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European Securities and Markets Authority
103 Rue de Grenelle
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30 May 2014

Re: ESMA Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive

Dear Sir/Madam,

UBS would like to thank ESMA for the opportunity to comment on the Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive. Please find attached our response to the consultation.

We would be happy to discuss with you, in further detail, any comments you may have. Please do not hesitate to contact Nemanja Pantic on +41-44-239 62 08.

Yours sincerely,
UBS AG

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Managing Director
Head of Executive & International Affairs

Jonathan Bibby
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UBS AG response to the European Securities and Markets Authority's Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive

III. I DRAFT REGULATORY TECHNICAL STANDARD ON THE CALCULATION METHOD OF THE 5% THRESHOLD REFERRED TO IN THE ARTICLE 9(5) AND (6) EXEMPTIONS (MARKET MAKER AND TRADING BOOK EXEMPTIONS)

Q1. Do you agree that the trading book and the market maker holdings should be subject to the same regulatory treatment regarding Article 9(6b) RTS?

ESMA proposes that a credit institution or investment firm intending to avail itself of the trading book exemption will need to have in place similar organisational requirements to the ones required of the market maker in the Commission Directive 2007/14/EC (henceforth, the Commission Directive).

First, we would like to clarify whether the reference in the consultation paper to the same regulatory treatment or similar organisational requirements refers to the control mechanisms by competent authorities as regards market markers under Article 6 of the above Commission Directive. Under Article 6, our understanding is that the market maker would need to:

(i) Notify to the competent authority of the Home Member State of the issuer that it conducts or intends to conduct market making activities on a particular issuer.
(ii) Make the identification of shares or financial instruments held for market making activity purposes by any verifying means and if not possible, the market maker may be required to hold them in a separate account for the purposes of that identification.

(iii) Provide upon request of the relevant competent authority the market making agreement between itself and the stock exchange and/or the issuer if such agreement is required under national law.

In case the reference in the consultation paper to the same regulatory treatment or similar organisational requirements refers to the above control mechanisms, initially introduced for market makers, we would not support condition (i) relating to an obligation to notify the Home Member State about conducted or intended trading book activities on a particular issuer. This is because positions in a trading book change very frequently given that a trading book consists of positions held intentionally for short-term resale and/or with the intention of benefiting from actual or expected short-term price differences between buying and selling prices or from other price or interest rate variations. An obligation to notify the Home Member State about trading book activities on a particular issuer would therefore create unnecessary administrative burden without, in our view, adding value to market transparency.

Q2. If not, please identify reasons and provide quantitative evidence for treating trading book and market making holdings differently?

As indicated in our answer to Q1, we would first require clarification on the nature of the regulatory treatment or organisational requirements. Should they consist of the conditions set out in Article (6) of the Commission Directive, we believe that the identification of shares or financial instruments held in a trading book should not be problematic for any credit institution or investment firm. However, a potential obligation to notify the Home Member State about trading book activities on particular issuers would lead to an excessive number of notifications to the authorities which we do not believe would add value to market transparency and would result in investors being burdened by unnecessary information requirements.

Q3. Do you agree with the ESMA proposal of aggregating voting rights held directly or indirectly under Articles 9 and 10 with the number of voting rights relating to financial instruments held under Article 13 for

the purposes of calculation of the threshold referred to in Article 9(5) and (6)? If not, please state your reasons.

First, we note that the threshold levels up to which exemptions for market making activity and trading book activity are applicable have not changed. The trading book exemption should only apply if the trading books do not exceed 5%. The market making exemption might be applied even for bigger holdings as long as the total holdings don't reach or cross the 10% threshold.

We agree that for the purpose of calculating the threshold up to which an exemption might be applicable, shares shall be aggregated with financial instruments (cash & physically settled). Most of the European jurisdictions already include cash-settled instruments in their major shareholder disclosure requirements and therefore typically also allow the use of exemptions on physically settled as well as cash settled financial instruments.

Q4. Can you estimate the marginal cost of changing your general major shareholding disclosure system for the purposes of notification of trading book and market making holdings, i.e., having different buckets for the purposes of the exemptions? Please distinguish between one-off costs and on-going costs.

Having different buckets, one for shares and one for financial instruments, would not create much additional cost. This is because existing regulatory requirements in certain member states to report significant holdings in financial instruments separately from shares already require firms to have systems that are capable of monitoring shares and financial instruments separately.

Q5. Do you agree that, in the case of a group of companies, notification of market making and trading book holdings should be made at group level, with all holdings of that group being aggregated (Article 3(1))?

