



FINANSTILSYNET

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AUTHORITY OF NORWAY

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1. Introduction

Act of 29 July 2007 no. 75 on securities trading (Securities Trading Act) entered into force on 1 November 2007 and 1 January 2008. The Act implements EU Directive 2004/39/EC on markets in financial instruments (MiFID), Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (Transparency Directive) and Directive 2004/25/EC on takeover bids.

This circular explains Finanstilsynet's understanding of the general rules of conduct set forth in the Securities Trading Act chapters 3 and 4. The text of the circular largely reproduces previous circular 9/2009, with some updates and changes.

Finanstilsynet will base its supervisory activity on the interpretations and assessments set out in the following.

The circular replaces circular 9/2009.

Part I – Securities Trading Act chapter 3

2. Scope of the rules of conduct

2.1 Wording of the Act

Section 3-1 Scope of application

(1) Chapter 3 applies to financial instruments which are quoted, or for which admission to quotation has been requested, on a Norwegian regulated market. Section 3-9 also applies to financial instruments which are not quoted, or for which admission to quotation has not been requested, on a Norwegian regulated market.

(2) Sections 3-3, 3-4, and 3-7 apply correspondingly to financial instruments not covered by subsection (1) provided that their value is dependent on financial instruments as mentioned in subsection (1).

(3) Sections 3-3, 3-4, 3-7 and 3-8 apply correspondingly to actions undertaken in Norway in connection with financial instruments which are quoted, or for which admission to quotation has been requested, on a regulated market in another EEA state. "Regulated market" in the first sentence means a market as defined in Directive 2004/39/EC Article 4(14).

(4) Sections 3-3, 3-4, 3-7 and 3-8 apply correspondingly to financial instruments traded on a Norwegian multilateral trading facility.

2.2 Comments on the scope of application

The scope of application of the Securities Trading Act chapter 3 is defined in section 3-1. This chapter applies to financial instruments which are quoted, or for which admission to quotation has been requested, on a *Norwegian regulated market*, see the Securities Trading Act section 3-1 subsection (1). A regulated market is further defined in the same Act section 2-3 subsection (3) which in turn refers to Act of 29 June 2007 no. 74 relating to regulated markets (Stock Exchange Act).

Financial instruments are further defined in the Securities Trading Act section 2-2, and include shares, primary capital certificates (now termed equity certificates), bonds, and several types of derivatives, including commodity derivatives.¹ The definition of financial instruments is amended to conform to MiFID, particularly in regard to financial commodity derivatives which now come under the general rules of the Securities Trading Act to a greater degree than was the case under the old Act. There is now a separate definition of inside information regarding commodity derivatives; see the Securities Trading Act section 3-2 subsection (4). See 3.4 for further details.

The Securities Trading Act chapter 3 applies to financial instruments which are quoted, or for which admission to quotation has been requested, on a Norwegian regulated market; see section 3-1 subsection (1). This chapter applies irrespective of whether or not a transaction is actually performed in the Norwegian market and irrespective of the issuer's, investor's or broker's nationality or place of business/residence. Hence it is not a condition that the transaction itself has been performed on a Norwegian regulated market. Chapter 3 applies to financial instruments issued either by Norwegian and foreign companies, provided they are quoted, or a request has been made for their admission to quotation, on a Norwegian regulated market.² This holds good irrespective of whether the financial instrument concerned is quoted on a primary or secondary Norwegian regulated market. A request for admission to quotation exists once a formal request for admission to quotation has been filed in writing.³

The provisions of the Securities Trading Act sections 3-3 (misuse of inside information), 3-4 (duty of confidentiality and due care in handling inside information), 3-7 (prohibition of advice) and 3-8 (market manipulation) are also applicable to actions undertaken in Norway in cases where the financial instruments concerned are quoted exclusively on another regulated in the EEA, or where admission to such quotation has been requested; see the Securities Trading Act section 3-1 subsection (3). Actions undertaken in Norway include telephone orders or electronic orders from Norway to a broker or market place abroad. If the action concerns financial instruments which are quoted, or for which quotation has been requested, on a Norwegian regulated market pursuant to the first paragraph, there is no requirement for the action to have been undertaken in Norway.

It follows from the Securities Trading Act section 3-1 subsection (2) that sections 3-3 (misuse of inside information), 3-4 (duty of confidentiality and due care in handling inside information) and 3-7 (prohibition of advice) are also applicable to unquoted financial instruments whose value is dependent on quoted instruments. Such instruments will typically be derivatives of stock-exchange-quoted instruments.

¹ Commodity derivatives are defined in the Securities Trading Regulations section 2-1.

² Currently these are Oslo Børs, Oslo Axess, NordPool, IMAREX and FishPool.

³ See Proposition to the Odelsting no. 12 (2004-2005), page 14.

Section 3-1 subsection (4) gives sections 3-3, 3-4, 3-7 and 3-8 corresponding application to multilateral trading facilities (MTFs), which are defined in the Securities Trading Act section 2-3 subsection (4). An MTF is an alternative market place for the trading of financial instruments which can be operated by an investment firm or regulated market with the requisite authorisation. According to this provision, the rules on misuse of inside information (section 3-3), duty of confidentiality and due care in handling inside information (section 3-4), prohibition of advice (section 3-7) and the provision on market manipulation (section 3-8) also apply to financial instruments that are traded on an MTF. This provision will only gain independent significance where unquoted financial instruments are traded on an MTF since chapter 3 in its entirety applies to financial instruments which are quoted, or for which admission to quotation has been requested, on a Norwegian regulated market; see the Securities Trading Act section 3-1 subsection (1).

3. Inside information, Securities Trading Act section 3-2

3.1 Wording of the Act

Section 3-2 Definition of inside information

(1) *“Inside information” means any information of a precise nature relating to financial instruments, the issuers thereof or other circumstances which has not been made public and is not commonly known in the market and which is likely to have a significant effect on the price of those financial instruments or of related financial instruments.*

(2) *“Information of a precise nature” means information which indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur and which is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of the financial instruments or related financial instruments.*

(3) *“Information likely to have a significant effect on the price of financial instruments or of related financial instruments” means information of the kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.*

(4) *“Inside information on commodity derivatives” means information of a precise nature which has not been made public and which relates, directly or indirectly, to one or more such derivatives and which participants in the market on which such derivatives are traded would expect to receive in accordance with what Finanstilsynet (the Financial Supervisory Authority of Norway) deems to be accepted market practices on the market concerned. “Information which participants would expect to receive” means information which is normally made available to market participants or information the publication of which is required by statute, regulations or other regulatory regime, including private law regulation and practices on the commodity derivatives market concerned or the underlying commodity*

derivatives market. The ministry may issue regulations laying down further rules on inside information in relation to commodity derivatives and accepted market practices.

3.2 Main definition

The Securities Trading Act section 3-2 subsection (1) defines inside information relating to financial instruments other than commodity derivatives. Inside information relating to commodity derivatives is defined in subsection (4); see 3.4. The definition contains the terms *precise* and *significant* which are further defined in subsections (2) and (3); see 3.3.

It is information relating to “*financial instruments, the issuers thereof or other circumstances*” that may constitute inside information. Based on the wording it seems clear that virtually any circumstance may be inside information if the other conditions in the provisions are met. There is no requirement of actual linkage between the information and the financial instrument or the issuer. For example, new framework conditions of significance for the issuer could constitute inside information. The same could be true of circumstances of less direct relevance to the issuer, for example knowledge of information pertaining to a competitor. Knowledge of market conditions for the securities, including awareness of how other market participants will act,⁴ may also constitute inside information.

Other typical examples of inside information would be knowledge of planned takeover bids,⁵ of major contracts⁶ entered into by the company etc.

Information which has been made public or is commonly known in the market is not covered by the provision. Information could be public without any active move being made to publish it. The point is whether the information is considered to have been made public, regardless of how this came about. Information which has been made public or is commonly known will typically be information disclosed via the media or information systems, for example Oslo Stock Exchange’s reporting system.

⁴ See Oslo District Court judgment of 19 September 2003 in case 03-2621M/30 which ruled that a broker was an insider because he was aware that four primary insiders at Tomra ASA were about to acquire a major holding in the company. See also Oslo District Court judgment of 31 March 2003 in case 03-02290 F/29 which ruled that the convicted person possessed inside information after receiving details of a sizeable sale of shares that was to be carried out in the course of two days at Pan Fish ASA.

⁵ See Oslo District Court judgment of 11 August 2003 in case TOSLO-2006-105458 which ruled that a communications adviser possessed inside information since he was aware that FSN Capital Partner AS was likely to make a bid to take over Via Travel Group in the near future. The court also ruled that he obtained inside information to the effect that Findexa Ltd. and Eniro AB were negotiating on Eniro’s acquisition of all shares of Findexa, with disclosure planned for some days subsequently. See also Trondheim District Court judgment of 28 September 2005 which ruled that the CFO at Reitangruppen AS was aware that Reitangruppen AS was negotiating with Sense International ASA on a possible merger with or takeover of Sense.

⁶ See Oslo District Court judgment of 11 July 2007 in case TOSLO-2006-105458 where a communications adviser obtained information relating to an agreement of intent entered into between a subsidiary of Ignis ASA, Enablence Inc. (Canada) and Samsung Electronics (South Korea) concerning the development of a product for the fibre optic market, with disclosure the following day. See also Agder High Court judgment of 15 September 2006 in case LA-2006-42810 where the accused had learned from a third party that a director of the Scandic hotel chain had stated that an agreement had been established to deliver interactive TV systems to a major international hotel chain.

3.3 Sub-definitions

3.3.1 “Information of a precise nature”

The Securities Trading Act section 3-2 subsection (2) makes clear what is meant by “*information of a precise nature*”.

Limiting inside information to information of a precise nature is particularly relevant where the information is incomplete or inexact. Assessing the nature of information will often coalesce with assessments of the possible effect of the information on the price of the financial instruments concerned.

Based on the wording it is sufficient that the information *indicates* one or more circumstances or events. The information need not be complete, exact or unequivocal so long as it is sufficiently specific to enable a conclusion to be drawn as to its possible effect on the price of the financial instruments concerned.⁷ Further, importance must be attached to the source’s closeness to the information. The outcome of an assessment could, for example, be different in the case of information stemming from the company’s director than in the case of information stemming from other parties.⁸

3.3.2 Significant effect

In order for information to be inside information, it must be likely to have a *significant* effect on the price of financial instruments or related financial instruments.

According to the Securities Trading Act section 3-2 subsection (3), a piece of information will be likely to have a significant effect on the price if “*a reasonable investor would be likely to use it as part of the basis of his investment decisions*”. The assessment of the possible price effect of the information must be made before the information is commonly known and discounted in the price. The assessment must take all market variables into account. In many cases it will necessarily be based on empirical evidence of how the information concerned affects the price if it becomes known in the market.

As regards price-sensitive events arising in a development process, for example contract negotiations, there is no doubt that the potential to affect the price, and hence inside information, may arise before the negotiations are completed. In other words there is no requirement of a board decision or other concluding decision in order for inside information to arise. The question of at what point information becomes inside information will depend on a concrete assessment of whether the fact of making public the particular stage of the decision process would in itself have an effect on the price.⁹ Factors in this assessment will include the

⁷ See Borgarting High Court judgment of 16 February 2004 no. 03-01353 M/02 where a shareholder in Finansbanken was convicted of unlawful insider trading. The court found that the information received by the shareholder (that an industrial participant was contemplating a transaction in Finansbanken in the near future) was sufficiently precise to constitute inside information.

⁸ See Oslo District Court judgment of 10 September 2004 in case 03-018037/MED-OTIR/07 where the court found that an incitement from the marketing manager of Birdstep ASA to sell shares based on forthcoming negative news for the company constituted inside information.

⁹ See Salten District Court judgment of 17 March 2005 in case 04-143314 concerning breach of the duty to investigate. The court considered it evident that a draft confidentiality and exclusivity agreement was of such a nature that it was likely to affect the price of the Nordlandsbanken ASA share. The court stated that such

likelihood of the process ending with a positive result for the issuer, the significance of the event for the issuer (for example the contract's size) and the market's expectations.¹⁰

3.4 Inside information on commodity derivatives

The Securities Trading Act section 3-2 subsection (4) defines inside information specifically in relation to commodity derivatives. Commodity derivatives are defined in the Securities Trading Regulations section 2-1, cf. the Securities Trading Act section 2-2 subsection (1) no. 4, cf. subsection (5) no. 2.

The requirement that the information must be of a precise nature and must not have been made public or be commonly known in the market also applies to commodity derivatives; see 3.2 and 3.3.1 above. Where the requirement of price effect is concerned, the assessment criteria are worded differently than in the case of other financial instruments.

Information relating “*directly or indirectly to one or more commodity derivatives*” is the subject matter of the above provision. This may typically be information linked to the underlying commodity or information about other commodities or derivatives of significance for the pricing of the particular derivative or derivatives.

Further, it is made clear that it is a matter of “*information [...] which participants in the market on which such derivatives are traded would expect to receive in accordance with what Finanstilsynet deems to be accepted market practices on the market concerned.*”

According to the Securities Trading Act section 3-2 subsection (4) second sentence, information which market participants would expect to receive is “[...] *information which is normally made available to market participants or information the publication of which is required by statute, regulations or other regulatory regime, including private law regulation and practices on the commodity derivatives market concerned or the underlying commodity market.*”

This provision covers information which the participants are required to make public under the trading rules governing the market concerned.¹¹ It also covers all other information normally made available to participants on the market concerned. This would be information made public not necessarily as a result of the obligations incumbent on the participants.¹² In Finanstilsynet's view, inside information – as in the assessment of other financial instruments

agreements are often the first step on the way to a takeover which in turn often leads to the shareholders being offered a price for the share that far exceeds the share's market price.

¹⁰ In the Frostating High Court judgment of 04 February 1999 in case LF-1998-924 M, the court concluded that information did not exist that was “*likely to affect the price of the securities significantly*” (as the provision was then worded). At issue was an approach to the target company concerning a possible takeover. The court concluded that the approach was one of many received by the company in the period concerned, and that the information was moreover so tenuous that the conditions were not deemed to be met.

¹¹ See for example Nord Pool's “Market Conduct Rules”.

¹² In the case of freight derivatives quoted on IMAREX this might typically be information about oil and gasoline inventories which the U.S. Department of Energy publishes each Wednesday or OPEC's production decisions.

– is information which a reasonable investor would be likely to use as part of the basis of his investment decisions.¹³

Trading on information which is not normally made available to market participants will not be punishable insider trading. However, misuse of such information could – depending on the circumstances – violate other provisions backed by penal sanctions, including the Securities Trading Act section 3-9 prohibiting unreasonable business methods.¹⁴

Finanstilsynet has thus far seen no need to issue regulations on what are to be deemed accepted market practices with respect to the information that participants on the commodity derivatives market can expect to receive. In all events, the relevant consideration in Finanstilsynet's view is whether such information is "*normally made available*" or "*the publication of which is required*", cf. the assessment theme stated in subsection (4) second sentence of the provision.

4. Misuse of inside information, Securities Trading Act section 3-3

4.1 Wording of the Act

Section 3-3 Misuse of inside information

(1) Persons possessing inside information may neither directly nor indirectly, for own or third party account, subscribe, purchase, sell or exchange financial instruments or incite others to carry out such transactions.

