



Dewey & LeBoeuf London

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"But things will get better..."

Some Timely Guidance in Relation to Disclosure of Inside/Price Sensitive Information by Main Market and AIM Companies

June 29, 2009

Looking back over the last 12 months, we have noted an increase in the number of disciplinary measures enforced by regulators against companies admitted to trading on London markets for breach of their respective ongoing disclosure obligations. During this period, three companies listed on the Main Market of the London Stock Exchange have been fined and sanctioned for breach of their respective disclosure obligations to the market. Prior to this, a Main Market company had not been publicly sanctioned since 2005 for such a breach. In 2008, AIM companies received the highest number of sanctions for breach of disclosure obligations compared to any previous year. Appendix 1 contains further details of such enforcement actions over the previous 12 months.

It is well understood that companies admitted to trading on the Main Market have a requirement to disclose without delay inside information¹ and AIM companies have a requirement to disclose price sensitive information², subject to certain exceptions.³ Companies may attempt to justify non-disclosure or delay disclosure of such information for a number of reasons. The following guidance (drawn from final notices or censures made within the last twelve months by the FSA or the London Stock Exchange for breach of disclosure obligations by certain companies) may assist advisers (such as corporate brokers and NOMADs) to dispel such myths:

- "Things will get better, the good news offsets the bad": In a recent case, a company agreed to a variation to a material contract that was likely to have a detrimental impact on anticipated profits. The company did not disclose this information because (although disclosure was likely to have a significant effect on the share price) the board believed that there would be firm opportunities over the course of the year to mitigate the negative impact of the variation to the material contract. The FSA stated that disclosure cannot be deferred due to anticipated

¹ Disclosure and Transparency Rules 2.2.1. Inside information is information of a precise nature which is not generally available, relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.

² Rule 11 of the AIM Rules for Companies. Price sensitive information is that which, if made public, would be likely to lead to a substantial movement in the price of the AIM securities.

³ Disclosure Rule and Transparency Rule 2.5.1. and Part 2 (Guidance Notes) Rule 11 of the AIM Rules for Companies, respectively.

positive news (which is material) that may mitigate the damage done by a negative disclosure. Companies must disclose both negative and positive news and allow the market to determine whether they cancel each other out. An AIM Disciplinary Notice issued on 16 July 2008 stated that negative disclosure should not be postponed due to a belief (even if that belief is reasonable or genuine) that performance of the relevant company will improve in the short term and/or that the negative disclosure could be offset by more favourable news. Companies must disclose all price sensitive information to the market without delay;

- "We are not sure how bad this issue really is": In the above case, the board of the company noted that it felt unable, at the time of the variation to the contract, to quantify the impact of the revised agreement on their business and that, as such, the decision whether or not to announce could not be taken. A total of four months passed before the company's CFO was tasked with assessing the impact that the variation would be likely to have on the company's finances. A further month passed before the assessment was delivered to the board and an announcement made. The FSA stated that this was unacceptable and that such inside information must be disclosed without delay. Announcements must not be delayed simply because the company is unable to quantify precisely the impact of negative news if it is likely to have a significant effect on the price of securities in any event;
- "The market will overreact": Having been informed by a key client of a significant loss of business, a company did not make this disclosure to the market on the basis that it would cause a drop in share price to a level that would not reflect what the board considered to be the "true value" of the company. In reaching this decision, the company relied on advice given by its investor relations adviser, which stated that the market, in its current state, would almost certainly overreact to such news, thereby creating a false market in the shares. In its Final Notice in January 2009, the FSA stated that this was not a valid reason to withhold disclosure and that companies must disclose all inside information regardless of concerns as to the effect disclosure may have on a company's share price; and
- "We signed an NDA": In a recent case, a company cited a confidentiality agreement that existed between it and a key customer as a reason for withholding an announcement when the customer informed the company that it would not be placing an order for a particular product as anticipated. In its Final Notice, the FSA clearly states that Confidentiality or Non-

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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Disclosure Agreements with customers do not justify non-disclosure of inside information. In fact, in practice, it is usual for NDAs to include exceptions for disclosures required by applicable laws and regulations.

In practice the obligation to disclose may not be clear cut and companies may believe they have a good reason not to make prompt disclosure of inside information. However, it is clear companies admitted to trading on London markets are not exempt from doing so merely because (i) there is potential for good news to offset the bad, (ii) because it is difficult to quantify precisely the impact of a particular event or circumstance on a company, (iii) because the company believes disclosure would disproportionately affect the company's share price, or (iv) because the matter is the subject of a confidentiality agreement. In order for companies to be able to make a quick and confident assessment of their disclosure obligations they may benefit from a clear internal process and procedure to deal with such issues, whether that be a dedicated person or group of people or a more formal "disclosure" committee. Such a group or committee often includes legal, accounting, investor relations and business unit personnel. If in doubt, companies should also seek advice from their NOMADs (if applicable), corporate brokers and lawyers at an early stage in relation to their disclosure obligations.

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Appendix 1

Type of Issuer	Sanction	Nature of breach of disclosure obligation	Date
Main Market Company	£140,000 fine and a public censure	Failing to make a prompt disclosure of the loss of a major customer	19 January 2009
Main Market Company	£245,000 fine and a public censure	Failing to make prompt disclosure of a significant adverse variation to the terms of a major distribution agreement	19 January 2009
AIM Company	Public censure	Failing to announce the cancellation of a large sale and purchase agreement; failing to update the market when a planned acquisition did not take place; omitting material information from RIS announcements	4 December 2008
AIM Company	£75,000 fine and private censure	Making misleading, unrealistic and optimistic statements about its performance	16 July 2008
AIM Company	£25,000 fine and private censure	Delaying disclosure price sensitive information to the market; failing to consult with its nominated adviser on its disclosure requirements	16 July 2008
AIM Company	£15,000 fine and private censure	Delaying announcements of price sensitive information; failing to disclose that a planned refinancing would not be completed in accordance with a previously announced deadline	16 July 2008
AIM Company	£75,000 fine and public censure	Repeatedly failing to disclose price sensitive information without delay in respect of operating difficulties	19 June 2008
Main Market Company	£350,000 fine and public censure	Incorrectly believing that a share price fall of 10% or more would be needed for an effect on share price to be deemed "significant"	11 June 2008