We generally support the calculation against the 5% exemption threshold and notification at group level. However, we believe that a derogation from notifying

at group level should be available if an entity meets the independence criteria set out under paragraph 72 (please refer to our answer to Q6 below) or where a management company or investment firm exercises voting rights regarding the portfolio management holdings independently from the parent undertaking (the latter exemption being already available under the 2004 Transparency Directive).

Q6 Do you agree that an exemption to notify at group level can apply if an entity meets the independence criteria set out under paragraph 72 (Option 2)?

Our understanding is that ESMA is proposing that a parent undertaking of a credit institution/investment firm wishing to benefit from the exemption from notification at group level should ensure that:

(i) The credit institution/investment firm exercises its voting rights unrelated to the shares held in connection with the trading book and market making activities independently from its parent undertaking
(ii) It sends a declaration as its status to the competent authority of the issuer of the shares.

Aggregation between subsidiaries shall not be required where an entity meets the above independence criteria.

We believe that calculating the trading book or market making book holdings against the 5% threshold can be made at a legal entity level, if the competent authority of the home member state of the issuer has been informed about the disaggregation levels and the independence criteria are met.

Under the 2004 Transparency Directive, this concept of disaggregation based on an independence test already exists with respect to portfolio management holdings of credit institutions/investment firms (i.e. where the voting rights with respect to such portfolio management holdings are exercised independently from the parent undertaking). Almost all [EU] jurisdictions have implemented the

exemption from group level notification for portfolio management holdings that meet the independence criteria in their national regimes.

Option 2 would extend the subjective scope of the exemption from disaggregation provided for in Article 12 (4) and (5) to also include credit institutions and investment firms in relation to their trading book and market making holdings. Considering that positions held as a market maker and/or in a trading book are not used to exert influence on the issuer, but instead are merely held for resale and/or taken on by the institution with the intention of benefiting in the short term from actual and/or expected differences between buying and selling prices or from other price or interest rate variations, we believe that it would make sense to extend the scope of the disaggregation exemption to credit institutions and investment firms in relation to their trading book and market making holdings, provided the independence criteria are met.

Furthermore we understand that the exemption applies also to non-EU groups that demonstrate that their subsidiaries' market making and trading activities meet the independence criteria on an on-going basis.

Q7 Please provide an estimate on how many times a year would your group have to report a major disclosure under the current regime in comparison to Option 1. Please include an estimate of the one-off or on-going costs involved.

Due to the fact that many key European jurisdictions have already implemented a requirement to report on cash-settled instruments and already provide for a disaggregation exemption, we believe that disaggregation would have only a minimal impact.

Q8. Do you think that Option 2 poses any further enforceability issues than Option 1? If yes, what kind of issues can you foresee arising out of it? Can you propose an alternative approach?

Option 1 allows only portfolio management holdings to be disaggregated in the case a group has a management company or investment firm conducting this activity.

Option 2 allows disaggregation based on proved independence of the controlled undertakings vis-a-vis the parent undertaking and compliance with written procedures on information barriers. Hence it doesn't limit the disaggregation exemption provided for in Article 12(4) and (5) to management companies and investment firms but extends the subjective scope of the exemption to also include credit institutions and investment firms in relation to their trading book and market making holdings.

We do not think that Option 2 would pose further enforceability issues as such disaggregation is already applied in many European jurisdictions. Also the independence requirement, the requirement to send a declaration to the competent authority of the issuer, as well as the requirement to have the ability to provide evidence upon request, are not new requirements. This is standard market practice within most European jurisdictions.

III.II DRAFT REGULATORY STANDARD ON THE METHOD OF CALCULATING VOTING RIGHTS REFERRED TO IN ARTICLE 13 (1A) (A) IN THE CASE OF FINANCIAL INSTRUMENTS REFERENCED TO A BASKET OF SHARES OR AN INDEX

Q9. Do you agree with the proposal that financial instruments referenced to a basket or index will be subject to notification requirements laid down in Article 13(1a)(a) when the relevant securities represent 1 % or more of voting rights in the underlying issuer or 20 % or more of the value of the securities in the basket/index or both of the above?

ESMA proposes that the calculation of such voting rights shall be made on the basis of the weight of the share in the basket or index and if at least one of the following conditions apply:

(i) The shares in the basket or index represent 1% or more of voting rights attached to shares of the specific issuer; or,
(ii) The shares in the basket or index represent 20% or more of the value of the securities in the basket or index.

We agree with the above methodology. In fact, the 20% threshold already exists in seven member states, of which three member states also use the 1% threshold (UK, Italy and the Netherlands).

However, in order to avoid non-meaningful disclosures being made to the market, as well as requiring unnecessary monitoring procedures, we would suggest to limit the scope of the above requirements to actively managed baskets and indices. Only within actively managed mandates on baskets and indices would an investor/manager potentially/theoretically have some sort of power to build a significant stake through such a multicomponent product. However, it would probably still be cost inefficient.

