

**PUBLIC COMMENTS RECEIVED ON IOSCO'S DRAFT CONSULTATION
POLICY AND PROCEDURES**



INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS

February 2005

List of Organizations that have provided comments:

- Association Française des Entreprises d'Investissement (AFEI)

- Assogestioni del risparmio gestito (ARG)

- Fédération Européenne des Fonds et Sociétés d'Investissement (FEFSI)

- IMF/World Bank (IFIs)

- International Council of Securities Associations (ICSA)

- International Banks and Securities Association of Australia (IBSAA)

- International Bar Association (IBA)

- London Investment Banking Association (LIBA)

- Stikeman Elliott LLP (SE)



Association Française
des Entreprises d'Investissement

Le Délégué Général

Mr. Philippe Richard
IOSCO Secretary General
Oquendo 12
28006 Madrid
Spain

FR/SR/05-0025

5 January 2005

Re: **ICSA Comments on IOSCO's draft *Consultation Policy and Procedures***

Dear Mr. Richard,

The French Association of Investment Firms (*Association Française des Entreprises d'Investissement* – AFEI) comprises more than 130 investment service providers, most of them investment firms, as well as credit institutions authorised to provide investment services. The majority of AFEI members operate in the fields of equities and derivatives. Approximately one-third are subsidiaries or branches of foreign institutions.

AFEI would like to thank IOSCO for the work that has gone into IOSCO's draft *Consultation Policy and Procedures*. IOSCO's adoption of a structured consultation policy is extremely important for AFEI because, by allowing for increased input from market participants and other interested parties, it will make regulatory policies more efficient. AFEI therefore welcomes this opportunity to comment on IOSCO's draft document.

First, AFEI would like to point out that, as a member of International Council of Securities Association (ICSA), it supports ICSA's letter concerning this consultation. Like ICSA, we strongly encourage IOSCO and its members to consult as a general rule. In cases where there is a significant departure from normal consultation procedures, we would like IOSCO and its members to provide notice of, and the reasons for, such a change in procedure by publishing statements on the Internet or in other media.

AFEI would like to add that on the whole, the underlying principles of the future consultation process are satisfactory. All too often, however they are described in overly concise or general terms, making it difficult to get a clear idea of how the process will work. A thorough and precise definition is needed to ensure that the consultation process is genuinely open and transparent and that the industry is closely involved. In AFEI's view, it would be best to use a more precise language when drafting fundamental principles.

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The following points should be addressed or described in greater detail:

- timeframes: the participants should have, as a general principle, at least three months to answer to a consultation;
- factors to be considered in deciding whether to seek public comment, which are dealt with in ambiguous terms;
- the coordination between IOSCO and the European Union, in order to avoid parallel work;
- the schedule for the coming year.

In closing, I would like to emphasize once again the importance of IOSCO's commitment to the adoption of a structured consultation policy and how much I appreciate this initiative. Please do not hesitate to contact me if you require further information about these comments.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Pierre de Lauzun', is positioned to the right of the typed name. The signature is fluid and cursive.

Pierre de Lauzun



ASSOGESTIONI

associazione del risparmio gestito

Mr Philippe Richard
Secretary General
IOSCO
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SPAIN

Anticipated by e-mail: mail@oicv.iosco.org
& fax: + 3491 555 93 68

Milan, 10 January 2005

Dear Mr Richard,

ASSOGESTIONI COMMENTS TO IOSCO's PUBLIC CONSULTATION ON ITS DRAFT CONSULTATION POLICY AND PROCEDURES

Assogestioni, the Italian Association for the Investment Management industry, whose members manage over 900 billion euro, would like to thank IOSCO for the opportunity to contribute to the discussion on the Consultation Policy and Procedures that IOSCO intends to adopt.

First of all, Assogestioni would like to express its appreciation for IOSCO approach to transparency and openness and support the organization's effort to work in full and effective cooperation with the industry.

We agree with the general objectives of consultations as described in the document and with the procedures IOSCO intends to adopt to achieve such objectives, however we would like to put forward some suggestions that we believe would improve the quality of the contributions to the consultations and make the process more effective:

- **Sharing the agenda:** in order to make the contribution of the industry more meaningful, it would be important to have a medium to long term view on all the issues on the agenda of IOSCO with an indication of the level of priority and a broad calendar. This would allow the industry to have an understanding of the framework within which IOSCO is moving and to give more appropriate contribution. Ideally, in order to provide a thorough view of the conceptual and regulatory framework in which the individual consultation are set, the agenda



should include both those items on which IOSCO intends to seek consultation and those on which it does not intend to do so.

