

## COMMENT LETTER

June 6, 2008

# Institute's Second Letter to Securities and Exchange Board of India - Margining of Institutional Trades (pdf)

June 6, 2008 Via Federal Express and Electronic Mail Shri C.B. Bhavé Chairman, Securities and Exchange Board of India SEBI Bhavan Plot No. C4-A, G-Block Bandra Kurla Complex, Bandra (East) Mumbai 400 051 chairman@sebi.gov.in Dear Mr. Bhavé, The Investment Company Institute (ICI) strongly supports the decision of the Securities and Exchange Board of India (SEBI) to not proceed with the upfront margining (or early pay-in) of institutional trades on a T+0 basis until further notice. 2 The ICI, however, still wishes to explain the issues and challenges that a T+0 regime for upfront margins would present for US registered investment companies (US Funds) if SEBI reconsiders the implementation of a T+0 requirement. Many ICI members hold foreign institutional investor (FII) licenses and are significant investors in the Indian market.3 A T+0 requirement would raise substantial issues for US Funds and would have a highly detrimental impact on the trading activities of US Funds in the Indian market. Some US Funds may cease trading in the India market. As of December 31, 2008, we estimate that US Funds held, in the aggregate, approximately \$36 billion of Indian securities in more than 400 different Indian issuers. Since April 21st, institutional investors, including US Funds, have been required to post margin, or make a pay-in, on T+1 for trades on the Indian market. The ICI expressed concerns regarding the impact of this requirement on US Funds.4 While US Funds are currently operating under the T+1

1 The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$12.66 trillion and serve almost 90 million shareholders. 2 See Securities and Exchange Board of India Circular no. MRD/DoP/SE/Cir-18/2008 (May 22, 2008) and Circular no. MRD/DoP/SE/CIR-06/2008 (March 19, 2008). 3 Importantly, US Funds should be viewed as a stable source of investment capital. See Investment Company Institute Perspective, Volume 2, Number 6, US Emerging Market Funds: Hot Money or Stable Source of Investment Capital? (December 1996) available at <http://www.ici.org/perspective/per02-06.pdf>. 4 The ICI submitted a letter to SEBI, dated April 14, 2008, discussing the ICI's concerns regarding the Circular's T+1 margin requirement for institutional trades beginning on April 21, 2008, available at Shri C.B. Bhavé Chairman, Securities and Exchange Board of India June 6, 2008

Page 2 of 9 requirement, the new requirement has impacted their investment activity and operations. The requirement was announced in March requiring US Funds to quickly evaluate and prepare for the T+1 environment. The substantial time zone difference

between India and the United States presents special circumstances for US Funds. The new requirement has shortened the period by which a US Fund can reconcile its trading activity, correct trade confirmation errors, provide instructions to custodians and ensure adequate USD are converted, and INR is available, for settlement. Settlement risk also has changed for US Funds with the early pay-in on T+1. A T+0 regime would present greater challenges for US Funds and, in some cases, US Funds may consider the challenges and risks too significant to continue to invest in the capital markets of India. In April, US Funds began to actively evaluate the implications of a T+0 requirement and remain uncertain as to the feasibility of a US Fund successfully trading in a T+0 environment. It is believed that such a requirement would likely limit, and possibly force some US Funds to discontinue, trading activity in India. We have identified the following key concerns for US Funds if SEBI implemented a T+0 requirement for payment of margin or an early pay-in. Each is described in more detail below.

