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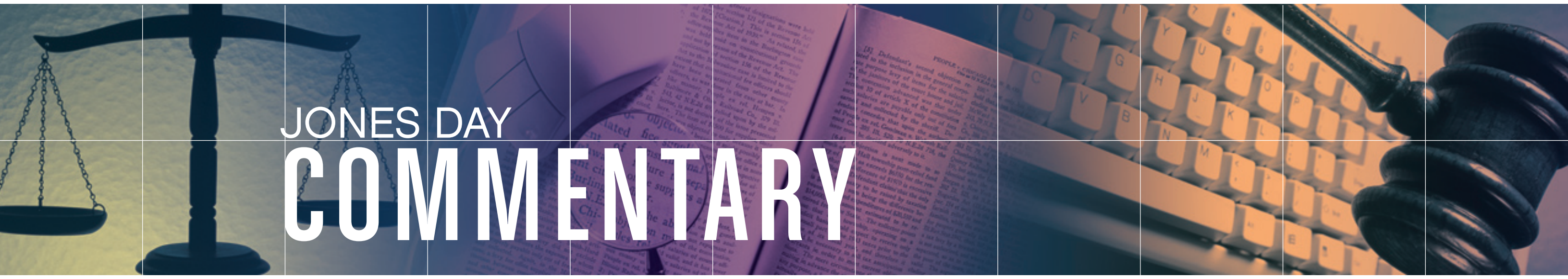


# UK AND FRENCH PROPOSALS ON REPORTING OF LARGE SHAREHOLDINGS IN LISTED COMPANIES

On October 23, 2008, both the United Kingdom Financial Services Authority (the "FSA") and the French Autorité des marchés financiers (the "AMF") published much-awaited proposals with respect to reporting of large shareholdings in listed companies. In France, the regulator went further, proposing heightened disclosure requirements and changes in the requirements for mandatory tender offers.

The proposals were triggered by several high-profile transactions in Europe in which third parties were able to build significant stakes in listed companies without being required to declare them under applicable regulations. Most recently, on October 28, 2008, Porsche disclosed that it had used derivatives to increase its shareholding in Volkswagen from 35 percent to 74.1 percent, causing Volkswagen's share price to increase 147 percent in one day as various market participants sought to cover short positions. Comments on the proposals are being accepted by the FSA until late January 2009 and by the AMF until November 14, 2008.

## UNITED KINGDOM: CONTRACTS FOR DIFFERENCE—FSA FEEDBACK AND POLICY STATEMENT ON DISCLOSURE

The FSA published draft rules designed to introduce increased transparency to the contracts for difference ("CfD") market on October 23, 2008. These draft rules reflect the feedback received by the FSA in response to its consultation paper (CP07/20), published in November 2007. In the words of the FSA's markets director, Alexander Justham, the FSA's "goal is to provide an effective and proportionate disclosure regime that works for all involved, and sustains market confidence and efficiency."

The existing disclosure regime under the Disclosure and Transparency Rules ("DTR") is triggered by reference to control of voting rights and therefore applies only to physically settled derivatives or contracts that convey an entitlement to control voting rights. Moreover, the investigative regime available under section 793 of the Companies Act 2006 does not apply to derivatives. As a result, outside an offer period,[1] cash-settled CfDs could be used to stake-build without disclosure and may even allow influence to be exerted on such things as voting and governance on an undisclosed basis. Investment affairs director of the Association of British Insurers, Peter Montagnon, summed up the concerns of many: "[C]ompanies should know who has built up a stake and investors too should be aware of what would otherwise be happening behind their backs."

**Proposals.** In its consultation paper *Disclosure of Contracts for Difference: Feedback and policy statement on CP07/20, and further technical consultation* (CP08/17), the FSA has proposed the following:

- The extension of the existing disclosure regime under DTR 5 to long CfD positions, whether settled physically or in cash. Long CfD positions would need to be aggregated with other shareholdings in the same company for disclosure purposes. The disclosure thresholds will remain unchanged—the initial threshold for disclosure will be 3 percent, and every percentage change thereafter will also be disclosable.

- The introduction of an exemption for CfD writers, similar in nature to the Takeover Panel's disclosure exemption for desks of banks and securities houses that have recognized intermediary status and that act in a client-serving capacity. This exemption is designed to reduce the number of meaningless disclosures from CfD writers effectively acting only as intermediaries and providing liquidity.

