110 Bishopsgate
19th Floor, Suites 19-06 and 19-07
London EC2N 4AY, UK
+44 (0) 207 961 0830
www.iciglobal.org

Suite 715–717, Level 7
Two Exchange Square
8 Connaught Place
Central, Hong Kong
+852 2168 0882

1401 H Street, NW
Suite 1200
Washington, DC 20005, USA
+001 202 326 5800
www.ici.org

1 June 2016

Submitted electronically
Finansdepartementet
P.O. Box 8008 Dep
0030 Oslo

Your reference: 16/550 FMA

Re: Proposal for Transposition of the Revised Transparency Directive

Dear Sir/Madam,

ICI Global[1] is writing in regard to Norway's major holding reporting regime. We understand that in the context of transposing the amended European Union Transparency Directive[2] there is the opportunity to revise Norway's major holding reporting requirements (cf. letter from the Ministry of Finance dated 2 March 2016 and proposal NOU 2016:2).[3] Our members are regulated funds that are publicly offered to investors in jurisdictions around the world. Many of our members invest in multiple jurisdictions, including Norway, and therefore file reports regarding major holdings of issuers depending on local laws. Consequently, our members have experience with these requirements globally and have compliance systems to assist in meeting the requirements of the jurisdictions in which a fund may invest, including Norway.

The current requirements for filing notifications of major holdings in Norway ("*frist for flaggemelding*") present significant compliance challenges for regulated fund managers. As explained below in more detail, the Norwegian requirements are more burdensome than in other

[1] The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$19.1 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC. A significant number of ICI Global's members have funds domiciled in multiple jurisdictions around the world and engage in trading from multiple locations on behalf of their regulated fund and other clients.

[2] Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013.

[3] Endringer i verdipapirhandelloven – flagging og periodisk rapportering — Gjennomføring av endringer i rapporteringsdirektivet.

jurisdictions, including compared to Members States in the European Union (EU), and also lack clarity. To provide more clarity and certainty for filers, we recommend: (1) alignment with the Transparency Directive to permit major holdings notifications to be filed within four trading days and (2) that a clear deadline be set forth in the Securities Trading Act (STA) itself. This approach would be consistent with the Transparency Directive and the approaches of other jurisdictions, while providing timely notification of major holdings and better enabling filers to meet their responsibilities.

Major Holdings Filing Requirement Should be Extended to Four Days

The Transparency Directive provides for an absolute deadline of four trading days for filing notifications of major holdings,[4] but countries within the EU are permitted to set requirements with shorter deadlines. In Norway, STA section 4-3(6) currently requires shareholders to make a filing of major holdings "immediately" and does not otherwise state a clear or absolute deadline (maximum number of trading days). In Norwegian:

> *Melding etter denne paragraf skal gis straks etter at avtale om erverv eller avhendelse er inngått, eller vedkommende blir kjent med eller burde ha blitt kjent med annen omstendighet som fører til at vedkommende når, passerer eller faller under en terskel i første ledd.*

As implemented and interpreted by the Financial Supervisory Authority of Norway (FSAN), the Norwegian requirement is much more onerous than what is required by the Transparency Directive and the requirements in most other EU jurisdictions; only Denmark has a requirement similar to that in Norway (please see Schedule 1 for a comparison to the requirements in other European countries).

As mentioned in NOU 2016:2, paragraph 4.9.1, the deadline may be exercised with some degree of discretion from the FSAN.[5] However, the concept of "immediately" has, in practice, been interpreted in an inflexible or narrow manner. The FSAN also has a very strict supervisory practice as set out in its guidance note to the STA chapter 3 ("*Lov om verdipapirhandel – enkelte kommentarer til kapittel 3 og 4*", paragraph 13.8) and its decisions concerning violation charges.

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[4] The provision concerning the deadline for filing in the Transparency Directive has been amended marginally. Article 12.2 of the Transparency Directive now reads:

> *The notification to the issuer shall be effected promptly, but not later than four trading days after the date on which the shareholder, or the natural person or legal person referred to in Article 10: (a) learns of the acquisition or disposal or of the possibility of exercising voting rights, or on which, having regard to the circumstances, should have learned of it, regardless of the date on which the acquisition, disposal or possibility of exercising voting rights takes effect; or (b) is informed about the event mentioned in Article 9(2).*

Under the amended Transparency Directive, the absolute deadline of four trading days has been reduced by replacing "four trading days, the first of which shall be the day after the date on which …," with "trading days after the date on which…"

[5] www.regjeringen.no/contentassets/1f6dbcc1a2044e3c8014e7917a5dcc27/no/pdfs/nou201620160002000dddpdfs.pdf.

