

COMMENT LETTER

May 11, 2005

ICI Comments on IOSCO Fund Governance Report, May 2005

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Mr. Philippe Richard
IOSCO Secretary General
Oquendo 12
28006 Madrid
Spain

Dear Mr. Richard:

On behalf of the Investment Company Institute,¹ we appreciate the opportunity to support IOSCO's consultation paper on "Examination of Governance for Collective Investment Schemes." We strongly agree that a common objective for regulators should be to develop a governance framework that "seeks to ensure that CIS are organized and operated efficiently and exclusively in the interests of CIS investors, and not in the interest of CIS insiders." The concept IOSCO sets forth of requiring independent review of those who operate collective investment schemes (funds) is an appropriate means to accomplish this objective. We have concerns, however, whether IOSCO should consider affiliates of a fund operator to be independent for these purposes.

The consultation document observes that all jurisdictions impose on fund operators an overriding obligation to act in the best interests of investors. To help assure that fund operators meet their obligations, IOSCO has proposed a set of standards based on the principle that fund governance should provide for the independent review of the actions of the operator in managing CIS assets. IOSCO states that the objective of the independent review is to provide an "outside perspective" to protect investors and describes the types of private entities (collectively to be known as "Independent Entities") that can have this role in various jurisdictions. IOSCO further states that the Independent Entity should have sufficient powers to exercise its functions and, in principle, should not be permitted to delegate its responsibilities. We believe a fund governance framework based on independent review is an appropriate way to seek to assure that funds are organized and operated in the interest of their investors.

We question, however, the notion that trustees and depositaries affiliated with the fund operator (for example, entities that control, are controlled by, or are under common control with the fund operator) can be considered Independent Entities for purposes of an independent review requirement. Although the consultation document states that reviewing

entities “desirably” should be legally and economically independent from the fund operator, IOSCO nevertheless intends that affiliates can fulfill this role. The report notes in this regard that some jurisdictions that permit an affiliated depository to oversee the fund operator impose additional conditions, e.g. making the affiliated depository jointly responsible for possible misconduct or fraud by the fund operator. In our view, imposing additional obligations on an affiliate does not turn an affiliate into an independent entity. As a member of the same corporate group as the fund operator, an affiliated depository or trustee has an economic interest in the success of the corporate enterprise that could impair its ability to provide independent oversight of the fund operator.

In support of our position, we note that the consultation document states that governance standards for CIS should be developed from the concepts of governance that have been broadly developed for corporate issuers, taking into account differences in the nature and purposes of CIS and those issuers. The concept of “independence” has an agreed meaning in corporate governance that cannot be stretched to include affiliates of an insider. For example, we do not believe that a company could assert that an executive of its affiliate that serves on the company’s board should be considered an “independent director” under a listing rule that requires that independent directors comprise a certain percentage of the company’s board.

In the consultation document, IOSCO notes that the way in which jurisdictions seek to address potential conflicts of interest in the operation of funds reflects differences in law, policy, and business structures. We agree that it is appropriate for each jurisdiction to determine the standards that will apply to funds sold to the jurisdiction’s investors. Accordingly, we believe IOSCO should acknowledge that the fund governance framework in some jurisdictions does not require a review mechanism by persons independent of the fund operator.

We express no opinion whether, or under what conditions, a system that relies upon affiliates to oversee fund operators achieves regulators’ objectives of protecting fund investors. Rather, we respectfully suggest that it would be a mistake for IOSCO to take the position that affiliated trustees and depositories should be considered independent reviewers.

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We appreciate the opportunity to comment on the IOSCO paper on CIS governance. If we can provide any other information or if you would like to discuss further any issues, please contact me at (202) 326-5826 or at podesta@ici.org or Jennifer S. Choi at (202) 326-5810 or jchoi@ici.org.

Sincerely,

Mary S. Podesta
Senior Counsel

ENDNOTES

¹The membership of the Investment Company Institute includes 8,512 open-end investment companies (“mutual funds”), 650 closed-end investment companies, 143 exchange-traded funds, and 5 sponsors of unit investment trusts. Our mutual fund members have assets in excess of \$7.9 trillion, accounting for approximately 95 percent of

total industry assets. Individual owners represented by ICI member firms number 87.7 million as of May 1, 2005, representing 51.2 million households.

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