ICI Comment Letter to Committee of European Securities Regulators, March 2005

Via E-mail and International Airmail

March 3, 2005

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 Institute[1] appreciates the opportunity to support the proposed advice of the Committee of European Securities Regulators (CESR) on possible implementing measures of the Transparency Directive. We believe CESR has taken a careful and thoughtful approach to the implementing measures, and we are especially pleased with the advice on conditions for exempting parents of non-EU management companies and investment firms from the requirement to aggregate their holdings with those of their subsidiaries.

Because the Institute's members have a particular interest in notifications of major holdings, our letter focuses on this aspect of CESR's proposed advice. Please find below our specific comments.

Calendar of Trading Days

We agree with CESR that the calendar of trading days of the issuers' home Member State should be used to calculate the date by which notifications must be made. We recommend, however, that CESR go beyond suggesting that a Member State publish the calendar that applies to its regulated markets. CESR should advise the Commission to require Member States to publish on their websites the relevant calendar and a list of issuers for which such calendar would apply. Providing full transparency to investors of the calendar of trading days and the list of issuers for which such calendar would apply would help investors comply with the disclosure requirements and make timely notifications.

During the hearing, CESR requested comment on whether a uniform calendar across the European Union would be of interest to investors. 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.

Entity Responsible for Making Notifications under Article 10

We support Approach A over Approach B in determining which entity should be responsible for making notifications under Article 10. Approach A generally requires only that the person or entity entitled to exercise voting rights make the notification. We also support CESR's special provision for Article 10(fa) provided under both approaches. Specifically, in situations where a person or entity controls voting rights that are held by a third party in the third party's own name (e.g., a trust), CESR's draft advice would only require the person or entity that controls the voting rights to make the notification.

The purpose for notification of major holdings is to provide issuers and the market with information about the accumulation of interests by investors in an issuer. This information permits the market to see movements of shares by an investor prior to the investor obtaining possible influence on the company. We believe that Approach A would accomplish this purpose. As a practical

matter, there is likely to be less interest by issuers and the market of being notified when (as Approach B would require) a shareholder's holdings fall below a relevant threshold because of one of the situations described in Article 10. We believe the most relevant information to disclose to issuers and the market is about the accumulation of interests. We also believe that Approach B would provide too much information that would not be helpful to the market or issuers.

In Section 7 – Standard Forms – CESR states that, because the person or entity who is entitled to exercise voting rights is not the shareholder, the notification must disclose the identity of the shareholder. We strongly disagree that shareholders that have given discretion to management companies or investment firms for investing and exercising voting rights and that are not subject to their own notification requirements should be identified. We do not believe that there is any policy reason for disclosing the identity of these shareholders.

In addition, we recommend that CESR clarify that a notification requirement would be triggered for a change in circumstances under Article 10 only if the change results in the crossing of a threshold, not merely if the number of voting rights changes. We believe paragraph 150 of CESR's proposed advice is written too broadly.

If holdings cross a threshold, the person or entity should make additional notifications. We do not believe, however, that a mere change in circumstances under Article 10 without crossing a threshold should trigger a notification requirement. The Transparency Directive reflects a determination that crossing certain thresholds is the point at which notification should be made. We do not believe it would be appropriate for CESR also to require notifications for changes that do not result in crossing a threshold.

On the issue of who should file under Articles 9 and 10, we recommend that CESR advise the Commission to provide that, if a person or entity is entitled to make investment decisions and to exercise voting rights, then only such person or entity should be required to make notifications under the Transparency Directive. In the case of management companies or investment firms, where the notification requirements apply to these companies and 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; these filings may provide a misimpression that both the managers and their clients are separately accumulating interests in the issuer or have the ability to exert influence over the issuer. [1]

Circumstances under which Shareholder "Should Have Learnt" of Acquisition or Disposal of Shares

For the reasons discussed in our letter of July 28, 2004 and acknowledged by CESR in its consultation paper, the day after a transaction was executed should be considered the point at which a natural person or legal entity is deemed to have knowledge of the acquisition or disposal or the ability to exercise voting rights. Global firms often have complex systems for tracking investments worldwide. A time period for reporting that begins from the day after the execution of the transaction would provide these global investors with a more reasonable period to obtain information from their worldwide systems that a notification may be required.

Conditions of Independence for Disaggregation Exemption

1. Parents of Non-EU Management Companies or Investment Firms

We are pleased that CESR proposes to advise the Commission that the parents of a management company or investment firm registered in a third country are not required to notify their aggregate holdings with the holdings managed by their subsidiaries if they comply with the same basic conditions of independence as parents of EU management companies and investment firms. The conditions set forth in the draft advice appear to be workable. We appreciate CESR taking into consideration comments from industry, including those of the Institute, in crafting this advice.

We fully agree with CESR's approach that the only conditions that need to be imposed under the Transparency Directive are those relating to the links/internal relationships between the parent and the management company or investment firm and a general requirement for a notification to the competent authority of the issuer. This approach is consistent with the Transparency Directive in that it is not based on an assessment of equivalence of third country regulatory frameworks for management companies and investment firms. We completely agree with CESR's understanding that the reference to "authorisation" of the management company or investment firm is to the type of activity in which a management company and/or investment firm engages; we believe CESR is correct that "authorisation" of the management company or investment firm under the laws or regulations of third countries is not necessary.

