



Manual

Corporate Governance

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FOREWORD

In recent years institutional investors have felt an increasing responsibility to make use of the controlling rights attaching to the shares they hold. This sense of responsibility has grown as a consequence of the legal reinforcement of the position of the general meeting of shareholders (hereafter: “general meeting”), due to the conferral of a number of new rights in 2004 and the enshrinement in law of the Dutch corporate governance code¹ in that same year. The widening of shareholders’ powers was largely prompted by the endeavours of the legislator and the Tabaksblat Committee to restore investor confidence in the management and supervision of listed companies, this confidence having been impaired by a number of notorious accounting scandals and bankruptcies shortly after the turn of the century. According to the legislator and the corporate governance committee (Tabaksblat Committee), the strengthening of the position of the general meeting was a necessary pre-condition for the improvement of the checks and balances at the listed companies, in order to reduce the risk of new scandals. The Netherlands was not the only country, incidentally, where the position of shareholders has been reinforced in recent years; this happened in large number of other countries as well.

On the basis of the idea that institutional investors who operate globally hold most of the shares in listed companies and manage other people’s money, a more active role is expected of this category of investors in particular. In the words of the Tabaksblat Committee, institutional investors should act primarily in the interest of their ultimate beneficiaries and they have a “responsibility to the ultimate beneficiaries or investors and the companies in which they invest, to decide, in a careful and transparent way, whether they wish to exercise their rights as shareholder of listed companies.”

A special paragraph on institutional investors was included in the Tabaksblat Code in order to codify the existing best practices for institutional investors with regard to corporate governance. According to the code, institutional investors should have a policy on exercising voting rights in companies in which they invest. In addition, they should report on the implementation of that policy and on the concrete voting behaviour at the general meetings. The legislator has underlined these obligations by enshrining what is known as the “apply or explain” principle for institutional investors in the Financial Supervision Act (Netherlands), hereafter “Wft”. With effect from the financial year 2007, every institutional investor established in the Netherlands is required by law to give an account of its compliance with the principles and best practice provisions in the Netherlands corporate governance code that apply to it.

The introduction of this statutory duty is also connected with society’s increasing interest in the question of how shareholders – and institutional investors as well, by extension – exercise the rights assigned to them. What responsibilities do shareholders have?

Eumedion regards it as one of its tasks to provide the institutional investors among its members with support in developing and implementing a voting policy and in accounting for the implementation of the voting policy. Eumedion has already contributed to this in the last few years, by making recommendations to the institutional investors which are its members. These recommendations are contained in the publications “Guidelines for the interpretation of provisions in the Tabaksblat Code relevant to institutional investors” (September 2006), “Recommendations on Executive Remuneration” (October 2006) and “Recommendations on the delegation of power to issue shares” (January 2008), which are published in this Corporate Governance Manual 2008, so that all the relevant information on the development and implementation of a voting policy can be found in one place.

¹ As published in the Government Gazette [Staatscourant] of 27 December 2004 (no. 250).

Reading guide

This manual provides the institutional investors which are members of Eumedion with guidelines for taking part in and voting at the general meetings of the Dutch listed companies. This version of the manual replaces the 2004 version published by Eumedion's predecessor, the Foundation for Corporate Governance Research for Pension Funds (SCGOP).

The manual consists of three sections. The first section contains a summary of the *rights* of shareholders in Dutch listed companies; this section provides a number of reference points or recommendations for each (standard) item on the agenda for a general meeting, which can be consulted when deciding on voting behaviour and with regard to asking questions during the general meeting. The second section contains an overview of shareholders' *responsibilities*, particularly those of institutional investors who invest in Dutch listed companies. Eumedion also provides a number of tools for use in accounting for the implementation of the voting policy. The third section comprises a number of recommendations on the organization of the general meetings of Dutch listed companies and a number of practical aspects of casting a vote at the general meetings of Dutch listed companies.

We hope that this new version of the Corporate Governance Manual will contribute towards further professionalization and greater depth of the voting policy of institutional investors. The text of the manual was closed on 22 April 2008 and will be updated regularly on the basis of new legislation and regulations, best practices and other developments.

Schiphol, 22 April 2008.

Roderick Munsters
(chairman)

Rients Abma
(executive director)

The text of this manual was formulated with the greatest possible care. We are, however, unable to guarantee that the information contained in this manual is still accurate on the date on which it is received, or will continue to be so in future. Eumedion cannot, therefore, be held responsible for decisions taken on the grounds of the information in this manual.

SECTION I: SHAREHOLDERS' RIGHTS IN THE NETHERLANDS

1.1 Summary of shareholders' rights

According to the Dutch corporate governance code, the general meeting must be able to exert such influence on the policy of the management board and supervisory board of the company that it plays a fully-fledged role in the system of checks and balances at the company (principle IV.1 of the Dutch corporate governance code).

Partly on the basis of this point of view, the legislator has granted the following legal rights to the general meeting as an organ of Dutch listed companies:

Appointment and dismissal of members of the management board and of the supervisory board

- a) appointment, suspension and dismissal of members of the management board, in which context it should be noted that management board members of a statutory two-tier company are appointed by the supervisory board (section 2:134 Civil Code (Netherlands), hereafter the "Civil Code"; see section 2:162 Civil Code for statutory two-tier companies);
- b) appointment, suspension and dismissal of members of the supervisory board, in which context it should be noted that the general meeting of statutory two-tier companies only has the option of collective dismissal of the members of the supervisory board (section 2:142, 158 par. 4, 144, 161a Civil Code);

Accountability of (financial) policy and supervision

- c) request of relevant information;
- d) granting of discharge to members of the management board and members of the supervisory board (section 2:101 par. 3 Civil Code);
- e) adoption of the annual report (section 2:101 par. 3 Civil Code);
- f) appropriation of the profit and declaration of the dividend (section 2:105 in conjunction with 101 par. 6 Civil Code; best practice provision IV.1.5 of the Dutch corporate governance code)²;
- g) appointment of the external auditor, unless stipulated otherwise (section 2:393 par. 2 Civil Code);

Remuneration

- h) adoption of the remuneration policy for the management board (section 2:135 par. 1 Civil Code);
- i) adoption of the remuneration for the supervisory board (section 2:145 Civil Code);
- j) approval of share schemes and option schemes (section 2:135 par. 3 Civil Code);

Internal structure

- k) amendment of the articles of association (section 2:121 Civil Code);
- l) resolution on a proposal by the management board to continue or discontinue the two-tier board system after the company no longer meets the legal criteria for application of the two-tier system (section 2:154 par. 4 Civil Code);
- m) conversion (section 2:18 in conjunction with 71 Civil Code);
- n) legal merger (section 2:317 in conjunction with 330 and 331 Civil Code);
- o) split-off (section 2:334 Civil Code);
- p) designation of a representative in the event of conflicting interests (section 2:146 Civil Code);
- q) issue of shares or delegation of this power to another organ (section 2:96 Civil Code);
- r) exclusion of the pre-emption right in the event of the issue of shares, or delegation of this power to another organ (section 2:96 Civil Code);
- s) purchase of own shares, or delegation of this power to another organ (section 2:96 Civil Code);
- t) reduction of capital (withdrawal of shares) (sections 2:99 and 2:100 Civil Code);
- u) instructions to file for bankruptcy (2:136 Civil Code);

² A distribution charged to the reserves also requires a resolution of the general meeting of shareholders.

Public offer and other decisions on a major change in the identity or character of the company

- v) approval of management board decisions concerning a significant change in the identity or character of the enterprise or company (section 2:107a Civil Code);
- w) discussion of a public bid for the shares of the company (section 18 par. 1 Decree on Takeover Bids Financial Supervision Act [Netherlands]);
- x) the exemption of a shareholder or group of shareholders acting in concert from the obligation to make a public bid for the shares³ (section 2 Exemptions Decree Financial Supervision Act [Netherlands]).

Logistics

- y) delegation of the power to determine a registration date (section 2:119 Civil Code);
- z) designation of the official language of the annual report and the annual accounts (section 2:391 par. 1 and 2:362 par. 7 Civil Code);
- aa) preparation of regulation information (annual report, annual accounts, the annual and/or half-year and quarterly results, changes in rights attached to securities, information related to bond offerings, and other stock price sensitive information) exclusively in the English language (draft section 5:25p Financial Supervision Act [Netherlands]⁴);
- bb) distribution of information to shareholders by way of electronic means of communication (draft section 5:25k Financial Supervision Act [Netherlands]⁵).

In addition to the above legal rights, the Dutch corporate governance code contains a number of rights for the general meeting. The Dutch listed companies have no obligation to grant these rights to the general meeting, but in the event of their failure to grant these rights, they must provide an explanation for this decision. The following rights are involved:

- a) discussion of the policy on reserves and dividends, in particular the amount and purpose of the reserve and the amount and type of the dividend (best practice provision IV.1.4 of the Dutch corporate governance code);
- b) discussion of each substantial change in the corporate governance structure of the company and of compliance with the Dutch corporate governance code (best practice provision I.2 of the Dutch corporate governance code).

Resolutions are passed by a simple majority of the votes cast at the meeting, unless a qualified majority and/or a quorum is stipulated by law or in the articles of association. A legal departure applies, for example, in the event of the cancellation of a nomination for the appointment of a member of the supervisory board, or in the case of the dismissal of the supervisory board of a statutory two-tier company (quorum) and when excluding or limiting the pre-emption right in the event of the issue of new shares (qualified majority of votes if less than half of the issued capital is present at the meeting). The articles of association of Dutch listed companies often include the stipulation that greater, super or qualified majorities are required for resolutions concerning an amendment to the articles of association, the dissolution of the company, and the dismissal of members of the management board and/or supervisory board (on the initiative of one or more than one shareholder). It is common to require a two-thirds majority of the number of votes cast representing at least half of the issued capital.

Besides the above-mentioned powers of the general meeting as an organ of a Dutch listed company, individual shareholders or groups of shareholders also have certain rights:

- a) shareholders who singly or jointly represent at least one percent of the issued capital or who hold shares with a collective market value of at least 50 million euro are entitled to put forward subjects

- to be dealt with at the general meeting⁶. The articles of association may contain lower thresholds (section 2:114a Civil Code);
- b) shareholders who individually or jointly represent at least ten percent of the issued capital can, on their request, be authorized by a court to convene a general meeting. The articles of association may contain a lower threshold (section 2:110 Civil Code);
- c) a shareholder who represents 95 percent of the issued capital is entitled to buy out the remaining shareholders (section 2:92 Civil Code and 2:359c Civil Code);
- d) the right to offer the shares to the party which represents at least 95 percent of the issued capital as a result of a public bid (section 2:359d Civil Code);
- e) the right to submit a request for indemnification if the shareholder has voted against a merger resolution, when the acquiring company is a company incorporated under the law of another member state of the European Union or the European Economic Area (draft section 2:333h Civil Code)⁷.
- f) shareholders who individually or jointly represent at least ten percent of the issued capital or who hold shares with a collective nominal value of at least 225,000 euro can ask the Enterprise Section of the Amsterdam Court of Appeal to institute an inquiry into the running of a company. The articles of association may contain lower thresholds (section 2:346 Civil Code);
- g) every shareholder can demand of the Enterprise Section that the annual report be corrected (section 2:447 in conjunction with 2:448 Civil Code).

Shareholders can, furthermore, also initiate (other) proceedings in civil law or administrative law (by using the Class Action [Financial Settlement Act], by taking part in class actions against Dutch listed companies whose shares are [also] listed or traded on a stock exchange in the United States, or by lodging an appeal with the Appeals Board for Trade and Industry against a decision by the Netherlands Authority for the Financial Markets [hereafter the "AFM"]).

1.2 Tools for Eumedion members in assessing the items on the agenda for a general meeting

In the following paragraphs Eumedion provides a number of tools for assessing subjects that frequently appear on the agendas of general meetings of Dutch listed companies. The tools are not exhaustive and are intended to be taken into consideration when reaching a decision on how to vote or on the discussion at the general meeting. Eumedion has prepared recommendations on a number of specific items on the agenda. The recommendations given in some paragraphs must never lead blindly to the issue of specific voting proxies. Institutional investors will always have to form an opinion on their voting behaviour – on the basis of expert external advice on each item on the agenda at each company, if required – a process in which the circumstances of the case will weigh heavily.

1.2.1 Discussion of the annual report

This part of the agenda is not a voting item; the report of the management board and the report of the supervisory board on the past financial year are discussed under this item on the agenda.

The following are points for attention in relation to the discussion of the annual report:

- Is sufficient and readily comprehensible information included about the mission, the strategy and the operational targets?
- Is a readily comprehensible risk paragraph included and a clear description of the internal risk management and control systems?
- Are the most important risks clearly stated and are indications provided of what the impact will be on the result and shareholders' equity should these risks materialize?

³ A resolution of this nature must be passed with 95 percent of the votes cast. The votes of the shareholder or group of shareholders acting in concert that is the subject of the proposed exemption are not counted as votes cast. It is also stipulated that the passing of resolutions in the general meeting should take place at a time that is no more than three months in advance of the acquisition of overall control by the shareholder or group of shareholders in question.

⁴ Bill to implement the European Transparency Directive (Parliamentary Papers 31 093); on October 1, 2008, this Bill will probably enter into force.

⁵ Bill to implement the European Transparency Directive (Parliamentary Papers 31 093); on October 1, 2008, this Bill will probably enter into force.

⁶ The Dutch Government intends to set the statutory threshold at 3 percent of the issued capital, which means that the nominal value criterion will be abolished (Parliamentary Papers [Netherlands] II 2006/07, 31 083, no. 1 and the preliminary draft of 3 January 2008 of the proposed amendments to the Financial Supervision Act, the Securities (Bank Giro Transactions) Act and the Civil Code in response to the advice of 30 May 2007 from the Corporate Governance Code Monitoring Committee (www.minfin.nl)).

⁷ Legislative proposal in implementation of the Mergers Directive (Parliamentary Papers [Netherlands] 30 929); this bill will probably come into effect in the spring of 2008.

- Is the explanation of the supervisory and advisory tasks of the supervisory board included in the report of the supervisory board, and is this sufficiently extensive and transparent?
- Is the report on the compliance with the Dutch corporate governance code acceptable to institutional investors? Are the reasons stated for any non-compliances acceptable to institutional investors and not clichés?
- Is the remuneration report sufficiently clear and transparent? Does it contain sufficient information on the standards on the basis of which short-term bonuses are paid and long-term bonuses granted? Is all the information required on the grounds of the Dutch corporate governance code included in the remuneration report? Does the company adhere to the Eumedion recommendations with regard to executive remuneration (Appendix I)?
- Has the company included a clear corporate social responsibility paragraph in the annual report?
- Is a clear and transparent summary included of the (potentially usable) anti-takeover measures and has the management board explained why the existing anti-takeover measures should be retained?
- Has the company implemented the points for attention referred to in paragraph III.1 with regard to the organization of the general meeting?

1.2.2 Adoption of the financial statements

Under Dutch law, this is a voting item at the general meeting. The consequence of non-adoption is that no dividend can be paid and no own shares bought (subject to the condition that the general meeting has agreed to this; see paragraph 1.2.14). The general meeting is unable to alter the financial statements during the meeting, but can make proposals for alterations. The external auditor must be consulted first for this purpose and must issue a certificate accordingly. A new meeting has to be convened to adopt the annual accounts.

