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SECTION 17j  
RULE 17j-1  
PUBLIC  
AVAILABILITY 8/8/00

**PUBLIC**

August 8, 2000  
Our Ref. No. 200051298  
Mackenzie Investment  
Management et al.  
File No. 801-24426

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT**

Your letter of August 3, 2000 requests our assurance that we would not recommend enforcement action to the Commission under Section 17(j) of the Investment Company Act of 1940 ("Act") and Rule 17j-1 thereunder if, for purposes of the personal trading reporting requirements of Rule 17j-1, certain directors of Mackenzie Investment Management, Inc. ("MIMI") and Mackenzie Financial Corporation ("MFC," and together with MIMI, the "Mackenzie Management Companies") are treated in the same manner as are directors of an investment company who are not "interested persons" of that company.

You state that MIMI, a majority-owned subsidiary of MFC, provides, through various subsidiaries, investment management, marketing, distribution, transfer agency and other administrative services to the Ivy Fund, an open-end investment company registered under the Act. MFC also provides investment advisory services to a series of the Ivy Fund. MFC and MIMI are investment advisers registered under the Investment Advisers Act of 1940 ("Advisers Act").

You state that currently MIMI's board of directors includes four independent directors, and MFC's board of directors includes seven independent directors.<sup>1</sup> Solely for purposes of this letter, you consider an independent director of the board of any of the Mackenzie Management Companies to be a director that would not be deemed to be an "interested person," as defined in Section 2(a)(19)(B) of the Act,<sup>2</sup> of any of those companies for any reason other than the fact that the person is a director of a Mackenzie Management Company and knowingly has any direct or indirect beneficial interest in

<sup>1</sup> You state that two of the independent directors of MIMI are also independent directors of MFC.

<sup>2</sup> Section 2(a)(19)(B) defines an "interested person" of an investment adviser of any investment company, in relevant part, to include: (i) any affiliated person of the investment adviser; (ii) any member of the immediate family of any natural person who is an affiliated person of the investment adviser; (iii) any person who knowingly has any direct or indirect beneficial interest in any security issued by the investment adviser or by a controlling person of the investment adviser; (iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of the investment company has acted as legal counsel for the investment adviser; (v) any broker or dealer registered under the Securities Exchange Act of 1934 or any affiliated person of such a broker or dealer; and (vi) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had at any time since the beginning of the last two completed fiscal years of the investment company a material business or professional relationship with the investment adviser or with the principal executive officer or any controlling person of the investment adviser. Section 2(a)(3) defines "affiliated person" of another person, in relevant part, to include: (i) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of such other person; (ii) any person directly or indirectly controlling, controlled by, or under common control with, such other person; and (iii) any officer, director, partner, copartner, or employee of such other person.

securities issued by a Mackenzie Management Company.<sup>3</sup> You state that the independent directors of the Mackenzie Management Companies serve in a traditional oversight capacity, providing an independent check on the management of the Mackenzie Management Companies. Specifically, you state that the independent directors give attention to matters such as approving the selection of qualified senior management, reviewing institutional norms and control procedures, monitoring the performance of both senior management and the companies, and reviewing management-formulated strategic planning initiatives. You state that the independent directors have no involvement with the day-to-day operations of either the Ivy Fund or the Mackenzie Management Companies. Thus, you state that the independent directors are not involved in decisions or recommendations regarding the purchase or sale of securities by any series of the Ivy Fund.

