FCA FINANCIAL CONDUCT AUTHORITY

UKLA Technical Note

Voting rights that are disregarded for notification purposes

Ref: UKLA / TN / 546.~~1~~2 Guidance Consultation

DTR 5.1.3R;
DTR 5.1.4R;
DTR 5.1.5R

DTR 5.1.5R allows certain voting rights to be disregarded for notification purposes below the 5% and 10% thresholds. Outlined below are our views on some of the applicable provisions.

EEA and ~~N~~non-EEA investment managers

The rules (DTR 5.1.5R (1)(a~~d~~) and DTR 5.1.5R (2)(a), (b), (c) and (d)~~(e)~~) ~~give us the power to determine that non-EEA~~ allow all EEA investment ~~entities and~~ managers ~~(including those in the UK)should be subject~~ to disclose at the EU minimum thresholds set out in Article 9(1) of the Transparency Directive (TD)~~the same sub 5% and 10% notification obligations as EEA firms~~.

~~We consider that equal treatment of non-EEA investment managers and entities should be conditional on the entities and managers concerned being subject to appropriate regulation in the country in question and there being no other reasons for not extending the concession, e.g. lack of reciprocity in the treatment of EEA investment managers.~~

~~A list of managers and entities that meet these conditions is published on our website together with a reference to the relevant DTR provisions.~~DTR 5.1.5R (2)(e) extends this exemption to non-EEA investment managers provided that they can lawfully manage those investments in a non-EEA State and that, if they were to manage their investments in the UK, they would require a permission under Part 4A of FSMA.

~~US investment managers~~

~~Based on our examination of the general regulation and major shareholding disclosure obligations of investment managers in the US, we consider that ‘investment advisors’ regulated under the Investment Advisors Act 1940 to be subject to equivalent regulation. These will therefore be treated in the same way as EEA investment managers.~~

Managers of lawfully managed investments, assets of a collective undertaking and open-ended investment companies

Managers are only required to disclose holdings at 5% or above (as opposed to 3%) of the issuer’s total voting rights and capital in issue. They must also notify us if their holdings reach, exceed, or fall below 10%. When their holdings reach 10%, the exemption no longer applies. Disclosures are required for every 1% increase or decrease above this threshold.

Disclosure obligations where a fund manager has been appointed on a discretionary basis

We clarify the disclosure obligations where, for example, a pension fund appoints a fund manager to act on a discretionary basis. Following the appointment, the beneficial owner (the pension fund trustee) ceases to have a separate notifiable interest, and the fund manager acting as an indirect holder of shares (as per DTR5.2.1R (h)) should make a notification if there are changes in the holdings of shares. Even if the client has retained power to give the fund manager instructions in respect of its assets, the client does not have a separate notifiable interest unless and until it exercises that power. The fund manager will only need to disclose when holdings breach 5% and 10% (DTR 5.1.5R).

Stock lenders and borrowing intermediaries

Both stock lenders and borrowers are required to make a notification if their lending or borrowing activity triggers a notification threshold when aggregated with other holdings (or in its own right if there are no other holdings).

When making a notification, it should be clear to the market that while a holder is notifying a disposal when they lend the shares, they still retain a notifiable right to recall of those lent shares.

An entity actively lending or borrowing stock will need to refer to the notification requirements and thresholds set out in DTR 5 and notify at the applicable thresholds. ~~The lending or borrowing of notifiable interests may not constitute a disposal or acquisition of the voting rights so no notification is necessary. For a stock lender acting under a standard stock lending agreement, a loan of shares will not amount to a disposal. The shares acquired by the borrower should be on-lent or otherwise disposed of by no later than the close of business on the next trading day. The borrower should also not declare any intention to exercise (and not exercise) the voting rights attached to the shares.~~

Clearing and settlement houses

~~Shareh~~Holders acquiring shares or financial instruments falling within DTR 5.3.1R (1) for the sole purpose of clearing or settlement within the T+3 settlement cycle do not need to disclose the change in holdings.

Custodians or nominees of holdings

Custodians or nominees who can only exercise the voting rights attached to shares held in that capacity under instructions given to them in writing or by electronic means do not have to disclose.

Market makers

Market makers who comply with the conditions and operating requirements set out ~~(as defined~~ in DTR 5.1.4R~~)~~ are exempt from disclosing holdings which remain below 10% of the issuer's total voting rights and capital in issue. This exemption falls away if they reach or exceed the 10% threshold. These ~~M~~market makers must disclose their total holdings if they change to

reach or exceed 10%, or reach, exceed or fall below every 1% above 10%, of the issuer's total voting rights and capital in issue.

Regarding the definition of market makers, DTR 5.1.3R (3) provides an exemption from notification of holdings up to 10% for market makers acting in their capacity as market makers. Market makers are broadly defined by the ~~Transparency Directive (TD) (via cross-reference to Markets in Financial Instruments Directive(MiFID))~~ as 'a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him', which is the same definition used in the Markets in Financial Instruments Directive (MiFID).

As stated in PS06/11, we believe the definition includes a market maker acting in that capacity when acting to provide quotes ~~O'~~over-~~T~~the-~~C~~counter~~'~~. This is because the term 'financial markets' in the definition should not or need not be construed narrowly to only ~~to~~ mean a regulated market or multilateral trading facility (MTF). We continue to hold this view.

On this basis, a '~~R~~retail ~~S~~service ~~P~~provider' offering quotes in SETS stocks (not through or on an LSE trading system) can be a 'market maker' for DTR 5 purposes, provided it does so by showing itself as willing to buy and sell SETs stocks at prices determined by it.

We further consider the definition of market makers to include 'SETS ~~P~~principals' as these are market makers on SETS or other systems that are not pure order-driven systems. In contrast, principal traders on a pure order-driven system (like SETS) would not be market makers for DTR5 purposes.

Credit institutions or investment firms

Provided that shares or financial instruments falling within DTR 5.3.1R (1) held by credit institutions or investment firms are held on the trading book, and their voting rights are not exercised or used to intervene in the management of the issuer, the holdings do not need to be disclosed below 5% of the issuer's total voting rights and capital. At the 5% threshold, the exemption of disclosure falls away, and credit institutions and investment firms must disclose their total holdings if they change to reach, exceed or fall below every 1% above 5% of the issuer's total voting rights and capital in issue.

Collateral takers

Provided a collateral taker does not declare any intention to – or actually exercise – the voting rights attached to shares under a collateral transaction (which involves the outright transfer of securities), they are exempt from major shareholding notification requirements.