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WFD (*Vrijstellingsregeling Wfd*). Some of the ongoing conduct of business rules will enter into force later in 2006.

6.2 The conduct of business rules apply not only to licensed Financial Services providers but also to those benefiting from an exemption to the licence requirement. However, certain Financial Services providers may rely on exemptions from (certain of) the conduct of business rules. Also, rules may differ per Financial Service category. For example, the rules regarding Financial Services providers (see 6.3 through 6.6 below) do not apply to most of those authorised to operate in The Netherlands on the basis of a "European passport" as referred to in 4.3 above.

Significant rules are set out below:

### Rules Regarding Financial Services Providers

6.3 Trustworthiness: The trustworthiness of persons (co)determining the Financial Services provider's policy, its employees and others acting under its responsibility must be beyond doubt.

6.4 Expertise: The expertise of persons determining day-to-day policy, as well as employees and other persons directly engaged in rendering Financial Services, must be sufficiently ensured.

6.5 Sound business operations: The administrative organisation and systems of internal control must be set up in such a manner that the AFM can reasonably supervise compliance with the conduct of business rules.

6.6 Indemnity insurance: (Re)insurance brokers must have in place a professional indemnity insurance.

### Conduct Of Business Rules Regarding Financial Services

6.7 Information disclosure and advertising rules: Clients must be provided with the necessary information prior to entering into an agreement and during the lifetime of the agreement; financial products qualifying as "complex products" remain subject to the existing (but revised) requirement to produce a "key features prospectus" (*financiële bijsluiter*).

6.8 Advising on financial products: Stricter information disclosure rules apply when advising customers on financial products.

6.9 Dispute resolution procedures: Internal complaints and dispute resolution procedures must be in place.

6.10 Cold calling: A prohibition applies on cold calling.

6.11 Relationship between principal and intermediary: A principal must check whether intermediaries offering its products and services are licensed under the WFD. The same applies *vice versa*. Also, principals are under a duty to inform the AFM when they detect irregularities within their intermediaries.

6.12 Outsourcing Financial Services: When outsourcing Financial Services to a third party, the Financial Services provider must ensure that this third party continuously complies with all applicable rules in connection with the outsourced Financial Services.

6.13 Specific conduct of business rules: Specific rules apply to 1) consumer (mortgage) loan providers and consumer credit intermediaries, and 2) insurance companies and brokers. For example, credit providers must assess their clients' financial position before actually entering into an agreement and must join a credit registration system (such as the Bureau Krediet Registratie).

## 7. Non-Compliance

Providing Financial Services without a licence and other breaches of the WFD's provisions may result in criminal or administrative sanctions, including substantial fines, the imposition of cease-and-desist orders subject to a penalty (*last onder dwangsom*) or licence withdrawal.

# SWITZERLAND

## SWX Swiss Exchange Rules On Ad Hoc Publicity Revised

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The provisions on *ad hoc* publicity are of great significance for listed companies as issuers. Recently, the *ad hoc* publicity provisions of the SWX Swiss Exchange were amended. Although some of the amendments simply reflect the development of the practice of the SWX Swiss Exchange over the last few years, others effected material changes for issuers.

The provisions concerning *ad hoc* publicity are contained in Section 72 of the Listing Rules (LR) of the SWX Swiss Exchange. The amended version of LR Section 72 now reads as follows:

(1) The issuer must inform the market of any price-sensitive facts which have arisen in its sphere of activity and which are not of public knowledge. Price-sensitive facts are capable of triggering a significant change.

(2) The issuer must provide information as soon as it has knowledge of the main points of a price-sensitive fact. However, it may postpone the disclosure of a price-sensitive fact if (a) the fact is based on a plan or decision of the issuer and (b) its dissemination is likely to prejudice the legitimate interests of the issuer. In the case of postponement of disclosure, the issuer must guarantee the complete confidentiality of such a fact; otherwise, the right to postponement of disclosure lapses immediately. Disclosure must be carried out so as to ensure equal treatment of all market participants. The admission board [of the SWX Swiss Exchange] may issue a directive with implementing provisions.

Pursuant to LR Section 72.5, those provisions are further detailed in a directive, the Ad hoc Publicity Directive (the AhPD). To substantiate this directive, the SWX Swiss Exchange issued a commentary (Commentary AhPD).

### Purpose And Scope

The *ad hoc* publicity provisions aim at informing all market participants in a true, clear and complete manner about material events regarding issuers. Furthermore, prompt disclosure to the public of potentially price-sensitive facts will ensure transparency of securities trading, equal treatment of all market participants and the proper operation of the securities market. In particular, insider trading will be prevented.

