THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK
BROWN BROTHERS HARRIMAN
CITIBANK, N.A.
DEUTSCHE BANK TRUST COMPANY AMERICAS
INVESTORS BANK & TRUST COMPANY
JPMORGAN CHASE BANK
MELLON FINANCIAL
THE NORTHERN TRUST COMPANY
RBC GLOBAL SERVICES
STATE STREET BANK AND TRUST COMPANY

COUNSEL AND SECRETARIAT TO THE ASSOCIATION:
BAKER & MCKENZIE
815 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006

TELEPHONE: 202/452-7000
FACSIMILE: 202/452-7074

WWW.THEAGC.COM

October 8, 2003

VIA E-MAIL AND AIR COURIER

Mr. Peter W. Skinner
Member of European Parliament
Committee on Economic and Monetary Affairs Secretariat
rue Wiertz
B-1047 Brussels
Belgium

Re: Draft European Union Transparency Directive

Dear Mr. Skinner:

We are writing to you again on behalf of the Association of Global Custodians ("Association"), an informal group of ten banks based in North America that are major providers of global custody services to cross-border institutional investors.[1] As noted in our prior correspondence to you of July 11, 2003, the members of the Association, through their own European branches or affiliates, or through their use of agent banks in Europe acting as subcustodians, safekeep very substantial positions in the securities of European companies for their institutional investor clients. Accordingly, the Association has a direct interest in the proposed EU directive that is intended to amend directive 2001/34/EC (March 26, 2003) to enhance transparency in share ownership information and to establish share position reporting requirements for security holders in Europe ("Draft Directive").[2]

---

1 The members of the Association are listed above.

2 Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of Transparency Requirements with regard to Information about Issuers Whose Securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC (March 26, 2003).

We have received a copy of your recent Draft Report on the Draft Directive.[3] The Association greatly appreciates your efforts to work toward clarifying that custodians without voting discretion should not be subject to the reporting requirements in the Draft Directive, and we support your draft insert in Recital 11 that makes that point. We believe that this language, if adopted, will help correctly place the reporting responsibility where it should lie. However, as you have noted in the Explanatory Statement at the conclusion of the Draft Report, the language of the Draft Directive itself is ambiguous as to whether custodians are subject to the reporting requirements in Article 9. Therefore, we suggest that the Committee on Economic and Monetary Affairs consider adding language that would eliminate uncertainty by amending the text of the substantive articles of the Draft Directive in ways that parallel your insert in Recital 11. Specifically, we recommend the following amendment:

A new paragraph should be added to the end of Article 9 as follows:

4. Article 9 shall not apply to shares held by custodians in their capacity as a custodian provided that they do not have any discretion over, or any influence on, how the voting rights attached to those shares are exercised.

We firmly believe that the Draft Directive needs to provide clear direction that custodians lacking voting discretion or influence should not be subject to share threshold reporting requirements. Our view in this regard is based in large measure on the difficulties that our members encountered as a result of the French law N.2001-420, dated May 15, 2001, and Decree 2002-803 concerning reporting by registered intermediaries that hold shares of French companies on behalf of beneficial owners domiciled outside of France.[4] As noted in our letter to you on July 11, 2003, various

---

[3] Draft Report on the Proposal for a European Parliament and Council Directive on the Harmonisation of Transparency Requirements with regard to Information About Issuers Whose Securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC (September 19, 2003).

[4] *See* Letter, dated July 16, 2002, from Daniel L. Goelzer, to Bruno Gizard, Secrétaire Général Adjoint, and Wayne H. Smith, Charge de Mission, Direction des Operations Financieres, Conseil des Marchés Financiers, Re: New Registered Intermediary Law (attached).

market participants in France joined custodians in supporting the repeal of that law due to the potentially disastrous effects of the reporting requirement on the market.

If you wish to discuss this matter, or have any questions concerning these comments, please contact the undersigned.

Sincerely,

Margaret R. Blake, Esq.
Baker & McKenzie
Counsel to the Association
202/452-7020

Dan W. Schneider, Esq.
Baker & McKenzie
Counsel to the Association
312/861-2620

Attachment: Letter, dated July 16, 2002, from Daniel L. Goelzer, to Bruno Gizard, Secrétaire Général Adjoint, and Wayne H. Smith, Charge de Mission, Direction des Operations Financieres, Conseil des Marchés Financiers, Re: New Registered Intermediary Law.

cc: Chair of Working Group
Dott. Carlo Biancheri
Head of International Relations Department

Mr. Daniele Ciani
Financial Services Attache
Italian Permanent Representation

Mr. Emmanuel Lacresse
Counseiller Financier Adjoint
La Representation Permanente de la France Aupres de L'Union Europeenne

Mr. Klaus-Heiner Lehne
Member of European Parliament
Committee on Legal Affairs and the Internal Market

Mr. Berton
Head of the Secretariat for the Committee on Economic and Monetary Affairs
Committee on Economic and Monetary Affairs
European Parliament

