

**MEMO# 18376**

January 5, 2005

# **PROPOSED ADVICE OF COMMITTEE OF EUROPEAN SECURITIES REGULATORS ON IMPLEMENTING MEASURES OF THE TRANSPARENCY DIRECTIVE**

[18376] January 5, 2005 TO: INTERNATIONAL COMMITTEE No. 1-05 RE: PROPOSED ADVICE OF COMMITTEE OF EUROPEAN SECURITIES REGULATORS ON IMPLEMENTING MEASURES OF THE TRANSPARENCY DIRECTIVE The Committee of European Securities Regulators (CESR) recently issued a consultation paper on its proposed advice to the European Commission on implementing the Transparency Directive. The consultation document provides CESR's draft advice on issues related to reporting of major holdings of securities (including the exemption for asset management companies to disaggregate securities holdings), equivalence of third country issuers, half-yearly financial reports, and the procedural arrangements for issuers' election of their home Member State. Comments are due to CESR by March 4, 2005. The Institute plans to comment on the consultation paper focusing on the issues related to reporting major holdings of securities. Please review the consultation paper carefully. The Institute's goal in providing comments will be to assure that the implementing rules for asset managers to report securities holdings are workable and that managers located outside the EU can take advantage of the disaggregation rules. We seek your input on areas on which we should comment. Please provide any concerns you may have with CESR's proposed advice to the Institute by February 15, 2005. This memorandum briefly describes CESR's draft advice on major holdings notifications that are relevant to asset managers. Conditions of Independence to Disaggregate Holdings According to CESR, for a parent to benefit from the disaggregation exemption, it must ensure that the management company or investment firm exercises its voting rights independently from the parent and it must send a declaration to the competent authority of the issuer of the shares. 1. Independence from Parent CESR proposes that parents must be able to demonstrate on request that the organizational structures of the parent and the management company or investment firm are such that voting rights are exercised independently. This must be demonstrated by at least 2 having implemented written policies and procedures reasonably designed to prevent the distribution of information between the parent and the management company or investment firm that relate to the exercise of voting rights and investment decisions over securities traded. CESR also states that the parents must be able to demonstrate on request that the persons who decide how voting rights are exercised are not the same for the parent and the management company or investment firm and act independently. Finally, where the parent is a client of its management company or investment firm or has holdings in the assets managed by the

management company or investment firm, it should be able to demonstrate that there is a clear written mandate for an arms-length customer relationship between the parent and the management company or investment firm.

**2. Declaration to Competent Authority** CESR proposes that firms relying on the disaggregation exemption file a declaration with the competent authority of the issuer. The declaration should include a statement from the parent to the competent authority that it does not interfere in any way in the exercise of the voting rights held by the management company or investment firm and that it can demonstrate that its management companies or investment firms exercise voting rights attached to the assets that they manage independently from it. The declaration also must include the names of the parent's subsidiary management companies or investment firms.

**Equivalence of Independence for Parents of Non-EU Investment Firms and Management Companies** CESR proposes that parents of non-EU management companies or investment firms may take advantage of the exemption from aggregation if they comply with the same requirements as parents of EU management companies or investment firms. That is, to disaggregate holdings: (1) the management company or investment firm must be free to exercise the rights attached to the assets it manages in all situations; (2) the management company or investment firm has to disregard the interests of the parent and any other party whenever conflicts of interest arise; (3) the parent must demonstrate on request that the organizational structures of the parent and the management company or investment firm are such that the voting rights are exercised independently; and (4) the parent must demonstrate on request that the persons who decide how voting rights are to be exercised are not the same for the parent and the management company or investment firm and that they act independently from one another. In addition, CESR would require that the parent of a management company or investment firm registered in a third country follow the same declaration procedures as that established for parents of management companies and investment firms registered in the EU. The declaration must include: (1) a statement from the parent that it does not interfere in any way in the exercise of the voting rights held by the management company or investment firm; (2) a statement from the parent that it can demonstrate that its management companies or investment firms exercise the voting rights attached to the assets that they manage independently from it; and (3) the names of the subsidiary management companies or investment firms.

**3 Calendar of Trading Days for Notification and Publication of Major Shareholdings** CESR proposes to require use of the calendar of trading days of the issuers' home Member State. In addition, CESR considers that it would be prudent for the competent authority to publish which calendar applies to its regulated markets.

**Circumstances under which Shareholders Should Have Learned of Acquisition or Disposal of Shares** CESR proposes two options to determine the date from which the period for filing notifications is measured, i.e., the date when a natural person or legal entity is deemed to have knowledge of the acquisition or disposal of holdings or the possibility to exercise voting rights. The two options are: (1) on the date a securities transaction is executed or (2) on the day after a securities transaction was executed. CESR acknowledges that the second option would give large and multinational management companies time to aggregate their holdings through the group and give overseas companies similar conditions as European companies by taking into account possible time differences.

**Standard Form for Notification** Generally, CESR proposes that the standard form required for filing notifications include information about the number of voting rights and the applicable filing threshold, the chain of controlled undertakings through which voting rights are effectively held and the date on which the threshold was crossed or reached. The form also would require the identify of the shareholder even if not entitled to exercise voting rights and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder. In cases of Article 10(g) (where a person or entity may exercise voting rights as a proxy), in any case where a natural person or legal entity holds

more than 10 proxies each of them representing less than 1% of the voting rights of an issuer, the identity of the underlying shareholders do not need to be disclosed although the total number of proxies needs to be disclosed. CESR provides the text of a proposed standard notification form on pages 64-65 of the consultation paper. Financial Instruments The Directive applies to financial instruments as well as shareholdings, and CESR proposes clarifications for determining for which financial instruments notification would be required. Holders of financial instruments that “result in an entitlement to acquire, on such holder’s own initiative alone, under a formal agreement, shares to which voting rights are attached already issued of an issuer whose shares are admitted to trading on a regulated market” are required to make notifications. CESR also proposes that holders of financial instruments must aggregate and notify all instruments held that relate to the same underlying issuer. CESR also proposes the content of the required notification. 4 Finally, CESR clarifies that the Transparency Directive does not require aggregation between financial instrument under Article 11a and shareholdings under Article 9 and voting rights under Article 10. Jennifer S. Choi Associate Counsel Attachment (in .pdf format)

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