20 December 2013

Best Practice Principles Group

By email to: consultation@bppgrp.info

Dear Sirs

Response on the Best Practice Principles for Governance Research Providers

I am writing on behalf of the GC100 to respond to the draft Best Practice Principles for Governance Research Providers ("Principles") issued by the Drafting Committee of the Principles.

GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 125 members of the group, representing some 81 companies.

Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

We welcome the opportunity to respond to the draft Principles and would be happy to discuss our comments with you in greater detail.

We have a couple of general comments to make before addressing the specific queries raised in your consultation document:

a) Introduction to the Principles

The first line on page 10 states that investors have a number of ownership rights, one of which is to vote at shareholder meetings. We would point out that under UK Company Law, it is not the investor, but the registered shareholder that has the legal right to vote. The registered shareholder may agree with the underlying investor that they may submit voting intentions, but this is a separate arrangement between investors and registered shareholders and is not enshrined in UK company law.

b) Our response to the original ESMA consultation

We would re-iterate the comments we made in the original submission to the ESMA consultation in 2012, which we set out in the Appendix.

Consultation Questions

We have the following responses to the specific consultation questions. Where we make no response, you may assume that we are in agreement or have no comment to make.

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The Association of General Counsel and Company Secretaries of the FTSE 100
The GC100 Group is an unincorporated members' association administered by the Practical Law Company Limited

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Q.3 Please share your views on the practicality of a comply-or-explain approach to the Principles.

Generally we are supportive of the "comply-or-explain" principle. However, we feel that the Principles, as currently drafted, are already very broad and are not drafted in a way against which it would be easy to "comply or explain". We feel that the Principles need to be stronger, so that compliance with a clear standard of behaviour, and explanation for non-compliance, is possible.

Examples of this are the use in a number of sections of words and phrases such as "reasonably", "reasonable efforts", and "may" (instead of "should"). Coupled with the section on limitations, the result is an unclearly defined set of expectations. If it is intended that the Principles are to work on a "comply-or-explain" basis, then the expected standard for compliance needs to be clearly defined at the Principle level. Phrases such as "reasonable efforts" and an explanation of the limitations can then be included in the explanations for any non-compliance.

In addition, we note the potential carve out under Principle 1 for organisational features to achieve adequate verification or double-checking where this is "proportionate to their size". Our view would be that a better test than size would be "proportionate to influence". There are a number of governance research providers who, while small, have disproportionate influence either through the number of votes cast in line with their recommendations in particular regions, or through their continuous interaction with the media.

Similar comments apply to question 4.

Q.7 What should the regional scope of the Principles be, in terms of signatories and services provided. For example, do you think that the Principles should be global?

We recognise that it is hard to apply the Principles globally, as practices vary widely between territories. However, we do feel that any governance research provider offering research services on issuers listed in Europe should adhere to the Principles, so that there is a common approach to governance reports across European companies. Issuers should be analysed in accordance with local practices, so that there is consistency. We believe that this approach will help to raise governance practices and standards across all jurisdictions.

Q.10 Do you agree with the definition of "governance research services"? Is the scope of the definition adequate? If not, please elaborate and provide specific suggestions.

Yes.

Q.11 Are the definitions of "vote agency services" and "engagement and governance overlay services" and their distinction from "governance research services" sufficiently clear and accurate?

Yes.

We note that this consultation is specifically focused on the role of governance research providers and not on the role of proxy voting agencies, although some organisations provide both services. Our comments are confined to governance research services, although we

would note that we are aware of issues with the voting process, which also need to be addressed elsewhere.

Q.12 Do you agree that the Principles should not impose standards of conduct on investors? If not, please explain why.

We do not believe that the Principles can really be understood in full without considering the role of the investors in the voting decision-making process. We recognise that the role of investors is beyond the scope of this consultation. However, issuers expect investors to use the services of governance service providers responsibly and to make their voting decisions within the context of the investment decision. We would also expect investors, who follow a voting recommendation from a governance research provider to vote against or to withhold their vote, to engage directly with the company concerned ahead of the general meeting.

Governance research providers are sometimes seen as standing between the company and its investors when investors decline to engage. We would encourage investors who use the services of governance research providers, also to consider the provisions of the UK Stewardship Code and engage directly with companies, particularly when the governance advice might indicate a negative or withheld vote.

