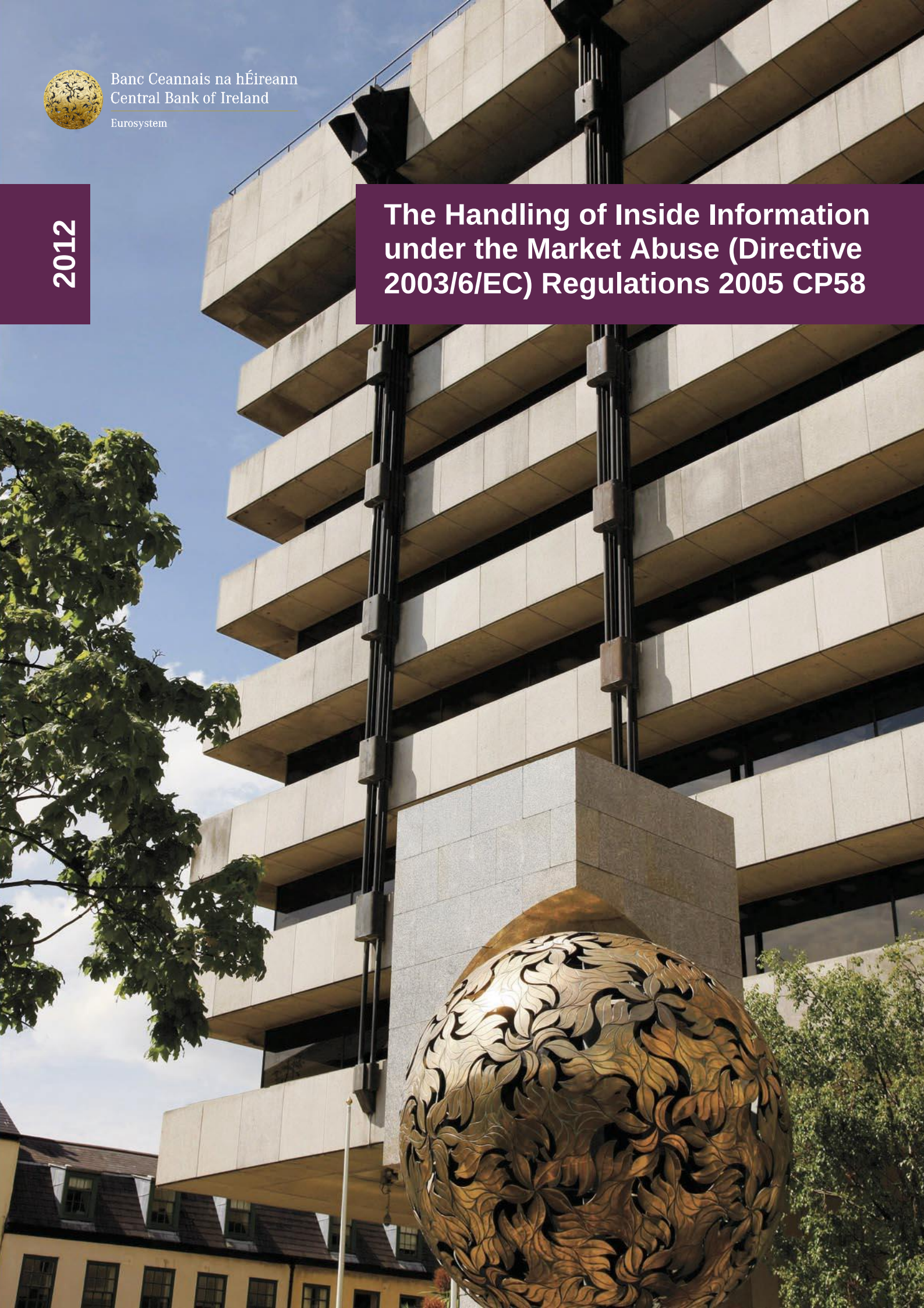

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

2012

The Handling of Inside Information under the Market Abuse (Directive 2003/6/EC) Regulations 2005 CP58

Contents

Making submissions

1.1 Please make your submissions in writing, and if possible, electronically as a Word document or a pdf document by email on or before **14 June 2012**.