The provisions on *ad hoc* publicity apply to all companies whose shares or debt instruments are listed on the SWX Swiss Exchange and which have their registered domicile in Switzerland. The provisions are not applicable to issuers that are not domiciled in Switzerland, provided these companies are also listed on a stock exchange in their country of origin. However, the provisions are applicable to issuers not domiciled in Switzerland but that have equity and debt instruments listed in Switzerland as well as on another stock exchange outside their country of origin.

### Duty To Disclose

An issuer is, in principle, obliged to inform the market about all potentially price-sensitive facts which occur in its sphere of activity and which are not publicly known. The SWX Swiss Exchange defines the term "facts" broadly. Mere rumours, ideas, planning alternatives and intentions are not deemed to be facts. Regarding forecasts, one must distinguish between forecasts which are merely based on expectations or hope and forecasts based on facts. Forecasts which are mainly based on facts are considered to be facts themselves. This should be kept in mind, in particular, with regard to forecasts about future earnings and results.

In order to trigger an *ad hoc* publicity obligation, the price-sensitive facts must have occurred in the issuer's sphere of activity. If this is not the case, there is no disclosure obligation. However, certain facts arising outside the issuer's sphere of activity may still trigger an *ad hoc* publicity obligation if such facts cause indirect changes in the issuer's sphere of activity. This is the case, for example, if an authority issues a decision (such as approval of a new drug by the U.S. Food and Drug Administration) or if an important business partner files for bankruptcy. Facts which have occurred outside the issuer's sphere of activity are, for example, general market data, launches of competitors' products, or analysts' buying or selling recommendations. Accordingly, a profit warning triggers a publication obligation only if the market expectations have been created by the issuer itself. However, unlike the profit warning, an actual profit collapse undoubtedly constitutes a fact which has to be disclosed pursuant to LR Section 72.

There is no disclosure obligation if the relevant facts are publicly known. Facts which become public in the course of a general shareholders' meeting are not considered to be publicly known unless the assembly is made accessible to mass media. The same is true for court decisions, even if disclosed in the course of a public meeting. Finally, the relevant facts must have the potential to result in significant price movements of the issuer's securities. The provisions dealing with *ad hoc* publicity do not fix a specific percentage threshold. Price-sensitive facts are deemed to be significant if an average market participant would base its decision to buy or sell the issuer's securities on such facts.

The following examples may constitute potentially price-sensitive facts and are therefore likely to be subject to *ad hoc* publicity rules:

- changes in corporate structure: mergers, takeovers, spin-offs, or restructurings;
- changes in capital: capital increases or decreases as well as share buyback programmes;
- major personnel changes: changes among the members of the board of directors, the management board or other key personnel as well as a change of auditors;
- changes in the course of business: new sales partners or strategic alliances, new important products, withdrawal or recall of an important product, material new contracts, or termination of material contracts;
- changes in financial results: major changes in earnings (*e.g.*, profit collapse), discontinuation of dividend payments, profit warnings, financial restructuring; and
- financial statements (key figures): annual and interim results.

According to LR Section 72, public tender offers are subject to *ad hoc* publicity rules, provided that they constitute potentially price-sensitive facts. Prior to the amendment of the *ad hoc* publicity provisions, this was controversial because the previous version of LR Section 72 required the potentially price-sensitive facts to have considerable effect on the issuer's assets and liabilities or financial position or on its general course of business. None of this is necessarily the case in the event of a public tender offer for the issuer's securities.

### Timing Of Disclosure

The issuer must inform the public once it has knowledge of the main aspects of potentially price-sensitive facts. This is the case if senior management or non-executive members of the board of directors know the main elements of the potentially price-sensitive facts. However, if key individuals are unaware of certain facts due to an inadequate internal organisational structure, they are not freed from the duty to publish the *ad hoc* information. In such a case, the issuer is likely to have violated the provisions on *ad hoc* publicity.

### Form Of Disclosure

Under LR Section 72.4, the disclosure has to be made in a manner ensuring equal treatment of all market participants. In particular, it is not permissible to inform only — or to pre-inform — a limited circle of privileged people, such as analysts, selected media, employees, shareholders or business partners. Common lock-up periods for media releases do not ensure equal treatment of all market participants. Although the information must be made simultaneously to all recipients, the information may still be prepared in different ways. It is, for example, not necessary that analysts receive the same text as the media or employees.

The *ad hoc* information must be distributed to:

- the SWX Swiss Exchange (at least 90 minutes ahead of general release to the public if published during trading hours);
- at least two electronic information systems widely used by professional market participants (for example, Bloomberg, Reuters or Telekurs);
- at least two Swiss newspapers with national circulation;
- all interested parties upon request (known as the "push system"); and
- the issuer's website (where the information must remain available for two years; this is known as the "pull system").

