Decree of 12 October 2006, containing rules implementing various provisions of Chapter 5.4 of the Act on Financial Supervision (Market Abuse Decree pursuant to the Act on Financial Supervision)

We Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc. etc. etc.

On the recommendation of Our Minister of Finance of 20 April 2006, no. FM 2006-00969 M;


Having consulted the Council of State (opinion of 3 July 2006, no. W06.06.0135/IV);

Having seen the more detailed report of Our Minister of Finance of 9 October 2006, no. FM 2006-01695U;

Have approved and decreed the following:
CHAPTER 1. DEFINITIONS

Section 1

For the purpose of this Decree and the provisions based upon it, the following terms shall have the following meaning:

a. the Act: the Act on Financial Supervision (Wet op het financieel toezicht);

b. price-sensitive information: information as referred to in Section 5:53(1) of the Act;

c. private transaction: transaction in a financial instrument on own account or on behalf of a third party on whose investments the party concerned exerts influence other than by virtue of the provision of an investment service.

CHAPTER 2. EXEMPTIONS FROM THE STATUTORY PROHIBITIONS

Provisions implementing Sections 5:56(6), 5:57(3) and 5:58(3) of the Act

Section 2

Section 5:56(1) and (3) of the Act shall not apply to the following categories of transactions:

a. assigning financial instruments as part of a personnel scheme to persons as referred to in Section 5:60(1)(a) and (b) of the Act or to employees, if in so doing a constant course of action is followed as regards the conditions and periodicity of the scheme;

b. exercising options assigned, exchanging convertible bonds or exercising warrants issued or similar rights to shares or depositary receipts for shares, as part of a personnel scheme as referred to in Subsection (a), on the expiry date of the right concerned or within a period of five working days preceding that date, and selling, within this period, the shares or depositary receipts for shares acquired by exercising these rights, if in the latter case the entitled party notified the issuing institution, at least four months before the expiry date and in writing, of its intention to sell, or granted the issuing institution an irrevocable authorisation to sell;

c. a transaction that must be conducted or effected in order to be able to fulfil an obligation to transfer shares or depositary receipts for shares;

d. concluding an agreement by which a party entitled to financial instruments commits itself irrevocably towards an offeror, in the context of a public offer that is proposed or being prepared, to offer financial instruments to which the public offer relates to the offeror, if that entitled party records the number of financial instruments to which the agreement relates in a written statement to the offeror;

e. concluding an agreement by which a party entitled to financial instruments or a party potentially entitled to financial instruments commits itself irrevocably, prior to the issuing or secondary offering of those financial instruments, to buy one or more of those financial instruments, if the entitled party or the potentially entitled party records the amount to which the agreement relates in a written statement to the institution issuing or making a secondary offering of the financial instruments;
f. issuing shares or depositary receipts for shares by way of dividend distribution, or acquiring such shares or depositary receipts for shares by way of dividend distribution other than in the form of dividend with stock option;

g. acting in good faith to serve clients via an intermediary, while only possessing inside information in respect of the trade;

h. the conducting or effecting of a transaction by employees of a legal person where inside information is available, if these employees themselves only possess price-sensitive information in respect of the trade;

i. the conducting or effecting of transactions in financial instruments in the context of a buy-back programme or stabilisation, as referred to in Chapters II and III respectively of Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (OJEU L 336), in a market in financial instruments, not being a regulated market, whose operator has recognised status as referred to in Section 5:26(1) of the Act, insofar as these transactions fulfil the conditions specified in the Regulation, on the understanding that the term “regulated market” in the Regulation shall also be understood to mean “market in financial instruments”, not being a regulated market, whose operator has recognised status as referred to in Section 5:26(1) of the Act.

j. the sale of shares, depositary receipts for shares or similar securities granted in connection with an employee share plan as referred to under (a), immediately after sale is first permitted pursuant to the conditions of grant, with the party concerned immediately utilising the proceeds from the sale to pay a tax obligation arising in connection with the grant.

Section 3

Communication as part of the normal duties, profession or position as referred to in Section 5:57(1)(a) of the Act shall be concerned in any event insofar as:

a. the party intending to make a public offer for financial instruments provides parties entitled to these financial instruments, awareness of whose willingness to offer their financial instruments to the intending party is reasonably necessary for the decision to make the public offer, with information that they need to give an opinion on their willingness;

or

b. the party intending to issue or make a secondary offering of financial instruments provides parties entitled to financial instruments or parties potentially entitled to financial instruments, awareness of whose willingness to buy financial instruments is reasonably necessary for the decision to issue or make a secondary offering of financial instruments, with information that they need to give an opinion on their willingness.

Section 4

1. The Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten, AFM) shall investigate at regular intervals whether certain categories of transactions or trade orders should be exempt from the prohibitions referred to in Section 5:58(1), opening words and (a) and (b) of the Act. It shall advise Our Minister accordingly. In its investigation, it shall in any event take the following factors into consideration:

a. the degree of transparency of the category of transactions or trade orders for the relevant regulated markets and other relevant markets in financial instruments admitted by the authorities;
b. the need to guarantee the operation of the market forces and the proper interaction between supply and demand on the relevant regulated markets and other relevant markets in financial instruments admitted by the authorities;

c. the impact that conducting or effecting the category of transactions or trade orders concerned will have on the market liquidity and the market efficiency of the relevant regulated markets and other relevant markets in financial instruments admitted by the authorities;

d. the extent to which conducting or effecting the category of transactions or trade orders concerned is in line with the trading mechanism of the relevant regulated markets and other relevant markets in financial instruments admitted by the authorities and enables investors to respond appropriately and in time to the new market situation that results from this category of transactions or trade orders;

e. the risk entailed by conducting or effecting the category of transactions or trade orders concerned as regards the integrity of directly or indirectly affiliated relevant regulated markets and other directly or indirectly affiliated relevant markets in financial instruments admitted by the authorities for the type of financial instrument involved within the European Union;

f. the result of any investigation into the category of transactions or trade orders concerned by a competent authority within the meaning of Directive No. 2003/6/EC of the European Parliament and of the Council of the European Union of 12 April 2003 on insider dealing and market manipulation (OJEU L 96);

g. the structural characteristics of the relevant regulated markets and other relevant markets in financial instruments admitted by the authorities.

2. The AFM shall ensure that:

a. before determining its advice, it consults representative organisations of interested parties, as well as other competent authorities within the meaning of Directive No. 2003/6/EC of the European Parliament and of the Council of the European Union of 12 April 2003 on insider dealing and market manipulation (OJEU L 96);

b. it publishes its advice, on which occasion it shall also provide a description of the category of transactions or trade orders concerned and of the factors taken into consideration in its advice;

c. it discloses its advice as soon as possible to the Committee of European Securities Regulators, established by Commission Decision No. 2001/527/EC of 6 June 2001 (OJEC L191).

3. If certain categories of transactions or trade orders are exempt by ministerial regulation from the prohibitions referred to in Section 5:58(1), opening words and (a) and (b) of the Act, the AFM shall investigate at regular intervals whether the exemption is still justified. In so doing, it shall take account of the factors referred to in Subsection (1) and the procedures referred to in Subsection (2). If it is the judgement of the AFM that its advice should be amended or adjusted, it shall advise Our Minister accordingly.
4. The categories of transactions or trade orders to which Section 5:58(1), opening words and (a) and (b) does not apply shall be designated by ministerial regulation with due observance of the advice of the Netherlands Authority for the Financial Markets referred to in Subsection (1).
CHAPTER 3. NOTIFICATION REQUIREMENTS, LISTS OF PERSONS WITH ACCESS TO PRICE-SENSITIVE INFORMATION AND THE REGULATIONS

3.1. Notification of transactions

Provisions implementing Sections 5:60(1), opening words and (d), (3), (5) and (6), and 5:62(3) of the Act

Section 5

The categories of persons referred to in Section 5:60(1)(d) of the Act shall be:

a. spouses, registered partners or life companions of the persons referred to in Section 5:60(1)(a) to (c) of the Act, or other persons cohabiting in a similar manner with the persons referred to in Section 5:60(1)(a) to (c) of the Act;

b. children of the persons referred to in Section 5:60(1)(a) to (c) of the Act of whom these persons have custody or that have been placed under guardianship and in respect of whom these persons have been appointed as guardians;

c. other relations by blood or affinity of the persons referred to in Section 5:60(1)(a) to (c) of the Act who have run a joint household with these persons for at least one year by the date of the transaction concerned; and

d. legal persons, trusts as referred to in Section 1(c) of the Supervision of Trust Offices Act (Wet toezicht trustkantoren), or partnerships:
   1°. where the executive responsibility rests with a person as referred to in Section 5:60(1)(a), (b) or (c) of the Act, or with a person as referred to in Subsections (a), (b) or (c);
   2°. that are under the control of a person as referred to under 1°;
   3°. that were established for the benefit of a person as referred to under 1°; or
   4°. whose economic interests are essentially equivalent to those of a person as referred to under 1°.

Section 6

1. A notification as referred to in Section 5:60(1) of the Act shall contain the following details:
   a. the name of the party with a duty to notify;
   b. the address of the party with a duty to notify;
   c. the name of the issuing institution involved;
   d. the reason for the notification;
   e. a description of the financial instruments involved in the transaction in question;
   f. the nature of the transaction;
   g. the date and place of completion of the transaction;
   h. the price and scope of the transaction.

2. The notification forms specified by the AFM shall be used to submit the notification.

Section 7

The notification requirement referred to in Section 5:60(1) of the Act shall have been fulfilled if, pursuant to Sections 5:38(1) or (2) or 5:48(6) of the Act, the AFM has been notified of a change as referred to in the relevant subsection that was effected by the transaction concerned.
Section 8

Section 5:60(1) of the Act shall not apply to transactions conducted or effected pursuant to a written mandate by a financial enterprise allowed to provide individual capital management services under the part on Market Access for Financial Enterprises or the part on Prudential Supervision of Financial Enterprises in the Act, if that mandate stipulates that the principal cannot exert influence on transactions conducted or effected by the financial enterprise in its capacity as authorised representative.

Section 9

1. A notification as referred to in Section 5:62(1) of the Act shall contain the following details:
   a. a description of the transaction or the instruction, the type of order and the type of trading platform;
   b. the reasons for the reasonable suspicion that the transaction or the instruction is in breach of Section 5:56(1) or (3) or Section 5:58(1) of the Act;
   c. details revealing the identity of the persons on whose behalf the transaction was carried out or who gave the instruction for the transaction, and the identity of the other persons involved in this transaction or instruction, as well as details revealing, where possible, whether the person giving the instruction for the transaction did so on own account or on the account of a third party;
   d. the capacity in which the investment firm is acting;
   e. other details that may reasonably be considered relevant to the investigation by the AFM.

2. If the details referred to in Subsection (1) are not available at the time of the notification, the investment firm shall in any event state the reasons referred to in Subsection (1)(b). The investment firm shall provide all the other details immediately once they are in its possession.

3. The notification shall be submitted by ordinary mail, electronic mail, fax or telephone, on the understanding that in the latter case the notification shall be confirmed in writing if the AFM so requests.

3.2. Lists of persons who may have knowledge on a regular or occasional basis of price-sensitive information and regulations

Provisions implementing Sections 5:59(8) and 5:65 of the Act

Section 10

1. The list of persons referred to in Section 5:59(7) of the Act shall contain the following details:
   a. the names of all the persons who may have knowledge on a regular or occasional basis of price-sensitive information;
   b. the reason why these persons appear on this list;
   c. the dates on which the list was compiled and updated.

2. Parties obliged to keep a list as referred to in Subsection (1) shall update the list immediately if:
   a. the reason why a person appears on the list has changed;
   b. a person needs to be added to the list;
   c. a person appearing on the list no longer has access to price-sensitive information.
3. Parties obliged to keep a list as referred to in Subsection (1) shall immediately state on the list the circumstance that determines that a person no longer has access to inside information and the moment when this circumstance arises.

4. Parties obliged to keep a list as referred to in Subsection (1) shall retain the outdated details for a minimum period of five years following the compilation or updating of the list.

Section 11

Regulations as referred to in Section 5:65 of the Act shall contain rules in respect of:

a. the duties and powers of the person referred to in Section 5:60(4) of the Act, if the relevant issuing institution as referred to in Section 5:65 of the Act decides to designate such a person;

b. the obligations of employees and of the persons referred to in Section 5:60(1)(a) and (b) of the Act with regard to the ownership of and transactions in financial instruments pertaining to the issuing institution;

c. where applicable, the period during which the persons referred to in Section 5:60(1)(a), (b) and (c) of the Act are not allowed to conduct or effect transactions in financial instruments pertaining to the issuing institution.

CHAPTER 4. PUBLIC DISCLOSURE OF PRICE-SENSITIVE INFORMATION

4.1 The manner of disclosure

Provisions implementing Section 5:59(8) of the Act

Section 12

1. An issuing institution as referred to in Section 5:59(1) of the Act shall disclose price-sensitive information directly pertaining to itself in such a manner that this information immediately becomes publicly accessible and is presented in such a manner as to enable investors to assess this information completely, accurately and in good time.