We agree that the Principles are not the right place to set out standards for investors and that they should be addressed elsewhere, for example through codes such as the UK Stewardship Code.

Q.13 Do you think that Principle One will help the market to better understand the different kinds of services and approaches that participants operate? If not, please explain.

Please see our comments on question 3. We believe that if the Principles were more tightly drafted, this would give greater clarity regarding the services provided and governance research providers would have greater scope to explain their approaches.

Q.18 Does Principle Two address the relevant issues or considerations relating to potential conflicts of interest in the provision of governance research? If not, please explain.

We believe that there is an inherent conflict of interest in cases where a governance research provider also provides services to issuers. If this is the case, governance research providers should ensure that proper “Chinese walls” are in place to prevent the governance research reports being influenced positively or negatively depending on whether or not the issuer concerned also purchases consultancy services from the same organisation. We would suggest that in cases where such services are provided to an issuer, this should be disclosed by the governance research providers in the governance research reports on that company. We believe that this would bring the disclosure of conflicts of interest in line with those in the broker/analyst relationship and therefore should be achievable without imposing a disclosure or cost burden that is too heavy.

We are strongly of the view that all reports should be verified with the issuer for factual accuracy prior to publication. We have seen a number of occasions when investors have been negatively influenced by governance reports that are inaccurate regarding the detail. We appreciate that the issuer and the governance research provider may well differ as to opinion on certain topics, but the factual detail should be accurate and based on the most current publicly available data. In the event that reports are issued that have not been verified with the company, this should be made clear in the report. Investors have a greater duty to engage directly with the issuer in cases where the information has not been verified.

As an absolute minimum, we consider that a governance research provider should allow the issuer to check a report in all cases where a contentious issue has been raised. These would be cases which either lead directly to a recommendation to withhold or vote against, or which may reasonably be expected to lead to a withhold or against vote from investors.

In addition we consider that it is important that companies are able to engage outside the season with governance research providers to provide an opportunity for the company to explain their policies. We do not believe that it is appropriate for governance research providers to charge issuers for the right to verify factual details in the governance research report on their company. These reports should be submitted to issuers for factual verification prior to publication as a matter of course.

These comments apply also to questions 19, 20, 22 and 23.

Q.24 Are there any other aspects of media and the public dialogue that should be taken into account? If yes, please elaborate and provide specific examples and/or suggestions.

We would caution against governance research providers discussing information concerning a particular company with the media without first having verified the details with the issuer. It is easy to cause embarrassment both to the issuer and to the governance research provider if inaccurate information is released to the press. We therefore agree with the guidance under Principle 3: Communications Policy that states that "comments and statements in the press or public forums may have a significant impact and, as such, should be properly managed". Our view is that proper management must extend to the verification of facts with the issuer prior to such public comments being made.

We would be happy to discuss any of these points with you further.

Yours faithfully,

Mary Mullally
Secretary, GC100

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25 June 2012

To be submitted online at www.esma.europa.eu

Dear Sirs,

Discussion Paper – An Overview of the Proxy Advisory Industry. Considerations on Possible Policy Options

The GC100 Group welcome the opportunity to respond to the recent discussion paper issued by the European Securities and Markets Authority into the Proxy Advisory Industry. As you may be aware, GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 120 members of the group, representing some 80 companies. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

The GC100 Group have conducted a survey of our members during the main 2012 proxy season, the results of the survey are available on request. The responses which follow are based on the findings of this survey and observations made at the roundtable meeting held at ESMA on 12 June 2012. Before we respond to the specific questions raised in the discussion paper, we would have the following general comments to make:

General Comments

1) We believe that the focus should not only be on the role of the proxy advisors, but also on the way the services they provide are used by investors. It is clear that many of the leading investors purchase the voting reports prepared by one or more of the advisory services and then draw their own conclusions when make the voting decision in conjunction with the underlying fund manager, often engaging directly with the issuer on points of contention. However, it also seems to be the case that some investors may lack the resources in-house to conduct the analysis themselves and may therefore rely entirely on the advice of just one proxy advisor, effectively outsourcing the voting decision.