- **Challenges and Issues with Currency Conversion or an INR Balance:** To enable a US Fund to meet a T+0 payment, the US Fund must convert USD on T+0 or have an INR balance sufficient to cover the payment. US Funds, however, are not generally able to convert USD into INR on a same-day basis and INR balances present regulatory and practical problems for US Funds.
- **Detrimental Impact on Portfolio Management:** To comply with a T+0 requirement, US Funds would be effectively forced to maintain INR balances, meaning increased currency risk and the commitment of additional assets to fund the balances. Further, US Funds, like other FIIs, may not earn interest on those balances resulting in additional costs as assets must remain in an account with no interest.
- **Increased Operational Risks:** To meet US legal standards, US Funds follow strict trade validation processes, including procedures to confirm the correct execution of a trade before a sub-custodian is directed to release funds. A T+0 requirement compromises [http://www.ici.org/statements/cmltr/08\\_india\\_margin\\_com.html#TopOfPage](http://www.ici.org/statements/cmltr/08_india_margin_com.html#TopOfPage). SEBI later issued guidance to the Indian exchanges permitting an early pay-in in lieu of a margin payment. See MRD/DoP/SE/Cir-10/2008 (April 17, 2008) available at <http://www.sebi.gov.in/Index.jsp?contentDisp=WhatsNewScroll&FilePath=/circulars/2008/MRDCir102008.html>. Shri C.B. Bhavare Chairman, Securities and Exchange Board of India June 6, 2008 Page 3 of 9 this important process and means custodians would need to act only on a broker's trade instructions without validation by the US Fund. It is unclear if US Funds or custodians would be willing to enter into such an arrangement. The T+0 requirement also alters the settlement cycle increasing a US Fund's risk exposure in this cycle.
- **Legal Restrictions on Borrowing by US Funds:** Arrangements permitting third-party payments on behalf of a US Fund, such as by brokers, present possible regulatory issues under both US and Indian law. Indian regulations prohibit the extension of credit to FIIs and US law strictly limits the ability of US Funds to enter into lending arrangements. Attached as an Appendix is a timeline illustrating the process currently undertaken by US Funds to effect a purchase or sale transaction in the Indian market in compliance with the T+1 requirement.<sup>5</sup> The timeline demonstrates why a T+0 regime is problematic for US Funds.

**Challenges and Issues With Currency Conversion or an INR Balance** For a T+0 payment, a US Fund must convert USD into INR on T+0 or have a sufficient INR balance to cover a payment. As described below, US Funds generally are unable to convert USD on a T+0 basis and foreign exchange regulations also impact the maintenance of an INR balance by US Funds. As more fully described later, an INR balance would also have negative implications for portfolio management.

**Market and Operational Challenges of Converting USD into INR on T+0** The Indian foreign exchange market is open from 9:00 a.m. to 4:30 p.m.; however, we understand the ability to execute a foreign exchange transaction for same-day value generally ceases to be available after 11:30 a.m. due to the liquidity of INR. US Funds, therefore, have a limited opportunity to act in this market. Under a T+0 requirement, a US Fund would be required to present conversion instructions to its local sub-custodian (who

generally executes the foreign exchange transactions) shortly after the opening of the foreign exchange market. Such a scenario is generally not feasible for two reasons. First, a US Fund's trading activity may not be completed until the close of the market - 3:30 p.m. for the National Stock Exchange or 4:30 p.m. for the Bombay Stock Exchange (i.e., 5 The timeline is based on trading instructions originating from New York. Certain US Funds may have investment advisory personnel, operations or settlement departments, or global custodians located in time zones different than that of New York (EST) or procedures that differ slightly from those described in the Appendix. These US Funds are, however, nevertheless subject to the same currency considerations, operational issues and time zone constraints that are indicated in the Appendix and described in this letter. Shri C.B. Bhav Chairman, Securities and Exchange Board of India June 6, 2008 Page 4 of 9 when the US Fund could no longer convert USD into INR).<sup>6</sup> Second, even in the exceptional case where a trade was executed in time to convert USD into INR, it would be extremely difficult for the US Fund to instruct the local sub-custodian to engage in the foreign exchange transaction prior to 11:30 a.m., given time zone differences and the trade validation process of US Funds (discussed in more detail below).<sup>7</sup>

### Legal and Operational Challenges with Maintaining an INR Balance

Because it is generally not feasible for US Funds to convert USD on T+0, US Funds would be required to maintain a surplus balance of INR for a T+0 payment.<sup>8</sup> Maintaining such a balance is not a desirable option for US Funds and imposes costs and risks not imposed on domestic investors and not present in other markets.