- **Provision for a proactive approach:** the Consultation Policy and Procedure appear to be drafted with the aim of favouring industry and public contribution to initiative promoted by the IOSCO while leaving relative little room to formally gather input coming proactively from the industry. We believe that a provision should be included to allow for contributions to be made to the content of the agenda of IOSCO and for suggesting the issues that the industry believe would benefit from IOSCO's attention. This would ensure IOSCO activity to be in line with the concerns of a very dynamic industry and to focus IOSCO's effort on issues that are close to the heart of those working in the investment management industry.
- **Adequate time:** on a more practical level, we would like to underline the importance of allowing a sufficiently long lead time to respond to call for consultation, especially on the more complex issues: this would grant Industry associations adequate time to consult with their members and to draft contributions that have been sufficiently discussed and shared among the industry players and representatives.

From a purely operational point of view we would like to suggest the adoption of an e-mail warning system that would alert all those who have registered of all new consultations and documents published by IOSCO.

Assogestioni is grateful for the attention given to its comments and is eager, now and in the future, to contribute to IOSCO's work and to cooperate effectively with the organization for the promotion of a fair, efficient and transparent market for investment.

Should you require any further discussion, please do not hesitate to contact us.

Yours sincerely

Fabio Galli
The Director General



Mr Philippe Richard
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Ref. 05-1003
Anticipated by e-mail: mail@oicv.iosco.org
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Brussels, 8 January 2005

Dear Mr Richard,

FEFSI COMMENTS TO IOSCO's PUBLIC CONSULTATION ON ITS draft CONSULTATION POLICY and Procedures

The European investment management industry¹ expresses its appreciation for the dedication to transparency and open cooperation that pervades IOSCO's consultation policy and procedures.

Indeed, the Consultation Paper is very much in line with what was discussed in October in Rio de Janeiro between investment funds associations from 35 countries from all over the world (IIFA) and representatives from IOSCO.²

At European level, recent experience with the regional grouping of securities regulators in Europe under CESR has highlighted the importance of such open and transparent consultation procedures, which can greatly contribute to the wider acceptance of cross-border standards and principles-setting measures such as aspired by IOSCO. We believe that it is vital for all interested parties to be given as much time and opportunity as possible to respond to the proposed considerations.

With regard to the general objectives of your consultation policy statement we can fully subscribe to the described policy points, but wish to stress in particular three points that in our minds are vital and that were also considered crucial at the aforementioned IIFA's conference in Rio:

1. For the industry, it would be important to get a better understanding of the prioritisation process with regards to the issues addressed by the IOSCO working committees. Meaningful comments can only be drafted if the industry is aware why certain issues are considered priority issues by supervisors and others not. This issue, however, is not addressed in the Consultation Paper.

¹ FEFSI, the Brussels-based European Fund and Asset Management Association, represents the interests of the European investment management industry (collective and individual portfolio management). Through its member associations and corporate members from 19 EU Member States, Liechtenstein, Norway, Switzerland and Turkey, FEFSI represents the European asset and fund management industry, with some 41,100 investment funds and EUR4.7 trillion in net assets under management. For more information, please visit www.fefsi.org.

² The discussion took place at the occasion of the 2004 annual meeting of the International Investment Fund Association with the participation of Hubert Reynier and Carlos Eduardo P. Sussekind.

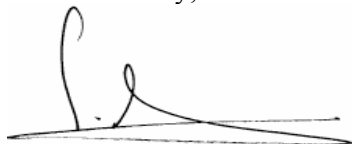
2. The results of IOSCO's decision making process will only attain the desired visibility and acceptability if the stated aim of increased transparency is effectively and practically achieved. We believe that it is crucial that IOSCO and in particular its subordinate Technical Committees and sub-groups make their intended activities and work programme known well in advance and keep the programme up-dated regularly of any additions or changes in priority. Such transparency will contribute to making the process more predictable for interested parties, who can in turn plan their own activities in accordance or anticipate possible rule changes. We believe that the early notice should take place well ahead of the adoption of potential IOSCO standards and principles as suggested in the last general objective. In this context, realistic deadlines for industry comments would be crucial. It will be important for all interested parties to be able to become pro-active, as opposed to reactive, with at times limited delays in which to coordinate responses to complex consultation questions. We believe this is esp. important given that IOSCO reserves itself the right not to consult, or consult more sparsely, on certain issues that remain within the margin of discretion of IOSCO (see 1st factor under so-called "flexible approach").

3. We believe that an early dialogue between the private sector and standard setters should be the norm and not merely subject to the unilateral consideration "where appropriate". We would advocate the possibility of IOSCO Technical Committee reserving an item on the agenda of regular meetings for an exchange of views with industry representatives. Such exchanges will be beneficial not only to the consistency of IOSCO work but also contribute to a greater visibility and wider dissemination of its results. Also, on a more general note we remark that despite the paper's title of consultation policy the ensuing considerations are oriented almost exclusively towards the conduct of public consultation and very little consideration to the broader policy elements. We believe there is more to consultation policy than solely conducting public consultations and would encourage IOSCO to clarify how it intends to implement the necessity to engage in a regular and structural dialogue with interested parties.