The following are points of reference for the proposal to adopt the financial statements:

- Has the external auditor issued an unqualified opinion, a qualified opinion or a disclaimer of opinion?
- Has the management of the company offered sufficient insight into the accounts and the standards used to give assessments and estimates of asset items and liability items?
- Has the company changed over to different accounting principles without adequate explanation?
- If there are current claims against the company and claims that can reasonably be expected, has a reserve been created for this purpose?
- Are the accounting principles still up-to-date (going concern, changed market conditions)?
- Have any recommendations made by the AFM or the Enterprise Section of the Appeals Court in Amsterdam with regard to the accounts of the company in question been implemented?

1.2.3 Corporate governance policy

This is (at least) a point for discussion during the general meeting. Companies can choose to put their corporate governance policy to a vote at the general meeting.

The following are points for attention in relation to this item on the agenda:

- Is the corporate governance policy being put to a vote at the general meeting, as recommended by Eumedion?
- Does the company apply the provisions of the Dutch corporate governance code to a substantial extent?
- Is the report on the compliance with the Dutch corporate governance code adequate? Are the reasons given for any instances of non-compliance acceptable to institutional investors and not clichés?
- It would be logical to ask critical questions and express doubts about proposals for or reports of an increase in the number of provisions that are not complied with.

1.2.4 Dividend policy and profit distribution

This is (at least) a point for discussion at the general meeting. Companies can choose to put their dividend policy to a vote at the general meeting.

The following are points for attention in relation to this item on the agenda:

- Is the dividend policy sufficiently clearly and transparently described?
- Is the dividend policy consistent and predictable?
- Is sufficiently concrete information provided on what percentage of the profit will definitely be paid and precisely how this percentage is calculated? What profit standard is observed, for example?
- Is the dividend policy closely aligned with the proposed dividend?
- Is the dividend policy periodically evaluated and is the general meeting informed of the results?

1.2.5 Appropriation of the profit and the amount of the dividend

This is a voting item at the general meeting. The general meeting can, however, change the proposal during the meeting. The financial statements must first be altered for this purpose, which means that the external auditor must be consulted and must issue a certificate. A new meeting has to be convened to adopt the amount of the dividend.

The following are points of reference in this context:

- Is the amount of dividend paid consistent with the company's dividend policy?
- What is the amount of the dividend payment and dividend yield in comparison with the companies in the peer group?
- What is the relationship between the dividend payment and the cash position?
- What is the relationship between the dividend payment and the possible purchase of own shares?
- Has it been made transparent why part of the profit is being allocated to the creation of reserves and what part is ultimately being allocated to the shareholders through the payment of dividend or through the purchase of own shares, and how consistent this is with company strategy?

1.2.6 Granting discharge to members of the management board and members of the supervisory board

This is a voting item at the general meeting. The consequence of granting discharge to members of the management board and members of the supervisory board is that the general meeting cannot reconsider components of the policy and supervision at a later time, with the exception of matters that were concealed, were not apparent or not disclosed, or were deliberately misleading. The withholding of discharge is held to be a corrective gesture. This item on the agenda has recently been "used" more often to express dissatisfaction with the policy being pursued, without (immediately) having to submit a motion of no confidence in the management board and/or the supervisory board.

The following are points of reference in this context:

- Is legal action still pending against the company, a member of the management board or a member of the supervisory board?
- If the financial statements are not adopted, granting discharge to members of the management board and members of the supervisory board is not an obvious course of action.
- Has the management board responded adequately in the previous financial year to the wishes of the shareholders with regard to the strategy and policy of the management board? Has the supervisory board played a good, mediating role in this context?
- Has the management of the company responded adequately to the recommendations made by shareholders in previous general meetings?
- Is the degree of compliance with the Dutch corporate governance code sufficiently high, or have reasons that are acceptable from the perspective of institutional investors been provided for the non-compliances with the provisions of the code?

1.2.7 Appointment of members of the management board

This is a voting item at the general meeting of the listed companies that are not two-tier board companies. At companies that apply the full two-tier board system, members of the management board are appointed by the supervisory board. At the listed companies that do not have to apply the two-tier board system, extra requirements contained in the articles of association can apply to a resolution of the general meeting (e.g. a qualified majority of votes, a stipulated quorum, or both) to reject the nomination for the appointment of a member of the management board. If the candidate in question is rejected by the general meeting, a new nomination should be presented in a new general meeting and may be expected to have taken the feelings of the general meeting into account.

The following are points of reference for this item on the agenda:

- What is the quality of the candidate; how does his resumé look?
- What is the service record of the person in question at his previous employer(s) and/or – if applicable – as a member of the supervisory board of another company, also where interacting with shareholders is concerned?
- Are there reasons to doubt the integrity and reliability of the candidate in question?
- Is the candidate in question in keeping with the objective of more quality and diversity in the membership of the management board?
- Is the member of the management board being appointed for a period of four years, in compliance with best practice provision II.1.1 of the Dutch corporate governance code?
- Does the person in question comply with best practice provision II.1.7 of the Dutch corporate governance code (maximum number of supervisory board memberships)?
- Is his remuneration package in keeping with the remuneration policy adopted by the general meeting and does that comply with the provisions set out in the Dutch corporate governance code and is it in line with the Eumedion recommendations (appendix I)?
- In the case of a reappointment, has the supervisory board evaluated the previous period of the appointment and what are the results of this evaluation?

1.2.8 Appointment of a member of the supervisory board

This is a voting item at the general meeting. The general meeting of companies with statutory two-tier status can reject the candidate in question by a simple majority of votes⁸ representing at least one-third of the issued capital. At the listed companies which do not apply the two-tier board system, extra requirements contained in the articles of association can apply to a resolution of the general meeting (e.g. a qualified majority of votes⁹, a stipulated quorum¹⁰, or both) to reject the nomination for the appointment of a member of the supervisory board. If the candidate in question is rejected by the general meeting, a new nomination should be presented in a new general meeting and may be expected to have taken the feelings of the general meeting into account.

The following are points of reference for this item on the agenda:

- What is the quality of the candidate; how does his resumé look?
- What is service record of the person in question with his employer and/or – if applicable – as a member of the supervisory board of another company or other companies, also where interacting with shareholders is concerned?
- Are there reasons to doubt the integrity and reliability of the candidate in question?
- Is the member of the supervisory board being appointed for a period of four years, in compliance with best practice provision III.3.5 of the Dutch corporate governance code?
- Has the company provided convincing arguments that the person in questions fits the supervisory board profile?
- Has the supervisory board also recruited outside existing networks to fill the vacancy?

⁸ This is: the majority of the votes cast plus 1.

⁹ A higher voting majority than 50 per cent plus 1, like two third of the votes cast or 75 per cent of the votes cast.

¹⁰ A specified part of the issued capital that needs to be represented at the general meeting in order to take legally valid decisions.

- Is the candidate in question in keeping with the objective of more quality and diversity in the membership of the supervisory board?
- Does the person in question comply with best practice provision III.3.4 of the Dutch corporate governance code (maximum number of supervisory board memberships)?
- After the appointment of the person in question, does the supervisory board comply with what is stated in best practice provision III.2.1 of the Dutch corporate governance code (no more than one non-independent member on the supervisory board)?
- In the case of a reappointment, has the supervisory board evaluated the previous period of the appointment and what are the results of this evaluation?
- In the case of a reappointment, does the person in question comply with what is stated in best practice provision III.3.5 of the Dutch corporate governance code (maximum of two reappointments)?
- In the case of a reappointment, was the person in question frequently enough present at the meetings of the supervisory board?

1.2.9 Adoption remuneration policy for the management board and approval of option and share schemes

a. Adoption of the remuneration policy for the management board

This is a voting item at the general meeting. The general meeting can put forward changes to the proposed remuneration policy. In practice, the draft then has to go back to the supervisory board, a new meeting may have to be convened and another vote will have to be taken.

b. Approval of option and share schemes

This is a voting item at the general meeting. The general meeting cannot effect any changes to the option and share schemes. The consequence of rejection is, however, that the draft scheme has to go back to the supervisory board, which submits a new scheme to the general meeting for its approval. The previous remuneration policy adopted by the general meeting and/or the share and/or option scheme approved by the general meeting continues to apply in the interim.

The following are points of reference with regard to this item on the agenda:

- Are the Eumedion recommendations on executive remuneration (Appendix 1) complied with to a sufficient extent?
- Are the provisions of the Dutch corporate governance code with regard to the remuneration of members of the management board (paragraph II.2) being applied to a sufficient extent and/or are arguments that are acceptable to institutional investors provided for non-compliance with the provisions of the code?
- Are the recommendations of the Corporate Governance Code Monitoring Committee complied with to a sufficient extent¹¹?

1.2.10 Adoption of the remuneration for the supervisory board

This is a voting item at the general meeting. The general meeting can put forward changes to the proposed remuneration policy. In practice, the draft then has to go back to the supervisory board, a new meeting may have to be convened and another vote will have to be taken.

The following are points of reference with regard to this item on the agenda:

- Are the provisions of the Dutch corporate governance code with regard to the remuneration of members of the management board (paragraph III.7) being applied to a sufficient extent and/or are arguments that are acceptable to institutional investors provided for non-compliance with the provisions of the code?
- Is the company in compliance with recommendation 30 of the Eumedion recommendations on

¹¹ See the third report of the Corporate Governance Code Monitoring Committee, issued in December 2007.

executive remuneration (Appendix 1)? This recommendation is relation to the remuneration of non executives of companies with a one tier board structure.

- Has the company provided good reasons for a proposed change in the remuneration of the members of the supervisory board?

1.2.11 Proposal to amend the articles of association

This is a voting item at the general meeting. On the grounds of the articles of association, qualified majorities of votes may apply to some amendments.

The following are points of reference with regard to this item on the agenda:

- If the amendment to the articles of association relates to the curtailment of the existing rights of ordinary shareholders, it would seem logical to vote against the amendment.
- If the amendment relates to a widening of the powers of shareholders, it would seem logical to vote in favour of the proposal.
- If the amendment relates to improved application of the Dutch corporate governance code by the company, it would seem logical to vote in favour.
- The situation is complicated when a number of amendments have been submitted with conflicting implications for shareholders' rights. In that event, it is always possible to request unbundling of the proposals (also see paragraph III.1).

1.2.12 Appointment external auditor

This is a voting item at the general meeting.

The following are points of reference with regard to this item on the agenda:

- Is it transparent what task assignment the supervisory board wants to give to the external auditor?
- Has the supervisory board prepared a transparent and comparative cost analysis of accountancy organizations that are qualified for the task assignment?
- In the event of a change of external auditor that is not prompted by the statutory obligation to change the external auditor, has the company provided good reasons for this change?
- Has the supervisory board made a thorough assessment of the functioning of the present external auditor and what are the most significant conclusions of this evaluation?
- What is the track record of the external auditor and of the organization where he is employed?
- Does the organization where the external auditor is employed have a licence from the AFM?
- Are there reasons for doubting the integrity and reliability of the organization where the external auditor is employed?
- What is the proportion of the amount that the company pays for the audit tasks carried out by the external auditor in relation to that for non-auditing tasks carried out by the same organization where the external auditor is employed?

1.2.13 Delegation of power to issue ordinary and preference shares

This is a voting item at the general meeting.

The following are points of reference with regard to this item on the agenda:

- Does the company comply adequately with the Eumedion recommendations concerning the delegation of the power to issue shares (see Appendix II)?

1.2.14 Authorization of the management board to purchase own shares

This is a voting item at the general meeting. Authorization cannot be given if the financial statements have not been adopted.

The following are points of reference with regard to this item on the agenda:

- Has the company included a record of changes in the number of shares purchased in the annual report, so that it is possible to obtain a good understanding of the development of the number of own shares purchased in the course of the financial year? Does the company provide information on the position of the shares purchased in the course of the financial year and the conditions against which the purchases were made?
- Does the company have sufficient cash resources to purchase own shares, without the solvency and liquidity of the company being put at risk?
- Has a clear description been provided of the objectives for which own shares are being bought (e.g. to cover the obligation to transfer shares to those who have acquired rights to these (such as holders of share options and conversion options), to pay share dividend, to support the share price, or to repay "surplus" cash resources to shareholders, partly in order to reorganize the capital structure)?
- Has a clear explanation been provided of why the company wishes to purchase own shares instead of increasing the dividend? Has an explanation been provided for why the possible purchase of own shares contributes to the realization of company strategy?
- Has a clear account been provided of how the own shares are to be acquired? Is the equal treatment of shareholders guaranteed at the time of the purchase of own shares?
- Have the limits between which the purchase price must lie been clearly defined? Eumedion has recommended that the purchase of own shares at a price higher than the market price should be avoided as much as possible. The price must definitely not be more than 5 percent above the market price. The company can also decide on an average market price over a certain period that must be no longer than 5 days.
- What are the consequences of the purchase of own shares for the liquidity of the share?

A resolution of the general meeting is required if the management board wishes to withdraw the own shares purchased.

1.2.15 Approval major transactions

This is a voting item at the general meeting.

The following are points of reference with regard to this item on the agenda:

- Has the management board demonstrated convincingly how the interest of the (minority) shareholders has been weighed against other interests?
- In the event of a takeover, is this takeover consistent with company strategy? Have the risks associated with the takeover been made sufficiently transparent?
- In the event of a takeover, has it been demonstrated convincingly that the advantages of the synergy are greater than the cost price of the takeover, taking what are known as the integration costs into account and the costs of financing the takeover? Is it possible to express the projected synergy benefits in concrete figures with a corresponding concrete time frame? Has the management board submitted a convincing implementation process to the general meeting, complete with scenarios and evaluation moments?
- In the event of a takeover, is the management board able to indicate how the takeover price was reached? Has a transparent fairness opinion been issued by a bank that is not involved in the transaction or accountancy firm, providing information on the prognoses assumed for the company being taken over? Have fairness opinions been issued that have not been published?
- In the event of a division or participating interest being disposed of, has it been demonstrated convincingly that the maximum feasible price has been stipulated?
- How does the takeover/disposal fit in with the company's long-term strategy?

1.2.16 Shareholders' proposals

A subject submitted by one or more shareholders who have made use of the right to place an item on the agenda can be put forward for discussion or put to a vote. The vote on the shareholders' proposal may be binding or non-binding in nature. The vote is binding if the proposal relates to a field which is within the powers of the general meeting on the grounds of the law or articles of association. The vote is not binding in all other cases, but the result of the vote does send a signal to the management board and the supervisory board. An opinion on a shareholders' proposal should be formed on the merits of each individual case, in which process the reference points listed above for the items on the agenda can be taken into consideration.

SECTION II: SHAREHOLDERS' RESPONSIBILITIES IN THE NETHERLANDS

II.1 Summary of the responsibilities of (certain) shareholders

The number of shareholders' rights has been extended in the last few years. Shareholders have the task of dealing responsibly with these powers and they have recently been increasingly reminded of this responsibility. The following obligations and rules of conduct for shareholders can be distilled from legislation and regulations, the Dutch corporate governance code, the reports of the Corporate Governance Code Monitoring Committee, and from the jurisprudence.