### Indian Foreign Exchange Regulations

We understand that Indian regulations generally require a foreign exchange transaction to be executed for an approved purpose, appropriately documented and reported to the Reserve Bank of India on a periodic basis. US Funds typically engage in foreign exchange transactions to settle a specific trade. Nevertheless, we understand that a foreign exchange transaction can be made without reference to a specific transaction and instead can simply be identified as for the settlement of securities transactions. If executed under these circumstances, we understand that the INR acquired for general securities settlement must remain in an account until the INR is utilized for securities settlement and cannot be converted back into USD absent the securities transaction. This means that a US Fund's portfolio manager would need to focus on carefully managing the conversion of USD into INR. The US Fund, unlike domestic investors, would be subject to increased risks, such as currency risk with respect to those funds, and may forego potential investment opportunities outside of the Indian market as the US Fund would be forced to maintain the balance and to use it solely for investment in India. In addition, we understand that FIIs are discouraged from speculating in INR and therefore maintaining

<sup>6</sup> We also understand that many local brokers generally do not send a report of the day's trading activity to the US Fund until the close of the Indian market. Therefore, even if a trade is executed in the morning, the US Fund is not likely to receive a confirmation until the end of the day.

<sup>7</sup> The possibility of a US Fund estimating an early pay-in on T-0 so that USD could be converted on T+0 raises several issues and imposes heightened and disproportionate risks and burdens on a US Fund. First, if there is no trade, the US Fund needlessly bears the cost and risk of the foreign exchange transaction. Second, if the trade is executed on different terms than expected, the US Fund may have a surplus or shortfall of INR. In addition, by executing a foreign exchange transaction before an order, a US Fund risks signaling a potential trade to the market, possibly impacting the price and availability of the security, particularly if there is limited liquidity.

<sup>8</sup> Currently, many US Funds typically purchase only the amount of INR necessary to settle an executed trade. Shri C.B. Bhav Chairman, Securities and Exchange Board of India June 6, 2008 Page 5 of 9

substantial INR balances with limited or infrequent investment activity could unnecessarily subject US Funds to increased scrutiny and questions from Indian authorities.

### Increased Complexity for Tax Certifications for Repatriation

Under Indian regulations, US Funds must obtain a certification that all

applicable taxes have been paid prior to repatriating funds.<sup>9</sup> If a US Fund maintains an INR balance for T+0 payments, the tax certification process is likely to be more complex and therefore more costly. As described above, US Funds would likely to maintain INR balances if required to make T+0 payments. One source for funding such balances could be proceeds from sales of Indian securities which would be used in lieu of converting and repatriating those proceeds. A US Fund also could retain INR dividends received from Indian investments. While such a strategy would help US Funds build an INR balance, US Funds not repatriating sales proceeds and dividends would be forced to maintain comprehensive records and face increased complexity to ensure accurate tax certifications. Since INR in a US Fund's account could be used in multiple transactions over a long period of time, a US Fund and its accountant would need to be able to track and reconcile the activity to determine taxes that must be paid.<sup>10</sup> US Funds and their local accountants would have to devote time and resources to this work, increasing accounting and compliance costs and contributing to an increased risk of errors.

**Detrimental Impact on Portfolio Management** As briefly described above, if there was a T+0 requirement and US Funds maintained INR balances, the portfolio management of US Funds would be negatively impacted, increasing both risks and costs for US Funds. Since operating in a T+0 environment would be a largely unique circumstance for US Fund managers, portfolio managers would need to assess the additional risks and costs of the Indian securities market versus other markets. Some portfolio managers may limit or refrain from investing in Indian securities. Others wanting or needing to remain in the Indian market, such as US Funds with a focus on India, would likely face increased costs impacting the performance of their funds and their competitive status in the US Fund market.<sup>11</sup> Some also may seek alternative