**Next Steps.** The FSA is currently consulting on the text of the revised rules and will accept comments until late January 2009. It intends to publish a final version of the new rules in February 2009, with the new disclosure regime coming into force on September 1, 2009. The implementation date has been selected to allow the participants time to update their systems and processes to ensure compliance with the new regime, although the FSA's anticipated timeline may, of course, change.

## FRANCE: STUDY GROUP FINDINGS ON SHAREHOLDING REPORTS, INVESTMENT INTENTIONS, AND RELATED PROPOSALS

The AMF published, on October 23, 2008, the findings of a study group that it commissioned in February to respond to concerns about "creeping" changes of control and to propose ways to enhance market transparency with respect to shareholdings in listed companies. The group noted that the increasingly sophisticated financial instruments available to market participants had made it possible for investors to build significant holdings in listed companies without triggering disclosure rules on the existence and size of a stake or the intentions of the stakeholder.

Under the current regime, a shareholder must notify the AMF (and the target company, which may have more stringent disclosure requirements in its bylaws) when, acting alone or in concert, it crosses any of the regulatory thresholds that begin at 5 percent and are repeated at 10 percent, 15 percent, 20 percent, 25 percent, one-third, one-half, two-thirds, 90 percent, and 95 percent. The thresholds are calculated with respect to percentage of capital or voting rights, which in some companies may not be the same due to, for example, double voting rights or treasury shares (which carry no voting rights while held by the company). Shareholders who fail to make the requisite disclosures may be deprived of their voting rights with respect to the shares exceeding the relevant threshold.

Upon crossing the 10 percent and 20 percent thresholds, a shareholder is also required by French law to inform both the AMF and the target company of its intent with respect to its investment over the next 12 months. The applicable rules require disclosure of whether the shareholder intends to (i) continue its acquisitions or remain at the same ownership level, (ii) seek to acquire control of the target company, or (iii) request the appointment of one or several representatives as members of the board of directors, management board, or supervisory board (as the case may be). These disclosures are published on the AMF's web site. Finally, upon crossing the one-third threshold, alone or acting in concert with others, a shareholder is required to launch a tender offer

1. The UK's Takeover Code requires disclosure of dealings during an offer period of CfDs and other purely economic positions of 1 percent or more of the target company.

for the remaining outstanding shares. Any shareholder who owns between one-third and 50 percent of the share capital or voting rights of a company, and who acquires more than an additional 2 percent within a 12-month period (known as "speed bumps"), must also launch a tender offer for all the shares outstanding.

**Proposals.** In order to respond to these concerns, in its *Report on threshold declarations and declarations of intent* (October 2008), the AMF study group has proposed the following:

- Treat as the underlying security any derivative instrument (such as an option) that gives an investor the right to acquire at its own initiative the economic benefit of the underlying security. These derivatives would also include equity swaps, certificates for difference, etc. The group also proposed to lower the initial threshold that triggers disclosure from 5 percent to 3 percent, in line with the United Kingdom, Germany, and Switzerland. The study group also recommended shortening the period to make the required disclosures to four trading days (from the current five) in response to reported abusive stock lending in advance of shareholders' meetings.

- Enhance disclosure requirements similar to Schedule 13D reporting requirements in the United States. Investors would be required to use more precise language than in the past to describe their intentions, without using equivocating language such as "circumstances permitting" or "reserves the right to." The statements would be required to cover a period of six months following the investment rather than the 12 months in effect today. Any material change in the disclosure would trigger a requirement to amend the statement. The time to file the statement would be reduced from 10 trading days to five. Finally, a statement of intent would be required upon crossing the 10 percent, 15 percent, 20 percent, and 25 percent thresholds.

- In order to protect minority investors, decrease the threshold triggering a mandatory tender offer to a level more closely aligned with *de facto* control of most publicly listed companies. The study group was not able to reach consensus on this topic, however, and therefore made three alternative proposals: (i) decrease the threshold to 25 percent of the voting rights of the target, (ii) decrease the threshold to 30 percent of the share capital, counting any derivatives as described in the first proposal, or (iii) limit the investor's voting rights to a specified amount despite its actual holdings. Additional "speed bumps" triggering a mandatory tender offer would also be added, to occur at 1 percent intervals instead of 2 percent intervals. The group also proposed a new exception for thresholds crossed due to "technical" reasons (*e.g.*, temporary transfers or unexercised equity-linked securities).

**Next Steps.** The AMF is currently consulting on the report and proposed changes and will be accepting comments until November 14, 2008. In order for the proposals to become effective, however, changes in both French law and related regulations will be required.

## LAWYER CONTACTS

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