Transparency

- a) statutory obligation to immediately report the acquisition or disposal of shares if certain threshold values of the issued capital and/or voting rights are exceeded or fallen short of (5, 10, 15, 20, 25, 30, 50, 75 and 95 percent)¹² (section 5:38 par. 3 and 5:39 par. 2 Wft);
- b) institutional investors should decide carefully and transparently whether they wish to exercise their rights as shareholders of listed companies (principle IV.4 of the Dutch corporate governance code);
- c) institutional investors annually publish, on their website at least, their policy on the exercise of voting rights on shares that they hold in listed companies (best practice provision IV.4.1 of the Dutch corporate governance code)¹³;
- d) institutional investors report annually on their website and/or in their annual report on the implementation of their policy on the exercise of voting rights in the relevant financial year (best practice provision IV.4.2 of the Dutch corporate governance code);
- e) institutional investors report at least once a quarter on their website, whether and how they have voted as shareholders at the general meetings (best practice provision IV.4.3 of the Dutch corporate governance code).

Conventions in dealing with the company and fellow shareholders

- a) a shareholder with a large block of shares should, on the grounds of reasonableness and fairness, make disclosure to and consult reasonably with the company in question¹⁴. In this context, he will have to disclose whether the block acquired is for investment purposes only, or whether he wishes to exercise influence on company policy with the block acquired (and wishes a seat on the management board or on the supervisory board to that end), or whether the interest acquired is the basis for the acquisition of a majority interest which is intended in turn to lead to acquisition of absolute control of the company. The company in question has an obligation to take note of the intentions of the shareholder and to investigate these intentions (jurisprudence¹⁵).
- b) shareholder and target company are subsequently obliged to enter into a dialogue (jurisprudence¹⁶).
- c) the general meeting can express its ideas on strategy by exercising the rights assigned to it in law and in the articles of association. The general meeting must take reasonableness and fairness into consideration in exercising these rights (jurisprudence¹⁷).
- d) if a major shareholder is not in agreement with the policy or strategy of the company, he must present credible alternatives and consult with the management board on this subject. If this does not happen, a policy change that a major shareholder wishes to implement is too much of a risk for other interested parties, such as employees and minority shareholders (jurisprudence¹⁸).
- e) institutional investors should be prepared to enter into a dialogue with the company, if they do not accept the explanation given by the company of a non-compliance with a best practice provision in the Dutch corporate governance code. The basic principle in this respect is that recognition of corporate

¹² The Dutch Government intends to introduce an additional threshold value that will be set at 3 percent of the issued capital or voting rights (Parliamentary Papers [Netherlands] II 2006/07, 31 083, no. 1, in addition to the draft bill of 3 January 2008 of the proposal for amendment of the Financial Supervision Act, the Securities (Bank Giro Transactions) Act and the Civil Code, in response to the advice of the Corporate Governance Code Monitoring Committee of 30 May 2007 (www.minfin.nl)).

¹³ Paragraphs c, d and e have a legal basis for institutional investors in the Financial Supervision Act, whereby the "apply or explain" rule applies.

¹⁴ The cabinet intends to provide for in law that shareholders who represent a certain voting interest must make their intentions public (Parliamentary Papers [Netherlands] II 2006/07, 31 083, no. 1, in addition to the draft bill of 3 January 2008 of the proposal for amendment of the Financial Supervision Act, the Securities (Bank Giro Transactions) Act and the Civil Code, in response to the advice of the Corporate Governance Code Monitoring Committee of 30 May 2007 (www.minfin.nl)).

¹⁵ Amsterdam Court of Appeal [Enterprise Section] 11 March 1999, JOR 1999, 89 (Breevast), grounds 4.16 and Amsterdam Court of Appeal [Enterprise Section] 22 March 2002, JOR 2002, 82 (Rodamco North America), grounds 3.8 and 3.9.

¹⁶ Amsterdam Court of Appeal [Enterprise Section] 8 March 2001, JOR 2001, 55 (Gucci).

¹⁷ Amsterdam Court of Appeal [Enterprise Section] 17 January 2007, JOR 2007, 42 (Stork) and Netherlands Supreme Court 13 July 2007, NJ 2007, 434 (ABN AMRO Holding).

¹⁸ Amsterdam Court of Appeal [Enterprise Section] 17 January 2007, JOR 2007, 42 (Stork).

- governance requires a tailor-made approach and that a company's non-compliance with individual provisions may very well be justified (principle IV.4 of the Dutch corporate governance code).
- f) a shareholder does not avail himself of the right he may have to place an item on the agenda, until after he has contacted the management board of the company on this subject. If the placing of an item on the agenda can be expected to lead to a change in company strategy, including the dismissal of incumbent members of the management board and/or supervisory board and the appointment of other members of the management board and/or members of the supervisory board, the management board must be granted a response time of 180 days in order to form an opinion on the views of the shareholder and to map out and explore possible alternatives. This response time also applies to a request for an extraordinary general meeting to be convened (recommendation of the Corporate Governance Code Monitoring Committee¹⁹).
- g) if a shareholder or a group of shareholders acting in concert acquires at least thirty percent of the voting rights, an obligation comes into effect to issue a public offer for all shares in the company (section 5:70 in conjunction with 1:1 Wft).

In addition to the above, the principle of Dutch corporate law also applies; that the exercise of rights and obligations can be evaluated in the light of the behavioural standard of reasonableness and fairness (section 2:8 Civil Code). This standard will be achieved more quickly when the influence of the investor is greater, because he has a relatively large block of shares in a company for example. There are also other specific situations in which the shareholder cannot entirely serve his own interests when exercising his voting rights. This applies, for example, in the situation where the shareholder does not hold the share interest in the relevant company for financial purposes alone, since other interests are also involved. The shareholder might be a competitor of the company, for instance, or the shareholder may have a direct interest in a transaction with the company. This shareholder must act reasonably and fairly in the exercise of his rights, from which it follows that he must always take the possible consequences of his voting behaviour on the continuity of the business operations into consideration when deciding whether to vote for or against a proposal²⁰.

II.2 Formulation of the voting policy by institutional investors

In September 2006 Eumedion published guidelines for the interpretation of the provisions in the Tabaksblat Code that refer to institutional investors (paragraph IV.4 of the code; repeated in Appendix 3 of this Manual). These guidelines are still of current value and are incorporated in their entirety in Appendix III.

II.3 ICGN statement on shareholder responsibilities

The International Corporate Governance Network (ICGN), the international organization in which institutional investors work together in the field of corporate governance, published a statement on the responsibilities of shareholders in July 2007. This statement was approved by the Eumedion Board and brought to the attention of its members. The paragraph on the "external responsibilities" of institutional investors is incorporated in Appendix IV to this document.

II.4 Securities lending

It frequently occurs that institutional investors legally transfer (a quantity of their) shares to a party that must transfer these shares in the near future for a variety of reasons; this is also referred to as securities lending. The recipient undertakes at the same time to transfer back an equal number of the same shares at a later time, subject to the payment of a lending fee. The practice of securities lending leads to a dilemma where corporate governance is concerned. The institutional investor will have to ba-

¹⁹ Recommendations on the relationship between company and shareholders and on the scope of the Code, "Nadere uitwerking van de Code" [more detailed interpretation of the Code], recommendation 4, May 2007.

²⁰ Also see R. Abma, "Het stemproces van institutionele beleggers" in G.T.M.J. Raaijmakers and R. Abma, Achter de schermen van beursaanbeleggers, initial advice to the Vereniging 'Handelsrecht' 2007.

lance the amount of the lending fee that can be earned to the benefit of its beneficiaries, against the benefits of voting at the general meeting. Securities lending could be detrimental to the goal of increasing the participation of shareholders in the decision-making process at general meetings and consequently of voting as many shares as possible. It is not enforceable that - nor is it verifiable in practice whether and how - the recipient exercises the voting rights on the borrowed shares. It is extremely possible that the parties who have borrowed the shares exercise the voting rights in a manner that is diametrically opposed to the voting policy of the institutional investor who is the beneficial owner of the shares. This is not in keeping with the fiduciary responsibility of the institutional investor to (also) manage the controlling rights attached to shares in a correct and responsible manner.

In its evaluation of the 2006 annual report and shareholders meetings season in 2006, Eumedion took the stance that the lending of shares by institutional investors in event-driven situations affecting the listed company should be discouraged. If a certain general meeting can result in an event-driven situation of this kind, Eumedion will bring this to the attention of its members and will suggest that the members consider recalling any lent shares before the registration date that applies to this general meeting.

Furthermore, Eumedion supports the Securities Lending Code of the ICGN, which was published in July 2007 and sums up the points for attention for institutional investors with regard to securities lending. The Securities Lending Code is incorporated in full in this document as Appendix V.

II.5 Cooperation with other shareholders (acting in concert)

II.5.1 Compulsory notification of a substantial participating interest in a Dutch listed company

Shareholders are becoming increasingly more active and are making increasing use of their shareholders' rights. Institutional investors who take their role as active shareholders seriously can make contact with each other and generally do so with the objective of sharing information and research efforts. In certain circumstances, however, close cooperation between shareholders can lead to an obligation to notify on the grounds of section 5:45, par. 5 of the Wft. This section stipulates that a person is deemed to have the disposal of the votes of which a third party has the disposal, if it has concluded a (verbal or written) agreement with this third party that provides for a "long-term common policy" on casting votes (for a longer period, in any event, than a single general meeting); this is also referred to as acting in concert. This is what is known as a notification of a substantial unit, on the grounds of which shareholders must notify the AFM when certain of the threshold values referred to in chapter 5.3 of the Wft have been reached/fallen below. The minimum threshold for notification has presently been set at at least 5 percent of the issued capital or votes in a listed company. The consequence of the notification is that the notification is included in a register that can be inspected by the general public. It is important for institutional investors to know when cooperation is so close that it is held to be acting in concert. The situations in which acting in concert exists must be clear in order to prevent institutional investors from rightly (but possibly wrongly as well) being faced with negative publicity or confronted with sanctions under administrative law and/or civil law, in the event of non-compliance with the notification rules²¹.

On order to clarify the question of when acting in concern exists in the sense of chapter 5.3 of the Wft, Eumedion has asked the AFM to stipulate under what circumstances certain activities of the Eumedion Investment Committee could possibly be qualified as acting in concert. The correspondence on this subject is included in Appendix VI to this manual.

II.5.2 Obligation to make a public offer for the shares of a Dutch listed company

On the grounds of section 5:70 Wft, a party that has acquired overall control is obliged to issue a public offer. Overall control exists when a party (alone or jointly with persons acting in concert with it) can exercise thirty percent or more of the voting rights. The objective of acting in concert must be either (i)

²¹ Under administrative law means that the AFM can impose a fine or a penalty and can publish this fact. Under civil law means that other interested parties (other shareholders, the company) can apply to a court to compel the person subject to the notification obligation to make the notification now, to suspend the exercise of voting rights, to suspend the implementation of resolutions passed at the shareholders' meeting, or to annul these resolutions.

to acquire overall control, or (ii) to cooperate with the target company to thwart an offer that has been announced. The acting in concert does not have to be evidenced by a written agreement. Verbal agreements, and even tacitly understood actions, may suffice. The law assumes that acting in concert always applies in certain relationships e.g. if shares are held by distinct group companies, spouses, or relations by blood or affinity. The existence of acting in concert depends on the circumstances of the case and will depend on the objective of the cooperation. The Netherlands Minister of Justice made the following comments in this connection during the parliamentary debate on the bill to introduce the compulsory bid into Dutch legislation and regulations "When cooperation takes place with a view to the adoption of joint stances on the principles of the corporate governance of a company, the acquisition of overall control will generally be absent as a goal in this process [E]. It can be stated in clarification that cooperation with the intention of achieving overall control will generally also not be involved if the cooperation and exchange of information between shareholders on the subject of the corporate governance of a company relates to a more effective decision-making process in the shareholders' meeting or to stimulate dialogue with the company. In other words, an effective dialogue between (a group of) shareholders and company management can take place, therefore, without the obligation to issue a public offer arising, to the extent that those engaged in this dialogue do not have the objective of acquiring overall control"²². The legislator has provided no concrete indications, however, as to what is still classified as corporate governance and when the will exists to exercise overall control. The AFM has no role in the interpretation of the concept of persons acting in concert within the context of the compulsory bid. It is left to the Enterprise Section of the Court of Appeal in Amsterdam and ultimately to the European court to interpret this concept.

SECTION III: PRACTICAL MATTERS

III.1 Recommendations on organization and procedure relating to the general meeting

Resolutions are formally passed at general meetings. The high and still growing percentage of international shareholders has made an efficient process for voting in absentia and for shareholder participation from a distance an inevitable necessity. One of the requirements to this end is that shareholders are provided with adequate opportunity in practice to study the agenda and underlying documents, and to form an opinion on these. This adequate opportunity is often still lacking in reality. There regularly is little time between the moment when shareholders receive notice of the general meeting and the moment when they must cast their votes. This situation must be improved by extending the period for convening the meeting and setting a registration date that is well in advance of the date of the general meeting. The number of votes cast at the meeting can be expected to increase significantly as a result of these measures. It is in the interests of both the shareholder and the listed company to make efforts to increase the number of votes, since a greater number of votes cast will mean more widely-based support for the decision-making process.

It is also necessary for business at general meetings to be conducted more effectively. The general meeting is the place where the management board and supervisory board are held accountable for their management and the supervision of that management. The physical general meeting enables both minor and major shareholders to put questions in person to the members of the management board and the supervisory board and to call them to account. Efficient debate at the meeting itself is also needed to persuade more institutional investors to participate in a physical general meeting (at the actual meeting or from a distance) and this demands discipline on the part of both the chairperson of the general meeting and the shareholders.

Partly in view of the above, Eumedion made the following recommendations to the listed companies with regard to the organization of general meetings:

- 1) The company decides on a registration date for the exercise of voting rights and of the rights to attend meetings that is between 21 and 30 calendar days before the date of the general meeting.
- 2) The agenda and the underlying documents (such as annual report and financial statements) are published on the company's website no later than 8 calendar days before the registration date.
- 3) The agenda clearly indicates which items are for discussion only and which items will be voted on.
- 4) Controversial proposals are not put to a vote as a bundle; important proposed amendments to the articles of association, for example, are put to separate votes.
- 5) The company will provide shareholders with the opportunity to ask written questions about the items on the agenda, as from the date of publication of the agenda; these questions will be dealt with and discussed in combination at the general meeting of shareholders, if required.
- 6) The management board and the supervisory board will not know the voting proportions of the "distance voters" at the start of the general meeting, unless this is also known to the general meeting at the same time. These voting proportions are either known in advance only to an independent third party (such as the civil-law notary), or to everyone.
- 7) At the start of the general meeting, the chairperson of the general meeting establishes a number of ground rules for questions from shareholders, such as possible regulation of the number of questions that a shareholder may ask and the maximum speaking time for a shareholder. These ground rules must not, however, be allowed to stand in the way of a good dialogue between shareholders and management board/supervisory board.

III.2 Practical matters with regard to the exercise of voting rights

In view of the international spread of the investment portfolios of institutional investors, it is impracticable in most cases to attend all shareholders' meetings. In order to vote, therefore, institutional investors will mostly give a proxy to a third party. This third party may be anyone, although in practice it is usually an asset manager, a custodian, a specialized party (a corporate governance service provider, for example, or a depositary or trust office), a fellow shareholder, or the notary of the general meeting.

²² Parliamentary Papers (Netherlands) | 2006/07, 30 419, no. C.

The proxy may be “open”, which implies that the proxy-holder himself may decide how he votes, or “closed”, which means that the proxy-holder has been instructed in advance on how to vote. Casting votes in this way is known as proxy voting and is a form of “distance voting”. Other forms are voting by post or by internet, i.e. e-voting, which is increasingly being offered. A number of these options are listed below.