2. The issuing institution shall not combine a disclosure as referred to in Subsection (1) with advertisements for its activities in a possibly misleading manner.

Section 13

1. A disclosure as referred to in Section 5:59(1), (2) or (5) of the Act that is made in the Netherlands shall be made in either Dutch or English.

2. A disclosure as referred to in Subsection (1) that is also made in another Member State shall also be made in the language accepted by the supervisory authority of that Member State or in a language customary in the sphere of international finance.
4.2. Exemptions from the immediate disclosure obligation

Provision implementing Section 5:59(4) of the Act

Section 14

1. A legitimate interest as referred to in Section 5:59(3)(a) of the Act shall be understood to mean in any event preventing the disclosure of:
   a. information as referred to in Section 5:59(1) of the Act from affecting the outcome or the normal pattern of negotiations to which an issuing institution as referred to in Section 5:59(1) of the Act is a party;
   b. decisions taken by the executive board of the issuing institution – which are still to be approved by the supervisory board or a comparable body pursuant to Book 2 of the Dutch Civil Code (Burgerlijk Wetboek) or the articles of association, while it is announced simultaneously that this approval has not yet been given – from being an obstacle to a correct assessment by the public; or
   c. a decision as referred to in Section 1:76 of the Act, a request as referred to in Sections 3:160 or 3:161 of the Act or the provision of liquidity support by the Dutch Central Bank (De Nederlandsche Bank) pursuant to the Bank Act 1998 (Bankwet 1998) from conflicting with the interests of the financial enterprise involved.
   d. preventing the disclosure of the fact that the Netherlands Authority for the Financial Markets made a request or notification as referred to in Sections 2(1) and 3(1) respectively of the Act on the Supervision of Financial Reporting from influencing the price of the securities of the issuing institution referred to in Section 1(b) of the Act on the Supervision of Financial Reporting, or the price of securities derived from those securities.

2. The confidentiality of information as referred to in Section 5:59(3)(c) of the Act shall be sufficiently guaranteed if the issuing institution has taken measures restricting the access to price-sensitive information to persons that need to be aware of this information as part of their normal duties, profession or position.

CHAPTER 5. PREVENTING INVESTMENT RECOMMENDATIONS FROM MISLEADING THE PUBLIC

Provisions implementing Section 5:64(1) of the Act

Section 15

Anyone publishing investment recommendations shall clearly and conspicuously state in the investment recommendation:
   a. the name and position of the natural person who drew up the investment recommendation; and
   b. the name of the person who is responsible for the publication of the investment recommendation.

Section 16

1. A publisher of an investment recommendation shall take reasonable measures to guarantee that the investment recommendation:
   a. mentions the fact that the investment recommendation is based on reliable sources, or, where applicable, states that there are doubts about the reliability of a source;
   b. makes a clear distinction between facts and information that is not based on facts; and
   c. clearly describes projections, forecasts and guide prices as such and identifies the main assumptions on which they are based.
2. Where a publisher of an investment recommendation is a person as referred to in Section 5:64(2)(a) of the Act, or a legal person affiliated with the investment firm, this publisher, without prejudice to Subsection (1), shall take reasonable measures to guarantee that the investment recommendation:

a. states all the material substantive sources, including the relevant issuing institution as referred to in Section 5:53(5)(a)(3°) of the Act, as well as whether the investment recommendation was disclosed to this issuing institution and was amended as a result before it was disseminated;

b. adequately explains the meaning of the investment recommendation and states in what manner the investment recommendation is based on the main assumptions;

c. adequately and concisely states the principles or methods used in assessing a financial instrument or an issuing institution as referred to in Section 5:53(5)(a)(3°) of the Act, or in determining a guide price for a financial instrument;

d. specifies the scheduled frequency of possible adjustments to the investment recommendation and of all major amendments to the publication policy announced earlier;

e. clearly and conspicuously mentions the date when the investment recommendation was first published, and the date and time to which every stated price of a financial instrument relates; and

f. where applicable, clearly and conspicuously mentions the fact that the advice included in the investment recommendation differs from the advice in the most recent investment recommendation with regard to the same financial instrument as referred to in Section 5:53(6)(a) of the Act, or with regard to the same issuing institution as referred to in that subsection, which was drawn up by the same natural person and published during an immediately preceding period of 12 months, as well as the date on which this earlier investment recommendation was published.

Section 17

1. A publisher of an investment recommendation shall clearly and conspicuously state in the investment recommendation the interests or conflicts of interest that may reasonably be assumed to potentially affect the objectivity of the investment recommendation.

2. If the publisher of an investment recommendation is a legal person, the obligation referred to in Subsection (1) shall apply mutatis mutandis to each natural or legal person working for the publisher under a contract of employment or otherwise that was involved in drawing up the investment recommendation.

3. The objectivity of the investment recommendation may be affected in any event if, before or during the publication of the investment recommendation, a person as referred to in Section 5:64(2)(a) of the Act or a legal person affiliated with the investment firm:

a. owns a substantial shareholding in the issuing institution referred to in Section 5:53(5)(a)(3°) of the Act, or if this issuing institution owns a substantial shareholding in the persons or enterprises referred to in the opening words of this subsection;

b. has another material financial interest in the issuing institution referred to in Section 5:53(5)(a)(3°) of the Act;
c. acts as a market maker or as liquidity provider with regard to the financial instruments of the issuing institution referred to in Section 5:53(5)(a)(3°) of the Act;

d. is a party to an agreement with the issuing institution referred to in Section 5:53(5)(a)(3°) of the Act concerning the publication of the investment recommendation;

e. is a party to any other agreement with the issuing institution referred to in Section 5:53(5)(a)(3°) of the Act; or

f. took over or placed financial instruments of the issuing institution referred to in Section 5:53(5)(a)(3°) of the Act in a professional or commercial capacity during the preceding 12 months when these financial instruments were issued.

4. Subsection (1)(e) shall not apply if the mentioning of the interests or conflicts of interest referred to in that subsection by the publisher of an investment recommendation or by a legal person affiliated with the publisher would result in the disclosure of confidential commercial information, and the agreement referred to in Subsection (3)(e) was in force for the preceding 12 months or resulted during this period in the payment of a fee to this publisher of an investment recommendation or to a legal person affiliated with this publisher, or in the promise of such a fee.

5. If the publisher of an investment recommendation is a legal person, it shall state its interests or conflicts of interest, or the interests or conflicts of interest of the legal persons affiliated with it that are relevant in relation to the investment recommendation:

a. which were known or may reasonably be assumed to have been known to the persons involved in drawing up the investment recommendation; or

b. which were known or may reasonably be assumed to have been known to persons other than those referred to under (a), before the investment recommendation was disseminated among clients or disclosed to the general public.

6. An investment firm as referred to in Section 5:64(2)(a) of the Act shall disclose every three months what fraction of the investment recommendations made during that period contained advice to “buy”, “hold”, “sell” or a comparable word or phrase, and what fraction of the issuing institutions referred to in Section 5:53(6)(a)(3°) of the Act for whom the investment firm performed major investment banking services during the preceding 12 months received such advice.

Section 18

1. A natural or legal person that works for an investment firm as referred to in Section 5:64(2)(a) of the Act under a contract of employment or otherwise, and that was involved in drawing up the investment recommendation, shall inform the investment firm whether his/its remuneration is linked to investment banking transactions performed by the investment firm or by any legal person affiliated to the investment firm, insofar as the investment firm is not already aware of this information.

2. If the natural person referred to in Subsection (1) receives or acquires shares in an issuing institution as referred to in Section 5:53(6)(a)(3°) of the Act prior to the public offering of such shares, he shall also disclose the price for which these shares were acquired and the acquisition date to the investment firm as referred to in Section 5:64(2)(a) of the Act, insofar as the investment firm is not already aware of this information.
3. An investment firm as referred to in Section 5:64(2)(a) of the Act shall include the information referred to in Subsections (1) and (2) in the investment recommendation.

4. A natural person that works for an investment firm as referred to in Section 5:64(2)(a) of the Act under an employment contract or otherwise, and that publishes an investment recommendation made by a third party, shall clearly and conspicuously state the name of the competent supervisory authority for the investment firm in this investment recommendation.

Section 19

1. If the investment recommendation referred to in Sections 16 or 17(1), (2) or (3) is not published in writing, the investment recommendation may specify what location – directly and easily accessible to the public – will give access to this required information.

2. If the information to be published as referred to in Section 16(2)(a), (b) or (c) is disproportionately long in relation to the investment recommendation and no changes have occurred in the assessment method or principles applied, the investment recommendation may refer to a location – directly and easily accessible to the public – where this required information can be accessed.

3. If the information to be published as referred to in Sections 17(1), (2), (3), (5) or (6) or 18(1) or (2) is disproportionately long in relation to the length of the investment recommendation, this investment recommendation may refer to a location – directly and easily accessible to the public – where the required information can be accessed.

CHAPTER 6. OPERATING ON MARKETS IN FINANCIAL INSTRUMENTS

6.1. General provisions

Provisions implementing Section 5:68(1) of the Act

Section 20

An enterprise as referred to in Section 5:68(1) of the Act shall take adequate measures in order to control conflicts of interest with regard to transactions in financial instruments.

Section 21

An enterprise as referred to in Section 5:68(1) of the Act shall take adequate measures:

a. in order to prevent price-sensitive information from becoming known outside the circle of persons who need to be aware of this information as part of their duties, profession or position;

b. in order to ensure that persons associated with the enterprise exercise the utmost care in dealing with information that they know or should reasonably suspect must be classified as price-sensitive.
Section 22

An enterprise as referred to in Section 5:68(1) of the Act shall designate a person to be responsible for the internal supervision of compliance with the provisions of this chapter, and shall lay down rules with regard to the exercising of that supervision.

Section 23

An enterprise as referred to in Section 5:68(1) of the Act shall keep a record of the transactions in financial instruments that it conducts on its own account, which record shall contain the following details:

a. the transactions conducted each day;
b. the financial instruments to which each transaction relates;
c. the date and time when each transaction was carried out;
d. where applicable, the identity of the third party that carried out the transaction;
e. the price or prices for which the transactions were carried out.

6.2. Code of conduct for private transactions

Provisions implementing Section 5:68(1) of the Act

Section 24

1. An enterprise as referred to in Subsection (2) shall have a code of conduct for private transactions by persons associated with the enterprise who are directly or indirectly involved in the enterprise’s transactions in financial instruments or who otherwise regularly have or may have inside information as part of their duties, profession or position, unless the enterprise, subject to Section 25(3), decides not to designate any persons as insiders as referred to in Section 25. The enterprise shall ensure that all those concerned are familiar with the code of conduct and shall supervise compliance with this code.

2. Subsection (1) shall apply to:
   a. clearing institutions;
   b. banks that are not allowed to provide investment services or perform investment activities, management companies of collective investment schemes, investment companies, financial institutions that have obtained a supervisory status certificate, company savings funds, pension funds and insurers which own a qualified shareholding in an issuing institution or whose transactions in financial instruments during the past calendar year amounted to € 20 million or more.

3. The transactions in financial instruments referred to in Subsection (2)(b) shall not include:
   a. the transactions of a branch office outside the Netherlands or a subsidiary of the enterprise; and
   b. the transactions of an enterprise based outside the Netherlands of which the enterprise concerned is a branch office.

4. For the purposes of Subsection (2)(b), the following transactions shall be disregarded:
   a. transactions in bonds issued by the State of the Netherlands, other governments and government bodies, international treaty organisations and supranational bodies governed by public law;
b. transactions in financial instruments, the management of which has been transferred to a third party, on such conditions that the enterprise exerts no influence on the selection of funds or on individual transactions;

c. transactions in index-linked funds or in units in collective investment schemes that are available only to professional market parties.

Section 25

1. The code of conduct referred to in Section 24(1) shall contain rules that are applicable to all the persons referred to in that subsection, and additional rules for insiders.

2. An enterprise shall designate as insiders:
   a. the persons that determine or co-determine the day-to-day policy of the enterprise;
   b. persons whose duties consist of conducting or effecting transactions in financial instruments, or of offering, providing, finalising or monitoring services in relation to brokerage in financial instruments or in relation to portfolio management;
   c. other persons who regularly possess or may possess inside information by virtue of their association with the enterprise.

3. An enterprise may decide not to designate a person as referred to in Subsection (2)(a) or (b) as an insider, if this person does not or may not regularly possess inside information.

4. An enterprise shall provide for procedures relating to the designation of insiders and the application of Subsection (3), and shall keep a list of the persons designated as insiders.

Section 26

The code of conduct referred to in Section 24(1) shall stipulate that a person as referred to in that subsection must avoid any mixing of business and private interests, or the reasonably foreseeable appearance thereof, with regard to transactions in financial instruments.

