Quoted Companies Alliance

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European Securities and Markets Authority (ESMA)
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28 January 2014

Dear Sirs,

ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

Introduction

We are the Quoted Companies Alliance, the independent membership organisation that champions the interests of small to mid-size quoted companies. Their individual market capitalisations tend to be below £500m.

The Quoted Companies Alliance is a founder member of European**Issuers**, which represents over 9,000 quoted companies in fourteen European countries.

The Quoted Companies Alliance Legal Expert Group has examined your proposals and advised on this response. A list of members of the Expert Group is at Appendix A.

Response

We welcome the opportunity to respond to this consultation. We have focused our response on the changes regarding insider lists and manager transactions, as we feel these areas will have the greatest impact on small and mid-size quoted companies.

We were broadly comfortable with the extension of the Market Abuse Regulation (MAR) to non-Regulated Markets, such as MTFs and OTFs (as issuers on such markets in the UK have been subject to market abuse legislation for some time). However, we were not in favour of the extension of the insider lists regime to issuers on MTFs and OTFs. This would be a new requirement so far as the UK is concerned - and we were concerned about the administrative burden, in terms of time and expense, for small and mid-size quoted companies in preparing and maintaining such lists. Therefore, we strongly support the exemption in the Market Abuse Regulation for companies on 'SME Growth Markets' from the need to produce insider lists on an ongoing basis.

Regarding the content of insider lists, we believe that the information proposed by ESMA is far too detailed and will be burdensome for issuers to provide. The contents of such lists should be proportionate and take into the account the purpose for which insider lists are required. Furthermore, we believe that there could be data protection issues with the amount of information required to be kept by issuers and their advisers. Please see our response to questions 84 – 90 below for more detail on this.

With regard to managers' transactions, we believe that ESMA should provide more guidance on the types of transactions that do or do not need to be notified. Please see our responses to question 91 -96 below for more detail on this.

Responses to specific questions

Insider Lists (Q84-90)

Q84 Do you agree with the information about the relevant person in the insider list?

We welcome ESMA's proposals for a precise format of an Insider List which would be used by all market participants. This seems a sensible approach.

However, the contents of such a list should be proportionate and take into account the purpose for which the Insider Lists are required. Their creation and updating should be manageable and not impose too great a burden on issuers and their advisers (for whom issuers will remain responsible if the creation, maintenance and updating of the Insider List has been delegated by the issuer to them). Against this background, we would not support the detailed identification requirements of Insider Lists suggested by ESMA. Information regarding place of birth and personal phone and electronic email addresses are not required to be kept by organisations in the UK. Even obtaining home addresses (and keeping them up to date) and recording dates of birth and national identification numbers (passport or NI numbers) would, in our view, be administratively and unnecessarily burdensome and disproportionate to the purpose of the Insider List, which is to enable a regulator to identify a person and the date and time at which the person obtained inside information.

We would therefore suggest that the identification requirements be limited to name, position within the issuer (or adviser), work address and work email address. In all cases, ESMA should consider the data protection issues for issuers and their advisers in keeping and disclosing such data.

Q85 Do you agree on the proposed harmonised format in Annex V?

We would therefore suggest that the proposed harmonised format in Annex V of the ESMA Discussion Paper dated 14 November 2013 (the Discussion Paper) be amended to reflect the observations in the above paragraphs.

Q86 Do you agree on the proposal on the language of the insider list?

We would support the proposal that Insider Lists are submitted in the official language of the relevant competent authority or the language that is customary in the sphere of international finance.

Q87 Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

It seems to us that it is also a sensible approach, in the modern world, for Insider Lists to be submitted to competent authorities in a secure electronic format.

Q90 Do you agree on the proposal to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement, or do you see other possibilities to fulfil the obligation?

As regards the exemption granted to SME Growth Markets, we recognise that the current text of MAR requires issuers on SME Growth Markets (if they are to have the benefit of the exemption) to be in a position to provide the Competent Authority on request with an Insider List. Therefore, there would, inevitably be a need, in practice (as ESMA recognises) for such issuers to have sufficient systems and procedures in place to produce such an Insider List if requested by the Competent Authority.

However, we would not support ESMA mandating the types of sufficient systems and procedures that issuers would need to put in place. Issuers must have the flexibility to develop their own appropriate systems and procedures; otherwise, we would question, whether, in these circumstances, the exemption will actually confer any significant cost savings for issuers on these markets.

Managers' Transactions (Q91-96)

Much of the law relating to the disclosure of transactions by PDMRs, including that relating to derivatives or other financial instruments, already applies to quoted companies in the UK.