The issuer is obliged to provide a service on its website that allows interested parties to receive free and timely notification of potentially price-sensitive facts via email (the push system). Furthermore, when *ad hoc* information is published, it must simultaneously be made available on the issuer's website for at least two years (the pull system).

## Postponement Of Disclosure

In some situations, the issuer may have an interest in delaying the disclosure of facts which are subject to *ad hoc* publicity. A postponement of disclosure is permissible if the following three conditions are satisfied:

- the facts are based on a plan or decision of the issuer;
- the dissemination of the facts is likely to prejudice the legitimate interests of the issuer; and
- the issuer guarantees complete confidentiality of the facts.

The possibility of postponing disclosure is particularly important when there are corporate crises, mergers and takeovers. However, as postponement of the notice is admissible only as regards facts based on a plan or decision of the issuer, it is not clear whether postponement is permissible in the event of a loss of capital or over-indebtedness. Postponement ought to be permissible in these situations as well, because immediate disclosure to the public would in most cases make any restructuring efforts obsolete. This is particularly true if the issuer plans to initiate insolvency proceedings or seeks to postpone bankruptcy. However, the admissibility of postponement of the disclosure in a corporate crisis must be carefully examined in each case.

Another issue potentially subject to *ad hoc* publicity is a planned mass layoff. The basic decision on a planned mass layoff may not only be a price-sensitive fact, but it may also trigger a consultation proceeding. Taking the above criteria into account, the disclosure of this fact may be postponed. However, there is a considerable risk of a leak because employees or their representative bodies must be informed about the planned layoff. It is therefore recommended to inform the public about the basic decision by the time the consultation proceeding has started.

Finally, as outlined above, postponement of disclosure is no longer permissible if the relevant information has leaked. In such case, the issuer must immediately inform the public in accordance with LR Section 72. In the event of postponement of disclosure, it is recommended that the relevant facts are disclosed to only a very small circle of privileged people (the need-to-know principle) who are asked to sign confidentiality agreements. Because the public must be informed immediately after an information leak, a continuously updated press release should be kept on hand. In the case of a leak, the SWX Swiss Exchange must be notified immediately by phone, provided that the leak has occurred during trading hours.

# SPAIN

## Corporate Governance Code Proposed For Listed Companies

MADRID—In an attempt to combine national and international corporate ethics standards, the Comisión Nacional del Mercado de Valores (CNMV) January 18, 2006, proposed a set of corporate governance recommendations for companies listed on the Spanish market.

The proposed Unified Code of Recommendations on the Governance of Listed Companies, which incorporates recommendations from the European Union and other sources, limits its 74 recommendations to the internal governance of publicly traded companies and calls for voluntary compliance.

Among its many recommendations, the proposed code suggests that at least one-third of the directors on a listed company's board be independent, with no personal or professional ties to the company or its shareholders. When a company's president and chief executive officer are the same person, it is recommended that a vice-president be chosen from among the independent board members.

If the title "independent board member" was used loosely in the past, the draft code presents a list of 10 criteria conditioning the use of this term.

Another recommendation is that companies deliberately seek out qualified female candidates to sit on their boards. Three in four listed companies reportedly have no female board members.

In the interests of transparency, the code proposes that board member remuneration be made a matter of public record, and be limited to "what is necessary to reward the dedication, qualification and responsibility required by the position, but not so high so as to compromise independence."

The proposal also foresees eliminating "poison pill" measures against hostile takeover bids.

While compliance with the code's recommendations is not compulsory, all companies must respect the definitions and concepts it contains, and state in their annual reports for 2007 whether or not they followed the recommendations in 2006. If they didn't, they must explain why.

## Proposal Criticized By Business Leaders

The proposal drew immediate criticism from business leaders, who saw it as restrictive and interventionist.

"Some of the recommendations are notably inconsistent, arbitrary, and imprecise, traits that make the Code to be highly interventionist even though compliance is voluntary," stated an editorial in the business daily *Cinco Días*.

CNMV President Manuel Conthe said the proposal could be improved, given that the final document is still open to public discussion. Critics will have until late March 2006 to push for modifications.

The authors of the plan pointed out that the proposed code is not meant to be an all-encompassing regulatory document.

"The reader unfamiliar with Spanish mercantile legislation might be perplexed by supposed omissions, which in reality aren't [omissions] given that they represent issues already regulated by our laws," said a statement by the working group commissioned to draft the proposal.

Initial criticism aside, the appearance of the new code was long awaited.