Section 27

1. The code of conduct referred to in Section 24(1) shall stipulate that an insider as referred to in Section 25(2):
   a. must disclose private transactions that he conducts, in the manner prescribed in the code of conduct, and with due observance of the regulations laid down in the code of conduct;
   b. must ensure to the best of his abilities that third parties, on whose investments he exerts or can exert influence, provide the internal supervisor referred to in Section 22 on his request with all information regarding any private transactions conducted or effected by these third parties.

2. The code of conduct may stipulate that transactions in specific categories of financial instruments need not be disclosed because their disclosure would not contribute to the objective of the code of conduct.

Section 28
CHAPTER 7. FINAL PROVISIONS

Section 30

Until the first day of the seventh month following the date of entry into force, Section 24(1) shall not apply to enterprises as referred to in Section 24(2)(b) that were active on the date of entry into force of this Decree and were exempt from Section 18a of the Act on the Supervision of the Securities Trade 1995 (Wet toezicht effectenverkeer 1995) by virtue of Chapter IVA of the Exemption Regulations pursuant to the Act on the Supervision of the Securities Trade 1995 (Vrijstellingsregeling Wet toezicht effectenverkeer 1995).

Section 31

The sections of this Decree shall enter into force at a time to be determined by Royal Decree. Different times may be set for different sections or parts thereof.

Section 32

This Decree shall be cited as: Market Abuse Decree pursuant to the Act on Financial Supervision (Besluit marktmisbruik Wft).
We hereby order and command that this Decree and the accompanying Explanatory Memorandum be published in the Bulletin of Acts, Orders and Decrees (Staatsblad).

The Hague, 12 October 2006

Beatrix

The Minister of Finance,
G. Zalm

Published on the thirty-first of October 2006

The Minister of Justice,
E.M.H. Hirsch Ballin
EXPLANATORY MEMORANDUM

General notes

Introduction

This Decree elaborates on various provisions of Chapter 5.4 of the Act on Financial Supervision (Wet op het financieel toezicht, Wft), regarding rules to prevent market abuse and in respect of operating on markets in financial instruments. A concordance table showing the "old" regulations on which the various sections are based can be found in Annex 1.

Chapters 2 to 5 (Market abuse)

In terms of substance, Sections 2 to 19 are virtually identical to the Market Abuse Decree (Besluit marktmisbruik), which entered into force on 1 October 2005. The references in that decree to the Act on the Supervision of the Securities Trade 1995 (Wet toezicht effectenverkeer 1995, Wte 1995) have been changed according to the corresponding sections in the Wft, and the terminology has been adapted according to the Wft as well. The Market Abuse Decree will be repealed with effect from the date of entry into force of the Market Abuse Decree pursuant to the Act on Financial Supervision.

In my letter to the Lower House following the liquidation of Van der Hoop Bankiers I indicated that I would clarify the crossover between the disclosure requirement under the rules on market abuse and the importance of confidentiality in respect of an application for emergency regulations. I fulfilled this promise by including a provision in Section 14 of the present Decree to the effect that where two supervisory measures as referred to in the Wft are imposed, and where liquidity support is provided by the Dutch Central Bank (De Nederlandsche Bank, DNB), a legitimate interest may be invoked, which will delay the disclosure, provided that the confidentiality of the information is sufficiently guaranteed and the delay will not deceive the public.

The responses received during the consultation procedure resulted in a number of amendments to the decree, which are explained in the relevant notes on the individual sections and under the heading 'Advice received' in this Explanatory Memorandum.

The final provisions in Chapter 6 of the Market Abuse Decree have been elaborated on (Sections 20 to 23, 25 and 26), or are no longer required because the provisions of the Act on the Disclosure of Major Holdings and Capital Interests in Securities-Issuing Institutions (Wet melding zeggenschap en kapitaalbelang in effectenuitgevende instellingen) will be part of the Wft (Section 24) when the present Decree becomes effective. Therefore they have not been incorporated in the present Decree.

The provisions regarding the register, which were included under the various subjects in the Wte 1995, are now included in Section 1:107 of the Wft. Therefore, the basis provided in Section 47(10) of the Wte 1995 for laying down rules regarding the arrangement and operation of the register has not been included in Chapter 5.4 of the Wft. Consequently, this basis is not referred to in the preamble to the present Decree.

In the Wte 1995 system, the annex setting out the statutory regulations that carried a penalty and the corresponding tariff numbers could be amended by order in council. The Wft system includes a similar annex in the Act itself, which is why the basis for amending the aforementioned annex by order in council has not been included in the Wft. Accordingly, this basis is not referred to either in the preamble to the present Decree.

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1 Parliamentary Documents II 2005/06, 30 300 IXB, no. 22, p. 8.
Chapter 6 of this Decree implements Section 5:68(1) of the Act, and contains the securities-related rules of conduct that apply to the enterprises referred to in that subsection. The present Decree replaces the rules that were based on the Wte 1995 and on the Decree on the Supervision of the Securities Trade 1995 (Besluit toezicht effectenverkeer 1995, Bte 1995), the main aspects of which were laid down in the Further Regulations on Market Conduct Supervision of the Securities Trade 2002 (Nadere regeling gedragstoezicht effectenverkeer 2002, Further Regulations) of the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten, AFM). Since these rules cannot be labelled as being of a technical or organisational nature, they have now been laid down by order in council, in accordance with the Instructions for Regulations (Aanwijzingen voor de regelgeving).

The text in Chapter 6 differs from the wording of the Further Regulations in many different places. The reasons for these differences are as follows.

Partly as a result of the implementation of the Market Abuse Directive\(^2\), the Wft contains detailed rules with regard to insider trading and price manipulation. The prohibitions and obligations applicable to everyone as laid down in Part 5.4.2 of the Wft and in Chapters 2 to 5 of this Decree also apply to financial enterprises, pension and savings funds and their employees, and are not repeated in this chapter. As a consequence, the prohibition on price manipulation and various other provisions included in the Further Regulations have become superfluous, because they already arise from the prohibition on insider trading or from the prohibition on ‘tipping’ (a person who possesses inside information is not allowed to communicate that information to a third party, other than in the course of his normal duties, profession or position).

The differences between the provisions in this chapter and the Further Regulations are partly due to the terminology used in the Wft, which means that definitions sometimes differ from those of the Wte 1995. Many of the terms used in this chapter have already been defined in the Wft. Different wording compared to the Further Regulations is not always intended to achieve a change in content. In some cases, the changes were only meant to make the text more concise and easier to understand.

As part of the attempt to reduce the administrative burden, a joint steering group consisting of DNB, the AFM, the Netherlands Bankers’ Association (Nederlandse Vereniging van Banken), the Association of Insurers (Verbond van Verzekeraars), the Securities Industry Council (Raad van de Effectenbranche), the Dutch Fund Association and the pension sector umbrella organisations studied the costs of compliance with a number of regulations, including the insider regulation as laid down in Annexes 3 and 3a to the Further Regulations (regulations on private transactions). The steering group recommended that these regulations be made more “principle based”, in the sense that the enterprises to which the regulations relate should themselves be responsible for designating insiders. The Further Regulations contained a list of the officers that classified as insiders on account of their position, even if they rarely or never came across price-sensitive information in practice. The enterprises had no discretionary power on that point.

The steering group’s recommendation has been carried out. Attempts have been made to restrict the administrative burden and costs of compliance in other areas as well, by leaving greater scope for the enterprises themselves to take responsibility.

As a result of the chosen format, Chapter 6 primarily contains provisions worded in general terms and few detailed regulations, which enables enterprises to take those measures that are appropriate for the nature and organisation of their operations.

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The enterprises will therefore have greater freedom, but also greater responsibility. What is important is not so much that an enterprise takes a mandatory approach with regard to every risk or issue requiring attention, but that it is aware of those risks or issues and that it acts and – where necessary – takes measures on the basis of its own findings. In the present case, this means that the enterprises involved should be alert to the (potential) presence of price-sensitive information within their organisations. What measures are required to ensure that the price-sensitive information is handled with due care will depend on the extent to which the information is present in the organisation concerned, the number of people who are aware of this information and any other relevant circumstances. In short, there should be a policy, based on an analysis of the occurrence of price-sensitive information within the institution, which tells the enterprise and the persons associated with the enterprise how to act. Enterprises will have ample freedom with regard to the content of that policy, as long as it is sufficiently clear what internal rules each person should observe and the enterprise has made the necessary provisions to supervise compliance with those rules.

In converting the rules from the Further Regulations to this Decree, consideration also had to be given to the fact that the securities-related rules of conduct for investment firms differ from and are more extensive than those applicable to the other categories of enterprises identified in this part. Some sections of this Decree therefore contain provisions that are different or only apply to investment firms.

The scope of Chapter 6 of the Decree is partly determined by the exemption provision of Section 5:68(2) of the Act. In terms of format, this provision is more limited than (Chapter IVA of) the Exemption Regulations pursuant to the Act on the Supervision of the Securities Trade 1995 (Vrijstellingsregeling Wet toezicht effectenverkeer 1995, Wte 1995 Exemption Regulations). First of all, Section 5:68 of the Act already provides that Part 5.4.3 of the Act only applies to enterprises that have their registered office in the Netherlands, so an exemption is not needed for enterprises with their registered office outside the Netherlands. Secondly, part of the old exemption regulations has been incorporated in this Decree. Under Section 24(3)(b), enterprises that are active on the markets in financial instruments to a limited extent only are not required to have a code of conduct for private transactions. However, they still have to comply with a number of general rules concerning the ethical and orderly handling of financial instruments. These rules are principle based and affect an enterprise in accordance with the extent to which they are relevant to the enterprise.

Administrative burden and other costs of compliance

In comparison with the Market Abuse Decree, Chapters 2 to 5 of the present Decree do not entail any changes in the administrative burden and other costs of compliance for the business sector or private individuals.

The rules in Chapter 6 of this Decree involve only a limited administrative burden in the form of obligations to provide information. Enterprises are required to keep a record of securities transactions conducted (Section 23) and a list of persons who have been designated as insiders (Section 25(4)). The former obligation already existed under the Wte 1995. The burden relating to keeping a list of insiders also remains the same compared to the situation under the Wte 1995, both with regard to the number of enterprises and with regard to the burden for each enterprise.
The obligation existing under the Wte 1995 for investment firms to notify the AFM of proposed significant changes in their structuring measures has not been retained in this Decree. This involves an estimated 10 to 20 notifications a year for the market as a whole. Not retaining this obligation to notify yields a (small) reduction in the administrative burden equivalent to approximately €1,500 a year.

The other costs of compliance arising from the insider rules were already addressed in the introduction to these notes (Chapter 6). According to the steering group referred to in the introduction, the insider regulation is among the regulations that, in the opinion of the market sector, cause the greatest amount of compliance costs. The steering group calculated these costs as follows: initial costs for insurers €4.5 million, annual costs of compliance for insurers €3.4 million, annual costs of compliance for banks €11 million. According to the steering group, making the regulation principle-based would yield a 25% saving. Assuming that the saving relates to the annual costs rather than the initial costs (which, after all, have already been incurred by most of the enterprises involved), the reduction in the other costs of compliance for banks and insurers would be 25% of €14.4 million, i.e. €3.6 million a year. If this calculation is extended to the other categories of institutions, including collective investment schemes, investment firms and pension funds, the total saving is soon twice as much (€7 million). This saving relates to a population of approximately 1,500 enterprises.

The changes in the insider regulation have the effect that officers who were previously classified as insiders on formal grounds, without regularly coming across price-sensitive information by virtue of their position, are no longer required to fulfil the related obligations with regard to their private transactions. In this sense, the administrative burden for private individuals is reduced as well, even though the people concerned are a specific and rather small group.

Until now, clearing institutions as such were not subject to supervision. However, the obligations under this chapter – with a few exceptions – are not new for clearing institutions, because previously they generally had to observe the rules of conduct of the Wte 1995 in their capacity as a credit institution or a securities institution. Therefore the corporate effects for this category are either zero or very small.

The foregoing can be summarised in the following table.

<table>
<thead>
<tr>
<th>Administrative burden</th>
<th>Other costs of compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structuring measures by investment firms</td>
<td>-/- 0.0</td>
</tr>
<tr>
<td>Insider regulation</td>
<td>-</td>
</tr>
<tr>
<td>Clearing institutions</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>-/- 0.0</td>
</tr>
</tbody>
</table>

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Advice received

The draft Decree was submitted for formal consultation to the two supervisory authorities and to the representative organisations of market parties. Responses were received from the Royal Netherlands Institute of Registered Accountants (Koninklijk Nederlands Instituut van Registeraccountants), the AFM, the Netherlands Bankers’ Association, the Dutch Fund and Asset Management Association, the Association of Insurers, the Association of Industry-Wide Pension Funds (Vereniging van Bedrijfstakpensioenfondsen) the Association of Company Pension Funds (Stichting voor Ondernemingspensioenfondsen) the Association of Occupational Pension Funds (Unie van Beroepspensioenfondsen) and the Securities Industry Council/Euronext Amsterdam N.V. The main points of the responses received will be discussed below.