1.2 Submissions should be marked "**Handling Inside Information CP58**" and sent by email to: marketmonitoring@centralbank.ie

1.3 In the event that you are unable to send your response electronically, please forward it by post, marked "**Handling Inside Information CP58**", on or before **14 June 2012** to:

Markets & Stockbrokers Supervision Division

Central Bank of Ireland

Block D Iveagh Court

Harcourt Road

Dublin 2

1.4 We invite comments on all aspects of this Consultation Paper ("**the Paper**"). If you are raising an issue that we have not referred to in the Paper, please indicate this in your submission.

1.5 We intend to make all submissions available on our website after the deadline for receiving submissions has passed. We shall not publish any information which we deem potentially libellous or defamatory.

1.6 The Central Bank of Ireland ("**the Central Bank**") accepts no liability whatsoever in respect of any information provided which is subsequently released or in respect of any consequential damage suffered as a result.

Introduction:

Market Abuse Directive (Regulations) 2005

Combating market abuse is crucial to the integrity of financial markets and for promoting investor confidence. In order to assist with developing and maintaining best practices in the handling and control of inside information and in pursuance of Paragraph 21 of the Recitals to the Market Abuse Directive[1] and in its capacity as single administrative competent authority,[2] it is proposed that the Central Bank's Market Abuse Rules will be amended to include further rules in relation to provisions that are concerned with the handling of inside information. It is anticipated that these rules will provide further clarity and guidance to issuers. These rules will focus, in particular on the decision(s) surrounding the classification of information as 'inside information', practices and procedures issuers have in place in relation to the handling of information which may be price sensitive, the creation and maintenance of insider lists and the recording of managers' transactions, as required under Regulations 10, 11 and 12 of the Market Abuse (Directive 2003/6/EC) Regulations 2005 ("the Regulations").

The main themes of this consultation paper have emerged as the result of an inspection programme, the aim of which was to examine how a sample of issuers handled and managed information which may be price sensitive. The Inspection programme provided some insight as to the uncertainty that can arise in deciding whether and when inside information may be present and when a possible announcement is required. The Central Bank would like to thank those issuers who engaged with the inspection programme. The discussions on the key issues around the handling of inside information were very useful and the Central Bank is encouraged by the fact that all of the issuers that they engaged with during the inspection welcomed the prospect of further rules/guidance that would enhance the existing Market Abuse regime.

This consultation paper is divided into three parts:

A. **Determining what information is sufficiently significant for it to be deemed inside information.**

B. **Types of insider list**

C. **Director and Personal Account Dealing and the definition of Persons Discharging Managerial Responsibility**

[1] Section 34 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. Paragraph 21 Recitals to Directive 2003/6/EC states, "The competent authority may issue guidance on matters covered by this Directive, e.g. definition of inside information in relation to derivatives on commodities or implementation of the definition of accepted market practices relating to the definition of market manipulation. This guidance should be in conformity with the provisions of the Directive and the implementing measures adopted in accordance with the comitology procedure."

[2] Regulation 3 of the Market Abuse Directive Regulations 2005

The Central Bank of Ireland is seeking comment and opinion on the matters detailed below which will constitute the substantive material of the proposed rules/guidance.

