

COMMENT LETTER

July 28, 2004

ICI Comment Letter on Measures to Implement Transparency Directive Across the EU (pdf)

July 28, 2004 Via E-mail and International Airmail Mr. Fabrice Demarigny Secretary General
The Committee of European Securities Regulators 11-13 avenue de Friedland Paris 75008
France Dear Mr. Demarigny: The Investment Company Institute¹ appreciates the opportunity to comment on the Call for Evidence on the Mandate for Technical Advice on Possible Implementing Measures Concerning the Transparency Directive by the Committee of European Securities Regulators (CESR). We have been closely following this legislation since 2002, and we are pleased that agreement has been reached on the Directive. We agree that CESR should provide technical advice on possible Level 2 implementing measures so that the Directive could be implemented consistently and uniformly across the European Union. As a preliminary matter, the Commission's mandate notes that CESR is required to "consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner." We hope that CESR will take advantage of the consultative process to exchange ideas and discuss possible approaches to issues as CESR develops its technical advice to the Commission. In this regard, we offer any assistance that CESR and its Expert Group may need during this process. Please find below our comments on the specific items for which the Commission seeks CESR's technical advice.

Information about Major Holdings 1. Standard Form for Disclosure of Major Holdings The Commission requests CESR's technical advice on the standard form to be used by an investor throughout the European Union when notifying the required information to the 1 The Institute is the national association of the US investment company industry. Our membership includes 8,643 open-end investment companies ("mutual funds"), 629 closed-end investment companies, 126 exchange-traded funds, and 5 sponsors of unit investment trusts. Our mutual fund members have assets in excess of \$7.4 trillion, accounting for approximately 95% of total industry assets. Individual owners represented by ICI member firms number 86.6 million as of mid 2003, representing 50.6 million households. Many of our members also manage assets in Europe, including UCITS and pension funds, and our comments reflect their experiences in Europe.

Letter to Mr. Fabrice Demarigny July 28, 2004 Page 2 of 5 issuer. We fully support the creation of a standard form for filing securities ownership reports in the EU. The ability to use a standard form would greatly benefit shareholders investing on a pan-European basis. The form should be designed to include and standardize the disclosure requirements imposed by the Transparency Directive. To the extent that Member States may require additional information, there should be a separate part of the standard form where this information could be provided. We believe CESR should recommend that the standard form be used in

all jurisdictions without alteration and that national regulators should not be permitted merely to use the form as a basis for their own forms. For investors that invest in several EU Member States, it is important to have one uniform form that can be used throughout the European Union. We suggest that CESR recommend that the Commission adopt the standard form through a regulation rather than a directive to ensure complete uniformity of the form.²

2. Trading Days The Commission's mandate requests CESR's advice in determining a calendar of trading days for all Member States for notification purposes. The Commission, however, states that it does not consider it necessary to define a uniform calendar of trading days throughout the European Union but that CESR should provide advice on the trading days of which Member State should be relevant. We assume that the Commission is seeking a European-wide calendar of trading days for the sole purpose of major holding notifications. As you know, Member States have different legal holidays, and trading days therefore can vary in the Member States. We believe a European-wide calendar would be helpful for investors that invest in more than one Member State to ensure compliance with the notification requirements.

3. Persons to Make Notifications The Commission seeks technical advice from CESR in clarifying which person (the shareholder or the natural person or legal entity referred to in Article 10 or both) should make the notification. We believe that, where the notification requirements apply to management companies or investment firms because they exercise voting rights on behalf of their clients, only the management companies or investment firms should be required to make the notifications, not the clients (shareholders) on whose behalf managers exercise voting rights. Requiring both managers and their clients to make notifications of major holdings would be burdensome and provide confusing information to the marketplace. For example, if both the managers and their clients are required to make filings, these filings may provide a misimpression to the issuer that the holdings of the managers and their clients separately have each reached the threshold level. The purpose of a requirement for disclosure of major holdings is to inform issuers and the market of the accumulation of a significant position in a security. We believe the entity that has the discretion to exercise the voting rights should have the obligation to make the notification to issuers and that issuers would be interested in being notified by the entity that had the discretion to exercise the voting rights.