The new law will extend more explicitly to companies quoted on MTFs and OTFs. However, as the rules of these securities markets in the UK already have provisions dealing, in broad terms, with the MAR's requirements, we would not expect, overall, the MAR requirements or ESMA's proposals on manager transactions to have a material adverse impact on small and mid-size quoted companies in the UK.

Q91 Are these characteristics sufficiently clear? Or are there other characteristics which must be shared by all transactions?

As a general observation, clearly, the provisions of Articles 14(1) and (2) of MAR are intended to be wide. This approach has been the practice in the UK where, in general terms, all transactions or deals by PDMRs (and their connected persons) are required to be publicly disclosed.

We consider that it would be helpful to issuers if ESMA could give the scope of the relevant provisions as much clarity as possible by ESMA providing guidance on transactions which either do need to be notified or, conversely, do not.

If gifts by way of inheritance are to be notified, which we think they should, (see paragraph 351 of the Discussion Paper) then ESMA needs to consider this in the light of the three business day notification requirement in MAR. In this instance, we consider the period for notification should run from the time the PDMR becomes aware of the testamentary bequest.

The list set out in paragraph 353 of the Discussion Paper is, therefore helpful. We would add that subscription rights are clearly intended to be notified and we would therefore suggest that there is an explicit reference to the 'exercise of warrants' and that this be added to paragraph 353e. We are not clear why the words '(primary market)' have been added to paragraph 353 f.

Q94 What are your views on the possibility to aggregate transaction data for public disclosure and the possible alternatives for the aggregation of data?

We support the principle of aggregation as a means of making the disclosure exercise as simple as possible. Although we do not hold any strong views, we would support a variant of the third option. Aggregation would be on a same day basis with no netting. We would suggest the highest and lowest prices (not the weighted average) should be disclosed but not the timeframe of the executions.

Q95 What are your views on the suggested approach in relation to exceptional circumstances under which an issuer may allow a PDMR to trade during a trading window?

In broad terms, we agree with ESMA's approach in relation to the exceptional circumstances in which a PDMR should be allowed to trade (i.e. sell) during the closed window period and the tests to be applied.

We recognise that MAR refers to 'immediate sale of shares' in the circumstances of severe financial hardship. We would ask ESMA to clarify whether a charge or pledge of shares (which would be publicly discussed under Act 14(2) of MAR) in these circumstances would be permitted. Generally, any guidance in terms of the circumstances where issuers will be justified in permitting PDMRs to deal during a closed window would be welcomed.

Q96 What are your view on the suggested criteria and conditions for allowing particular dealings and on the examples provided? Please explain.

In the UK, it is typical for there to be a number of specified exemptions for share option schemes (ESMA is referred to paragraph 2 of the UK's Model Code set out in the Annex to Listing Rule 9.2 (the Model Code)).

Further exemptions, also set out in paragraphs 12 to 26 of the Model Code, which are permitted in the UK during "close periods" include undertakings to take up rights (or other pre-emptive offers (e.g. an open offer), the sale of nil paid rights in order to fund the balance of entitlements under rights issues, and undertakings to accept a takeover offer and gifts to spouses or civil partners. ESMA is referred to all of these exemptions. These have worked well in a UK context for many years.

We question whether the four month notification requirement in paragraph 376 of the Discussion Paper is too long as it requires the PDMR to make an investment decision significantly in advance of the instrument's expiration date. We would suggest this is reduced to, say, two months before the expiration date if the instrument's expiration date would fall within a closed window period.

If you would like to discuss of any of response in more detail, we would be happy to attend a meeting.

Yours faithfully,

Tim Ward
Chief Executive

APPENDIX A

Quoted Companies Alliance Legal Expert Group

Gary Thorpe (Chairman)	Clyde & Co LLP
Chris Barrett	Bird & Bird LLP
Richard Beavan	Boodle Hatfield LLP
Ian Binnie	Hamlins LLP
Ross Bryson	Mishcon De Reya
Simon Cox/Julie Keefe/Jo Chattle	Norton Rose Fulbright LLP
David Davies	Bates Wells & Braithwaite LLP
Mebs Dossa	McguireWoods
Stephen Hamilton	Mills & Reeve LLP
Susan Hollingdale/Hilary Owens	Practical Law Company Limited
Martin Kay	Blake Lapthorn
Philip Lamb	Lewis Silkin
Maegen Morrison/Danette Antao/ Bernard Wall	Hogan Lovells International LLP
June Paddock	Fasken Martineau LLP
Tom Shaw/Paul Arathoon/ David Hicks/Jaspal Sekhon	Speechly Bircham LLP
Donald Stewart	Progility plc
Mark Taylor	Dorsey & Whitney
Anthony Turner	Farrer & Co