(2) Subsection (1) applies only to misuse of inside information as mentioned in section 3-2. Subsection (1) does not prevent the normal exercise of any option or forward/futures contracts previously entered into upon the expiry of such contracts.

4.2 Prohibition of trading

The prohibition of insider trading applies to anyone "*possessing inside information*". No causal connection is required between the inside information and the transaction decision of the person making the trade.¹⁵

¹³ An indirect requirement of price effect may be inferred from the Securities Trading Act section 3-2 subsection (2) inasmuch as the information must be specific enough to enable a "conclusion to be drawn as to the possible effect [...] on the price of the financial instruments." Nord Pool's Disciplinary Committee stated in a case concerning Lyse Produksjon AS and Lyse Handel AS on 5.9.2010 that the Securities Trading Act section 3-2 subsection (4) must be interpreted such that a requirement of price effect applies in the case of commodity derivatives.

¹⁴ See Proposition to the Odelsting no. 12 (2004-2005), page 30.

¹⁵ The European Court of Justice, in case 45/08 (reproduced in the Official Journal C 51 27.2.2010 page 7), ruled on whether the prohibition of insider trading in the Market Abuse Directive (MAD), which is transposed into Norwegian legislation in the Securities Trading Act section 3-3, requires a causal connection between the inside information and the transaction (i.e. whether it can be proved that the person who made the trade "used" the inside information "deliberately"). The Court ruled that the prohibition of insider trading sets no requirement as to a causal connection.

Inasmuch as the prohibition applies to anyone “*possessing inside information*”, a person may in principle trade independently of whether others in the undertaking where he/she is employed possess such information. This underscores how important it is for undertakings to establish satisfactory in-house procedures to ensure that persons responsible for investment decisions are cut off from inside information present elsewhere in the undertaking; see the Securities Trading Act section 3-4 subsection (2) and 5.3 below.

Negligent violations will be covered by the provision; see the Securities Trading Act section 17-3 subsection (1). The requirement of due care will be relative in the sense that the assessment will be more stringent for persons with a particular knowledge of or connection to the inside information.¹⁶

4.3 Transactions covered by the prohibition

4.1.1 Subscription, purchase, sale and exchange

The prohibition targets subscription, purchase, sale and exchange of financial instruments. The subscription date is the date on which the investor is contractually bound by the subscription.

The prohibition against exchange of financial instruments spells out that any purchase or sale is covered by the provision, irrespective of the nature of the compensation.

Entering a transaction assignment (order) may be a criminal offence as an *attempt* at insider trading if the order is not executed; see the General Civil Penal Code section 49. This is on the assumption that the investor who enters the order is acting on inside information.

If the investor gains inside information about the security in question after entering the order but before the order is executed, omitting to cancel the assignment may constitute a criminal violation of the insider trading prohibition.¹⁷

4.1.2 Inheritance, gift, redemption

The prohibition against insider trading does not apply where financial instruments change owner as a result of inheritance, probate or gift. Redemption of shares in connection with a reduction of capital accompanied by simultaneous distribution to the shareholders pursuant to the Public Limited Liability Companies Act section 12-1 is also considered to fall outside the scope of application of this provision.¹⁸

¹⁶ See Proposition to the Odelsting no. 12 (2004-2005), page 31.

¹⁷ See statements in Proposition to the Odelsting no. 29 (1996-1997) page 29 and the minority’s statements in Borgarting High Court judgment of 16 February 2004 no. 03-01353 M/02.

¹⁸ Redemption under the Public Limited Companies Act section 12-1 must be segregated from a company’s acquisition of own shares under chapter 9 of the same Act. The company’s purchase, sale or exchange of own shares will come under the prohibition of insider trading in the Securities Trading Act section 3-3 subsection (1) to the extent that the person or persons in question are acting on inside information.

4.4 Prohibition of incitement

Persons possessing inside information are also prohibited from inciting others to subscribe, purchase, sell or exchange financial instruments. The prohibition of incitement typically covers encouraging others to make a trade, irrespective of whether the buyer/seller becomes privy to the inside information concerned.¹⁹ Criminal incitement may exist irrespective of whether or not the incited person actually makes the trade.²⁰

The prohibition does not cover giving advice to someone to refrain from trading. Such cases will however be captured by the prohibition of advice in the Securities Trading Act 3-7, see 8 below.

4.5 Trading for own account

The prohibition of insider trading applies to trading for own account, irrespective of who makes the trade. The prohibition accordingly applies in principal-agent and active-management relationships where the principal has inside information and the agent (for example an investment firm) executes trades in accordance with the principal's instructions. If the principal has inside information, he/she must ensure, through instructions to the agent, that no trading takes place for his/her account in the financial instruments to which the information relates.²¹ The necessary assumption is that the approach can be made in such a way that the principal does not pass inside information to the asset manager and thereby come into conflict with the duty of confidentiality.²²

4.6 Trading for third party account

The prohibition of insider trading also applies to transactions executed in one's own name but for third party account.

Trades made in another's name for third party account are also covered by the provision. For example an employee of an undertaking who possesses inside information about a financial instrument will also be barred from trading in this financial instrument on behalf of the undertaking in which he/she is employed.

4.7 Misuse reservation

4.7.1 General comments

The prohibition of insider trading applies only where misuse of inside information is involved; see the Securities Trading Act section 3-3 subsection (2). Whether inside information has in fact been misused will depend on the circumstances of the particular case.

¹⁹ See Oslo District Court judgment of 19 September 2003 in case 03-2621M/30 and Oslo District Court judgment of 7 November 2007 in case TOSLO-2006-105458.

²⁰ See Oslo District Court judgment of 7 November 2007 in case TOSLO-2006-105458.

²¹ See Proposition to the Odelsting no. 29 (1996-1997) page 32.

²² To curtail these situations it would appear advisable to ensure that the management assignment does not involve financial instruments in respect of which the person concerned regularly is an insider.

An example of non-misuse despite the possession of inside information is cited in the Act itself, namely the normal exercise of a previously-entered-into option or forward/futures contract upon contract expiry; see the Securities Trading Act section 3-3 subsection (2) second sentence. The same necessarily applies in the case of normal redemption of convertible bonds.

The exercise of subscription rights acquired before the holder acquires inside information does not, according to the wording, fall within the exception in respect of previously-entered-into option or forward/futures contracts in the Securities Trading Act section 3-3 subsection (2) second sentence. Normal exercise of subscription rights acquired before the holder acquired inside information may however come under the misuse reservation in the Securities Trading Act section 3-3 subsection (2) first sentence. For example Finanstilsynet assumes that the exercise of a previously acquired subscription right that has a monetary value, on or close to the expiry date, cannot normally be regarded as misuse of inside information in contravention of the Securities Trading Act section 3-3.²³

The legislative history²⁴ and the Market Abuse Directive's foreword²⁵ give a number of examples not considered to involve the misuse of inside information:

- Passive execution of client orders.
- Where two or more persons collaborate for example on a takeover, and each knows that the other(s) is/are also trading in shares and that disclosure of this fact would contribute to pushing up the price.
- Where the person possessing inside information fully informs the counterparty (to the extent the confidentiality rules do not prevent this; see the Securities Trading Act section 3-4 subsection (1) and 5 below).
- An investor trades in the opposite direction to the direction in which the inside information is likely to affect the price.
- Awareness of own transaction decisions for own account, even though the transaction will affect the price significantly.
- An employer's issuance of employee options will normally not entail misuse of inside information, even if the issuance takes place at the same time as inside information is present at the issuer and/or among its employees. This assumes that the employee options are established as direct agreements between the issuer and its employees on the right to subscribe/purchase shares in the issuer.

The above examples will guide the assessment of whether misuse is present in other types of cases.

4.7.2 A closer look at some type cases

Finanstilsynet has in its supervisory practice handled cases in which issues relating to misuse of inside information have come to the surface. Examples are discussed in this section.

4.7.2.1 Insider matters in connection with active management agreements

Issues related to misuse of inside information may come to a head where a customer who has outsourced his portfolio management to an active asset manager receives inside information

²³ This is comparable with "normal" exercise of previously acquired option or forward/futures contracts.

²⁴ NOU 1996: 2 *Securities Trading*, page 49.

²⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0025:EN:PDF>

about an instrument covered by the manager's mandate. Trades made by the manager for the customer's account will be deemed to have been made by the customer in relation to the insider trading prohibition. Trades made for the customer's account in periods when the customer has had inside information may therefore conceivably contravene the prohibition of misuse of inside information.

Investors who regularly have inside information about one or more financial instruments should as a rule limit the manager's mandate so as to not include these financial instruments.²⁶ Where an investor receives inside information about a financial instrument falling within a manager's mandate, the prohibition against insider trading must be weighed against the duty of confidentiality. In Finanstilsynet's view the need for confidentiality must weigh heavily in this process. An investor's approach to a manager not to trade in a particular share is only permitted provided the investor does not provide inside information to the manager and thereby contravenes the duty of confidentiality in the Securities Trading Act section 3-4. If there is a risk that the investor, by approaching the manager with a view to a halt in trading, may contribute to the spread of inside information to unauthorised persons, the investor should in Finanstilsynet's view refrain from such an approach. If he does refrain, the investor may of course run the risk of the manager trading in the instrument in question in a situation in which the investor has inside information. However, provided that the manager has not been privy to the inside information and the investor has not influenced the manager, the assumption is that there will normally not be grounds to regard this as misuse of inside information in contravention of the Securities Trading Act section 3-3.

4.7.2.2 Insider issues related to buy-backs in accordance with the Commission

Regulation on buy-back programmes and stabilisation of financial instruments

Buy-back programmes are utilised by issuers that acquire their own issued shares with a view to reducing their capital, implementing employee stock option programmes or converting debt to equity.²⁷ The rules of the Commission Regulation on buy-back programmes and stabilisation of financial instruments, cf. the Securities Trading Act section 3-12 subsection (2), apply to such buy-backs. To benefit from the "safe harbour" provision, a buy-back programme must be implemented in accordance with Articles 4 to 6, cf. article 3, of the Commission Regulation.

Various models can be used to implement buy-back programmes that meet the requirements of the Commission Regulation. A common procedure is for the issuer to place an order with an investment firm which then executes the order on the exchange as ordinary broking. Another is for the issuer to outsource the management of the buy-back programme to an investment firm which trades actively in accordance with the issuer's mandate. The investment firm undertakes to manage the issuer's buy-back subject to the conditions and constraints set out in the Commission Regulation. In such buy-back situations where an investment firm actively manages a buy-back programme, insider trading issues may arise if the issuer, after contract formation but before completion of the buy-back, becomes privy to inside information.

According to the Securities Trading Act section 3-12 subsection (1) the prohibition of market manipulation does not apply to buy-back programmes, but the wording of the provision does

²⁶ See 4.5 and Proposition to the Odelsting no. 29 (1996-1997) page 32.

²⁷ See the Commission Regulation on buy-back programmes and stabilisation of financial instruments, preamble (4).

not cover insider trading. However, according to the Commission Regulation preamble (1) and the Market Abuse Directive Article 8, the prohibitions laid down in the Market Abuse Directive (including the prohibition of market manipulation and insider trading) do not apply to trading in treasury shares in buy-back programmes "provided such trading is carried out in accordance with implementing measures adopted to that effect". Inasmuch as the Regulation is referred to in the Securities Trading Act 3-12, it is reasonable to take this to mean that the prohibition of insider trading also does not apply to buy-back programmes implemented in accordance with Regulation's provisions. In Finanstilsynet's view the prohibition of insider trading does not apply to buy-back programmes that meet the conditions of the Regulation.

According to Article 6 paragraph 3(b) of the Regulation, an investment firm may on behalf of an issuer buy shares as part of a buy-back programme in cases where the issuer during the life of the programme receives unpublished inside information. This is on condition that the buy-back programme is lead-managed by an investment firm or a credit institution which makes its trading decisions in relation to the issuer's shares independently of, and without influence by, the issuer with regard to the timing of the purchases. Hence, in a case such as that mentioned, the presence of inside information in the issuer will not preclude the investment firm from executing the order.

5. Duty of confidentiality and due care in handling inside information, the Securities Trading Act section 3-4

5.1 Wording of the Act

Section 3-4 Duty of confidentiality and due care in handling inside information

(1) Persons possessing inside information must not disclose such information to unauthorised persons.

(2) Persons possessing inside information shall handle such information with due care so that the inside information does not come into the possession of unauthorised persons or is misused. Issuers of financial instruments and other legal entities who are regularly in possession of inside information shall have routines for secure handling of inside information.

5.2 Duty of confidentiality

The duty of confidentiality applies to anyone in possession of inside information, including persons who acquire such information by chance. The same applies to investors, for example in connection with the placement of substantial securities holdings in the market. The prerequisite for criminal punishment is that the person understood or ought to have understood that it was a matter of inside information.²⁸

²⁸ See Proposition to the Odelsting no. 12 (2004-2005), page 35.

The duty of confidentiality applies vis-à-vis unauthorised persons. In Proposition to the Storting no. 29 (1996-1997), page 4, the Ministry of Finance states:

The duty of confidentiality should not prevent information exchange to persons with a reasoned need for the information. The issuer must for example be able to furnish internally such information as is necessary for the company's ordinary administrative processes. Externally it must be possible to furnish such information as is necessary for the ordinary operation of the business. Confidential information should not be passed on either externally or internally to an extent greater than that for which the recipient has a natural and objective need. The Ministry would also make reference to the committee's discussion of individual situations where the issue is relevant in NOU 1996:2, pp. 65-66.

The provision is intended to ensure that only persons with an objective and well-founded need for inside information are given access to such information. This applies both internally in the company and vis-à-vis external parties. Who are 'authorised' persons in respect of the information must be considered in the concrete context. It is important that employees in the issuer etc have a mindful and critical awareness of who are appropriate recipients of inside information. The issuer must at all times be in the control of the identity of recipients of inside information.²⁹ Persons who are made insiders by the issuer and have received inside information have a duty of confidentiality.

5.3 Handling inside information

Over and above the duty of confidentiality, all persons are required to display due care in their handling of inside information to prevent such information coming into the possession of unauthorised persons or being misused. Inside information should not, for example, be referred to in the presence of unauthorised persons. A person possessing inside information must ensure that such information is stored and distributed in a proper manner.

The requirement of due care in handling inside information applies irrespective of whether the regulated market is open or closed.

Under this requirement, depending on the circumstances, the person handing over any such information must make the recipient aware that the information is of an inside nature and the significance this entails; see also 6.6.

Issuers of financial instruments and other legal entities that are regularly in possession of inside information must have procedures for secure handling of such information. With satisfactory procedures in place, any suspicion that inside information is being exploited is easier to dispel.

Issuers must enable retention of case documents, access to databases, copying, archiving, shredding and dispatch of such information to take place in a manner that ensures that price-sensitive information does not come into the possession of unauthorised persons. Where price-sensitive information about for example accounting data, sales figures etc is concerned,

²⁹ See judgment delivered in Oslo District Court on 24 March 2009 in case 08-153951MED-OTIR/08. The judgment states that it is not those who have been made insiders that should take the process forward, but the investment firm that has received an assignment. The consequence would in the opposite case be an absence of oversight over inside information.

employees of the issuer may also be regarded as unauthorised. The individual issuer must consider the need for guidelines for information handling in the case of unforeseen events of price-sensitive significance, for example where the business is sensitive to shutdowns. In the event of mergers, transfers of business and substantial contract negotiations there may be a need to establish procedures for anonymising case documents, reports, analyses and the like.