Regarding the calculation of the 1% or more of voting rights in the underlying issuer criteria, we understand that it captures index or basket related financial instruments if shares in the basket or index represent 1% or more of voting rights attached to shares of the specific issuer. However, in respect of the standard indices, such as Euro Stoxx 50, CAC 40 or DAX, the indicated number of the shares of a specific issuer and class represented by the index equals 100% or nearly 100% of such class. If understood this way, the 1% criteria would effectively capture all standard indices and undermine the relevance of 20% criteria.

Q10. Are there any other thresholds we should consider?

We do not believe other thresholds should be considered as the proposed methodology is reasonable. There is no need for additional requirements as we do not believe that baskets and indices would be used for stake building

activities. It would not be cost effective for an investor to build a stake by investing in small holdings via baskets/indices.

The proposal is in line with the EU jurisdictions which have already implemented the monitoring of baskets / indices in their national regimes (UK, Italy and the Netherlands).

Q11. Please estimate the number of disclosures you would have to make per year should the above mentioned thresholds be adopted. Please also provide an estimate of the compliance costs associated with the disclosure (please distinguish between one-off and on-going costs).

We are not in a position to provide this information at this time.

Q12. Do you agree that a financial instrument referenced to a series of baskets which are under the thresholds individually but would exceed the thresholds if added and totalled should not be disclosed on an aggregated basis?

Yes, we agree, based on the same reasons as provided in our response to Q10. We do not believe that baskets and indices are being used for stake building activities.

III.III DRAFT REGULATORY TECHNICAL STANDARD ON THE METHODS OF DETERMINING DELTA FOR THE PURPOSES OF CALCULATING VOTING RIGHTS RELATING TO FINANCIAL INSTRUMENTS WHICH PROVIDE EXCLUSIVELY FOR CASH SETTLEMENT

Q13. Do you agree that our proposal for the method of determining delta will prevent circumvention of notification rules and excessive disclosure of positions? If not, please explain.

Our understanding of the ESMA proposals is as follows:

(i) The number of voting rights relating to an exclusively cash settled financial instrument with a linear, symmetric pay-off profile with the underlying share shall be calculated on a delta-adjusted basis with cash position being equal to 1.

(ii) The number of voting rights relating to an exclusively cash settled financial instrument without a linear, symmetric pay-off profile with the underlying share shall be calculated on a delta-adjusted basis, using generally accepted standard pricing models.

We agree that a cash-settled instrument will not be exercised if it is out of the money and therefore we would support delta adjusted reporting in order to prevent meaningless and excessive disclosure of positions. However, it is not clear to us that it helps prevent the circumvention of the notification rules compared to non-delta adjusted reporting.

Q14. Do you agree with the proposed concept of "generally accepted standard pricing model"?

We agree with the proposed concept of generally accepted standard pricing models. Delta calculations are used for credit and market risk monitoring and the respective calculation models are being reviewed and approved by national regulatory authorities of the respective position bearing legal entities. Consequently generally accepted standard pricing models are already widely in use.

III. IV DRAFT REGULATORY STANDARD ON CLIENT-SERVING TRANSACTIONS

Q15. Are these three types of client serving exemptions all appropriate in terms of avoiding excessive or meaningless disclosures to the market? Please provide quantitative evidence on the additional costs borne by financial intermediaries should any of these exemptions not be adopted.

ESMA requests stakeholder views on whether it is appropriate to allow the exemptions under Article 9(4), (5) and (6) and in Article 12 (3), (4) and (5) (as set out in paragraphs 129 -135 of the ESMA CP) to be applied to three types of client serving transactions, that is financial instruments held by a natural person or legal entity:

(i) Fulfilling orders received from clients;
(ii) Responding to a client's requests to trade otherwise than on a proprietary basis; or
(iii) Hedging positions arising out of such dealings.

We support the proposal to allow exemptions for client serving transactions. We note that the above exemptions for client serving transactions have been already introduced in the UK in 2009 (in the FCA's Disclosure and Transparency Rules via DTR 5.3.1R). We understand the principle behind the FCA's exemption is similar to ESMA's proposal. Firms holding a position purely to facilitate a client position, with no interest in the performance of underlying equity, should not need to make a disclosure. This is a key exemption and is similar in nature to the UK Takeover Panel's disclosure exemption for desks of banks and securities houses which have Recognized Intermediary (RI) status and which act in a client-serving capacity.