Naturally, the European investment management industry stands ready to provide the substantive input into IOSCO's work and to play a role in the above considerations.

Should you require any further information regarding the above issues, please do not hesitate to contact me.

Yours sincerely,



Steffen Matthias
Secretary General

cc. Mr Hubert Reynier, AMF Paris
Mr Carlos Eduardo P. Sussekind, CMV Rio de Janeiro



**THE WORLD BANK
THE INTERNATIONAL MONETARY FUND**



January 6, 2005

Mr. Philippe Richard
Secretary General
International Organization of Securities Commissions
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28006 Madrid
SPAIN

Fax: 34 (91) 555 93 68

Dear Mr. Richard:

We are writing to comment on the draft "IOSCO Consultation Policy and Procedures."

We applaud IOSCO's efforts to make its consultation practices more widely known to those outside its membership by posting its consultation processes on its website. We believe, however, that the draft document could be made even stronger if IOSCO were to indicate that it will consult the public as a general rule (allowing for exceptions where it would not be appropriate because of confidentiality concerns, urgency in the need for an IOSCO response, etc.). Such an approach would engender a greater degree of confidence in IOSCO's commitment to a public consultation process. This approach would be consistent with best practice for securities regulators in consulting with the public in the formulation of policy.

Sincerely yours,

The World Bank

The International Monetary Fund

Larry Promisel
Director
Financial Sector Global Partnerships

Arne Petersen
Chief
Financial Infrastructure
Monetary and Financial Systems Department



ICSA

INTERNATIONAL COUNCIL of SECURITIES ASSOCIATIONS

January 7, 2005

Mr. Philippe Richard
IOSCO Secretary General
Oquendo 12
28006 Madrid
Spain

Re: ICSA's Comments on IOSCO's draft *Consultation Policy and Procedures*

Dear Mr. Richard:

The International Council of Securities Associations (ICSA)¹ would like to thank you and your colleagues at IOSCO for the work that has gone into IOSCO's draft *Consultation Policy and Procedures*. IOSCO's adoption of a structured consultation policy is extremely important because it will, by allowing for increased input from market participants and other interested parties, make regulatory policies more effective while also reducing the risk that new policies will have unintended, and potentially damaging, consequences for financial markets. In addition, IOSCO's adoption of a structured consultation policy will have a positive influence elsewhere because of the demonstration effect that the policy will have on IOSCO's members.

Therefore, we welcome this opportunity to comment on IOSCO's draft document. First of all, we commend IOSCO for its proposal to consult on all projects that would involve the issuance of international standards and principles for the securities sector. However, ICSA members strongly encourage IOSCO to consult as well on all proposals that would involve the modification of international standards and principles for the securities industry. In addition, we would like to note some other areas where we believe IOSCO's proposed consultation policy could and should be strengthened.

1. ICSA is composed of trade associations and self-regulatory associations for the securities industry in eleven countries as well as a number of international trade associations. ICSA members represent and/or regulate the firms that carry out the bulk of the activity on the world's equity, bond and derivatives markets. A list of ICSA members is attached to this letter.

1. Prior to the formal consultation

The period prior to a formal consultation is a critical and often underappreciated stage in the consultation process. Therefore, we urge IOSCO to place greater stress on consulting with market participants and other informed parties prior to beginning work on a consultation document in order to determine the need for regulatory action and, if such a need exists, what action would be appropriate. Contacts with market participants and other informed parties during this preparatory phase would help focus the debate on the most important and material issues.

2. During the consultation process

The heart of any structured and effective consultation program is regulators' ability to target and invite submissions from the full range of interested parties in as open a manner as possible. IOSCO and its members could accomplish this objective by: (a) publishing consultation documents on the Internet and in a wide variety of media, both internationally and within individual jurisdictions, in order to ensure that the greatest number of interested parties is aware of the documents; (b) considering the establishment of working groups composed of market professionals and others knowledgeable about the specific topic under consideration in order to elicit their views; and, (c) seeking comment, whenever possible, on the cost and operational implications of proposed standards or principles, including the impact on small firms, sufficiently early in the consultation process for market participants to analyze them prior to submitting their comments.