Where companies other than the issuers are concerned, the requirement of procedures is particularly relevant for the company's advisers, typically investment firms, law firms, accountancy firms and media counselling firms.³⁰ The same applies to legal entities that regularly receive inside information because they are represented on the board of an issuer. Banks that regularly receive price-sensitive information from issuing companies in connection with granting of credit/loans must also have in place procedures for secure handling of such information.

The requirement of procedures will depend on who it is in the company that receives inside information, how frequently such information is received and how the business in general is organised.

Further, the requirement of procedures will also apply to participants in the commodity derivatives market who are regularly in possession of inside information.

5.4 A closer look at information handling in connection with book-building processes

5.4.1 Introduction

Finanstilsynet has on several occasions seen leaks and deficient information handling routines when large blocks of quoted shares have been placed in bookbuilding procedures. By *bookbuilding* Finanstilsynet means a procedure in which an investment firm seeks to sell/place a sizeable holding of financial instruments by contacting a selection of investors. The procedure is usually conducted on the auction principle with investors being solicited for bids for the instruments they are interested in at various levels. Bookbuilding usually takes place over a brief period and at a discount, often in the form of a price range which may change in light of the incoming bids.

Below follows an account of requirements Finanstilsynet considers must be made of such processes. Although the emphasis in the following is given to large sales orders for shares quoted on a Norwegian stock exchange to be placed in the secondary market by means of a book-building process, the assessments made may have a bearing on inside information handling during the placement of large orders in general, including purchase orders and issues.

5.4.2 Handling and passing on of inside information

Anyone in an insider position is prohibited from trading. It follows from the Securities Trading Act section 10-11 on conduct of business rules that an investment firm must not put its clients in such a position against their will. The duty of due care in information handling and the conduct of business rules consequently entail that investors who are contacted by

³⁰ This is in addition to the more general conduct of business rules to which the adviser may be subject.

investment firms must give their consent before inside information is passed to them. The recipient must be made aware that the information is of an inside nature and, depending on the circumstances, the consequence that this entails. The scope and the consequences of this obligation are discussed in 6.6.

Investment firms must employ a carefully considered and judicious method for transmitting inside information in connection with bookbuilding processes such that the risk of leaks and abuse is reduced to a minimum.³¹

What is to be regarded as inside information will need to be considered in concrete terms. The question is whether the investors who are contacted can exploit this information at the expense of the market in general. In its assessment the investment firm must take into account information already present in the market and possessed by the individual investor, the name of the share concerned and market conditions in general.

Knowledge of an investor's order to buy or sell a large block of shares could constitute inside information. Conditions of the order to be placed – e.g. the price range, the timetable and the originator of the order – could also, depending on the circumstances, be price sensitive. Moreover, inexact or incomplete information on an order could also constitute inside information. For example, the very name of a share could in Finanstilsynet's view constitute inside information in given circumstances. Finanstilsynet therefore recommends investment firms to be wary of identifying the company to which an assignment relates before the investors have been made insiders. In many cases a rational investor will conclude that an approach made to him probably relates to the placing of a large number of shares which is liable to have a negative effect on the price.

Investors should, regardless of whether they already own shares of the company concerned, receive the same, limited information before being made *insiders*. In the opposite case investors will be able, through their contacts, to piece together fragments of information into a more meaningful whole. This precept rests not only on the requirement for proper information handling, but also on consideration for the market's integrity and requirements of the conduct of business rules; see the Securities Trading Act section 10-11.

Many problems related to the handling of inside information can be avoided if a bookbuilding procedure is announced beforehand. An alternative that reduces the risk of abuse of inside information is to conduct bookbuilding outside stock exchange trading hours. Investment firms should make a concrete assessment in each case to see if it is possible to defer the start of bookbuilding until the stock exchange has closed.

5.4.3 Elimination of information asymmetry

A question raised is the point at which information asymmetry ceases to apply in a bookbuilding procedure, in other words the point when equal information is again available to all market participants and contacted investors can resume trading (for example by selling the shares they have bought). Clearly this will in principle be the point at which the sale of the shares becomes known in the market (in other words after the trade has been reported to the stock exchange). Information asymmetry is not normally deemed to have been eliminated at

³¹ See also Securities Trading Act section 10-9 which is broader than section 3-4 in the sense that information about a bookbuilding process which is not inside information (for example a client's purchase interest) may also be confidential.

the time of the transaction, i.e. at the time when allocations are made during the bookbuilding procedure.

In some cases the information asymmetry will not be eliminated when the investment firm files its report. A pertinent example is where shares are sold on behalf of primary insiders. Depending on the circumstances, investors will in such cases risk being 'locked up' until primary insider notification is given pursuant to the Securities Trading Act section 4-1. In the interest of an unambiguous information-asymmetry-elimination point, and to ensure that investors exit insider positions as soon as possible, Finanstilsynet recommends that such notification be given at the same time, or close to the same time, as matching takes place at the stock exchange. Although it is the duty of primary insiders to send such notification, Finanstilsynet recommends that investment firms and primary insiders discuss, ahead of the transaction, the time when notification is to be sent, and that the investment firm and the primary insiders coordinate their actions. See also 11.8.

In cases where bookbuilding is unsuccessful and the transaction is not completed as planned, the point at which information asymmetry is eliminated must be considered in concrete terms. As a basis Finanstilsynet takes this to be the point at which it becomes clear that the bookbuilding is unsuccessful and has closed. However, the possibility cannot be ruled out that, under given circumstances, information given to potential investors in connection with the bookbuilding may also constitute inside information after the bookbuilding process in question has closed.

5.5 Specifically on the right of intermediaries to transmit order book information in connection with assignments for primary insiders

Finanstilsynet has noted confusion as to whether the Securities Trading Act permits investment firms to give potential counterparties/clients information about an order in cases where the principal is subject to reporting ahead of a possible trade.

Comments on the above issue may also have a bearing on brokers' handling of other price-sensitive information concerning the order book, for example purchase or sale of large holdings.

Finanstilsynet takes it that little is required for a reportable trade executed by a primary insider (or order tied to such trade) that is not insignificant to be deemed inside information. The sensitivity of such a trade or order is assumed to depend on circumstances such as the size of the holding, the primary insider's position, whether the financial instrument is sold in the ordinary manner or by reduction of debt-financed shareholdings (for example after default), the primary insider's holding after the transaction and the market situation for the financial instrument, including volatility.

The circumstances may indicate that potential counterparties can be given authorised status under the Securities Trading Act section 3-4, see 5.2. However, information about a reporting party's purchase/sale order may not be passed to a counterparty to a greater extent than is strictly necessary. This means for example that in situations where an order could easily have been executed via a stock exchange there would not be sufficient need to give this type of

information to the counterparty. How the assignment could most expediently be executed would necessarily be up to the intermediary's discretionary judgement. However, discretionary judgement must be exercised in a prudent manner. A desire for higher overall brokerage income would for example clearly be an extraneous consideration in the exercise of discretionary judgement.

Where inside information is passed on, the firm or broker must make sure that the counterparty is aware that the information is of an inside nature and the consequences that misuse of such information may entail. Further, a statement must be obtained from the recipient putting him under obligation to keep the information confidential and not to pass it on or exploit it. It rests on the intermediary to prove that such a statement has been obtained. Where such statement is made by voice recording, the client must be made aware on the recording that the statement is secured by such recording.

It follows from the Securities Trading Act section 3-4 subsection (2) that “[...] *legal entities who are regularly in possession of inside information shall have routines for secure handling of inside information*”; see 5.3. An obligation for investment firms to have in place satisfactory routines for and oversight of inside information also follows from the Securities Trading Act section 9-11. Investment firms must be certain of their ability to ensure that information about primary insiders' trading is not passed to clients or counterparties by other means or to a greater extent than permitted; see discussion above.

Employees of investment firms are required to treat as confidential any information about the affairs of others which may come to their knowledge in the course of their work; see the Securities Trading Act section 10-9. Hence the broker may not pass on the primary insider's identity without the primary insider's consent. The same applies in situations where it is more than likely that the primary insider can be identified on account of the nature of the order and other factors.

5.6 Cross-border transactions

The Securities Trading Act's rules concerning the handling and misuse of inside information apply to financial instruments which are quoted, or for which admission to quotation has been requested, on a Norwegian regulated market, irrespective of whether the issuer and/or the investor is/are foreign; see the Securities Trading Act section 3-1. This means, inter alia, that the provisions of chapter 3 apply regardless of where the action is carried out. Purchases of Norwegian-quoted shares from, for example, Sweden, could consequently be affected by the prohibition of insider trading. Further, investment firms that approach foreign investors are obliged to treat them in the same manner as Norwegian investors. Proper information handling requires Norwegian investment firms intending to place a large quantity of securities with the help of foreign assistants to take steps to ensure that the assignment is in its entirety carried out in compliance with Norwegian law.

6. Insiders list requirement, Securities Trading Act section 3-5

6.1 Wording of the Act

Section 3-5 List of persons who have access to inside information

(1) Issuers of financial instruments shall ensure that a list is drawn up of persons who are given access to inside information. If a person who is given access to inside information is a legal entity, the list shall include those of the entity's employees, elected officers, and assistants etc., who are given access to the information.

(2) The list shall be continuously updated and shall state the identity of persons with access to inside information, the date and time the persons were given access to such information, the functions of the persons, the reasons why the persons are on the list and the date of entries and changes to the list. The list shall be retained in a satisfactory manner for at least 5 years after its creation or updating, and shall be transmitted to Finanstilsynet upon request.

(3) Issuers of financial instruments shall ensure that persons given access to inside information are aware of the duties and responsibilities this involves, as well as the criminal liability associated with misuse or unwarranted distribution of such information. Issuers of financial instruments shall be able to satisfy Finanstilsynet that persons with access to inside information are aware of their duties under the first sentence.

6.2 General comments

Issuers are subject to obligations when persons are given access to inside information. The central obligation requires the issuer to ensure that lists are drawn up of persons who are given access to inside information. This obligation must be segregated from the obligation requiring issuer undertakings to maintain an overview of the company's primary insiders in connection with the notification requirement; see the Securities Trading Act section 4-1 subsection (4) and 11.6.

The lists must include all persons who are given access to inside information, including the employees of the issuer. The provision also requires issuers to ensure that persons with access to inside information are aware of the obligations and responsibilities involved, that this can be documented, and that the lists are retained in a satisfactory manner.

The rationale for the provision is primarily the need for control and oversight. If the competent authorities are unable to rapidly gain an overview of parties with access to inside information at a given point in time, an inspection may be significantly compromised. In addition, the provision is expected to focus alertness to the way inside information is handled.

The issuer is obliged to forward the lists to Finanstilsynet and regulated markets upon request; see the Securities Trading Act section 3-5 subsection (2) and section 5-3 subsection (3).

The obligation to maintain lists will primarily be of significance in cases where inside information arises in an issuer without the information being made public immediately, in other words where the issuer opts to defer publication of the inside information under the Securities Trading Act section 5-3.

6.3 Issuer obligations

The obligation to ensure that complete lists are maintained, that persons given access to inside information are aware of the responsibilities involved, the pertinent documentation, and satisfactory retention of the lists, rests with the issuer of the financial instruments. However, there is no requirement that the issuer should perform these tasks itself. It may – where circumstances permit – be natural to have the company's professional advisers, for example investment firms, lawyers and auditors, take on these tasks on behalf of the issuer insofar as concerns the advisers' own information handling. It is however the issuer that is responsible for ensuring that the obligations are complied with and that a complete overview can be delivered to Finanstilsynet on request. In as much as the issuer will be responsible for any errors committed by its assistants, the undertaking should ensure that the assistants have the ability to fulfil the obligations and that clear-cut responsibilities are established vis-a-vis the principal. Hence the assistant's obligations should be anchored in the assignment document or the like. The issuer's responsibilities may also – depending on the circumstances – call for the issuer to oversee more closely that the assistant actually fulfils his obligations and keeps abreast of the scale of dissemination of the inside information.

6.4 Entry in insiders list

Any person who is *given access* to inside information must be entered in the list. In other words, there is no longer any requirement that such persons have actually received inside information, so long as they are given access to the information. The obligation to maintain a list applies in respect of inside information pertaining to the issuer or its financial instruments. Information received by the issuer that relates exclusively to other companies listed on a regulated market will accordingly not entail a listing obligation for the first-mentioned company. Another matter is that such obligation will often follow from an agreement with the other company listed on a regulated market.³² Moreover, the requirement of due care in information handling in the Securities Trading Act section 3-4 will in any case often require the recipient to have in place routines for secure handling of inside information, whether pertaining to the company itself or others.

A concrete assessment will be needed to determine when inside information is deemed to exist and what is deemed to constitute *access to* such information. Issuers must have in place routines to ensure regular assessment of what persons within and outside the undertaking should be entered in the list. The same will apply to professional advisers and lead managers etc acting on commission from the undertaking.

If the recipient of the information is a legal entity, the list must also include natural persons in the undertaking who are given access to the information; see the Securities Trading Act

³² For example where a bank with stock exchange quoted securities receives inside information from another listed company in connection with a credit evaluation.

section 3-5 subsection (1) second sentence. Each member of staff within the legal entity, for example an audit company or law firm that is given access to the inside information, must be entered in the list of the issuer. In the case of audit companies the list must at least include persons directly participating in the audit of the issuer.

In contract negotiations the issuer will be obliged to list contract counterparties who are given access to inside information about the issuer that has arisen independently of the negotiations. However, Finanstilsynet considers that the issuer is not obliged to keep a list of persons in the company it is negotiating with simply because these persons possess information about the negotiations as such. In the latter case it is hardly natural to take it that the counterparty was *given access* in the meaning of the Act. Finanstilsynet would nonetheless recommend the issuer to enter in the list counterparty personnel with which it has been in direct contact in the negotiations.

Finanstilsynet further considers that the provision should be subject to restrictive interpreting when it comes to persons employed on a regulated market who receive inside information under the Securities Trading Act chapter 5. These persons should not be entered in the list.

6.5 Requirements on the content and retention of the list

The list should be continuously updated and state the identity of persons with access to inside information, the date and time the persons were given access to such information, the functions of the persons, the reasons why the persons are on the list and the date of entries in and changes to the list.

The requirement as to date and time means that the hour at which the person concerned was given access to the inside information should be stated as far as practically possible. If, for example, notice of a board meeting contains inside information, it is sufficient to note the hour of dispatch. Where inside information exists after a development process, the hour at which the information became inside information will be relevant for list purposes.

Further, the person's function must be stated in the list. Normally their job designation will suffice. The reason why the individual is on the list should be stated in order to identify the connection between the individual and the inside information. For example, a person may be on the list because he or she deals with price-sensitive accounting data, another because he or she is working on a price-sensitive project. Finanstilsynet considers that the issuer should employ different lists for the various events where inside information arises.

The list should be up to date and be updated continuously. The dates of entries and changes to the list should be stated without removal of persons' names. If inside information 'lapses', for example because negotiations terminate without a planned agreement being entered into, the date and time should be entered.