A. Determining what information is sufficiently significant for it to be deemed inside information.

Paragraph 6 of the Recitals to implementing Directive 2004/72/EC[3] states: *"The establishment by issuers or persons acting on their behalf or for their account, of lists of persons working for them under a contract of employment or otherwise and having access to inside information relating, directly or indirectly to the issuer, is a valuable measure for protecting market integrity. These lists may serve issuers or such persons to control the flow of such inside information and thereby manage their confidentiality duties. Moreover, these lists may also constitute a useful tool for competent authorities when monitoring the application of market abuse legislation. Identifying inside information to which any insider has access and the date on which it gained access thereto is necessary for issuers and competent authorities. Access to inside information relating, directly or indirectly, to the issuer by persons included on such a list is without prejudice to their duty to refrain from insider dealing on the basis of any inside information as defined in Directive 2003/6/EC.*

Requirements contained in Regulation 10 of the Market Abuse Regulations 2005

Inside information, shall mean, "information of a precise nature *(it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments)* which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect (*information a reasonable investor would be likely to use as part of the basis of his investment decisions*) on the prices of those financial instruments or on the price of related derivative financial instruments. [4]

Regulation 10 of the Market Abuse Regulations 2005 requires the issuer of a financial instrument to publicly disclose[5] without delay inside information -

(a) which directly concerns the issuer, and

[3] As regards accepted market practices, the definitions of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of manager's transactions and the notification of suspicious transactions.
[4] Defined in Article 1(1) of the Market Abuse Directive and Article 1(1) and (2) of implementing Directive 2003/124/EC.
[5] Regulation 10(6) stated that the issuer shall take reasonable care to ensure that the disclosure of inside information to the public is synchronised as closely as possible between all categories of investors in regulated markets in all Member States on which - (a) the issuer's financial instruments concerned are admitted to trading, or (b) the issuer has requested admission to trading of the financial instruments concerned.

(b) in a manner that enables fast access and complete, correct and timely assessment of the information by the public.

The decision to deem information as inside information, by virtue of the preciseness and significant effect tests primarily rests with the issuer of a financial instrument. Once information is deemed by the issuer to be inside information, Regulation 10 requires the issuer to publicly disclose without delay the pertinent inside information[6], which directly concerns the issuer[7], and in a manner that enables fast access and complete, correct and timely assessment of the information by the public[8]. Further the issuer is required not to combine, in a manner likely to be misleading, the provision of inside information to the public with the marketing of the issuer's activities.

Regulation 10(4) states that an issuer shall be deemed to have complied with paragraph (1) where, upon the coming into existence of a set of circumstances or the occurrence of an event, albeit not yet formalised, the issuer has without delay informed the public of those circumstances or that event, as the case may be and this is further expounded by Regulation 10(5) which states that, where there is any significant change concerning already publicly disclosed inside information, the issuer shall publicly and without delay disclose the change - (a) immediately after the change occurs, and (b) through the same channel as the one used for public disclosure of the original information.

A partial exemption from disclosure without delay is contained in Regulation10 (7) which states, '*the issuer may delay the public disclosure of inside information to avoid prejudicing the issuer's legitimate interests provided that -*

(a) the failure to disclose the information would not be likely to mislead the public, and

(b) the issuer is able to ensure the confidentiality of the information.'

Regulation 10(8) provides further detail on the meaning of "legitimate interests" by providing a non-exhaustive indicative list of what "legitimate interests" may include. Regulation 10(8) lists the following circumstances, as examples - (a) negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure (in particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer);

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[6] Regulation 10(1). Regulation 10(2) states that: 'Without prejudice to any measures taken under paragraph (1), the issuer shall, for a period of not less than 6 months, post on the issuer's Internet site or sites any inside information that the issuer is required to publicly disclose.'
[7] Regulation 10(1)(a)
[8] Regulation 10(1)(b)

(b) Decisions taken or contracts made by the management body of the issuer which need the approval of another body of the issuer in order to become effective, provided that -

(i) the organisation of the issuer requires separation between those bodies, and

(ii) a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public.

Recommendations for proposed new rules:

When considering these requirements, it is evident that the process of considering information to be 'inside information' is a multi-faceted and multidimensional process. The process becomes no less complex as the information develops and as the issuer prepares to announce the 'inside information' to the market.

