2 November 2006

Submitted by email to
secretariat@cesr.eu
FAO Mr Fabrice Demarigny, Secretary General

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ICSA response to CESR's Call for Evidence on the Evaluation of the Supervisory Functioning of the EU Market Abuse Regime **Document reference CESR/06-078**

Dear Mr Demarigny

The Institute of Chartered Secretaries and Administrators (ICSA) is an international professional body with some 44,000 members and 28,000 students in over 70 countries worldwide fulfilling a variety of roles in a wide range of different types and sizes of organisations. Many of these members are company secretaries in public companies and will be directly involved in interpreting, advising on, and the practical implementation of, directives, law and regulation. Company secretaries of listed companies will often be secretary to the disclosure committee, manage dealing notifications and the insider lists.

The Market Abuse Directive was implemented in the UK on 1 July 2005, and there are three areas on which we would like to report the experience of our members:

1. insider lists
2. PDMRs
3. the disclosure of inside information

1. Insider lists

Administering the list:
As a result of the detailed requirements around insider lists, captured in the FSA Handbook, Disclosure Rules, 2.8, the maintenance of these lists has become a major exercise, particularly for the larger, multinational companies. It is debatable whether the benefits of this new, centralised, prescriptive regime outweigh the costs. Some companies have invested in special software to manage the list (the cost of which is in the £thousands); where the list is managed in-house, its maintenance requires considerable resource in terms of time. The average size of the lists seem to be in the early hundreds, but some companies have lists in the thousands, so to keep such lists 'promptly' updated at the centre, and ensuring that each new addition is alerted to their legal and regulatory duties and the related sanctions is clearly demanding, particularly for multinational companies. A further burden under current rules is that insiders have to gain pre-clearance from the centre to deal:

"*Persons discharging managerial responsibilities* (who are not *directors*) and employee insiders must not deal in any *securities* of the *company* without first notifying the company secretary or a designated *director* and receiving clearance to deal from him." Model Code, 4(e) as annexed to the Listing Rules.

Encouragingly the FSA are reviewing this obligation at the moment, and may in the future restrict the need for pre-clearance to PDMRs.

It may be worth considering giving companies more freedom to decide themselves how to manage their lists of insiders (so that some sub-lists can be held locally by a project manager), so long as the centre can provide a full list to the FSA in a reasonable timeframe. Perhaps further guidance on 'persons acting on the issuer's behalf' (who are able to manage their own lists) could enable this phrase to be interpreted internally and not just as the issuer's advisers, thereby enabling some decentralisation of the list.

Deciding the point at which someone is added to the list:
We understand that most companies, and in particular those that report quarterly, will have a fairly static list of those who are involved with the results. Teams that are working on projects that are likely to become price sensitive, and certainly when they are deemed to have become price sensitive, are added and removed from the list as projects develop. The difficultly is deciding the point at which someone should be added to the list (ie should it only be once the information is price sensitive, rather than just likely to become price sensitive) – this is an area on which further guidance may be of value as there is a divergence of views, certainly between member states. Where companies have a joint structure, across two member states, they will usually develop processes around the member state that has the stricter interpretation of what 'access to inside information', means. This can result in UK companies being forced to add certain persons to an insider list before it is considered necessary from a solely UK perspective.

In particular, guidance on what 'access' to inside information was intended to mean may be helpful. For example, in a finance department there will be employees who could 'access' the inside information by using computer systems etc to look beyond what is directly required of them, but they are not directly involved with such information. Agreeing when access becomes involvement (thereby involving addition to the list, and dealing restrictions) has proved problematic and is being interpreted differently. A narrow definition can reduce the size of a list three-fold.

Having large numbers on the lists do cause companies problems beyond the purely administrative, as the company can find itself severely restricted in when it can timetable non-exempt share related activity, such as an award under a long term incentive plan.

Extra guidance for foreign listed companies:
London is seeing a significant increase in foreign listings and often the PLC holding company will have its operations outside the EU. Additional guidance and education should be considered for these foreign companies coming to the EU to incorporate/and or list. It can be a real issue for these companies to keep the list promptly updated, when they need to deal with operating subsidiaries across the world, perhaps in jurisdictions where the concept of inside information is not so well established. The logistical issues are real and the ability for companies to keep project insider lists locally, available to the centre on request, might be appreciably more realistic in these circumstances.

2. PDMRs
Companies have come to differing views as to who, within their companies, meet the definition of PDMR. Some have not extended beyond the board, others have included the company secretary and/or members of the executive committee. We support the lack of prescription here, as clearly one size does not fit all. However, some companies have experienced problems in deciding who to include. There has been a suggestion that a way of judging whether someone should be a PDMR is if the Remuneration Committee sets their remuneration, or if the management position is referred to in the listing particulars.

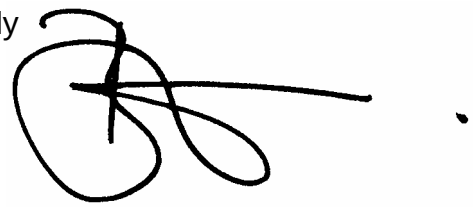
In the UK, PDMRs have to notify the issuer of dealings within four business days of the transaction, and then the issuer must notify the market of the dealing by the end of the next business day. There is a feeling that the notification of PDMR dealings to the market, where the PDMR is not a board member, is not of significant interest to the market. Additionally some PDMRs, who are not board members, are in employee share schemes, perhaps in other jurisdictions, where the scheme does not typically have board level membership and therefore has not been set up to facilitate timely notifications to the centre. The operation of some of these share schemes is complex, sometimes using phantom shares, and has also proved difficult to translate into a UK notification. Weighing up the burden of tracking the share interests of non-director PDMRs (let alone their connected persons) and making the related notifications, against the perceived value of these notifications in the market, one has to question the point of the PDMR regime.

3. The disclosure of inside information

The requirements around the disclosure of inside information, in terms of timeframe and content, has resulted in companies reviewing their procedures in this area; this has often resulted in disclosure committees meeting more frequently, more detailed records of decisions being made and better documented procedures (often in the form of a manual), all of which must be welcomed.

Please contact me should you like further detail on any of the points we raise.

Yours sincerely



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