Mr Greg Tanzer
Secretary General
International Organization of Securities Commissions
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Spain

[By e-mail: PeriodicDisclosure@iosco.org]

28 August 2009

Dear Secretary General,

IOSCO – Public Comment on the Principles for Periodic Disclosure by Listed Entities: Consultation Report

We write on behalf of the members of ICMA and SIFMA to express members' views concerning the Consultation Report.

We agree that in increasingly globalised securities markets, generally accepted international disclosure standards play a critical role in facilitating cross-border capital raising. Complementing IOSCO's earlier steps towards an international consensus on disclosure standards for public offerings and initial listings of securities and principles for ongoing disclosures, we therefore welcome this IOSCO initiative to develop specific guidance on periodic disclosures.

In addition to guidance on the content and publication of periodic disclosures, we recommend that IOSCO develop principle(s) on the liability of issuers for such disclosures. Assuming (as IOSCO does) that the disclosures will inform investment decisions, it is likely that investors will have a right to compensation if they are (or are alleged to be) incorrect. To the extent that there is such a purpose and liability, this will encourage the preparation of periodic reports as though they were prospectuses with consequent additional demands on management time and resource. Moreover, investors may be incentivized towards speculative litigation (as is e.g. the case with allegedly misleading registration statements in the US) and further management time and company resources will be spent fighting off spurious claims. In Europe, the requirement under the Transparency Directive to publish reports throughout the EEA, will mean that such claims will potentially be made in multiple jurisdictions under multiple legal systems, further adding to time and cost in defending them. The combined result of the above factors may make leave listing becomes so onerous and costly that issuers decide to avoid it.

On this basis, we believe that to fulfil the policy objective of better on-going information being made available to investors, IOSCO needs also consider liability and how to limit multiple cross border claims.

Liability

We recommend that IOSCO consider a liability threshold based on 'fraud' rather than 'reasonable care'. The IOSCO liability principle(s) need to achieve an optimal balance between the needs of the market for timely, meaningful and more accurate disclosure on the one hand and liability for inadequate or misleading disclosures on the other. We acknowledge that this is a difficult balance to strike but consider it essential to do so. If the liability threshold is set too low, those making disclosures may become over cautious. In extreme cases this may even lead issuers to migrate to other markets with less onerous liability regimes. But a liability threshold that is too high may result in inaccurate disclosure to the detriment of investors and the markets as a whole.

There is a further important balance to be struck between a liability regime that motivates management to make accurate disclosure and one that is so uncertain, or so easily triggered, or so draconian in its sanctions, that management spends too much time preparing disclosure. Cost, in this area, is not just to do with fees paid to advisors, but also involves undue diversion of management time. Investors need managers to run their companies and the more time that is spent in crafting reports so as to limit exposure to hair-trigger liability regimes, the less time will be available to seize market opportunities and increase profitability. There is also a risk that, if liability for disclosures is too easily incurred or if the job of director involves too much introspection for disclosure purposes, it will become increasingly difficult to recruit the right people to populate boardrooms of public companies.

We recommend that IOSCO consider the development of liability principles that include clarification of: the basis for liability; the range of disclosures covered; the liability for late statements; the application to non-regulated markets; and issues relating to the ranking of investor claims, the liability of those making statements, the position of sellers and holders of securities, and the measure of damages. We also recommend that IOSCO analyze the expected impact of the principle(s) on litigation levels and of the benefits and limitations of private actions to enforce securities law.

In particular, we recommend that IOSCO be very clear as to the liability threshold. In this respect we believe that the policy objective discussed above can only be achieved through a fraud based liability test. In this respect, it may be informative to explore the English statutory (Companies Act) regime which effectively amounts to a test akin to 'deceit' under English law, so that: 'knowledge' means the knowledge that the directors actually had (i.e. not knowledge that was available to them or that they could have deduced by putting together a number of different facts that were within their knowledge) and 'recklessness' is construed so that if a disclosable fact were provided to a director but he chose not to read it, he would only have been reckless if that choice was made with a dishonest intent.

Cross Border Claims

In Europe, information has to be disclosed 'using such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the Community' (Transparency Directive). This may potentially trigger simultaneous liability in a number of different EEA states for information that is alleged to be misleading. This is because investors will read the information when it is relayed to them in their state and rely on it to their detriment, so that, under normal conflict rules, the applicable law to determine liability will be their local law. This result would largely negate the protection afforded to companies by any national regimes and defeat the policy objectives described above. It makes sense in such cases that there should be one set of legal proceedings, applying one set of legal principles. In this respect, one option may be that the law of the regulated market to which the issuer is admitted applies - and, if there is more than one, it will be the lead market (although consideration will need to be given as to how this is determined).

Yours sincerely,

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practice which have facilitated the orderly functioning and impressive growth of the market. ICMA actively promotes the efficiency and cost effectiveness of the capital markets by bringing together market participants, including regulatory authorities and governments. www.icmagroup.org

The Securities Industry and Financial Markets Association brings together the shared interests of more than 600 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. For information on SIFMA, please visit. www.sifma.org