EXECUTING BLOCK TRADES
ISSUES IN PRACTICE

Nicholas Holmes of Ashurst LLP and Peter Castellon of Proskauer Rose LLP consider some of the issues that can arise when executing shareholder block trades.

A block trade is a secondary sale of a large quantity of existing shares. Block trades are typically carried out by institutional investors and are best suited to highly liquid and well-researched shares in public companies. They can provide a rapid and efficient solution for holders of substantial equity stakes wishing to monetise their positions through the equity capital markets. Unlike large public offerings, which require months of preparation, block trades are typically launched, executed and priced very quickly, sometimes within 24 hours. Since January 2000, offering sizes have varied between $2.3 million and $5.9 billion.

This article considers:

- The structures and timetables that can be adopted to execute block trades.
- The key issues that can arise before the launch of a block trade.
- How to document a block trade.
- Disclosure issues when executing a block trade.
- Issues that may arise after the block trade is announced.
- The impact of the MiFID II Directive (*2014/65/EU*) (MiFID II).

STRUCTURE

A block trade can be structured as:

- A bought deal, in which the investment bank acting as manager of the block trade buys the shares from the seller before the manager starts its formal marketing efforts. The manager generally resells the shares as soon as possible after they are acquired from the seller. To the extent that it is able to resell the shares at a higher price, the manager keeps the difference.
- A non-risk deal, also known as an accelerated equity offering (AEO), where the manager builds a book of demand for the seller before agreeing on a price based on that demand. Frequently, the manager receives a commission from the seller. In some cases, the manager may earn an agreed spread.
- A back-stopped deal, falling somewhere between a bought deal and an AEO, where the manager does not take the shares onto its own books before marketing (as with a bought deal), but does guarantee the seller a minimum price. If the manager is unable to find buyers for all of the shares at or above the back-stopped price, it buys the shares itself.

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TIMETABLE

There are two general approaches to a block trade timetable. In the first, the seller appoints the manager in advance. This is most frequently used for AEOs but can be followed for bought deals and back-stopped deals. The manager and the seller will first agree on the block trade agreement, conduct due diligence, prepare announcements and take care of any formalities. They will then launch the block trade when they believe the time is right.

In the alternative approach, the manager is appointed in a competitive process immediately before the block trade is launched. In this case, the timetable is inevitably highly challenging (*see box "Indicative timetable for competitive process"*). The seller invites bids for a block of shares it wishes to sell. It does so by having one of its advisers (sometimes a law firm) call a pre-agreed list of investment banks, as potential managers, to alert them to the block trade.

Sometimes the investment banks will be asked to sign a confidentiality letter. The confidentiality letter (if used) usually arrives around 2:45 to 3:00 pm. It will not disclose the underlying securities but will require the interested parties to agree to be bound by an obligation of confidentiality in return for the disclosure of the details of the intended block trade transaction.

Confidentiality letters vary in scope but sometimes contain additional provisions intended to prevent unsuccessful bidders in receipt of information from selling short the relevant shares. These restrictions can sometimes be onerous, and it is important to ensure that a representative of the equities trading arm of a participating investment bank is comfortable with them before the confidentiality letter is signed by that bank. Confidentiality letters are not strictly needed, as banks have a duty of confidentiality in any event. (*For a form of confidentiality letter, see feature article, "Strictly confidential: new block trade confidentiality letter" www.practicallaw.com/3-500-2224.*)

The seller or its advisers will then circulate a package of documents, including an invitation to tender a bid, a draft timetable, a draft block trade agreement with schedules including an investor representation letter (if applicable) and, sometimes, forms of supporting legal opinions (*see "Documents" below*).

Indicative timetable for competitive process

T-1	2.45-3 pm	• Confidentiality letter circulated
	3 pm	• Package of tender documents circulated to invited banks that have signed the confidentiality letter
	4.30 pm	• Deadline for invited banks to submit bids
	5 pm	• Notification to successful manager(s) • Conference call between seller and manager(s)
	5.15 pm	• Block trade agreement executed • Announcement and launch of transaction
	10 pm – 7 am	• Closing of books (potential to close earlier depending on how the deal is going)
T	7 am	• Pricing, pricing announcement and allocations
T+2		• Settlement and delivery

PRE-LAUNCH

Before a block trade is announced, the parties will need to address a number of issues.

Due diligence

The scope of the due diligence exercise for a block trade varies based on the circumstances of the transaction, the relationship between the manager and the issuer, and the relationship between the seller and the issuer; for example, if the manager is the issuer's corporate broker, it will already know the issuer well, so a shorter due diligence exercise might be needed. In any event, the scope of the due diligence exercise for a block trade is limited when compared to the scope for an initial public offering (IPO) or other offering by an issuer. The shares should already be listed and there will be significant amounts of publicly available information, including annual reports, other financial and corporate announcements and independent research reports. This is unlike an IPO or rights offering, where marketing efforts are focused on a prospectus and other marketing materials prepared especially for the offering and needed to disclose new or transformative information.

Timing

Managers will not usually wish to undertake a block trade in the shares of an issuer that will shortly report financial results. Block trades will usually take place at least four weeks before the relevant announcement, although this might be reduced by a few days or even a week in exceptional circumstances.

In any such case, the manager is likely to require a due diligence call with the issuer to assure itself that no material disclosures are imminent, that the issuer is up to date with its disclosure obligations and that trading is in line with market expectations, although care will be needed to avoid triggering the provisions of the Market Abuse Regulation (*596/2014/EU*) (MAR) and inside information concerns.

The safest time to conduct a block trade is shortly after the publication of the issuer's financial results: all material information concerning the issuer can then reasonably be presumed to be in the public domain. Separately, if the issuer is an EEA listed company and the seller is a person discharging management responsibilities (PDMR) within the issuer, or a body corporate in which a PDMR is a director or senior executive with power to make management decisions, then the trade cannot take place during a closed period (that is, the period of 30 calendar days before the announcement of an interim financial report or year-end report) (*Article 19, MAR*) (*see feature article "Market Abuse Regulation: ensuring compliance amidst uncertainty". www.practicallaw.com/6-629-5677.*)

Sounding out the market

A successful and profitable bid for a block trade requires a good knowledge of the market dynamics of the relevant stock and the sector in which its issuer operates. It also requires a good sense of the likely appetite of investors. Getting this wrong can lead to

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a failure to bid competitively for the block or, alternatively, to unsold stock on the bank's books and a risk of incurring a financial loss. For this reason, banks sometimes sound out the market by telephoning potential investors to assess their likely appetite before bidding for a block of shares at a particular price. A number of legal and regulatory constraints should, however, be borne in mind before undertaking any market soundings.

Insider dealing and market abuse. Inside information may arise at a number of different points in a block trade, and it is important to distinguish between them. These points include:

- When a manager contacts investors acting on its own behalf (that is, on its own initiative and without being under mandate from a seller) (scenario A).

- The sounding of investors, by a manager, to gauge their appetite for a trade when acting on behalf of a seller (scenario B).

- The actual offering of the securities to investors in order to effect the transaction (scenario C).

The fact that a particular prospective seller, or even an unnamed seller, is contemplating a substantial sale of specified securities is likely in itself to be inside information for the purposes of the criminal insider dealing regime under Part V of the Criminal Justice Act 1993 (1993 Act), and the market abuse legislation now contained in MAR (superseding the Market Abuse Directive (*2000/6/EC*) (MAD) and the provisions of the Financial Services and Markets Act 2000 (FSMA) that implemented MAD). However, this may not be the case in scenario A, where a firm is simply testing investor appetite for a block trade on its own initiative but has not been approached by the seller. In this respect, although MAR is a civil regime, EEA competent authorities have significant powers under MAR to fine, publicly censure, or withdraw or suspend the authorisation of, an investment firm or person where market abuse has been carried out (*Articles 30 and 31, MAR*).

It is possible to argue that if the identity of the issuer of particular securities is not disclosed, either expressly or by implication given the investment bank's or the market's existing knowledge, any information relating to a potential sale might not be inside information within the meaning of the 1993 Act or MAR. Therefore, it may be possible to disclose certain non-specific information regarding the issuer without falling within the MAR prohibitions. However, given the limited extent of information that can be disclosed before this information may be considered inside information under MAR, market participants may find the benefits of this approach limited and, in any event, this approach is unlikely to be available for scenario C involving the offering of securities, as the information given in respect of the offering will inevitably need to be precise and in scenario B it will still be a sounding under MAR (as set out below), even if there is no inside information.

Previously the FCA Handbook had two relevant safe harbours, known as the "legitimate business" and "dutiful execution of client order" safe harbours which related to the execution of the orders, rather than disclosure of inside information. However, under MAR, the concept of dutiful execution has been removed and the legitimate business safe harbor has been narrowed. Nevertheless, MAR sets out a legitimate behaviour safe harbour in Article 9(2)(a) that permits an entity in possession of inside information to trade where doing so is in the normal course of its function as either a market marker or a counterparty.

A further safe harbour exists where an entity that is in possession of inside information executes an order on behalf of a third party legitimately in the normal course of the exercise of that person's employment, profession or duties (*Article 9(2)(b), MAR*). These safe harbours under Article 9 of MAR continue to permit a market participant to carry out a transaction in the course of its legitimate business. For example, the acquisition of instruments by the manager who is conducting the block trade would be within the MAR safe harbour, where the manager is acting in accordance with its legitimate business as a counterparty (*Article 9(2)(a), MAR*). These safe harbours would not, however, apply to the disclosure of inside information itself and also would not permit the ultimate buyers, who may have been market sounded (*see below*), to deal.

If information disclosed by a potential seller to the investment bank is inside information (and it generally will be, as noted above), the dissemination of that information to third parties before any announcement of a transaction would prima facie constitute unlawful disclosure (*Article 10, MAR*). However, disclosure of inside information is lawful, according to Article 10 of MAR, where it is disclosed in accordance with the "normal exercise of an employment, a profession or duties". Taking this into account, inside information could potentially be disclosed in each of scenarios A, B and C above, and therefore market participants need to consider whether this disclosure is lawful.