III.2.1 Granting a proxy to a Eumedion member who is attending the general meeting of the listed company in question

Eumedion members can give a proxy to the Eumedion member who is “physically” attending the general meeting of the relevant company. Approximately one month and a half before the AGM season, Eumedion circulates an overview of the Dutch shareholder meetings at which a Eumedion member will be present who is willing to take voting proxies from other Eumedion members to the meeting. The following procedure has been agreed.

1. As soon as the name and identity details of the person from the Eumedion member who is going to attend the general meeting are known, it is advisable for members to notify their own custodians accordingly. This can sometimes be done electronically by means of what is known as a voting platform. It can be indicated via a system of this kind that the shares in question will be “physically” voted, i.e. during the general meeting, and the contact details of the person who is actually going to be voting should be provided filled in at this time. Members who do not use a voting platform of this kind should send this information (physical voting and by whom) to the custodian bank and a member of the bank staff will then complete the necessary paperwork²³.
2. The member receives a certificate of deposit from the custodian and this serves as an admission ticket for the general meeting in question. The certificate states the name of the beneficial owner of the shares, the number of shares held by the beneficial owner on the registration date, and the name of the person to whom the proxy has been given. The bank or the investor usually has to sign the certificate of deposit in order to have actual access to the shareholders’ meeting.
3. The person attending the relevant general meeting should be informed that he is being granted a proxy to vote and/or speak on behalf of the member in question. This person will ensure that the analysis of the items on the agenda to be dealt with and the recommended voting behaviour are circulated in good time before the general meeting.
4. As soon as the draft certificate of deposit has been received from the custodian, it is recommended to forward this draft to the person who will actually be attending the general meeting, so that he knows in good time on whose behalf he is going to vote (in addition) and approximately how many votes he will be representing.
5. The final certificate of deposit should be sent to the person receiving the proxy (preferably by fax or e-mail). This is done by either the custodian or by hand by the member (if his signature is required on the proxy, for example). The person attending the general meeting in question should take this certificate of deposit to the meeting with him, as proof that he is also voting on behalf of that other party.
6. As soon as the granter of the proxy has studied the draft analysis of the items on the agenda and the recommended voting behaviour and has decided whether or not to follow the advice, the proxy holder must be informed accordingly. It is possible for the proxy holder to vote differently on different proxies at the general meeting.
7. It is advisable for the granter of the proxy to make contact with the company in question one or two days before the shareholders’ meeting, in order to ensure that the company has received the same information and that the completed forms meet the stipulated requirements.
8. It is advisable for the person who is physically attending the shareholders’ meeting to be present at least one hour before the meeting starts, so that he is sure of having sufficient time to complete the verification procedures. The person should have valid proof of identity with him. It has proved useful to keep the names and (mobile) telephone numbers of the custodian(s) involved, the company secretary and the investors represented ready to hand.

²³ It is advisable, however, to apply directly to the custodian for a voting form, in order to save time and avoid the risk of something going wrong in the voting chain.

III.2.2 Shareholders Communication Channel

The 2000 AGM season saw the first opportunity to vote by proxy in the Netherlands using the Shareholders Communication Channel [Stichting Communicatiekanaal Aandeelhouders]. This communications channel offers shareholders a convenient and efficient method of casting their votes. In formal terms, they give the proxy to a central proxy-holder, who votes on their behalf during the meeting. The central proxy-holder has no independent will; he collects proxies and votes automatically in accordance with specific instructions. In essence, therefore, this is actually a form of “remote voting”, i.e. without being physically present at the shareholders’ meeting.

The communications channel has its limitations, however, one of which is that only a small number of companies participate. The second is that only holders of Dutch securities accounts are reached in practice. These are private individuals, therefore, who hold a securities account with one of the participating Dutch banks, but institutional investors who hold an account with a non-Dutch custodian cannot vote through the communications channel in practice, or only with difficulty. The reason for this is the largely virgin territory of ownership rights to securities in international chains of intermediaries.

III.2.3 International practice

The share portfolio of an institutional investor will, for the most part, consist of non-Dutch companies. The custodians (banks) of an institutional investor will generally have a working relationship with an international voting service. Institutional investors who wish to exercise their voting rights attaching to these non-Dutch shares can do so by using the internet options offered by the international voting service providers and it is thereafter the custodian’s responsibility as authorized agent to ensure that the vote actually reaches the company.

It is not only possible to cast votes using the internet facilities, but voting advice for each item on the agenda can also be obtained through the consultancy where the institutional investor is a client. An institutional investor is able to outsource much of the voting process in this way, while still efficiently making a well-considered vote count. This does not alter the fact that the institutional investor remains responsible for the voting behaviour and, therefore, for the monitoring of the actual implementation of the voting policy by a third party. As a consequence, the institutional investor will have to decide who is responsible within its own organization for the implementation of the voting policy. It should be borne in mind in this context that decisions have to be made at short notice in many cases, since the period between the publication of the agenda and the registration of the vote cast is a limited one. It should also be realized that voting is largely a seasonal activity that peaks in the March-June period, due to the link between the date of the close of the financial year and the date of the general meeting. Furthermore, the voting chain is only as strong as its weakest link and all sorts of administrative and legal obstacles remain to exercising voting rights.

The international proxy advisory services offer the following options:

- The proxy advisory service provides an analysis of the items on the agenda with a corresponding voting recommendation. All the client has to do is to monitor the recommendations to decide, for example, whether they are consistent with its own voting policy or with its own voting behaviour guidelines. Once this has been done, the votes can be cast.
- Larger scale outsourcing of the voting process is possible. The consecutive process of receiving the convocation for a general meeting and the voting forms, determining the number of votes that can be cast, casting the votes themselves, and keeping note of how the votes were cast can be transferred in its entirety to the proxy advisory service. The advisory service then votes in accordance with the client’s voting behaviour guidelines, or on the basis of the client’s voting policy that was communicated in advance.
- A variant on this is the service of alerting the client to the circumstance that specific attention is required for the agenda of a general meeting, but only in the case of a number of shares selected

by the client. These are mostly the shares in the companies in the country where the client is established or in companies where controversial matters are at issue.

Institutional investors who work with external asset managers can agree with these asset managers that the latter will exercise the voting rights attaching to the shares in portfolio in accordance with the voting policy formulated by the institutional investor, which can be set out in the management agreement. It will still be necessary, however, for the institutional investor to make certain that this policy is actually being implemented. After all, the institutional investor continues to be responsible at all times for the voting behaviour on the shares.

III.2.4 Proxy solicitation

Institutional investors with an active interest in corporate governance will not only want to vote themselves, but will also want to be in touch with other shareholders, if necessary, in order to build greater joint voting power by collecting proxies; this is known as proxy solicitation. The draft of the bill to implement the advice of the Corporate Governance Code Monitoring Committee²⁴ makes it possible for shareholders to send information to fellow shareholders via the listed company. The solicitation of proxies through sending this information is not permitted, however. Where appropriate, Eumedion coordinates members' efforts to this end, when one of the members asks other institutional investors for proxies (see above). The problems of acting in concert should, however, be taken into consideration in this context (see paragraph II.5).

III.2.5 Engagement

In certain cases, institutional investors wishing to make use of their voting rights need more than their own analyses of the proposals published by the company or the recommendations of specialist proxy advisory services. They will require the company to provide further clarification or an explanation of the proposals before deciding on their voting behaviour and the company will be willing to acquiesce, in principle, in order to minimize the risk of a vote against. The sounding out of proposals in advance of the general meeting prevents the unnecessary polarization of positions in the course of the meeting. In this light, discussions with the management board are consistent with careful preparation of the decision-making process at the general meeting. These discussions can be one on one or group conversations with or on behalf of several shareholders. Moreover, the massive scale and openness of a general meeting does not make this the most appropriate forum for a good and substantive exchange of opinions on company policy and strategy. These are the reasons why institutional investors are increasingly pursuing a dialogue with the company outside the general meeting, a process referred to by the term engagement.

The communication of price-sensitive information should be avoided during the meetings, because price-sensitive information must in fact be provided equally and simultaneously to all investors. If the management board nevertheless (unintentionally) imparts price-sensitive information during the dialogue with (a group of) shareholders, this information will have to be made public as soon as possible by means of a press release, unless the confidentiality of the information is guaranteed because, for example, the recipient of the information is bound by an obligation to observe secrecy²⁵. Institutional investors themselves can also take measures to reduce the risk of "accidents". It is customary to establish in advance that no price-sensitive information will be exchanged, the institutional investor explicitly reserving to itself the right to disclose any price-sensitive information still acquired, should the company fail to do so. It is also advisable for a discussion of this kind to be conducted with at least two people representing the institutional investor. Another institutional investor is sometimes invited to attend the meeting as well, in order to reduce the risks of unilateral distribution of price-sensitive information.

²⁴ Draft bill of 3 January 2008 of the proposal for amendment of the Financial Supervision Act, the Securities (Bank Giro Transactions) Act and the Civil Code in response to the advice of 30 May 2007 from the Corporate Governance Code Monitoring Committee (www.minfin.nl).

²⁵ Section 5:59 Wft.

III.3 Literature and websites

III.3.1 Literature

A. de Jong, G.M.H. Mertens, J. van Oosterhout and H.M. Vletter van Dort, Substance or symbolism; Corporate governance practice of institutional investors, Erasmus University Rotterdam; Report to Eumedion and the Dutch Corporate Governance Foundation, 2007.

P.J. van der Korst, M.P. Nieuwe Weme and G. van Solinge, Delegation of power to issue shares, Radboud University Nijmegen; Report to Eumedion, 2008. Dutch Corporate Governance Committee, The Dutch Corporate Governance Code; Principles of good corporate Governance, Paris, 2004.

III.3.2 Websites

The Netherlands Authority for Financial Markets: www.afm.nl

Eumedion: www.eumedion.nl

European Corporate Governance Institute: www.ecgi.org

International Corporate Governance Network: www.icgn.org

Monitoring Committee Corporate Governance Code: www.corpgov.nl

OECD: www.oecd.org.

SECTION IV: ABOUT EUMEDIION

Good corporate governance

Pension funds and other major asset managers from all over the world work together in Eumedion in order to better fulfil their role as (co-)owners of Dutch listed companies.

A company is, after all, an alliance of interested parties of all kinds who want to be rewarded for their contributions. In the case of smaller companies, the owner weighs up the particular interests and the owner ultimately decides on company policy. In the case of listed companies, ownership is spread over the shareholders, who want to make their votes count at shareholders' meetings and can also enter into dialogue with company management outside these meetings. Eumedion brings institutional investors together, promotes their interests as shareholders, and furthers good corporate governance.

More than one thousand billion euro

Eumedion was formed in 2006 and currently has more than sixty members. More than half of these are Dutch pension funds and the other members are investment funds, insurance companies and other asset managers of mainly Dutch origin. The number of foreign asset managers that are members of Eumedion is substantial now and continues to grow.

The members of Eumedion collectively manage more than one thousand billion euro, which is approximately twice as much as the combined annual earnings of the entire population of the Netherlands. Almost half of that money is invested in shares and approximately a quarter of that, i.e. around 125 billion euro, has been entrusted to Dutch companies. All in all, the members of Eumedion collectively hold approximately ten percent of the shares in Dutch listed companies.

Joining forces

Shareholders used to pocket their dividends and sold their shares if they did not like the company policy, but things are different now. Major institutional investors are definitely expected to shoulder their responsibilities as co-owners and Eumedion helps them to do so by ensuring, in the first place, that voting at shareholders' meetings is more efficiently organized.

It is partly thanks to Eumedion, for example, that Dutch listed companies publish their agendas sooner and that investors can make better preparations as a consequence. Eumedion members also often act on behalf of each other at shareholders' meetings, which enables them to make their voices heard in the discussion and to cast their votes as well, without having to attend all the meetings in person. In addition, Eumedion can also make contact with a management board and supervisory board on behalf of the members, in order to communicate issues that are giving rise to concern.

In the Hague and Brussels, Eumedion also guards the interests of institutional investors by keeping a critical eye on developments relating to legislation and regulations and making proposals on how to do things better. As a representative of institutional investors, Eumedion also participates in various institutions as well, such as the Corporate Governance Code Monitoring Committee and the Foundation for Annual Reporting.

In this way, Eumedion contributes to good corporate governance at listed companies, while saving its members time and money.

Policy and implementation

Eumedion regularly commissions research into issues of current interest in the field of corporate governance, such as the remuneration policy for top corporate executives, and also takes part in the public debate by means of a wide range of publications and press releases. The annual symposium is always a highlight in this context, above all because the members debate the issues directly with each other.

In addition, Eumedion has five committees that focus on subfields such as legislation, financial repor-

ting, shareholders' meetings and the dialogue with companies. The members of these committees are also able, on Eumedion's behalf, to enter into dialogue with legislators, for example, or with representatives of other interested parties.

The executive director of Eumedion and his staff organize all processes and ensure that these proceed smoothly. Eumedion also has a General Board consisting of members' representatives. The General Board decides on policy and chooses an Executive Board from among its members to supervise the implementation of policy. The General Board is accountable to the Members' Meeting that takes place twice a year.

Contact

You will find more information about Eumedion on the website at www.eumedion.nl where you will also find all publications, such as research reports, opinions and press releases. And you can, of course, also contact Eumedion.