Market abuse

In view of the recent entry into force of the Market Abuse Decree (1 October 2005), the main point of departure in drawing up the present Decree was to take over the provisions from that decree unchanged where possible.

Various responses contained suggestions which, had they been adopted, would have meant the establishment of additional rules that are not required by the directives on market abuse1. Consequently, these suggestions were not adopted. The implementation of the directives was maintained on these points, nothing more and nothing less. Obviously, corrections were made and clarifications given where necessary. These will be briefly discussed below.

For example, the Market Abuse Decree erroneously stipulated that neither issuing shares, or depositary receipts for shares, in the form of dividend with stock option nor acquiring shares or depositary receipts for shares in the form of dividend with stock option was allowed by way of dividend distribution. However, only acquiring shares or depositary receipts for shares in the form of dividend with stock option is prohibited, whereas issuing is allowed. The wording of Section 2(f) of the present Decree has therefore been amended.

The notes on Section 2(g) have been amended. The exemption applies to an intermediary (broker), i.e. to a person acting on the account of a principal. A market maker or liquidity provider acts on his/its own account and therefore does not fall under the exemption.

Section 3(b) contains a new provision compared to the corresponding section in the Market Abuse Decree, which indicates explicitly that communication as part of the normal duties, profession or position will be involved if certain (potential) (major) shareholders are sounded out in order to find out whether these shareholders are willing to buy financial instruments. Section 3 now gives two examples of parties acting in the course of their normal duties, profession or position. Various responses showed that there is the impression that communication as part of the normal duties, profession or position is only involved if the situation is listed explicitly in Section 3. However, this is not the case. If the communication is part of the normal duties, profession or position, the prohibition on communicating price-sensitive information is not breached. The Explanatory Memorandum makes it clear that Section 3 only gives examples of such situations, rather than an exhaustive list.

In Section 8, “the part on Prudential Supervision of Financial Enterprises” has been added because, pursuant to Section 3:33 of the Act, a bank may provide investment services.

The wording has been amended in Section 11(b) and (c). The scope of both subsections has remained unchanged.

Since the text submitted apparently caused confusion, it is explained under Section 14(1)(b) that the term “approval” is used within the meaning in the Dutch Civil Code, while the wording of that subsection has been amended to improve readability.

The wording of Section 14(2) has been amended for clarification purposes because the fact that a person from outside the issuing institution is aware of price-sensitive information will not be an impediment to guaranteeing the confidentiality of this information, if this person needs to be aware of the information as part of his normal duties, profession or position.

In addition, various comments related to the provisions of Section 5.4 of the proposed Wft. These comments were taken into consideration when the definitive Act was drawn up.

**Securities-related market conduct supervision**

The comments made by the consulted parties in respect of securities-related market conduct supervision deserve a closer look. Chapter 6, unlike the provisions on market abuse, is meant to extensively streamline the regulations already in existence and make them more principle based. The responses received showed that this approach is widely supported.

The AFM agreed with the points of departure underlying the draft Decree, including simplifying the regulations and making them more principle based, and leaving more scope for the responsibility of the enterprises themselves.

The AFM criticised the proposal to exempt enterprises whose transactions in financial instruments amount to less than € 20 million a year from the obligation to draw up a code of conduct for private transactions by insiders. According to the AFM, such a quantitative criterion would make an insufficient contribution to the objective of the regulations to prevent market abuse. The AFM argued that the decisive factor should be the extent to which an enterprise regularly conducts transactions that might involve insider trading.

The AFM’s suggestion to apply a qualitative rather than a quantitative criterion for the applicability of the aforesaid rules (obligatory code of conduct) has not been adopted. The limit of € 20 million was already applicable under the former regulations, on the understanding that this criterion was part of the exemption regulations then applicable, whereas it has now been incorporated in the present Decree. Initially this limit gave rise to some problems, because it was not always sufficiently clear how enterprises had to calculate the volume of their transactions in financial instruments. The Decree provides more clarity on this point. Replacing the criterion already in existence with a different, qualitative criterion would only create further confusion, certainly in the wording suggested by the AFM, which leaves a great deal of scope for different interpretations.

The AFM also advocated a duty to disclose for enterprises that are not required to possess a licence, but have to comply with the securities-related rules of conduct, such as interprofessional collective investment schemes. The AFM argued that this would prevent a situation in which the AFM had to make a great effort to ascertain which enterprises belong to the supervision population.

It should be noted that the said categories have been subject to supervision since the introduction of securities-related market conduct supervision on 1 December 2003, and that the legislation applicable at the time did not provide for a duty to disclose either. In general, there is no reason to combine a substantive rule with a separate rule, such as a duty to disclose, in order to enable the supervisory authority to monitor compliance with that substantive rule,
because this only leads to an additional burden for the parties involved.

The AFM’s remark that enterprises that reinsured all their assets and liabilities and therefore do not conduct transactions in financial instruments should be exempt, will be incorporated in the exemption regulations where necessary.

The Dutch Central Bank did not make any comments about the draft Decree.

The Netherlands Bankers’ Association (NVB) noted that there had been great progress in making the regulations more principle based. On the other hand, the NVB still found “rule-based reflexes” which it would like to see amended or deleted. In this context, the NVB paid detailed attention to the ‘prohibition on intra-day trading’, which was included in the old regulations and had been taken over in Section 26, opening words and under (b) of the draft Decree. The NVB argued that the prohibition dated from a time when the trade and its administrative processing were regulated differently than is now the case. At present, the relevant staff members of a securities institution no longer have an advantage in terms of information. Where the prevention of speculative conduct is concerned, a provision worded in principle-based terms would be preferable to the proposed section, which in some cases would impede rather than promote cautious investment.

Pursuant to the NVB’s comments, the prohibition on intra-day trading was deleted. This is consistent with the aim of formulating the regulations in principle-based terms where possible and reducing the costs of compliance.

The NVB doubted whether these regulations would yield a saving of 25% or € 7 million, noting that the Markets in Financial Instruments Directive (MiFID) would largely cancel out the cost reduction.

The reduction in the “other costs of compliance” by 25% or € 7 million foreseen in the context of the present Decree is based on steering group calculations of other costs of compliance. These calculations came from the sector itself. The MiFID will certainly have an impact on the Wft, but insofar as can be anticipated at present, this impact will not involve the securities-related market conduct supervision or the related administrative burden and costs of compliance.

In addition to the general observations discussed above, the NVB commented at great length on the various sections in Chapter 6. These comments resulted in a number of amendments and clarifications in the text of the Decree and the explanatory notes.

The Dutch Fund and Asset Management Association (DUFAS) was pleased that the securities-related market conduct rules had been formulated in highly principle-based terms. DUFAS found that the existing exemptions – for enterprises with a transaction volume under € 20 million and for enterprises that outsourced their asset management – were missing from the text submitted and asked whether they could be retained. DUFAS believed that the gains to be achieved with a clear exemption could not be realised if the enterprises involved were to practise self-assessment.

There seems to be a misunderstanding here. As mentioned above, the existing limit of € 20 million was retained in this Decree. In calculating the actual transaction volume, “transactions in financial instruments whose management has been transferred to a third party, on such conditions that the enterprise exerts no influence on the selection of funds or on individual transactions” (Section 24(4)(b)) are disregarded. This, too, is a continuation of (an element of) the exemption regulations already in existence.
However, there is a difference between the former exemption regulations and their continuation in Section 24(2)(b) and (4). An enterprise whose relevant transaction volume is less than € 20 million used to be exempt from all securities-related market conduct rules. Under the present Decree, the rules concerning a code of conduct for private transactions by insiders will not apply, but the enterprise still has to comply with the general rules of Part 6.1.

The term ‘self-assessment’ as referred to by DUFAS derives from an earlier draft version of this Decree. The idea of such a self-assessment was abandoned in its envisaged format, although the primary assumption is still that enterprises themselves should investigate the risks that exist with regard to handling price-sensitive information, both within the enterprise and by persons associated with the enterprise, and should gear their policy to these risks.

The Association of Industry-Wide Pension Funds, the Association of Company Pension Funds and the Association of Occupational Pension Funds (hereinafter: the pension sector umbrella organisations), in a joint response, were pleased that the Decree, by focusing on a principle-based approach, would facilitate tailor-made solutions. They suggested that the securities-related market conduct supervision of pension funds be incorporated in the new Pensions Act (Pensioenwet) and, with regard to occupational pension funds, in the Act on Obligatory Occupational Pension Schemes (Wet verplichte beroepspensioenregeling), in order to combine all domains of supervision for pension funds – material and prudential supervision by DNB and the supervision of communication obligations and securities-related market conduct supervision by the AFM – in the aforesaid Acts. According to the pension sector umbrella organisations, this would have a number of advantages, including the possibility of detailing the rules in a more sector-specific manner and using more uniform terminology.

It should be remembered that, only a few years ago, the express decision was taken to extend securities-related market conduct supervision to all financial institutions that are active on the securities markets, including pension funds, so as to create an integrated approach for the entire financial sector. This had the effect that the relevant rules for all sectors were laid down in Section 18a of the Wte 1995. This approach was continued in the Wft: see Section 5:68. It would not be logical to reverse this process now. As opposed to the advantage for the pension funds in that they would be dealing only with the pension laws and not with the Wft, there is the disadvantage of a return to the fragmentation existing previously in the area of securities-related market conduct rules. Regulations in the Wft would not prevent tailor-made solutions for pension funds, as long as guarantees are in place to ensure that unjustified differences between the sectors will not result.

The pension sector umbrella organisations also commented on the exemptions provided by the Decree. (N.B. Strictly speaking, the word “exemption” is not appropriate here. What matters in this Decree is that rules concerning a code of conduct for private transactions by insiders should not apply to enterprises that fulfill certain conditions.) The pension sector umbrella organisations asked about the relationship between the exemption applicable by operation of law and the general requirements which all pension funds, both exempt and non-exempt, have to fulfil according to the Decree. They argued that compliance requirements should not be forced upon an exempt fund “through the back door”.

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The remark made by the pension sector umbrella organisations concerned the difference, explained above in response to the comments by DUFAS, between the exemption regulations already in existence and the regulation in Section 24(2)(b) and (4). The “exemption” in Section 24 relates only to the provisions contained in that section (and thereby in the whole of Part 6.2). Part 6.1 applies to all enterprises that fall under Section 5:68 of the Wft. These latter rules are new for pension funds that used to be fully exempt. This is not a back-door construction, but is based rather on the consideration that the general requirements laid down in Part 6.1 are also relevant to smaller enterprises, and to enterprises which, although not on a regular basis, may occasionally be dealing with price-sensitive information. Wording these requirements in principle-based terms where possible ensures that they will not entail any unnecessary burden for the enterprises involved.

Finally, the pension sector umbrella organisations raised some questions about the internal supervisor. Pursuant to these questions, the text has been clarified in respect of a number of points.

The Association of Insurers endorsed the NVB’s response. In the Association’s view, enterprises that satisfy the conditions of Section 24(2)(b) and (4) would have to be exempt from all securities-related market conduct rules, and therefore also from the general provisions laid down in Sections 20 to 23.

It has already been explained above why the general provisions apply to all the enterprises referred to in Section 5:68 of the Act.

The Association also observed that Section 24(4) provided for the possibility of the AFM laying down further rules. The Association thought that these rules would greatly affect the scope of the present Decree and should therefore be laid down by an order in council.

The subsection concerned has now been removed from the Decree.

The Securities Industry Council (REB) and Euronext observed in their joint advice that, although the Explanatory Memorandum on the Decree indicated that the administrative burden would increase, this burden had not been further quantified. This increase was in contrast to the reduction in the burden with regard to the insider regulation.

Contrary to what the REB and Euronext believed, the Decree will not result in an increase in the administrative burden. Where they spoke of a non-quantified administrative burden, they were probably referring to the (since amended) passage on the previously existing obligation for investment firms to notify the AFM of significant changes in their structuring measures. This obligation has been scrapped in the present Decree, so that there will be a (small) reduction in the burden.

The REB and Euronext also commented on a number of sections in the Decree. These comments were taken into account where possible when the text of the Decree and the explanatory notes were amended.

Notes on individual sections

Chapter 1. Definitions

Section 1

The terms “investment recommendation” and “publisher of an investment recommendation” in Section 1 of the Market Abuse Decree are now defined in Section 5:53(6) and (7) of the Wft, respectively, and have therefore not been included in the definitions.
The term “supervisory authority” defined in Section 1:1 of the Wft has not been included in the present definitions for the same reason.

In terms of content, the description of the term “price-sensitive information” in Subsection (b) of this section was taken over from Section 1(c) of the Market Abuse Decree.

