Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (Text with EEA relevance)

COMMISSION REGULATION (EC) No 1287/2006

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC[(1)], and in particular Articles 4(1)(2), 4(1)(7) and 4(2), Article 13(10), Article 25(7), Article 27(7), Article 28(3), Article 29(3), Article 30(3), Article 40(6), Article 44(3), Article 45(3), Article 56(5), and Article 58(4) thereof,

Whereas:

(1) Directive 2004/39/EC establishes the general framework for a regulatory regime for financial markets in the Community, setting out, among other matters: operating conditions relating to the performance by investment firms of investment and ancillary services, and investment activities; organisational requirements (including record-keeping obligations) for investment firms performing such services and activities on a professional basis, and for regulated markets; transaction reporting requirements in respect of transactions in financial instruments, and transparency requirements in respect of transactions in shares.

(2) It is appropriate that the provisions of this Regulation take that legislative form in order to ensure a harmonised regime in all Member States, to promote market integration and the cross-border provision of investment and ancillary services, and to facilitate the further consolidation of the single market. Provisions relating to certain aspects of record-keeping, and to transaction reporting, transparency and commodity derivatives have few interfaces with national law and with detailed laws governing client relationships.

(3) Detailed and fully harmonised transparency requirements and rules regulating transaction reporting are appropriate so as to ensure equivalent market conditions and

Changes to legislation: *There are currently no known outstanding effects for the Commission Regulation (EC) No 1287/2006. (See end of Document for details)*

the smooth operation of securities markets throughout the Community, and to facilitate the effective integration of those markets. Certain aspects of record-keeping are closely allied as they make use of the same concepts as are defined for transaction reporting and transparency purposes.

(4) The regime established by Directive 2004/39/EC governing transaction reporting requirements in respect of transactions in financial instruments aims to ensure that relevant competent authorities are properly informed about transactions in which they have a supervisory interest. For those purposes it is necessary to ensure that a single data set is collected from all investment firms with a minimum of variation between Member States, so as to minimise the extent to which businesses operating across borders are subject to different reporting obligations, and so as to maximise the proportion of data held by a competent authority that can be shared with other competent authorities. The measures are also designed to ensure that competent authorities are in a position to carry out their obligations under that Directive as expeditiously and efficiently as possible.

(5) The regime established by Directive 2004/39/EC governing transparency requirements in respect of transactions in shares admitted to trading on a regulated market aims to ensure that investors are adequately informed as to the true level of actual and potential transactions in such shares, whether those transactions take place on regulated markets, multilateral trading facilities, hereinafter 'MTFs', systematic internalisers, or outside those trading venues. Those requirements are part of a broader framework of rules designed to promote competition between trading venues for execution services so as to increase investor choice, encourage innovation, lower transaction costs, and increase the efficiency of the price formation process on a pan-Community basis. A high degree of transparency is an essential part of this framework, so as to ensure a level playing field between trading venues so that the price discovery mechanism in respect of particular shares is not impaired by the fragmentation of liquidity, and investors are not thereby penalised. On the other hand, that Directive recognises that there may be circumstances where exemptions from pre-trade transparency obligations, or deferral of post-trade transparency obligations, may be necessary. This Regulation sets out details of those circumstances, bearing in mind the need both to ensure a high level of transparency, and to ensure that liquidity on trading venues and elsewhere is not impaired as an unintended consequence of obligations to disclose transactions and thereby to make public risk positions.

(6) For the purposes of the provisions on record-keeping, a reference to the type of the order should be understood as referring to its status as a limit order, market order, or other specific type of order. For the purposes of the provisions on record-keeping, a reference to the nature of the order or transaction should be understood as referring to orders to subscribe for securities or the subscription of securities, or to exercise an option or the exercise of an option, or similar client orders or transactions.

(7) It is not necessary at this stage to specify or prescribe in detail the type, nature and sophistication of the arrangements for the exchange of information between competent authorities.

(8) Where a notification made by a competent authority relating to the alternative determination of the most relevant market in terms of liquidity is not acted upon within a reasonable time, or where a competent authority does not agree with the calculation made by the other authority, the competent authorities concerned should seek to find a solution. It is open to the competent authorities, where appropriate, to discuss the matter in the Committee of European Securities Regulators.

(9) The competent authorities should coordinate the design and establishment of arrangements for the exchange of transaction information between themselves. Again it is open to the competent authorities to discuss those matters in the Committee of European Securities Regulators. Competent authorities should report to the Commission which should inform the European Securities Committee of those arrangements. In carrying out the coordination, competent authorities should consider the need to monitor the activities of investment firms effectively, so as to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market in the Community, the need for decisions to be based on a thorough cost-benefit analysis, the need to ensure that transaction information is used only for the proper discharge of the functions of competent authorities and finally the need to have effective and accountable governance arrangements for any common system that might be considered necessary.

(10) It is appropriate to set the criteria for determining when the operations of a regulated market are of substantial importance in a host Member State and the consequences of that status in such a way as to avoid creating an obligation on a regulated market to deal with or be made subject to more than one competent authority where otherwise there would be no such obligation.

(11) ISO 10962 (Classification of financial instruments code) is an example of a uniform internationally accepted standard for financial instrument classification.