Mr. Schiffauer
Head of the Secretariat for the Committee on Legal Affairs and the Internal Market
Committee on Legal Affairs and the Internal Market
European Parliament

Mr. Jürgen Tiedje
European Commission

THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK
BROWN BROTHERS HARRIMAN
CITIBANK, N.A.
DEUTSCHE BANK TRUST COMPANY AMERICAS
INVESTORS BANK & TRUST COMPANY
JPMORGAN CHASE BANK
MELLON TRUST/BOSTON SAFE DEPOSIT
& TRUST COMPANY
THE NORTHERN TRUST COMPANY
STATE STREET BANK AND TRUST COMPANY

COUNSEL TO THE ASSOCIATION:
BAKER & MCKENZIE
815 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006

TELEPHONE: 202/452-7013
FACSIMILE: 202/452-7074

July 16, 2002

VIA FACSIMILE AND AIR COURIER

Bruno Gizard
Secrétaire Général Adjoint

Wayne H. Smith
Charge de Mission
Direction des Operations Financieres

Conseil des Marchés Financiers
31, rue Saint-Augustin 75002 Paris
France

Re: **New Registered Intermediary Law**

Messrs. Gizard and Smith:

I am writing on behalf of the Association of Global Custodians ("Association"), an informal group of nine U.S. banks that are major providers of global custody services to institutional investors.[1] The members of the Association hold, through French banks acting as subcustodians, very substantial positions in the securities of French companies for their institutional investor clients. Accordingly, the Association has a strong interest in the administration and interpretation of the recently-adopted law (Law N 2001-420, dated May 15, 2001 and Decree #2002-803) concerning the registration of

[1] The Association of Global Custodians ("Association") is an informal association of nine banks that are major providers of cross-border custody services to institutional investors. The members of the Association are listed above.

intermediaries that hold shares of French companies on behalf of beneficial owners that are domiciled outside of France. The purpose of this letter is to outline our concerns regarding the new law.

Background

We understand that Article L.228-1 of the Commercial Code provides that, when the beneficial owner of securities is not a resident of France, ownership may be recorded/registered in the name of an intermediary on behalf of the foreign beneficial owner. This may be accomplished either through registration of the securities in the name of the intermediary or by the holding of the foreign investor's securities in an omnibus account maintained with a French bank in the name of the intermediary. The objective of this new law is to improve transparency in the control of French companies, while reinforcing shareholders' rights by facilitating their participation in General Meetings. By improving French issuer access to the beneficial owners of securities, the law seeks to increase participation in such meetings and to lessen the problems associated with obtaining a quorum.

To accomplish these goals, the new law requires the registration of intermediaries that hold French securities on behalf of foreign investors and imposes certain responsibilities on such registered intermediaries. Articles L.228-2 and L.228-3 require a registered intermediary, on request from the issuer, to disclose the identity of the beneficial owners. Apparently, Article L.233-7 of the Commercial Code also requires that, for each French company whose securities are held by the registered intermediary, the registered intermediary must report to the company and to the Conseil des Marches Financiers ("CMF") the crossing of the following ownership thresholds: 5%, 10%, 20%, one-third, 50% and two-thirds of the share capital or of the voting rights of the company. Under French law, the company may additionally establish further thresholds subject to these same reporting obligations. Under Article L.228-3-3, sanctions for failure to comply with the law include the suspension of voting rights and the postponement of dividend payments. The deadline for an entity to file the required declaration that it is a registered intermediary is August 5, 2002.

Since this law was first published, there has been considerable discussion and uncertainty within the custody industry and issuer community regarding the role of the registered intermediary. Among other things, there are differences of opinion regarding

the scope of the reporting obligations of registered intermediaries and whether French banks acting as subcustodians can serve as registered intermediaries. We understand that the major French sub-custodian banks will meet with you on July 17 to discuss these issues.

Registered Intermediaries Should not be Required to Report Threshold Crossings

The Association believes that registered intermediaries should not be required to make substantial shareholding reports (i.e., to report when aggregated client positions in a particular company cross one of the reporting thresholds). Such reporting would not assist in the effort to identify the underlying owners of securities or the levels of their ownership. Reporting would, however, be burdensome for intermediaries. The reporting requirements should continue to focus on beneficial owners and issuers, not on intermediaries.

Requiring that a registered intermediary report on the crossing of thresholds would not provide meaningful information to issuers because such reporting could only be based on the information reflected in the registered intermediary's records. For example, a registered intermediary would have no way of including in its reporting the positions of a client that are held through other registered intermediaries. Thus, a client that holds interests in the same issuer through accounts with several intermediaries could cross one of the reporting thresholds without increasing its position at any single intermediary by an amount that triggered intermediary reporting. Conversely, registered intermediary reports would not necessarily reflect actual crossing of a threshold by a beneficial owner. A report by such an intermediary that a threshold had been crossed could merely reflect the fact that several of the intermediary's clients (some of whom might themselves be intermediaries and some of whom might be beneficial owners) had made small increases in their positions. In short, reports filed by registered intermediaries would be incomplete at best and misleading at worst to issuers.