When it comes to information related to the periodic presentation of financial statements, Finanstilsynet is aware that the insiders list requirement could prove very burdensome and serve little purpose if practised in a stringent manner. Finanstilsynet assumes it would be sufficient for the issuer to employ a more standardised list and to assess accounting

information in relation to inside information at suitable points in time³³; see stock exchange circular 3/2005. However, changes in the insider group must be entered in the list (the date of persons' removal from the list must be entered; their names must not be deleted), and the list must be retained in the usual manner.

The list must be retained for at least five years. There are no requirements as to the list's form or layout.

6.6 Obligation to make insiders aware of their responsibilities, and relevant documentation

According to the Securities Trading Act section 3-5 subsection (3) the issuer is required to ensure that persons given access to inside information are aware of the duties and responsibilities this involves, including the criminal liability associated with misuse or unwarranted distribution of such information. The aim is to prevent misuse and leaks of inside information.

What level of activity will need to be displayed by the issuer will depend on the circumstances, including the recipient's professionalism in dealing with price-sensitive information. Professional participants in the Norwegian securities market (intermediaries, lawyers) will not normally need to be made aware of their responsibilities. This type of participant is expected to be acquainted with the rules governing the securities market and to be able to assess the information's price sensitivity. Where other persons are concerned, the circumstances may call for the issuer, possibly the assistant under the issuer's responsibility, to explicitly make such persons aware of the information's price sensitivity and the consequent responsibility involved. This will, for example, be the case where media counsellors, printers of prospectuses or foreign advisers are given access to inside information. The same applies in respect of employees of the issuer who have access to inside information.

The documentation requirement in relation to the above will be relative in the sense that the circumstances, including the recipient's professionalism, will play a part. Where Norwegian professional participants in the securities market are concerned, the documentation requirement can be met by reference to the professionalism of the person concerned. In other cases it might be necessary to present documentation in writing, for example a circular received or a statement signed by project participants. The point is to preclude doubt subsequently being cast over whether or not recipients of inside information have been aware of the nature of the information and the consequent obligations involved.

³³ For example certain points in time where accounting data are presented.

7. Duty to investigate, Securities Trading Act section 3-6

7.1 Wording of the Act

Section 3-6 Duty to investigate

(1) Before any member of the board, senior employee, member of the control committee or auditor associated with the issuer may subscribe, or incite anyone to subscribe, purchase, sell or exchange financial instruments issued by the undertaking, the person concerned shall properly investigate whether there exists such information as mentioned in section 3-2 regarding the financial instruments or the issuer thereof. The first sentence applies correspondingly to any deputy member, observer, board secretary and company secretary to the board in the issuer. The first sentence applies correspondingly to senior employees and board members of an undertaking in the same group who can normally be expected to have access to inside information.

(2) The duty to investigate also applies to the entering into, purchase, sale or exchange of option or futures/forward contracts or corresponding rights connected to financial instruments issued by the undertaking as well as to incitement to such transactions.

7.2 Range of persons

According to the Securities Trading Act section 3-6 subsection (1) the duty to investigate applies to any member of the board, senior employee, control committee member, auditor, deputy member, observer, board secretary or company secretary to the board of the issuer. It also applies to senior employees and board members of an undertaking in the same group who can normally be expected to have access to inside information. This range is also relevant to persons subject to a notification requirement; see the Securities Trading Act section 4-1 subsection (1).

In assessing whether a person is a “*senior employee*”, a significant factor will be whether he or she is in a position to influence dispositions of the company that may be of a price-sensitive nature; further, whether he or she regularly has access to information that is qualitatively in line with the information received by the CEO.³⁴ See also 11.2 for further comments in relation to the range of persons.

7.3 Content of the duty to investigate

Any board member, senior employee etc (primary insider) must *properly investigate* whether there exists inside information in the undertaking before he or she subscribes, or incites anyone to subscribe, purchase, sell or exchange financial instruments issued by the undertaking. A primary insider must actively investigate whether inside information exists in the undertaking. In assessing whether a proper investigation has been made, a significant factor will be whether the primary insider has infringed the issuer’s in-house routines, if any,

³⁴ See Proposition to the Odelsting no. 29 (1996-1997) page 34.

with respect to investigation. Hence significance can be attached to sound internal routines when establishing the concrete subject matter of the duty to investigate.³⁵

Finanstilsynet expects an investigation to be made in connection with own account trading, irrespective of whether trading through a representative is envisaged. Primary insiders are consequently also required to investigate where an agent/manager is to execute a trade in the company to which the primary insider is connected. The same applies if a trade is to be executed for third-party account. See also 4.6.

8. Prohibition of advice, Securities Trading Act section 3-7

Section 3-7 Prohibition of advice

Persons possessing inside information shall not give advice about trading in financial instruments to which the information relates.

The prohibition applies to advice concerning trades in the financial instruments to which the inside information relates, including advice to refrain from trading.³⁶

Violation of the prohibition of advice may be subject to criminal punishment regardless of whether the recipient of the advice actually acts on the advice.

9 Prohibition of unreasonable business methods, Securities Trading Act section 3-9

Section 3-9 of the Act establishes that no-one may employ unreasonable business methods when "trading in financial instruments". The provision addresses any and all parties, including the individual investor who buys or sells financial instruments. The provision's legislative history, see NOU 1996:2, states the following:

The conduct of business rules and the prohibition of unreasonable business methods are general provisions that supplement the specialised rules of section 6 on insider trading and of section 9 et seq. on oversight of invitations to subscribe in connection with stock issues. [...] Both contractual terms and contractual techniques may, as aspects of an individual securities trade, be regarded as such business methods that are covered by the unreasonableness standard.

From this it follows that the provision is broad in its scope of application, and that also individual trades may constitute unreasonable business methods. It is also clear that the

³⁵ See Proposition to the Odelsting no. 29 (1996-1997) page 37.

³⁶ See Proposition to the Odelsting no. 12 (2004-2005) page 46.

provision is a legal standard able to supplement narrower, specialised rules. Hence the fact that some aspects of such behaviour are also regulated by specialised provisions does not mean that the general provision of section 3-9 subsection (1) is inapplicable if the behaviour in question is considered to constitute an unreasonable business method.

Reference is also made to NOU 1996:2 which states the following with regard to what factors will be relevant in determining whether or not unreasonable business methods have been used:

In considering what business methods are unreasonable it is natural to take ordinary business methods as a starting point. However, this does not prevent business methods with some prevalence from being considered unreasonable. The parties involved are also of significance to an assessment of whether a business method is unreasonable. A specific level of knowledge and experience, or lack of such, on the part of a party will enter into the assessment. An unreasonable outcome of a securities trade is not crucial to the assessment.

10. Reporting obligation, Securities Trading Act section 3-11

10.1 Wording of the Act

Section 3-11 Reporting obligation

(1) Any person conducting or arranging transactions in financial instruments on a professional basis shall report to Finanstilsynet without delay if there is reason to suspect that a transaction might constitute insider trading or market manipulation. The ministry may adopt regulations providing that the first sentence shall only apply to investment firms and credit institutions.

(2) Persons reporting to Finanstilsynet under subsection (1) shall not disclose to any other party that notification has been or will be given.

(3) Information disclosed in good faith to Finanstilsynet under subsection (1) shall not constitute a breach of any form of confidentiality requirement and shall not constitute a basis for compensation or criminal proceedings.

(4) The ministry may in regulations lay down further rules on the transmission of information to Finanstilsynet and on reporting under this section.

10.2 General comments

The obligation to report suspected insider trading or market manipulation to Finanstilsynet is in addition to the reporting obligation pursuant to the Money Laundering Act of 2009 section 18, cf section 4, which requires financial institutions and investment firms to report suspicion of money laundering to ØKOKRIM³⁷. Where both insider trading/market manipulation and

³⁷ Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime

money laundering are suspected, a report must be filed both with Finanstilsynet and ØKOKRIM.

10.3 Substantive scope

The reporting obligation pursuant to section 3-11 applies to “*any person conducting or arranging transactions in financial instruments on a professional basis*”. In the Securities Trading Regulations section 3-1 the Ministry limits the reporting obligation to investment firms and credit institutions, including the employees of such institutions.

The reporting obligation applies to businesses “*conducting or arranging transactions in financial instruments*”. Such businesses will typically include investment firms' investment services under the Securities Trading Act section 2-1 subsection (1) – and to some extent ancillary services under the Securities Trading Act 2-1 subsection (2). In the case of credit institutions which are not investment firms, such business will typically be services requiring authorisation under the Securities Trading Act section 9-2 subsection (2). However, the reporting obligation may also arise in credit institutions' lending activity when transactions are arranged in financial instruments.

Businesses operating under licence pursuant to the Securities Funds Act section 2-1 subsection (2) fall outside this scope.

10.4 The ‘might constitute’ requirement

The reporting obligation applies where there is suspicion that transactions conducted by the undertaking and its employees *might constitute* insider trading or market manipulation. There is no requirement that the suspicion should refer to the transaction itself, so long as the transaction is what triggers the suspicion. Further, the reporting obligation may be triggered either by executed transactions or by actions in preparation for an imminent transaction.³⁸

In addition to a reporting obligation triggered by suspicious transactions conducted by the undertaking's customers, the undertaking will be obliged to report suspicion triggered by transactions or preparations carried out by one or more of the undertaking's employees. The necessary assumption here is that the person concerned has used – or has intended to use – the company's systems to execute the transaction.

10.5 Reason to suspect

A reporting obligation arises for the undertaking and its employees where there is “*reason to suspect [...] insider trading or market manipulation*”. According to Finanstilsynet, the phrase “*reason to suspect*” should not be interpreted stringently. The reporting obligation cannot be conditional on a preponderant likelihood of insider trading or market manipulation.

³⁸ See statements in Proposition to the Odelsting no. 12 (2004-2005) page 91.

Nor is it crucial when the suspicion arose. Hence a reporting obligation could just as easily arise before the transaction is carried as after it is completed or after the attempt to execute it has been given up or has failed.

The question of when “*reason to suspect*” exists must be settled in concrete terms. A number of factors, either combined or separately, may trigger suspicion. However, a wide-ranging duty to investigate cannot be imposed on reporting entities. Anyone intending to conduct or arrange a transaction must refrain if he understands or ought to understand that he will thereby be accessory to violating the provisions concerned. In as much as the reporting obligation already comes into play upon “*reason to suspect*”, the transaction can in the normal course of events probably be carried out without the conducting or arranging entity risking incurrance of accessory liability. However, the circumstances may be such the person ought to understand ahead of the intended transaction that executing it will constitute a criminal offence, for example where an investor, possibly holding a key position in the issuer, announces that he has inside information. In such cases the broker will have to refrain from execution, and report the matter to Finanstilsynet.

As regards indications of insider trading or market manipulation, reference is made to CESR’s (Committee of European Securities Regulators)³⁹ guides at level 3.⁴⁰

10.6 Time limit for reporting

Where there is reason to suspect a violation, this shall be reported to Finanstilsynet without delay. Hence reporting must be unsolicited and immediate. This applies even if not all documentation to be forwarded to Finanstilsynet is available at the time in question.

10.7 Liability and duty of confidentiality

The person who files the report must not disclose “*to any other party that notification has been or will be given*”. It is particularly important to maintain confidentiality vis-a-vis the person on whose behalf the transaction is conducted, the latter's representatives or other affected parties. The person making the report may of course inform his superior or a compliance officer in the undertaking to which he is attached.

The identity of the reporting party will be kept confidential by Finanstilsynet. Under the Securities Trading Act section 3-11 subsection (3), reports filed with Finanstilsynet in good faith will entail no liability for the person who filed the report. The requirement of good faith is not stringent. Nor do such reports constitute a breach of any form of confidentiality. This applies both to statutory and contractual duty of confidentiality.

³⁹ CESR is a committee consisting of supervisory authorities in the EEA member states. In addition to assisting in the task of rule formulation, CESR prepares standards and guidelines (level 3) in areas not regulated by legislation. Such guidelines are not binding, but are given weight by national supervisory authorities.

⁴⁰ See http://www.cesr-eu.org/data/document/04_505b.pdf – <http://www.cesr-eu.org/popup2.php?id=4683>

10.8 The report's content and transmission

The report should be sent to Finanstilsynet.⁴¹

The further requirements on the content of the report are set out in the Securities Trading Regulations section 3-4. Section 3-4 reads:

Section 3-4 Requirements for content of notification pursuant to the Securities Trading Act section 3-11

(1) Notification pursuant to the Securities Trading Act section 3-11 shall contain:

- (a) a description of the transaction, including the type of order and type of trade,*
- (b) information about the reasons why the party subject to the reporting obligation suspects that the transaction may constitute insider trading or market manipulation,*
- (c) information on the identity of the person on behalf of whom the transaction was carried out and of any other parties to the transaction,*
- (d) information on the capacity in which the party subject to the reporting obligation operates (for own account or on behalf of a third party), and*
- (e) any other information which may be relevant in reviewing the transaction to which the suspicion of insider trading or market manipulation relates.*

(2) If all the information mentioned in subsection (1) is not available at the time of notification, the notification shall include at least the reasons why the notifying person suspects that the transaction may constitute insider trading or market manipulation. All remaining information mentioned in subsection (1) shall be provided to Finanstilsynet as soon as it becomes available.

(3) Notification pursuant to the Securities Trading Act section 3-11 may be given to Finanstilsynet by post, telefax, telephone or by such other means as Finanstilsynet determines. Finanstilsynet may require that information provided by telephone be followed up with written notification.

Guidelines for investment firms' reporting of suspicious transactions are given on Finanstilsynet's website.

⁴¹ Currently the securities institutions supervision section at Finanstilsynet deals with such reports in Norway. Reports are filed with the competent authority in the member state where the undertaking has its head office or – if it is a branch – in the member state where the branch is located, see Commission Directive 2004/72/EC, Article 7.

Part II – Securities Trading Act Chapter 4

11. Notification requirement, Securities Trading Act section 4-1

11.1 Wording of the Act

Section 4-1 Notification requirement for primary insiders

(1) Persons as mentioned in section 3-6 subsection (1) shall immediately notify the Norwegian regulated market on which the shares are quoted of any purchase, sale, exchange or subscription of shares issued by the company or by companies in the same group. This also applies to the company's trade in its own shares and shares of companies in the same group. An undertaking which owns quoted shares in another undertaking or shares in another undertaking that is listed on a regulated market, and which because of such ownership is represented on the board of the other undertaking, must notify trading in such shares. Notification shall be sent no later than the start of trading on the regulated market on the day following the purchase, sale, exchange or subscription.

(2) The notification requirement also applies to loans as mentioned in the Private Limited Companies Act section 11-1 and the Public Limited Companies Act section 11-1, agreements on, exchange, purchase or sale of subscription rights, options and corresponding rights connected to shares as mentioned in subsection (1). The notification requirement applies regardless of whether the financial instrument gives rise to physical or financial settlement.

(3) The notification requirement also applies to trading involving a shareholder's related parties as mentioned in section 2-5 nos. 1, 2 and 4.

(4) The company shall without undue delay transmit an updated overview of persons as mentioned in subsection (1) to the regulated market concerned. The notification shall contain the name, personal identity number or similar identification number, address, type of office or post in the company and other employment position, if any.