The definition in Subsection (c) of the term “private transaction”, which is used in Chapter 6, has been amended compared to the definition of (private) securities transaction according to the Further Regulations by clarifying that a private transaction is also involved if the transaction is not conducted for one’s own account but on behalf of a third party, whereas the person involved in fact determines or co-determines the investments of that third party. This latter situation may be the case, for example, if the person involved manages the investments of his partner or children. Obviously, this does not cover the provision of investment services to the clients of the enterprise with which the person involved is associated.

The term “affiliated third party”, which is used in the Further Regulations to indicate a precisely defined circle of persons around insiders, has not been retained in this chapter, because it is not consistent with the envisaged principle-based format. N.B. Section 5 of this Decree, which concerns persons who are closely affiliated with certain officers of issuing institutions, has been worded in rule-based terms, because the Implementing Directive on accepted market practices and notification regulations1 prescribes accordingly.

Chapter 2. Exemptions from the statutory prohibitions

Section 2

This section is based on Section 5:56(6) of the Act and replaces Section 2 of the Market Abuse Decree.

Pursuant to Section 5:56(6) of the Act, this section designates categories of transactions to which the prohibitions on conducting or effecting transactions using inside information, as referred to in Section 5:56(1) and (3), do not in any event apply. In this respect, a distinction is made according to the persons who carry out the transactions and the circumstances in which they are carried out.

As evidenced by Recitals 18 and 29 of the Market Abuse Directive, the European legislator intends to make a distinction between legal and illegal forms of insider trading, and the term “using” serves to make this distinction in the prohibition norm.2 The memorandum pursuant to the report on the Market Abuse Act3 already indicated that “using” inside information will be involved if a person conducting a transaction is aware or should be aware of the fact that there is a non-public piece of information4 which, when disclosed, might have a significant influence on the price of the financial instruments or on the price of derived financial instruments. Therefore the “using” element does not refer to a causal relationship.

The Market Abuse Directive is not intended to prohibit necessary and customary transactions carried out in the normal course of a profession or business, as is shown by Recital 18 of the Directive, which states that the mere fact that market makers, bodies authorised to act as counterparties, or persons authorised to execute orders on behalf of third parties, who possess inside information, confine themselves to their legitimate business of buying and selling financial instruments or to carrying out an order dutifully, should not in itself be deemed to constitute use of such inside information.

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1 Directive No. 2004/72/EC of the Commission of the European Communities of 29 April 2004 implementing Directive No. 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers’ transactions and the notification of suspicious transactions (OJEU L 162).

2 In this regard, see also the conclusion of the Procurator General in the ruling of the Supreme Court of 31 May 2005 (Flexovit), L.J.N. AR92/1, and nos. 116 et seq. from the conclusion.

3 Parliamentary Documents II 2004/05, 29,827, no. 7, p. 20.

4 The term “particular(s)” in the Market Abuse Act was changed by memorandum of amendment to “information”. See Parliamentary Documents II 2004/05, 29,827, no. 10, p. 2.
In addition, Recital 29 of this Directive pays specific attention to public takeover bids: “Having access to inside information relating to another company and using it in the context of a public takeover bid for the purpose of gaining control of that company or proposing a merger with that company should not in itself be deemed to constitute insider dealing.” These recitals in the Directive concern transactions carried out in the normal course of a profession or business (functional relationship). The exemptions listed in Section 2(d), (e), (g) and (h) are an extension of these recitals.

In addition, Section 2(a), (b) and (f) list exemptions that do not directly result from a functional relationship. In the case of the exemptions in Subsections (a) and (b) (assigning and exercising rights attached to financial instruments as part of a personnel scheme), the legislator wanted to indicate in advance that if the conditions laid down in these subsections are fulfilled, no inside information is used and the transactions will therefore not be in breach of the prohibition. Although no special conditions have been created for the exemption in subsection (f) (distributing shares or depositary receipts for shares by way of dividend), this situation does not in fact constitute “using inside information” because it does not involve a decision by the parties entitled to dividend or by the issuing institution (in this case, the general meeting of shareholders decides whether dividend will be distributed). It was decided to retain these exemptions in order to ensure the necessary legal certainty for market parties and in order to prevent unnecessary and unjustified impediments to the trade in financial instruments. Furthermore, these transactions pose no material threat to the integrity of the markets in financial instruments or to the interests of the parties operating on those markets.

One rule that has not changed at all is that transactions conducted using an unjustifiable difference in level of knowledge between the various market parties are not exempt from the prohibition. In this context, for example, transactions in financial instruments during the period in which a due diligence audit is carried out, with a view to a possible shareholding in or takeover of the issuing institution concerned, by the persons involved in this audit will not be justified before the proposed shareholding or takeover has been publicly disclosed.

Subsection (c) ensues directly from Article 2(3) of the Market Abuse Directive.

**Subsection (a)**

Under this subsection, the assignment (which is understood to mean the combination of offer and acceptance, therefore the entire agreement) of options, convertible bonds, warrants and similar rights to shares of an issuing institution as part of a personnel scheme is exempt from the prohibition on insider trading. Such schemes are regularly used as a remuneration instrument and as a means of creating ties between the directors, supervisory board members or employees and the issuing institution or a subsidiary or group company of this issuing institution.

It is possible that the issuing institution concerned or the directors, supervisory board members or employees possess inside information at the time when the agreement is established (the assignment), which means that without this exemption the assignment would be in breach of the prohibition. A personnel scheme is understood to mean a scheme whereby certain financial instruments are offered to directors, supervisory board members or employees, and whereby the issuing institution or a subsidiary or group company of this issuing institution follows a constant course of action as regards the conditions and periodicity of the assignment.
In particular, this concerns the moment of assignment, the decision-making in that regard, the group of entitled persons to whom financial instruments are assigned and the number of financial instruments to be assigned. These elements of the assignment should be elaborated on in accordance with a constant course of action. The purpose of following a constant course of action is to create a tight framework for the assignment of financial instruments to directors, supervisory board members or employees, which is abstract from specific circumstances to such an extent, that any inside information that may exist cannot play a part at the moment of assignment. The enterprise must properly document the constant course of action. For example, it should be able to demonstrate when the decision in favour of the annual assignment was taken. In particular, the moment of assignment should be a fixed, objectively determinable moment, if possible a fixed day on which assignments are made. This approach prevents a situation in which an exemption from the prohibition would nevertheless apply in the event of a one-off assignment of financial instruments for a particular situation, or frequent changes in the distribution circle, the degree of participation and the conditions applied on that occasion. For clarity’s sake it should be added that financial instruments may be assigned to, for example, new employees or newly-appointed directors or supervisory board members, or to employees, directors or supervisory board members on the occasion of an anniversary or promotion, subject to the condition that the personnel regulations state explicitly that financial instruments may be assigned in these situations. In that case, the personnel regulations will have sufficient “constancy”.

If the personnel regulations meet the requirement of a constant course of action there will be no breach of the prohibition, despite the possible existence of inside information at the moment of assignment.

Subsection (b)

The exemption from the prohibition on insider trading formulated in this subsection was included because some directors, supervisory board members or employees frequently possess inside information, which could make it virtually impossible for them in practice to exercise the options, convertible bonds, warrants or similar rights acquired in the context of the personnel regulations. Accordingly, these persons would have to let their rights lapse without using them, which would be difficult to reconcile with the purpose of these rights. Therefore this subsection provides that exercising options assigned, exchanging convertible bonds and exercising issued warrants or similar rights to shares or depositary receipts for shares as part of a personnel scheme on the expiry date of the right concerned, or within a period of five working days preceding that date, will be exempt from the prohibition. The period of five working days was included in order to keep the exemption from the statutory prohibition to a minimum, while providing sufficient opportunity for actually exercising the rights. The exemption from the prohibition also applies to the sale resulting from the exercise of these rights, provided that this sale takes place on the expiry date of the right concerned or within a period of five working days preceding that date.
In that case, however, the party involved must have announced in writing at least four months in advance that he intended to sell the shares immediately after exercising the rights. This four-month period was included in order to prevent a situation in which the party involved, who possesses inside information at the time of exercising the rights, would decide at that moment whether or not to dispose of the shares acquired.

If the party involved, having submitted notification of the intent to sell, decides not to dispose of the shares acquired, the full prohibition will apply to the sale. However, the final choice may be recorded at an early stage by granting the issuing institution an irrevocable authorisation to sell, as often happens in practice. Since in that case the party involved can no longer reconsider its choice, he cannot be guilty of insider trading.

Subsection (c)

Another exemption applies to transactions in financial instruments conducted in order to fulfil a transfer obligation. For example, this may involve the fulfilment of obligations arising from a personnel scheme in relation to the exercising of options or warrants (a warrant is a right issued by the issuing institution itself to buy a specific number of shares or bonds within a specific period for a predetermined price). Obligations relating to the exchange of convertible bonds or similar rights to shares are another example. However, transactions necessary in order to fulfil transfer obligations on other grounds are also conceivable. In such cases the transaction conducted in fulfilment of the obligation to sell or the obligation to exchange will be exempt from the prohibition pursuant to Section 5:56(5)(a) of the Act, but the preceding buy-back transaction necessary in some cases will not.

In this respect it is irrelevant whether this transaction takes place at the same time as, immediately after or some time after the assignment of option rights or the issue of convertible bonds.

Since these transactions will only be exempt from the prohibition insofar as they are necessary in order to fulfil the obligations concerned under unchanged conditions, the issuing institution must be able to demonstrate this necessity by showing that, following the transaction, the number of financial instruments available to the issuing institution, whether at present or in the future, will not exceed the total (potential) quantity required to fulfil the transfer obligation. However, in the event of an early disposal of financial instruments that are held in portfolio for the purpose of a future obligation, the early disposal must be assessed in light of the prohibition on insider trading.

Subsection (d)

Where this subsection and subsection (e) of this Explanatory Memorandum speak of shares and (major) shareholders, these terms also refer to other financial instruments and parties entitled to financial instruments. In practice, however, it is customary to use the terms shares and (major) shareholders. This custom is adhered to in this document.
A party intending to make a public offer for shares that for this reason sounds out existing (major) shareholders as to whether they would be willing to offer their shares if an offer were to be made, will act in the course of his normal duties, profession or position, because such a party will need to know whether a proposed public offer has any chance of success. Therefore this course of action, provided that certain conditions are fulfilled, will not be in breach of the prohibition on communicating price-sensitive information to third parties as worded in Section 5:57(1)(a) of the Act, and this situation is therefore exempt under Section 3(a).

The (major) shareholder who is approached by the offeror about the offer consequently also comes into possession of inside information. There is little point for the offeror in sounding out the (major) shareholder concerned if the latter cannot indicate to the offeror whether or not he will respond to the offer.

Because the term “transaction” in Section 5:56(1) of the Act is given a broad interpretation in practice, it might be assumed that the promise by a (major) shareholder constitutes the start of a transaction and is therefore prohibited pursuant to Section 5:56(1) of the Act. In order to ensure that a (major) shareholder is allowed to make a promise to the offeror, this subsection exempts making a promise from the prohibition on insider trading, on condition that the (major) shareholder specifies in writing to the offeror how many shares he will offer. The offeror can use this written statement, among other things, to make it clear that the sounding out was necessary. For clarity’s sake it should be pointed out that, in the event that the target company (the company that is the object of a possible offer) approaches the (major) shareholder, the promise to respond positively to the offer will be made to the offeror, whether or not through the agency of the target company, because the promise to respond positively to the offer is directed at the offeror, and the eventual transaction is concluded with the offeror. The exemption in this subsection therefore concerns the promise to the offeror.

The offeror may obtain inside information by sounding out (major) shareholders. If the offer document states, in accordance with the rules for public takeover bids, which (major) shareholders have already announced that they will accept the offer in respect of their financial instruments, the price-sensitive information on this point will be publicly disclosed and the prohibition on transactions will no longer apply to the offeror.

Please note, furthermore, that situations occur in practice in which an offeror is part of a group and another group unit or a newly established group unit formally makes the offer during the bidding process. There are also situations in which the target company sounds out (major) shareholders. What is stated below in respect of an offeror also applies to the other or new group unit and to the target company sounding out the (major) shareholders.

Although an issue is not specifically mentioned, this situation is comparable with a takeover bid.

Subsection (e)

What is stated in the notes on Subsection (d) also applies to a promise from a (major) shareholder or potential (major) shareholder who is sounded out by (a representative of) an issuing institution in the context of a proposed issue or secondary offering as to whether he will respond positively to that issue or secondary offering. Because the parties sounded out in the context of a proposed issue or secondary offering not only include existing (major) shareholders, but sometimes also future (major) shareholders, the exemption also applies to potential (major) shareholders.
Under Subsection (e), too, the sounding out must be necessary and the promise must be specified in a written statement to the issuing institution. As long as the promise has not been recorded, the exemption requirements will not have been fulfilled and the prohibition on insider trading will apply to (major) shareholders or potential (major) shareholders.

