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# Reminder: new UK disclosure regime for long positions in CfDs coming into force from 1 June 2009

New rules come into force on 1 June 2009 requiring holders of qualifying long positions in certain contracts for difference ("CfDs") to disclose such positions to the UK Financial Services Authority (the "FSA") and the issuer of the underlying shares. The commencement of the rules has been brought forward from its original date in September 2009.

## The New Rules

The new disclosure rules apply to all investors, wherever domiciled, who hold long positions in CfDs (including other instruments having a similar economic effect, such as convertibles and warrants). CfDs are caught by the rules if they reference shares that are admitted to trading on a regulated or prescribed market in the UK or the EEA, and the shares are in a UK-incorporated issuer whose chosen "home state" in Europe (under the Disclosure Rules and Transparency Rules ("DTR") of the FSA's Handbook of Rules and Guidance) is the UK. This restriction to UK-incorporated issuers contrasts with the existing disclosure rules applicable to non-CfD financial instruments, which extend to non-UK incorporated issuers so long as, essentially, their "home state" in Europe (under the DTR) is the UK and the securities are admitted to trading on a regulated or prescribed market in the UK or EEA.

Disclosure must be made if long positions in such CfDs reach, exceed or fall below 3%, and each 1% threshold thereafter up to 100% of the issued shares in the underlying issuer. Holdings must be aggregated, including with holdings of other disclosable instruments (such as shares or options). Long positions are not to be set off against corresponding short positions. Derivatives referencing a basket or index must be taken into account for disclosure purposes only if securities in the basket/index represent 1% or more of the voting rights in the underlying issuer, or the exposure to the underlying issuer amounts to 20% or more of the total value of the basket/index. There is also an anti-avoidance provision requiring derivatives referencing a basket or index to be taken into account if the basket/index is being used as a device to avoid the disclosure rules. The new disclosure rules extend to CfDs that were acquired prior to 1 June 2009 and are still held on that date; CfDs acquired before this date will be deemed to have been acquired on 1 June 2009. Both exchange-traded and OTC CfDs are within scope.

## Exemptions

The CfD disclosure regime will be subject to the same partial exemptions currently set out in the DTR for: (i) underlying voting rights held on a firm's trading book that do not exceed 5% and are not used to intervene in the management of the underlying issuer; and (ii) except at the thresholds of 5% and 10% and above, underlying voting rights attached to shares forming part of a client's or fund's portfolio that is managed on behalf of that client or fund by an investment manager that is UK FSA-authorised or exempt, or authorised in another EEA member state and operating in the UK under a "passport" (and accordingly this exemption is generally not available to US investment managers). Also in line with the current rules, firms need not disclose intra-day holdings, nor any acquisition of CfDs that remains subject to conditions beyond the control of the contracting parties (such as necessary shareholder approvals).

There is also a new exemption for "client-serving intermediaries" applicable to institutions merely servicing client demand. This covers firms that (for example) write a short CfD for a client and as a result effectively take a long position. To benefit from this exemption, firms must self-certify to the FSA that they qualify for "client-serving intermediary" status. Long positions resulting from movements between a firm's accounts or between group companies need not be disclosed if such movements are simply for tax or accounting purposes.

## Calculations

In calculating percentage holdings, firms may use either a nominal or delta-adjusted basis until 31 December 2009. Thereafter, firms must report on a delta-adjusted basis. As under the existing disclosure regime, the denominator in percentage calculations is the total number of voting rights as per the most recent regulatory disclosure that is required to be made by the issuer at the end of any calendar month during which an increase or decrease in voting rights has occurred.

## Next Steps

The first disclosures under the new rules must be made within two trading days of the commencement of the regime: that is, by 3 June 2009. The requirements are implemented through changes to chapter 5 of the DTR. Firms should note that these requirements operate independently of both the Takeover Panel's disclosure rules, and the short-selling notification obligations.



If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

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|---|---|---|---|---|
| Azad Ali<br>London<br>+44.20.7655.5659<br>azad.ali@shearman.com | Azam H. Aziz<br>New York<br>+1.212.848.8154<br>aaziz@shearman.com | Lorna Xin Chen<br>Hong Kong<br>+852.2978.8001<br>lorna.chen@shearman.com | Tobia Croff<br>Rome<br>+39.06.697.679.209<br>tobia.croff@shearman.com | Thomas A. Donegan<br>London<br>+44.20.7655.5566<br>thomas.donegan@shearman.com |
| Pierre-Nicolas Ferrand<br>Paris<br>+33.1.53.89.71.77<br>pferrand@shearman.com | Laura S. Friedrich<br>New York<br>+1.212.848.7411<br>laura.friedrich@shearman.com | Nathan J. Greene<br>New York<br>+1.212.848.4668<br>ngreene@shearman.com | Katja Kaulamo<br>Frankfurt<br>+49.69.9711.1719<br>katja.kaulamo@shearman.com | Richard Metsch<br>New York<br>+1.212.848.7518<br>rmetsch@shearman.com |
| William R. Murdie<br>London<br>+44.20.7655.5149<br>bill.murdie@shearman.com | Barnabas W.B. Reynolds<br>London<br>+44.20.7655.5528<br>barney.reynolds@shearman.com | Paul S. Schreiber<br>New York<br>+1.212.848.8920<br>pschreiber@shearman.com | Robert C. Treuhold<br>Paris<br>+33.1.53.89.70.60<br>rtreuhold@shearman.com | M. Holland West<br>New York<br>+1.212.848.4579<br>hwest@shearman.com |
| John Adams<br>London<br>+44.20.7655.5740<br>john.adams@shearman.com | Aatif Ahmad<br>London<br>+44.20.7655.5120<br>aatif.ahmad@shearman.com | James Brilliant<br>London<br>+44.20.7655.5612<br>james.brilliant@shearman.com | | |

BROADGATE WEST | 9 APPOLD STREET | LONDON | EC2A 2AP | WWW.SHEARMAN.COM