In relation to scenario B, MAR provides a new safe harbour that can be relied on when carrying out this activity in the form of a market sounding regime, which may apply to communications under block trades in a similar way to other transactions (*Article 11, MAR*) (Article 11). In particular, recital 35 of MAR confirms that where a market sounding procedure is used, the disclosing market participant will be considered to be acting within the normal course of his employment, profession or duties. The requirements in relation to market soundings are set out at Article 11 and include, among other elements, ensuring that the recipient of the information agrees that he is prohibited from using that information or attempting to use that information to acquire or dispose for his own account (or third party) financial instruments relating to that information. A large number of the new requirements set out in MAR relate to the form and nature through which the market sounding is conducted and recorded. In order to deal with the MAR requirements for market soundings, many market participants have a market sounding script or checklist that is read out to a potential investor by the disclosing market participant before conducting the sounding.

In relation to scenario C, the firm would not be able to rely on Article 11 as it does not apply to effecting transactions; rather, it only applies to gauging interest in the proposed transaction. Instead the firm would have to ensure that any disclosure made as part of the dealing was made in the normal exercise of its profession or duties (*Article 10(1), MAR*). In addition, the position of the market participant who has received the market sounding has to be considered. If such a participant is in receipt of inside information (following the market sounding) it is generally accepted that in order to be cleansed of this information an announcement would need to be made before the participant can deal. Therefore, in relation to scenario C, an announcement will typically be made before the deal is effected.

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In relation to scenario A, where an entity is gauging investor interest on its own initiative (and therefore not within the market sounding regime) it must be careful that doing so does not result in the unlawful disclosure of inside information. The entity would not be able to rely on Article 11 as it is not acting on behalf of, or on the account of, the issuer or seller. However, an entity reaching out to investors on the public side should not be disclosing inside information (that is, the information being disclosed should be public in this context).

It is open to a regulated firm to disclose to a seller, as a customer or a potential customer, that the firm may contact selected investors to gauge their appetite for a particular transaction, or kind of transaction, and to obtain the seller's consent to that course of action where appropriate. The then-Financial Services Authority suggested in its 5 April 2004 decision notice concerning Morgan Grenfell & Co Limited that informing the customer of intended action is essential in circumstances where the customer's interests might be disadvantaged by that action. This disclosure might be made, in theory, at any time between the initial meeting with the seller or its advisers and the time at which the firm is mandated to act on its behalf. Until mandated or requested to by a seller, banks are not restricted from unilaterally seeking bayside feedback without falling into the market sounding regime.

FCA regulation. Managers will need to additionally take into account the FCA's Handbook provisions, where relevant. In particular, the first tier of the FCA's Handbook consists of the Principles for Businesses (Principles), which include that a firm must:

- Conduct its business with integrity (*Principle 1*).
- Conduct its business with due skill, care and diligence (*Principle 2*).
- Pay due regard to the interests of its customers and treat them fairly (*Principle 6*).
- Manage conflicts of interest fairly, both between itself and its customers and between a customer and another client (*Principle 8*).

The Principles are frequently the basis on which the FCA takes enforcement action, including in cases where market abuse or insider dealing legislation has not been infringed. A disclosure of trading information which damages a customer's interests may not constitute market abuse but may breach Principles 6 and 8.

Block trade agreement representations

The following representations from the selling shareholder are typically included in the block trade agreement:

- Corporate power and authority.
- No conflicts.
- Title to the securities.
- No stamp taxes.
- No manipulation.
- No inside information.
- Directed selling efforts. This should be included if the block trade is structured pursuant to Regulation S under the Securities Act (Regulation S). No further representation may be required if the transaction is structured solely pursuant to Regulation S.

If the block trade is structured pursuant to Section 4(a)(1) of the US Securities Act of 1933 (Securities Act), no US law-specific representations are needed.

The following additional representations are required if the block trade is structured pursuant to Rule 144A under the Securities Act (Rule 144A) or Section 4(1½):

- General solicitation. While there is an argument that the general solicitation representation is not required in the case of a block trade structured pursuant to Rule 144A, it is, nevertheless, always provided in Rule 144A block trade agreements. The representation is required in the case of a Section 4(1½) block trade.
- Investment company.
- Passive foreign investment company (PFIC).

The following additional representations should be included if the block trade is structured pursuant to Rule 144A.

- Fungibility.
- Ongoing information.

There is no need for a representation that covers integration. The concept of integration is not applicable in the case of a sale by a shareholder, whether or not the shareholder is an affiliate of the issuer.

Representations that cover foreign private issuer (FPI) status and substantial US market interest (SUSMI) are sometimes included. In circumstances where the FPI status and SUSMI status of the issuer are obvious, no representations are required. However, in block trades involving a competitive process, due to the limited time available to review the issuer's status, the representations are typically included.

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US issues in block trades

There are a number of issues that need to be considered if shares are expected to be sold into the US.

Exemptions

The registration requirements of the US Securities Act of 1933 (Securities Act) apply worldwide, so any securities offering must be registered with the US Securities and Exchange Commission or structured pursuant to an exemption from the registration requirements. Possible exemptions include the following:

Section 4(a)(1). If the seller is not an affiliate of the issuer, it may be possible to structure the block trade under section 4(a)(1) of the Securities Act (Section 4(a)(1)), which allows the trade to be extended to both qualified institutional buyers (QIBs) and non-QIB investors in the US. Section 4(a)(1) is an exemption for secondary trades. The US securities lawyers involved should advise whether the seller is an affiliate of the issuer. There is a presumption of affiliation if the seller holds 10% or more of the issuer's voting securities or if it has representation on the issuer's board of directors; however, other factors may be taken into account. If the seller is not an affiliate of the issuer, this exemption is the easiest to use.

Regulation S. Regulation S under the Securities Act (Regulation S) is an exemption for securities sold outside the US. There are three categories of restriction based on the volume of US trading in the shares. For shares of most European or Asian issuers, it will be sufficient to comply with this exemption if the shares are sold outside the US and there are no direct selling efforts in the US. It is usually possible to sell to a US institution as long as the buy order originates outside of the US. Only on rare occasions will it be necessary to exclude sales to US persons outside the US. In any event, Regulation S permits sales to US-based advisers acting for non-US accounts whether or not the adviser is acting with discretion. In addition, a non-US adviser acting with discretion for a US account is not a US person.

Rule 144A and Section 4(1½). If a block trade is extended into the US, it is likely that the US securities lawyers involved will recommend that sales in the US be limited to QIBs. This will permit the block trade to be structured pursuant to Rule 144A under the Securities Act (Rule 144A) or Section 4(1½) of the Securities Act (Section 4(1½)). In the case of both exemptions, there cannot be general solicitation in the US, and the issuer cannot be an investment company, as defined in the US Investment Company Act of 1940, as amended (investment company). Specific representations will be needed in the purchase agreement for a Rule 144A offering (*see box "Block trade agreement representations"*). If the seller is unable to give representations on fungibility or ongoing information, the offering can be structured under Section 4(1½). If the block trade is structured pursuant to Section 4(1½), it is customary to ask QIBs to provide an investor representation letter.

Investment company and PFIC

If the issuer is an investment company, it will be difficult to structure the block trade under Rule 144A or Section 4(1½) (*see above*). The US lawyers involved should advise whether the issuer is an investment company. If the issuer is a PFIC, there may be adverse tax consequences for US investors that buy its shares. The US lawyers involved should advise whether the issuer is a PFIC.

Volcker rule

The Volcker rule places restrictions in certain circumstances on investment banks engaging in proprietary trading in "covered funds" (*section 619, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*). In general terms, a European or Asian company that is not an investment company will not be a covered fund. Accordingly, the investment company representation should be sufficient to confirm that the restrictions would not apply, and in most cases there is no need for any specific reference to the Volcker rule in the block trade agreement. If the issuer is an investment company, then the Volcker rule restrictions will need to be considered.

Section 4(a)(7)

Section 4(a)(7) of the Securities Act is an exemption from the registration requirements of the Securities Act for certain transactions extended to accredited investors in the US. This exemption is not practical for block trades in shares of non-US issuers.

Principles 6 and 8, and most of the FCA Conduct of Business (COB) Rules relating to designated investment business, concern business carried out with or for customers. For this purpose a customer includes pre-existing and potential customers of the bank but does not include a market counterparty. Market counterparties include governments, government agencies, central banks and monetary authorities, supranational organisations, state investment bodies, other regulated firms and certain other market professionals. In many cases, the manager is unlikely to classify the seller in a block trade as a professional client, so the Principles and COB Rules will be relevant to the relationship.

It follows that the Principles may be breached by actions carried out by the manager's employees before the manager has been mandated (as the Principles include potential customers) by a seller for a block trade, and irrespective of whether the seller is an existing customer of the manager. The Principles and COB Rules will clearly also apply after a mandate has been given.

Misuse of confidential information. Whether or not it signs a confidentiality agreement, the manager is bound by general principles of the law of confidence not to misuse or disclose any confidential information given to it in circumstances of confidence. If a potential seller provides information to the manager in relation to a proposed block trade (for example, its intention to enter into the trade, the nature of the trade it is contemplating or the identity of the securities to be traded), this information is likely to be held to be confidential information. On the other hand, information obtained by the manager from its own research or from speculation will not be confidential information.

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Each case will depend on its particular circumstances. For example, a seller that is known to have only one significant holding is more likely to be able to establish that the information it has given to the manager about its intention to undertake a block trade is confidential (even without having identified the security to be traded) than a seller that has many holdings and that has not revealed which security it intended to sell.