(5) Any person subject to the notification requirement under subsection (1) shall without undue delay transmit to the regulated market concerned an updated overview of persons and companies as mentioned in subsection (3) if such persons and companies hold financial instruments as mentioned in subsections (1) and (2). The notification shall contain the personal identity number, organisation number or similar identification number.

(6) This section applies correspondingly to equity certificates.

11.2 Range of persons subject to the notification requirement

A notification requirement rests on persons as mentioned in the Securities Trading Act section 3-6 subsection (1) (primary insiders). Persons mentioned in section 3-6 are any member of the board, senior employee, control committee member, auditor, deputy member, observer, board

secretary or company secretary to the board in the issuer. The provision also applies to any senior employee or board member of an undertaking in the same group who normally can be assumed to be given access to inside information.

In assessing whether a person is a “*senior employee*”, a significant factor will be whether he is in a position to influence dispositions of the company that may be of a price-sensitive nature; further, whether he regularly has access to information that is qualitatively in line with the information received by the CEO.⁴² See also 7.2.

The duty rests on the primary insider himself. If the primary insider has engaged an intermediary to execute the transaction, the primary insider must take measures to ensure that the notification requirement is complied with. This will normally require the party subject to the notification requirement to give the intermediary clear instructions to announce executed trades immediately (in any event before the regulated market concerned opens for business the next trading day). It is not sufficient for the primary insider simply to expect the intermediary to be aware of his position as primary insider. Nor, in principle, is it sufficient to expect the intermediary to respond immediately in line with previous practice, unless the intermediary has expressly undertaken to give such a rapid response. It may, depending on the circumstances, take on a different complexion if a well established, long lasting practice exists between the parties. See also 11.8 on the intermediary’s duty of care in connection with assignments for primary insiders.

The notification requirement also applies to companies trading in their own shares. Further, a company owning stock-exchange-quoted shares in another undertaking or shares in another undertaking that is listed on a regulated market, and which because of its equity interest is represented on the board of that undertaking, must notify trades in such shares. Whether the board representative is to be deemed to represent the company in which he is employed will be a matter for concrete assessment. The size of the shareholding and the board representative's position in the company may be significant factors.⁴³

11.3 Trading by close associates/related parties

A primary insider must also notify trading (purchase, sale, exchange or subscription) executed by the following of his close associates/related parties, see the Securities Trading Act section 4-1 subsection (3), cf the Securities Trading Act section 2-5 nos. 1, 2 and 4:

- the spouse or a person with whom the shareholder cohabits in a relationship akin to marriage,
- the shareholder's under-age children, and under-age children of a person as mentioned in no. 1 with whom the shareholder cohabits,
- an undertaking in which the shareholder himself or a person as mentioned in nos. 1, 2 or 5 exercises influence as mentioned in the Private Limited Companies Act section 1-3 subsection (2), the Public Limited Companies Act section 1-3 subsection (2) or the General and Limited Partnerships Act section 1-2 subsection (2),

⁴² See Proposition to the Odelsting no. 29 (1996-1997) page 34.

⁴³ See Proposition to the Odelsting no. 29 (1996-1997) page 47.

Notifying parties are required to send to the regulated market concerned an overview of their related parties if the latter hold financial instruments covered by the primary insider's notification requirement; see section 4-1 subsection (5). The lists must be up to date, i.e. primary insiders must send the overview and any changes therein to the regulated market concerned without undue delay. This list, in contrast to the list of primary insiders, see subsection (4), is not in the public domain.

11.4 Notifiable transactions

11.4.1 Introduction

Primary insiders' notification requirement applies to their purchase, sale, exchange or subscription of shares issued by the company to which the primary insiders are attached.⁴⁴

A notification requirement also arises where a primary insider purchases, sells, exchanges or subscribes shares in other companies in the same group, regardless of whether such companies are listed on a Norwegian regulated market.

All trades made by a primary insider for own account must be notified. This applies even where the trades are in the name of a third party, for example through an investment firm. Trading in the primary insider's own name for third-party account is also included. However, the notification requirement does not apply to trades in the name of a third party and for third-party account.⁴⁵

A notification requirement also applies to the purchase, sale, exchange or subscription of equity certificates and convertible bonds as well as to agreements concerning entry into, exchange of or purchase or sale of, subscription rights, options and corresponding rights attached to shares; see section 4-1 subsections (2) and (6). The provision is assumed to also apply where employees are allotted options free of charge.

The notification requirement applies regardless of whether the financial instrument gives rise to a physical or financial settlement; see the Securities Trading Act section 4-1 subsection (2) second sentence.⁴⁶ This means that it is of no consequence for the notification requirement whether the primary insider's trade refers to a derivative contract giving rise to physical delivery of shares or a derivative contract giving rise to a cash settlement. The justification for the rule is that both types of trade are an expression of the primary insider's assessment of the underlying quoted share.⁴⁷

The notification requirement does not apply to acquisitions in the form of inheritance, gifts etc. It is also assumed that receipt of consideration shares in connection with an ordinary merger or demerger will not normally be notifiable. However, acceptance of a voluntary or mandatory bid under the Securities Trading Act Chapter 6 will trigger notification.

⁴⁴ In its consultation document of 29 September 2010 Finanstilsynet, based on Commission Directive 2004/72/EC (Market Abuse Directive), recommended including a separate scope-of-application provision in a new section 4-1 of the Securities Trading Act. The recommended provision clarifies that the notification requirement only applies to companies having Norway as their home state.

⁴⁵ See NOU 1996:2 *Securities Trading*, page 74.

⁴⁶ This provision entered into force on 1 July 2010.

⁴⁷ See Prop. 84 L, 4.4.4 (legislative proposal).

As regards a company's "*trading*" in shares issued by an undertaking where the company is represented on the board by virtue of an equity interest in the undertaking, notification will include the purchase, sale exchange and subscription of shares in the undertaking concerned.

11.4.2 Conditional agreements relating to purchase, sale or subscription

A notification requirement exists once a binding agreement is made. The requirement arises at this point and not upon receipt of the contract note or upon payment or settlement or the like.

As a general rule a notification requirement does not arise in the case of agreements that are not binding with final legal effect until the conditions are met or waived. However, the Securities Trading Act section 4-1 subsection (2) stipulates that entry into, purchase or sale of options or equivalent rights attached to shares is notifiable. This is natural in as much as also these types of agreements may bring to the market an awareness of the insider's expectations of the company's future prospects.

Options are also notifiable pursuant to section 4-1. Notification is not dependent on whether compensation is paid for the option. The requirement applies both to the seller/issuer and the holder/buyer, provided they are primary insiders.

Conditional agreements relating to purchase, sale or subscription will effectively be option agreements if the option holder controls the coming into play of all legal conditions needed for completion of the purchase or sale. Consequently such agreements must be notified when entered into. This applies irrespective of whether they involve a call option right or a put option right. Unilaterally offered options and call and put rights are therefore not covered. True enough, a unilateral offer to someone to buy shares at a particular price where a certain time limit is set for acceptance will also give the other party a dated option, but it is hardly natural to regard this as the "*entry into*" or "*purchase*" or "*sale*" of an option or equivalent right. In this case a notification requirement will only be triggered once the offer is accepted by the other party. It may be pointed out that options allotted to employees/officers free of charge with a basis in the employment relationship or office are not regarded as unilateral options in the present context.

Where the conditions are tied to circumstances that are beyond the control of the rights holder or of both parties (for example granting of licences or consent from a third party), it is not natural to speak of an "*option*", and this can hardly be regarded as an "*equivalent right*". Finanstilsynet states that no notification requirement applies in such situations. To the extent it is clear that the condition(s) will be met, a notification requirement will never the less come into play.

For example, a notification requirement will not be triggered by the acceptance of an offer of sale if the buyer has not attained the required level of acceptance or other conditions are not in place. The same necessarily applies on the part of the acceptor. The opposite will apply if the offeror has reserved the right to waive the condition(s), which is the norm. In this case the notification requirement will arise as the offer gains acceptance.

11.4.3 All-or-nothing orders

An all-or-nothing order is where the client gives the broker an order to buy or sell a particular number of shares. It may be agreed or understood that the broker will execute the order in partial transactions, but that the client will not be obliged to accept any delivery until the

entire agreed number of shares can be delivered or sold. Such orders will have a certain life and stipulate a particular price or price limit (normally calculated as an average price).

When executing this type of order for clients, an investment firm will expose itself to risk until the volume and price conditions set by the principal are met. Seen from the principal's vantage point this has a clear parallel to conditional purchase and sale agreements, as mentioned above. The principal has contracted for a specified volume at a specified average price, and is only legally bound once all the conditions are met.

Also implicit in the assignment is the fact that the broker is obliged to let the client benefit from the first executed partial transactions once the overall volume conditions are met (when the final partial transaction can be executed). Hence the client has a right to buy or sell shares after the initial partial transactions, but this right is conditional on the overall volume being executed on the terms agreed.

An investment firm will as a rule be interested in the client taking over the initial partial transactions even in cases where the overall volume is unattainable, but the client is not entitled to this. A consequence is that in the case of, say, a buy order where the price rises after partial purchases have started so that the volume condition cannot be fulfilled, it is the brokerage house and not the client that benefits from the rise in value. Where it is agreed or understood that the client will get the shares regardless, it will not be a matter of an all-or-nothing order.

In the case of an all-or-nothing order from a primary insider which the intermediary needs several days to fill, Finanstilsynet states that the notification requirement will only be triggered once volume and price conditions and/or other conditions are met, provided it is matter of a genuine all-or-nothing order. A notification requirement will however apply to partial transactions on the individual trading day if the conditions set entail little or no genuine risk to the investment firm, for example because the stated limit is high and the order filling period is long and liquidity in the share is good.

11.4.4 Sale in the event of a breach of conditions in connection with loan-financed shares

“Sale” is normally understood to mean a voluntary change of ownership. Finanstilsynet considers that a realisation forced by the execution and enforcement authorities falls outside the scope of this term. Of practical significance is whether the same applies in the case of sale with a basis in conditions included in a primary insider's loan agreement; see the Enforcement Act section 1-3 subsection (2). Such sale will typically be prompted by a declining share market in which the pledgee no longer considers there to be adequate security for the primary insider's commitment.

This type of prior agreement is very widespread in connection with loan financing of shares. A feature of this type of realisation is its potential swiftness, low cost and the absence of publicity that may accompany a claim being paid through the agency of the enforcement authorities. Although the pledgee in the event of a breach of the loan terms has an unconditional right to sell the pledged shares, such a sale may well take place more or less ‘in concert with’ the pledger, and on occasion the primary insider himself assists in realising the financial instruments through the ordinary sales channel. In Finanstilsynet's view a sale triggers a notification requirement for the primary insider under the Securities Trading Act

section 4-1 regardless of whether it is the pledger or pledgee or an independent broker who undertakes the sale. The provision is understood such that it also applies to sale for a primary insider's account that takes place in accordance with a prior agreement on realisation, also where the sale is executed by another participant (who in this case acts for third-party account and possibly also in the name of a third party).

11.4.5 Subscription

In stock issues, a basis is taken in the timing of a binding subscription. The Public Limited Companies Act section 10-7 further defines a binding subscription to be a subscription entered on a designated subscription form or in the minutes of the general meeting.

In situations where it is not known on the subscription date how many shares will be allotted (and, in the event, depending on the allotment criteria, how many risk not being allotted any shares at all), the notification requirement first comes into play when allotment takes place.

11.4.6 Futures – rolling

A future is a trade with deferred settlement. Such contracts are to be notified by the primary insider when a binding contract is entered into. On the contrary, notification shall not be given upon delivery of the shares.

The term “*rolling*” is often used with reference to situations where, after a futures contract is entered into, a new deferred delivery date is agreed. In such cases a reckoning is made based on the price movement of the underlying instrument, after which the parties settle up for the entire price movement or parts thereof to that date and adjust the futures price.

When a futures contract is rolled, and a new delivery date established, a new agreement is effectively in place which the primary insider has to notify anew. This applies even where no adjustments are made to other terms.

The notification should make clear that the item being rolled is a futures contract.

11.4.7 Repo transactions

Here a repo transaction means any agreement between two parties relating to the repurchase of shares etc. The transaction combines an agreement for the spot sale (spot purchase) of a security with a simultaneous agreement between the same parties for the repurchase of the security at a future point in time. This type of agreement is often used to collateralise borrowing and is thus an alternative to mortgaging. The spot seller in a repo transaction retains the price risk.

Both the spot transaction and the forward element (repurchase agreement) come under section 4-1. The question may be raised whether the provision achieves its aim in relation to such transactions. After close assessment Finanstilsynet has not found sufficient basis for a narrower interpretation of the provision where such transactions are concerned. In other words repo transactions must be notified in the ordinary manner, i.e. as a spot sale and a forward repurchase.

11.4.8 A company's trading in its own shares

The Securities Trading Act section 4-1 subsection (1) first sentence requires a company to notify any purchase, sale, exchange or subscription of shares etc when the company trades in its own shares. The issuing company's trading in its own shares can only be in the form of purchase, sale or exchange in as much as the Public Limited Companies Act section 9-1 prohibits subscription of own shares. However, pursuant to section 4-1 subsection (2) the company must also notify options and similar rights attached to its own shares that the company enters into, sells or purchases, on the same terms as other notifying parties. The necessary assumption is that the agreements are tied to existing shares. Issuance of new shares or issuance of subscription rights, options or other rights to subscribe new shares in the company will not be notifiable by the company under the Securities Trading Act section 4-1. Such information may however, depending on the circumstances, come under the information requirement in section 5-2 of the same Act. Where a company purchases its own subscription rights or options conferring the right to purchase or subscribe shares in the company, both the purchase and any subsequent sale will be notifiable.

A subsidiary's trading in an issuer's shares and trading in shares in the same group as the issuer are notifiable under the Securities Trading Act section 4-1 subsection (1) second sentence and section 2-5 subsection (1) no. 4.

11.4.9 Trading between related parties

The question has been raised of the appropriateness of notifying trades between a notifying party and its related parties in as much as the notifying party is in these situations required to notify both a sale and a purchase. It may be noted that in these cases notification does not in sum give information to the market about the notifying party's expectations of the company. Finanstilsynet none the less believes that situations are conceivable where such transactions can convey information about the notifying party's expectations of his 'own' company. Finanstilsynet accordingly, in keeping with the wording of the Act, states that such transactions must be notified.

11.5 Time limit for notification

Notification must be sent to the regulated market immediately the trade is executed, and at the latest by the time the regulated market opens for business on the following trading day.

11.6 List of primary insiders

The issuer is required to send an overview of primary insiders in the company to the regulated market concerned; see the Securities Trading Act section 4-1 subsection (4). The lists must be updated, issuers being required to notify the regulated market concerned without undue delay of persons who are no longer primary insiders and when new person are added to the list. The list of primary insiders should not be confused with the list of persons with access to inside information under the Securities Trading Act section 3-5; see 6 above.

