

**DISCLOSURE AND TRANSPARENCY RULES (DISCLOSURE OF CONTRACTS
FOR DIFFERENCES) INSTRUMENT 2009**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 73A (Part 6 Rules);
 - (2) section 89A to 89G (Transparency obligations); and
 - (3) section 157(1) (Guidance).
- B. The rule-making powers listed above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 1 June 2009.

Amendments to the Handbook

- D. The Disclosure Rules and Transparency Rules sourcebook (DTR) is amended in accordance with the Annex to this instrument.

Notes

- E. In the Annex to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers but do not form part of the legislative text.

Citation

- F. This instrument may be cited as the Disclosure and Transparency Rules (Disclosure of Contracts for Differences) Instrument 2009.

By order of the Board
26 February 2009

Annex

Amendments to the Disclosure Rules and Transparency Rules sourcebook (DTR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 5.1.2 R Subject to the exemption for certain third country *issuers* (DTR 5.11.6R), a *person* must notify the *issuer* of the percentage of its voting rights he holds as *shareholder* or holds or is deemed to hold through his direct or indirect holding of *financial instruments* falling within DTR 5.3.1R(1), subject to the exemption in DTR 5.3.1R(2), (or a combination of such holdings) if the percentage of those voting rights:

...

Certain voting rights to be disregarded

- 5.1.3 R Voting rights attaching to the following *shares* are to be disregarded for the purposes of determining whether a person has a notification obligation in accordance with the thresholds in DTR 5.1.2R:

...

- (4) (a) shares held; or
 (b) shares underlying financial instruments within DTR 5.3.1R to the extent that such financial instruments are held;

by a *credit institution* or *investment firm* provided that:

- (ai) the shares, or financial instruments, are held within the *trading book* of the *credit institution* or *investment firm*;
 (bii) the voting rights attached to such *shares* do not exceed 5%; and
 (eiii) the *credit institution*, or ~~as the case may be~~ *investment firm*, ensures that the voting rights attached to shares in, or related to financial instruments in, the *trading book* are not exercised or otherwise used to intervene in the management of the *issuer*.

...

...

- 5.3.1 R (1) A *person* must make a notification in accordance with the applicable thresholds in DTR 5.1.2R in respect of any ~~qualifying~~ *financial instruments* which they hold, directly or indirectly, which:
- (a) ~~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.~~ are qualifying financial instruments within DTR 5.3.2R; or

~~[Note: article 13(1) of the TD]~~

(b) unless (2) applies:

(i) are referenced to the shares of an issuer, other than a non-UK issuer; and

(ii) have similar economic effects to (but which are not) qualifying financial instruments within DTR 5.3.2R.

(2) Paragraph (1)(b) does not apply to financial instruments held by a client-serving intermediary:

(a) acting in a client-serving capacity; and

(b) satisfying the conditions in (3) and the continuing obligations in (4).

(3) For the purposes of (2) a client-serving intermediary is a person satisfying the following conditions:

(a) (i) it is authorised by its Home State under MiFID or the BCD, or, subject to (iii), as a third country investment firm, to deal as principal, in a client-serving capacity, in financial instruments falling within (1)(b), and to carry on any relevant business connected to such dealing; or

(ii) (A) it is a person which would be an investment firm or credit institution if it carried on relevant business, and had its head office, in the EEA;

(B) it is in the same group as a person in (a)(i); and

(C) it has equivalent authorisation from its home state regulator to that set out in (a)(i); and

(iii) references to a third country investment firm in (i) are limited to relevant business carried on by such firms which is subject to regulatory supervision under the laws of a Member State;

(b) it has appropriate systems and controls in order to identify, distinguish between and monitor its client-serving dealings and interests and its proprietary trading dealing and interests;

(c) when acting in a client-serving capacity it does not:

(i) intervene, nor does it attempt to intervene, in;

- (ii) exert, nor purport to exert, influence on;
the management of the *issuer* concerned;
- (d) (i) it has certified in writing to the *FSA* that it considers itself to qualify for client-serving intermediary status and that it satisfies the conditions in (a) to (c);
- (ii) for a *person* falling into (a)(ii)(A) a further certification in writing to the *FSA* of the matters in (d)(i) must have been made in relation to that *person* by the *person* in its *group* falling into (a)(i), and
- (iii) the certificates in (i) and (ii) must have been:
 - (A) signed by a relevant *person* of at least *director* level; and
 - (B) made and sent to the *FSA* in the preceding 12 month period.
- (4) A client-serving intermediary must:
 - (a) inform the *FSA* as soon as it becomes aware that it no longer satisfies the conditions in (3); and
 - (b) provide the *FSA*, on request, with information relevant to its status or operation as a client-serving intermediary.
- (5) For the purposes of (2) and (3), acting in a client-serving capacity means:
 - (a) fulfilling orders received from *clients* otherwise than on a proprietary basis;
 - (b) responding to a *client's* requests to trade otherwise than on a proprietary basis; or
 - (c) hedging positions arising out of dealings in (a) or (b).

5.3.2 R For the purposes of *DTR* 5.3.1R(1)(a):

- (1) ~~*Transferable*~~ *transferable securities* and *options*, ... ;
- (2) ~~The~~ the ... ;
- (3) ~~A~~ a ...

[**Note:** Article 13(1) of the *TD* and Article 11(1) of the *TD* implementing Directive]

5.3.3 G (1) For the purposes of *DTR* 5.3.1R(1)(a) and to give effect to Directive 2004/109/EC (TD), qualifying financial instruments ~~*financial instruments*~~ should be taken into account ... Consequently, qualifying financial

~~instruments~~ financial instruments ...