What constitutes misuse of confidential information will depend on the reason the manager received the information in each case. However, any use or disclosure of confidential information by the manager for its own or a third party's benefit without the seller's consent could constitute misuse of that information.

Once a confidentiality letter is signed the manager becomes bound by its terms. A breach of those terms is a breach of contract (*for background, see feature article "Drafting confidentiality agreements: the DNA of an NDA", www.practicallaw.com/9-536-5387.*)

Breach of agency duties. If the block trade is to be executed by the manager in an agency capacity, the manager will, following the mandate to act, owe the seller contractual and common law duties of agency; mainly, to act in the seller's best interests.

Basic provisions of an investor representation letter

We understand that no offering document or prospectus has been prepared.

We acknowledge that (a) we may not rely on any investigation that [US broker-dealer], any of its affiliates or any person acting on its on their behalf may have conducted, and none of such persons has made any representation to us, express or implied, with respect to the Securities or the Company, (b) we have conducted our own investigation with respect to the Securities and the Company, and (c) we have received all information that we believe is necessary or appropriate.

We confirm that we are a "qualified institutional buyer", as defined in Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), that is able to bear the economic risk of an investment in the Securities.

We understand that (a) the Securities are not being, and will not be, registered under the Securities Act, (b) the Securities are being offered and sold to us in a transaction that is exempt from the registration requirements of the Securities Act, and (c) the Securities are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act.

We agree (a) not to offer or sell the Securities, except [pursuant to an exemption from the registration requirements of the Securities Act] [outside the United States pursuant to Regulation S under the Securities Act] and (b) not to deposit the Securities in an unrestricted depositary receipt facility for so long as the Securities are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act.

(*The first alternative in the paragraph above is appropriate for most Section 4(1½) offerings. For certain Section 4(1½) offerings of securities listed on an exchange in the US, the lawyers providing the no registration opinion might require the use of the second alternative.*)

Even before it receives a mandate for the block trade, the manager may owe agency duties to the potential seller independent of the block trade, for example, as a result of a corporate advisory or corporate broking role.

DOCUMENTS

The main documents required for a block trade include the block trade agreement, law firm opinions and investor representation letters.

Block trade agreement

The block trade agreement will be short when compared to an underwriting agreement for an IPO or other offering by an issuer, even if the block trade is worth billions of pounds. The block trade agreement will contain representations from the seller, including as to valid title, no encumbrances, no inside information and compliance with securities laws (*see box "Block trade agreement representations"*). It will also contain pricing and settlement provisions. A block trade agreement will frequently also include an indemnity from the seller to the manager and a lock-up of the seller's remaining holdings in the issuer.

Some block trade agreements are structured so that the manager buys the shares from the seller and resells the shares to investors as principal, rather than as the seller's agent. In such a case, the manager and seller usually sign the block trade agreement only after the manager has found investors for the shares (that is, the book of demand is covered). For shares of a company incorporated in the UK, the manager will need to qualify for the intermediaries' exemption, which allows the manager to buy and resell the shares without incurring a stamp duty or stamp duty reserve tax liability (*sections 80A and 88A, Finance Act 1986*). Only the ultimate investors pay this duty or tax.

Other block trade agreements are structured so that the manager will act as the seller's agent.

Opinions

Law firms involved in a block trade will sometimes be asked to provide an opinion to the manager. This will generally cover the seller's corporate and other authority to sell the shares, its valid title to the shares and the validity and enforceability of the block trade agreement. In addition, if shares are expected to be sold into the US, US securities lawyers will more often than not be asked to provide a no registration opinion confirming that the transaction does not need to be registered with the US Securities and Exchange Commission (*see box "US issues in block trades"*). A no registration opinion from the seller's lawyers is especially helpful to banks bidding in a competitive process.

Investment banks have varying requirements, and opinions are requested for some block trades, but not others. If an opinion is requested, consideration should be given to the timing of the opinion. In some cases, it could be preferable for the opinion to be delivered at pricing rather than closing.

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Investor representation letters

US investors are sometimes asked to sign investor representation letters in order to participate in the block trade. If the transaction is structured pursuant to Section 4(1½) of the US Securities Act of 1933 (Securities Act), there are specific representations that the investor is asked to make. (*For an example of some of the basic provisions to be included in an investor representation letter in order to perfect an exemption from registration under the Securities Act, see box "Basic provisions of an investor representation letter"*).

DISCLOSURE

A manager bidding for a block of shares will need to know exactly what information about the trade or its purchase and subsequent resale will require public disclosure and when that information must be disclosed. This varies considerably depending on the statutory requirements in the jurisdiction in which the issuer is incorporated and the regulatory requirements in the jurisdiction in which its shares are listed. This must always be checked carefully in advance. The applicable rules for an issuer incorporated in England and Wales whose shares are admitted to trading on the London Stock Exchange are set out below.

Announcement

It would be usual for the seller to announce the launch of a block trade when books open (*see box "Indicative timetable for a competitive process"*). In the case of a bought deal the announcement would refer to a disposal. In the case of an AEO or back-stopped deal, the announcement would refer instead to an intention to dispose. In each case, the announcement would indicate the change in the seller's percentage holding in the issuer. It would not usually refer to the price at which the shares had been bought or back-stopped.

An announcement before the commencement of marketing is sometimes thought to be necessary to avoid any risk of committing market abuse through the making of "selective disclosure" to potential buyers of the shares. Under MAR, the new market sounding regime will generally be relied on in order to carry out marketing, pre-announcement (*see "Insider dealing and market abuse" above*).

Trade reporting

Under the Rules of the London Stock Exchange (LSE), the manager (assuming that it is a member firm) must submit a trade report of the dealing within prescribed deadlines. Where a transaction is effected outside of the trade reporting period (that is, between 7:15 am and 5:15 pm), the trade report must be submitted before 7:45 am on the next trading day.

The trade report will contain details of the transaction, including size and price. This would involve disclosing the price (where the manager was buying as principal) at a time when the manager may not yet have been able to offload its risk in full. It will have had some time on the evening of launch of the transaction to market to qualified institutional buyers in the US, but would only have had between one and two hours to access European demand on the morning of the pricing announcement. This might pose a commercial problem by revealing the price that the manager was committed to paying while the offering was still ongoing.

There are exemptions under the LSE Rules permitting the delayed publication of trade reports where a member firm elects to use block trading facilities (these will be further amended in relation to the MiFID II Directive (*see "MiFID II" below*)). Under a block trade facility, for example, publication would occur at the earlier of when it has been 90% offset and three business days after the relevant trade. The definition of a block trade for these purposes is made by reference to its size as a multiple of normal trading in the stock: for example, in the case of a SETSmm (the LSE's premier electronic trading service) security, the trade must be at least 75 times the normal market size.

DTR 5

If the block trade is of a block of shares in an issuer whose shares are admitted to trading on a regulated market and that issuer's home member state is the UK, the seller may need to notify the issuer under chapter 5 of the Disclosure Guidance and Transparency Rules (DTR 5) if it holds over a certain percentage of the issuer's voting rights and the block trade reduces its holding through a percentage threshold. The percentage thresholds that trigger this disclosure obligation are 3% and each one percent threshold above 3%, unless the issuer is a non-UK issuer in which case the percentage thresholds are 5%, 10%, 15%, 20%, 25%, 30%, 50 % and 75 %. A non-UK issuer is an issuer whose home member state is the UK other than a UK incorporated public company or a company incorporated in the UK or whose principal place of business is in the UK.

There are limited exceptions for issuers incorporated in certain other jurisdictions that are deemed to have substantially equivalent shareholding disclosure requirements. Currently, the FCA deems the US, Japan, Israel and Switzerland to be equivalent. The manager will also have a notifiable interest in a bought deal of this size. However, if the manager is acting as a market maker, the relevant percentage threshold for disclosure is 10% and, similarly, where the shares are held in the trading book, the percentage threshold is 5%. In assessing whether a notification is required, the net position at midnight on the day concerned should be considered, taking account of acquisitions and disposals executed during the day.

The notification to the issuer must be made as soon as possible and in any event within four trading days in the case of a non-UK issuer and two trading days in all other cases (DTR 5.8.3R). The issuer must publish the notification as soon as possible and in any event by the end of the trading day following receipt of the information, unless it is a non-UK issuer in which case it has three trading days to publish the notification (DTR 5.8.12R(1)). This disclosure is not usually problematic, however, as by the time it is published to the market, the manager is likely to have exited its position. Notifications must be made on form TR1 (*www.fca.org.uk/your-fca/documents/notifications-of-major-interests-in-shares-tr1-*).

POST-ANNOUNCEMENT

One selling issue that often arises is the manager's ability to disclose to potential buyers the status of its book of demand during the offering. This is a question it will frequently be asked and the answer has potential legal implications.

The simplest approach is to offer no comment. If that is not practicable, it is crucial to ensure that any statement made is not misleading, false or deceptive. If it is misleading and is made to induce the potential investor to participate in the offering, this could constitute a breach of the market manipulation prohibition in section 397 of FSMA, to which criminal liability could apply. Even if it is not intentionally misleading, the statement could constitute a

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negligent misstatement, a misrepresentation and a breach of contract.

If the status of the book of demand is to be disclosed, this should not be done selectively (that is, it should be sent by a Bloomberg to the newswires so that it is visible to the whole market) and the disclosure must be accurate, fair, clear and not misleading. Typical statements regarding the status of the book of demand include the following:

- "At the bottom end of the price range, the book is approximately half covered, based on indicated demand as of this morning."
- "The book is covered."
- "The offering is oversubscribed/multiple times oversubscribed."