Section 17(j) of the Act makes it unlawful for any person affiliated with a registered investment company, its investment adviser, or its principal underwriter, in connection with the purchase or sale by the person of securities held or to be acquired by the investment company, to engage in any fraudulent, deceptive or manipulative act or practice in contravention of rules and regulations adopted by the Commission. Rule 17j-1(a) makes it unlawful for any person affiliated with an investment company or its investment adviser or principal underwriter from engaging in fraudulent, deceptive or manipulative activities in connection with the purchase or sale by the person of securities held or to be acquired by the investment company. The rule also contains certain requirements that are designed to prevent fraudulent activity on the part of persons who are in the position to gain personal benefit through their relationship with the investment company.<sup>4</sup>

One such requirement is that "access persons," as defined in the rule,<sup>5</sup> must make certain reports with respect to their personal trading and holdings in securities. Rule 17j-1(d) requires every access person of an investment company, and every access person of an investment adviser or principal underwriter for the investment company, to submit to that investment company, investment adviser or principal underwriter: (i) an initial holdings report no later than 10 days after the person becomes an access person;

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<sup>3</sup> You state that certain of the independent directors beneficially own securities issued by MIMI and/or MFC. You state, however, that no independent director of MIMI or MFC owns, controls, or holds 5% or more of the outstanding voting securities of either MIMI or MFC. In addition, you state that no independent director has control of either MIMI or MFC, either individually or by virtue of any arrangement with any other person. Section 2(a)(9) defines the term "control," in relevant part, to mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with the company. In addition, Section 2(a)(9) provides that any person who owns beneficially, either directly or through one or more controlled companies, more than 25% of the voting securities of a company is presumed to control that company.

<sup>4</sup> See "Personal Investment Activities of Investment Company Personnel," Investment Company Act Release No. 23958 (Aug. 20, 1999) (adopting amendments to Rule 17j-1) ("1999 Release").

<sup>5</sup> Rule 17j-1(a)(1), in relevant part, defines an "access person" to include any director, officer, or general partner of an investment company or of its investment adviser.

(ii) a quarterly transaction report no later than 10 days after every calendar quarter; and  
 (iii) an annual holdings report. These reporting requirements are intended to enable the relevant organization to monitor effectively potential conflicts of interests that may arise from an access person's securities holdings and transactions.<sup>6</sup>

Rule 17j-1(d)(2)(ii) excepts from the initial and annual holding reporting requirements any director of an investment company who is not an interested person of the company within the meaning of Section 2(a)(19)(A) ("disinterested fund director"), and who would have been required to make a report solely by reason of being an investment company director. That provision also excepts a disinterested fund director from the quarterly transaction reporting requirement unless the director knew or, in the ordinary course of fulfilling his or her official duties as a director, should have known that during the 15-day period immediately before or after the director's transaction, the investment company purchased or sold the security, or the investment company or its investment adviser considered purchasing or selling the security. In proposing the rule, the Commission explained that it was unnecessary "to subject disinterested [fund] directors to reporting requirements as extensive as those applicable to other persons, since disinterested [fund] directors would, as a general matter, have less contact with an investment company's day-to-day operations than other access persons."<sup>7</sup>

You state that all of the directors of the Mackenzie Management Companies are required to make the personal trading and holding reports required by Rule 17j-1(d) because they are access persons of the Ivy Fund. You believe, however, that, solely for purposes of these reporting requirements, the independent directors of the Mackenzie Management Companies should be treated in the same manner as the disinterested fund directors of the Ivy Fund, and therefore should be able to rely on the exceptions from the reporting requirements of Rule 17j-1(d)(2)(ii).<sup>8</sup> You state that the independent directors of the Mackenzie Management Companies do not have greater access to, or involvement with, the management or fund investment and trading personnel of the Mackenzie Management Companies or the Ivy Fund than do the disinterested fund directors of the Ivy Fund. Furthermore, you argue that the purposes underlying Section 17(j) and Rule 17j-1 are not advanced by subjecting the independent directors of the Mackenzie Management Companies to reporting requirements as extensive as those that apply to other access persons, because the independent directors have no involvement with the day-to-day operations of either the Mackenzie Management Companies or the Ivy Fund.

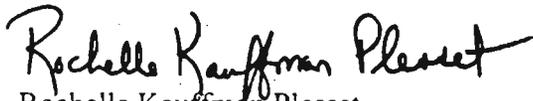
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<sup>6</sup>See 1999 Release, *supra* note 4; "Personal Investment Activities of Investment Company Personnel and Codes of Ethics of Investment Companies and their Investment Advisers and Principal Underwriters," Investment Company Act Release No. 21341 (Sept. 8, 1995) (proposing amendments to Rule 17j-1).