<sup>9</sup> US Funds typically employ local accountants to determine the taxes that are due and to complete the necessary certifications. <sup>10</sup> We understand that currently most US Funds do not maintain INR balances and repatriate funds shortly after settlement, in part, due to the complexity of calculating taxes if funds are not immediately repatriated. <sup>11</sup> US Funds operate in a highly competitive market and US Fund shareholders demand investment performance and services at a competitive level of fees and expenses. US Fund shareholders are heavily invested in lower cost funds with above average long-term performance. See ICI Research Commentary, Competition in the Mutual Fund Business (January 2006) available at [http://www.ici.org/stats/res/2rc\\_competition.pdf](http://www.ici.org/stats/res/2rc_competition.pdf). Shri C.B. Bhavé Chairman, Securities and Exchange Board of India June 6, 2008 Page 6 of 9 means to gain exposure to the Indian market, such as through derivative instruments, like depositary receipts, or derivative transactions executed in other jurisdictions. Since US Funds electing to continue to purchase Indian securities would face a practical need to maintain an INR balance for T+0 payments, assets of those funds would effectively be diverted from other investments and the need for a balance also would impact trading activity. Many US Funds investing globally typically maintain cash in USD to provide maximum flexibility while reducing foreign currency risk. An excess balance of INR would increase a US Fund's foreign currency risk. US Fund managers also would need to carefully consider the size of their INR balance as they manage their fund assets. Managers would need to oversee the INR balance to ensure adequate INR resources, neither too high nor too low. Insufficient balances would limit trading, possibly leading to missed opportunities, delays, fragmented trading and possibly higher prices. The existence of Indian foreign investment limitations heightens the potential impact of delayed trading as a US Fund with an open order, but an insufficient INR balance, could completely miss an investment opportunity if the foreign investment limit is reached before sufficient INR is available.<sup>12</sup> Insufficient INR also increases the risk that a US Fund would be unable to meet its margin (or early pay-in) requirement, which would then revert to the executing broker, and the US Fund would thus be unable to meet the requirement to settle trades through the clearinghouse process.<sup>13</sup> An INR balance that is too large (or

underused) would limit a US Fund's ability to make other investments. In addition, the maintenance of large INR balances would not be in the interest of a US Fund as US Funds, like all FIIs, cannot earn interest credit on an INR balance. By not receiving credit on balances, US Funds effectively face higher costs to trade in the Indian market as non-income producing resources (other than gain or loss associated with currency fluctuations) would need to be committed to trade in an Indian market with a T+0 requirement. These costs would certainly impact whether, and to what extent, US Funds invest in Indian securities. 12 The Reserve Bank of India recently prohibited trading by FIIs in shares of two Indian banks since the overall FII holdings in those banks was over the foreign ownership limit. See RBI circular FE.CO.FID/ 28861/11.01.091/2007-08, June 5, 2008. 13 See SEBI Circular MRD/DoP/SE/Cir- 17/2005 of September 2, 2005 available at <http://web.sebi.gov.in/circulars/2005/mrdcir0172005.html>. We understand that there are monetary penalties for trades that fall outside of the clearing house process as well as regulatory scrutiny and action against repeat offenders. Shri C.B. Bhavne Chairman, Securities and Exchange Board of India June 6, 2008 Page 7 of 9 Increased Operational Risks US regulation requires US Funds to adopt and implement written policies and procedures reasonably designed to prevent violation of the US securities laws.14 In addition, a US Fund's investment adviser owes a fiduciary duty to the fund, which requires the investment adviser to act in utmost good faith with respect to the fund.15 As a result, US Funds generally maintain strict trade validation procedures designed to identify trading errors and ensure only valid trades are settled. A T+0 requirement severely limits the window of opportunity for US Funds to promptly correct trading errors, increasing the risk of erroneous trades. In addition, while a US Fund would be required to make a payment on T+0 (or deliver securities for sale), the US Fund would not receive securities or proceeds from a sale any earlier, thereby increasing the exposure of the US Fund to settlement risks.16 Under current practices, a US Fund typically receives trade confirmations from local Indian brokers after the close of trading on T+0. After receipt of the confirmations, the US Fund confirms the details of each trade and transmits instructions to its global custodian. The global custodian validates that the trade is authenticated and transmits settlement instructions to the local sub-custodian, who is then authorized to proceed with the transaction.17 Early pay-in or the margin payment is made on T+1 and securities or sale proceeds are typically received on T+2. As illustrated in the Appendix, if SEBI implemented a T+0 rule, a US Fund's local sub-custodian would have to make a payment based solely on a broker's execution instructions. It is unclear if US Funds or custodians would be willing to enter into such an arrangement. In addition, this arrangement would raise substantial concerns as erroneous trades could be executed and US Fund assets committed or delivered in error. These circumstances would introduce new and serious risks for US Funds. The process for unwinding erroneous transactions would likely be complex and costly. There is, therefore, significant concern among US Funds about a T+0 payment without specific instructions from the US Fund. The change in settlement risk, i.e., US Funds making payments on T+0 and 14 See United States Investment Company Act of 1940, Rule 38a-1. 15 See S.E.C. v. Capital Gains Research Bureau, 375 U.S. 180 (1963). 16 In fact the US Securities and Exchange Commission has explicitly recognized that a country's settlement systems and practices can have a significant effect on the liquidity and investment characteristics of a fund's assets. See Investment Company Act Rel. 22658, Custody of Investment company Assets Outside the United States (May 12, 1997). 17 As indicated in the Appendix, it is 6 a.m. in New York when trading ceases on the National Stock Exchange and 7 a.m. when trading ceases on the Bombay Stock Exchange. Due to the difference in time, operations of US Funds and global custodians in the US typically are not operating at the time the Indian market is open. It is our understanding that, even if the personnel of a US Fund and its global custodian operated 24-hours a day, it would likely still not be