We seek a few clarifications on the text of the technical advice. We recommend that CESR clarify that the management company or investment firm is free to exercise "voting" rights (and not all rights) independently in all situations. As discussed above, we believe

that the Level 1 text of the Transparency Directive permits the Commission to condition the exemption upon independence of voting decisions and not all decisions.

We also seek clarification that the exemption applies (as it does for parents of EU management companies and investment firms) where the exercise of voting rights is delegated by the management company or investment firm to a third party provided that the third party exercises the voting rights independently from the parent of the management company or investment firm. We fully support CESR's view that the disaggregation exemption applies in cases where the exercise of the voting rights is delegated by a EU management company or investment firm to a third party subject to the same independence requirement. We see no reason why parents of non-EU management companies and investment firms should lose the exemption under these circumstances.

Finally, we seek clarification that the disaggregation provision would apply for parents of non-EU management companies and investment firms in relation to financial instruments under Article 11a. For parents of EU-management companies and investment firms, CESR proposes to require that the management company and/or investment firm meet the relevant requirements of the UCITS Directive and MiFID and the declaration to the same competent authority is made under Article 11a. We are concerned about how non-EU management companies and investment firms would be able to comply with these conditions.

2. Parents of EU Management Companies or Investment Firms

Generally, we agree that the proposed advice on the conditions for disaggregation appears reasonable. We note, however, one issue with the condition that management companies and investment firms have policies and procedures, among other things, to prevent sharing of information related to the exercise of investment decisions over securities traded. The Transparency Directive provides an exemption from disaggregation provided that the management company or investment firm exercises voting rights independently from the parent.

Although in principle we have no particular objections to the condition that CESR proposes (which is a condition that the US Securities and Exchange Commission imposes for disaggregation), the text of Transparency Directive only permits expressly the conditions for disaggregation to be contingent on independence of voting decisions not investment decisions. We believe that CESR should limit the conditions for disaggregation accordingly.

We also do not believe that CESR should adopt the suggested advice described in paragraph 248. The suggestions include (1) the appointment of a senior individual with the management company or investment firm with responsibility to help ensure independence between the management company/investment firm and its parent and (2) the production by the senior individual of an annual report to the Board on the policy and procedures established to maintain independence when exercising voting rights between the management company or investment firm and its parent. We believe CESR is taking an appropriate approach by establishing the criteria for independence; CESR should not dictate how firms can best implement or verify the conditions of independence.

Standard Form

We have several specific comments on the standard form for making major holdings notifications in the European Union.

First, paragraph 304 states that, under Article 15(3), it is the shareholder who shall file the notification with the competent authority. We seek clarification that in the case where the shareholder does not itself have a notification obligation, it would not have to file a notification with the competent authority. Specifically, if the shareholder does not itself have holdings that cross a threshold but has holdings that are managed by a management company or investment firm that must make notifications, it should be the management company or investment firm that would notify the competent authorities, rather than its individual clients.

Second, as discussed above, we have concerns with respect to the requirement in the standard form that the identity of the shareholder be disclosed even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10. We seek clarification that, in the case where a shareholder (client) has given discretion for investing and exercising voting rights to another entity (management company or investment firm), the identity of the shareholder need not be disclosed, especially if the shareholder has not by itself crossed an applicable threshold.

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 issuers and the market would be interested in knowing the identity of the entity that has the discretion to make voting decisions and has crossed a particular threshold and not the clients of such entity that have relinquished their voting decisions over the security.

Finally, we do not believe that CESR should adopt the suggestion that the total number and percentage of voting rights contained in a previous notification be contained in the new notification. This information would be duplicative and unnecessary because issuers and the competent authorities should have access to prior notifications. We also recommend that CESR not adopt the views of some CESR members that information about how the holder has acquired or disposed of the shares should be disclosed. We do not

believe this information is relevant to the purpose of the Transparency Directive.

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We appreciate the opportunity to provide comments on CESR's draft advice to the Commission on the notification of major shareholding provisions of the Transparency Directive. If we can provide any other information or if you would like to discuss further any issues, please contact me at jchoi@ici.org or at (202) 326-5810.

Sincerely,

Jennifer S. Choi
Associate Counsel

ENDNOTES

[1] The Institute is the national association of the US investment company industry. Our membership includes 8,567 open-end investment companies ("mutual funds"), 642 closed-end investment companies, 143 exchange-traded funds, and 5 sponsors of unit investment trusts. Our mutual fund members have assets in excess of $8.03 trillion, accounting for approximately 95% of total industry assets. Individual owners represented by ICI member firms number 87.7 million as of mid 2004, representing 1.2 million households. Many of our members also manage assets in Europe, including UCITS and pension funds, and our comments reflect their experiences in Europe.

[2] Some Member States have required disclosure at both the client/fund level as well as the management company/investment firm level, which has led to market and issuer confusion. Institute members have received calls from issuers and the press who believe that both the client/fund and the management company have separately crossed the threshold level for reporting.