The Central Bank's engagement with issuers during the inspection programme further augmented this contention. The inspection also provided evidence of the complexities for issuers with this process. The Central Bank noted with particular interest that the responsibility for the process of considering information as inside information and the processes that consequentially arise rested with the Board of Directors of each of the issuers engaged with during the Inspection Programme. It was also of interest that the tasks associated with the above process were delegated to specific directors or members of the senior management team in most of the respective issuers

Consequently, The Central Bank is proposing additional rules in relation to the issues detailed below:

- That each and every issuer formally constitute a 'committee' of relevant persons[9] to convene as required and to conduct the process that arises as a result of information being considered inside information, reporting to the Board of Directors, as and when deemed appropriate by the Board.
- There should be written policies and procedures drafted and adopted by this committee.
- A formal written record should be kept of the meetings of this committee. These records should chart the deliberations and discussions of the committee from the time that they convene to decide whether a particular piece(s) of information should be considered inside information, to the creation of an insider list, as required under Regulation 11 and through the addition of persons to that insider list as they are made aware of inside information. The committee should also consider their deliberations relating to the development of the information in anticipation of an announcement to the market and should include the rationale for reasons to delay the announcement of such inside information.

[9] The composition should reflect the 'key persons' in each issuer who would be best placed to manage the process of considering information as inside information and conducting the necessary tasks that accompany such a consideration. The Central Bank of Ireland will not prescribe the persons/officers of the issuer that should be present on this committee in recognition of the individuality of each issuer.

- It will be recommended that a contemporaneous chronology of events is the best mechanism whereby the above objectives can be achieved.

It should be noted that it is anticipated that these additional rules will prove very useful for each issuer, as it will enable effective control over inside information, which, by its nature, is a key objective for every issuer dealing with inside information. The ability to effectively control inside information should result in minimal disruption or detriment to the issuer that can arise should a leak of inside information occur or should rumours begin to circulate as a result of the existence of inside information.

The contemporaneous chronology will also assist the issuer in providing the information necessary to demonstrate 'legitimate interest', should the issuer be asked to explain why they delayed the announcement of inside information to the market.

Finally, it is anticipated that the measures listed above will prove to be of beneficial use to issuers in meeting the requirements as set out in Regulation 11. This is discussed further in Part B, below.

Q1: Please indicate whether you concur with the views of the Central Bank? It would be appreciated if any comments/suggestions you make are supported with appropriate detail and commentary.

B. Types of insider list

Regulation 11(1) requires that, 'each relevant person[10] shall draw up a list - (a) of those persons working for the relevant person, under a contract of employment or otherwise, who have access to inside information relating directly or indirectly to the relevant person who is the issuer, and (b) containing the information set out in Schedule 4.

The information detailed in Schedule 4 is as follows:

For the purposes of Regulation 11, lists of insiders include all persons covered by that Regulation who have ***access to inside information*** ***relating, directly or indirectly***, to the issuer, whether on a ***regular or occasional basis***.

2. Lists of insiders shall state -

(a) the identity of any person having access to inside information,

(b) the reason why any such person is on the list, and

(c) the date at which the list of insiders was created and updated.

3. Lists of insiders shall be promptly updated -

(a) whenever there is a change in the reason why any person is already on the list,

(b) whenever any new person has to be added to the list, and

(c) by mentioning whether and when any person already on the list has no longer access to inside information.

4. Lists of insiders shall be kept for at least 5 years after being drawn up or updated.

5. Persons required to draw up lists of insiders shall take the necessary measures to ensure that any person on such a list that has access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions attaching to the misuse or improper circulation of such information.

Regulation 11 (2) further provides that, 'each relevant person shall regularly update the list drawn up by the relevant person pursuant to paragraph (1).'

Regulation 11(3) and 11(4) require compliance with a request of the Central Bank to the relevant person, to furnish the Bank with a list drawn up by the relevant person pursuant to paragraph (1).

[10] Regulation 11(5) states that subject to paragraph (6), in this Regulation, "relevant person" means - (a) the issuer; (b) a person acting on behalf of the issuer; or (c) a person acting for the account of the issuer.