Lack of Legal Certainty and Consistency is Problematic

Although the intent of the current STA requirement may be to provide flexibility to shareholders, this degree of supervisory discretion raises concerns about legal certainty as well as increases the risks of the requirement being inconsistently applied to filers. This lack of certainty and consistency is particularly troubling because a breach of the filing duty is a punishable offense. Consequently, the current "flexible practicing" of the rules has been neither beneficial, nor flexible.

In fact, some firms have been advised by counsel that the FSAN has interpreted the deadline as the end of the trading day on which the trade is executed. We understand that the FSAN has occasionally granted international asset managers headquartered in a time zone different than Norway and filing on an aggregated basis, a filing deadline of two trading days, counted from the day the trade is executed (or from when the relevant other circumstance triggering a filing duty occurred). However, this extended deadline is not documented and is not universally applied. To our knowledge, an extended deadline has not caused any disruption to the markets.

"Immediate" Requirement Poses Significant Operational Challenges and Increases Costs

The existing filing requirement poses significant operational challenges for global fund managers and compliance with this requirement by filing on essentially an immediate basis leads to increased costs for some global fund managers.

Global fund managers established outside of Norway, particularly those based in later time zones, face difficulty in complying with the Norwegian requirements due to differences in business hours that result in a limited or non-existent overlap in business hours as well as operational procedures that ensure the accurate aggregation and reporting of positions. For example, 9 a.m. on the West Coast of United States is 6 p.m. in Oslo;[6] there is no overlap in the working day. Consequently, it is not possible for a filing to be submitted from the U.S. West Coast after 9 a.m., but prior to 6 p.m. in Oslo, for a trade that occurred in Norway that day.

These time-zone and operational challenges are compounded when filings are made on an aggregated/consolidated basis for multiple accounts/funds managed from different locations around the world and in different time zones. Additionally, the revised Transparency Directive extends the basis for calculating positions to include certain derivative positions, which will further add significant complexity to the filing process.

In practice, calculating positions for purposes of submitting required notification filings requires a review and reconciliation of the global holdings of a manager and any of its affiliates, and the funds and accounts for which they each act as discretionary investment managers. For a global fund manager, the location of this process may be anywhere in the world, and the particular processes and procedures that have been put in place by the firm to comply with trading allocation, reconciliation, and reporting requirements from multiple jurisdictions vary to accommodate the specific circumstances of the firm.

[6] At certain times of the year it is 5 p.m. in Oslo when it is 9 a.m. on the U.S. West Coast.

To comply with large shareholder reporting requirements, global fund managers have internal systems and reporting procedures that seek to ensure that holdings are monitored promptly. Some global fund managers have implemented systems and procedures whereby trading activity is reviewed and security positions are aggregated on a daily basis at the close of business where the manager and the relevant trading desk is located. These systems do not calculate global positions on a real time basis. Rather, the firm's security positions are gathered across the world-wide markets and incorporated into the firm's internal systems overnight. For firms for which this process takes place overnight in the United States, the earliest possible time that holdings can be reviewed for notification purposes is T+1 in Norway (however, if such firm is based on the West Coast of the United States then this review may begin after the Norwegian market has closed on T+1 in Norway). For a firm that has instituted such a process, it is impossible to meet a standard of "immediate" notification in Norway. However, the systems and procedures put in place by such firms, which allow for calculation of positions at the end of trading in multiple global markets, are consistent with best market practices of reputable global fund managers. The systems and processes that are designed and developed to comply with the regulatory requirements of multiple jurisdictions, while at the same time ensuring that trades are executed, allocated, and reconciled accurately and that required filings are accurate.

We understand that some global fund managers that invest in Norway have instituted special monitoring and reporting procedures with respect to their purchase of Norwegian securities in order to be able to submit filings on the trade date or prior to the opening of the market in Norway on T+1. These procedures include employing manual processes for Norwegian securities (whereas others are automated) and assigning additional personnel to cover monitoring when the firm is near thresholds. Although it has been possible to implement special measures, these measures require deviations from standard procedures and lead to increased compliance costs and burdens.

These operational challenges and increased costs for compliance place a disproportionate burden on firms located outside of, and particularly far away from, Norway, and ultimately impact the comparative attractiveness of the securities of Norwegian companies and instruments listed on Norwegian regulated markets to issuers in other markets. We therefore encourage the Ministry of Finance to carefully consider revising its notification requirements. Such a change would still ensure timely notification while assisting filers in meeting their regulatory responsibilities.