<sup>7</sup>"Prevention of Unlawful Activities With Respect to Registered Investment Companies," Investment Company Act Release No. 10162 (Mar. 20, 1978) (proposing Rule 17j-1).

<sup>8</sup>You state, however, that the Mackenzie Management Companies and the independent directors of these companies will continue to comply with the reporting requirements of Rule 204-2(a)(12) under the Advisers Act.

We would not recommend enforcement action to the Commission under Section 17(j) and Rule 17j-1 if, solely for purposes of the exceptions to the personal reporting requirements of Rule 17j-1(d)(2)(ii), the independent directors, as defined above, of the Mackenzie Management Companies are treated in the same manner as are disinterested directors of an investment company. This position is based on the facts and representations set forth in your letter, in particular that the independent directors (1) would not be deemed to be interested persons, defined in Section 2(a)(19)(B) of the Act, of a Mackenzie Management Company for any reason other than that they are directors of a Mackenzie Management Company and knowingly have any direct or indirect beneficial interests in securities issued by a Mackenzie Management Company,<sup>9</sup> and (2) have no involvement with the day-to-day operations of either the Mackenzie Management Companies or the Ivy Fund. This response represents the views of the staff on enforcement action only and does not purport to state any legal conclusion on the issue presented.

  
Rochelle Kauffman Plesset  
Senior Counsel

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<sup>9</sup> See note 3.

August 3, 2000

## VIA FEDERAL EXPRESS

Douglas J. Scheidt, Esq.  
Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549

Re: Request With Respect to Certain "Access  
Persons" for Relief from the Personal Holding and  
Transaction Reporting Requirements of Rule 17j-1

Dear Mr. Scheidt:

We are counsel to Mackenzie Investment Management Inc. ("MIMI") and Mackenzie Financial Corporation ("MFC," and together with MIMI, the "Mackenzie Management Companies"). MIMI, a majority owned subsidiary of MFC, is a Delaware corporation that is registered with the Securities and Exchange Commission (the "Commission") as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"). MIMI provides, through various subsidiaries, investment management, marketing, distribution, transfer agency and other administrative services to the series of Ivy Fund, an open-end investment company registered under the Investment Company Act of 1940, as amended (the "1940 Act"). MFC is also registered with the Commission as an investment adviser under the Advisers Act. MFC provides investment advisory services to one series of Ivy Fund. We are writing on behalf of the Mackenzie Management Companies to request assurance that the Division of Investment Management (the "Division") will not recommend enforcement action to the Commission if, as discussed more fully below, certain directors of the Mackenzie Management Companies are treated in the same manner as are directors of an investment company who are not "interested persons" of that investment company for the purposes of the various personal trading reporting requirements of Rule 17j-1 under the 1940 Act.

I. Background

Section 17(j) of the 1940 Act makes it unlawful for certain affiliated persons of registered investment companies and their investment advisers and principal underwriters to "engage in any act, practice, or course of business in connection with the purchase or sale . . . by such person of any security held or to be acquired by such registered investment

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company.” The Commission has promulgated Rule 17j-1 to clarify and regulate those acts that are deemed to violate Section 17(j). In adopting Rule 17j-1, the Commission expressed concern with the “increasing number of situations involving parallel trading by individuals with knowledge regarding transactions anticipated or engaged in by registered investment companies.” Investment Company Act Release No. 11421 (Oct. 31, 1980) (the “Adopting Release”). The abuses that Rule 17j-1 is designed to eliminate are those “where access persons improperly are able to gain personal benefit through their relationship with the investment company.” Id.

