

TRANSPARENCY DIRECTIVE: HM Treasury consultation on implementation of the major shareholding notification provisions

This response by the Disclosure of Interest in Shares working party of The Law Society's Company Committee has been approved by The Law Society's Company Law Committee [and the City of London Law Society's Company Law Sub Committee].

- 1. Do you agree with the proposal that the principal obligation of disclosure should be changed from the current 'interest in shares' under the Companies Act 1985 to control of exercisable voting rights under the Directive?**

Yes. We agree that the principal obligation of disclosure should be changed to reflect the Directive requirement which relates to voting rights. One point which we do not think is clear, but should be made clear, is the position of preference shares or other securities which usually would not have any voting rights at general meetings of an issuer but may do so at particular times e.g. if payment of dividends are in arrears (in the case of preference shares) or where the company is proposing to consider an issue on which a particular class of shares can vote (in the case of shares with rights to vote on particular issues).

It would be helpful if it were clear whether holders of such securities are never subject to a disclosure obligation, or are subject to a disclosure obligation but only when there are voting rights currently exercisable. Some classes of shares may also have voting rights which are always exercisable but only on one issue or a limited number of issues. Also the rights of a class of shares may provide that rights are exercisable at any general meeting if there is a proposal to vary the rights of that class of shares. From a literal reading of the Directive it seems the shares do not have to be traded for the notification obligation to apply if another class of shares is traded. Is this correct? Article 9(1) of the Directive requires notification of the acquisition or disposal of shares to which voting rights are attached and provides that information "shall also be given in respect of all the shares which are in the same class and to which voting rights are attached". We hope that either implementing measures or the UK implementing legislation will clarify what notifications are needed where there is more than one class of shares to which voting rights are attached. It would be helpful if issuers were required to make an announcement through a Regulatory Information Service when voting rights become or cease to be exercisable.

- 2. Do you agree with the proposal to remove non-traded public limited companies from the scope of the disclosure regime?**

Yes. We agree with this proposal.

- 3. Do you agree with the proposal to give the FSA powers to make issuers admitted to trading on non-regulated markets in the UK (and those with qualifying holdings in those issuers), subject to the regime where appropriate for market transparency reasons?**

We think the question of whether the FSA should have powers to make issuers

admitted to trading on non-regulated markets subject to the regime should be decided primarily by the users of those markets. We think there is a case for leaving this to each non-regulated market to decide. If the Government does intend to apply the requirement to such issuers, we think it should consider what should happen if an issuer also has its shares traded on another EU market. We think it would be desirable to avoid duplication of a notification requirement as far as possible. We are not clear how the Government intends to judge whether it is appropriate to impose the requirement for market transparency reasons.

4. Do you agree with the proposal to repeal the current criminal sanctions for breach of notification obligations and give the FSA powers to deal with breaches of notification obligations equivalent to those it has to deal with breaches of rules under FSMA?

Yes. We agree with the proposal to repeal the current criminal sanctions. Although we think it is appropriate for the FSA to have powers to deal with breaches where the issuer's shares are traded on a regulated market, we are not convinced that this is necessarily the correct approach for non-regulated markets. We can see both advantages in the FSA dealing with breaches (because they will be set up to do so) and possible disadvantages (if the penalties imposed by the FSA for breach are out-of-line with penalties imposed for breach of other rules of the market). We think it will be important to be guided by the relevant markets on this question. One way to deal with the possible disadvantage would be for the FSA to take account of the penalties imposed for breach of other market rules when deciding on any penalty for breach of the notification requirement.

5. Do you agree with the proposal to maintain the scope of the current Companies Act regime and give the FSA equivalent powers to require disclosures in respect of holdings of financial instruments?

We are content for the scope of Section 210A Companies Act 1985 to remain unchanged. If the Government plans to use the powers conferred by this section we think it should consult first on draft regulations. We agree that the FSA should be given powers to require disclosures in respect of holdings of financial instruments. However, we think there should be consultation as to whether the FSA's powers should be limited to regulated markets, leaving non-regulated markets to be dealt with by those markets.

6. Do you have any comments on the likely costs of implementation of the major shareholdings notification provisions of the Directive?

We think that the Partial Regulatory Impact Assessment under-estimates the one-off costs of moving to the new regime. The main costs will fall on institutional investors, custodians and others who buy, hold and sell shares, who will have to make significant changes to their systems for monitoring their positions and whether they have an obligation to disclose an interest, as well as the cost of educating their affected employees. There will also be a significant cost for solicitors who advise on this area of law in educating those solicitors. We are not sure if the benefits of applying the requirement to non-regulated markets will outweigh the benefits, but think market users are best placed to judge this. We agree that the removal of non-traded public

companies from the requirement will lead to cost savings.

7. Do you have any comments on the impact on competition of the implementation of the major shareholdings notification provisions of the Directive?

No.

8. Do you have any comments on the impact on small business of implementation of the major shareholdings notification provisions of the Directive?

We would not expect there to be a significant impact on small businesses and, to the extent there is an impact we would expect it to be beneficial.