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Appendix I: Eumedion recommendations on executive remuneration

Preamble

1. In March 2003 Eumedion's predecessor, the Corporate Governance Research Foundation for Pension Funds (SCGOP), issued the Recommendations on Executive Remuneration. The then-SCGOP participants used these recommendations as one of the basic tools to assess proposals for the remuneration policy for executives, which have been submitted to the general meeting of shareholders for adoption since then. National and international developments have occurred since 2003 that have led to a re-evaluation of these recommendations. The Dutch corporate governance code (the Tabaksblat Code) has come into effect, for example, containing many best practice provisions relating to executive remuneration. A number of SCGOP recommendations were incorporated into the Tabaksblat Code and the Dutch Monitoring Committee Corporate Governance Code (the Frijns Committee) reports every year on compliance with the provisions of the Code by Dutch listed companies. In addition, the legal framework relating to executive remuneration has been changed. Since 1 October 2004 the general meeting of shareholders has had the right to adopt the remuneration policy for executives and the right to approve option and share schemes. The Organization for Economic Cooperation and Development (OECD) adopted revised Principles of Corporate Governance in May 2004, the European Commission published a recommendation for executive remuneration on 14 December 2004 and on 7 July 2006 the International Corporate Governance Network adopted updated guidelines for executive remuneration. The US stock exchange supervisor, the SEC, proposed more stringent transparency provisions for executive remuneration on 11 August 2006. Numerous studies have been published on the subject of the structure and development of executive remuneration at listed companies, and on the effectiveness of remuneration systems.
2. It was partly in response to these developments that Eumedion reviewed the Recommendations on Executive Remuneration in 2006. The new recommendations provide institutional investors with tools to assess existing remuneration policy and new proposals for an executive remuneration policy, and to evaluate these on the basis of new insights. It should be noted for the sake of clarity that the Eumedion participants will apply the recommendations in their analysis of the proposals for the executive remuneration policies of listed companies having their registered offices in the Netherlands. Non-listed companies and non-Dutch listed companies have their own characteristic features to which different remuneration structures may well be better suited. The institutional investors judge the proposals of the Dutch listed companies in the light of their own backgrounds, taking Dutch legislation and regulations, and the facts and circumstances into consideration.
3. The formulation of the revised recommendations is based on existing Dutch legislation on executive remuneration at listed companies (transparency on the level and structure of the components of the remuneration, general meeting of shareholders has the right to adopt the remuneration policy and a right of approval regarding share and option schemes). Further basic premises were the application of the principles and best practice provisions in the Dutch corporate governance code that refer to executive remuneration and the remuneration of supervisory board members, in addition to Netherlands jurisprudence in the field of executive remuneration. The Eumedion recommendations are therefore complementary to the existing Dutch regulatory framework for executive remuneration and are consequently not recommendations to change or replace the Dutch regulatory framework. The general meeting of shareholders fulfils an important position in the checks and balances applied to executive remuneration, in both Dutch legislation and the Dutch corporate governance code. Shareholders have a major interest in a good remuneration structure for executives, since a good remuneration structure contributes to the creation of shareholder value in the long term. Furthermore, society actually expects shareholders, and institutional investors in particular, to address the subject of executive remuneration and to form an opinion on it.
4. The existing legislation and regulations and the Tabaksblat Code specify requirements for the transparency of the costs of executive remuneration and stem from the principle of rewarding an executive for above-average or exceptional performance or efforts, in order to ensure that the executive's interests run (more closely) parallel to the shareholder's interests and to allow an executive to share in the benefits of any success achieved by the company. The present recommendations have the additional objective of aligning executive remuneration more closely with the long-term objectives of the company and – by extension – to make the long-term bonus in normal circumstances a more important component of the total remuneration package than the short-term bonus. The long-term bonus is not paid, furthermore, until certain objectives have been achieved. In addition, the recommendations are intended to improve the transparency of executive remuneration, which can contribute to the quality of the accountability of management boards and supervisory boards to the general meeting of shareholders in this respect.
5. The revised recommendations assume a structure in which a separate supervisory board functions in addition to the management board, whether or not this is required by law on the grounds of the two tier board structure. Companies in the Netherlands that are not subject to the compulsory application of the two-tier rules are also permitted to opt for what is referred to as a one tier board structure, in which a single board comprises both executive and supervisory (non-executive) directors. In the light of the statutory regulation relating to the formation of a European Company and the announcement of the Minister of Justice on facilitating the introduction of a one-tier board structure, it can by no means be ruled out that companies will choose the one tier structure in future. In order to make the recommendations scenario-resistant, the provisions with regard to members of a management board are also applicable to the executives of companies of this kind. The provisions relating to the supervisory board are also applicable to the non-executive directors of companies with a one tier board structure, with the exception of specific recommendation 30.
6. The revised recommendations assume that the remuneration of an executive of a listed company may consist of the following components: i) the fixed annual salary, ii) annual (short-term) bonus, iii) long-term incentive plans (hereafter: long-term bonus), such as option and share schemes, iv) pension and other benefits, such as the contribution to medical insurance and other insurances, v) other emoluments (also referred to as perks or perquisites), such as a company car, expense account and housing, and vi) severance pay. In addition, the recommendations assume that the level of the various components of the remuneration is determined by the supervisory board in response to a proposal from the remuneration committee (if one has been set up), within the framework of the remuneration policy adopted by the general meeting of shareholders. The level of remuneration for members of the supervisory board is determined by the general meeting of shareholders, in response to a proposal from the supervisory board. The contracts of employment with individual executives are in compliance with the remuneration policy adopted by the general meeting of shareholders. The individual contracts of employment include no materially different arrangements than those described in the remuneration policy and which have been made public on the grounds of best practice provision II.2.11 of the Dutch corporate governance code.
7. The responsibility of the general meeting of shareholders to adopt the executive remuneration policy and to approve share and option schemes implies that institutional investors should handle this responsibility with care. According to the Dutch corporate governance code, a company endeavours to create shareholder value in the long-term. If shareholders expect the management board to focus on the long-term objectives of the company, shareholders should also judge the management board on that criterion. This means, among other things, that shareholders will be vigilant in ensuring that, under normal circumstances, the long-term bonus constitutes a greater part of the total executive remuneration package than the annual (short-term) bonus. They will

also take care that this shift does not lead to an unintentional increase in the value of the total remuneration paid to executives.

8. Where the recommendations refer to an “objective” this may refer to a company objective or an individual objective for an executive, as is stated explicitly or made clear by the context. An objective for an individual executive is defined in concrete terms, is feasible and measurable, and has a clearly specified performance, threshold value(s) and a measuring moment. If an executive achieves his objectives, he becomes eligible for either a short-term or long-term bonus in accordance with the agreements set out in writing in advance. Where the recommendations refer to a “performance standard”, this means the more general description of the objectives to be achieved (such as [relative] total shareholder return (TSR), turnover and return on assets) for the position in question.
9. Two kinds of peer groups are referred to in the recommendations, viz. the labour market peer group and the performance peer group. The labour market peer group is the group of companies used to establish the level and composition of the executive remuneration. The performance peer group is the group of companies mostly used to establish the relative performance of the company and the corresponding number of shares or options that then become unconditional. Generally speaking, the two peer groups will contain different companies. A labour market peer group makes it possible to establish a benchmark for competitive remuneration levels in the comparative domestic or European markets, so that competent executives can be recruited and retained. Cautious use should be made of companies from the United States, in view of the completely different remuneration philosophy and structure prevailing there. The performance peer group consists of the company’s direct competitors and this peer group may explicitly include the competing companies from the United States.

Recommendations on executive remuneration

Responsibilities of the supervisory board

1. The supervisory board is responsible for the proposal for the policy relevant to the remuneration of the management board [hereafter the “remuneration policy”] in the form as it is submitted to the general meeting of shareholders for adoption. If applicable, the remuneration committee of the supervisory board initiates the proposal. The company makes the required resources available to enable the supervisory board to fulfil its duty. The supervisory board is aware of the outcomes of the various scenarios for the executive remuneration policy and annually assesses whether the executive remuneration policy is still consistent with the objectives of the company. The remuneration report includes a statement from the supervisory board explaining the results of this assessment.
2. The supervisory board or its remuneration committee may seek the advice of an external remuneration consultant, regarding the structure of the executive remuneration policy. The supervisory board or its remuneration committee is responsible for the appointment of the external remuneration consultant and for issuing the instructions to the said consultant, and ensures that this consultant reports exclusively to the supervisory board or its remuneration committee. The basic principle of the instructions issued is to avoid a possible conflict of interests on the part of the remuneration consultant. The name of the external remuneration consultant and of the firm where this consultant is employed are disclosed in the remuneration report.
3. Before unconditionally granting variable components of remuneration to an executive, the supervisory board evaluates the consequences of doing so on the total amount of his remuneration, from the point of view of reasonableness and fairness and taking the moral values of society into account. The supervisory board has at all times the discretionary power – as set out in the remuneration policy – to adjust the level of the variable remuneration components to be granted. Any use of this discretionary power is stated in the remuneration report with sound reasons why this was done.

Structure of executive remuneration

4. The executive remuneration policy has two objectives: a) to enable the cost-efficient recruitment and retention of qualified and competent executives and b) to stimulate executives to create shareholder value in the long term.
5. The level and composition of executive remuneration are consistent with the company’s general remuneration policy.
6. The remuneration structure is transparent, clear and comprehensible.
7. The remuneration of an executive is structured in such a way as to strike a balance between fixed and variable components of remuneration, and within the variable components, between the achievement of short-term and long-term objectives and between pecuniary and non-pecuniary components. The required proportions depend on market conditions and the concrete circumstances in which the company operates. The remuneration structure nevertheless focuses to a considerable extent on achieving the company’s long-term objectives and strategies. In normal circumstances, therefore, the long-term bonus constitutes a greater part of the total remuneration than the annual (short-term) bonus.
8. The company states its long-term objectives in the remuneration report and how the short-term objectives merge with these.
9. The granting of the variable components of the remuneration is made mainly dependent on the realization of a limited number of clearly quantifiable and challenging objectives communicated in advance to the executive. The objectives are published, unless this is contrary to an overriding interest of the company.
10. If the level and composition of executive remuneration are determined in part by the remuneration policy of a certain group of companies [hereafter “the labour market peer group”], the company must carefully specify the criteria for the selection of the group of companies and explains why the chosen group of companies meets the criteria. The supervisory board states in the remuneration report what it does with the results of the labour market peer group comparisons. Sound reasons are provided for proposed changes to the labour market peer group. The number of legal persons that make up the labour market peer group must be such as to avoid coincidences and the group must consist of at least twelve legal persons.

Long-term bonus

11. The maximum long-term bonus as a percentage of the fixed salary when granted is disclosed by the company in the proposal for the remuneration policy and the company provides sound reasons for this maximum.
12. The company provides sound reasons for the choice of components for the long-term bonus. The components are related to (rights to subscribe for) shares (such as share options, performance shares, stock appreciation rights, etc.). Share schemes are preferable to option schemes²⁶.
13. In order to combat dilution of the earnings per share, it is preferable for companies to use repurchased own shares within the framework of an option and/or share scheme (calculated for the employees collectively). Should it be necessary to issue shares in connection with an option and/or share scheme, however, companies will increase the number of shares outstanding by no more than one percent per year.
14. Shares granted to executives without financial consideration will be retained for a period of at least five years after acquisition of the shares or until at least one year after the termination of the employment, if this period is shorter.
15. The number of shares that an executive holds in the company no more than three years after his first appointment is such that that number adequately safeguards the alignment of interests between the executive and the shareholder. He will also continue to hold a significant number of shares in the company for the rest of his term of appointment.

²⁶ This leads to a higher degree of alignment of interests between executives and shareholders. In contrast to share options, executives also feel the downside risks that a share scheme involves.

16. The conditions for the unconditional granting of options and/or shares to an executive will not be altered in the event of a change of control over the company. Amendment of these conditions is possible, however, in the event of a very substantial expansion or restriction of the company's activities. If the company ceases to exist *de facto*, the arrangement referred to in recommendation 26 applies.
17. The company discloses and provides sound reasons for the following: a) the performance standards whereby options and/or shares become unconditional and b) the proportions (in percentages) of these performance standards within the potential long-term bonus that can be achieved. The performance standards are quantifiable, with (relative) total shareholder return (TSR) being preferred. If TSR is applied as a performance standard, this standard is measured over at least a number of successive years under review²⁷.
18. If the performance standards are based on the performance of one or more companies (hereafter a "peer group") or of an index, the company will provide sound reasons for the composition of the peer group or the choice of index. The peer group consists of the company's direct competitors (national and international) to the greatest possible extent. Sound reasons must be given for proposed changes to the peer group. The number of listed companies in the peer group must be such that coincidences are avoided.
19. If the relative TSR is applied as a performance standard for share and/or share option schemes, the conditional granting of shares and/or share options will cease when the company's performance is below the peer group median. When other performance standards are applied, the company discloses and provides sound reasons for the circumstances under which the maximum long-term bonus is paid and the circumstances under which a smaller part is paid.

Annual (short-term) bonus

20. In the proposed remuneration policy, the company discloses the maximum annual (short-term) bonus as a percentage of the fixed annual salary and provides sound reasons for this maximum. The company also discloses and provides sound reasons for a) the performance standards for achieving the annual (short-term) bonus and b) the proportions (in percentages) of these performance standards within the potentially achievable annual (short-term) bonus. In addition, to the extent that financial performance standards are concerned, a link is made to an item on the balance sheet and/or in the profit and loss account. The emphasis in performance standards is on quantifiable standards.
21. In the remuneration report, the company provides transparent information on each of the performance standards, regarding whether and to what extent the objectives for the payment of the annual (short-term) bonus have been achieved.
22. The company discloses and provides sound reasons for the circumstances under which the maximum annual (short-term) bonus is paid and the circumstances under which a smaller part of the bonus is paid.
23. The audit committee and thereafter the external auditor establish whether the (financial) objectives have been realized. Their decision is stated in the remuneration report.
24. The conditions for the payment of the annual (short-term) bonus are not amended in the course of the year (or performance period).
25. The company does not pay bonuses to its executives on anything other than an annual basis.

Severance schemes

26. The amount of severance pay on termination of the employment for any reason whatsoever (and therefore also termination due to a change of control) is within the limits defined in best practice provision II.2.7 of the Dutch corporate governance code.

²⁷ Also referred to as a rolling period.

Clawback provision

27. The arrangements for the long-term bonus, for the annual (short-term) bonus, for bonuses that are part of a severance scheme and the scheme in the form of shares or share options contain the provision that bonuses, share options and/or shares that have been granted will be reclaimed should it emerge at a later date that these had been wrongly granted (in part) on the basis of incorrect (financial) information (this is known as a *clawback* provision). In the event of a bonus being wrongly granted, the company initiates a procedure to reclaim the bonuses, share options and/or shares granted.

Transparency

28. All the information on executive remuneration is included in the remuneration report, in order to further the uniformity of reporting on executive remuneration.
29. The remuneration report contains a separate format for the (values of the) components of the executive remuneration, in order to further comparability between years and companies. This will include an amount in euros for the following components: i) fixed annual salary, ii) annual (short-term) bonus relating to the year under review, iii) the value of the long-term bonus relating to the year under review, iv) the value of the pension; v) the value of all other emoluments; vi) the value of any severance pay and vii) the total amount of the remuneration for the executive in the year under review.

Remuneration non-executives

30. If, contrary to best practice provision III.7.1 of the Dutch corporate governance code, the company intends to pay part of the remuneration of a non-executive in shares, it is stipulated that the shares must be retained until at least two years after his resignation²⁸.

²⁸ A deviation of this kind may be justified for non-executives from the point of view of a different division of responsibilities and liabilities in comparison with members of the supervisory board. In addition, the recommendation might be useful in recruiting non-Dutch nationals for positions as non-executives at Dutch listed companies.

Appendix II: Eumedion recommendations on the delegation of power to issue shares

a) Governing bodies involved in delegation.

In view of the statutory division of tasks and powers within the company, it is most obvious that where the power to issue shares is delegated, the board of directors is instructed to issue them by the annual general meeting. For the same reason, the articles of association or the resolution to delegate must state that the issuing of shares based on this delegation requires the prior approval of the supervisory board.

The resolution to delegate may lay down the circumstances in which a share issue based on this delegation does not require the prior approval of the supervisory board, e.g. shares issued as part of a staff participation scheme approved by the general meeting.

There is no reason to subject the general meeting's delegation of its statutory powers to the approval of another body within the company, such as the supervisory board.

b) Agenda items and explanatory note

A note on the proposal to delegate the power to issue shares must be published explaining the reasons for this proposal and the conditions under which the power to be delegated is to be exercised (including the maximum number of shares to be issued, the delegation period and the method of determining the issue price). This explanatory note must be placed on the company's website and lodged at the company's office for perusal.

Where the power to issue different types of shares is delegated, these proposals must be separate agenda items with separate explanatory notes. Where the power to issue shares is delegated with different objectives in mind (e.g. proposed acquisitions or staff participation schemes), these objectives must be itemised in the explanatory note, and delegation of the power to issue shares of the same class but with different objectives must be separate agenda items.

c) Maximum number of shares to be issued

The maximum number of ordinary shares or financing preference shares to be issued on the basis of the resolution to delegate must be geared to the company's reasonably expected financing requirements (e.g. on account of acquisitions or reorganisations) during the period for which delegation is being requested. The reasons for this maximum number must be given in the notes to the proposal.