11.7 Requirements on the content of notification, Securities Trading Act section 4-3

Section 4-3 Requirements on notification

Notification pursuant to section 4-1 subsections (1) to (3) shall contain information on the following:

- 1. name of the person subject to the notification requirement,*
- 2. background for the notification,*
- 3. name of the issuer,*
- 4. description of the financial instrument,*
- 5. type of transaction,*
- 6. timing and market for the transaction,*
- 7. price and volume of the transaction and*
- 8. holding after the transaction.*

The background for the notification is the circumstance that causes the person concerned to be subject to the notification requirement (post, position), and whether it is the person himself or a related party who has executed the transaction. The notifying party need not identify which related party(ies) has/have made the trade: it is sufficient for the notifying party to state that the trade was executed by a related party and not by the primary insider himself.

The notification should also give a description of the financial instrument. The description should contain the name and type of financial instrument, a statement/description of its class, its terms, key characteristics etc. This will be particularly relevant in cases where the financial instrument is not standardised. Where options are concerned, the notification must state whether it is a buy or sell option, the strike price, redemption period and maturity.

If the financial instrument is quoted on more than one regulated market, the notification shall state whether and on what market the transaction was executed; see section 4-3 subsection (1) no. 6.

The primary insider's and his related party's overall holding after the notified transaction shall be stated in the notification. This applies both in the case of notifications of own trades and those of related parties.

11.8 Intermediary's duty of care in connection with assignments for primary insiders

Based on the information received by Finanstilsynet from primary insiders in notification cases, violations often appear to be rooted in primary insiders' lack of knowledge of the rules or poor compliance with them. Whether a transaction consists of ordinary order transmission or results from active management, the primary insider not infrequently cites:

- a misunderstanding with the intermediary about who was to see to notification,
- the intermediary's failure to respond rapidly enough for the primary insider to comply with the notification time limit,

- the intermediary's failure to make clear the rules governing the primary insider's obligation to notify the Oslo Stock Exchange, even though the situation called for this to be done.

According to the Securities Trading Act section 4-1, it is the primary insider himself who is duty bound to ensure that the obligation to notify the Oslo Stock Exchange is complied with. The primary insider must accordingly ensure that the intermediary is instructed to respond rapidly to enable him to comply with the notification obligation. The provision does not preclude the primary insider from leaving it others, for example the intermediary, to notify trades. The primary insider must however act with due care to ensure clarity with regard to who is to attend to notification.

In connection with client assignments, investment firms are required by the Securities Trading Act section 10-11 to observe conduct of business rules, which includes ensuring that the client's interests are safeguarded in the best possible manner and giving the client necessary information commensurate with the latter's professionalism. Intermediaries in securities trading are also expected to be aware of the notification provisions in the securities trading legislation. An investment firm may, depending on the circumstances, have a duty to facilitate the customer's compliance with his notification obligation under the Act. Finanstilsynet assumes that such a service to the client will also – quite independently of that duty – be in the investment firm's best interest.

Against this background, affected investment firms are urged to give particular attention to these provisions. Where active management performed for primary insiders is concerned, it would seem reasonable to address these matters as soon as the management agreement is entered into.

11.9 Sanctions for violation of the notification requirement

As from 1 July 2010 Finanstilsynet was empowered to impose a penalty charge for violation of the rules governing notifiable securities trading. The threat of criminal sanction is retained for gross or repeated violations. In its supervisory practice Finanstilsynet will impose an administrative penalty charge for violations not subject to a criminal penalty.

Finanstilsynet can sanction against primary insiders for late notification and failure to notify; see section 17-4. Primary insiders may also incur a penalty where a notification has deficient content under the Securities Trading Act 4-3, where a related party has failed to notify or where the listed of related parties as mentioned in section 4-1 subsection (4) has not been updated. Further, Finanstilsynet can sanction against an issuer for late notification and failure to notify under section 4-1 and for failure to update the list of primary insiders; see the Securities Trading Act section 4-1 subsection (4).

The wording of the Securities Trading Act section 17-4 permits the exercise of judgement with regard to the size of the fine such that "importance shall in particular be attached to the scale and effects of the violation as well as the degree of guilt found". Circumstances surrounding violations of the notification requirement will vary widely and will be reflected in the size of the violation penalty imposed. Both wilful and negligent violations of the notification requirement may be sanctioned against under the Securities Trading Act section

17-4. The same applies to the abetting of violations of the notification rules and to attempted violations. Abetting of violations and attempted violations are, however, infrequent. Anyone guilty of gross or repeated violation of the notification rules may be fined under the Securities Trading Act section 17-3 subsection (2) no. 6. This sanction, imposed by the prosecuting authority, is confined to serious violations.

12. Mandatory disclosure obligation, Securities Trading Act section 4-2

12.1 Scope

The disclosure rules apply to “*shares admitted to trading on a regulated market of an issuer having Norway as its home state*”; see the Securities Trading Act section 4-2 subsection (1).

Norway will be the home state for the following companies:

1. Norwegian companies with shares admitted to trading on a Norwegian regulated market.
2. Norwegian companies with shares admitted to trading on a foreign regulated market within the EEA.
3. Companies from countries outside the EEA if Norwegian authorities are the supervisory authorities. It follows from the Prospectus Directive that this will be the case where such issuers have made a public offering or sought admission to trading in Norway as their first market within the EEA area after 1 July 2005. Issuers who chose Norway as their home state prior to this date are additional to the above. The provisions of the Securities Trading Act on this subject are not readily graspable.

‘Regulated market’ in the Securities Trading Act section 4-2 subsection (1) means a regulated market as defined in Act of 29 June 2007 No. 74 (Stock Exchange Act) section 3 subsection (1) or a similar regulated market in another EEA country. As of 1 January 2008 there are two regulated markets in Norway where shares are admitted to trading: Oslo Børs and Oslo Axess.

Oslo Børs has published on its website a list of issuers having Norway as their home state (<http://www.oslobors.no/Oslo-Boers/Notering/Noterte-selskapers-hjemstat-mv>).

In the case of companies admitted to trading on a Norwegian regulated market but having another EEA country as their home state, disclosure must take place in conformity with the disclosure rules of the issuer’s home state.

12.2 Shares, rights to shares and voting rights attached to shares

12.2.1 General

The disclosure obligation is triggered by changes in the influence structure of the issuer company or by changes in positions likely to confer influence. The obligation refers both to

the portion of shares and/or rights to shares in the company held by the party subject to the disclosure obligation and to that party's voting rights attached to shares (which the party concerned holds without owning the associated shares). Accordingly disclosure is required where the party's portion of shares alone, of rights/voting rights alone or the sum of shares and rights/voting rights reaches or crosses a disclosure threshold.

The following items deal with some types cases related to disclosure of rights to shares and acquisition of shares, including issues (12.2.2), as well as brief notes on voting rights attached to shares (12.2.3).

12.2.2 Disclosure in some type cases

12.2.2.1 Futures agreements and rolling of such agreements

Futures agreements must be disclosed as acquisitions when entered into. Disclosure at the time the shares are actually delivered under the agreement is not necessary.

The term 'rolling' is often used with reference to situations where, after a futures contract is entered into, a new deferred delivery date is agreed. In such cases a reckoning is made based on the price movement of the underlying instrument, after which the parties settle up for the entire price movement or parts thereof up to that date and adjust the futures price.

When a futures contract is rolled, and a new delivery date established, a new agreement is effectively in place which the market should be informed about, even where only the delivery date is adjusted. Finanstilsynet's reasoning here is that the date on which control of the holding passes to the buyer is relevant information for the market. Disclosure in such cases will also give the market an indication of the length of time voting in respect of the shares is precluded in cases where no agreement is entered into under the Public Limited Companies Act section 4-2.

See 12.9 concerning the content of notification inter alia in connection with rollover of futures agreements.

12.2.2.2 Disclosure in connection with subscription rights

Subscription rights are regarded as rights to shares in section 4-2 subsection (5). Subscription rights include warrants as mentioned in the Public Limited Companies Act section 11-12 (referred to in the translation of that Act as 'freestanding subscription rights'), and pre-emption rights in connection with increases of capital, see the Public Limited Companies Act section 10-4 and below.

Any acquisition or disposal of subscription rights or warrants that results in a disclosure threshold being reached or crossed must be disclosed. The equity interest is computed by reference to the registered share capital at the time the agreement concerning the acquisition or disposal was entered into.

Pre-emption rights issued in connection with increases of capital pursuant to the Public Limited Companies Act section 10-4 come in principle under the disclosure obligation. However, Finanstilsynet does not consider disclosure to be necessary for someone who receives pre-emption rights *in the same proportion* as his previous shareholding, and who thereby retains the same relative portion of shares in the company.

A disclosure obligation may however come into play if the party acquires or disposes of pre-emption rights, or for other reason receives pre-emption rights in a different proportion from his previous shareholding. In such cases, disclosure must be made in the same way as in the case of acquisition and disposal of warrants; see above.

Exercise of pre-emption rights and other subscription rights must be disclosed as acquisition of shares if the conditions for disclosure are otherwise present; see also further details in 12.2.2.3.

12.2.2.3 Disclosure in connection with issues

Investors who subscribe to public offerings or private placings are required to disclose such transactions as share acquisition if a disclosure threshold is reached or passed.

In the case of shares acquired through subscription, the general rule is that a disclosure obligation arises once a binding and final agreement on subscription is entered into. However, where new shares are issued in a public offering or private placing the number of shares to be allotted to each subscriber may not be clear on the date of subscription, for one thing owing to the risk of over-subscription. Finanstilsynet states that in a public offering or private placing it is not necessary to make a disclosure until the date of allotment, in other words the date when it is clear to the subscriber how many shares he is allotted in the issue. On the allotment date the acquisition will be disclosed in accordance with the new increased share capital which will by then be established, even if the registered share capital has not been raised correspondingly.

In order for the disclosure obligation in respect of shares acquired in issues to be deemed to arise on the date of allotment, the allotment – i.e. the acquisition – must be final and unconditional. However, if, on the allotment date, conditions for the allotment apply that have not been met, the allotment may, according to the circumstances, be disclosable as a "right" to shares; see the Securities Trading Act section 4-2 subsection (2), cf. subsection (5). See 12.2.2.4 below for further details.

Shareholders not participating in the issue may be required to disclose passive crossing of a disclosure threshold. See further details under 12.3.2.5 and 12.8.

12.2.2.4 Particulars re disclosure obligation in case of conditional acquisitions

A disclosure obligation in respect of acquisitions applies where a final, binding agreement has been entered into. If, on the agreement date, conditions for the acquisition apply that have not been met, the agreement will as a rule not trigger a disclosure obligation *as an acquisition* until the conditions have been met or waived. However, the agreement may, depending on the circumstances, be disclosable as a "right" to shares; see the Securities Trading Act section 4-2 subsection (2), cf. subsection (5). According to the Securities Trading Act section 4-2 subsection (5), rights attached to shares include "*subscription rights, options on the purchase of shares and equivalent rights*".

Conditional agreements on purchase, sale or subscription will in reality entail an option agreement where the option holder controls the activation of all necessary legal conditions for implementation of the purchase or sale. Such agreements must consequently be disclosed upon being entered into.⁴⁸ A typical example of this is offerings for purchase of shares having

⁴⁸ See the same requirement regarding the notification obligation in 11.4.2.

for example conditions related for example to a certain level of acceptance, but where the conditions can be waived by the offeror. The offeror must in such case disclose this as an acquisition of rights attached to shares successively as acceptances are received, provided a disclosure threshold is reached or crossed.

If the condition is beyond the acquirer's control, typically a condition regarding concession, company law decision etc., the wording of the Securities Trading Act section 4-2 subsection (5) gives little guidance. In Finanstilsynet's view emphasis must in this assessment be given to the nature of the condition and the purpose of the disclosure rules. It is important that market be given information about de facto and possible influence in the issuer. Accordingly agreements on acquisitions that are conditional, but where the condition does not come across as an actual impediment to the acquisition, shall be disclosed upon being entered into.

As an example of how the relationship to the disclosure rules should in Finanstilsynet's view be handled in such situations, mention is made of the allotment of shares in issues that are conditional upon subsequent approval by the issuer's general meeting. At this point in time, under the disclosure provisions, the subscriber is deemed to have made an acquisition of shares. Disclosure shall in such case take place as described in 12.2.2.3 above.

12.2.3 Further details on voting rights attached to shares

12.2.3.1 Introduction

The Securities Trading Act section 4-2 subsection (3) reads:

Equivalent to shares and/or rights to shares are voting rights attached to shares that can be exercised with a basis in:

1. *an agreement under the Act on Provision of Financial Collateral sections 3 and 4, provided that the holder of the collateral declares to the provider of the collateral his intention to vote for the shares,*
2. *a proxy not containing instructions from the shareholder, and*
3. *an agreement under the Public Limited Companies Act section 4-2*

'Equivalent to (...) are (...)' means, firstly, that voting rights that can be exercised with a basis in one of the categories listed in this provision must be added to the portion of shares and rights to shares of the party concerned when computing that party's share of the share capital and/or corresponding share of the votes in the company. Secondly, it means that disclosure is required when the party's share of voting rights alone - or the sum of shares, rights to shares and voting rights - reaches or exceeds a disclosure threshold. Reaching and exceeding a disclosure threshold on the basis of voting rights in these cases is the result of a circumstance other than disposal or acquisition. See 12.3.2.

In addition to voting rights that can be exercised with the three criteria listed in the Securities Trading Act section 4-2 subsection (3), there are voting rights attached to shares issued by foreign issuers having Norway as their home state that can be exercised pursuant to other forms of voting rights transfers; see the Securities Trading Regulations section 4-2 and 12.2.4.5.

12.2.3.2 Voting rights that can be exercised by agreement pursuant to the Act on Provision of Financial Collateral

Pursuant to the Securities Trading Act section 4-2 subsection (3) no. 1, voting rights

of a party subject to the disclosure obligation that can be exercised by agreement pursuant to the Act on Provision of Financial Collateral of 26 March 2004 No. 17, will be included in the computation of that party's ownership interest in the company.

A basic precept of Norwegian law is that a mortgagee may not exercise voting rights attached to shares used as loan collateral without a proxy. The Securities Trading Act presumes in contrast that this precept does not apply to shares included in financial collateral. Such voting rights will thus have a bearing on the disclosure obligation of the holder of the collateral. The question of the collateral holder's exercise of voting rights attached to such shares is however not taken up as a problem in the Securities Trading Act's legislative history.

In a normal situation the collateral holder would have no interest in exercising voting rights attached to such shares. Besides, the shares would often be sold or loaned to others during the collateral period, thereby preventing the exercise of voting rights by the collateral holder. Thus, in the normal run of things voting rights conferred by an agreement on provision of financial collateral would seem to be a barely relevant basis for the transfer of influence. Given the condition that the collateral holder must declare to the provider of the collateral his intention to exercise the voting rights, the parties should when concluding the agreement on provision of collateral (the framework agreement) establish whether or not the collateral holder has such intent.

If the conditions in the above provision are met, the collateral holder must include the voting rights together with his holding, and a disclosure obligation will be triggered if any threshold is exceeded. In relation to the disclosure rules the provider of collateral is regarded by Finanstilsynet as the owner of the shares even though he has transferred ownership of the shares under the Act on Provision of Financial Collateral, provided he is entitled to have the like shares returned by the collateral holder. Otherwise the provider of the collateral would be able to avoid the disclosure obligation by temporarily withholding shares from his holding by posting them as collateral. If the provider of the collateral is not entitled to have the shares returned, the transaction must presumptively be deemed to constitute a disposal of the shares on the part of the collateral provider and an acquisition on the part of the collateral holder.

