

UK SHAREHOLDER ACTIVISM

Briefing

FCA Rules on Trade Reporting

August 2014

Overview

The UK regulator the Financial Conduct Authority (the 'FCA') requires that any person,¹ anywhere in the world, must report to the relevant UK issuer² and the FCA the percentage of the issuer's voting rights that it holds as shareholder or that it held or was deemed to hold through its direct or indirect holding of financial instruments, if the percentage of those voting rights:

- Reaches, exceeds or falls below 3 percent, 4 percent, 5 percent, 6 percent, 7 percent, 8 percent, 9 percent, and 10 percent and each 1 percent threshold thereafter up to 100 percent; or
- Reaches, exceeds or falls below the above thresholds as a result of events changing the breakdown of voting rights and on the basis of information disclosed by the issuer.

Such disclosures are public. The rules of the FCA relating to disclosure of positions also extend to non-UK companies whose shares are admitted to trading on a UK-regulated market; for them, disclosure is required when the percentage of voting rights held reaches, exceeds or falls below 5, 10, 15, 20, 25, 30, 50 and 75 percent. For such purpose, the total voting rights of the relevant issuer will be calculated according to its most recent public disclosure.

Reporting

A reporting obligation arises:

- When there is an acquisition or disposal of shares or financial instruments;
- If there is a change in the issuer's total voting rights which results in a person's holding changing and passing through one of the relevant thresholds (such as if the issuer issues further shares or buys back some shares); or

¹ For these purposes the definition of 'person' includes companies, natural persons, legal persons and partnerships.

² An 'issuer' is any company or other legal person or undertaking (including a public sector issuer) which has any class of financial instruments admitted to trading on a regulated market or in respect of which an application for admission to trading on a regulated market is pending.

- If there is a reportable position held through multiple types of holdings (such as if voting rights are held directly as a shareholder and the shareholder also holds financial instruments which give rise to equivalent rights), and there is a change in how the voting rights are held, even if the overall percentage remains the same.

Calculating a Reportable Position

Holdings of shares and financial instruments are aggregated. A shareholding must be taken into account where the shares are held in the person's name and for its own account, as well as where the shares are held in its own name, but are held on behalf of another person (i.e., held as nominee). The holding of depositary receipts must also be aggregated with other shareholdings and must be treated as if the holder holds the specific underlying shares which are represented by the depositary receipts.

The FCA rules also treat a person as an indirect holder of shares when that person is entitled to acquire, dispose of or exercise the voting rights attached to the shares but may not necessarily be the registered holder or beneficial owner of such shares. This includes certain situations in which a third party holds the voting rights attaching to the shares temporarily, where such voting rights are lodged as collateral, or where the person may exercise as a proxy³ at its discretion in the absence of specific instructions from shareholders (such as where investment managers and management companies are able to determine the manner in which voting rights attached to shares under their control are exercised). Subject to these rules, and absent an obligation to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question, concert parties will not usually be required to report on an aggregated basis.

A person must aggregate any indirect holdings with its direct holdings to calculate if there is a reportable position, but when the report is made the person must then disaggregate the direct and indirect holdings in the report to the issuer.

The actual calculation should be made based on all the issued shares carrying voting rights divided by the total number of voting rights according to the issuer's most recent public disclosure.

Voting Rights Held Through Financial Instruments

In calculating whether a report must be made, a person must take account of both direct and indirect holdings of financial instruments as well as direct and indirect holdings of shares.

Qualifying financial instruments are transferable securities and options, futures, swaps, forward rate agreements and any other derivative contracts, provided that they result in an entitlement to acquire, on the holder's own initiative alone, under a formal agreement, shares to which voting rights are attached that are already issued and are admitted to trading on a regulated market or a UK-prescribed market. To be within the scope of the requirement to include them in the reporting calculation, the holder must have an unconditional right to acquire the shares on maturity or discretion as to whether or not to acquire them.

It is also necessary to aggregate with the other holdings referenced above any financial instruments that have a similar economic effect to qualifying financial instruments. In essence, this requires that any derivative instrument that has an economic effect equivalent to a long position on the economic

³ There is no exemption for proxies. Where a proxy is granted, the proxy holder must disclose its total holdings as soon as is reasonably practicable following the proxy deadline if these exceed the relevant threshold, taking account of its own holdings as well as the holding of voting rights held through proxies.

performance of the shares must be included in the person's calculation, irrespective as to whether or not the instrument is settled physically in shares or in cash.

Exempt Holdings

The following types of holdings are among those that are exempt from the calculation as to whether or not a reporting threshold has been reached or exceeded and may be disregarded:

- Shares acquired for the sole purpose of clearing and settlement within a three-day settlement cycle;
- Shares held by a custodian or nominee in that capacity, provided that the custodian or nominee can only exercise the voting rights attached to such shares under instructions given in writing or by electronic means;
- Shares held by a market maker;
- Shares held by a bank or investment firm within its trading book;
- Shares transferred as collateral, provided that the collateral taker does not declare its intention to exercise, and does not exercise, the voting rights attached to such shares; and
- Shares borrowed under a stock lending agreement.

There is also a useful exemption for certain types of investment managers and asset managers who can, for reporting purposes, disregard any shareholdings that they hold except at the thresholds of 5 percent, 10 percent and above. All FCA-authorized investment managers managing client assets with investment discretion may take advantage of this partial exemption, as can US investment advisors regulated under the US Investment Advisors Act of 1940 (who are deemed to be subject to equivalent regulation).

Reporting Procedure

The report to the issuer (and to the FCA) must be made using Form TR1.⁴ The form has several key sections including: (i) the resulting voting rights; (ii) the chain of controlled undertakings through which voting rights are effectively held, if applicable; (iii) the date on which the threshold was reached or crossed; and (iv) the identity of the shareholder and of any person entitled to exercise voting rights on behalf of that shareholder.

Notably, Form TR1 does not require disclosure of the shareholders' plans with respect to the issuer, unlike the US Schedule 13D.

Form TR1 also has an Annex which contains the specific contact information for the person making the report. The entire form (including the Annex) must be sent by email or fax to the FCA, with just the form (i.e., without the Annex) being sent to the issuer.

The obligation to make the report is that of each direct or indirect shareholder; however, where the obligation falls on more than one person, a single common notification can be made (though the legal responsibility for this still rests with all of the holders concerned).

⁴ See <http://www.fca.org.uk/your-fca/documents/notifications-of-major-interests-in-shares-tr1->. The FCA's notes for the completion of Form TR1 are available online at: <http://www.fca.org.uk/static/documents/ukla/forms/notes-tr1.pdf>.

The report must be made within two⁵ trading days after the date on which the person passes through the relevant reporting threshold.

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If you have any questions concerning this *Briefing*, please contact your attorney at Schulte Roth & Zabel or one of the following attorneys: [Eleazer Klein](#), [Jim McNally](#) or [Marc Weingarten](#).

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⁵ Or, for a non-UK issuer, within four trading days.