(12) If granting waivers in relation to pre-trade transparency requirements, or authorising the deferral of post-trade transparency obligations, competent authorities should treat all regulated markets and MTFs equally and in a non-discriminatory manner, so that a waiver or deferral is granted either to all regulated markets and MTFs that they authorise under Directive 2004/39/EC, or to none. Competent authorities which grant the waivers or deferrals should not impose additional requirements.

(13) It is appropriate to consider that a trading algorithm operated by a regulated market or MTF usually should seek to maximise the volume traded, but other trading algorithms should be possible.

(14) A waiver from pre-trade transparency obligations arising under Articles 29 or 44 of Directive 2004/39/EC conferred by a competent authority should not enable investment firms to avoid such obligations in respect of those transactions in liquid shares which they conclude on a bilateral basis under the rules of a regulated market or an MTF where, if carried out outside the rules of the regulated market or MTF, those transactions would be subject to the requirements to publish quotes set out in Article 27 of that Directive.

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(15) An activity should be considered as having a material commercial role for an investment firm if the activity is a significant source of revenue, or a significant source of cost. An assessment of significance for these purposes should, in every case, take into account the extent to which the activity is conducted or organised separately, the monetary value of the activity, and its comparative significance by reference both to the overall business of the firm and to its overall activity in the market for the share concerned in which the firm operates. It should be possible to consider an activity to be a significant source of revenue for a firm even if only one or two of the factors mentioned is relevant in a particular case.

(16) Shares not traded daily should not be considered as having a liquid market for the purposes of Directive 2004/39/EC. However, if, for exceptional reasons, trading in a share is suspended for reasons related to the preservation of an orderly market or *force majeure* and therefore a share is not traded during some trading days, this should not mean that the share cannot be considered to have a liquid market.

(17) The requirement to make certain quotes, orders or transactions public pursuant to Articles 27, 28, 29, 30, 44 and 45 of Directive 2004/39/EC and this Regulation should not prevent regulated markets and MTFs from requiring their members or participants to make public other such information.

(18) Information which is required to be made available as close to real time as possible should be made available as close to instantaneously as technically possible, assuming a reasonable level of efficiency and of expenditure on systems on the part of the person concerned. The information should only be published close to the three minute maximum limit in exceptional cases where the systems available do not allow for a publication in a shorter period of time.

(19) For the purposes of the provisions of this Regulation as to the admission to trading on a regulated market of a transferable security as defined in Article 4(1)(18)(c) of Directive 2004/39/EC, in the case of a security within the meaning of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC[(2)], there should be considered to be sufficient information publicly available of a kind needed to value that financial instrument.

(20) The admission to trading on a regulated market of units issued by undertakings for collective investment in transferable securities should not allow the avoidance of the relevant provisions of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[(3)], and in particular Articles 44 to 48 of that Directive.

(21) A derivative contract should only be considered to be a financial instrument under Section C(7) of Annex I to Directive 2004/39/EC if it relates to a commodity and meets the criteria in this Regulation for determining whether a contract should be considered as having the characteristics of other derivative financial instruments and as not being for commercial purposes. A derivative contract should only be considered to be a

financial instrument under Section C(10) of that Annex if it relates to an underlying specified in Section C(10) or in this Regulation and meets the criteria in this Regulation for determining whether it should be considered as having the characteristics of other derivative financial instruments.

(22) The exemptions in Directive 2004/39/EC that relate to dealing on own account or to dealing or providing other investment services in relation to commodity derivatives covered by Sections C(5), C(6) and C(7) of Annex I to that Directive or derivatives covered by Section C(10) of that Annex I could be expected to exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries from the scope of that Directive, and therefore such participants will not be required to apply the tests in this Regulation to determine if the contracts they deal in are financial instruments.

(23) In accordance with Section B(7) of Annex I to Directive 2004/39/EC, investment firms may exercise the freedom to provide ancillary services in a Member State other than their home Member State, by performing investment services and activities and ancillary services of the type included under Section A or B of that Annex related to the underlying of the derivatives included under Sections C(5), (6), (7) and (10) of that Annex, where these are connected to the provision of investment or ancillary services. On this basis, a firm performing investment services or activities, and connected trading in spot contracts, should be capable to take advantage of the freedom to provide ancillary services in respect of that connected trading.

(24) The definition of a commodity should not affect any other definition of that term in national legislation and other community legislation. The tests for determining whether a contract should be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes are only intended to be used for the purposes of determining whether contracts fall within Section C(7) or C(10) of Annex I to Directive 2004/39/EC.

(25) A derivative contract should be understood as relating to a commodity or to another factor where there is a direct link between that contract and the relevant underlying commodity or factor. A derivative contract on the price of a commodity should therefore be regarded as a derivative contract relating to the commodity, while a derivative contract on the transportation costs for the commodity should not be regarded as a derivative contract relating to the commodity. A derivative that relates to a commodity derivative, such as an option on a commodity future (a derivative relating to a derivative) would constitute an indirect investment in commodities and should therefore still be regarded as a commodity derivative for the purposes of Directive 2004/39/EC.

(26) The concept of commodity should not include services or other items that are not goods, such as currencies or rights in real estate, or that are entirely intangible.

(27) The Committee of European Securities Regulators, established by Commission Decision 2001/527/EC[(4)] has been consulted for technical advice.

(28) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,