The prohibition on transactions laid down in Section 5:56 of the Act will remain applicable in full to transactions conducted by the (major) shareholders and potential (major) shareholders other than the transactions referred to in this subsection and in subsection (d). The prohibition in Section 5:57 of the Act will also remain applicable in full to (potential) (major) shareholders that have been approached by the offeror and the issuing institution about the offer and the issue or secondary offering respectively. In fact, confidentiality agreements and "standstill agreements" are concluded in practice in order to emphasise the obligation to observe the prohibition on disclosure and to counteract premature publicity, for example about the takeover.

The offeror and the issuing institution may only sound out (potential) (major) shareholders under the circumstances referred to in Subsections (d) and (e). The offeror, the issuing institution and the (potential) (major) shareholders, because they are in possession of inside information, are not allowed to conduct transactions unless the inside information has been publicly disclosed.

Subsection (f)

Issuing shares or depositary receipts for shares by way of dividend distribution is also exempt from the prohibition on insider trading. Although the parties entitled to the dividend or the issuing institutions may possess inside information at the moment when the dividend is distributed, it would not be expedient to include this distribution under the prohibition. The size of the dividend and the manner in which it is distributed will already have been approved by a resolution of the general meeting of shareholders, and – except for dividend with stock option – will be virtually beyond the influence of individual parties entitled to dividend.

The exemption for acquisitions of shares or depositary receipts for shares does not extend to acquisitions of shares or depositary receipts for shares resulting from the fact that the party entitled to dividend opts to acquire shares or depositary receipts for shares in the event of dividend with stock option. The Market Abuse Decree erroneously stipulated that neither issuing shares or depositary receipts for shares in the form of dividend with stock option nor acquiring shares or depositary receipts for shares in the form of dividend with stock option was allowed by way of dividend distribution. Only the acquisition of shares or depositary receipts for shares in the form of dividend with stock option is prohibited, whereas the issuing thereof is allowed. The wording of Subsection (f) has been amended accordingly.

Subsection (g)

Subsection (g) contains an exemption with regard to intermediaries acting in the context of the professional trade. These intermediaries include persons (brokers) who act on the instructions and for the account of third parties. Acting on one’s own account does not fall under this exemption.

In view of the scope of Section 5:56 of the Act, the exemption also concerns intermediaries trading in financial instruments that have been admitted to a market in financial instruments, rather than a regulated market.
Subsection (h)

There are situations in which inside information about this issuing institution to which the traded financial instruments relate is available to some people within this trading issuing institution (and therefore to the institution itself), but not to the people who are actually involved in conducting or effecting the transaction. There are a number of different variations of this situation. For example, the credit department of a credit institution (and therefore also the credit institution itself) will normally possess price-sensitive information about clients. If the securities department of that credit institution were to trade in financial instruments relating to one of those clients, the credit institution would be acting in breach of Section 5:56 of the Act, even if that securities department did not possess the aforesaid information. There are also situations where, for example, directors or members of the executive board of a credit institution listed on a market in financial instruments possess price-sensitive information about their own enterprise, while the securities department of that credit institution does not possess that information. In this situation, too, the people concerned in that securities department would not be allowed under Section 5:56 of the Act to trade in financial instruments pertaining to their own enterprise, although this is part of that department’s normal duties. These situations do not fall under the exemption provided by Subsection (g) because, in these situations, the inside information in the possession of the intermediary (the credit institution) does not exclusively concern the trade but also the legal person to which the financial instruments relate. Since it is not the intention to preclude the aforementioned transactions (because these are normal business operations), this subsection provides for an exemption.

For the record, it should be noted that, in order to invoke this exemption, a mere reference to the existence of “Chinese walls” will not suffice. It must be demonstrated in each specific case that the “Chinese walls” concerned effectively precluded the “leaking” of information.

Subsection (i)

Subsection (i) is new compared to the Market Abuse Decree and is connected to Parts Q-Z of the amendments that were made to the Wft in the Memorandum of Amendment pertaining to the Act Implementing and Amending the Act on Financial Supervision (Invoerings- en aanpassingswet Wet op het financieel toezicht). As a result of the latter amendments, the provisions on market abuse – as was the case under the Wte 1995 – also apply to a market in financial instruments, not being a regulated market, whose operator has recognised status under Section 5:26(1) of the Act. Subsection (i) ensures that the exemptions for buy-back programmes and for the stabilisation of financial instruments, laid down in Regulation 2273/2003, also apply to this type of market. Section 5:56(5)(c) and (d) already include the same provisions in respect of regulated markets.

Section 3

This section is based on Section 5:57(3) of the Act and replaces Section 3 of the Market Abuse Decree. This provision ensues from Article 3(a) of the Market Abuse Directive.
Section 5:57(3) of the Act includes the basis for laying down rules by order in council as regards the cases and circumstances involving the disclosure of information as part of the normal duties, profession or position. If a disclosure is made as part of the normal duties, profession or position, the prohibition on disclosure laid down in Section 5:57(1)(a) of the Act will not apply. Section 3 gives only two examples of parties acting in the context of their normal duties, profession or position and therefore does not contain an exhaustive list of such situations. In addition to the situations mentioned, it is conceivable that, for example, a lawyer, accountant, secretary or press officer may also disclose price-sensitive information to a third party as part of his normal duties, profession or position.

Where these notes on Section 3 speak of shares and (major) shareholders, these terms also refer to other financial instruments and parties entitled to financial instruments. In practice, however, it is customary to use the terms shares and (major) shareholders. This custom is adhered to in this document.

The exemption in Section 3(a) concerns the party that intends to make a public offer for shares and therefore sounds out existing (major) shareholders as to whether they would be willing to offer their shares if an offer were to be made, because a (potential) offeror will need to know whether a proposed public offer has any chance of success. However, this sounding out will have to be restricted to the (major) shareholders about whom it is reasonably necessary for the offeror to know whether they will respond positively to the offer. The term “reasonably necessary” constitutes an objective criterion, which enables the AFM to perform a retrospective test to determine whether the party doing the sounding out could reasonably conclude in the circumstances concerned that sounding out was necessary for (an assessment of) the success of an offer. The regulations on public takeover bids also provide for the possibility of a potential offeror approaching (major) shareholders in order to find out whether they are prepared to respond positively to an offer that may be made. Therefore, such a course of action is not in breach of the prohibition on disclosing price-sensitive information to third parties, as worded in Section 5:57(1)(a) of the Act. On the contrary, it may benefit the proper operation of the market in financial instruments if a potential offeror sounds out (major) shareholders, because this will prevent an offer that has no chance of success from being made and causing unnecessary price fluctuations.

Subsection (b) is new compared to the Market Abuse Decree and indicates explicitly that disclosure as part of the normal duties, profession or position as referred to in Section 5:57(1)(a) of the Act will be involved if certain (potential) (major) shareholders are sounded out in order to find out if these shareholders are willing to buy financial instruments. The shareholder’s promise directly relating to this sounding out was already included in Section 2(e) of the Market Abuse Decree.

The sounding out referred to in Subsection (b) must be restricted to the (major) shareholders about whom it is reasonably necessary for the issuing institution to know whether they are prepared to buy financial instruments. Because the parties sounded out in the context of a proposed issue or secondary offering not only include existing (major) shareholders, but sometimes also future (major) shareholders, the exemption also applies to potential (major) shareholders. The term “reasonably necessary” constitutes an objective criterion, which enables the AFM to perform a retrospective test to determine whether the party doing the sounding out could reasonably conclude in the circumstances concerned that sounding out was necessary for (an assessment of) the success of the issue or secondary offering.
As stated above, Section 3 does not provide an exhaustive list. By way of further indication, two other examples are given below that were previously included in the AFM’s interpretation “Sounding out (potential) shareholders as part of conducting transactions”.

– A party that intends to conduct or effect a transaction requiring the approval of the general meeting of shareholders, and that therefore sounds out the voting inclinations of existing (major) shareholders at the general meeting of shareholders, will act in the course of his normal duties, profession or position, because an issuing institution will need to know whether a proposed transaction has any chance of success. This sounding out must be restricted to the (major) shareholders about whom it is reasonably necessary for the issuing institution to know whether they will vote for the proposed transaction at the general meeting of shareholders. The purpose of this sounding out is to gain insight as to whether a proposed transaction has any chance of success, and to obtain an impression of the shareholders’ voting inclinations in situations where the general meeting of shareholders has to approve a proposal from the executive board.

Proposed transactions requiring the approval of the general meeting of shareholders may be corporate or legal mergers, for example.

In the context of a proposed transaction with the objective of transferring the business of an enterprise (corporate merger), whereby the buying company will carry on the business operations, the buying company may sound out the shareholders of the selling company in order to estimate whether and to what extent the selling company’s general meeting of shareholders will approve the decision to sell the business. However, this provision only relates to those forms of corporate merger whereby the merger is subject to a resolution of the general meeting of shareholders or situations in which the shareholders may indirectly block a decision to effect a corporate merger.

A legal merger may also involve a situation where it is important to gain an impression of the voting inclinations of a number of shareholders. The acquiring company may sound out the shareholders of the company that will cease to exist. This is all the more important because the general meeting of shareholders of the company that will cease to exist will be authorised, to the exclusion of other company bodies, to pass a resolution to enter into a legal merger with another (i.e. the acquiring) company.

– A party that intends to take a significant strategic decision, and therefore seeks the opinion of existing (major) shareholders on this point, will act in the course of his normal duties, profession or position, because an issuing institution will need to know whether the strategic decision has any chance of success. This sounding out must be restricted to the (major) shareholders about whom it is reasonably necessary for the issuing institution to know whether they support or oppose the proposed significant strategic decision. The purpose of this sounding out is to gain insight as to whether a proposed transaction has any chance of success and obtain the opinion of a shareholder on a proposed significant strategic decision, in particular where it is expected that an individual shareholder or a group of shareholders may directly (or indirectly) exert a material negative influence on that decision.
A significant strategic decision may be a restructuring of the business, for example, whereby shareholders may directly or indirectly influence the significant change concerned. This restructuring might be a management buy-out, an acquisition, the disposal of a business unit or the establishment of long-term collaborative ventures, such as the conclusion of a joint-venture or franchise agreement.

The prohibition on insider trading (Section 5:56(1) and (3) of the Act) will apply in full to person to whom the price-sensitive information is disclosed. The prohibition on disclosure laid down in Section 5:57(1)(a) of the Act will remain applicable in full to sounding out (major) shareholders whose confirmation that they will respond positively to the offer is not reasonably necessary for the offer to succeed.

The offeror (Subsection (a)) or issuing institution (Subsection (b)) will be responsible for handling the contacts with (major) shareholders with due care, and the offeror/issuing institution must be able to make it clear at all times that it was reasonably necessary for the offeror/issuing institution to sound out certain (major) shareholders. If the sounding out is not necessary, this is not a case of disclosure in the course of the normal duties, profession or position, and the prohibition in Section 5:57(1)(a) of the Act will therefore apply in full.

Section 4

This section is based on Section 5:58(3) of the Act and replaces Section 4 of the Market Abuse Decree. This provision ensues from Articles 2 and 3 of the Implementing Directive on accepted market practices and notification regulations.

Under Section 5:58(3) of the Act, it may be designated by or pursuant to an order in council that certain categories of transactions or trade orders are not subject to the prohibitions on conducting a transaction that sends or may send an incorrect or misleading signal and on conducting a transaction in order to maintain the price of financial instruments at an artificial level (Section 5:58(1), opening words and (a) and (b) of the Act), and the manner in which these categories of transactions or trade orders are designated may be further specified. This section provides for the relevant procedure.

Pursuant to Subsection (1), the AFM will have to assess at regular intervals whether certain categories of transactions or trade orders, although classifiable as market manipulation under the prohibition, can nevertheless be deemed acceptable and should therefore be exempt from the prohibition. A new or emerging category may not be deemed unacceptable by the AFM because it is not yet exempt from the prohibition, but instead will have to be examined on its merits. In addition, the AFM must monitor whether the existing exemptions can still be maintained, or whether developing insight entails different considerations that may, for instance, necessitate the cancellation of an existing exemption (Subsection (3)). For example, a supervisory authority may subject an accepted market practice to a new investigation if there have been material changes in the relevant market environment, such as changes in the trading rules or in the market infrastructure.

Since market practices change at a rapid pace in order to respond to investors’ needs, the term “at regular intervals” in Subsections (1) and (3) means that the AFM must always be alert to new and developing market practices. In this context, the AFM must take a number of factors (Subsection (1)) and procedures (Subsection (2)) into consideration.
If the AFM takes the view that a particular category of transactions or trade orders should be exempt from the prohibition on market manipulation, it will advise the Minister of Finance accordingly. On that occasion, it will specify the factors that were taken into account in determining whether the practice concerned is acceptable, in particular if different conclusions were drawn on different national markets as regards the acceptability of the same practice.

