

COMMENT LETTER

April 25, 2002

Letter on Possible Changes to European Securities Ownership Reporting Rules, April 2002

April 25, 2002

Juergen Tiedje
DG Internal Market,
Unit F.2 – Securities and Organized Markets
European Commission
200, rue de la Loi
B – 1047 Brussels
Belgium

Dear Mr. Tiedje:

We understand that the European Commission is currently working on the second round of consultations for updating the Regular Reporting Directive and, as part of the consultation, is considering whether to change the threshold level for reporting significant ownership of securities from the current level of ten percent. The Investment Company Institute would respectfully like to share its views and the experiences of our members with respect to requirements for reporting significant ownership of securities in the hope that they may be of assistance to the Commission as it considers suggestions for lowering the threshold.

The Investment Company Institute is the national association of the US investment company industry.^{[1](#)} We represent our members and their shareholders in matters of legislation, regulation, taxation, public information, economic and policy research, business operations and statistics. Our members are active in Europe both by investing in European issuers for their US mutual funds and by establishing investment funds in Europe, many of which also invest in European securities.

In general, we would urge the Commission to seek to assure that any changes to its rules for reporting securities ownership do not impose unnecessary burdens on institutional investors, such as mutual funds and pension funds and their investment managers, that do not invest for control purposes. As worldwide mutual fund assets have grown significantly from \$2 trillion in 1990 to over \$12 trillion at the end of 2000, and worldwide pension assets are estimated to stand at over \$13 trillion, it is not uncommon for institutional managers to make investments for their clients that cross securities reporting thresholds. Securities ownership reporting rules should be drafted to balance the need for the market

to learn promptly of the accumulation of securities by those who may seek to influence control over an issuer with the goal of not imposing unnecessary burdens on institutional investors who have no such control purpose.

Threshold Level for Reporting Securities Ownership

The Institute appreciates the important policies that underlie requirements to disclose significant ownership of issuers. The reporting obligation provides both issuers and the market with information about accumulation of interest by investors in a particular issuer. As stated above, however, such benefits must be weighed against the burdens imposed on investors subject to the reporting obligations. This is especially important in regard to establishing the threshold level for reporting. A threshold level that is too low can make reports meaningless or uninformative by requiring many routine filings from numerous investors. It also can impose significant obligations on investors.[2](#)

If the Commission determines to lower the threshold from the current ten percent threshold, we would recommend a five percent threshold provided that the Commission also tailors the reporting rules for institutional investors as described below. Five percent is the threshold used by the largest number of jurisdictions for securities ownership reporting.[3](#)

Streamlined Rules for Institutional Investors

In order to avoid imposing unnecessary burdens on passive institutional investors, the Commission should tailor the reporting rules for institutional investors. This could be done by using a higher reporting threshold for filings by investment managers, as is done in the United Kingdom for UK and EU based investment managers. These managers file under a ten percent threshold, rather than the three percent threshold applicable to other filers.[4](#) Under this approach, if the Commission were to lower the EU filing threshold to five percent, for example, it could consider retaining the ten percent threshold for investment managers that do not invest for change of control purposes. Another option would be to reduce the frequency with which passive institutional investors must report holdings over the threshold amount, as is done in the United States.[5](#) Under this approach, for example, the Commission could propose to amend the Regular Reporting Directive to permit passive institutional investors to disclose securities holdings over the threshold on an annual basis.

Aggregation Policy

In order to avoid imposing unnecessary costs on institutional investors, the Commission also should review the issue of aggregation for purposes of determining whether an investor has crossed the threshold level for reporting securities ownership. A policy that requires holdings of affiliated entities to be aggregated for purposes of reporting securities ownership can be burdensome for global institutional investors that make investments worldwide.

Member states of the European Union take different approaches regarding positions held by related asset managers for purposes of determining whether an asset manager has crossed the relevant threshold for reporting securities ownership. For example, in the United Kingdom, we understand that positions held by asset managers that are under common control must be aggregated for purposes of determining whether an asset manager has crossed the reporting threshold. The requirement to aggregate is irrespective of whether

the affiliated asset managers are structured and operated so that voting and investment powers over the securities positions are exercised independently.[6](#)

We would submit that, in situations in which voting and investment decisions about particular securities are not made pursuant to any explicit or implicit agreement, but rather are made independently, there appears to be no reason why the holdings of affiliated asset managers must be aggregated for purposes of reporting. Aggregation in these circumstances does not provide the market or the issuer with useful information about buying activities or patterns of a particular investor. It does, however, impose significant burdens on certain institutional investors.