MIFID II

MiFID II, which is due to apply from 3 January 2018, will introduce greater obligations for investment banks carrying out block trades, while also raising the following uncertainties:

- MiFID II will reintroduce a form of the old "concentration" rule whereby equities will have to be traded on a regulated market or other trading venue. This will modify Article 1(c) of the Association for Financial Markets in Europe (AFME) Model Block Trade Agreement, which permits the sale of a security outside a trading venue.
- The large-in-scale exemption for pre-trade transparency will still apply, although the thresholds for reaching the required size will increase. Similarly, the deferral period for post-trade transparency will still exist, but the time periods will generally be decreased (*see "Trade Reporting" above*). The reference price waiver or negotiated trade waiver, or both, to the extent that these were relied on, will be more problematic once MiFID II applies given that the trading volume through these waivers will be restricted by volume caps.
- The application of the best execution rule will depend on the structure of the block trade. In relation to bought or back-stopped deals it is likely that best execution requirements will be less relevant than in relation to an agency deal.
- Additional duties will be owed to professional clients and eligible counterparties in terms of investor protection rules, such as cost and charges, but the nature of a block trade should mean that these duties are more limited than, for example, an advisory or discretionary mandate. There are extended rules on conflicts of interest, but they will still be dealt with using similar procedures.
- A number of investment banks that provide agency deals may register as a trading venue, such as an organised trading facility, as they may be considered as providing "multilateral" services under MiFID II (*Article 1(7)*). However, there is currently uncertainty over this point pending European Securities and Markets Authority (ESMA) Level 3 guidance.

Nicholas Holmes is a partner at Ashurst LLP and Peter Castellon is a partner at Proskauer Rose LLP.

Related information

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Full name: Block trade purchase agreement (principal basis).

DATED

SECONDARY BLOCK TRADE AGREEMENT

between

[FULL NAME OF SELLER]

and

[FULL NAME OF MANAGER]

CONTENTS

CLAUSE

THIS AGREEMENT is dated [DATE]

Drafting Note A:
Background 1 – this agreement

Drafting Note B:
Background 2 – this agreement

PARTIES

(1) [FULL LEGAL NAME], a [company] registered in [JURISDICTION] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Seller**).

(2) [FULL LEGAL NAME], a [company] registered in [JURISDICTION] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Manager**).

BACKGROUND

(A) The Seller proposes, subject to the terms and conditions stated herein, to sell [AGGREGATE NUMBER OF SHARES TO BE SOLD] [TITLE OF SHARES] (**Shares**) of [NAME OF COMPANY], a company incorporated under the laws of England and Wales (**Company**), to the Manager.

(B) The Shares to be sold hereunder shall be referred to as the Securities (**Securities**). The Securities will be purchased by the Manager as a block trade in accordance with Regulation S (**Regulation S**) under the US Securities Act of 1933, as amended (**Securities Act**) and subject to the rules and regulations of the London Stock Exchange in relation to such trades, subject, however, to the additional matters set out below.

(C) The Seller understands that the Securities will be resold by the Manager outside the United States in accordance with Regulation S [and in the United States to investors reasonably believed to be qualified institutional buyers, as defined in Rule 144A (**Rule 144A**) under the Securities Act].

Drafting Note C:
Background 3 – Securities sold into United States (optional US wording)

1. SELLER'S REPRESENTATIONS AND WARRANTIES

The Seller represents and warrants to, and agrees with, the Manager, as of the date hereof and as of the Closing Date (as defined in clause 3), that:

(a) the Seller has been duly incorporated and is validly existing under the laws of [JURISDICTION]. It has full power under its constitutional documents and applicable law, and all authorisations, approvals, consents and licences required by it have been unconditionally obtained and are in full force and effect, to permit it to enter into and perform this Agreement. This Agreement has been duly authorised, executed and delivered by the Seller and is a valid and binding agreement of it enforceable in accordance with its terms;

(b) the sale and delivery of the Securities and the compliance by it with all of the provisions of this Agreement, as well as the consummation of the transactions herein contemplated, will not conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a material default under, its constitutional documents, any agreement or instrument to which it is a party or by which it is bound or to which any of its property or assets is subject, or any statute or any order, rule or regulation of any court or governmental agency or body having jurisdiction over it or its property or assets;

(c) no person has any conflicting right, contingent or otherwise, to purchase or to be offered any of the Securities. The Seller has valid title to, and the legal right and the power to sell and transfer full beneficial and legal interest in, the Securities, and transfer of the Securities to the Manager will pass title to such Securities, free and clear of all security interests, liens, encumbrances, equities or other claims together with all rights and advantages now and hereafter attaching to such Securities. The Securities rank *pari passu* with and are of the same class as the other Shares;

(d) there are no legal or governmental proceedings pending or, to the knowledge of the Seller, threatened that may prevent the sale as contemplated by this Agreement or permit the unwinding of the sale and the clawback of the Securities;

(e) no stamp duty or stamp duty reserve tax, or VAT or withholding tax or other similar issuance or transfer taxes or duties are payable by or on behalf of the Manager in [INSERT ALL RELEVANT JURISDICTIONS] in connection with the sale and delivery of the Securities in the manner contemplated hereunder or the consummation of any other transaction contemplated herein in connection with the sale of such Securities;

Drafting Note D:
Clause 1(e) - No stamp duty

(f) none of the Seller, any of its affiliates (where, in this agreement, the term **affiliate** shall have the meaning specified in Rule 501(b) of Regulation D (**Regulation D**) under the Securities Act) or any person acting on its or their behalf has or will make bids or purchases for the purpose of creating actual or apparent active trading in, or of raising the price of, any Shares or any right to purchase Shares or securities convertible into or exchangeable or exercisable for Shares that is designed to or that has constituted, or that might reasonably be expected to cause or result in, manipulation of the price of any security of the Company;

(g) the Seller is not aware of any information (including without limitation any information regarding any material adverse change or prospective material adverse change in the condition of, or any actual, pending or threatened litigation, arbitration or similar proceeding involving, the Company) that is not described in the Company's most recent annual report or subsequent public information releases (collectively, the **Publicly Available Information**) that is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the Company and its subsidiaries. To the best of its knowledge, the Publicly Available Information is accurate and complete in all material respects; and the sale of the Securities will not constitute a violation by it of [Rule 10b-5 under the US Securities Exchange Act of 1934, as amended (**Exchange Act**),]the regulations of the Financial Services Authority or any other applicable law prohibiting market abuse or insider dealing in securities;

Drafting Note E:
Clause 1(g) - No inside information (optional US wording)

(h) none of the Seller, any of its affiliates or any person acting on its or their behalf has engaged or will engage in any directed selling efforts with respect to the Securities, as defined in Regulation S [or in any general solicitation or general advertising with respect to the Securities, as defined in Regulation D];

Drafting Note F:
Clause 1(h) - US directed selling efforts

Drafting Note G:
Clause 1(h) - General solicitation and advertising (optional US wording)

(i) [no registration of the Securities under the Securities Act is required for the transfer and sale of the Securities in the manner contemplated hereby;]

Drafting Note H:
Clause 1(i) - No registration (optional US clause)

(j) [the Company is not an investment company within the meaning of the US Investment Company Act of 1940, as amended;]

Drafting Note I:
Clause 1(j) - Investment company (optional US clause)

(k) [the Company is not a passive foreign investment company within the meaning of section 1297 of the US Internal Revenue Code of 1986;]

Drafting Note J:
Clause 1(k) - Passive foreign investment company (optional US clause)

(l) [the Securities, when issued, were not of the same class (within the meaning of Rule 144A) as any securities then listed on a national securities exchange registered under section 6 of the Exchange Act or quoted in a United States automated inter dealer quotation system and otherwise satisfy the eligibility requirements of Rule 144A(d)(3) under the Securities Act; and]

Drafting Note K:
Clause 1(l) - Fungibility (optional US clause)

(m) [the Company [is a reporting company under section 13 or section 15(d) of the Exchange Act **OR** is exempt from the reporting requirements of the Exchange Act by virtue of the exemption under Rule 12g3-2(b) thereunder **OR** has undertaken to provide to any holder of the Securities, requesting for itself or on behalf of a prospective investor, the information to be provided pursuant to Rule 144A(d)(4) of the Securities Act].]

Drafting Note L:
Clause 1(m) - Ongoing information (optional US clause)

2. SALE AND PURCHASE

2.1 Subject to the terms and conditions set out in this Agreement, the Seller agrees to sell the Securities to the Manager at a price per security of [AMOUNT] (**Purchase Price**), which equals [AGGREGATE PRICE] (**Total Purchase Price**) in aggregate for all the Securities. The Manager agrees to purchase the Securities at the Total Purchase Price.

2.2 The parties acknowledge and agree that the sale of the Securities may be effected outside a regulated market or multilateral trading facility, and in particular the parties acknowledge and agree that the sale of the Securities shall not be an on-exchange transaction that is subject to the rules of the London Stock Exchange.

3. SETTLEMENT

Unless otherwise agreed by the parties, completion of the sale and purchase of the Securities will take place at [TIME] (London time) on [CLOSING DATE] (such time and date to be the **Closing Date**), by credit through the facilities of CREST of the Securities to an account or accounts designated by the Manager, against payment by or on behalf of the Manager of the Total Purchase Price, less any fees and expenses payable by the Seller pursuant to clause 5 , in same-day funds. The Securities will be transferred with full title guarantee, fully paid and free from all liens, charges, claims, equitable interests, encumbrances and any other interests or rights of any third party whatsoever and together with all rights now or hereafter attaching thereto, including the right to receive and retain all dividends and other distributions declared, paid or made after the date hereof.