## Recommendations Come From Variety Of Sources

With Order ECO/3722/2003, the former Popular Party government commissioned the CNMV to elaborate a code of corporate conduct based on recommendations of the so-called Olivencia Code (approved in 1998) and the Aldama Report drafted in the aftermath of the 2001 financial scandal surrounding the failed brokerage house Gescartera *(see WSLR, October 2001, page 9).*

The current Socialist-led government July 25, 2005, created a special working group to help the CNMV update and integrate lessons learned since publication of the Olivencia and Aldama documents into a single, unified code that also reflects recent recommendations from the European Commission.

Among these recommendations are Recommendation 2004/913/EC fostering an appropriate regime for the remuneration of directors of listed companies and Recommendation 2005/162/EC on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.

Also considered were recommendations of the Basel Committee on Banking Supervision, included in the document "Enhancing Corporate Governance for Banking Organisations."

The CNMV proposal is open for public comments until February 28, 2006. The definitive version of the code is scheduled to be approved by March 31, 2006.

*The text of the proposed code is available, in Spanish, at www.cnmv.es/cnmvdia/decetes/CUP.pdf*

*The text of Order ECO/3722/2003 is available, in Spanish, at noticias.juridicas.com/base_datos/Privado/o3722-2003-eco.html*

# SWEDEN

## E.U. Directive On Takeover Bids Would Be Implemented By Proposal

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The Swedish Takeover Committee recently published its report "New Regulation of Public Takeover Offers" (SOU 2005:58), which proposes changes to the Swedish takeover regime in order to make it conform to the European Union's 13th Company Law Directive, the directive of the European Parliament and of the Council on takeover bids (Directive 2004/25/EEC) of April 21, 2004. The Takeover Directive must be implemented in E.U. member states by May 20, 2006.

The Committee initially notes that mergers and acquisitions through public offerings for shares — takeover offers — are commonly occurring in business and industry in Sweden, in other European countries, and elsewhere in the world. In Sweden, during the 15-year period between 1990 and 2004, an aggregate of 358 takeover offers was made for companies with shares listed on the Stockholm Stock Exchange, the Nordic Growth Market (NGM), or Aktietorget, a smaller list. A total of 280 of these offers led to an acquisition of the target company. In somewhat different terms, an average of 20 listed companies was acquired each year in Sweden in the same period.

In a number of countries, rules regarding takeover offers have emerged gradually over a number of years. The first set of rules, the U.K. City Code on Takeovers and Mergers, was developed at the end of the 1960s within the framework of self-regulation in the British stock market. Generally based on the U.K. regulations, takeover rules have thereafter been introduced in the majority of other European countries. At the point when the E.U. Takeover Directive was adopted, these rules had many common features, but also clear differences.

## Swedish Approach

Sweden was one of the earliest adopters of takeover rules among countries outside the United Kingdom. Briefly, takeover rules were promulgated by the Swedish Industry and Commerce Stock Exchange Committee (the NBK) in 1971 in the form of recommendations. The rules have successively been developed and adapted to the needs of business and industry and in the light of international developments, and have been introduced into the listing agreements of the Stockholm Stock Exchange, the NGM, and Aktietorget.

New and extensively revised takeover rules issued by the NBK came into force on March 1, 2003. Later in 2003, the NBK again amended the takeover rules, among other things to reduce the threshold for mandatory offers from 40 percent to 30 percent, as well as to introduce a requirement under which the bidder must make an explicit statement regarding the bidder's compliance with the NBK rules and rulings by the Swedish Securities Council.

The substantive contents of the NBK rules are now materially similar to the corresponding rules in the Takeover Directive. However, the Directive also contains certain provisions that lack direct correspondents in the NBK rules.

## Implementing The Takeover Directive

After many years of negotiations, in 2004 the E.U. member states and the European Parliament agreed on a harmonisation directive for the regulation of takeover offers: the Takeover Directive *(see WSLR, January 2004, page 4).* The purpose of this directive is, among other things, stated to be the protection of the interests of the holders of securities of companies governed by the law of a member state when these companies are subject to a takeover bid or to a change in control and at least some of their securities are admitted to trading on a regular market. The directive is a minimum directive, meaning that the member states are free to prescribe stricter rules than the directive provides.

The Committee's task has been to propose how the Takeover Directive may be implemented in Swedish law. The work has been conducted in close consultation with the corresponding committees in other Nordic and European countries, primarily the United Kingdom, Germany, and France.

The proposals made by the Committee can be summarised as follows:

### Combination Of Rules

The Committee's proposal for future takeover regulation in Sweden is based on a combination of law and stock exchange rules. The main rules will also in the future consist of the NBK's

  