12.2.3.3 Voting rights that can be exercised by proxy

Pursuant to the Securities Trading Act section 4-2 subsection (3) no. 2, the voting rights of a party subject to the disclosure obligation to shares that can be exercised by proxy without instructions will be included in the computation of that party's ownership interest in the company.

Finanstilsynet appreciates that this provision raises particular issues in relation to the many proxies that a company receives from shareholders when a general meeting is convened. The issue addressed here is that of when a proxy must be deemed to have been given instructions pursuant to Securities Trading Act section 4-2 subsection (3) no. 2. See 12.3.2.2 for other aspects of this issue.

Finanstilsynet's basic position is that proxies must be deemed to have been given *without instructions* in the sense of the provision, except where instructions have been given for all matters to be considered by the general meeting. However, a reservation applies to cases where only matters of minor significance are left to the discretion of the proxy holder.

It should be pointed out that someone representing a shareholder who is a legal person (its

legal representative) is not regarded as a proxy holder under this provision. It should also be made clear that the issuer of a proxy remains the owner of the shares to which the voting rights concerned are attached, and that he must therefore include the shares in his ownership interest during the term of the proxy. This may be of significance, for example, for acquisitions/disposals carried out during the term of the proxy. On the other hand, the issuer of the proxy escapes disclosing the issuance or withdrawal of the proxy.

12.2.3.4 Voting rights that can be exercised by agreement pursuant to the Public Limited Companies Act section 4-2

Pursuant to the Securities Trading Act section 4-2 subsection (3) no. 3, the voting rights of a party subject to the disclosure obligation to shares that can be exercised by agreement pursuant to the Public Limited Companies Act section 4-2, are included in the calculation of that party's ownership interest in the company.

As a general rule an acquirer of shares cannot exercise the voting rights attached to such shares until he is entered in the register of shareholders; see the Public Limited Companies Act section 4-2 subsection (1). Under subsection (2) of that section, the disposer and acquirer may upon change of ownership – or later – agree that the disposer can exercise the voting rights attached to the shares pending their transfer to the acquirer.

For the acquirer of the shares the disclosure obligation is triggered if his ownership interest at the time of acquisition reaches or crosses a disclosure threshold, irrespective of whether it is agreed that the disposer can exercise the voting rights attached to the shares pending their transfer to the acquirer.

Where the disposer is concerned, disposal of the shares and entry into a voting rights agreement must be regarded as two separate matters in relation to the disclosure provisions: one applying to the disposal of shares and one applying to the provision of voting rights. This also applies where the agreement regarding the disposer's exercise of voting rights is already in place at the time of disposal. Both the disposal of shares and the provision of voting rights will trigger a disclosure obligation if other necessary conditions are present. If both matters are agreed at the same point in time, the disposer will be able to disclose them in the same notification.

Until the acquirer is entered in the shareholder register or the voting rights agreement ceases for another reason, the disposer must include the voting rights in his holding, for example in relation to a later acquisition of shares. The acquirer of the shares must for his part include the shares in his holding in the same period.

12.2.3.5 Voting rights that may be exercised by agreement as mentioned in the Securities Trading Regulations section 4-2

Pursuant to the Securities Trading Regulations section 4-2, voting rights attached to shares issued by foreign issuers having Norway as their home state and which can be exercised pursuant to other forms of voting rights transfers than those mentioned in the Securities Trading Act section 4-2 subsection (3), must also be included when computing the relevant party's ownership interest in the company. This provision accommodates other forms of voting rights transfers envisaged under the legislations of other countries.

12.3 Events that trigger the disclosure obligation

12.3.1 Acquisition, disposal or other circumstance

As previously, a disclosure obligation may be triggered by *acquisitions* and *disposals*; the new element is that the obligation can also be triggered by *other circumstances*, see the Securities Trading Act section 4-2 subsection (2). This is a natural consequence of the inclusion of a person's voting rights when computing that person's ownership interest in a company. However, there are also other situations that previously did not trigger a disclosure obligation that will do so now.

A disclosure obligation may for example be triggered by the disposal of rights to shares. However – as previously – cessation of rights does not trigger a disclosure obligation.

12.3.2 Further details of 'other circumstances'

A complete list of what are regarded as *other circumstances* under the Securities Trading Act section 4-2 subsection (2) is given in the Securities Trading Regulations section 4-3:

Under the Securities Trading Act section 4-2 subsection (2), 'other circumstances' comprise:

- (a) entry into or termination of an agreement concerning financial collateral,*
- (b) issuance or withdrawal of a proxy,*
- (c) entry into an agreement pursuant to the Public Limited Companies Act section 4-2, subsection (2),*
- (d) establishment or dissolution of a group relationship pursuant to the Securities Trading Act section 2-5 no. 3,*
- (e) entry into or cessation of binding cooperation pursuant to the Securities Trading Act section 2-5 no. 5,*
- (f) corporate actions that alter the distribution of voting rights,*
- (g) entry into or termination of agreement concerning transfer of voting rights as mentioned in section 4-2.*

12.3.2.1 Establishment or termination of agreement concerning financial collateral

The ordinary rules of contract law determine when an agreement on provision of financial collateral is deemed to have been entered into, and it is at this point in time that a disclosure obligation arises. Normally, a framework agreement is entered into that regulates the general obligations and rights of the parties. However, in the above provision the term 'agreement' refers to supplemental agreements in which the shares are provided as collateral. Where the point in time of 'cessation' of the agreement is concerned, Finanstilsynet's presumption is that this is the point at which the shares are returned to the provider of the collateral or the point at which the holder of the collateral realises the collateral, for example in the event of a breach of contract.

12.3.2.2 Issuance or withdrawal of a proxy

For proxies, a disclosure obligation is triggered once the proxy holder learns or should have learned that the voting rights were issued or withdrawn. Proxies submitted to a company in connection with general meetings may vary in form. A proxy may be given to a board member, managing director or someone proposed by the company in the proxy form enclosed with the notice of the meeting. A proxy may also, for example, be assigned to the person who opens the meeting, or left blank.

When convening a general meeting, a company should take steps to ensure that proxy arrangements are as far as possible clarified before the day of the meeting. For some companies the requirement as to advance notification will be set forth in the company's articles of association, see the Public Limited Companies Act section 5-3. This will enable the company to determine in advance who should represent proxies that are left blank and give it time to count the proxies. Finanstilsynet will expect a company to have proper routines for counting in the period between notice of the meeting and the deadline for advance notification (possibly later) so that disclosure notifications can be filed as soon as possible after a disclosure threshold is crossed.

Where the crossing of a disclosure threshold is not clarified prior to the general meeting, for example where the proxy is presented at that meeting and not before, Finanstilsynet considers disclosure unnecessary. Disclosure notification has limited informational value at that point.

According to the Securities Trading Regulations section 4-1 subsection (3), proxy issuance and withdrawal may be disclosed in a single notification, provided the proxy only applies to the next general meeting and this is stated in the notification. According to the Public Limited Companies Act section 5-2 subsection (2), a proxy is deemed to apply only to the next general meeting unless it is made quite clear that another meaning is intended.

12.3.2.3 Entry into a voting rights agreement in connection with a change of ownership of shares

For agreements under the Securities Trading Act section 4-2 subsection (2), the point in time that an agreement is entered into is crucial to when the disclosure obligation arises. Such an agreement may be entered into at the time of the transfer of the shares or later.

12.3.2.4 Establishment or dissolution of a group relationship and binding cooperation

The provisions aim to increase the efficiency of the disclosure provision by bringing the establishment and cessation of certain close-associate relationships within the scope of the disclosure obligation.

Establishment and termination of group relationships may trigger disclosure obligations. The same applies to establishment and dissolution of binding cooperation. "Binding cooperation" means both concrete agreements and tacit understandings. It may be noted that the wording of the Securities Trading Act section 2-5 no. 5 has been altered to make it clear that it also covers cooperation in cases where a bid is frustrated or prevented.

Establishment or dissolution of other close-associate relationships that cause a disclosure threshold to be crossed, for example marriage or divorce, will not trigger a disclosure obligation.

A disclosure obligation arises where a party became aware, or should have become aware, of the circumstance that led to a disclosure threshold being reached or crossed, see section 4-2 subsection (7) and 12.8.

Where a disclosure obligation is incumbent on all the parties in a consolidated group, sending a joint notification will suffice, see the Securities Trading Regulations section 4-1, subsection (2).

12.3.2.5 Corporate actions that alter the distribution of voting rights

Changes in the distribution of shareholders' voting rights resulting, for example, from increases or reductions of capital, must be notified if a disclosure threshold is crossed. In such cases a shareholder may be subject to a disclosure obligation even if he has remained passive. Changes in capital that do not affect the distribution of voting rights will not trigger a disclosure obligation.

A disclosure obligation arises where the party concerned became aware, or should have become aware, of a corporate action, see section 4-2 subsection (7). What degree of alertness/diligence can be required of a party subject to a disclosure obligation will be a matter for concrete assessment in the particular case. The legislative works state that the provision needs to be viewed in conjunction with the Securities Trading Act section 5-8 on the issuer's obligation to make public any changes in rights to the issuer's shares, the company's share capital or voting rights changes, etc. Finanstilsynet's position is that a party subject to a disclosure obligation should be aware of a corporate action at the latest within a reasonable period after the issuing company has filed notification of the action; see 11.8.

12.3.2.6 Agreement concerning the transfer of voting rights as mentioned in the Securities Trading Regulations section 4-2

Situations where a person enters into an agreement on the transfer of voting rights as mentioned in the Securities Trading Regulations section 4-2 will also involve 'other circumstances' that may give rise to a disclosure obligation. The same will apply to the cessation of such agreements. The point in time that the disclosure obligation arises will in this context depend on the type of voting rights transfer that is involved.

12.4 Disclosure thresholds

The number of disclosure thresholds has increased. Disclosures are now required when the following thresholds are crossed: 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3 and 90%. The 15% and 25% thresholds are new in relation to earlier law.

12.5 Consolidation

12.5.1 General comments

The Securities Trading Act section 4-2 subsection (6) states:

The following are regarded as equivalent to the acquirer's or disposer's own shares, rights to shares or voting rights as mentioned in subsection (3):

- 1. Shares or rights to shares held or acquired or disposed of by related parties as mentioned in section 2-5, and*
- 2. Voting rights attached to shares as mentioned in subsection (3) that are held by or transferred to related parties as mentioned in section 2-5 or by cessation of such rights.*

When the ownership interest of a party subject to a disclosure obligation is computed, shares and rights to shares that are owned by related parties of that party shall as previously be included in that party's ownership interest in the company, see the Securities Trading Act section 4-2 subsection (6) no. 1. Related parties' voting rights attached to shares must also be

included together with the holdings of the party concerned, see the Securities Trading Act section 4-2 subsection (6) no. 2.

According to nos. 1 and 2 of the above provision, the *party concerned* must disclose shares, rights attached to shares and voting rights that are owned/held or acquired/transferred or disposed of/expire on the part of related parties. This is of significance where consolidation is 'one-sided', and where the related party who carries out the transaction causes a disclosure threshold to be exceeded for the group. It means that the party subject to the disclosure obligation must issue a disclosure notification in cases where minor children or a company under his control performs the triggering transaction. If there is consolidation 'both ways' it would be the party who triggered the disclosure obligation for the group that has to issue the disclosure notification. This applies to consolidations pursuant to the Securities Trading Act section 2-5 nos. 1, 3 and 5 (spouses etc., group companies and partners in binding cooperation).

A disclosure obligation is triggered both where related parties acquire or dispose of shares/rights attached to shares or transfer or return voting rights and where other circumstances cause the stake of the related parties concerned to be changed, cf. held. For example, the fact that a controlled company passively crosses a threshold after a corporate action that alters the distribution of voting rights would trigger a disclosure obligation for the personal shareholder who controls the company if the change causes the owner's and the company's total holding of shares and/or voting rights to cross or reach a disclosure threshold.

12.5.2 Consolidation requirements on investment firms and management companies for securities funds

The Securities Trading Regulations section 4-5 states:

(1) The obligation to consolidate pursuant to the Securities Trading Act section 4-2, subsection (6), cf. section 2-5 no. 3, does not apply to the holdings of investment firms and management companies from an EEA country other than Norway, as dealt with in Directive 2004/109/EC Article 12 (4) first paragraph and Article 12(5) first paragraph, on the terms and conditions set forth in the said Directive Article 12(4) and (5), and Commission Directive 2007/14/EC, Article 10.

(2) In respect of holdings of investment firms and management companies from countries outside the EEA, the exception in subsection (1) applies correspondingly where the undertaking fulfils the requirements in Directive 2004/109/EC, Article 23(6), and Directive 2007/14/EC, Article 23.

The above provision applies to foreign investment companies and management companies if certain requirements as to organisation and independence are met.

For Norwegian management companies and investment firms, the state of the law will be as previously as regards their holdings of shares of issuers having Norway as their home state. Shares in securities funds managed by the same fund manager must be consolidated pursuant to the Securities Trading Act section 4-2 subsection (6), cf. section 2-5 no. 5. Shares owned by funds managed by a management company are not to be consolidated with shares owned by other companies in the same group. The rationale is that the shares are owned by the fund and must be managed in the interests of the shareholders. Furthermore, there must be effective

information barriers between the management company and other group companies.

Where individual portfolio management (active portfolio management) provided by a Norwegian management company for securities funds and by investment firms is concerned, the shares are entered in the individual investor's securities account and the voting rights accrue to the investor. Hence the state of the law remains unchanged in this area in so far as shares issued by companies having Norway as their home state are concerned.

With regard to shares issued by issuers having countries other than Norway as their home state, Norwegian management companies and investment firms must comply with the consolidation rules of the issuer's home state.

12.6 Exceptions for holdings acquired for certain purposes

12.6.1 General comments

An exception from the disclosure obligation previously applied to investment firms when crossing the 5% disclosure threshold if the trade was part of the firm's investment service activities and the firm did not seek to influence the management of the issuing company. This exception is not continued in its earlier form, and some changes have been made to its subject matter.

The Securities Trading Regulations section 4-4 reads:

(1) The Securities Trading Act section 4-2 does not apply to:

(a) shares and rights to shares acquired solely to secure settlement within a period of three trading days after execution of the trade, or

(b) shares or rights to shares that are acquired or sold by a market maker where the shares or the rights reach, exceed or fall below the 5% threshold, provided the market maker does not influence the management of the company or exert pressure on the company to get it to acquire the shares or the rights or to support the price.

(2) Shares or rights to shares in the trading portfolio of an investment firm or credit institution must not be included in the institution's holdings if the institution does not exercise the voting rights or otherwise use the voting rights to influence the management of the company, and the shares or the rights to shares in the trading portfolio do not individually exceed the 5% threshold.

(3) A market maker who trades shares or rights to shares of an issuer having Norway as its home state shall, without undue delay, notify Finanstilsynet if the party concerned wishes to make use of the exception in subsection (1)(b). The market maker shall indicate the issuer to which this applies. Corresponding notification shall be given upon cessation of the market making activity.