4. SELLER'S COVENANTS

The Seller covenants and agrees with the Manager that:

(a) it will promptly pay or transfer to or to the order of the Manager on receipt, any dividend or distribution declared or other rights declared or distributed by the Company for the Securities for which a record date occurs on or after the date hereof;

(b) it undertakes, at its own expense, to execute all such documents and do all such acts and things as the Manager may reasonably require in order to give effect to the terms of this Agreement and to enable the sale and purchase of the Securities to be carried out and given full force and effect;

(c) it will notify the Manager forthwith if on, or at any time before, the Closing Date it comes to the Seller's knowledge that any of the representations, warranties, undertakings or agreements set out in clause 0 ceases to be true and accurate or becomes misleading in any respect or that there has been any breach of any of such representations, warranties, undertakings or agreements;

(d) the Seller will comply with all applicable filing, announcement and notice requirements in connection with the transactions contemplated by this Agreement; and

(e) during the period beginning on the date hereof and ending [NUMBER OF DAYS] days from the date hereof, neither it nor any of its agents, nominees, subsidiary companies or associated companies will offer, sell, contract to sell or otherwise dispose of any Shares, or securities convertible into, exchangeable for or representing the right to receive, any Shares, without the Manager's prior written consent.

Drafting Note M:
Clause 4.1 – Lock-up

5. EXPENSES

Except as may otherwise be provided in this Agreement, each party shall bear its own fees, disbursements, costs and expenses incident to the performance of its obligations hereunder; except that the Seller shall bear all of the costs of VAT, stamp duties, depositary fees, transfer taxes and duties incident to the sale and delivery of the Securities. The Seller agrees, irrespective of whether the sale contemplated herein is completed, to pay to the Manager amounts equal to the fees, disbursements and expenses of the Manager's legal advisers and the Manager's out-of-pocket expenses incurred in connection with the transaction contemplated by this Agreement together in each case with an amount equal to any VAT payable thereon. The Manager shall be entitled to deduct the fees and expenses incurred by it from the amounts payable to the Seller pursuant to clause 3. The agreements and covenants of the Seller in this clause 5 shall survive termination of this Agreement.

6. CLOSING CONDITIONS

6.1 The obligations of the Manager hereunder shall be subject to the following conditions:

(a) all representations and warranties and other statements herein by the Seller are, at and as of the date hereof and at and as of the Closing Date, true and correct; and

(b) before the Closing Date, there shall not have occurred any change, or any development involving a prospective change, in the condition, financial or otherwise, or in the earnings, business or operations of the Company and its subsidiaries, taken as a whole, from that set forth in the Publicly Available Information issued before the date hereof that, in the sole judgement of the Manager, is material and adverse and that makes it in the sole judgement of the Manager, impracticable to conduct the offering of the Securities in the manner contemplated herein.

6.2 The Manager in its sole discretion may waive any of the foregoing conditions. If any condition to the Manager's obligations has not been satisfied or waived before the Closing Date, the Manager may elect, in its sole discretion, to terminate this Agreement. clause 5, clause 7, clause 8, clause 9, clause 11, clause 12, clause 13 and clause 14 shall survive any such termination.

7. INDEMNITY

7.1 The Seller will indemnify and hold harmless the Manager against any losses, claims, damages or liabilities to which the Manager may become subject insofar as such losses, claims, damages or liabilities (or actions in respect thereof) relate to or arise out of any breach or alleged breach of the representations and warranties, covenants or other undertakings of the Seller in this Agreement or the Manager's participation in the transaction contemplated by this Agreement. The Seller agrees to reimburse the Manager for any legal or other expenses reasonably incurred (together with any applicable VAT) by the Manager in connection with investigating or defending any such action or claim as such expenses are incurred.

7.2 The obligations of the Seller under this clause 7 shall be in addition to any liability that the Seller may otherwise have and shall extend, on the same terms and conditions, to the directors, officers, employees and controlling persons within the meaning of the Securities Act, as the case may be, of the Manager and each of its affiliates within the meaning of the Securities Act (and shall include the partners of any such affiliate).

7.3 The obligations of the Seller set forth in this clause 7 shall survive termination of this Agreement.

8. NO DISCLOSURE

Before the Closing Date, except as may be required by applicable law or regulation, the transactions contemplated by this Agreement may not publicly be disclosed to any third party or otherwise publicly referred to by the Seller without the prior written consent of the Manager.

9. SURVIVAL OF REPRESENTATIONS

The indemnities, agreements, representations, warranties and other statements of the Seller, as set out in this Agreement or made by or on behalf of it, shall remain in full force and effect and shall survive delivery of and payment for the Securities.

10. TERMINATION

10.1 This Agreement shall be subject to termination in the absolute discretion of the Manager by notice given to the Seller, before the Closing Date, if at any time before such time:

(a) trading in the Shares shall have been suspended by the London Stock Exchange or trading in securities generally on such exchange shall have been suspended or limited, or minimum prices shall have been established on such exchange;

(b) a banking moratorium shall have been declared by the relevant authorities in the UK or the United States, or there is a material disruption in banking or securities settlement or clearance services in the UK or the United States; or

(c) there shall have occurred any outbreak or escalation of hostilities, declaration by the UK or the United States of a national emergency or war or other calamity or crisis where the effect of clause 10.1(c) on the financial markets is such as to make it, in the sole judgement of the Manager, impractical or inadvisable to proceed with the offering or delivery of the Securities.

Drafting Note N:
Clause 10.1 – Termination events

10.2 Clause 5, clause 7, clause 8, clause 8, clause 11, clause 12, clause 13 and clause 14 shall survive any termination of this Agreement and shall continue in full force and effect.

11. NOTICES

11.1 All statements, requests, notices and agreements hereunder shall be in writing, and shall be delivered or sent by mail or facsimile transmission:

(a) if to the Manager to [NOTICE ADDRESS FOR MANAGER], Attention: [NAME FOR NOTICE TO MANAGER], fax: [FACSIMILE NUMBER FOR MANAGER];

(b) if to the Seller to [NAME AND ADDRESS OF SELLER], Attention: [NAME FOR NOTICE TO SELLER], fax: [FACSIMILE NUMBER OF SELLER].

11.2 Any such statements, requests, notices or agreements shall take effect, in the case of a letter, statement, request, notice or agreement sent by mail or hand delivery, at the time of delivery, or in the case of facsimile transmission, at the time of despatch, unless expressly stated otherwise in any such document.

12. THIRD PARTY RIGHTS

A person that is not a party to this Agreement, except with respect to clause 7 hereof, has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement. This Agreement may be rescinded, varied or amended in any way and at any time by the parties to this Agreement without the consent of the persons contemplated by clause 7 hereof. Time shall be of the essence in this Agreement.

13. GOVERNING LAW

This Agreement (and any dispute, controversy or claim of whatever nature arising out of or in any way relating to this Agreement or its formation) shall be governed by and construed in accordance with English law, and the parties irrevocably submit to the courts of England and Wales, which shall have non-exclusive jurisdiction to hear and decide any suit, action, dispute or proceeding relating to this Agreement (**Proceedings**), and for this purpose each party irrevocably submits to the jurisdiction of the courts of England and Wales. Each party waives any objection it may at any time have to the courts of England and Wales being nominated as the forum to hear and decide Proceedings and agrees not to claim that the courts of England and Wales are not an appropriate or convenient forum. [Process relating to the Proceedings may be served on the Seller by being delivered to [SERVICE ADDRESS IN ENGLAND AND WALES]. This will not affect the Manager's rights to serve process in any other manner.]

Drafting Note O:
Clause 13 – Governing law

14. COUNTERPARTS

This Agreement may be executed by any one or both of the parties hereto in any number of counterparts and via facsimile, each of which shall be deemed to be an original, but all such counterparts shall together constitute one and the same instrument.

This agreement has been entered into on the date stated at the beginning of it.

[MANAGER]	**[SELLER]**
By:	By:
Name:	Name:
Title:	Title:

Endnotes

A Background 1 – this agreement

This agreement assumes that the issuer is a company incorporated in England and Wales and that its shares are listed on the Official List of the London Stock Exchange (LSE) and admitted to trading on the LSE's Main Market. If other jurisdictions or stock exchanges are involved, this can be accommodated subject to minor amendments. This standard document is for a block trade where the manager acts as principal. The agreement is governed by English law.

This agreement provides for a subsequent resale of the shares by the manager outside the United States (US) in reliance on ***Regulation S (www.practicallaw.com/5-107-7128)*** of the US ***Securities Act of 1933, as amended (www.practicallaw.com/1-382-3805)*** (Securities Act). It also provides the additional representations required for a ***Rule 144A (www.practicallaw.com/6-382-3780)*** or ***Section 4(1½) (www.practicallaw.com/8-382-3798)*** offering into the US.

Rule 144A and section 4(1½) are exemptions from the registration requirements of the Securities Act . They allow securities to be offered to certain investors in the US without having to register the transaction with the US ***Securities and Exchange Commission (www.practicallaw.com/9-382-3806)*** (SEC). The exemptions also allow securities to be sold to large sophisticated institutional investors called ***qualified institutional buyers (www.practicallaw.com/1-382-3730)*** (QIBs).

Section 4(1½) is usually used either if:

- The securities are not eligible for Rule 144A because the securities, when issued, were fungible with shares (or ***American Depositary Receipts (www.practicallaw.com/6-385-1867)***) listed on the New York Stock Exchange or Nasdaq Stock Market.
- The company is unable or unwilling to provide the ongoing information required by Rule 144A(d)(4). For more information on the requirements of Rule 144A(d)(4), see *Drafting note, Ongoing information (optional US clause).*

For more information on these two exemptions, see *PLC US Corporate & Securities, Practice note, Resales under Rule 144A and Section 4(1½) (www.practicallaw.com/6-382-8768).*

B Background 2 – block trades

Block trades are secondary sales of large blocks of existing shares in a company. Typically these transactions are launched, executed and priced on a fast-track basis, sometimes within a twenty-four-hour period. The timetable for a block trade can start with investment banks receiving a confidentiality agreement after the market closes at 5.00 pm. For more information on block trades, see *Article, Block trades: an introduction (www.practicallaw.com/8-202-2671)*, and on block trade confidentiality agreements, see *Article, Strictly confidential: new block trade confidentiality letter (www.practicallaw.com/3-500-2224).*)

The sale and purchase agreement for a block trade is short when compared to an underwriting agreement for an IPO because:

- Block trades are executed on a tight timetable.
- The shares are already listed, so there is significant publicly available information about the company.