If no material financing requirement is envisaged in the proposed delegation period, an authorisation to issue ordinary shares or financing preference shares may relate to not more than 10% of the subscribed capital after issue.

d) Delegation period

The power to issue shares may be delegated for a period not exceeding 18 months from the time of the resolution to delegate. This period will be reduced to 16 months from the moment the Bill to implementation of the Transparency Directive enters into force (presumably October 1st, 2008).

The resolution to delegate must state whether the delegation can be withdrawn by the annual general meeting.

Where a delegation period is still in progress, the proposal must be worded as an extension of this current delegation, to prevent a lack of clarity as to whether the current delegation will continue alongside the delegation to be granted.

e) Permitted issue price

It is within the power and the responsibility of the board of directors as the governing body to which the power to issue shares has been delegated and of the supervisory board as the supervisory body to de-

termine an issue price which will take into account the interests of all concerned, including the interests of the shareholders in particular.

If the issue price is materially, i.e. more than 10%, lower than the average market price of the share concerned over the previous three-month period, the board of directors must state this by way of a press release and on the company's website in an explanatory note concerning this issue price.

The shareholders' interest in preventing dilution as a result of the issue price being too low is protected by their statutory preferential right, in respect of which please refer to the recommendation at (f).

f) Precluding and restricting preferential rights

A share issue in return for a contribution lower than the market price at the time of issue disadvantages the holders of shares already issued as an issue in return for a lower contribution will reduce the value of their shares. The statutory pre-emption right or the negotiable claim which they receive in this connection protects them against this or compensates for the reduction in value respectively. This safeguard is lost if both the power to issue shares and the power to preclude or restrict the preferential right are delegated to the board of directors.

Such a combined resolution to delegate must therefore provide that:

- (i) when these powers are jointly exercised by the board of directors, the value of the contribution must not be more than 10% lower than the average market price over the three-month period prior to the share issue; and
- (ii) a board decision based on this delegation is placed on the company's website, together with an explanation and notes on the proposed contribution.

In addition, the articles of association or the resolution to delegate must state that any board decision based on this delegation requires the prior approval of the supervisory board.

g) Anti-takeover preference shares

Anti-takeover preference shares are only issued:

- (i) as a temporary, necessary and proportionate protection against a specific threat to the continuity of the company or its policy, or a specific threat to the interests of the company, its business, the shareholders, the employees and other stakeholders and its business and after careful consideration of these interests;
- (ii) to a legal entity of which the board of directors is independent²⁹ from the company;
- (iii) up to a maximum which may not exceed 100% of the nominal amount of the previously subscribed shares³⁰; and
- (iv) with as objective to enable the board of directors and the supervisory board of the company to enter into a constructive dialogue with the bidder, to explore possible alternatives, to inform the shareholders of the company or to protect the continuity of the company or its policy and the interests described under (i). Within six months after the issuance of anti-takeover preference shares, the board will issue a statement of the results or of 'the state of play' and will organize an extraordinary general meeting to discuss this statement with the shareholders.

In the event of a proposal to delegate the power to issue anti-takeover preference shares which will be exercised by granting a call or put option, the explanatory note must contain a description of:

- (v) the (draft) option agreement containing the conditions under which the option can be exercised;
- (vi) the maximum number of protective preference shares that can be issued;
- (vii) the maximum period for which the protective preference shares can be held;
- (viii) the conditions under which the company can withdraw the anti-takeover preference shares; and
- (ix) the composition of the board of directors of the legal entity with which the option agreement has been or will be concluded.

Where a call or put option has been issued in respect of anti-takeover preference shares, the company will provide the information referred to above (at (v)-(ix)) each year in its annual report.

²⁹ I.e. independent from each other, the company board and any partial interest (§ 9.3.).

³⁰ Assuming that the authorised capital has been divided into shares of the same value as specified in Section 2:118, para. 2 of the Dutch Civil Code.

Appendix III: Eumedion guidelines for the interpretation of provisions in the Tabaksblat Code relevant to institutional investors

Preamble

1. Institutional investors have fiduciary responsibility towards their underlying beneficiaries. Good corporate governance standards can contribute to sustainable profit growth at the companies in which institutional investors invest, and using the voting rights attaching to the shares can be one of the instruments to improve corporate governance standards. Partly as a consequence of the Dutch corporate governance code, institutional investors have an obligation of means to develop a policy of their own with regard to the exercise of voting rights attaching to shares that they hold in listed companies (hereafter "voting policy"). The underlying beneficiaries, therefore, are entitled to information on subjects including the voting policy and its implementation.
2. The more detailed interpretation of the provisions of the code is focused on institutional investors established in the Netherlands, in the sense of section 1:1 of the (Netherlands) Financial Supervision Act (hereafter the "Wft"); these are investment firms, life insurers or pension funds.
3. The formulation of this more detailed interpretation of the provisions of the code relating to institutional investors is based on the statutory obligation of an institutional investor to report on its compliance with the principles and best practice provisions of the Dutch corporate governance code that focus on institutional investors (section 5:86 and 5:87 Wft). If the institutional investor has not or has not fully complied with the relevant principles and best practice provisions in the previous financial year, or does not intend to fully comply with these in the current or subsequent financial year, it must make a statement to this effect providing the reasons why (the "apply or explain" rule). The statement on the degree of compliance must be shown in the annual report or placed on the website of the institutional investor. The institutional investor can also decide to send the statement to the address of every participant or client that has given explicit prior permission to be thus approached. For the purposes of the application of the statutory provisions, shares are equated with depositary receipts for shares issued with the company's cooperation.
4. The more detailed interpretation assumes that an institutional investor will wish to comply as fully as possible with the provisions of the code that are aimed at institutional investors. It is also assumed that an institutional investor uses a website to provide information.
5. If an institutional investor has outsourced (part of) its asset management, the institutional investor must make arrangements with the external asset manager regarding the manner in which voting rights will be exercised on the shares assigned to the management of the asset manager.
6. All information that an institutional investor publishes on the voting policy and its implementation must be placed and updated on a separate part of the website (i.e. separate from other information provided by the institutional investor) that is recognizable as such. Using the search function and entering search terms such as "voting policy" or "corporate governance"³¹ will bring interested parties relatively easily to this specific part of the site. If required, an institutional investor can confine itself to placing a hyperlink to the website of the party with which it has concluded an agreement on the implementation of the voting policy and the institutional investor follows that voting policy when the party publishes this information on its website. In addition to the publication on the website of the information just referred to, institutional investors are also recommended to include the (outline of) the voting policy and its implementation in the annual report.
7. The objective of the more detailed interpretation of the provisions of the code is to increase transparency on voting policy, the implementation of voting policy, and voting behaviour. The interpretation contains minimum norms, but institutional investors may choose to go beyond the minimum norms summarized below.

³¹ It should be stated in this context that "corporate governance" relates to the policy of the institutional investor with regard to the corporate governance structure of the company in which the institutional investor holds shares. This term should be kept separate from the framework of the governance structure at the investor's own organization.

Guidelines for the interpretation of code provisions

Interpretation best practice provision IV.4.1: publication of voting policy

1. Institutional investors publish their voting policy annually, in any event on the website they use.
2. The report should always address the following questions.
 - a) What is the objective of the voting policy?
Ingredients could be the following: (long-term) value creation, reduction of risks and increase in return.
 - b) To what extent are votes cast on the shares in companies invested in? Have restrictions been included in the voting policy? What do these restrictions consist of? Are they connected to the following, for example.
 - i) the region
Only the Netherlands or the European Union for example, and/or only in the countries where the shares are not blocked, or only for a limited period.
 - ii) the sector
Only the largest investments per sector for example (e.g. energy, basic industry, industrial enterprises, durable consumer goods, non-durable consumer goods, healthcare, financial services, information technology, telecommunications and utilities).
 - iii) the size of the block of shares
Only if the share interest represents a certain market value or percentage interest for example, or those companies in which the institutional investor has invested most.
 - iv) the "nature" of the shareholders meeting
Only those meetings for example, where major decisions are on the agenda.
 - v) the policy on securities lending around the date of the general meeting.
The policy for example, that all shares are recalled when major decisions are on the agenda, and that under "normal circumstances" a certain percentage is always voted of the total number of shares in the specific company which the institutional investor is beneficial owner of.
 - c) Which corporate governance code or voting behaviour guideline is observed in order to decide on voting behaviour?
National corporate governance codes for example (the Tabaksblat Code in the case of the Netherlands), the code of the International Corporate Governance Network, the OESO corporate governance code, the voting guidelines of corporate governance service providers, a code of the institutional investor's own, and Eumedion guidelines with regard to executive remuneration, for example.
 - d) How are conflicting interests in relation to the voting behaviour dealt with inside the investor's own concern?³²
Are no votes cast for example, or does the institutional investor "blindly" accept the advice of a corporate governance service provider in that case? Or have certain measures been taken to combat these conflicting interests when determining voting behaviour?
 - e) Have changes been made to the voting policy?
Have new insights led to amendment of the voting policy? Have changes to codes led to amendment of the voting policy?

Interpretation best practice provision IV.4.2: implementation voting policy

3. Institutional investors must report annually on the implementation of their voting policy.
4. The report should always address the following questions.
 - a) What were the most important developments in implementation of the policy in the year under review?

³² This relates, for example, to the situations in which an institutional investor offers commercial services to a company in which shares are also held, or situations in which an institutional investor holds shares in the parent organization or in the company whose pension scheme is administered by the institutional investor in question (the sponsor).

Ingredients include the cases in which the institutional investor's voting policy has been departed from and the reasons for this. Have certain aspects been emphasized, such as the spearheads in the Eumedion spearheads letter?

- a) Has voting been outsourced or managed in-house?
Has voting been completely or partly delegated to an external assets manager, for example?
- b) Is there physical participation in the decision-making process at the general meeting of shareholders or are votes cast "at a distance" by means of issuing a proxy to an intermediary? Examples of this could be institutional investors themselves physically voting at the general meeting, voting via the Shareholders Communication Channel or ANT-Trust, or distance voting via an international corporate governance service provider, such as Institutional Shareholder Services or Glass Lewis. It can be stated in this context how votes were cast at aggregate level (by country, region or sector, for example) or how many votes were cast in total.
- c) Are proxies – with or without (binding) voting instructions – given to other institutional investors to vote at the meetings on each other's behalf?
Via the Eumedion network, for example.

Interpretation best practice provision IV.4.3: quarterly voting report

5. Institutional investors should report at least once a quarter on whether and how they voted the shares in listed companies.
6. This quarterly report should present a summary of the voting behaviour at the general meetings in the past quarter. If an institutional investor decides to depart from best practice provision IV.4.3, the institutional investor must at least state those matters that depart significantly from its own voting policy.
At least once per quarter institutional investors should report at individual company level how they voted at which meeting (in favour, against, or abstained, for each item on the agenda). The institutional investors can depart from this by publishing information on an aggregate basis for example (for each region or sector), or by stating only the numbers of votes cast and not how they voted. In the case of such departures, an institutional investor should always state in which cases its own voting policy was departed from to a significant extent. In addition to information on voting behaviour, institutional investors can also provide information on the general meetings of shareholders that were physically attended, plus possibly a report on those physically attended meetings and/or the substance of any dialogue entered into with the company.
7. When external asset managers have been engaged, agreement is reached with these parties - if possible – on how they report to the client on the voting behaviour on the shares held for this institutional investor.

Appendix IV: ICGN statement on shareholder responsibilities

- 1.1 High standards of corporate governance will make boards properly accountable to shareholders for the companies they manage on their behalf. They will also help investee companies make sound decisions and manage risks to deliver sustainable and growing value over time Pursuit of high standards of governance is therefore an integral part of institutions' fiduciary obligation to generate value for beneficiaries.
- 1.2 It follows that corporate governance considerations should be integrated into the investment process. Moreover, general benefits from high standards of governance will accrue over time only if all institutions are working to play an appropriate part.
- 1.3 Shareholder rights should always be exercised with the objective of delivering sustainable and growing value in mind. This requires attention to the specific situation of the company concerned rather than the formulaic application of governance rules. Instead of seeking to interfere in the day-to-day management of the company, institutional shareholders and their agents should actively engage in a constructive relationship with investee companies to increase mutual understanding, resolve differences, and promote value creation.
- 1.4 A relationship of trust is more likely to be achieved when institutional shareholders and their agents can demonstrate that they are exercising the rights of ownership responsibly. These include:

i. Application of consistent policies

Just as it is important for beneficiaries to be informed of the governance policies adopted by those that act for them, so it is important for companies to be aware of the policies that shareholders are likely to adopt. In most markets this has been made easier by the development of corporate governance codes, which set standards for both sides to understand and apply.

Shareholders should be clear what standards they are applying, and how they monitor investee companies. Where this could lead to a negative vote or an abstention at a general meeting, the company's board should be informed of this, ideally in writing, and of the reasons for the decision, at least in respect of significant holdings.

Institutional shareholders should periodically measure and review the effectiveness of their monitoring and ownership activities and communicate the results to their beneficiaries, in such a way as to enhance their understanding without compromising specific engagement efforts.

ii. Engagement with companies

Responsible owners should make use of their voting rights. A high voting turnout at general meetings will help ensure that decisions are sound and representative.

Successful engagement, however, requires more than considered voting. It should also include: maintaining dialogue with the board on governance policies in order to address concerns before they become critical; supporting the company in respect of good governance; and consulting other investors and local investment associations where appropriate.

When engaging with companies about governance issues, shareholders should respect market abuse rules and not seek trading advantage through possession of price sensitive information. Where appropriate and feasible, they may consider formally becoming insiders in order to support a process of longer-term change. At the outset of engagement with companies they should make it clear whether or not they

wish to become insiders. They should encourage companies to ensure that all sensitive information and decisions resulting from engagement are made public for the benefit of all shareholders.

They should consider working jointly with other shareholders on particular issues. In working with other investors, they should also respect rules with regard to concert parties. Institutions should encourage regulators to develop rules with regard to both market abuse and 'concertation' that can be enforced sensibly and do not inhibit reasonable collaboration between shareholders or constructive dialogue more generally.

Investors should have a clear approach for dealing with situations where dialogue is failing. This should be communicated to companies as part of their corporate governance policy. Steps that may be taken under such an approach include: expressing concern to the board, either directly or in a shareholders' meeting; making a public statement; submitting resolutions to a shareholders' meeting; submitting one or more nominations for election to the board as appropriate; convening a shareholders' meeting; arbitration; and, as a last resort, taking legal actions, such as legal investigations and class actions.

iii. Voting

Beneficial owners, or the governing bodies that invest on their behalf, have the ultimate right to vote. Markets collectively have a duty to oppose the abuse of voting power by those who do not enjoy beneficial ownership.

Voting is not an end in itself but an essential means of ensuring that boards are accountable and fulfilling the stewardship obligation of institutions to promote the creation of value. Institutional shareholders should therefore seek to vote their shares in a considered way and in line with this objective. They should develop and publish a voting policy so that beneficiaries and investee companies can understand what criteria are used to reach decisions. Voting decisions should reflect the specific circumstances of the case. Where this involves a deviation from the normal policy institutions should be prepared to explain the reasons to their beneficiaries and to the companies concerned.