Serious Consequences of Violations

The consequences of being found in violation of the notification requirements and being subject to a fine are significant. First, a violation of the notification requirement potentially subjects a firm to a substantial monetary penalty. Notably, the amended Transparency Directive introduces a substantially stricter sanctions regime, with administrative pecuniary sanctions of up to EUR 10,000,000, up to 5% of the total annual turnover, or up to twice the amount of profits gained or losses avoided because of the breach.[7] More extensive notification requirements with respect to the types of instruments to be included in the notifications may result in an increased likelihood of

[7] See Article 28b of the amended Transparency Directive.

violations. Depending on the size of a global fund manager and the investment mandates of its clients, the total amount of penalties that may be imposed on a firm could be substantial.

The impact of a violation, however, goes far beyond the monetary penalty that may be imposed. For global fund managers, sanctions from a regulatory authority such as a violation charge imposed under the STA or otherwise by the FSAN may trigger multiple disclosure requirements imposed by other regulatory authorities such as the U.S. Securities and Exchange Commission, federal, state and local level supervisory authorities, as well as disclosure to fund investors, clients, and prospective clients. There are various circumstances in which global fund managers are required to disclose, whether to regulatory authorities and/or existing or prospective investors or clients, any regulatory violations or fines to which they have been subject. The fact of such a violation – regardless of its nature or the amount of any fine – may be determinative in regulatory approvals granted or withheld and business given or withdrawn by clients. In addition, firms may suffer reputational harm due to such violations, particularly were there to be public or media disclosure of such violations.

More Burdensome than Requirements in Other Jurisdictions

As mentioned in NOU 2016:2 page 41, the "immediate" deadline differs significantly among EU and EEA Member States and Norway is among the relatively few jurisdictions with these very onerous requirements. As noted on Schedule 1, for other European jurisdictions, the allowed timeframe to submit required notification varies from two trading days to within five trading days. Of the twenty European countries listed, only Norway and Denmark require "immediate' disclosure. These rules which are more onerous and different from other EU member states – on the balance – make the Norwegian market less attractive for foreign institutional investors, as compared to other markets, especially in light of the potential penalties for, and consequences of, late notifications.

Recommended Filing Deadline

For the reasons described above, we respectfully request that the deadline be extended to a maximum of four trading days, and that the provision should read:

> *Melding etter denne paragraf skal gis **uten ugrunnet opphold og senest fire handelsdager** etter at avtale om erverv eller avhendelse er inngått, eller vedkommende blir kjent med eller burde ha blitt kjent med annen omstendighet som fører til at vedkommende når, passerer eller faller under en terskel i første ledd.*[8]

In addition, the filing deadline should be clearly set forth in the STA, not in a regulation. Currently, a breach of the duty to file shareholder notifications is an offense punishable by fines (cf. section 17-3(3) of the STA). Further, the FSAN has the authority to issue violation charges for

[8] In English: *Notification subject to this provision shall be provided **without undue delay and four trading days at the latest** after an agreement on acquisition or sale has been entered into, or the shareholder becomes aware of or should have become aware of other circumstances leading to the shareholder reaching, passing or falling below a threshold set out in the first paragraph.*

breach of the filing duty (cf. section 17-4(1)). For practical purposes, a violation charge works as a fine.

We are concerned that a regulation would likely be adopted closer to entry into force of the rules, and this would leave less time for market actors to implement policies and procedures to comply with new rules.

A maximum filing deadline of four days would achieve the purpose of the major holdings filing notification requirement – that of ensuring timely and adequate transparency regarding the holdings of publicly listed companies – while accommodating the operational challenges of compiling this information, particularly for a global fund manager.

Conclusion

On this background, we respectfully suggest that the deadline for filings be extended consistent with the Transparency Directive to allow for a maximum deadline of four trading days and that the deadline be clearly set forth in the STA itself. This would support and enable more accurate reporting, better compliance and ensure clarity and certainty for all market participants. Such a change would also help to ensure fair and consistent application of the reporting obligations and penalties for violations.

* * * * *

We greatly appreciate your consideration of these issues. If you have any questions, please contact Eva Mykolenko at emykolenko@ici.org or +202-326-5837.

Sincerely,

/s/ Dan Waters

Dan Waters
Managing Director

Schedule 1 Overview of filing deadlines in Europe

Country	Timeframe
Austria	Two business days after trade date
Belgium	Trade date plus four days
Czech Republic	Three business days
Denmark	Immediate
Finland	"Without undue delay", however, no later than the trading day following the day when shareholder becomes aware of a threshold having been crossed
France	Within five days
Germany	Four days from trade date
Greece	Trade date plus three days
Ireland	Within two trading days
Italy	Within five business days of trade date
Luxembourg	Within four trading days
Netherlands	Within four trading days
Norway	Immediate
Portugal	Four business days after trade date
Romania	Three days after trade date
Spain	Within four business days
Sweden	Trade date plus three days
Switzerland	Four trading days
Turkey	Trade date plus three days
United Kingdom	Two trading days