3. Responding to the feedback received

An effective consultation policy both encourages and requires a genuine dialogue between regulators and market participants. A genuine dialogue is possible only when market participants and others understand that IOSCO welcomes comments on its consultation documents and will respond appropriately to those comments. This means, first and foremost, that market participants and others must be given adequate time to respond to consultation documents, a particularly important consideration for complex policy considerations. We would like to note that some national regulators have adopted or are contemplating adopting a minimum three-month consultation period for all consultation documents and we urge IOSCO

to adopt the same. In addition, we would encourage IOSCO and its members to inform interested parties of their thinking at various stages of the consultation process, including through the use of concept releases and feedback statements. Most critically, we would encourage IOSCO and its members to consult for a second time if the response to the first consultation revealed significant problems, or where revised proposals are substantially different from the proposals on which the original consultation was based.

4. Providing notice when normal procedures cannot be followed

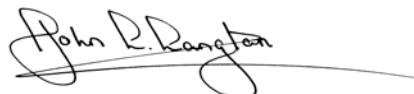
In those cases where there is a significant departure from normal consultation procedures, we urge IOSCO and its members to provide notice of, and the reasons for, such a change in procedure through published statements on the Internet and other media.

5. Reviewing the consultation process

Given that this is a new and exploratory stage for IOSCO, ICSA members would encourage IOSCO to review its consultation policy within a relatively short period of time. Specifically, we would suggest that it might be useful for IOSCO to review its consultation principles and procedures after two years or so.

In closing, we would like to emphasize once again the importance of IOSCO's commitment to the adoption of a structured consultation policy and how much we appreciate this initiative. Please do not hesitate to contact the undersigned or Dr. Marilyn Skiles, Secretary General of ICSA, regarding the comments in this letter. For your review, we are enclosing a copy of ICSA's *Statement on Regulatory and Self-Regulatory Consultation Practices*.

Sincerely,



John L. Langton
Chief Executive, International Securities
Market Association (ISMA) and
Chairman, ICSA Advisory Committee



Sir Adam Ridley
Director General, London Investment
Banking Association (LIBA) and
Chairman, ICSA Working Group on
Regulatory Transparency

The members of ICSA are as follows:

Association Française des Entreprises d'Investissement, France
Australian Financial Markets Association, Australia
Bond Exchange of South Africa, South Africa
The Bond Market Association, United States
Italian Association of Financial Intermediaries, Italy
International Banks and Securities Association of Australia, Australia
International Primary Market Association, United Kingdom
International Securities Market Association, Switzerland
Investment Dealers Association of Canada, Canada
Japan Securities Dealers Association, Japan
Korea Securities Dealers Association, Korea
London Investment Banking Association, United Kingdom
NASD, United States¹
Securities Industry Association, United States
Swedish Securities Dealers Association, Sweden
Taiwan Securities Association, Taiwan

1. NASD abstained from voting on this document.



INTERNATIONAL
BANKS AND SECURITIES
ASSOCIATION OF AUSTRALIA

7 January 2005

Mr Philippe Richard
General Secretary
International Organisation of Securities Commissions
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28006 Madrid
SPAIN

Dear Mr Richard

IOSCO's Consultation Policy and Procedures

The International Banks and Securities Association of Australia (IBSA) welcomes the opportunity to comment on IOSCO's Consultation Policy and Procedures. IBSA is the trade association for investment banks and securities companies in Australia and our members typically form part of a global business. IOSCO's regulatory guidance through its international principles and standards has a significant bearing on members' operations as it is given effect by national regulators. In this context, we commend IOSCO's decision to establish the proposed policy and procedures for effective consultation and release a 'consultation draft' for industry comment.

IBSA is a member of the International Council of Securities Associations (ICSA) and we endorse its submission to you on the consultation draft. We also wish to offer a number of supplementary comments that we hope will assist you in finalising the policy and procedures to be adopted for consultation. The main theme of these comments is that effective consultation, undertaken by government agencies and industries in a genuine spirit of collaboration, will lead to better regulation and a lower risk of regulatory failure.

Our comments fall under four broad headings:

1. Culture

- There should be a strong disposition within IOSCO to willingly consult on projects that may result in the establishment or modification of international regulatory principles or standards. The consultation draft is a clear statement by IOSCO of its intention to consult and this is welcome.
- Trust and a commitment to cooperation by both industry and IOSCO are vitally important. Confidence in a fair and open process is the foundation of effective consultation. We believe IOSCO has established a good foundation through the Technical Committee's New York Conference last October and implementation of the consultation draft will be even more important in nurturing the partnership with industry.

2. General Objectives

- The key objective of consultation is to ensure effective stakeholder input to deliver better regulatory outcomes, achieve regulatory best practice and minimise the risk of regulatory failure. The consultation draft would benefit from a clearer statement of this objective, as this would more directly draw attention to the benefits that accrue to all sides from effective consultation. Effective consultation requires a commitment of resources by both IOSCO and its respondents and this would make the offsetting benefits more transparent.
- The consultation draft outlines a number of subsidiary objectives that flow from this, which we agree with. In particular, effective consultation should lead to more efficient identification and prioritisation of relevant issues and it should help industry to understand the drivers behind IOSCO's work.
- In addition, we note that effective consultation would also enhance policy neutrality to the extent that all competing stakeholder groups would be informed of emerging policy initiatives.