Recommendations for proposed new rules:

When considering the requirements of Regulation 11, it would seem that the recommendations advised under Regulation 10 will assist issuers in meeting the requirements detailed under Regulation 11. It would also appear that a contemporaneous chronology of events, detailing what person(s) were told what information, when and why they were told, will assist issuers in ensuring that their insider list matches the requirements of Schedule 4.

During the Central Bank's engagement with issuers it transpired that issuers maintain permanent, event-based and combined (both permanent and event based) insider lists in order to meet the requirements of Regulation 11. On the basis of the inspection and for the purposes of this Consultation Paper it is assumed that each issuer maintains either a permanent, event-based or combined (permanent and event based) insider list.

With that in mind it is proposed that the following Rules be issued:

- It is the considered view of the Central Bank that event based lists are the most appropriate form of insider list to meet the requirements of Regulation 11.

Q2: Please indicate whether you concur with the views of the Central Bank? It would be appreciated if any comments/suggestions you make are supported with appropriate detail and commentary

- The Central Bank asserts that notwithstanding the fact that there will be persons who, by virtue of their office are always going to be listed on each event based insider list due to the consequential access to inside information that such position brings. It is the Central Bank's view that an event based insider list is the most appropriate.

- Should an issuer make a claim that due to the nature of its business a permanent list is the most appropriate means for them to maintain compliance with Regulation 11, it will need to provide reasoning to the Central Bank, explaining why the permanent list is a more appropriate mechanism for it to satisfy the pertinent requirements.

- The Central Bank will require any insider list supplied under Regulation 11(3) will be accompanied by a detailed chronology of events that will be read in accordance with the insider list.

Article 2(1) of the Market Abuse Directive states that, 'Member States shall prohibit any person referred to in the second subparagraph who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.

The first subparagraph shall apply to any person who possesses that information:

(a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or

(b) by virtue of his holding in the capital of the issuer; or

(c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or

(d) by virtue of his criminal activities.

Article 3(a) and (b) further detail the prohibition on persons who disclose inside information to a third party or who make recommendations to a third party based on their possession of inside information. Article 4 further extends the scope extends the scope of the prohibitions to persons in possession of inside information, who knew or ought to have known that the information was inside information.

As inclusion, on an insider list is significantly indicative of possession of inside information, it would be beneficial for issuers to maintain event-specific insider lists, as in the event that an investigation for market abuse is commenced, it would be beneficial to all parties concerned that those persons details on the issuers insider list, where at the time in question in possession of the pertinent inside information.

Q3: Please indicate whether you concur with the views of the Central Bank? It would be appreciated if any comments/suggestions you make are supported with appropriate detail and commentary.

C. Director and Personal Account Dealing

Recommendations for proposed new guidance:

It was noted by the Central Bank during the inspection programme that all issuers have adopted the 'Model Code' for the purposes of director's dealings. Following the inspection programme, the Central Bank of Ireland shall be recommending:

- That each issuer has a documented policy and procedure on director, senior management and employee dealing.
- In recognition that most employees are rarely in possession of inside information, it shall sufficient to include rules on staff dealing in the Employee Code of Conduct.
- The Central Bank will also be recommending that an alert procedure be included in the code of conduct for employees should they become aware of information that they consider to be inside information.

Q4: Please indicate whether you concur with the views of the Central Bank? It would be appreciated if any comments/suggestions you make are supported with appropriate detail and commentary

Persons Discharging Managerial Responsibilities

Regulation 12 is concerned with the disclosure requirements of persons discharging managerial responsibility and in certain circumstances, persons closely associated with them. Regulation 12(1) states that, ' Subject to paragraphs (3) and (4), persons discharging managerial responsibilities[11], within an issuer of financial instruments registered in the State, and, where applicable, persons closely associated[12] with them, shall notify to the Bank transactions conducted on their own account relating to shares of the issuer, or to derivatives or other financial instruments linked to them.