The Implementing Directive on accepted market practices and notification regulations assumes that the supervisory authority accepts these categories of transactions and trade orders, thereby indicating that it does not consider these to be in breach of the prohibition. As the prohibition on market manipulation will also be enforced under criminal law in the Netherlands, the acceptance by the AFM of certain categories of transactions or trade orders would have the effect that these exemptions would also have to apply to the prohibition under criminal law. It would not be desirable for constitutional purposes for an autonomous administrative authority to have the power to determine exemptions from a prohibition under criminal law. It was therefore decided in the Market Abuse Decree – and the Directive leaves scope for this – that, as described above, the AFM will advise the Minister of Finance to exempt a particular market practice from Section 5:58(1), opening words and (a) and (b) of the Act, if it finds such an exemption to be desirable. If the Minister of Finance, after consultation with the Ministry of Justice, is of the same opinion, these exemptions will be laid down in a ministerial regulation. Consultations with the Ministry of Justice will take place because a breach of Section 5:58(1), opening words and (a) and (b) of the Act has been classified as an economic offence. Under the Wte 1995 system these exemptions would be laid down in an order in council, but in order to prevent ambiguity during the preparation of the order in council about the legal force of the category of transactions or trade orders to be exempted, it has been decided to lay down the exemptions in a ministerial regulation because of the shorter and swifter procedure involved.

To date, no categories of transactions or trade orders have been exempted under this section, because the AFM has yet to identify a category as requiring exemption. For the moment, it is considered sufficient to lay down the factors that the AFM must take into consideration in determining its advice to the Minister of Finance about categories of transactions or trade orders to be exempted, as well as the procedures to be followed on that occasion.

Article 2(2) of the Implementing Directive on accepted market practices and notification regulations provides that the supervisory authority may not deem certain practices, such as new or emerging market practices in particular, to be unacceptable simply because it has not yet accepted these practices. The AFM will advise the Minister as soon as possible if it takes the view that a category should be exempt from the prohibition on market manipulation.

Subsection (1)

Subsection (1) sets out the factors that the AFM must take into consideration when investigating categories of transactions or trade orders to which the prohibition on market manipulation should possibly not apply. Factors that the AFM must take into consideration are, for example, the fact that liquidity-enhancing market practices are more likely to be regarded as accepted market practices than practices that reduce market liquidity.
Market practices that impede the interaction between supply and demand because they restrict the opportunities for other market players to respond to transactions, or market practices that breach the rules and regulations designed to prevent market abuse, or codes of conduct, are less likely to be regarded as accepted (see the first recital of the Implementing Regulation on accepted market practices and notification regulations).

Subsection (b) provides that the AFM, in considering whether a category of transactions or trade orders should be designated, must take account of the need to guarantee the operation of the market forces and the proper interaction between supply and demand on the relevant market in financial instruments. According to Article 2(1), last paragraph of the Implementing Directive on accepted market practices and notification regulations, this means that the impact of the relevant market practice in particular must be analysed against the main market parameters, such as the specific market conditions before the market practice concerned was applied, the weighted average price of one single trading session or the daily closing price.

Subsection (f) states that the AFM must take into account the result of an investigation into the relevant category of transactions or trade orders by a government body in another Member State or by a body appointed by the government in another Member State as the competent authority within the meaning of the Market Abuse Directive. According to Article 2(1)(f) of the Implementing Directive on accepted market practices and notification regulations, the main question in this context is whether conducting the relevant category of transactions or trading orders breaches the rules and regulations designed to prevent market abuse, or breaches codes of conduct, either on the market in question or on directly or indirectly related markets within the European Union.

If the AFM investigates the market concerned pursuant to Subsection (g), it will take account of the structural characteristics, such as the question of whether or not the market concerned is regulated, the categories of financial instruments that are traded on the market concerned and the types of market participants, whereby it also takes account of the extent to which non-professional investors operate on the market concerned (Article 2(1)(g) of the Implementing Directive on accepted market practices and notification requirements).

Subsection (2)

Pursuant to Subsection (2)(a), the AFM must consult representative organisations of interested parties and foreign supervisory authorities before advising the Minister of Finance. Under Article 3(2), first paragraph of the Implementing Directive on accepted market practices and notification regulations, such organisations are understood to include, but not be limited to, the following: representatives of issuing institutions, financial services providers, consumers, other agencies and market operators. The AFM may decide not to hold these consultations as long as an investigation is in progress into a possible individual breach of the prohibition and sanctions may be imposed pursuant to this investigation.

When assessing the acceptability of a specific market practice, the AFM must also consult supervisory authorities in other Member States, in particular in cases where there are markets comparable to the market under investigation as regards, for instance, structure, volume or type of transactions. Circumstances may occur in which a market practice is deemed acceptable in one market, but not in another, comparable market within the European Union.
Subsection (2)(c) provides that the AFM must disclose its advice to the Committee of European Securities Regulators (hereinafter: CESR). The purpose of this disclosure is to give CESR the opportunity to place this advice on its website.

Subsection (3)

After certain categories of transactions or trade orders have been designated as exempt, the AFM must check on a regular basis whether the exemption is still justified. In doing so, it must obviously consider the factors referred to in Subsection (1) and the procedures referred to in Subsection (2), and take account in particular of material changes in the relevant market environment, such as changes in the trading rules or in the market infrastructure as referred to in Subsection (1)(g). If it is the judgement of the AFM that an exemption should be changed or amended, it will advise the Minister of Finance accordingly.

Chapter 3. Disclosure obligations, lists of persons having access to price-sensitive information and the regulations

Section 5

This section is based on Section 5:60(1)(d) of the Act and replaces Section 5 of the Market Abuse Decree. This provision ensues from Article 1(2) of the Implementing Directive on accepted market practices and notification regulations.

This section designates categories of persons who are closely affiliated with the persons referred to in Section 5:60(1)(a), (b) or (c) of the Act, i.e. persons who determine or co-determine the day-to-day policy of the issuing institution, supervisory board members or managers at that institution. The persons referred to in this section, like the persons referred to in Section 5:60(1)(a), (b) or (c) of the Act, are obliged to disclose transactions conducted or effected for their own account in shares pertaining to the issuing institution referred to in Section 5:60(1)(a), (b) or (c) of the Act, or in financial instruments whose value is partly determined by the value of these shares.

The duty to disclose will apply if a natural person is associated with:

1. an issuing institution with its registered office in the Netherlands that issued or will issue financial instruments as referred to in Section 5:56(1)(a) or (b) of the Act; or

2. an issuing institution with its registered office outside the European Union that issued or will issue financial instruments as referred to in Section 5:56(1)(a) of the Act.

Subsection (a) implements Article 1(2)(a) of the Implementing Directive on accepted market practices and notification regulations, which refers to the life partner who is considered equivalent to a spouse under national law. This provision is implemented in this subsection by means of the description "registered partners or life companions (i) or other persons cohabiting in a similar manner with the persons referred to in Section 5:60(1)(a) to (c) of the Act". The term "registered partner" derives from Section 1:80a of the Dutch Civil Code.

The children referred to in Subsection (b) are the children that are subject to parental authority pursuant to Section 1:245 of the Dutch Civil Code and the children that have been placed under guardianship and in respect of whom the persons referred to in Section 5:60(1)(a) to (c) of the Act have been appointed as guardians (Section 1:378 of the Dutch Civil Code).
This provision implements Article 1(2)(b) of the Implementing Directive on accepted market practices and notification regulations. A child who has reached the age of majority and who is living at home therefore falls under Subsection (c).

Control as referred to in Subsection (d) may be either direct or indirect control. The term “control” should therefore be given a broad interpretation.

A trust as referred to in Section 1(c) of the Supervision of Trust Offices Act is a trust as referred to in Article 1(2)(d) of the Implementing Directive on definitions and public disclosure¹.

Section 6

This section is based on Section 5:60(3) of the Act and replaces Section 6 of the Market Abuse Decree. This provision ensues from Article 6(3) of the Implementing Directive on accepted market practices and notification regulations.

Pursuant to Section 5:60(3) of the Act, Section 6(1) specifies the details that the notification referred to in Section 5:60(1) of the Act must contain. The phrase “the nature of the transaction” in Subsection (f) may refer, for example, to an acquisition or disposal.

Practice has shown that the address of the party obliged to notify must also be known to the AFM, because the issuing institution cannot provide this information in respect of all persons, such as relations of the persons referred to in Section 5:60(1)(a) to (c) of the Act. Section 1:107(3)(c)(3°) of the Act provides expressly that the address details of the parties obliged to notify will not be included in the register referred to in Section 1:107(1) of the Act. The address of the party obliged to notify will not be publicly disclosed and will not be available for inspection by third parties. The term “address” also includes the place of residence.

Subsection (2) provides that the notification forms specified by the AFM must be used to submit a notification. This provision is meant, on the one hand, to minimise the administrative burden for parties obliged to notify and, on the other, to channel the information flow for the AFM as much as possible. This is in fact a continuation of the current practice.

Section 7

This section is based on Section 5:60(5) of the Act and replaces Section 7 of the Market Abuse Decree.

This section regulates the concurrence of the duty to disclose for directors and supervisory board members, under Section 5:60(1) of the Act, with Section 5:38(1) or (2) or 5:48(6) of the Act. The duty to disclose under Section 5:60(1) of the Act will have been fulfilled if a disclosure was already made to the AFM pursuant to the aforesaid sections. This duty to disclose will not have been fulfilled if a parent company discloses transactions conducted or effected by subsidiaries, because in that case there will not be a double duty to disclose for the natural or legal person conducting or effecting the transaction.

Section 8

This section is based on Section 5:60(6) of the Act and replaces Section 8 of the Market Abuse Decree.

A financial enterprise may possess a licence as referred to in Section 2:96 of the Act for providing investment services, or fall under the exemptions in Sections 2:97 or 2:98. A bank may provide investment services under Section 3:33 of the Act.

Under Section 5:60(6) of the Act, transactions carried out under a ‘discretionary management agreement’ need not be disclosed to the AFM.

In practice, directors of listed enterprises in particular make regular use of discretionary management agreements with regard to transactions in financial instruments that pertain to their own enterprise. Such a management agreement establishes a contractual relationship between the party entitled to financial instruments (the principal) and a portfolio manager (the authorised representative), under which the discretionary management of the securities portfolio is transferred to the authorised representative.

Obviously the parties are allowed to include specific provisions when entering into the agreement, for example a description of the type of financial instruments or products in which transactions may be conducted, the objective and the strategy to be followed. However, the authorised representative must be independent and free of any instructions from his client when performing all acts of management resulting from the agreement, and must (re)invest the capital at his own discretion, albeit subject to the restrictions laid down in the agreement.

The parties are allowed to make amendments to the basic assumptions and objectives of the portfolio management agreement. In particular, these amendments may involve the investment policy, the risk profile and the reinvestment of released funds.

However, these amendments can only be made at such a level of abstraction that no influence is exerted on the specific individual transactions conducted or effected by the authorised representative, and otherwise only during periods in which there is no question of inside information (which periods are indicated in accordance with Section 11(c) in the regulations of an issuing institution and are known as open periods).

As the insider obliged to notify is not the party that carries out such transactions, they are exempt from the duty to disclose under Section 5:60(1) of the Act. This is in accordance with existing practice. This exemption has been included in the present Decree to promote legal certainty. Obviously the authorised representative is not required either to disclose the transaction, because he does not belong to the categories of persons referred to in Section 5:60(1) of the Act.

For the sake of completeness it should be noted that a one-off irrevocable buy or sell order, whereby the authorised representative must buy or sell financial instruments pertaining to the principal’s own company during a certain predetermined period within a predetermined price limit, cannot be equated with a discretionary management agreement, because, under a discretionary management agreement the authorised representative is free to choose the manner of investment and reinvestment, while he is also authorised to replace existing securities (funds, financial instruments, etc.) with other securities.

Section 9

This section is based on Section 5:62(3) of the Act and replaces Section 9 of the Market Abuse Decree. This provision ensues from Articles 9 and 10 of the Implementing Directive on accepted market practices and notification regulations.
This section provides rules with which a disclosure as referred to in Section 9(1) must comply, and specifies the manner in which this disclosure must be made.

In Subsection (1)(a), the phrase “a description of the transaction or the instruction” means, for example, that the disclosure must specify the name of the institution issuing the financial instruments concerned, the type of financial instruments, the ISIN/ticker code, whether the transaction involves buying or selling, the price, and the date and time of the transaction, so that it will be clear to the AFM what kind of transaction is involved. The description of the “type of order” means, for example, that the disclosure must specify whether the order is a limit order, a market order or has other characteristics of an order, and whether, for instance, a block trade is involved. The description of the “type of trading platform” means that the disclosure must specify the trading platform via which the order has been or will be carried out, e.g. a regulated market, or an OTC (over the counter) market.

