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New Italian Disclosure Reporting Regime Aims to Rein In Short-Selling Amid Market Turbulence

On July 10, 2011, the *Commissione Nazionale per le Società e la Borsa* (the Italian securities regulator, “CONSOB”) adopted a new disclosure regime for short selling of Italian stocks. The new rules, which became effective on July 11, 2011, require market participants to report their net short positions exceeding certain thresholds.

Resolution No. 17862 adopted by CONSOB on July 10, 2011 (the “Resolution”) has introduced temporary reporting obligations of net short positions held in relation to shares admitted to trading on the Italian regulated markets. The measure adopted by CONSOB comes amid exceptional market conditions, in particular the high price volatility and trading trends recorded on June 24, 2011 and on July 8, 2011. According to CONSOB, the Resolution tries to prevent that “the absence of reporting obligations of net short positions increase speculative pressure on shares traded on the Italian regulated markets”. The new disclosure regime came into force on July 11, 2011 and will expire on September 9, 2011.

Disclosure Obligations

Any natural or legal person or any other entity, whether Italian or not, must report to CONSOB any holding of a short position in the share capital of any listed issuer whose main market is an Italian regulated market, if such short position, net of any long positions in the same shares, equals or exceeds 0.2% of the share capital of the issuer. Once a notification has been made, additional disclosure is required for any increase or decrease in the net short position equal to or higher than 0.1%.

The net short position is calculated at the closing of each business day and disclosure must be made to CONSOB by 3.30 p.m. (CET Time) on the business day following the day on which the position reached, exceeded or fell below the disclosable percentage trigger. End-of-day positions are calculated with reference to the transactions executed on that same day, whether or not settled.

The English-language form to be submitted to CONSOB to comply with these disclosure obligations can be found at <http://www.consob.it/mainen/documenti/english/resolutions/res17862.htm>.

Calculation of the Net Short Position

The size of net short positions is expressed as a percentage of the company’s share capital, calculated on the basis of the number of the issuer’s shares that constitute the net short positions and the total number of the shares of the company’s capital.

The Resolution defines “net short position” as a short position calculated with respect to the number of underlying shares of the relevant issuer, taking into account: (i) any short positions – *i.e.* both actual sales of shares (not yet settled) and potential sales of shares arising from short positions in derivative financial instruments; netted by (ii) any long positions – *i.e.* shares actually held, actual purchases of shares (not yet settled) and potential purchases of shares arising from long positions in derivative financial instruments, in each case irrespective of the trading venue.

Derivative financial instruments are computed on a “delta-adjusted” basis. In turn, the delta is calculated using the closing price of the underlying shares. Also, in the event that the variation of the delta itself in a given day causes the thresholds to be crossed, the relevant net short position must be reported to CONSOB.

In the context of a share capital increase, the shares to be included when calculating net short positions are deemed to be issued on the first trading day following the end of the offering period. Preemptive subscription rights form part of the calculation of net short positions.

Other Provisions

Generally, legal entities must calculate only one net short position. However, different rules may apply in the event of legal entities having different decision-making functions. In particular:

- (i) Any management company and other legal entity, whether Italian or not, that manages several funds and/or collective investment schemes and that, in relation to the same funds or schemes exercises independent investment strategies, must calculate the relevant net short position with reference to each specific fund, irrespective of the fact that the funds are managed by the same legal entity;
- (ii) Conversely, the net short positions held by funds and/or collective investment schemes that follow the same strategy determined by the same legal entity must be aggregated for purposes of calculating the total net short position; and
- (iii) Investment firms and other legal entities that hold positions in financial instruments through two or more business units, operating independently of each other, must calculate the net short positions with reference to each such business unit.

Where investment decisions are taken at a group level or where two or more entities that are part of a group act in agreement, the calculation of the net short position must be made at the group level.

Exemptions

The disclosure regime set forth by the Resolution does not apply to the activities carried out by (i) market makers acting in their capacity as such; and (ii) specialists, as defined in the listing rules of *Borsa Italiana S.p.A.* (the Italian Stock Exchange), and institutions acting as liquidity providers, both acting in their capacity as such.

Conclusions

The Resolution provides for an increase in CONSOB’s supervisory powers in the current highly volatile market environment, aligning Italian securities laws to the measures adopted by regulators in other major European jurisdictions and the current legislative proposal of the European Commission on short selling.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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