While the value of registered intermediary reporting on the crossing of thresholds would be limited, the costs and burdens of compliance with such a requirement would be great. Compliance would require each registered intermediary to monitor, on a daily basis, all of its non-resident clients' holdings in every French security; to aggregate these positions; and to report when there has been a change in any of the six

thresholds.[2] Because of the ability of French issuers to adopt their own additional thresholds, such reporting would also require the registered intermediary to continuously review the requirements of every French company and to add new thresholds to its monitoring as they were adopted. This would result in an enormous expenditure of resources for little benefit in terms of the transparency of the beneficial ownership of French companies. In addition, registered intermediaries would incur costs associated with the filing of reports each time a threshold was crossed. Ultimately, of course, these monitoring and reporting costs might be passed on to institutions that invest in France, reducing the attractiveness of such investment.[3]

---

[2] The difficulty and complexity of this task would be compounded if indirect and derivative interests in securities must also be considered in determining beneficial ownership and whether a threshold has been crossed. It is not clear whether a registered intermediary's determinations could be based on its clients' aggregate ownership of shares only, or whether warrants, convertible bonds, ADRs, futures, options and other types of derivative interests would also need to be included. Although Article L233-9 of the Commercial Code mentions "agreements" which confer rights to shares, it is uncertain whether a registered intermediary is required to treat these types of publicly-traded instruments as "agreements" for these purposes. The need to include derivatives in calculating ownership levels could be technically very challenging for registered intermediaries.

[3] Other countries appear to have addressed this problem without imposing threshold reporting requirements on intermediaries. In the United Kingdom, for example, custodians acting for third party clients are "bare trustees" in that they lack discretion and act only on instructions from the beneficial owner or its appointed agents. Section 198 of the Companies Act requires persons with an interest in shares to report to the stock exchange when certain thresholds are reached (generally 3% for the beneficial owner and 10% for the fund manager) and to report any subsequent whole percentage point increase or decrease. Under Section 209, the bare trustee is exempted from this provision, since it has no discretion. Issuers can, however, compel a bare trustee to disclose the identity of persons who have an interest in the shares. Section 212 permits that process to be repeated, if the company believes that a disclosed party is an intermediary, until the beneficial owner is uncovered.

Local Custodians Should Serve as Registered Intermediaries

The problems that would result from requiring intermediaries to report when their clients' aggregate holdings have crossed a threshold are compounded by the confusion surrounding the question of who is permitted or required to register as an intermediary. In our view, the appropriate registered intermediary is the French subcustodian bank through which foreign investor positions are held in the French markets. While, as explained above, we do not believe that registered intermediaries should be required to report threshold crossings, the logic of permitting French banks to serve as registered intermediaries is especially compelling if such reporting is nonetheless required.

Some French banks have reportedly taken the position that only global custodians -- i.e., non-French banks -- are required to register. We find nothing in the law to support this view. The definition of the term registered intermediary appears in Commercial Code Article L228-1 and in Decree No 2002-803. These authorities do not preclude a French custodian bank from acting as a registered intermediary. Conversely, these provisions in no way state that only foreign banks, such as global custodians, must be registered intermediaries. However, because there is confusion on this point in the French banking community, we ask that the CMF clarify that French subcustodian banks may register as intermediaries under the new law.

Further, as a practical matter, we believe that French subcustodians are far better positioned to act as registered intermediaries than are global custodians. This is particularly true if the CMF concludes, notwithstanding our position above, that the registered intermediary must report on the crossing of thresholds. First, since the French custodian operates in the market and has better access to local developments, it has the best ability to monitor issuer reporting thresholds, changes in outstanding share positions, and similar matters that affect threshold reporting. In fact, if a global custodian were required to make such reports, it would presumably have to obtain this type of information from its French subcustodian. Second, there are far fewer French banks that act as subcustodians than there are global custodians with clients that hold positions in French companies. Therefore, if French subcustodians act as registered intermediaries, the number of reports that will have to be filed will be reduced and the issuer confusion associated with multiple intermediary reports will correspondingly decline.

Conclusion

For the reasons stated above, the Association urges that the CMF not require registered intermediaries that hold shares of a French issuer to report the crossing of ownership thresholds. The registered intermediary's obligations should be limited to disclosing the identity of its client; reporting should remain the duty of the beneficial owner. We also urge that the CMF make clear that French subcustodian banks may act as registered intermediaries when the shares of non-resident beneficial owners are held through accounts on the books of such French banks. Considerations of both law and of practical reality dictate that the registered intermediary obligation not fall on global custodian banks.

If you wish to discuss this matter, or have any questions concerning these comments, please contact either Diana Dijmarescu (JPMorgan Chase-London) at (44) 207-742-0327, or the undersigned at (202) 452-7013.

Sincerely,

Daniel L. Goelzer

Daniel L. Goelzer
Counsel to the Association