Rule 17j-1(d) generally requires that “access persons” file reports with registered investment companies, the companies’ investment advisers or the companies’ principal underwriters regarding the access persons’ personal trading in securities. The required reports include an initial holdings report, filed within 10 days after an access person becomes an access person, quarterly transaction reports, filed within 10 days after the end of every calendar quarter, and an annual holdings report. Rule 17j-1(a) defines an “access person” as, among other persons, “any director, officer, general partner or Advisory Person of a Fund or of a Fund’s investment adviser.” Rule 17j-1(d)(2) generally excepts from the reporting requirements of the Rule those directors who are not deemed to be “interested persons” of the fund.<sup>1</sup>

## 2 Relief Requested

Under the definition of “access person,” all directors of the Mackenzie Management Companies would be required to file the personal trading reports required by Rule 17j-1(d) with respect to Ivy Fund. For the reasons outlined below, we respectfully request assurance that the Division will not recommend enforcement action to the Commission if the Independent Directors (as defined below) of the Mackenzie Management Companies<sup>2</sup> are treated, for purposes of the exceptions to the filing of initial and annual holdings reports and quarterly transaction reports described in Rule 17j-1(d)(2)(ii), as though they are directors of a fund who are not “interested persons” of the fund.<sup>3</sup> For the

<sup>1</sup> Rule 17j-1(d)(2)(ii)(B) limits the exception applicable to a fund director who is not an “interested person” of the fund, providing that such a director must file a quarterly transaction report with respect to a security if “the director knew or, in the ordinary course of fulfilling his or her official duties as a Fund director, should have known that during the 15-day period immediately before or after the director’s transaction . . . the Fund purchased or sold” the security.

<sup>2</sup> Currently there are four Independent Directors of MIMI and seven Independent Directors of MFC. Two of the Independent Directors of MIMI are also Independent Directors of MFC.

<sup>3</sup> The Independent Directors and the Mackenzie Management Companies will continue to comply with the reporting and record-keeping requirements of Rule 204-2(a)(12) under the Advisers Act, as such provisions apply to the Independent Directors.

purposes of this relief, an Independent Director is a person who would not be deemed to be an "interested person" of a Mackenzie Management Company, as the term "interested person" is defined in Section 2(a)(19)(B) of the 1940 Act, for any reason other than the fact that the person (i) is a director of a Mackenzie Management Company or (ii) knowingly has any direct or indirect beneficial interest in securities issued by a Mackenzie Management Company.<sup>4</sup>

### 3. Discussion

Conflicts of interest between investment company personnel (such as portfolio managers) and their funds can arise when these persons buy or sell securities for their own accounts. These conflicts arise because fund personnel have the opportunity to profit from information about fund transactions, often to the detriment of fund investors. Rule 17j-1 addresses these conflicts of interest, in part, by requiring access persons to provide the personal holding and trading reports described above. These requirements are appropriate with respect to certain access persons, including, for example, any director or officer of an investment adviser who, in the ordinary course of his or her business, makes, participates in, or obtains information regarding the purchase or sale of securities for a registered investment company or whose functions or duties as part of the ordinary course of his or her business relate to the making of any recommendation to such investment company regarding the purchase or sale of securities. We believe, however, that the interests of Section 17(j) and Rule 17j-1 are not advanced by subjecting the Independent Directors of the Mackenzie Management Companies to reporting requirements as extensive as those applicable to other access persons, since the Independent Directors have no involvement with the Mackenzie Management Companies' day-to-day operations.<sup>5</sup> We believe that such an unnecessary burden and invasion of privacy of the Independent Directors should be avoided, so that highly qualified individuals are not discouraged from serving in such a position.

The Independent Directors of the Mackenzie Management Companies do not have greater access to, or involvement with, the management or fund investment and trading personnel of the Mackenzie Management Companies or Ivy Fund than do the independent

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<sup>4</sup> Certain of the Independent Directors beneficially own securities issued by MIMI and/or MFC. The Independent Directors of MIMI and MFC are eligible to participate in a Director Stock Purchase Plan under which the directors receive, in lieu of cash, securities issued by MIMI or MFC as compensation for their service as Independent Directors. No Independent Director of MIMI or MFC owns, controls or holds 5% or more of the outstanding voting securities of either MIMI or MFC. In addition, no Independent Director has control of either MIMI or MFC, either individually or by virtue of any arrangement with any other person.

