International
Capital
Market
Association

ICMA

By e-mail

Zurich, February 16, 2006 /TH/MH/in

To the members of the Association

Prospectus Directive suggested EEA Equity Selling Restrictions

1. Introduction

The attached Prospectus Directive suggested equity selling restrictions are intended to apply to a placement of shares in the EEA so as not to attract a prospectus requirement either prior to a prospectus being approved or passported in the relevant Member State for a general public offer, or in a case where no such prospectus will be available.

The suggested selling restrictions have been developed by a working group of ICMA members and capital market law firms in London to assist the market to develop a common approach to the requirements of the Prospectus Directive in relation to equity offerings.

2. The suggested equity selling restrictions in light of EU and UK competition law

In line with the Association's longstanding policy and in order to ensure that the suggested equity selling restrictions meet the requirements of both EU and UK competition law, they were submitted to ICMA's outside legal counsel who confirmed that they do not raise EU or UK competition law concerns.

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3. The board's approval of the suggested equity selling restrictions

The suggested equity selling restrictions were approved by the board at its meeting held on December 9, 2005.

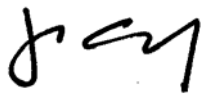
4. The wording of the suggested equity selling restrictions

The suggested equity selling restrictions are attached to this circular as a separate document.

5. Update of IPMA's Handbook

Pending the publication of a consolidated ICMA Rule Book, the current version of the IPMA Handbook on ICMA's website will be replaced with an amended version incorporating the suggested equity selling restrictions.

Yours sincerely,



Thomas Hunziker
General Counsel

Matthias Schwarz
Director for Finance
and Administration

Attachment

Prospectus Directive EEA Suggested Selling Restrictions (Equity)

Explanatory Guidelines

Introduction

The forms on pp. 4 to 7 have been developed by a working group of ICMA Members and capital markets law firms in London to assist the market to develop a common approach to the requirements of the Prospectus Directive in relation to equity offerings. They do not constitute ICMA legal advice.

The suggested selling restrictions are intended to operate on an EEA-wide basis, so far as the Prospectus Directive is concerned. They assume that member states' implementing legislation is consistent with the Directive. If this is not the case, additional or different restrictions may be required. It will also be necessary to add local securities law provisions as required (for example, in the UK dealing with financial promotion and regulated activities).

These suggested restrictions are intended to apply to a placement of shares so as not to attract a prospectus requirement either prior to a prospectus being approved or passported in the relevant member state for a general public offer or in a case where no such prospectus will be available.

Duration and scope of the suggested restrictions

The suggested restrictions are intended to apply to the managers until such time as there is no longer a risk that their activities may trigger a prospectus requirement in connection with the placement.

The Prospectus Directive refers to a placement through "financial intermediaries" in two key provisions:

- the definition of "offer of securities to the public" is expressed to apply to the "placing of securities through financial intermediaries" (Article 2.1(d));

- in testing whether the conditions for the exemptions from the requirement to publish a prospectus in connection with a public offer are satisfied, Article 3.2 says: "The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions [for any of the exemptions] are met for the final placement".

The concept of a placement "through financial intermediaries" is not explained in the Directive. Nor is it clear at what point the final placement takes place. Thus there may be a prospectus requirement for so long as any period which could be considered to be one of primary placement activity lasts.

There may be circumstances in certain jurisdictions where one or more of the managers themselves could be considered to have made a public offer (this is discussed further below in connection with the "fewer than 100 persons" exemption).

The suggested selling restrictions (see proviso to lettered paragraphs) require the managers to avoid offers which may fix the issuer (or possibly one or more other managers) with a prospectus obligation. Therefore, once the managers have determined that the shares are no longer being placed, the suggested selling restrictions do not apply in respect of any future offers of the issuer's shares which any of them makes.

The suggested selling restrictions (see first paragraph) also make it clear that they apply to the shares which are the "subject of the [offering/placement] contemplated by this [Subscription/Underwriting Agreement]". They do not therefore extend to already issued shares which are not the subject of the offer or placement; once the shares cease to be the subject of the "final placement", the suggested restrictions fall away.

Multiple Offers to fewer than 100 persons

Under the Prospectus Directive, in the case of a contemplated retail offer, it will be necessary to produce a prospectus (whether or not passported), except for the very limited exemption given by Article 3.2(b): "an offer of securities addressed to fewer than 100 natural or legal persons per member state, other than qualified investors". Given that this exemption is tested for the "final placement" of securities, two potential issues arise:

- certain managers may, independently of one another, seek to use the exemption in a particular member state, making offers which in aggregate exceed 99 and thereby triggering a possible prospectus requirement; and

- on-sales by financial intermediaries to their retail clients, if they are considered part of the "final placement" process, may also trigger a prospectus requirement.

The suggested selling restrictions provide that sales by the managers in reliance on the fewer than 100 persons exemption must be co-ordinated by the lead manager to ensure that the numerical limits are observed.

