed manner. The Shareholder Rights Directive stipulates inter alia that “shareholders should be able to cast informed votes at, or in advance of, the general meeting, no matter where they reside. All shareholders should have sufficient time to consider the documents intended to be submitted to the general meeting...”.
5. In order to reconcile these partially conflicting objectives, the AFME Post Trade Division through its Custody Committee has worked out a proposal (in the attached document entitled “Position paper on inadequate Record Dates”) that
 - provides for an adequate record date to be at least five business days before the date of the general meeting
 - requests the elimination of currently existing additional requirements and restrictions to participate in general meetings
 - dismisses mandatory systems of notification of shares voted on but sold after the record date, as these would have a significant negative impact.

This position paper includes a section on why it is key that voting entitlements be determined by booked positions as of record date at the CSD. Some more information on this topic is given in the attached paper setting out an AFME Proposal to harmonise and standardise shareholder registration processes.

² The Standards are attached. They are also available on : http://www.europeanissuers.eu/_mdb/spotlight/11en_GM_Market_Standards_Final_20100909.pdf

Please do not hesitate to contact us if any further information or clarification is necessary or desirable. We are prepared and would be honoured to discuss the topics discussed in this document in more detail should you wish to do so.

Enclosed

- AFME Position Paper on inadequate Record Dates
- AFME Proposal to harmonise and standardise shareholder registration processes
- Market Standards for General Meetings