possible for a trade to be confirmed in accordance with current trade validation procedures prior to or shortly after the close of the Indian market. Shri C.B. Bhavé Chairman, Securities and Exchange Board of India June 6, 2008 Page 8 of 9 receiving settlements on T+2, also will require additional consideration by US Funds when investing in the Indian market. For these reasons, a T+0 requirement would raise substantial new operational risks and challenges for US Funds that many US Funds may determine are too high or costly to justify continued participation in the Indian market. Legal Restrictions on Borrowing by US Funds

If, under a T+0 regime, third parties, such as an executing broker, post payment on behalf of an institutional investor, this would raise concerns for US Funds under Indian and US law.<sup>18</sup> We understand that Indian regulations may prohibit certain entities from extending credit to FII and that FIIs also may be prohibited from receiving credit. Absent guidance or clarification regarding the legality of an extension of credit to an FII for a T+0 payment, US Funds would be reluctant to enter into lending arrangements. In addition, the United States Investment Company Act of 1940 (1940 Act) places restrictions on US Funds with respect to the borrowing of funds.<sup>19</sup> If brokers could make payments on T+0 for US Funds, US Funds would need to evaluate the implications of such an arrangement under the 1940 Act. Consequently, US Funds may be unable to utilize such an arrangement. Further, members anticipate that even if a broker could make the T+0 payment, the broker would charge an additional fee for the service, impacting the US Fund's expenses and, therefore, its performance. We also believe that it is likely that smaller brokerage firms may not have adequate capital to post payments for the trades of FIIs. This means that FIIs, including US Funds, would have a decreased selection of brokers and need to rely on larger brokers, decreasing competition in this market.

<sup>18</sup> In addition to the legal issues relating to borrowing, T+0 payments by a broker would raise the same concerns regarding validation of trades prior to settlement since the broker would only be acting on its own instructions without any validation or confirmation from the US Fund.

<sup>19</sup> Section 18 of the 1940 Act makes it unlawful for a registered open-end company to issue a senior security (which includes any instrument constituting a security and evidencing indebtedness) or sell a senior security of which it is the issuer and permits a registered closed-end company to issue senior securities only subject to certain conditions. Section 18 contains a limited exception, which permits US Funds to borrow from banks (as defined in the 1940 Act), subject to certain asset coverage requirements, and also permits a US Fund to issue a note evidencing a temporary loan, as long as it does not exceed 5% of the company's total assets at the time it is made. In addition, a closed-end investment company is permitted to issue a note in consideration for any privately arranged loan or extension or renewal thereof that is not intended to be publicly distributed. See United States Investment Company Act of 1940 Section 18.