2) Issuers welcome the opportunity to engage with our investors, as the corporate governance matters can be placed within the commercial context and voting decisions can then be "investment-led". We appreciate that the volume of work, and time constraints, mean that it is impossible for every investor to engage with every issuer and that investors will therefore tend only to engage when there are specific matters of concern or where they hold a significant holding. Issuers are therefore happy to engage with proxy advisors, particularly where they have the ability to influence a large number of smaller institutional shareholders who collectively represent a significant percentage of shares. Some proxy advisors, however, refuse to engage with issuers or make contact only once their report has been finalised such that issuers' ability to engage on the voting recommendations (and supporting rationale) in the report is very limited (see paragraph 7(c) below). Although this is limited, it needs to be understood that that it is near impossible for issuers to have an effective dialogue with a large group of smaller investors, if they effectively "outsource" the voting decision to one advisor who refuses to engage. We understand that there is some concern on the part of proxy advisors that engagement might lead to unwelcome "lobbying" by issuers, but would point out that engagement should be a two-way process, reflecting one of the key principles of the UK Stewardship Code that there should be a "purposeful dialogue" between issuers

and investors. Whilst issuers obviously would like investors to vote in favour of the Company's resolutions, we also want to know and understand why a group of investors may not wish to vote in favour and we want to understand their concerns. Effective engagement can lead to change which is in the interest of both issuers and investors. A reluctance to engage on the part of certain investors and proxy advisers is not constructive to effective corporate governance.

3) We also believe that whilst we have some concerns around the role of some proxy advisors, particularly relating to accuracy and potential conflicts, there are other elements of the proxy process which cause more concern. The voting process using a chain of intermediaries with whom neither the investor nor the issuer has any contractual relationship is complex and cumbersome, particularly when operating cross border. We heard at the June meeting that investors are sometimes required to submit their voting intentions 20 days ahead of a meeting, giving them only a few days to read the meeting materials and make their decision, and yet the issuers and their agents only receive the votes a few days ahead of the meeting. In the intervening period, the voting intentions may be handled by custodians, subcustodians, proxy voting agencies and registrars and each step prolongs the voting process.
This limits the time available for engagement and effective decision making.

4) We also note the practice whereby proxy voting agents will release voting results earlier on payment of a fee. This creates a potential conflict of interest as the proxy voting agents are acting as agent for the investor and should not also be financed by the issuer. The practice also undermines transparency and good corporate governance. We therefore believe that proxy voting agents should not be able to sell voting intentions to issuers ahead of meetings rather than submitting votes through the proper process and would ask ESMA to consider undertaking a review of this practice (see further, paragraph 5a below).

5) Whilst we recognise that ESMA is focusing on the role of proxy advisors within Europe, it is also important to look at the voting policies followed by US investors, many of whom have a policy or in some cases are mandated by their investment committees to follow the recommendations of a particular proxy advisor. There have been a number of instances when an individual fund manager has wished to support an issuer against the proxy advisor's recommendation, but has been unable to persuade their investment committee to deviate from their voting policy to follow the proxy advisor. This is not a matter that can only be considered in the European context.

Turning now to your specific questions, we would comment as follows:

1) How do you explain the high correlation between proxy advice and voting outcomes?

The GC100 survey showed that the various proxy advisors had differing levels of influence over the voting outcome in the UK. In the UK, ISS/RREV and IVIS (ABI) had a significant impact, whilst Manifest and PIRC influenced the holders of fewer shares. Glass Lewis seemed to have less of an influence, except for companies with a US shareholder base. Very few companies were aware of Proxinvest and only one company had ever been contacted by them.

2) To what extent:

a) Do you consider that proxy advisors have a significant influence on voting outcomes?

See response to question 1.

b) Would you consider this influence as appropriate?

This influence is appropriate provided that the voting decision remains with the investor. At the June meeting, a number of investors made the point that they purchased the reports and analysis from the proxy advisors and then made their own voting decisions. We believe that this is appropriate as it assists the decision making process. However, outsourcing the actual voting decision would not be appropriate as the decision needs to be investment-led. At the

June meeting, mention was made of voting platforms, where the voting intentions are prefilled on-line with a particular proxy advisor's recommendations. We feel that the use of such platforms distances the investor from the decision making process and hinders proper engagement between investor and issuer.