<sup>5</sup> We note that in the release proposing the adoption of Rule 17j-1 the Commission used a similar rationale to justify excluding disinterested directors of funds from the general reporting obligations of Rule 17j-1. Investment Company Act Release No. 10162 (Mar. 20, 1978).

trustees of Ivy Fund. Like the independent trustees of Ivy Fund, the Independent Directors of the Mackenzie Management Companies serve as an independent check on the management of the Mackenzie Management Companies. The Independent Directors do not manage their companies' operations on a day-to-day basis. Instead, the Independent Directors serve in a traditional oversight capacity, giving attention to matters such as approving the selection of qualified senior management, reviewing institutional norms and control procedures, monitoring the performance of both senior management and the companies, and reviewing management-formulated strategic planning initiatives. The Independent Directors also have no involvement with the day-to-day operations of Ivy Fund. Thus, the Independent Directors are not involved in decisions or recommendations regarding the purchase or sale of securities for any series of Ivy Fund.

In recognition of the fact that most fund's independent directors do not have immediate access to trading and portfolio management information, Rule 17j-1 properly exempts a fund's independent directors from the requirement to report personal securities transactions. This exception to Rule 17j-1's reporting requirement is, we believe, of some importance to many independent directors of investment companies for legitimate reasons of privacy and because reporting can be a substantial burden.<sup>6</sup> We believe that it would not be inconsistent with the purposes underlying Section 17(j) and Rule 17j-1 if the Independent Directors of the Mackenzie Management Companies were treated, for this limited purpose (*i.e.* non-reporting of personal securities transactions), in the same manner as Ivy Fund's independent trustees. Subjecting independent directors of investment advisers to Rule 17j-1's reporting requirement is, we believe, a burden without any clear regulatory purpose or benefit.

We do not believe that the relief requested hereunder, if granted, would compromise the protection of investors. The Independent Directors of the Mackenzie Management Companies would still be subject to written codes of ethics, required under Rule 17j-1, containing provisions reasonably necessary to prevent these Independent Directors and other access persons from engaging in any conduct prohibited by Rule 17j-1. In addition, the Independent Directors will be subject to Rule 17j-1(d)(2)(ii)(B), which, in this context, will require that an Independent Director file a quarterly transaction report with respect to a security if the director knew or, in the ordinary course of fulfilling his or her duties as a director, should have known, that during the 15-day period immediately before or after the director's transaction, a series of Ivy Fund purchased or sold the security, or a Mackenzie Management Company considered purchasing or selling the security on behalf of a series of Ivy Fund. The Independent Directors and the Mackenzie Management Companies will also continue to comply with the reporting and record-keeping requirements of Rule 204-2(a)(12) under the Advisers Act, as such provisions apply to the

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<sup>6</sup> The Commission's recent mutual fund corporate governance proposal includes rules requiring disclosure of various positions and transactions of fund directors and "their immediate family members." We respectfully note that the Commission's proposed definition of "immediate family members" has been met with significant opposition from members of the mutual fund industry because, among other things, such overly broad disclosure requirements will unduly burden fund directors and invade their privacy.

August 3, 2000

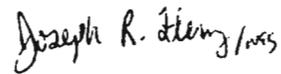
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Independent Directors. Moreover, the Independent Directors would still be bound by the threshold legal principle that investment company personnel -- at all levels -- act as fiduciaries. This principle can be restated as a single core precept: the interests of Ivy Fund and its shareholders must and will come first.

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If you have any questions or need any additional information concerning the foregoing, please call William E. Schwartz at (617) 728-7163 or the undersigned at (617) 728-7161.

Very truly yours,



Joseph R. Fleming

JRF/cg