The sale and purchase agreement is between the seller of the shares and the investment bank that is acting as manager. If acting as principal, the manager buys the shares from the seller and resells them to investors. The manager retains any premium to the extent that it can resell the shares at a higher price.

A block trade can be structured in several ways, including:

- A bought deal (where the manager buys the shares from the seller before it starts marketing them).
- An accelerated equity offering (where the manager builds a book of demand before agreeing on a price).

The manager acts as a principal in bought deals and sometimes acts as a principal in accelerated equity offerings. In other cases, the manager may act as an agent in accelerated equity offerings.

C Background 3 – Securities sold into United States (optional US wording)

Insert the optional wording in brackets if the Securities will be sold into the US.

D Clause 1(e) – No stamp duty

Insert the relevant jurisdictions that this clause applies to in the square brackets, for example:

- Jurisdiction governing this agreement.
- Countries or US states of incorporation of the Company and the Seller.
- Jurisdictions of any listing of Securities and of any clearance system through which Securities are held.

E Clause 1(g) – No inside information (optional US wording)

Insert the optional wording in brackets if the Securities will be sold into the US.

F Clause 1(h) – US directed selling efforts

One of Regulation S' requirements is that no directed selling efforts can be made in the US. The Seller is representing that it has made no previous effort to sell the shares in the US. For more information on directed selling efforts, see *Practice note, Regulation S Transactions: No Directed Selling Efforts in the US (www.practicallaw.com/5-383-1182).*

G Clause 1(h) – General solicitation and advertising (optional US wording)

Insert the optional wording in brackets relating to general solicitation and advertising if the Securities will be sold into the US.

Securities sold in the US pursuant to Rule 144A or Section 4(1½) may only be offered to QIBs. General solicitation and general advertising in the US are prohibited. (For more on this prohibition, see *PLC US Corporate & Securities, Practice note, Section 4(2) and Regulation D Private Placements: No General Solicitation or Advertising of the Offering (www.practicallaw.com/8-382-6259)*). The ***Jumpstart Our Business Startups Act of 2012 (www.practicallaw.com/2-518-7869)*** (JOBS Act), enacted 5 April 2012, requires the SEC to revise Rule 144A by 4 July 2012 to allow general solicitation and advertising in certain circumstances. This revision of Rule 144A has been delayed (see *Legal update, SEC Will Miss JOBS Act Rulemaking Deadline for Regulation D and Rule 144A (www.practicallaw.com/5-520-1232)*). However, even after Rule 144A is revised, it is likely that market participants in block trades will continue the practice of not engaging in general solicitation or general advertising. The JOBS Act does not, by its terms, affect Section 4(1½) transactions. For more information on the JOBS Act's changes to general solicitation and advertising, see *Practice note, JOBS Act: Regulation D and Rule 144A General Solicitation Summary (www.practicallaw.com/1-518-7172).*

H Clause 1(i) – No registration (optional US clause)

Include this representation if the Securities will be sold into the US pursuant to Rule 144A or Section 4(1½).

This representation can be removed if the Seller's US lawyers are providing a no-registration opinion, although it is common for both the representation and the opinion to be given. The Seller's lawyers should volunteer a no-registration opinion.

If an opinion is to be delivered instead of the inclusion of this representation, it should be delivered at the time of execution of this agreement. It is generally believed that it is impractical to have the delivery of opinions included as closing conditions in *clause 6* in an entirely secondary offering.

I Clause 1(j) – Investment company (optional US clause)

Include this representation if the Securities will be sold into the US pursuant to Rule 144A or Section 4(1½).

This representation can be removed if the Seller's US lawyers are covering this in an opinion.

It is crucial for the Seller's US lawyers to determine whether the Company is an investment company if the block trade will be sold into the US. If the Company is an investment company, the sale of shares must comply with the US Investment Company Act of 1940.

This standard document does not provide for the sale of shares of an investment company. The requirement of either a representation or an opinion helps to ensure that the necessary investment company determination is made.

If an opinion is to be delivered instead of the inclusion of this representation, it should be delivered at the time of execution of this agreement. It is generally believed that it is impractical to have the delivery of opinions included as closing conditions in *clause 6* in an entirely secondary offering.

J Clause 1(k) – Passive foreign investment company (optional US clause)

Include this representation if the Securities will be sold into the US pursuant to Rule 144A or Section 4(1½).

If the Company is a passive foreign investment company, US shareholders may have to pay tax on their proportionate share of the Company's revenue, regardless of whether it pays a dividend.

K Clause 1(l) – Fungibility (optional US clause)

Include this representation if the Securities will be sold into the US pursuant to Rule 144A, but it is not required if the Securities are being sold into the US pursuant to section 4(1½).

Rule 144A is not available if the Securities, when issued, were fungible with shares (or ADRs) listed on the New York Stock Exchange or the Nasdaq Stock Market. If the Securities were fungible, then section 4(1½) can be used.

L Clause 1(m) – Ongoing information (optional US clause)

This representation is not required if the Securities are being sold in the US in accordance with section 4(1½).

However, include one of the options in this clause if the Securities are being sold in the US in accordance with Rule 144A. Under Rule 144A(d)(4), a holder or prospective buyer must have the right to obtain certain information on request from the Company, unless the Company is either a:

- Reporting company required to file reports with the SEC under the Exchange Act.
- Non-US company exempt from reporting because it complies with the information publication requirements of Rule 12g3-2(b) (www.practicallaw.com/5-385-1561) under the Exchange Act.

For more information on Rule 12g3-2(b), see *PLC US Corporate & Securities, Practice note, Rule 12g3-2(b) Filing Exemption: Why and How to Qualify (www.practicallaw.com/3-384-8503).*

If the Company is not a US reporting company, is not complying with Rule 12g3-2(b), and is unable or unwilling to provide the ongoing information required by Rule 144A(d)(4), then the block trade should be structured under section 4(1½).

M Clause 4.1 – Lock-up

The lock-up will not be required if the Seller is disposing of its entire holding in the Company. The lock-up period usually ranges from 90 to 365 days. The duration of the lock-up is driven by the expectations of the market and depends on a variety of factors, such as the size of the stake being sold and the size of the stake being retained by the Seller. The lock-up period does not usually last for more than one year.

N Clause 10.1 – Termination events

Where the Company has material operations or assets in any country other than the UK, or where any disruptions in any other major markets would have an adverse effect on the sale of the Securities, the parties may consider including such countries (along with the UK and the US) in *clause 10.1(b)* and *clause 10.1(c)*.

O 13. Governing law

Insert the optional wording in brackets if the Seller's registered address is an address outside England and Wales.

The wording in square brackets in not required where the Seller is not registered in England and Wales but has a business presence in England and Wales. In those circumstances, it is regarded as domiciled within the jurisdiction and can be served at the place in the jurisdiction where it carries out its business activities.

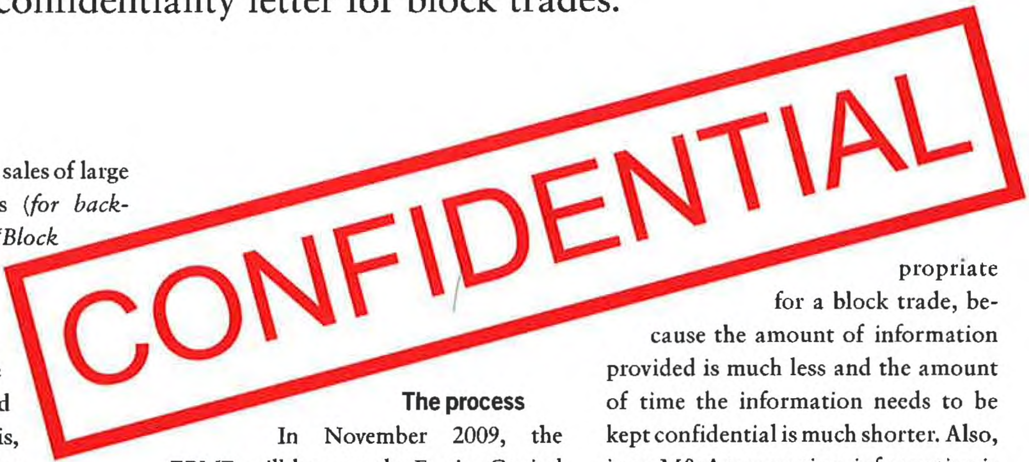
The rules for service are set out in the ***Civil Procedure Rules (www.practicallaw.com/6-107-5906)*** (CPR) Rule 6, under which special rules apply to service out of the jurisdiction (that is, England and Wales) and, if outside the EU, permission of the court may also be required.

This can be time-consuming and increases the cost of litigation. In addition, in all cases service would have to comply with local law and, therefore, the advice of local lawyers would be required. Unless the claim form has been served properly, the English courts will not have jurisdiction to determine the claim. Providing for service within the jurisdiction will avoid this, and is, therefore, recommended.

Strictly confidential

New block trade confidentiality letter

Peter Castellon of **Baker & McKenzie LLP** and **Nicholas Holmes** of **Ashurst LLP** explain the motivation behind, and drafting of, the new standard form confidentiality letter for block trades.



Block trades are secondary sales of large blocks of existing shares (*for background, see feature article "Block trades: an introduction", www.practicallaw.com/8-202-2671*). Typically, these transactions are launched, executed and priced on a fast-track basis, sometimes within a 24-hour period, and are frequently run as competitive bid processes late in the evening.