Asset managers should have appropriate arrangements for reporting to beneficiaries on the way in which voting policy has been implemented and on any relevant engagement with companies concerned. As a matter of best practice they should disclose an annual summary of their voting records together with their full voting records in important cases. Voting records should include an indication of whether the votes were cast for or against the recommendations of the company management. The ICGN encourages transparency and consideration should be given to the merit of voluntary public disclosure of an asset manager's voting record as this may be of demonstrating a commitment to accountability and to show that conflicts of interest are being properly managed. As the level of public disclosure has increased in major markets, it is helpful if asset managers explain their thinking on public disclosure even when they have decided not to disclose.

Institutions should seek to reach a clear decision either in favour or against each resolution. In defined or specific cases, institutions may wish to abstain in order to signal to the company. This may be either that it is in danger of losing support if it persists with a particular policy or that it is moving in the right direction but has not yet implemented an appropriate policy. In either case the reason for the decision should be properly communicated to the company.

Where ownership responsibilities are outsourced, institutions should disclose the names of agents to whom they have outsourced together with a description of the nature and extent of this outsourcing and how it is regularly monitored. Where they feel it is not appropriate to name the agents they have employed, they should explain their reasons.

Institutions should work proactively with other intermediaries and, where appropriate, regulators to remove barriers to voting wherever they occur in the chain.

iv. Addressing corporate governance concerns

Institutions risk failing in their responsibilities as fiduciaries if they disregard serious corporate governance concerns that may affect the long-term value of their investment. They should follow up on these concerns and assume their responsibility to deal with them properly. Such concerns may relate to:

Transparency and performance, including the level and quality of transparency; the company's financial and operating performance, including significant strategic issues; substantial changes in the financial or control structure of the company; the accounting and auditing practices of the investee company;

Board structures and procedures, including the role, independence and suitability of non-executives and/or supervisory directors; the quality of succession practices and procedures; the remuneration policy of the company; conflicts of interest with large shareholders and other related parties; the composition and adequacy of the internal control systems and procedures; the composition of the audit and remuneration committees; the management of environmental and ethical risks;

Shareholder rights, including the level and protection of shareholder rights; minority investor protection; proxy voting arrangements; the independence of third party fairness opinions rendered on transactions.

Appendix V: ICGN Securities Lending Code of Best Practice

The lending of securities and especially of common shares is an increasingly important practice which improves market liquidity, reduces the risk of failed trades, and adds significantly to the incremental return of investors. However, we have found that there is widespread misunderstanding of securities lending transactions on the part of those not directly involved in the process. The word 'lending' has itself misled many as in law the transaction is in fact an absolute transfer of title against an undertaking to return equivalent securities. Misconceptions as to its nature have led to loss of shareholder votes in important situations, as well as to cases of shares being voted by parties who have no equity capital at risk in the issuing company, and thus, no long-term interest in the company's welfare. Lenders' corporate governance policies may also be undermined through lack of coordination with lending activity. It is also imperative that there be as little risk as possible that a poll of the shareholders may be compromised through misuse of the borrowing process. To address these concerns the ICGN proposes this Code of Best Practice to its members. It encourages other concerned investors, market intermediaries, and public companies to take account of the Code where appropriate.

Three broad principles which apply to all areas of investment practice are here used to clarify the responsibilities of all parties engaged in stock lending. With their relevant applications in this area, they are:

First, **transparency**: the lending process, frequently handled today as a purely mechanical adjustment to custodial arrangements, should become subject to the same visibility and safeguards as any other transaction conducted on an owner's or beneficiary's behalf in a securities account.

Second, **consistency**: it is unreasonable to expect that lending agents can make subtle judgements as to when they should sacrifice some income in order to protect the lender's long-term economic interests and stewardship commitments. A clear set of policies which indicates with as little ambiguity as possible when shares shall be lent and when they shall be withheld from lending or recalled is necessary in order to ensure that similar situations are handled in the same way. Clear mechanisms should be set up to handle borderline situations. Neither the long-term economic interest in better governance nor the interest in maximising short-term remuneration should be allowed to exceed the parameters set for each by the stated policy of the primary lender³³.

Third, **responsibility**: responsible shareholders have a duty to see that the votes associated with their shareholdings are not cast in a manner contrary to their stated policies and economic interests. While fiduciaries have a duty to maximise economic returns to their beneficiaries, they equally have a fiduciary duty to protect their long-term interests through voting and other actions sometimes precluding lending. Fiduciaries also have a duty to ensure that the pursuit of more income is not subjecting their beneficiaries to greater risks. These responsibilities must be appropriately balanced according to the primary lender's voting policy, in accordance with its ultimate beneficiaries' preferences. This responsibility lies with the primary lender, and not with its agents.

By properly following these broad principles best practice with regard to share lending can be achieved. The difficulty lies in applying them thoroughly. Staffers or agents responsible for voting and investment decisions should always have full transparency whether and what percentage of shares have been lent. Beneficiaries should always know which percentage their manager has voted of its position in a given portfolio company. Consistency may be lost when a lender with a policy to recall shares to vote "on important issues" cannot know in a particular country with an early record date what the issues to be voted upon will be. (This is the case in the United States and Canada.) Responsibility has been ignored when lenders, drawn by suddenly rising demand, lend shares under circumstances in which it is highly probable that they are being borrowed in order to alter the result at a shareholders' meeting, possibly to their own detriment.

³³ The asterisk indicates when a term defined in Appendix III is used in the text for the first time.

Specific aspects of best practice follow from these broad principles. While simple to state, their application may be complex and involve many unsuspected technical adjustments. We have therefore sought to provide more detailed guidance and explanation in the attached appendices. The basic tenets of best practice, however, are:

- 1. All share lending activity should be based upon the realisation that lending inherently entails transfer of title from the lender to the borrower for the duration of the loan.** Most economic rights of the lender can be preserved through contractual agreements with the borrower. Those involving the issuer, however, such as the right to vote, or one's continuity on the share register, **cannot** be preserved in this way. If an investor wishes to vote its lent shares or protect its legal interests as a registered shareholder, it **must** recall the shares.
- 2. During the period of a stock loan, lenders may protect their rights only with the borrower, since they have no rights with the issuer of the shares which have been lent.** Stock loans are normally collateralised at more than 100% of the current market value of the loan. The collateral may be cash, high-quality debt securities, or equivalent equity securities. Lenders must ensure that this collateral, together with any contractual claims upon the borrower, adequately protects their interests for the duration of the loan.
- 3. Institutional shareholders should have a clear policy with respect to lending, especially insofar as it involves voting.** A lending policy should clearly state, *inter alia*, the lender's policy with regard to recall of lent shares for the purpose of voting them. All lending conducted by the institution or on its behalf should be done in accordance with this stated policy.
- 4. Lending policy should be mandated by the ultimate beneficial owners of an institution's shares,** whether they be another institution or corporate body or an assemblage of individuals.
- 5. Where lending activity may alter the risk characteristics of a portfolio, the policy should state the extent to which this is permitted.** This involves the extent of lending activity, the quality of the borrowers, the quality of the collateral accepted for loans, and its nature: cash, other securities, or a combination of the two, as well as any questions as to changes in the duration of the portfolio, as well as its other risk characteristics.
- 6. The returns from lending should be disclosed separately from other investment returns when reporting to clients or beneficiaries. They should not be hidden under management and other costs.** As lending has become an important source of revenue, it behoves institutions to disclose its extent to their clients or beneficiaries, as well as the extent to which investment returns and cost ratios are being driven by or ameliorated by the returns from lending.

7. It is bad practice to borrow shares for the purpose of voting. Lenders and their agents, therefore, should make best endeavours to discourage such practice. Borrowers have every right to sell the shares they have acquired. Equally the subsequent purchaser has every right to exercise the vote. However, the exercise of a vote by a borrower who has, by private contract, only a temporary interest in the shares, can distort the result of general meetings, bring the governance process into disrepute and ultimately undermine confidence in the market.

The ICGN affirms the principle that companies should know who controls the votes at their general meetings, and that this transparency should benefit all market participants. Considering the availability of market instruments that separate economic ownership from control, the ICGN believes that it has become desirable for companies and the broader market to be able to track significant divergence of voting power from declared economic ownership. The ICGN therefore invites the relevant market authorities to consider amending their holdings disclosure regimes to include the transfer of actual or contingent voting rights executed through the use of securities lending and derivatives.

The attached appendices attempt to delineate in full the responsibilities of the different parties, the sorts

of circumstances under which the above principles might be compromised, and how these situations should be handled in accordance with best practice. They are intended as guidance. Best practice may be achieved by other mechanisms as long as the principles are kept in mind in devising appropriate procedures.

Appendix I to ICGN Securities Lending Code of Best Practice: Duties of the Respective Parties to a Lending Transaction

A. Lender's Responsibilities

- a) **Policy on Voting and Recall of Loaned Shares** – The fund, fund sponsor, or principal manager* of a portfolio or fund from which shares are loaned (hereafter the primary lender*) should be responsible for drafting and publishing a general policy that clearly sets forth the scope of lending activity, and under what circumstances, if any, this activity is to be subordinated to voting and to the lender's duties as a long-term shareholder.
- b) **Terms of Master Agreement** – A Master Lending Agreement among the primary lender, the borrower,* and any custodians, agents or other parties involved in the loan transaction should implement these policies, the attendant procedures, including the procedures for recalling* shares and whatever penalties there are for non-compliance, and indicate the likelihood that shares may be recalled for voting purposes. Needless to say, the Master Lending Agreement should protect the lender's and the borrower's economic interests to the greatest extent possible in the jurisdiction involved.
- c) **Disclosure within the Lender's Ownership Chain*** – The primary lender's trustees or directors should effectively communicate their policies and procedures to designated executives at the lending institution and at any agent organisations involved in the investment, lending, or voting of those shares, as well as with those responsible for corporate governance for the portfolio or fund in question. All changes in actual positions due to any lending activity should be updated daily to all those executives charged with investing or voting the shares.
- d) **Responsibility for Compliance** – The primary lender should be responsible for ensuring that its policies and procedures are practicable, that they fulfil the principles expressed herein, and that they are properly administered no matter what the lender's structure and division of responsibilities among different business units or agent companies.
- e) **Dispute Resolution** – The primary lender or its principal manager should establish and administer specific procedures to resolve disputes that may arise in connection with the implementation of its lending policy. A record should be kept of each of these disputed cases and the decision should be communicated to all the designated parties within the lender's organisation.
- f) **External Disclosure** – The revenues from lending activity should be disclosed separately to the portfolio's or the fund's beneficiaries. If the jurisdiction is one in which voting must be disclosed to beneficiaries, lenders should also disclose when shares were not voted because they were out on loan.
- g) **Lending Agents** – The obligations of any agent charged with conducting lending activity on behalf of a primary lender are normally set out in a contract. It is important that primary lenders ensure contracts are worded so as to incorporate the maintenance of best practice, including, where appropriate, the terms and conditions of the Master Lending Agreement. Ultimate responsibility for maintaining best practice in lending policy is the duty of the primary lender.

B. Borrower's Responsibilities

- a) **Recall of Borrowed Shares** – Borrowers should agree to return equivalent shares to those borrowed promptly upon the lender's request whether these are in the borrower's possession or more likely must be purchased in the market. All properly executed requests for recall must be treated as equally valid.
- b) **Non-Voting of Borrowed Shares** – It is never good practice for borrowers to exercise voting rights with respect to shares they have borrowed, except in the rare circumstances where they are acting pursuant to the lender's specific instructions. This limitation is not binding upon a subsequent *bona fide* purchaser of borrowed shares.
- c) **Special Terms of Agreement** – Borrowers should comply with any additional terms agreed with the lender and should, to the extent possible, communicate these terms to other parties on whose behalf they are carrying out the borrowing.

d) **Accountability and Prevention of Abuses** – When borrowing shares for a third party client, borrowers should use their best efforts to ensure that the principals on whose behalf they are acting understand that they are supposed to comply with best practice, as set forth in this Code.

C. Recommended Actions for Issuers to Ameliorate the Effects of Lending

a) **Timely Notice of Shareholder Meetings and Other Transactions** – Issuers should publish and distribute a Notice of Meeting, Agenda and other disclosure documents in sufficient time for lenders and borrowers of shares to comply with their policies and best practices as set forth in this document, including public notice of the issues well before any significantly advanced record date.

b) **Separation of Record Dates for Dividend Payments and Shareholder Meetings** – To minimise the effect of share lending for dividend swaps* upon shareholder participation and share voting, issuers should not set dividend record dates less than 30 days in advance of a shareholder meeting or record date (whichever is relevant for voting) nor less than 15 days after the shareholder meeting (or record date).

c) **Tabulation** – Issuers have a duty of care in their record keeping and administration of shareholder voting to identify and expose abuses in the voting of borrowed shares and to prevent double voting of shares. If the custodians' practice of using commingled accounts interferes with that responsibility, issuers have a duty to call public attention to the problem, and to work with custodians to ameliorate it wherever practicable.

Appendix II to ICGN Securities Lending Code of Best Practice: Guidance on Best Practices Associated with the Responsibilities of Primary Lenders, Lending Agents, and Borrowers

1. Voting and share lending.

- 1.1. The voting right is normally inseparable from the share in which it inheres.
- 1.2. Accordingly, except in the rare case in which some private treaty provides for the separation of voting right from the share (and this is permitted by the issuer and by any applicable law), the primary lender of a share loses his voting right for that share. Until and unless a recall is executed, and an equivalent share is delivered to the lender, he is disenfranchised with respect to that share.
- 1.3. Any subsequent bona fide purchaser of that share, whether his ownership come as a result of purchase of a share sold short* by the borrower, or of delivery in lieu of a failed settlement,* acquires the voting right together with all the other indicia of ownership. As a matter of market practice, he will have no idea that his share had formerly been borrowed from someone else. As far as the issuer is concerned, the share has changed hands.
- 1.4. With respect to ownership rights, the initial borrower is in a different position than any subsequent owner to whom the shares are sold, as the initial borrower knows that the shares were borrowed, and that it retains rights over the collateral* posted in lieu of payment.

2. Improper Lending Practices.

- 2.1. The borrowing of shares for the primary purpose of exerting influence or gaining control of a company without sharing the risks of ownership is a violation of best practice. Similarly, the borrowing of shares in order to deliberately reduce or suppress the vote at a shareholders' meeting is bad practice.
- 2.2. Accordingly, the borrowing of shares for the purpose of exercising the right of the shareholder's vote is to be discouraged by all lenders.
- 2.3. The borrower of a share, for whatever purpose, should not vote that share without the express permission of the lender, and in accordance with his instructions.
- 2.4. Similarly, the holder of a share as collateral should not vote that share, unless specifically given the exclusive right to do so by private treaty with the borrower who provided the collateral.
- 2.5. The lender's Master Lending Agreement should specify that shares are not being lent for the principal purpose of voting those shares, and should provide clear guidance as to what circumstances might permit a borrower to vote borrowed shares as well as what the responsibilities of any lending agents might be in those circumstances.
- 2.6. No lender or lending agent should knowingly enter into a scheme in which he is making shares available to a borrower for the primary purpose of voting them, or of otherwise attempting to exert control upon the issuing company by means of the voting right attached to the borrowed shares.

3. Lending policy, lending contracts, transparency, and disclosure.

- 3.1. Policy on lending, and in what circumstances lending is to be considered subordinate to voting, should be a responsibility of the trustees or the directors of the fund or portfolio from which shares are to be lent.
 - 3.1.1. A written statement of the lending policy should be communicated to any other entities up and down the chain of ownership which might have any reason to become involved with lending or voting decisions.
 - 3.1.2. The lending policy statement should also be made available to the ultimate beneficiaries of the portfolio or fund. This document should make clear under what general circumstances loans are likely to be recalled for voting purposes, and the approximate extent of loan activity envisioned.