For example, with the globalization of financial institutions, two completely separate affiliates from different parts of the world purchasing securities for their investment funds or other clients without consultation with each other would be required to aggregate their holdings for reporting purposes. Institutional investors, therefore, must establish global compliance programs to monitor constantly holdings by their affiliates around the world.

Given that asset managers typically are passive investors and do not invest for control purposes, the excessive burden imposed by such an aggregation policy does not appear to be justified. Moreover, with the increasing trend towards greater consolidation of financial institutions, more fund managers likely will be under a holding company structure and the burdens imposed by this type of aggregation policy will become more common place.[7](#) In addition, the burdens imposed by such an aggregation policy would be compounded if the Commission determines to lower the threshold level for reporting securities ownership. Accordingly, the Commission should consider incorporating in the Regular Reporting Directive a reasonable rule with respect to aggregation that does not require aggregation if affiliates exercise voting rights and investment decisions independently. [8](#)

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We request that the Commission carefully weigh the benefits and costs of lowering the threshold level for reporting securities ownership. If the Commission determines to lower the threshold, it should include provisions to streamline filing burdens for institutional investors that have no control purpose. In addition, the Commission should consider establishing aggregation rules that would not require affiliates to aggregate holdings if the affiliates exercise voting rights and investment decisions independently. [9](#)

If you would like to discuss these issues further or have any questions, please contact me at (202) 326-5826 or at podesta@ici.org.

Sincerely,

Mary S. Podesta
Senior Counsel

ENDNOTES

[1](#) The Institute's membership includes 9,039 open-end investment companies (mutual funds), 486 closed-end investment companies and 6 sponsors of unit investment trusts. Its mutual fund members have assets of about \$6.951trillion, accounting for approximately 95 percent of total industry assets, and over 88.6 million individual shareholders.

[2](#) For example, in the United Kingdom the threshold level for reporting is only three percent

for non-EU managers. The three percent threshold in the UK is one of the lowest in the world. One of our members, in a one-year period, made approximately 1700 disclosure notifications in the UK. This same investor made, over the same period of time, approximately 700 notifications to all other non-US regulatory authorities combined.

[3](#) The Institute's Foreign Investing Guide, which includes information on the securities ownership reporting requirements in 52 jurisdictions outside of the US, indicates that 29 countries currently use the five percent threshold. The US also uses the five percent threshold. In addition to the EU, 17 jurisdictions use the ten percent threshold.

[4](#) The Institute has requested that the UK make the ten percent threshold available to non-EU investment managers as well. The Institute's request currently is being considered by the UK Department of Trade and Industry.

[5](#) In the US, qualified institutional investors and other passive investors may use streamlined procedures that reduce the frequency of filings and a short form for making filings.

[6](#) In most European countries, the issue of aggregation by investment managers is not addressed directly but rather is addressed indirectly through definitions of control. In Finland, a person who has control over an entity that is a shareholder is considered a shareholder for purposes of the reporting requirements. Germany and Spain also appear to require aggregation of shares held by controlled affiliates. In Italy, however, a company controlling several management companies does not aggregate the shares for which the controlled companies hold or have the authority to direct voting rights to determine its disclosure obligation. Italian law does, however, require a mutual fund company to aggregate the shareholdings of all the funds over which it exercises discretionary control.

[7](#) For example, financial services reform legislation enacted in 1999 in the US removed impediments to the creation of financial services holding companies that combine banking, securities, insurance and other financial services activities. In addition, the burdens associated with a requirement to aggregate all securities positions also can be expected to have a significant impact on European asset management institutions that increasingly are operating on a global basis. Foreign firms, and in particular European firms, have made significant acquisitions of US money management companies in recent years. We estimate that, as of March 26, 2002, \$981 billion, or 14.2 percent, of total US mutual fund assets were managed by foreign investment management companies or their affiliates.

[8](#) The Commission also might want to consider the feasibility of developing a uniform form that could be used throughout the European Union for filing securities ownership reports. The use of a standard form would be of significant benefit to institutional investors in administering their securities ownership reporting compliance programs.

[9](#) In the US, the federal securities laws contain exceptions with respect to aggregation that reduce unnecessary burdens on professional managers that are subject to securities ownership filing requirements. Regulation 13D-G under the Exchange Act provides that when related money managers independently exercise voting and investment powers, the positions of the individual managers need not be reported together for purposes of disclosure under Regulation 13D-G.

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