Often, the first sign that the banks get of the impending bid process is when they are asked to sign a form of confidentiality letter. These letters are sometimes contentiously or inappropriately drafted, and valuable time is wasted in negotiating them, resulting in a delay in receiving information and, consequently, in less time being available to focus on pricing the shares. The European Primary Markets Division (EPMD) has recently issued a standard form confidentiality letter (the standard form) (*see box "Standard form confidentiality letter"*).

The hope is that use of the standard form will save time and effort, and that time can instead be used in assessing the appropriate pricing of the block. The timing of the introduction of the standard form is good: there is a general belief among investment bankers that block trades will become more frequent in the months to come, as share prices recover from their recent lows.

The process

In November 2009, the EPMD will become the Equity Capital Markets division of the newly-formed Association for Financial Markets in Europe (AFME). AFME is a European trade body formed through the merger of the London Investment Banking Association and the European operations of the Securities Industry and Financial Markets Association.

AFME will continue the work of these bodies in bringing together the shared interests of 200 member banks and securities firms to promote policies and practices that work to expand and perfect markets, while enhancing the public's trust and confidence in the industry. The Equity Capital Markets division focuses on the primary equity markets and provides a forum for industry professionals to explore areas of common interest and to facilitate best practice.

The EPMD created a working group in mid-2008 to consider a standard form. Part of the problem with confidentiality letters to date is that some are based on a mergers and acquisitions (M&A) precedent. An M&A model is not appropriate for a block trade, because the amount of information provided is much less and the amount of time the information needs to be kept confidential is much shorter. Also, in an M&A transaction, information is given to a potential acquirer, which might be a company that does not have systems in place to keep information confidential, so a detailed confidentiality letter could be of value; whereas, in a block trade, information is given to an investment bank that will have extensive systems of Chinese walls and information barriers to handle confidential information.

The resulting standard form, finalised in July 2009, resolved several recurring problems that have in the past caused wasted time during the crucial pricing period: in particular, over-broad definitions of confidential information, and trading restrictions that are too widely drafted (*see below*).

Key sections

Particularly important provisions in the standard form include:

Preamble. The preamble refers merely to a potential block trade. The issuer's name is not mentioned anywhere in the agreement.

Standard form confidentiality letter

[Letterhead of Selling Shareholder]

[Name and address of investment bank]

Date:

Dear Sirs,

We refer to a potential block trade (the "Transaction"). As a condition to our disclosing any information to you relating to the Transaction, we require that you agree in writing to the following:

1. You shall not, without our prior written consent and subject to paragraph 2 below, use, distribute, or disclose to any third party any information (except for information that can be obtained from publicly available sources, was in your possession on a non-confidential basis prior to the date of this letter agreement, or that comes into your possession on a non-confidential basis from a third party who is not known by you to be under a confidentiality obligation to us) that is disclosed to you by us or our representatives concerning the Transaction, including (a) information concerning the underlying company and **[Selling Shareholder]** that is provided in connection with the Transaction, (b) knowledge about the contemplation of, and preparation for, the Transaction, and (c) the contents of this letter agreement ("Confidential Information").

2. You shall:

   (a) use the Confidential Information solely to the extent necessary in connection with your possible engagement referred to above;

   (b) disclose Confidential Information solely to your advisors, your employees, your affiliates or the employees of your affiliates to the extent necessary for the purposes of paragraph 2(a) above; *provided, however,* that such employees and affiliates are required to use or disclose the Confidential Information solely in accordance with this letter agreement;

   (c) otherwise disclose Confidential Information solely to the extent that you, or any of your affiliates, your employees or the employees of your affiliates, is required to do so by law, regulation, regulatory process, governmental agency, or court order; *provided* that you have first, to the extent practicable and permissible, (i) provided us with prompt notice of such obligation and any related regulatory or legal process to enable us to seek an appropriate protective order or other remedy and (ii) consulted with us with respect to our taking steps to resist or narrow the scope of such obligation;

   (d) if we so request, promptly return to us all Confidential Information we have provided you and, to the extent practicable, destroy all materials you have produced that are derived from, or contain, such Confidential Information; *provided* that you may retain Confidential Information and any such derivative materials, to the extent required for legal, regulatory or internal compliance purposes, or which have been created pursuant to automatic electronic archiving procedures.

3. No failure or delay by us in exercising any right, power, or privilege set out in this letter agreement shall operate as a waiver, nor shall any single or partial exercise preclude any other or further exercise of any right, power or privilege under this letter agreement.

4. You acknowledge that those of your employees who receive Confidential Information and those employees of your affiliates who receive Confidential Information are not permitted to trade in the securities of the Company in breach of any applicable securities laws. **[NOTE: This provision is not intended to restrict ordinary-course, public-side trading.]**

5. Without prejudice to the rights and remedies otherwise available to us, we shall be entitled to seek equitable relief by way of injunction if you breach or threaten to breach any of the provisions of this letter agreement.

6. This letter agreement contains the entire agreement between you and us concerning the confidentiality of the Confidential Information and shall have effect to the exclusion of any other obligation of confidentiality that might otherwise apply to you.

7. No modification or waiver of the terms and conditions of this letter agreement shall be binding on you or us unless agreed in writing.

8. This letter agreement shall be governed by the laws of **[England and Wales]**. You agree to submit to the exclusive jurisdiction of the courts of England and Wales regarding any dispute in connection with this letter agreement. A person who is not a party to this letter agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any form of this letter agreement. **[Under appropriate circumstances, the law and jurisdiction of New York and/or any other European Economic Area jurisdiction may be used. Bracketed text to be amended or deleted if English law is not chosen to govern the agreement.]**

9. This letter agreement will remain in effect until the earlier of the following: (a) the time and date on which marketing of the Transaction begins, (b) a date determined by mutual agreement of the parties to this letter agreement and (c) twelve months from the date of this letter agreement.

10. This letter is consistent in all material respects with the standard form Block Trade Confidentiality Agreement promulgated by SIFMA.

[Signature Page Follows]
Please sign a copy of this letter and return it to us.
Yours faithfully,

[Selling Shareholder]

By: ____________________
Name:
Title:

Accepted and acknowledged

[Investment Bank]

By: ____________________
Name:
Title:

Section 1: general confidentiality requirement. Confidential information is defined to mean any information provided by the selling shareholder or its representatives regarding the block trade. There are three carveouts from the definition:

- Information that can be obtained from publicly available sources.
- Information already in the bank's possession on a non-confidential basis.
- Information that comes into the bank's possession on a non-confidential basis from a third party that is not known to be under a confidentiality obligation.

The first paragraph is fairly standard in confidentiality letters and was not the subject of much discussion.

Section 2: permitted uses. Sections 2(a) and 2(b) contain fairly generic requirements to use the information for purposes of the block trade.

Section 2(c) provides the bank with the ability to respond to regulatory enquiries without breaching the confidentiality requirements. To the extent practical and permissible, the bank will notify and consult with the selling shareholder.

Section 2(d) contains a requirement to return or destroy material at the request of the selling shareholder. There is a proviso to this requirement: the bank may retain confidential information and derivative materials to the extent required for legal, regulatory or internal compliance purposes or that have been created pursuant to automatic electronic archiving procedures. This is a very important proviso. Most banks are under regulatory requirements that do not permit them to destroy documents and would not be able to agree to this section without the proviso.

Section 4: trading restrictions. This section contains restrictions on trading in the issuer's shares. This section is not really needed, because section 2 sets out the permitted uses by employees and affiliates in possession of the confidential information.

Nevertheless, a section of this nature sometimes appears in confidentiality letters and, when it does, it will frequently go too far. Banks have in place rigorous systems of Chinese walls and information barriers to keep non-public information from reaching traders. The sales and trading employees of an investment bank operate on the public side of the Chinese wall. They do not get information from the private side and can, therefore, continue trading.

US exemptions

The registration requirements of the US Securities Act of 1933 (Securities Act) apply worldwide, so any securities offering must be registered with the US Securities and Exchange Commission or structured pursuant to an exemption from the registration requirements. Possible exemptions include the following:

Regulation S. Regulation S of the Securities Act is the exemption for securities sold outside the US. There are three categories of restriction based on the level of US trading volume in the securities. For shares of most European issuers, it will be sufficient if the shares are sold outside the US and there are no direct selling efforts in the US. It is usually possible to sell to a US institution so long as the buy order originates outside the US.

Rule 144A and Section 4(1½). If the block trade will be extended into the US, it is likely that the US securities lawyers involved will recommend that sales in the US be limited to qualified institutional buyers (QIBs). This will permit the block trade to be structured pursuant to Rule 144A under the Securities Act (Rule 144A) or Section 4(1½). In the case of both exemptions, there cannot be general solicitation in the US, and the issuer cannot be an investment company, as defined in the US Investment Company Act of 1940, as amended (investment company).

Section 4(1). If the seller is not an affiliate of the issuer, it may be possible to structure the block trade under section 4(1) of the Securities Act, which will allow the trade to be extended to both QIBs and non-QIB investors in the US. The US securities lawyers involved should advise whether the seller is an affiliate of the issuer.

Investment company and PFIC. If the issuer is an investment company, it will be difficult to structure the block trade under Rule 144A or Section 4(1½). The US lawyers involved should advise whether the issuer is an investment company. If the issuer is a passive foreign investment company (PFIC), there may be adverse tax consequences for US investors that buy its shares. The US lawyers involved should advise whether the issuer is a PFIC.

It is not in anyone's interest for the employees on the public side of the wall to find out about the block trade before the marketing commences. The formulation used in some confidentiality agreements prohibits trading in the shares by the entire bank, thus requiring public side employees to be told prematurely and for trading in the issuer's shares to stop. An investment bank might choose to withdraw from the block trade process rather than stop trading.

The formulation used in the standard form is meant to be fair to both sides, but not to require the premature notification of public-side employees. Trading restrictions are the most contentious sections of these types of letters, usually because the restrictions have been taken from an M&A precedent. This formulation should go a long way towards smoothing out the process.