4. Circumstances under which Shareholders Learn of Acquisition or Disposal of Shares The Commission requests advice to clarify the circumstances under which the shareholder or the natural person or legal entity referred to in Article 10 should have learned of the acquisition or disposal of shares to which voting rights are attached. The purpose of this requirement seems to be to assure that investors make the efforts needed to determine that a position requiring disclosure has been reached. In providing advice to the Commission on this matter, CESR should be mindful that global investors that purchase EU securities may use complex systems for tracking purchases of securities worldwide. As a result, there may be a short delay in a purchase or sale of securities being reflected in the system of a global firm that would alert the firm to a notification obligation. We recommend that CESR advise the Commission that the circumstances under which shareholders should have learned of the acquisition or disposal of shares should be no earlier than a trading day after the trade date of the transaction that triggers the reporting obligation.³

5. Clarification of the Conditions of Independence for Management Companies and Investment Firms and their Parents The Commission seeks technical advice to clarify the conditions of independence to be complied with by management companies or by investment firms and

their parents to benefit from the exemptions in Articles 11.3a and 11.3b (disaggregation provisions). Specifically, the Commission invites CESR to consider the level of independency and the conditions that management companies/investment firms and their parents should comply with to benefit from the exemption of not being required to aggregate at the level of the parents. We believe that CESR should focus on the degree of independence that the management companies/investment firms have from their parents with respect to exercising voting rights of their portfolio companies. We are of the view that the exemption should not be conditioned on independence of the subsidiaries generally because the Directive does not base the exemption on independence on all matters but on the exercise of voting rights. In this regard, CESR could consider whether management companies/investment firms have policies and procedures to ensure independence in exercising voting rights and whether there are oversight mechanisms in place that are designed to ensure compliance with those policies and procedures. In determining independence for this purpose, we do not believe it would be appropriate to consider the ownership structure of the affiliates or the ability of parent companies to influence the general management of their subsidiaries but only whether parent companies can influence the exercise of voting rights. 3 Under Article 11, a shareholder would be required to report to the issuer no later than four trading days, the first of which would be the day after the date on which the shareholder should have learned of the acquisition or disposal of shares. Letter to Mr. Fabrice Demarigny July 28, 2004 Page 4 of 5 The Commission also requests CESR's technical advice on a list of third countries that ensure the equivalence of the independence requirements laid down in the Directive in relation to management companies or investment firms (Article 19.3c). We recommend that CESR determine that the US ensures the equivalence of the independence requirements. In the mandate, the Commission invites CESR to focus its assessment at this stage on those third countries it considers being the most relevant from the point of view of European capital markets. Because US management companies and investment firms are significant investors of EU securities, we believe the US should be one of the first third countries considered by CESR. The US has a similar regime for reporting securities ownership, and the Securities and Exchange Commission in 1998 provided guidance allowing affiliated companies, including management companies, not to aggregate holdings of affiliates if certain information barriers are maintained. We would be happy to provide CESR with more detailed information about the procedures required in the US. Although we expect that CESR may draft its advice on independence by analyzing European precedents on these matters, we believe there may be other effective ways to assure the level of independence required by the Directive. The US rule is effective in assuring independence and thus we believe it clearly supports a determination by CESR that the US rule assures equivalent independence with respect to a US management company/investment firm seeking to take advantage of the disaggregation provisions of the Directive. 6. Financial Instruments under Article 11a.1 The Commission seeks CESR's technical advice about the types of financial instruments that entitle holders to acquire shares with voting rights and the aggregation of these financial instruments for disclosure purposes. We fully support the development of a EU-wide standard of the types of financial instruments that entitle the holder to acquire voting shares for shareholding disclosure purposes. A EU-wide standard would facilitate compliance for those shareholders that invest in more than one Member State. In addition, we understand that the exemption provided for management companies and investment firms in Articles 11.3a, 11.3b, 19.3b, and 19.3c was intended to apply to these types of financial instruments as well as to the underlying shares. We hope that CESR will confirm this understanding. We believe that there is no reason to distinguish between holdings of these financial instruments, including options, from holdings of the underlying shares where the management companies/investment firms are exercising voting rights independently

from their parents. Electronic Network of Information about Issuers The Commission has invited CESR through a separate letter to present a progress report on a possible European-wide electronic network of information about security issuers. We fully support the creation of a network containing standardized information about EU issuers. We hope that such an electronic network will be easily accessible to all investors, both within the EU and outside the EU. We also would encourage that information about how shareholders could exercise their voting rights be included as standard information of issuers in this system. * * * * *

Letter to Mr. Fabrice Demarigny July 28, 2004 Page 5 of 5 We appreciate the opportunity to provide comments on CESR's mandate from the Commission on the Transparency Directive. If we can provide any other information or if you would like to discuss further any issues, please contact me at podesta@ici.org or at (202) 326- 5826 or Jennifer Choi at jchoi@ici.org or at (202) 326-5810. Sincerely, Mary S. Podesta Senior Counsel

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