3. Framework and Procedures

- The default position should be to consult on matters involving the establishment or modification of regulatory principles, standards or measures; that is, consultation should occur as a matter of course unless there are specific reasons why consultation would not be appropriate. In these cases, IOSCO should explain the reasons for a decision not to consult.
- To the extent possible, there should be a forward agenda for policy initiatives to assist planning.
- For individual projects, a clear, integrated consultation plan, supported by the necessary authority and reasonable response periods, would assist effective consultation.
- Input should be sought from all stakeholders (eg through IOSCO's website and country regulators networks etc) and recognise their potential diversity.
- Rather than adhere to rigid rules, it is better that there is flexibility in the consultation mechanisms adopted – these might include industry working groups or panels, meetings ancillary to the written dialogue, informal contact with stakeholders etc.
- IOSCO should consult at the conceptual (ideas) stage, before positions become entrenched in policy proposals (which their authors would naturally want to defend).
- Later technical input from industry on matters of policy detail, including instrument design and implementation details, would help refine regulation so that it operates in the optimal manner.
- IOSCO should ensure that contributors to the consultation process receive adequate feedback during the development of a policy proposal so that industry knows its views have been considered and understood, if not always accepted. It may be necessary to engage in a second round of consultation so changes to the original position can be checked to ensure they achieve the desired result. This feedback process would help deepen industry's

understanding of IOSCO's policy and would help to establish good working relationships over time, amongst other things.

4. Transparency and Accountability

- Transparency and clarity about the objectives of both the policy proposals and the associated consultation process would help develop a shared understanding of these issues.
- There should be accountability within IOSCO at a high level for consultation planning and its implementation.
- An early review of the effectiveness of the consultation process would help to iron out any practical problems that emerge as the process is being bedded down.

IOSCO's regulatory principles and standards are at the international end of the policy continuum that passes through Australian law and concludes at the Australian end with ASIC instruments that our members must adhere to on a daily basis in the conduct of their business. IOSCO's "Objectives and Principles of Securities Regulation" covers consultation by national regulators, recommending that regulators should have a process for consultation with the public including those who may be affected by a policy change. It is appropriate that IOSCO now take the initiative to provide for adequate consultation at the international end of the spectrum too.

IOSCO is developing an important and influential role in international regulation. It has the potential to deliver significant benefits by improving the consistency of international regulation over time and assisting the further integration of global markets. The consultation draft is a positive step in this regard.

Please contact me if you have any queries in regards to our submission.

Yours sincerely

Duncan Fairweather
Executive Director

cc Jeff Lucy, Chairman, Australian Securities and Investments Commission



the global voice of
the legal profession

January 7, 2005

Mr. Philippe Richard
IOSCO Secretary General
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28006 Madrid
Spain

Re: Public Comment on the *IOSCO Consultation Policy and Procedures*

Dear Mr. Richard,

The International Bar Association is pleased to comment on the “IOSCO Consultation Policy and Procedures” proposal which we believe raises important principles about democracy, public participation and the rule of law in the context of the laudable goal of international regulatory convergence in securities regulation. The IBA, the global voice of the legal profession, is uniquely suited to make this comment as our members include 16,000 individual lawyers and over 190 Bar Associations worldwide.

We are submitting our comments as set out below on behalf of the ITS Committee (Issues and Trading in Securities Committee) which has approximately 1300 members from 87 different countries and the CMF (Capital Markets Forum) which brings together more than 770 business lawyers, market professionals and regulators from 85 countries. Both the ITS Committee and the CMF are part of the Legal Practice Division of the International Bar Association.

As an organization, the IBA aims to influence the development of international law reform and the just rule of law throughout the world. Our members include lawyers from both emerging and developed nations and those who represent the interests of individual investors and consumers as well as those who represent banks, companies, sophisticated investors and market professionals. In the area of securities regulation, our members represent the full range of those whose interests may be harmed or served by any regulatory initiative affecting the capital markets or securities laws. In today’s rapidly converging world where in many countries the savings of ordinary people are invested in the stock market, where retirement savings depend increasingly on fair rules of play in the trading markets and where individual savers, large companies and governments find their investment and policy choices limited by

the global market, we believe that fair and effective securities regulation is critical to the quality and responsiveness of global capital markets.