Section 8: governing law. The default formulation has the confidentiality letter governed by English law. However, New York law or the law of another EEA jurisdiction can also be used if preferred.

Section 9: termination. This section was the subject of some debate. There is a school of thought that a letter such as this one will terminate on its own when it is no longer relevant if there is no termination clause. The other school of thought is that obligations will continue forever if there is no termination section.

The general expectation is that the confidentiality letter will terminate when the marketing of the transaction begins. This point in time was chosen because there will no longer be any need to keep information confidential. The formulation used in the standard form does not require the bank to ask specific permission to commence marketing. Some block trades do not have a formal announcement, so the termination is not connected to an announcement. If, for some reason, the block trade is never launched, then the confidentiality letter will terminate by mutual agreement. In the unlikely event that a mutual agreement cannot be reached, the letter will terminate 12 months from its date.

Related information

Links from www.practicallaw.com and the web
This article is at
www.practicallaw.com/3-500-2224

Topics
Rights issues and other secondary issues
www.practicallaw.com/0-103-2095

Practice notes
Alternative structures for secondary issues: overview
www.practicallaw.com/3-204-4996

Previous articles
Block trades: an introduction (2006)
www.practicallaw.com/8-202-2671

Other links
Model block trade purchase agreement
www.practicallaw.com/2-202-2669
Securities Industry and Financial Markets Association
http://epmd.sifma.org/dynamic.aspx?id=2192

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Other considerations

Use of the standard form will go a long way towards making the process of competitive block trades progress more smoothly. However, the confidentiality letter is just one part of the process. Before a block trade is launched, lawyers to the selling shareholder should:

- Make sure the seller is not in possession of inside information.
- Have a draft block trade purchase agreement ready (*a full version of a standard form purchase agreement can be found at www.practicallaw.com/2-202-2669*).
- Have considered selling restrictions (especially the appropriate exemptions for selling in the US) (*see box "US exemptions"*).

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Proskauer

U.S. investor representation letter

[*Letterhead of QIB*]

[*Date*]

To: [***U.S. broker-dealer***] **[1]**

Purchase of [*name of shares*] (the "Securities") [2] of [*name of issuer*] (the "Company")

Ladies and Gentlemen:

In connection with our purchase of the Securities:

We understand that no offering document or prospectus has been prepared.

We acknowledge that (a) we may ***not*** rely on any investigation that **[*U.S. broker-dealer*]**, any of its affiliates or any person acting on its or their behalf may have conducted, and none of such persons has made any representation to us, express or implied, with respect to the Securities or the Company, (b) we have conducted our own investigation with respect to the Securities and the Company, and (c) we have received all information that we believe is necessary or appropriate.

We confirm that we are a "qualified institutional buyer", as defined in Rule 144A under the U.S. Securities Act of 1933, as amended, that is able to bear the economic risk of an investment in the Securities.

We understand that (a) the Securities are ***not*** being, and will ***not*** be, registered under the Securities Act, (b) the Securities are being offered and sold to us in a transaction that is exempt from the registration requirements of the Securities Act, and (c) the Securities are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act.

We agree, for so long as the Securities are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act, (a) ***not*** to offer or sell the Securities, except **[pursuant to an exemption from the registration requirements of the Securities Act] [outside the United States pursuant to Regulation S under the Securities Act] [3]** and (b) ***not*** to deposit the Securities in an unrestricted depositary receipt facility.

We understand that an exemption pursuant to Rule 144A under the Securities Act may not be available for the resale of the Securities. **[4]**

Very truly yours,

[***NAME OF QIB***]

By:________________

Name:
Title:

Notes

[1]
This investor representation letter must be addressed to a U.S. broker-dealer regulated by FINRA. It cannot be addressed solely to a non-U.S. financial intermediary. If the seller or the issuer so request, this letter may also be addressed to either or both of them.

[2]
Examples of the name of the shares include the following:

- ordinary shares
- class A shares
- shares of common stock.

[3]
The first alternative is appropriate for most Section 4(1½) offerings. For certain Section 4(1½) offerings of securities listed on an exchange in the United States, the lawyers providing the no registration opinion might require the use of the second alternative.

[4]
The last paragraph is not needed in the case of transactions structured pursuant to Rule 144A. It might be appropriate in the case of a transaction structured pursuant to Section 4(1½) or Section 4(a)(2) to QIBs; although, not if there is an ongoing information covenant.

In certain circumstances, it might be appropriate to consider including one or both of the following paragraphs:

ERISA

We are ***not*** a "Plan" (which term includes (i) an employee benefit plan subject to part 4 of subtitle B of Title I of the U.S. Employee Retirement Income Security Act of 1974, as amended ("ERISA"), or a plan, individual retirement account and other arrangement subject to Section 4975 of the U.S. Internal Revenue code of 1986, as amended (the "Tax Code"), (ii) a plan, individual retirement account and other arrangement subject to the prohibited transactions provisions of Section 406 of ERISA or Section 4975 of the Tax Code, or to provisions under applicable federal, state, local, non-U.S. or other laws or regulations that are substantially similar to such provisions of ERISA or the Tax Code and (iii) an entity the underlying assets of which are considered to include "plan assets" under ERISA), and we are ***not*** purchasing the Securities on behalf of, or with the plan assets of, any Plan. We understand that the Securities may ***not*** be offered or sold or transferred to a Plan.

PFIC

We understand that the Company has ***not*** definitively determined whether it was a PFIC for any prior year. If the Company is treated as a PFIC for U.S. federal income tax purposes, there could be adverse consequences for U.S. investors.

Rule 135e legend

Rule 135e provides a safe harbor for announcements, press releases and other press-related materials in connection with an offering structured pursuant to Regulation S. Inserting the legends below will have the effect of the press release ***not*** constituting general solicitation, general advertising or directed selling efforts.

The following legend should be inserted at the top of the press release in all-capital letters:

> NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES, CANADA OR JAPAN.

The following legend should be inserted at the end of the press release in addition to any legends or rubrics that might be required by local law or practice:

> This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States.

The first legend should always include Canada, ***unless*** a Canadian lawyer has been consulted. There is a practice developing of including further jurisdictions, such as Australia, South Africa and New Zealand. There is ***no*** need to include New Zealand. There is also practice of including a sweep-up clause (such as "and any other jurisdiction where such activity would be unlawful"). You should ***not*** use a sweep-up clause: it is of ***no*** help to the person distributing the press release.

The second legend should be inserted in announcements or press releases as its own, stand-alone paragraph. It should ***not*** be combined with other legends.

In the case of an advertisement in a non-U.S. publication, such as the Financial Times, the first legend can be omitted.

Deed for Rule 144A(d)(4) compliance

This deed is made on **[*date*]** by **[*name of issuer*]**, a company organized under the laws of **[*jurisdiction*]** (the ***Company***), in favor of holders of the Company's **[*title of securities*]** (the ***Securities***) and prospective holders of Securities.

Whereas, it is intended that certain Securities will be placed in the United States to qualified institutional buyers, as defined in Rule 144A under the U.S. Securities Act of 1933, as amended; now this deed witnesseth as follows.

1. The Company hereby gives the **[representations and]** covenant set out below:

[*(a)*] So long as any of the Securities are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act, and if for any reason, the Company is not exempt from the reporting requirements of Section 13 or 15(d) of the U.S. Securities Exchange Act of 1934, as amended, or the information furnishing requirements of Rule 12g3-2(b) thereunder and is not then subject to, and in compliance with, such reporting requirements under the Exchange Act, the Company undertakes to any holder of such restricted securities, or any prospective purchaser of such restricted securities designated by a holder, to provide to such holder or prospective purchaser upon the request of such holder or prospective purchaser, any information required to be provided by Rule 144A(d)(4) under the Securities Act.

[(b) The Company is not an "investment company" within the meaning of the U.S. Investment Company Act of 1940, as amended.

(c) The Company is not a "passive foreign investment company" within the meaning of Section 1297 of the U.S. Internal Revenue Code of 1986, as amended.]

2. This deed (and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to this deed or its formation, including any non-contractual dispute) shall be governed by and construed in accordance with **[English][Irish]** law.

Note:

In the case of a secondary block trade, if the selling shareholder is providing investment company and PFIC representations in the block trade agreement, there is no need to repeat them in the deed. Similarly, in a primary offering, they would typically be contained in the underwriting agreement, not the deed. They can be included in the deed in the case of a secondary block trade, where the issuer is willing to provide them instead of the selling shareholder.

In witness whereof, this deed has been executed as a deed on the date stated above.

[NAME OF ISSUER]

By: __________________________

Name:
Title: Director

[NAME OF ISSUER]

By: __________________________

Name:
Title: **[Director][Secretary]**

Present when the common seal of **[*Name of issuer*]** was affixed to this deed and this deed was delivered:	
	__________________________ **Name:** **Title:** Director
	__________________________ **Name:** **Title: [Director][Secretary]**

Note: Two forms of signature block are provided here. Choose the one appropriate to the circumstance.

Rule 144A(d)(2) notice

From: **[*Name and address of U.S. broker*]**

To: **[*Name and address of QIB*]**

Date: [•]

Block trade in shares of [*name of issuer*]

In connection with the above-referenced transaction, we hereby notify you that the sellers of the shares may be relying on an exemption from the provisions of Section 5 of the U.S. Securities Act of 1933, as amended, provided by Rule 144A under the act.

For so long as the shares acquired in the above referenced transaction remain "restricted securities" within the meaning of Rule 144 of the Securities Act, such shares may not be deposited in any unrestricted ADR facility.

[Note: The second paragraph is needed only if the issuer has an *unrestricted* ADR facility. If the issuer has ADRs listed on the New York Stock Exchange or the Nasdaq Stock Market, the facility will be unrestricted. Also, if the issuer has a level I ADR facility, the facility will be unrestricted.]