3) To what extent can the use of proxy advisors induce a risk of shifting the investor responsibility and weakening the owner's prerogatives?

This depends on how the investors choose to use the services provided by the proxy advisor. We do not believe that it is appropriate for an investor to abrogate the responsibility of ownership through an over dependence on one proxy advisor. We also believe that the use of voting platforms pre-filled in accordance with a particular proxy advisor's recommendations further undermines the investor's ability to make their own decisions.

4) To what extent do you consider proxy advisors:

a) To be subject to conflicts of interest in practice?

The June meeting discussed a number of potential conflicts faced by proxy advisors including being owned by issuers on the one hand or investors on the other and the provision of consulting services to issuers, as is commonly the case in the US.

b) Have in place appropriate conflict mitigation measures?

We are not aware of the internal practices within proxy advisors.

c) To be sufficiently transparent regarding the conflicts they face?

We believe that proxy advisors could be more transparent about their potential conflicts.

5) If you consider there are conflicts of interest within proxy advisors which have not been appropriately mitigated:

a) Which conflicts of interest are most important?

There is a potential conflict when a proxy advisor is appointed as agent for the investor and also provides advisory services to issuers or sells their report on an upcoming meeting to the issuer. If the proxy advisor is being financed both by the investor and the issuer or requiring issuers to pay for the right to see the reports prepared about their meeting, there is a danger that their independence could be compromised. We believe that if a proxy advisor is acting as an agent for the investor, then they should not also be financed by the issuer.
Whilst out of scope of this discussion paper, we also believe that proxy voting agents should be not be permitted to sell voting intentions to issuers ahead of meetings rather than submitting the votes through the proper process. This is another factor which delays the proper voting process and curtails the time allowed for investors to make their voting decisions and engage with issuers. Proxy voting agents are acting as agent for the investor and should not also be financed by the issuer.

b) Do you consider that these conflicts lead to impaired advice?

It is impossible for issuers to know whether these conflicts lead to impaired advice, but if an agent is acting for two principals, then the likelihood of bias must increase.

6) To what extent and how do you consider there could be improvement:

a) For taking into account local market conditions in voting policies?

In our view, there has been an improvement in this area in the UK over the years, although we understand that this is an issue in other jurisdictions where proxy advisors have less of an

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understanding of particular local governance practices.

In the UK for example, we often find that US based ISS and Glass Lewis will recommend votes against certain remuneration practices, which would have been acceptable in a US company, even for companies with a global presence, a large number of US employees and a significant number of shares held by US institutions. For example, large sign-on payments or payments on termination are not unusual in the US environment, but are frequently criticised by proxy advisors when paid by European companies. Where those proxy advisors influence US investors, US investors have been seen to vote against a Remuneration Report, even though such payments would have been acceptable in a US company.

Another area, where UK issuers have found there to be a lack of understanding by certain US proxy advisors is the resolution to hold General Meetings, which are not AGM's on 14 days' notice. UK companies have been permitted to hold GMs on 14 days' notice since at least the 1948 Companies Act. The Shareholder Rights' Directive enabled this practice to continue, provided certain conditions were met, including an annual enabling resolution. In the UK, GMs might be required for certain matters, such as large acquisitions, which our competitors in the US or other European countries can do without holding a meeting.

b) On dialogue between proxy advisors and third parties (issuers and investors) on the development of voting policies and guidelines?

As mentioned above, issuers are keen to engage with investors and also with the proxy advisors acting as their agents and are willing to have a dialogue regarding the development of their voting policies and guidelines. We have this opportunity with certain proxy advisors and find it frustrating when others refuse to engage.

7) To what extent do you consider that there could be improvement, also as regards to transparency, in:

a) The methodology applied by proxy advisors to provide reliable and independent voting recommendations?

The answer to this sub- question and the following sub-questions varies depending on the proxy advisor and the specific analyst within the proxy advisor. Different issuers also have had different experiences of the various proxy advisors.