A key underlying tenet of modern securities regulation is disclosure and transparency at all levels. In this context, we believe that it is critical that IOSCO's proceedings and actions also be conducted on this basis. While we fully expect that in the coming years, our individual members and Bar Associations may take a range of views on which elements of convergence are appropriate for their individual countries and for the interests they represent, there is one principle where we believe we stand with a common voice: on the need for transparency and disclosure in the rulemaking process itself.

With this in mind, we submit that IOSCO should not permit any consultations to take place with comments which are anonymous to the public. We understand that internal regulatory deliberations must and should be confidential. Once any proposal is posted for consultation, however, all comments, both formal and informal, should be made in full transparency with attribution, and the extent to which IOSCO is meeting with or receiving information from interested companies, lobbyists or groups should be apparent to all. We therefore recommend that all submissions after the publication of the consultation should be public and easily accessible.

With the leadership role of IOSCO, it is worthy of note that a number of regulatory agencies look at IOSCO principles in implementing home country standards and requirements. It seems increasingly clear that the essential discussion of standards will take place at the IOSCO level rather than later at the home country level and that home country regulators will increasingly take the position that the standards adopted by IOSCO foreclose further discussion in the home country of the topics covered by these standards. This process is legitimate in democratic rulemaking when, and only when, those same principles have been fully vetted in a public manner at an international level.

In closing we note that the legal profession is not specifically mentioned in the "interested parties" to be consulted, although given the intense and necessary involvement of lawyers or other legal professionals in the drafting, interpretation and adjudication of securities laws, we expect this is an unintentional oversight. We suggest, however, that in each consultation process IOSCO would benefit from specifically and systematically soliciting input from private lawyers, Bar Associations and other legal professional groups. The IBA has experience in this type of comment process and stands ready at any time to help IOSCO to organize these contacts.

Thank you for your consideration of these points. If you have any questions or if we can provide you with any additional information please contact Margaret Tahyar, ITS Senior Vice Chair (margaret.tahyar@dpw.com, telephone: +33-1-5659-3670) or Meng Liang, IBA Program Lawyer (meng.liang@int-bar.org, telephone: +44-20-7629-1206 X231).

Sincerely yours,

G. Blair Cowper-Smith
Co-Chair, ITS Committee

Daniel Hurstel
Co-Chair, Capital Markets Forum

Jaap Willeumier
Co-Chair, ITS Committee

Andrew Soussloff
Co-Chair, Capital Markets Forum

Margaret Tahyar
Senior Vice Chair, ITS Committee

Claudio Visco
Vice-Chair, Capital Markets Forum

Luis de Carlos
Vice Chair Publications, ITS Committee

Walter Jospin
Vice Chair Publications, ITS Committee

Philip Boeckman
Vice Chair Programming,
ITS Committee

Pere Kirchner
Vice Chair Programming,
ITS Committee

Jørgen Madsen
Secretary, ITS Committee

IOSCO: DRAFT STATEMENT ON CONSULTATION POLICY & PROCEDURES

comments by the London Investment Banking Association

The London Investment Banking Association (LIBA) welcomes the initiative by IOSCO to prepare, and consult on, a formal Consultation Policy. LIBA is a member of the International Council of Securities Associations (ICSA) and fully supports the comments submitted separately by ICSA on the proposed policy. LIBA is the principal trade association in the United Kingdom for firms active in the investment banking and securities industry. The Association represents the interests of its Members on all aspects of their business and promotes their views to the authorities in the United Kingdom, the European Union and elsewhere. Our Association's comments on the draft IOSCO Statement are as follows.

INTRODUCTION

2. For any body whose central concern is **regulation**, its policy of consultation can with advantage be based on an explicit broad statement of the principles of good regulation. These are now widely accepted as embracing, inter alia, the following:
 - a) Regulation should be directed at remedying **significant and demonstrable market failure**. Where other goals are prescribed, whether in addition or as an alternative, they should be clearly specified.
 - b) Regulatory policies should be **proportional**; and **targeted**. These requirements mean that the ills remedied or **benefits** achieved by regulation should **substantially outweigh the costs** of the policies adopted. Regulatory intervention should be **confined as far as possible to the relevant sector**, products and classes of intermediaries and market participants. Moreover,
 - c) the measures adopted should be **risk-based**; no more complex, all-embracing or invasive than is justified by the risks mitigated; and should normally be framed in explicit recognition of the principle that **seeking, let alone achieving, zero failure is usually impossible and nearly always unjustifiably costly**.