12.6.2 Shares and rights to shares acquired solely for settlement purposes

The Securities Trading Regulations section 4-4 subsection (1)(a) excepts from the disclosure provision shares or rights to shares acquired to secure settlement within a short settlement cycle. The fact that the shares are 'acquired solely to secure settlement' means that the

acquirer cannot exercise voting rights attached to the shares. Nor may the acquisition have been made in order to influence conditions pertaining to the issuer. There is no limit on the number of shares/rights to shares to which this can apply.⁴⁹

The maximum settlement period is three trading days after the transaction date, in other words T+3. This also applies if the shares or the rights to the shares have been acquired outside the marketplace.

If the conditions for utilising the exception are met, then no disclosure need be made of the acquisition or disposal of either the shares or the rights to shares. Nor should the holding be included together with the other holdings of the party concerned when computing the ownership interest of that party in relation to the disclosure thresholds.

12.6.3 Shares or rights to shares acquired or disposed of by a market maker

The Securities Trading Regulations section 4-4 subsection (1)(b) excepts from the disclosure obligation the acquisition or disposal of shares or rights to shares by market makers in cases where the shares or the rights reach, exceed or fall below the 5% threshold.⁴

Market maker' means a person who on a continuous basis deals on own account in the purchase and disposal of financial instruments; see the Securities Trading Act section 2-4 subsection (2). When market makers undertake to purchase and sell financial instruments, the purpose must be to ensure sufficient liquidity in the market for the financial instrument concerned. Section 4-4 subsection (1)(b) of the Securities Trading Regulations further specifies that the exception only applies provided the market maker does not influence the management of the company or exert pressure on the company to induce it to acquire the shares or the rights to shares or to support the price. Any disregard for these conditions will cause the activity not to be judged to be market making at all.

The above provision applies to Norwegian investment firms with a licence to provide investment services pursuant to the Securities Trading Act section 2-1 subsection (1) no. 3 and investment firms with an equivalent licence from another EEA country.

Another new element is that any market maker who trades shares or rights to shares of an issuer with Norway as its home state must without undue delay notify Finanstilsynet if he wishes to make use of the exception, see the Securities Trading Regulations section 4-4 subsection (3). The market maker must also notify Finanstilsynet when he ceases market making activity. The notification must state which issuers are involved and should be sent to Finanstilsynet at post@finansstilsynet.no.

Hence a market maker should not disclose any crossing of the 5% threshold, nor should the shares be included together with other holdings of the party concerned in relation to the disclosure thresholds. If the market maker's holdings reach or exceed the 10% threshold, the exception will not apply to any part of the holding.

⁴⁹ In practice this is normally done through soft underwriting of an issue by the lead manager who formally subscribes, pays for and receives the shares on the understanding that the shares will be transferred to the actual subscribers subject to payment. Situations may also arise where the lead manager borrows shares from a major shareholder for allotment purposes with return effected by means of a later issue.

12.6.4 Shares and rights to shares in the trading portfolio of an investment firm or credit institution

Shares and rights to shares that are a part of an investment firm's or a credit institution's trading portfolio should not be included together with the firm's or institution's other holdings; see the Securities Trading Regulations section 4-4 subsection (2). The condition is that the firm or institution does not exercise the voting rights or otherwise use them to influence the management of the issuer, and that neither the shares nor rights to shares in the trading portfolio separately exceed the 5% limit.

The term *trading portfolio* is defined in section 2-1 of Regulations of 22 June 2000 no. 632 on minimum capital adequacy requirements in respect of market risk etc., for credit institutions and investment firms. According to that provision, a trading portfolio consists of positions in financial instruments, see the Securities Trading Act section 2-2, plus commodities and commodity derivatives that the institution has on own account with a view to resale or to make short-term gains on price or interest rate movements, as well as to hedge positions. Finanstilsynet assumes this definition to apply in the present context.

12.7 Nominee registration

The Securities Trading Regulations section 4-6 reads:

(1) Anyone who on behalf of others possesses in his own name shares issued by foreign companies having Norway as their home state shall comply with the disclosure provisions in the Securities Trading Act chapter 4 and the present regulations as if the party concerned were the owner of the shares. The first sentence does not alter the shareholder's obligation to disclose his own holdings.

(2) Subsection (1) first and second sentence does not apply to shares held in conjunction with nominee registration provided the nominee is only able to exercise voting rights pursuant to further instructions from the shareholder, and such instructions exist in written or electronic form.

Nominees must disclose shares issued by foreign companies with Norway as their home state in the same manner as if the nominee were the owner of the shares. The actual owner must also include the shares in his holding in relation to the disclosure obligation. However, if the nominee can only exercise voting rights attached to the shares pursuant to instructions from the actual owner, then the nominee shall not add the shares to his holdings.

According to the Public Limited Companies Act section 4-10 subsection (3), a nominee listed in a Norwegian securities register may only exercise financial rights to the shares covered by the nominee assignment. The nominee may not exercise voting rights in respect of the shares on the basis of the nominee agreement. Hence nominee registration in Norwegian companies will not trigger a disclosure obligation for the nominee unless a proxy exists enabling the nominee to vote without instructions, cf. the Securities Trading Act section 4-2 subsection (3) no. 2.

12.8 Meeting the disclosure obligation

Notifications should be sent to the regulated market on which the share has been admitted to trading (at present Oslo Børs or Oslo Axess), see the Securities Trading Act section 4-2 subsection (2) and Regulations on the submission of disclosure notifications etc., of 6 December 2007 no. 1359 section 1. Notification must also be sent to the issuer company.

The time-limit for meeting the disclosure notification is regulated in the Securities Trading Act section 4-2 subsection (7):

Notification pursuant to this section shall be given immediately an agreement on acquisition or disposal has been entered into, or the party concerned becomes aware, or should have become aware, of any other circumstance causing the party concerned to reach or fall below a threshold in subsection (2).

The point at which a party subject to the disclosure obligation should have become aware of the circumstance will depend upon a concrete assessment in the particular case. An indispensable requirement, however, is that the party has established appropriate routines – and, depending on the circumstances, also systems – and that he actively takes steps that put him in a position to be apprised of the necessary information as rapidly as possible. If, for example, he has outsourced all or parts of the management of his holdings to an active portfolio manager, then measures must be taken to ensure that the disclosure obligation is met in a timely manner. The same applies in relation to related parties who are active in the stock market. Further, a party who reaches or falls to a disclosure threshold must keep abreast of changes in the issuer company's share capital or changes in its voting rights.

In cases where *other circumstances* as dealt with in the Securities Trading Regulations section 4-3 trigger a disclosure obligation, Finanstilsynet's position is that a party subject to this obligation will in principle be required to make a disclosure immediately he becomes or should have become aware of the circumstances, regardless of whether the circumstance has arisen in purely contract-law or company-law terms. A pertinent example concerns the termination of binding cooperation, see the Securities Trading Regulations section 4-3(e), but where a notice period is agreed. Provided no conditions are attached to the notice of termination or uncertainty prevails concerning the termination of the agreement on other grounds, disclosure may be required as soon as notice of termination is given.

In the case of passive crossing of a disclosure threshold, for example because of an increase of capital, see the Securities Trading Regulations section 4-3(f), disclosure may similarly be required as soon as the result of issue and the size of the company's new capital are clear. However, based on an assessment of the intentions behind the disclosure obligation provisions, Finanstilsynet's position in such cases will be that the party subject to such obligation should have been aware of the corporate action at the latest within a reasonable period after the issuing company reported that the changed capital is registered in the Register of Business Enterprises.

The time available to make a disclosure notification is short, i.e. *immediately*. In practice this means the time it takes to formulate and transmit the message. If the time of notification is after closing time of the regulated market's notification system, it will suffice for notification

to be given before the marketplace opens the next day.

12.9 Disclosure notification

12.9.1 Requirements on the content of the disclosure notification

The Securities Trading Regulations section 4-1 subsection (1)(a) to (i) sets out requirements on the content of the notification.

12.9.1.1 Name of issuer of the shares

It is made clear that the name of the issuer of the shares must be stated in the notification.

12.9.1.2 Date when the ownership interest reached, exceeded or fell below a threshold established in the Securities Trading Act section 4-2 subsection (2)

Under previous law, it was the *time of day* that was specified. In practice, it was sufficient to state the date. The wording has been adjusted to accord with earlier practice.

For transactions, the date to be specified in the notification will be the date the acquisition or disposal took place. Where futures agreements are concerned, the date of entry into an agreement and the deferred date of delivery shall be stated. For issuance and withdrawal of proxies, the relevant date would be the date on which the issuance or withdrawal that triggered the disclosure obligation came to the attention of the proxy holder, or should have come to his attention.

In cases where a disclosure obligation is triggered before the effect of the circumstance giving rise to the obligation has arisen, the notification must state the date when the person concerned became aware of the circumstance and, if possible, the future date on which the contract-law or company-law effect of the circumstance comes into play.

If a passive crossing of a disclosure threshold is involved, for example due to an increase of capital, the relevant date would be the date the capital increase was registered in the Register of Business Enterprises. For foreign undertakings a basis would be taken in legislative acts having corresponding legal effect.

12.9.1.3 Name of the entity subject to a disclosure obligation, including the name of the shareholder

The provision has a somewhat unclear wording with the use of the word 'including'. The intention was that both the name of the party subject to the disclosure obligation and the name of the owner of the shares to which the voting rights are attached should appear on the disclosure notification. The rationale for the provision is presumably that it would be of interest to the market to know which shareholders have assigned voting rights and for that reason will not be exercising voting rights in respect of their shares for a period.

As regards the many proxies received by a company from shareholders when a general meeting is convened, Finanstilsynet does not consider it necessary to list the names of shareholders who have assigned proxies without instructions. Here it is sufficient for a party subject to a disclosure obligation to state that he has received a specific number of proxies without instructions from the company's shareholders.

12.9.1.4 Number of shares stated in the notification

The Securities Trading Regulations section 4-1 subsection (1)(d) requires notification of the number of shares involved. It is the number of shares, attached rights or voting rights that triggered the notification that shall be disclosed. If a disclosure obligation is triggered by consolidation or passive crossing of the threshold, the provision will not apply inasmuch as the crossing cannot be linked to a specific number of shares.

12.9.1.5 The subsequent situation with respect to voting rights, including the percentage of shares and votes in the company that are held by the party concerned

The notification must contain enough information to give the market a true picture of the changes. The disclosure threshold crossed must of course be stated. The notification must also state the percentage of shares owned by the party concerned and the percentage of voting rights to be imputed to that party, provided that they are not identical. Voting rights must be split into voting rights attached to shares owned and other, additional, voting rights.

If disclosure is triggered on a consolidated basis, the group's total ownership interest must be stated. If the disclosure obligation is triggered solely by the ownership interest of the party concerned, it is this that must be specified. If the obligation is triggered on both levels, then both must be stated.

The ownership interest is computed by reference to the capital registered in the Register of Business Enterprises at the time the transaction/circumstance triggering the disclosure obligation took place. However, an exception applies where shares are subscribed or rights are exercised requiring companies to issue new shares. In such cases practical considerations call for the ownership interest to be calculated by reference to the increased share capital in so far as this has been clarified; see also 12.2.2.3.

12.9.1.6 Percentage of shares and votes in the company held by the party concerned in the form of rights to shares

The ownership interest held in the form of rights to shares must be stated. The justification for differentiating between shares and voting rights attached to shares on the one hand and rights to shares on the other hand is that rights to shares confer no immediate management rights in the company.

12.9.1.7 The circumstance that triggered the disclosure obligation, and whether this applied to the party concerned himself or to related parties as mentioned in the Securities Trading Act Section 2-5

The specific circumstance that triggered the disclosure obligation must be stated. This could be the disposal, acquisition or borrowing of shares, or it could be some other circumstance, for example the establishment of a group relationship, receipt of voting rights with a basis in a proxy, etc. Where rollover of futures is concerned, the notification should make clear that the item being rolled is a futures contract.

If it is a related party's acquisition/disposal or the like that triggers the disclosure obligation, the fact shall be stated. This will be of significance where the disclosure obligation rests on someone other than the person who performs the triggering transaction, for example where transactions are performed by minor children. In such cases, the notifier is not required to state the identity of the related party or the notifier's relationship to the related party.

12.9.1.8 The chain of controlled companies through which the shares or rights are owned

This provision requires the notifier to state the chain of companies through which the shares, voting rights or rights to shares are controlled.

12.9.1.9 Notifications applying to rights to shares as mentioned in the Securities Trading Act section 4-2 subsection (5)

If the notification concerns convertible loans, options etc., a description must be given of the rights, including the date on which the rights will or may be exercised, and the date on which they expire. The notification must contain enough information for it to be meaningful. It must for example state whether the rights attach to existing shares (options) or a right to subscribe new shares (subscription rights). Furthermore, the exercise and expiry dates must be stated, as must the exercise price and any other conditions applying to the exercise of the rights.

12.9.2 Joint notification by two or more notifiers

The Securities Trading Regulations section 4-1 subsection (2) states that two or more persons who are subject to a disclosure obligation can make a joint notification. An agreement on joint disclosure notification does not however exempt the individual notifier from his responsibility for ensuring that correct and proper notification is actually sent.

12.9.3 Joint notification of issuance and withdrawal of a proxy

The Securities Trading Regulations section 4-1 subsection (3) simplifies notification of proxy issuance and withdrawal. A single notification may be made provided the proxy only applies to the next general meeting and this is stated in the notification.

12.10 Sanctions for non-compliance with the disclosure obligation

The Securities Trading Act draws that distinction between gross or repeated violations of the disclosure obligation and less serious violations. In the case of less serious violations, Finanstilsynet is authorised to impose a violation penalty, see the Securities Trading Act section 17-4 subsection (1).

Finanstilsynet may impose violation penalties for violations of the disclosure provisions in the Securities Trading Act section 4-2 or section 4-3 subsection (2) or regulations made pursuant to those provisions. Finanstilsynet can accordingly sanction against delay in submitting and failure to submit disclosure notifications and against disclosure notifications with deficient content.

Both wilful and negligent violations are covered. The Securities Trading Act section 17-4 subsection (4) requires Finanstilsynet to attach importance to the degree of guilt found when determining a violation penalty. Complicity in violation of the disclosure rules may also attract a violation penalty, see Securities Trading Act section 17-4 subsection (1) second sentence. The same applies to attempted violations (see third sentence of the provision).

According to subsection (4) of the provision, the violation penalty must be determined on a

case-by-case basis. Further, importance must be attached to the scale and effects of the violation. The transaction amount and the financial situation of the violator may also be given emphasis. The time factor may also be taken into account, enabling differentiation between disclosure notifications that are delayed by a day as opposed to a week.

Procedure in cases concerning violation penalties under the Securities Trading Act section 17-4 subsection (1) will follow the ordinary rules of the Public Administration Act. The Ministry of Finance will be the appeal authority in respect of Finanstilsynet's decisions on violation penalties, see the Public Administration Act section 28. It follows from the Securities Trading Act section 17-4 subsection (6) that legal action may not be brought against a decision concerning a violation penalty until the right of appeal has been utilised. However, legal action may be brought where a party subject to a disclosure obligation has appealed against the decision, and six months have elapsed since the appeal was declared without the Ministry of Finance having decided the case, cf. the second sentence of subsection (6).

A fine may be handed down to anyone who 'grossly or repeatedly' violates the provisions on disclosure obligations, see the Securities Trading Act section 17-3 subsection (3). This sanction, imposed by the prosecuting authority, is confined to the most serious violations.

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