Regulation 12 (2) states, 'Persons discharging managerial responsibilities, within an issuer of financial instruments not registered in the State, and, where applicable, persons closely associated with them, shall notify transactions conducted on their own account relating to shares of the issuer, or to derivatives on

[11] In relation to an issuer of financial instruments, means a person who is - (a) a member of the administrative, management or supervisory bodies of the issuer, or (b) a senior executive - (i) who is not a member of the bodies referred to in paragraph (a) of this definition, (ii) having regular access to inside information relating, directly or indirectly, to the issuer, and (iii) having the power to make managerial decisions affecting the future developments and business prospects of the issuer.

[12] In relation to a person discharging managerial responsibilities within an issuer of financial instruments, means - (a) the spouse of the person discharging managerial responsibilities, (b) dependent children of the person discharging managerial responsibilities, (c) other relatives of the person discharging managerial responsibilities, who have shared the same household as that person for at least one year on the date of the transaction concerned, (d) any person - (i) the managerial responsibilities of which are discharged by a person -(I) discharging managerial responsibilities within the issuer, or (II) referred to in paragraph (a), (b) or (c) of this definition, (ii) that is directly or indirectly controlled by a person referred to in subparagraph (i) of paragraph (d) of this definition, (iii) that is set up for the benefit of a person referred to in subparagraph (i) of paragraph (d) of this definition, or (iv) the economic interests of which are substantially equivalent to those of a person referred to in subparagraph (i) of paragraph (d) of this definition;

other instruments linked to them –

(a) if the issuer is registered in another Member State, in accordance with the rules of notification relating thereto of that Member State,

(b) if the issuer is not registered in another Member State, to the competent authority of the Member State to which the issuer is required to file the annual information in relation to shares in accordance with Article 10 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003, including the Directive as it stands amended for the time being.'

Regulation 12 (3) provides, 'Notification of transactions required by paragraph (1) and, where applicable, paragraph (2) (b), shall be made to the Bank within 5 working days of the day of the transaction.

Regulation 12 (4) states, 'Subject to paragraph (5), the Bank may provide that, where the total amount of the transactions is less than €5,000 at the end of a calendar year, no notification is required or notification may be delayed until 31 January of the following year.

Regulation 12(5) provides, 'For the purposes of paragraph (4), the total amount of transactions shall be calculated by adding together -

(a) the transactions conducted on the own account of a person discharging managerial responsibilities within an issuer, and

(b) the transactions conducted on the own account of persons closely associated with the person referred to in subparagraph (a).

Regulation 12(6) states, 'A notification required by paragraph (1) shall contain the following information

(a) the name of the person discharging managerial responsibilities within the issuer or, where applicable, the name of a person closely associated with such a person,

(b) the reason for responsibility to notify,

(c) the name of the relevant issuer,

(d) a description of the financial instrument,

(e) the nature of the transaction (for example, acquisition or disposal),

(f) the date and place of the transaction, and

(g) the price and volume of the transaction.

Finally Regulation 12(7)states, 'The Bank shall ensure that public access to information concerning the transactions notified to it under this Regulation is readily available, at least on an individual basis, without delay.'

Central Bank of Ireland Guidance

As a result of the inspection programme the Central Bank felt it important to re-iterate the definition of Persons Discharging Managerial Responsibilities as detailed below. It is important that issuers guard against interpreting the definition of Persons Discharging Managerial Responsibility too narrowly. The Central Bank would advise issuers when interpreting and implementing Regulation 12 that they address the scope of the definition of Persons Discharging Managerial Responsibility as detailed below.

Persons Discharging Managerial Responsibility are defined as:

In relation to an issuer of financial instruments, means a person who is -

(a) a member of the administrative, management or supervisory bodies of the issuer, or

(b) a senior executive -

(i) who is not a member of the bodies referred to in paragraph (a) of this definition,

(ii) having regular access to inside information relating, directly or indirectly, to the issuer, and

(iii) having the power to make managerial decisions affecting the future developments and business prospects of the issuer.

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