- d) Regulatory policy-making and implementation for securities and financial business normally involves the exercise of powers and authority delegated to agencies, officials, experts and specialists. As a rule, such policy-making is not much exposed to the rigours of democratic scrutiny and control; yet is of great importance both to the sectors regulated and their customers. For these reasons, it is particularly important that regulatory policy-making should be **transparent** and **accountable**. This principle is **particularly relevant to the activities of IOSCO**, which embraces nearly all the financial regulatory agencies in the world's market economies, but hitherto has exposed itself to little scrutiny by consumers, market representatives, trade associations (other than some SROs) or national parliaments. Adoption of clear procedures to ensure **Transparency and accountability**, to the best standards of the XXIst century, would therefore seem essential from the start.
- e) In considering possible remedies to apparent market failures, or the pursuit of other regulatory objectives, policy makers should objectively **consider the full range of possible/appropriate policy responses**. These may involve a variety of measures as alternatives to classic regulatory interventions, such as improving the operations of the market (e.g. by liberalisation, disclosure and increased competition); self-regulation; or by joint initiatives between the authorities, consumers and market representatives. As a general rule, a competitive and well-informed market is the best regulator.
3. **We would urge IOSCO to base its Statement explicitly on a statement of regulatory philosophy on lines such as these.**

General Objectives

4. IOSCO's admirable first principle is

“to assist in a determination of whether concerns exist which require a regulatory response, and if so, what form of action is appropriate.”

This principle is of special methodological significance, since it gently articulates the fundamental distinction between considering **whether to intervene at all**; and, if the answer is presumed to be 'yes', considering **what is the best method** to adopt. This distinction appears little more than a statement of the obvious, once written down; but practice in regulatory policy making frequently fails to respect it. In particular and worst

of all, consultation often only begins **after** a decision has been taken to intervene, which may well be unjustified and unjustifiable on some occasions. **We would urge IOSCO to give this vital principle greater prominence, both in its consultation policy statement, and in future practice.**

Factors to be Considered in Deciding whether and how to seek public comment

5. We are a little surprised and distinctly uneasy at the inclusion of no less than nine factors which, it is suggested, should be considered before deciding whether to seek public consultation. Nearly all of them convey the feeling that they may serve as explanations or, rather, excuses – and possibly rather unworthy ones – for **not** consulting. We know of no regulatory organisation which has set and achieved good standards of regulatory consultation and transparency while explicitly subscribing to such a wide range of “factors” of a frankly negative kind. **At the least, should they not be reviewed critically?** And should IOSCO not instead **commit itself firmly and explicitly to the presumption that it will always consult except where there are very serious problems of confidentiality or urgency which would constitute a serious justification for secrecy?**

Ways of Consulting

6. Turning to the question of **how** to seek public comment, we would note that in the last ten or so years, consumers and market participants have often been overwhelmed, not just (as is well known) by the sheer volume and number of policy initiatives and consultation, but also by duplicative or multiplicative proposals – something which is much less well-known and scarcely appreciated. IOSCO has launched a fair number of duplicative initiatives itself. **Should IOSCO not explicitly undertake to avoid where possible launching duplicative policy initiatives and consultations in future?**
7. Industry participants are well aware that sudden crises and media interest can sometimes create acute political and parliamentary pressure for very swift “action” by regulators. The UK and the EU have seen their fair share of this phenomenon in the financial sector in the last 15 or so years. Regrettably, the record generally suggests that on many occasions such hurried, crisis-driven regulation is bad regulation. Often this is because policy is designed and implemented without the awareness and understanding or detailed knowledge of technical and market issues which is essential to good regulation; but

which can only be assured by involving market participants in its design. The lesson of many such experiences is therefore that:

- a) procedures which **encourage or facilitate** hurried, crisis-driven, regulatory policy-making are to be **avoided** as far as is realistic;
- b) when it **is** nonetheless felt essential to devise and implement new regulation very quickly, it is imperative to consult as fully and far as possible, even if there is little time in which to do so;
- c) crisis measures adopted with little or no consultation should be explicitly identified and legislated for on a **temporary** basis. Thus
- d) at the least they should be **subject to early review; or**, better still, they should **automatically lapse** after a few years, thus opening the door to a rational, measured, long term policy initiative based on full and considered consultation.

Flexibility & Pre-Consultation

8. The Statement commits IOSCO to a “flexible approach to public consultations”. To that end, one aspect of flexibility which might with value be considered by IOSCO is the practice of informal “pre-consultation” with selected experts and market participants in the early stages of policy making, before any formal consultations are launched. This can help greatly in focusing effort and attention where it is most needed; in identifying research and expertise which may be valuable; and in establishing whether there is any case for action. It is striking that the Lamfalussy Wise Men strongly commended such informal pre-consultation to the European Commission in their report on improving consultation and regulation for the European Union’s Financial Services Action Plan.