- 3.2. The lending contract should be negotiated with the full knowledge and active participation of the primary lender of the securities if the lending is to be done by an agent. Any subsequent changes to the contract or other departures from standard practice should be discussed beforehand with the primary lender or its manager responsible for the shares in question.
- 3.3. It is recommended that lenders rely upon a contract which protects their rights and provides full compensation or damages with respect to all corporate actions, as well as allowing for recall in the event of a vote the lender deems controversial and appropriate for recall.
- 3.4. In the event of failure to deliver like shares when they have been recalled for the purpose of voting, the penalties should be the same as for failure to deliver for any other reason.

4. Communication of lending activity.

- 4.1. It should be incumbent upon whoever is responsible for actual lending—whether it be a division of the primary manager, the primary manager’s custodian, or any other agent of the primary manager or the holding chain—to update the data on any lending activity and on attendant changes in the relevant portfolio. This data should be furnished to all those personnel responsible for management of that portfolio, and to those responsible for voting decisions and for the implementation of corporate governance policy.
- 4.2. Such data should be made available in a timely fashion, normally by the close of business each day.
- 4.3. If responsibility for portfolio management and/or voting decisions has been delegated by the primary manager to another agent not in the chain of control between the primary manager and the lending agent, a separate chain of communication should be set up, and the lending agent required to inform directly this entity [or these entities] of lending activity and changes in the composition of the portfolio resulting therefrom.

5. Communication regarding proxy material, record or blocking dates, and decision dates.

- 5.1. The following personnel are potentially in need of information regarding meeting agendas and dates, the text of proposals, key decision dates, and parameters for any proxy vote or other corporate action which might trigger a recall:
 - (a) The portfolio manager directly responsible for buy and sell decisions concerning the stock in question
 - (b) Whoever is responsible for proxy voting decisions regarding the same security
 - (c) The party responsible for implementing corporate governance policy
 - (d) The principal manager of the fund involved if different from above.
- 5.2. Primary lenders should ensure that the proper mechanisms for timely dissemination of this information are in place, so that all of these key decision makers are informed sufficiently ahead of decision deadlines that they may make appropriate judgments in accordance with their particular mandates. This may require some sort of routine distribution of communications from the custodian, and/or from other services.

6. Resolution of disputes involving recall.

- 6.1. The Primary Lender’s Policy Statement, as well as the Master Lending Agreement, should prescribe a formal mechanism to resolve any dispute arising from a difference of opinion as to whether a given share should be left out on loan or recalled.
- 6.2. Such a dispute-resolving mechanism should fairly represent the different perspectives of investment managers, corporate governance staff, and the exigencies of lending.
- 6.3. Decisions should be made in accordance with the primary lender’s stated lending policy, its governance policy, and the explicit objectives of the fund. The object is to resolve the conflict between short-term revenue maximization and longer-term investment or governance goals.

- 6.4. The decisions of the resolving mechanism should be a matter of record to be communicated to those responsible for setting and enforcing corporate governance policy at the primary lender or its manager.

7. Record dates.

- 7.1. Record dates pose a special challenge to the lender of securities, as they may be significantly divorced in time from the date of the actual vote.
- 7.2. In those jurisdictions in which it has been the practice for the issuer to publish and distribute proxy material and the agenda of the shareholders’ meeting only after the record date and only to shareholders of record on that date, it may be difficult or impossible for lenders to know whether they might want to recall shares for voting in advance of the record date.
 - 7.2.1. To circumvent this conundrum, issuers should promulgate the agenda for upcoming shareholders’ meetings publicly (e.g., by posting at the company’s website) sufficiently in advance of the record date that lenders may have time to recall should they decide to do so. This is in keeping with the “Issuer’s Recommended Actions” delineated in Appendix I. C. above.
 - 7.2.2. In the absence of such provision by issuers, lending institutions in those jurisdictions can only make reasonable efforts to learn whether an upcoming shareholder vote is likely to be sufficiently controversial under their own voting guidelines that they should consider recalling the relevant share in advance of the record date.
 - 7.2.3. Absent resources for such information gathering, it may be impossible for lenders to pursue a policy of recalling lent shares ‘in the event of an important or controversial vote.’
- 7.3. When the record date or its functional equivalent is near in time to the shareholders’ meeting, and the agenda has already been distributed some time before, this problem does not arise.

8. Dividend dates.

- 8.1. Another common use of lending is for dividend swaps. For this strategy to be employed, the share must be lent over a dividend record date. Obviously, the lender loses the vote over that period, which may coincide with the meeting date, or the record date for voting in a record date jurisdiction.
- 8.2. Lending institutions should be aware of this hidden consequence of such a lending transaction.
- 8.3. Issuers are also urged to separate dividend record dates sufficiently from voting record dates or whatever other dates are ruling for eligibility to vote (e.g., reconciliation date, the date of the meeting, etc.), so that transactions of this type do not reduce the valid shareholder vote, or confuse the question of who is the proper beneficial owner entitled to vote.

9. Lending policy and risk.

- 9.1. By lending shares, a portfolio’s risk characteristics may be changed significantly. Normally, the standard contracts and practices in use successfully counter that possibility, but exceptions may exist.
- 9.2. In those markets in which the lender’s margins are determined or affected by the reinvestment of the collateral required for the loan, additional assessments of risk are necessary, and additional controls may be warranted to ensure that lending agents do not exceed the risk parameters appropriate for that portfolio.

10. Disclosure of lending activity.

- 10.1. As a general matter, lending activity is not reported to outside parties or to individual fund beneficiaries, except where provided for by contract or by law.

- 10.2. However, the net income obtained from lending ought to be separately accounted for in regular reports to beneficiaries, since it is neither appropriate to regard it as a part of investment return, nor should it be allowed to conceal the actual costs of custody, transfer, and other administrative costs, or the costs attendant upon the actual lending program itself.
- 10.3. Additionally, in any public report on voting decisions made during the preceding year, the instances in which shares were not voted because they were out on loan, and the resultant 'under-vote' of shares, by percentage or by actual number, ought to be disclosed to beneficiaries of the reporting funds.

Appendix VI: Correspondence between Eumedion and AFM about acting in concert

1. The memo submitted to the Netherlands Authority for the Financial Markets with regard to acting in concert

Reason

Shareholders are becoming increasingly active and make increasing use of their shareholders' rights, sometimes working together to this end. Under certain circumstances, this cooperation may give rise to an obligation to notify on the grounds of section 5:45, par. 5 (Netherlands) Financial Supervision Act, hereafter "Wft". This section stipulates that a person is deemed to have the disposal of the votes of which a third party has the disposal, if the person has concluded an agreement with that third party which provides in a "long-term common policy" on the exercise of voting rights, also referred to as acting in concert. Institutional investors who take their role of active shareholder seriously may make contact with each other and do this partly with the help of Eumedion, with the objective of being able to share information and research efforts. In the unwelcome event that cooperation of this kind were nevertheless to be considered acting in concert, this could have the undesirable effect of nipping dialogue-expanding cooperation in the bud.

The question addressed in this memo is whether the activities of the investment committee of Eumedion might entail a notification obligation on the grounds of section 5:45 Wft. This is not the case in our opinion. This position is explained below, on the basis of a description of the work of Eumedion and the activities of the Eumedion investment committee, in addition to the text and the rationale of section 5:45 Wft.

Eumedion

It has become clear in recent years that the subject of corporate governance cannot be left exclusively to the listed companies. Institutional investors themselves must urge the companies in which they invest to improve their corporate governance. Institutional investors are increasingly investing in shares and are managing money belonging to third parties when they do so. They have a fiduciary duty towards their beneficiaries or investors as a consequence and are increasingly frequently pressed by those beneficiaries and investors to keep a critical eye on how the companies that are invested in perform in the context of corporate governance. This is the reason why an active attitude is expected of them (also by the legislator).

A wide-ranging and mutually coherent representation of interests in the field of corporate governance has explicit added value in this context. In the Netherlands, institutional investors cooperate on corporate governance within the framework of Eumedion. Eumedion attempts to satisfy the social and political expectations of institutional investors by encouraging joint consultation between institutional investors, and with listed companies and their representative organizations. In addition, Eumedion consults with the Dutch government, institutions of the European Union, other relevant authorities and sectoral organizations, and pursues the objective of influencing legislation and regulations. It also provides services to its members with regard to corporate governance and undertakes all other activities conducive to its objective. Eumedion's work on preparing policy is done by five committees, one of which is the investment committee.

Investment committee

The investment committee was formed with the objective of providing the executive board of Eumedion with information on current and material corporate governance issues of importance at listed companies and on flagrant non-compliance with accepted corporate governance standards by listed companies. The investment committee advises the executive board on approaching listed companies or policy-makers. In addition, the investment committee discusses the practical and logistical processes surrounding the

general meeting of shareholders (hereafter the “AGM”). To this end, the investment committee analyses at least the following:

- a. the information relating to corporate governance supplied by the listed companies (annual reports, press releases, etc.), including the report on compliance with accepted corporate governance standards and the reasons given for any non-compliance with these;
- b. the control structure and management structure at the listed companies.

The investment committee also monitors other publicly available information relating to the corporate governance at the listed companies and reports from corporate governance rating institutes.

The investment committee meets every three months in principle. Every Eumedion member is allowed to send a representative to the investment committee, but not every member is represented at present. The procedure followed by the investment committee with regard to the (preparations for) AGMs is as follows. Eumedion draws up a summary of the AGMs and sends this AGM schedule to all Eumedion members; this schedule contains a proposal stating which member(s) wish to attend a certain AGM. The person going to an AGM makes a (preliminary) analysis of the items on the agenda and forwards this to the members. Members can decide on the basis of the AGM schedule and analysis whether to give a proxy to the person attending the AGM. They have no obligation to do so and can always decide whether or not to go to the AGM themselves. If required, the person attending the AGM can consult in advance on the items on the agenda for the AGM with other members attending the AGM. Members have no obligation to vote. They can decide not to exercise their voting rights or to exercise them through other channels (such as ISS). A member can decide on the basis of the analysis of the items on the agenda for the AGM to give the person going to the AGM a proxy to vote in favour or against an item on the agenda, depending on the discussion during the AGM.

It is important to stress that Eumedion only plays a facilitating role; Eumedion coordinates the meetings of the investment committee and provides the committee with relevant information, if necessary. Eumedion is a consultation platform and makes no voting recommendations as a consequence, receives no proxies and also does not vote on behalf of its members. The analysis of the items on the agenda for an AGM is not made by Eumedion either.

Rationale of obligation to notify and conclusion Eumedion

The important question in this connection is whether the cooperation within the Eumedion investment committee can be regarded as *an agreement which provides in a long-term common policy on the exercise of voting rights* (acting in concert). According to the legislative history, an agreement of this kind exists if persons have agreed to implement a long-term policy with regard to the company that issued the shares and wish to give shape to this policy by the collective exercise of their voting rights, on the basis of an agreement that will not apply to only a single general meeting of shareholders (see [Netherlands] parliamentary papers II 2202/03, 28 985, no. 3, page 33)³⁴.

In our opinion, there is no question of an agreement in the sense of section 5:45, par. 5 Wft. In the first place, the declaration of intent by the members of the investment committee does not envisage the long-term and collective pursuit of policy with regard to the casting of votes. In the second place, the actual procedure within the investment committee gives no reason to presume the existence of an agreement of this kind. The objective of section 5:45, par. 5 Wft is to provide transparency of the control structure at listed companies. The section is intended to prevent shareholders from concealing the actual extent of their voting power by means of secret agreements and thus to avoid the law. This objective must consistently be borne in mind with regard to the question of the existence of acting in concert. Also significant is the extent of the ties between shareholders and the purpose of these ties. In cases where a number of shareholders acting collectively wish (repeatedly) to exercise their voting rights at an AGM of

³⁴ For the purposes of a possible obligation to notify, each person that is a party to such an agreement must assign to itself the total number of votes of all the persons that are parties to the agreement. In doing so, a person must directly assign to itself the votes which it itself has disposal of, but assign indirectly the other votes that are part of the agreement.

a listed company, they will have to notify the Netherlands Authority for the Financial Markets (hereafter the “AFM”) accordingly. In cases where the shareholders acting collectively have free disposal of the voting rights to which they are entitled, there is no question of an agreement that provides for a long-term common policy on the exercise of voting rights.

The Eumedion members are always completely at liberty to exercise voting rights at their own discretion. The only objective of the joining of forces in the Eumedion investment committee is the exchange of information in order to arrive at a stance with regard to subjects related to corporate governance. This joining of forces does not have the objective of forming a coalition to exercise its voting rights identically during an AGM. The individual members make their choices independently and make no arrangements on how they will vote. Members may decide, on the basis of the AGM schedule and analysis, to give a proxy to the person attending the AGM. They are under no obligation to do so and can always decide whether or not to go to the AGM themselves and to vote. Differences of opinion between members are possible and allowed. Members themselves can specify the contents of the proxy and the person going to the AGM carries out the member’s instructions. The member may be in agreement with the analysis and instructs the person attending the AGM to vote in accordance with the analysis, unless the person attending the AGM is convinced at the AGM by certain viewpoints explained by the management board of the company. Eumedion members may naturally pursue the same course of action because they share the same opinion, but this does not mean that they are acting in concert.

The investment committee has agreed that, generally speaking, the same person will be encouraged to attend an AGM of a certain company (the continuity objective), because this will result in the accumulation of more knowledge about the company’s operations and shareholders will be well informed. It is possible, therefore, that certain shareholders will always give a proxy to the same person to vote on their behalf over a number of years. This “outward appearance” should not, in our opinion, give rise to suppositions of acting in concert. After all, this arrangement is only intended to ensure that shareholders are well informed when they vote and does not have the objective of reaching agreements on voting behaviour.

Finally, it should also be noted, in view of the foregoing, that section 5:45, par. 9 Wft does not apply either, because the person attending the AGM (the proxy-holder) is not at liberty to vote at his own discretion.

2. The concise statement on the consultations with the AFM, as approved by the AFM on 29 January 2008

- The AFM concurs with the Eumedion position that there is no question of acting in concert as long as members themselves ultimately decide whether and how they vote at a shareholders’ meeting. If individual members always decide on their own stance, this means that voting instructions are given to the person attending the AGM and no notification has to be given of this. This is also the case if the discussion at the AGM leads the person attending the AGM to vote differently to what had originally been intended. The granter of the proxy must, in that event, have stated in advance that the proxy holder was permitted to vote differently and why. In that case, voting instructions have in fact been given that imply a certain degree of freedom.
- The AFM sees few problems for the regular shareholders’ meetings where no dramatic items are on the agenda. Things could be different, however, in the event of an unusual situation (a proposed change in strategy, for example). If members consult together in advance, take a stance and communicate this stance at more than one AGM, this can be qualified as acting in concert. When the AFM discerns a pattern (same letter, different letterhead, use of the same lawyer, collective visits to a company), it will look back with retrospective effect on behaviour at the first shareholders’ meeting.



- It may be stated in conclusion that cooperation within the Eumedion investment committee cannot easily be held to be acting in concert in the case of a regular AGM where no dramatic/important matters are on the agenda. In the case of an unusual situation, however, in which a common stance is taken in the course of more than one AGM, the AFM recommends that the AFM should be notified accordingly for reasons of safety.





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