Shri C.B. Bhavé Chairman, Securities and Exchange Board of India June 6, 2008 Page 9 of 9 Conclusion A T+0 regime would raise significant issues for US Funds investing in Indian securities. As described above, our members believe that it is unclear whether US Funds would be able, or even willing, to operate in a T+0 environment. The current T+1 regime represents, in our view, a sufficiently quick settlement process to ensure trades are honored, while providing US Funds with time, although very limited, to validate and confirm a trade and ensure adequate funds are available for the transaction. For the reasons discussed in this letter, we support SEBI's determination not to proceed with a T+0 requirement at this time and we respectfully request that SEBI refrain from implementing this requirement. If SEBI reconsiders implementing the T+0 requirement, we request that SEBI consider the substantial issues and challenges raised for US Funds and provide sufficient notice to allow US Funds to fully evaluate whether they can continue to invest in Indian securities and if not, to implement an orderly plan of sale of their Indian securities. \* \* \* \* \*

We appreciate the opportunity to express our views on this important issue. If you have any questions about our comments or need additional information, please

contact me at [solson@ici.org](mailto:solson@ici.org) or at (202) 326-5813. Sincerely, /s/ Susan M. Olson Susan M. Olson Senior Counsel, International Affairs cc: Dr. T.C. Nair, Whole-Time Member, Securities and Exchange Board of India David Grim, Assistant Chief Counsel, Division of Investment Management, U.S. Securities and Exchange Commission Ester Saverson, Jr., Assistant Director Office of International Affairs, U.S. Securities and Exchange Commission T-1 T+0 T+1 7:30 pm Mumbai 10:00 am - New York • Purchase or sale order placed by fund portfolio manager. (1) 1:00 pm- Mumbai 3:30 am - New York 6:30 pm- Mumbai 9:00 am - New York 9:00 am- Mumbai 11:30 pm - New York 6:30 pm- Mumbai 8:30 am - New York 9:30 am- Mumbai 12:00 am - New York •National Stock Exchange (NSE) opens at 9:30 am and Bombay Stock Exchange (BSE) opens at 9:55 am. •Fund traders begin executing the trade through various brokers. (2) • Phase 1: Local sub-custodian required to confirm transaction with NSE or BSE; early pay-ins are processed, generally by 3 p.m. 11:30 am - Mumbai 2:00 am - New York • Same-day value foreign exchange transactions become generally unavailable. (3) • NSE and BSE remain open for trading. 6:30 pm- Mumbai 9:00 am- New York • Phase 2: Payment required to be posted with the clearinghouse. (5) 4:30 pm - Mumbai 7:00 am - New York • BSE closes at 4:30 pm; NSE closes at 3:30 pm. • Brokers send confirmations to the fund indicating the day's trading activity. (4) • Fund confirms trade. May occur later in day based on fund operations and/or location of personnel. (6) • Fund transmits instructions to global custodian. • Global custodian validates that the trade is authenticated and transmits instructions to local sub-custodian. • Prior to 9:00 am, local sub-custodian receives trade instructions and matches to brokers trade in market. • Local sub-custodian [or other designated party] exchanges appropriate amount of USD/INR based on final trade information. • Phase 1: Final margin required to be posted with clearinghouse. Notes to Appendix (1) A US Fund's investment advisory personnel may be located throughout the globe and a purchase or sale order may be placed by such personnel at any time. Traders, however, will not be able to begin executing a trade until the Indian market opens for trading. (2) A US Fund's trade may be executed at any time during the trading hours of the National Stock Exchange or Bombay Stock Exchange. (3) The Indian foreign exchange market is open from 9:00 am to 4:30 pm. We understand, however, that the market for same-day value foreign exchange transactions is generally only available until approximately 11:30 am due to INR liquidity. (4) The day's trading activity is typically sent to a US Fund for confirmation at the conclusion of trading on the NSE and BSE. (5) It was unclear whether the T+0 payment would be due at the end of the day on T+0 or as early as at execution on T+0. (6) US Funds operate in a highly regulated environment and generally maintain strict trade validation procedures designed to identify trading errors and ensure only valid trades are settled.