Broadly speaking however our survey indicated that the reports prepared by ISS/RREV and IVIS ABI are regarded as broadly accurate. Our experience of Manifest and Glass Lewis is mixed, because of their reluctance to share the report. Issuers report a high level of inaccuracy with PIRC. UK issuers have little experience of Proxinvest.

b) The dialogue with issues when drafting voting recommendations?

According to our survey, UK issuers tend to have significant dialogue and engagement with ISS/RREV and IVIS/ABI, moderate and often very time-compressed engagement with PIRC and limited engagement with Manifest and Glass Lewis. As stated before, issuers would welcome greater and timely engagement, particularly with those proxy advisors who have been reluctant to engage. One option could be to require proxy advisors to consult with issuers prior to finalising and publishing recommendations when it is proposed to vote against a resolution. This would ensure that any factual errors are addressed and, if necessary, the background to the resolution can be clarified.

c) The standards of skill and experience among proxy advisor staff?

We appreciate that proxy advisors have a very high work load in the peak AGM season analysing thousands of proxy statements within a very short period of time. We sense that a number of the analysts used are young inexperienced (albeit bright) temporary/seasonal employees working towards tight deadlines. Necessarily, this leads to some errors and a box

ticking mentality. For this reason, it is essential that reports should be shown to issuers prior to publication, so that we can check any factual inaccuracies. There will always be areas where we will disagree on policy matters with some proxy advisors, but we should have the opportunity to amend any matters of fact.

8) Which policy option do you support (if any)? Please explain your choice and your preferred way of pursuing a particular approach within that option, if any?

We believe that there should be increased regulation/supervision in this area, but we would not go as far as to advocate binding legislative instruments at either EU or national level at this stage. We would therefore support Option Two, which would require member states and the industry to develop standards and encouraging proxy advisors to develop their own code of conduct. We would expect such code of conduct to include the following:

- A requirement to engage with issuers and to share any report with a reasonable period prior to publication.

- A prohibition on providing services for a fee to both investors and issuers. i.e. that proxy advisor should only act as agent for one principal on a specific matter.

- Public disclosure of conflicts of interest, whether actual or potential with detailed explanation as to how these conflicts are mitigated.

- Disclosure as to the extent that pre-filled voting platforms are used.

- Where proxy advisors also act as proxy voting agents for the same investor, an explanation as to how these services are kept separate.

- A requirement for proxy voting agents to submit votes to issuers through the proper voting process as and when the votes are received rather holding them until the proxy deadline.

9) Which other approaches do you deem useful to consider as an alternative to the presented policy options? Please explain your suggestions.

As we have mentioned, we believe that there are other related areas, which should also be reviewed:

- The focus should not only be on proxy advisor services but also on how investors use those services. For example, as in the UK Stewardship Code, a requirement on investors to engage directly with an issuer, if they intend to vote against or withhold.

- We need to recognise that this is not just a European issue as many global companies have global shareholders who seem to follow proxy advisor advice very closely with less willingness to engage directly with issuers.

- The practices of proxy voting agencies also need to examined, particularly the use of pre-filled voting platforms and the provision of services to issuers as well as to investors.

- The voting process itself, particularly cross-border, needs improvement as the number of intermediaries between the investor and issuer hampers effective engagement and forces investors to make voting decisions within very short timescales.

10) If you support EU level intervention, which key issues, both from section IV and V, but also other issues not reflected upon in this paper, should be covered? Please explain your answer.

This has been covered earlier in our response.

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11) What would be the potential impact of policy intervention on proxy advisors, for example as regards:

a) Barriers to entry and competition

Proxy advisors are best placed to comment on this, but from an issuer perspective, we welcome further players in the market. The market is currently dominated by one player, which means that that payer has undue influence on investors.

b) Inducing a risk if shifting the investor responsibility and weakening the owners' prerogatives;

We have covered this point earlier in our response. We believe that investors should be required to ensure that advice received from proxy advisors is used appropriately and within an investment context.

c) and/or any other areas?

We have nothing further to comment.

d) Please explain your answers on: i) EU level; ii) national level

We believe that we have covered this in our response.

12) Do you have any other comment that we should take into account for the purposes of this Discussion paper?

Please see our introductory comments.

We would be delighted to continue the debate on this topic further with you.

Yours faithfully
Mary Mullally
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