As to the second issue, it is for the managers to determine, in line with the suggested selling restrictions, the basis on which they sell to financial intermediaries where there is a possibility of retail on-sales.

The suggested language includes a legend for the prospectus stating that any purchaser of shares in the placement should itself only make exempt offers and that the issuer has only authorised offers made by the managers resulting in sales constituting the final placement of the shares. To the extent permitted by the relevant competent authority responsible for the approval of the prospectus such legend should be given due prominence.

The forms also include a form of buyer representation whereby the contractual arrangements for sale between issuer/managers and second-tier purchasers who are financial intermediaries incorporate their own restrictions, together with a representation as to the qualified investor status of the purchasers. These are similar in style to the conventional restrictions, but would prohibit reliance by financial intermediaries (who purchase shares from the issuer or the managers) on the "fewer than 100 persons" exemption when they sell on (except with the consent of the lead manager). This form is included to assist in circumstances for which this type of representation is considered suitable. It can also be included in the prospectus/offering circular. However, it is not appropriate to all types of offerings and methods of selling, and, in particular, has not been approved by ICMA Committees for use in debt offerings.

If the representation is used, then, depending on the jurisdiction and the share placement concerned, there are various ways in which it might be incorporated into the contractual arrangements for sale (for example, in the standard terms and conditions of business between managers and their financial intermediary clients). It should be noted that qualified investor status has to be established (whether by reliance on a representation or otherwise) before any offer is made, not at the time a contract for sale is concluded. Generally it will not be enough merely to set out the wording as a "deemed representation" in the prospectus/offering circular. It will also be a question of local law and fact as to who takes the benefit of the representation (the selling manager, the issuer or both of them).

Market participants considering using the buyer representation will need to consider these issues in relevant jurisdictions. The inclusion of the form of representation in the attached forms should not be regarded as advice or a recommendation by ICMA that it be used in offering documentation or, if so used, that it will be effective under all applicable laws.

January 2006

Suggested selling restrictions – Subscription/Underwriting agreement

In relation to each Member State of the European Economic Area which has implemented the Prospectus Directive (each, a "**Relevant Member State**") each [Manager] represents and warrants that it has not made and will not make an offer to the public of any shares which are the subject of the [offering/placement] contemplated by this [Subscription/Underwriting Agreement] (the **"Shares")** in that Relevant Member State **[**other than the offers contemplated in the [Prospectus/Offering Circular] in *[name(s) of Member State(s) where prospectus will be approved or passported for the purposes of a non-exempt offer]* once the [Prospectus/ Offering Circular] has been approved by the competent authority in *[name of Member State where prospectus will be approved]* and published [and passported] in accordance with the Prospectus Directive as implemented in *[name(s) of relevant Member State(s)]* **]** [1], except that it may make an offer to the public in that Relevant Member State of any Shares at any time under the following exemptions under the Prospectus Directive, if they have been implemented in that Relevant Member State:

(a) to legal entities which are authorised or regulated to operate in the financial markets or, if not so authorised or regulated, whose corporate purpose is solely to invest in securities;

(b) to any legal entity which has two or more of (1) an average of at least 250 employees during the last financial year; (2) a total balance sheet of more than €43,000,000 and (3) an annual net turnover of more than €50,000,000, as shown in its last annual or consolidated accounts;

(c) to fewer than 100 natural or legal persons (other than qualified investors as defined in the Prospectus Directive) subject to obtaining the prior consent of [Lead Manager] for any such offer; or

(d) in any other circumstances falling within Article 3(2) of the Prospectus Directive,

provided that no such offer of Shares shall result in a requirement for the publication by [Issuer] or any Manager of a prospectus pursuant to Article 3 of the Prospectus Directive.

[1] The text included within the bold square brackets should not be included in a prospectus prepared only for an application for admission to trading.

For the purposes of this provision, the expression an "offer to the public" in relation to any Shares in any Relevant Member State means the communication in any form and by any means of sufficient information on

the terms of the offer and any Shares to be offered so as to enable an investor to decide to purchase any Shares, as the same may be varied in that Member State by any measure implementing the Prospectus Directive in that Member State and the expression "**Prospectus Directive**" means Directive 2003/71/EC and includes any relevant implementing measure in each Relevant Member State.