Timing and Forward Planning

9. When compared with the consultation policies of other regulatory bodies, the Statement is unusual in giving no indications of the length of time IOSCO would normally expect to provide for a consultation – i.e. in conditions where there is no exceptional pressure for swift action. There is no shortage of bench marks or examples to draw on. In the European Union (EU) a period of three months is probably the norm for consultation on

financial regulation in conditions where there are no pressing deadlines; and for the international policy issues which the EU deals with, experience shows that even a period as long as this is often extremely challenging, except for industries and trade associations which are particularly well organised; and even for them it can sometimes be insufficient. Since IOSCO deals with truly worldwide issues, there is a case for allowing longer – say at least an extra month – to allow market participants a modicum of **time to liaise** and consult not merely across national boundaries (as in Europe) but **across continents**. A further reason for asking for more time is the simple but compelling consideration of translation in the widest sense: of giving consultees reasonable time in which to overcome problems of understanding arising from **differences in language, culture and institutions**. The task of understanding and translating from a master text – and exploring it with busy firms and senior executives cannot always be undertaken quickly or thoroughly within a mere 12 or 13 weeks. **We would therefore urge IOSCO to aim for minimum consultation periods of four months.**

10. Another important and neglected issue in international regulation is the need for **reasonably precise indications of the forward plans of the major players in the regulatory game**. The task of organising experts, research industry study groups, exchanges of views with market participants in other countries, not to mention organising conferences, is hard as it is. We have found that organising such activities effectively necessitates access to a rolling forward 12-18 months calendar of policy-makers' planned meetings and consultation initiative. **We would strongly urge that IOSCO publishes regularly, revises and rolls forward such a programme at least every 6 months.** [The FSA has published such a programme in the UK for some time, which has been of immense value to the market participants it consults].

Collaboration with Market Participants

11. Many of the principal securities associations in the world's major market economies collaborate and meet regularly, if not very frequently, to debate policy and regulatory issues of common concern. We believe that many of them would be able and willing – whether through the framework of the International Council of Securities Associations or otherwise – to so organise themselves as to help IOSCO with its consultative processes. Such liaison, dissemination and facilitation would not only serve to give IOSCO more and better market assessments of, and reactions to, its policy proposals. They would also

in effect permit IOSCO to use the good offices of market participants and their associations to give wider publicity to IOSCO's initiatives.

A review of the new policy?

12. We are sure that both IOSCO and market participants in the sectors which its members regulate will learn much about which aspects of the new consultation policy work well and which do not over the first few years in which the new policy is implemented. **For this reason it would seem wise to suggest that the operation of the new policy be publicly reviewed after, say, 4 years.** This would permit long enough time to elapse for worthwhile experience to be built up. It is perhaps relevant that when the European Union introduced the reforms recommended by the report of the Group of Wise Men chaired by Baron Lamfalussy, they provided for such a review procedure.

London

7 January 2005

Stikeman Elliott LLP (SE)

I am writing in response to the draft IOSCO Consultation Policy and Procedures issued for comment in November. I apologize for the slight delay in responding.

Firstly, allow me to commend IOSCO for embracing an increased level of accountability and transparency. As IOSCO assumes a more important and pro-active role in promoting the development of international standards and their convergence with those of domestic market regulators, this is a critical initiative.

As a general rule, public input should be sought, both in determining IOSCO's agenda and in formulating policy (or recommendations with respect thereto). There are many models for such transparency/accountability. While the current draft is a good starting point, it might benefit from the shift in focus and some further elaboration. Perhaps it should also be recognized that such procedures will evolve over time (and with experience) and a commitment made to review them on a regular basis.

I wonder whether the list of factors to be considered in deciding whether and how to seek public comment is all that helpful. For example, having reviewed all of the publications issued by IOSCO during the last calendar year, it strikes me that IOSCO would have benefited (and could not have been prejudiced) from seeking public consultation in each instance.

The issue, then, is how (rather than whether), to seek public comment. While this issue is raised, it is not addressed in the draft. Instead, there is a "statement of consultation procedures" which simply contemplates a process of posting drafts on IOSCO's web site. I would have thought this should be the presumptive minimum and (as contemplated elsewhere in the draft) that there may be circumstances where more extensive consultations are warranted - reaching out to interested parties to engage in input or dialogue beyond that possible through the web site posting.

I'm also not sure why it should be presumed that all comments received on consultation documents will be posted anonymously. In most instances, I would have thought that commentators will have no objection to being identified and that knowing their identity will assist others in evaluating their comments (and, possibly, responding).

There are, of course, numerous other details which one would typically address by way of administrative procedures - time frames for consultation, requirements to summarize comments received and indicate the manner in which they have been reflected in a final report, etc. As noted above, these may await development as IOSCO gains experience with the public consultation process. The key is to make a real commitment to accountability and transparency - in this regard, the draft (subject to the brief comments noted above) should be a good starting point.

The views expressed above solely reflect those of the other and have been prepared, with haste, as I only became aware of the draft document earlier this week. I hope they are of some assistance.

Sincerely,
Ed

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