[**Note:** Recital 13 of the *TD implementing Directive*]

- (2) For the purposes of *DTR 5.3.1R(1)(b)*, in the *FSA's* view:
- (a) a financial instrument has a similar economic effect to a qualifying financial instrument in *DTR 5.3.1R(1)(a)*, if its terms are referenced, in whole or in part, to an issuer's shares and, generally, the holder of the financial instrument has, in effect, a long position on the economic performance of the shares, whether the instrument is settled physically in shares or in cash. This is because such an instrument may give the holder the potential to gain an economic advantage in acquiring, or gaining access to, the underlying shares. For example, that result may occur because of the likelihood that the counterparty will have hedged with the underlying shares or with an instrument which may provide access to such shares. The holder may then be in a more advantageous position, compared to other market users (i.e. other potential purchasers of the shares), to gain access to those shares, either directly from the counterparty, or indirectly, for example in the market following sale by the counterparty;
 - (b) 'long' derivative financial instruments not having a linear, symmetric pay-off profile in line with the underlying share (that is, instruments not having a 'delta 1' profile, for example cash-settled options) should be considered to have an economic effect, in relation to the underlying shares represented, similar to that of a qualifying financial instrument, only in the proportion which is equal to the delta of the instrument at any particular point in time. So, for an instrument with a delta of 0.5 on a particular day, the instrument will provide a 'similar economic effect' in half of the underlying shares represented. This will mean that holders may need to monitor delta changes at the end of each trading day in order to determine whether a disclosure is required;
 - (c) a financial instrument referenced to a basket or index of shares will not have similar economic effects to a qualifying financial instrument unless:
 - (i) the shares in the basket represent both 1% or more of the class in issue and 20% or more of the value of the securities in the basket or index; and
 - (ii) use of the financial instrument is connected to the avoidance of notification;
 - (d) a financial instrument held by a person within a group, where the following conditions are satisfied, will not be considered to have economic effects similar to a qualifying financial instrument:

- (i) it is held by that *person* solely for tax or accounting reasons relating to the *group* and not for reasons connected to the avoidance of notification; and
- (ii) another *person* in the *group* has made, or is, and continues to be, exempt from making, a notification under DTR 5.3.1R in respect of the position represented by that *financial instrument*.

5.3.4 R The holder of qualifying *financial instruments*, and, to the extent relevant, *financial instruments* with similar economic effects, is required to aggregate and, if necessary, notify all such instruments as relate to the same underlying *issuer*.
 [Note: article 11(2) of the *TD implementing Directive* in respect of qualifying *financial instruments*]

...

5.7.1 R A *person* making a notification in accordance with DTR 5.1.2R must do so by reference to each of the following:

- (1) the aggregate of all voting rights which the *person* holds as *shareholder* and as the direct or indirect holder of qualifying *financial instruments* and *financial instruments* with similar economic effects;
- (2) the aggregate of all voting rights ...; ~~and~~
- (3) the aggregate of all voting rights held as a result of direct and indirect holdings of qualifying *financial instruments*; ~~and~~
- (4) the aggregate of all voting rights deemed to be held as a result of direct and indirect holdings of *financial instruments* having similar economic effects to (but not including) qualifying *financial instruments* in (3).

...

5.8.2 R ...

- (4) For *financial instruments* having similar economic effects to (but which are not) qualifying *financial instruments* within DTR 5.3.2R, a person making a notification in (1) must do so on a delta adjusted basis, that is, in relation to the underlying *shares* referenced, only in the proportion which is equal to the delta of the instrument at any particular point in time.

...

Transitional Provisions

(1)	(2) Material to which the Transitional provision applies	(3)	(4) Transitional provision	(5) Transitional Provision: dates in force	(6) Handbook Provision: coming into force
14	...				
15	<u>DTR 5.1.2R</u> , <u>DTR 5.3.1R</u> , <u>DTR 5.8.2R(1)</u> and (4), <u>DTR 5.8.10R</u>	R	For <i>financial instruments</i> having similar economic effects to (but which are not) qualifying <i>financial instruments</i> within <u>DTR 5.3.2R</u> , but which do not have a linear, symmetric pay-off (that is, a ‘delta 1) profile for the purposes of <u>DTR 5.3.3G(2)(b)</u> , a <i>person</i> making a notification under <u>DTR 5.1.2R</u> and <u>DTR 5.8.2R(1)</u> may, at their option, treat each <i>financial instrument</i> in question as having a delta 1 profile, but only if the <i>person</i> also makes a notification to the <i>issuer</i> of the total number voting rights relating to <i>shares</i> referenced by, and the strike, or execution, price of, each such <i>financial instrument</i> .	1 June 2009 to 31 December 2009	1 June 2009
16	TP 15	G	The effect of TP 15 is that <i>persons</i> holding <i>financial instruments</i> falling within <u>DTR 5.3.3G(2)(b)</u> have a choice as to how they notify their deemed holding of voting rights in the underlying <i>shares</i> , either on a delta adjusted or nominal basis. Where notification is made on a nominal basis, extra information is required so that the delta adjusted position is capable of being calculated (when used in conjunction with information about the maturity or expiry date (notifiable under <u>DTR 5.8.2R</u>) and other information derivable from publicly available sources, for example, relating to volatility).	1 June 2009 to 31 December 2009	1 June 2009

<u>17</u>	<u>DTR 5.1.2R, 5.3.1R, 5.8, 5.9</u>	<u>R</u>	<u>A notification of the strike, or execution, price of, and the total number of voting rights relating to shares referenced by, each financial instrument for the purposes of TP 15 is to be treated as part of the notification to the issuer and references to 'notification' shall be construed accordingly.</u>	<u>1 June 2009 to 31 December 2009</u>	<u>1 June 2009</u>