Suggested selling restrictions - "Plan of distribution" in Prospectus/Offering Circular

In relation to each Member State of the European Economic Area which has implemented the Prospectus Directive (each, a "**Relevant Member State**") an offer to the public of any shares which are the subject of the [offering/placement] contemplated by this [Prospectus/Offering Circular] (the **"Shares"**) may not be made in that Relevant Member State **[**other than the offers contemplated in the [Prospectus/Offering Circular] in *[name(s) of Member State(s) where prospectus will be approved or passported for the purposes of a non-exempt offer]* once the [Prospectus/ Offering Circular] has been approved by the competent authority in such Member State and published [and passported] in accordance with the Prospectus Directive as implemented in *[name(s) of relevant Member State(s)]***]** [2] except that an offer to the public in that Relevant Member State of any Shares may be made at any time under the following exemptions under the Prospectus Directive, if they have been implemented in that Relevant Member State:

(a) to legal entities which are authorised or regulated to operate in the financial markets or, if not so authorised or regulated, whose corporate purpose is solely to invest in securities;

(b) to any legal entity which has two or more of (1) an average of at least 250 employees during the last financial year; (2) a total balance sheet of more than €43,000,000 and (3) an annual net turnover of more than €50,000,000, as shown in its last annual or consolidated accounts;

[2] The text included within the bold square brackets should not be included in a prospectus prepared only for an application for admission to trading.

(c) by the Managers to fewer than 100 natural or legal persons (other than qualified investors as defined in the Prospectus Directive) subject to obtaining the prior consent of [Lead Manager] for any such offer; or

(d) in any other circumstances falling within Article 3(2) of the Prospectus Directive,

provided that no such offer of Shares shall result in a requirement for the publication by [Issuer] or any Manager of a prospectus pursuant to Article 3 of the Prospectus Directive.

For the purposes of this provision, the expression an "offer to the public" in relation to any Shares in any Relevant Member State means the communication in any form and by any means of sufficient information on the terms of the offer and any Shares to be offered so as to enable an investor to decide to purchase any Shares, as the same may be varied in that Member State by any measure implementing the Prospectus Directive in that Member State and the expression "**Prospectus Directive**" means Directive 2003/71/EC and includes any relevant implementing measure in each Relevant Member State.

Legend for Offering Circular/Prospectus

This [Offering Circular/Prospectus] has been prepared on the basis that all offers of [Shares] **[**other than the offer(s) contemplated in the [Offering Circular/Prospectus] in [*name(s) of Member State(s) where prospectus will be approved or passported for the purposes of a non-exempt offer*], once the [Offering Circular/Prospectus] has been approved by the competent authority in such Member State and published [and passported] in accordance with the Prospectus Directive (2003/71/EC) as implemented in *[name(s) of relevant Member State(s)]***]**[3] will be made pursuant to an exemption under the Prospectus Directive, as implemented in member states of the European Economic Area ("EEA"), from the requirement to produce a prospectus for offers of [Shares]. Accordingly any person making or intending to make any offer within the EEA of [Shares] which are the subject of the placement contemplated in this [Offering Circular/Prospectus] should only do so in circumstances in which no obligation arises for the [Issuer] or any of the [Managers] to produce a prospectus for such offer. Neither the [Issuer] nor the Managers have authorised, nor do they

[3] The text included within the bold square brackets should not be included in a prospectus prepared only for an application for admission to trading.

authorise, the making of any offer of [Shares] through any financial intermediary, other than offers made by [Managers] which constitute the final placement of [Shares] contemplated in this [Offering Circular/Prospectus].

Buyer's representation[4]

Each person in a Member State of the European Economic Area which has implemented the Prospectus Directive (each, a **"Relevant Member State"**) [other than, in the case of paragraph (a), persons receiving offers contemplated in the [Prospectus/Offering Circular] in *[name(s) of Member State(s) where prospectus will be approved or passported for the purposes of a non-exempt offer]*] who receives any communication in respect of, or who acquires any [Shares] under, the offers contemplated in this [Prospectus/Offering Circular] will be deemed to have represented, warranted and agreed to and with each Manager [and the Issuer] that:

(a) it is a qualified investor within the meaning of the law in that Relevant Member State implementing Article 2(1)(e) of the Prospectus Directive; and

(b) in the case of any [Shares] acquired by it as a financial intermediary, as that term is used in Article 3(2) of the Prospectus Directive, (i) the [Shares] acquired by it in the [placement/offer] have not been acquired on behalf of, nor have they been acquired with a view to their offer or resale to, persons in any Relevant Member State other than qualified investors, as that term is defined in the Prospectus Directive, or in circumstances in which the prior consent of the [Lead Manager] has been given to the offer or resale; or (ii) where Shares have been acquired by it on behalf of persons in any Relevant Member State other than qualified investors, the offer of those Shares to it is not treated under the Prospectus Directive as having been made to such persons.

For the purposes of this representation, the expression an "**offer of [Shares] to the public**" in relation to any [Shares] in any Relevant Member State means the communication in any form and by any means of sufficient information on the terms of the offer and any [Shares] to be offered so as to enable an investor to decide to purchase or subscribe for the [Shares], as the same may be varied in that Relevant Member State by any measure implementing the Prospectus Directive in that Relevant Member State and the expression "**Prospectus Directive**" means Directive

[4] This representation will have to be adapted if the Managers are permitted to make offers to retail investors in reliance on the "fewer than 100 persons" exemption.

2003/71/EC and includes any relevant implementing measure in each Relevant Member State.