However, we do not see why the exemption should be limited to cash-settled financial instruments only. At a minimum, we believe this should also include physical shares used to hedge positions arising out of client facilitating transactions (case (iii) above). This is because client serving transactions have the sole purpose of providing liquidity without any strategic interest and are conducted in significant volumes by large banks. In our view, the disclosure of significant numbers of major shareholdings with regards to such transactions would therefore be meaningless for the market.

Q16 Can these three types of client-serving exemption allow for a potential risk of circumvention of major shareholdings' disclosure regime?

No, we do not believe this would be the case as positions held in client serving capacity are not used to build a stake. Client facilitation transactions do not have an economic or strategic purpose. The only purpose of holding such shares is to enable client transactions. The clients on the other side would still have a disclosure obligation on their holdings (e.g. as the holder of positions which the bank has processed or as the holder of a long swap where the bank acts as the counterparty and hedges the risk respectively).

Q17 Do you agree with our analysis that applying the current exemptions can address certain notification requirements for cash-settled financial instruments introduced by Article 13(1)(b)?

We would agree that cash-settled financial instruments could be part of a trading book, market making book, custodian account, clearing and settlement process, among others, and therefore should fall under already existing exemptions. We would not interpret the existing exemptions in a way that they would be limited to shares and physical instruments only.

This would be in line with the UK FCA's existing approach. As an example for the Trading Book, the FCA has confirmed that CFDs held within the trading book benefit from the existing exemption contained in DTR 5. This allows financial institutions and investment firms to disregard holdings provided they do not exceed 5 per cent and are held on the trading book. Shares which are held as part of a hedging transaction relating to a CFD can also benefit from the trading book exemption up to the current limit of 5 per cent.

Q18. In your opinion, is the application of current exemptions sufficient to achieve the aim of this provision (i.e. avoiding unmeaningful notifications to the market)?

We believe that the exemption for client serving transactions should be introduced as a separate and additional exemption applicable on all financial instruments including shares used for hedging positions arising out of client

serving activities. The first reason is that existing exemptions (custodian, clearing and settlement) are not related to client serving activities. Secondly, limiting the exemption to trading book positions and/or market making positions would not take into consideration all types of client serving transactions. Consequently, we believe there would still be some unmeaningful notifications to the market, taking into account our answer to Q16.

Q19 Do you agree that the client-serving exemption should cover MiFID authorised entities as well as a natural or legal person who is not itself MIFID authorised but is in the same group as a MiFID authorised entity and is additionally authorised by its home non-EU state regulator to perform investment services related to client-serving transactions? Can you foresee any additional cost in case the exemption does not also cover non-EU entities within the group? If yes, please provide an estimate?

We agree that the client-serving exemption should extend to both MiFID authorised entities and non-MiFID authorised entities which are in the same group as a MiFID authorised entity. Many firms are likely to have in their group entities which engage in client-serving activities but which are not MiFID authorised. If the exemption were not to extent to non-MiFID authorised entities, additional costs of compliance would incur for those firms.

Q20. Do you think that the proposed methods of controlling client-serving activities are effective? Do you envisage other control mechanisms which could be appropriate for financial intermediaries who wish to make use of the exemption?

Yes, we agree. Any financial institution should be able to demonstrate to the competent authorities that it has appropriate systems and controls in order to identify client serving activities and clearly separate them from proprietary dealings.

IV DEFINITION AND SCOPE OF THE INDICATIVE LIST OF FINANCIAL INSTRUMENTS

Q21. When does a financial instrument have an "economic effect similar" to that of shares or entitlements to acquire shares? Do you agree with ESMA's description of possible cases?

We consider this to be the case when the value of the financial instrument is based on the performance of the underlying share. We agree with ESMA's description of possible cases.

We are concerned that the inclusion of repurchase and stock lending agreements in the list has the effect that routine stock lending or repo operations by investors would trigger notifications, since a shareholder's long position would change from a physical holding of shares to a financial instrument (being the right of recall of the shares under the stock loan or repo agreement), whereas a stock loan or repo operates as a disposal with a simultaneous agreement to re-acquire the shares at a later date. This would lead to a large volume of disclosures of a technical nature reflecting routine stock lending or repo activity where there is no change in the underlying economic exposure.

We therefore recommend that it should be clarified that stock loan and repo transactions are not included in limb (g) of Article 13(1b). This is in line with the position in the UK, where DTR 5.1.1(5) specifies that a stock-lending agreement which provides for the outright transfer of securities and which provides the lender with a right to call for re-delivery of the lent stock (or its equivalent) is not to be taken as a disposal by the lender of any shares that are the subject of the stock loan.

Q22 Do you think that any other financial instrument should be added to the list? Please provide the reasoning behind your position.

We do not believe any other financial instruments should be added to the list.