The phrase “details revealing the identity of the persons” in Subsection 1(c) means that the disclosure must specify the names and dates of birth of the persons on whose behalf the transaction has been or will be carried out, as well as of the other persons that are or will be involved in this transaction, and the identity of the counterparty in a transaction in the case of an OTC market. Whether the transaction involves a natural or a legal person can be derived from these details. Furthermore, this provision implements the phrase “such as for own account or on behalf of third parties”, which is included in parentheses in Article 9(1)(d) of the Implementing Directive on accepted market practices and notification regulations. However, this addition between parentheses is not logical at that point in the text. It may be assumed that this addition relates to Subparagraph (c) of this Implementing Directive, so that the disclosure makes it clear to the AFM whether the party giving instructions to carry out the transaction did so on behalf of a third party or on its own account.

In Subsection (d), the term “capacity” refers to the role of the party obliged to notify in relation to the person on whose behalf the transaction has been or will be carried out. This role could be that of broker, underwriter or agent, for example.

If, for instance, the AFM needs additional information during an investigation in response to the disclosure of the transaction, it may ask the issuing institution to provide this information under Section 1:74 of the Act.

Section 5:62(3) of the Act also includes a basis for determining when a reasonable suspicion as referred to in Section 5:62(1) is involved. This provision has not been implemented until now. Nevertheless, this basis has been included for further elaboration because it remains possible that this term will be further specified at European level.

Subsection (3) sets out how the disclosure can be made to the AFM. For example, it will be possible to make the disclosure online by using a simple standard disclosure form drawn up by the AFM.

Section 10

This section is based on Section 5:59(8) of the Act and replaces Section 10 of the Market Abuse Decree. This provision ensues from Article 5 of the Implementing Directive on accepted market practices and notification regulations.

This section contains rules with regard to the content, updating and retention of the list referred to in Section 5:59(7) of the Act, which an issuing institution having its registered office in the Netherlands or a third country (outside the European Union), as well as anyone acting on behalf or on the account of such an issuing institution, must be able to keep of the persons who may have knowledge of price-sensitive information on a regular or occasional basis.
Such persons may be direct employees of the issuing institution, for example, but they may also be such as lawyers, accountants or other contracted parties. This provision implements Article 5(2) to (4) of the Implementing Directive on accepted market practices and notification regulations. The reason why persons are included on the list referred to in Subsection (1)(a) can be divided into two categories: persons who may have knowledge of price-sensitive information on a regular basis and persons who may have knowledge of price-sensitive information on an occasional basis.

An issuing institution, as well as anyone acting on behalf or on the account of such an institution, is free either to use one list of all employees who are or may be involved because of their position in, for example, a project or transaction in which they have access to price-sensitive information, or to use separate lists (e.g. one list of employees and one list of projects).

The “reason why a person appears on the list” referred to in Subsection (2)(a) may be a description of the transaction or project in which the person in question is involved. The knowledge to which persons have access fluctuates, and it is not feasible, for example, to keep a record within a certain project as to who possesses what price-sensitive information at what time. This implementation of the provision in the Directive will minimise the administrative burden for the business sector within the objectives of the directives. The lists, which are retained for five years after being drawn up or updated, in accordance with Paragraph (4), may also be retained in electronically accessible and secured files.

Section 11

This section is based on Section 5:65 of the Act and replaces Section 11 of the Market Abuse Decree.

This section contains the rules with which the regulations to be drawn up under Section 5:65 of the Act by issuing institutions having their registered office in the Netherlands or a third country (outside the European Union) must comply. The rules laid down in the regulations as regards the ownership of and transactions in financial instruments pertaining to the issuing institution by employees and the persons referred to in Section 5:60(1)(a) to (c) only relate to transactions in shares of the issuing institution as referred to in Section 5:65 of the Act or in financial instruments whose value is partly determined by the value of these shares. This approach is in line with the duty to disclose as referred to in Section 5:60 of the Act, which also concerns the disclosure of transactions in shares in accordance with the Market Abuse Directive. If an issuing institution has appointed a person as referred to in Subsection (a) (compliance officer) (see also Section 5:60(4) of the Act, which provides that a disclosure can be made through the agency of a person to be designated by the issuing institution), rules will have to be drawn up with regard to this person’s duties and powers. In practice, this person will often be a ‘compliance officer’, although this is not compulsory under the law. It should be noted in this regard that the parties that are obliged to notify under Section 5:60(1) of the Act will themselves remain responsible for the correctness and timeliness of the disclosure to the AFM. The appointment of a compliance officer does not detract from this responsibility.
Furthermore, the regulations must contain rules about the obligations of employees and the persons referred to in Section 5:60(1)(a) and (b) of the Act as regards the disclosure of the ownership of and transactions in shares pertaining to the issuing institution or in financial instruments whose value is partly determined by the value of these shares. The Market Abuse Decree also included Subsection (c) of Section 5:60(1) of the Act. However, the person holding a management position as referred to in the said Subsection (c) already falls under the term “employee” and therefore does not need to be mentioned separately. Accordingly, the scope of this subsection has remained unchanged.

Pursuant to Subsection (c), the regulations must specify the “closed period”. The term “closed period” refers to the period in which price-sensitive information will frequently become available, e.g. the period in which annual figures are compiled or discussions are held about a takeover. In practice, the categories of persons referred to in the regulations are not usually allowed to conduct or effect transactions in financial instruments of the issuing institution during this closed period. Alternatively, an issuing institution may indicate when the categories of persons referred to in these regulations are allowed to conduct or effect transactions in financial instruments (“open periods”), because this also achieves the intended effect of these regulations, i.e. that no trading takes place during periods in which these persons (may) possess inside information. Each year, the precise dates will have to be established with regard to both open and closed periods, so that these periods are specified in concrete terms. Because Subsection (b) has been amended, reference is no longer made to this subsection. Instead, a direct reference is made to the persons referred to in Section 5:60(1)(a), (b) and (c) of the Act. The scope of this subsection has therefore also remained unchanged.

The fact that the Market Abuse Decree no longer provides for the obligation to send the regulations and changes therein to the AFM for the AFM’s information before the effective date obviously does not mean that drawing up regulations has become a “non-committal” obligation. The AFM supervises compliance with the prohibition on insider trading. If, for instance, the AFM wants to inspect the regulations in the context of an investigation into insider trading, it may ask the issuing institution to provide these regulations under Section 1:74 of the Act.

The Tabaksblat Code prescribes that an issuing institution must place its regulations on its website.

Chapter 4. Public disclosure of price-sensitive information

Section 12

This section is based on Section 5:59(8) of the Act and replaces Section 12 of the Market Abuse Decree. This provision ensues from Article 2 of the Implementing Directive on definitions and public disclosure and from Article 21 of the Implementing Directive on accepted market practices and notification regulations.

Article 2(1) of the Implementing Directive on definitions and public disclosure contains the obligation to inform the public immediately. Pursuant to the Transparency Directive\(^1\), implementing measures are being established about the dissemination of regulated information, which also includes price-sensitive information.
This section, unlike Section 12 of the Market Abuse Decree, speaks of price-sensitive information “directly pertaining to itself”. Although this already follows from Section 5:59(1) of the Act, it has been included for clarification purposes. It changes nothing with regard to substance.

Section 13

This section is based on Section 5:59(8) of the Act and replaces Section 13 of the Market Abuse Decree. This provision ensues from Article 20 of the Transparency Directive.

Subsection (1) concerns the situation where financial instruments are admitted only in the Netherlands, or where the issuing institution applied for or agreed to the admission to trading of those financial instruments only in the Netherlands. The issuing institution must choose at least one of two languages (Dutch or English) in which it wants to disclose price-sensitive information.

Subsection (2) concerns the situation where financial instruments are admitted both in the Netherlands and in one or more other Member States, or where the issuing institution applied for or agreed to the admission to trading of those financial instruments in one or more other Member States. The issuing institution may opt to disclose the price-sensitive information also in the language accepted by the supervisory authority of that other Member State or in a language customary in the sphere of international finance. This need not necessarily be the same language. It goes without saying that English is a language that is customary in the sphere of international finance.

Section 14

This section is based on Section 5:59(4) of the Act and replaces Section 14 of the Market Abuse Decree. This provision ensues from Article 3 of the Implementing Directive on definitions and public disclosure. In short, the obligation to disclose price-sensitive information directly pertaining to the issuing institution applies to issuing institutions (Section 5:59(1) of the Act). Therefore the same issuing institution is also the party to whom the standard in this section is addressed, with the proviso that Subsection (1)(c) is directed at issuing institutions that are also financial enterprises.

Subsection (1) explains what is meant in any event by a legitimate interest as referred to in Section 5:59(3)(a) of the Act. Where a legitimate interest exists, the public disclosure of price-sensitive information may be delayed, as long as the other two conditions of Section 5:59(3) of the Act are fulfilled as well, i.e. that this delay will not deceive the public and that the confidentiality of the price-sensitive fact is guaranteed. The use of the words “in any event” indicates that the possibilities for delaying disclosure included in this subsection are not an exhaustive list. This means that other situations involving a legitimate interest are also conceivable.

Pursuant to Subsection (1)(a), the non-thwarting of negotiations to which an issuing institution as referred to in Section 5:59(1) of the Act is a party, and whose disclosure may affect the outcome or the normal development of these negotiations, may be regarded as a legitimate interest. This may involve a situation, for example, in which the continued existence of such an issuing institution is under serious and imminent threat. However, a condition in this example is that public disclosure of the fact that negotiations are being held and the identity of the parties involved in these negotiations would seriously harm the interests of existing and potential shareholders, because it would jeopardise the completion of these negotiations to secure the recovery of the issuing institution in the long term.
Subsection 1(b) uses the phrase “or a comparable body” to indicate a supervisory body of a foreign company or issuing institution whose duties are comparable to those of a Dutch supervisory board. Obviously, this phrase does not refer to the general meeting of shareholders or a comparable body. Where a legitimate interest exists, the issuing institution must undertake all reasonable efforts to obtain the prompt approval of the supervisory board or a comparable body of a company or issuing institution, so that the principal requirement of immediate disclosure (Section 5:59(1) of the Act) is fulfilled. The phrase “decisions taken or contracts made” from Article 3(1)(b) of the Implementing Directive on definitions and public disclosure has been implemented in this section through the inclusion of “decisions taken by the executive board of the issuing institution” because the conclusion of a contract by the executive board will normally be preceded by a decision by the executive board. The term “body” as included in Article 3(1)(b) of the Implementing Directive on definitions and public disclosure has been implemented through the phrase “supervisory board or a comparable body”. Decisions by the executive board that can be classified as price-sensitive will normally require the approval of this body of the issuing institution in particular.

The term “approval” has been used here within the meaning of Section 164 of Book 2 of the Dutch Civil Code. Finally, the wording of (b) has been amended to improve the readability of this subsection. No change in content was intended with this amendment.

Subsection (1)(c) is directed at issuing institutions that are also financial enterprises. Consumer confidence in the soundness of financial enterprises is an essential factor in the proper operation of the financial sector. The Wft provides for supervisory rules and enforcement instruments in order to guarantee that soundness where possible. In the situations referred to in this subsection, confidentiality is an important condition for effectiveness, and public disclosure might harm the interests of the financial enterprise involved. As already indicated in the introduction to this Explanatory Memorandum, Section 14 has been clarified with regard to the concurrence of the disclosure obligation under the rules on market abuse and the importance of confidentiality in the situations referred to in this subsection.

This subsection provides that preventing the disclosure of the appointment of a custodian (Section 1:76 of the Act), or of the submission of an application to declare emergency regulations applicable under Sections 3:160 or 3:161 of the Act where this application concerns the issuing institution itself, or of the DNB providing liquidity support under the Bank Act 1998, from being contrary to the interests of the financial enterprise may be regarded as a legitimate interest. In these cases, the financial enterprise may decide to delay the disclosure, because disclosure would be contrary to its interests. Obviously, a delay will only be possible as long as the other two conditions of Section 5:59(3) of the Act are fulfilled as well.

Immediate disclosure of the appointment of a custodian may damage the reputation of the institution and thus be contrary to the interests of the financial enterprise.

A supervisory authority may decide to appoint a custodian if the appointment is necessary to obtain a greater grip on the operations of a financial enterprise.

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1 Compare the decision of the Advisory Committee on Listing and Issuing Rules (Adviescommissie Fondsenreglement) of 20 January 2003 (Petroplus), JOR 2003/119, which also held this view as regards the application of Article 28h of the Listing and Issuing Rules of Euronext Amsterdam N.V.
Such an appointment may be necessary in three situations: (a) if the lighter instrument of an instruction did not produce the desired effect, (b) if the adequate operation of the financial enterprise is jeopardised as a result of extraordinary events, or (c) if the soundness of the financial enterprise is jeopardised to such an extent that immediate intervention is required.

Preventing the disclosure of the application to declare the emergency regulations applicable from being contrary to the interests of the financial enterprise may also be regarded as a legitimate interest. The disclosure of such a measure may hamper the continuity of a financial enterprise, which is not in the interests of either the creditors or the shareholders of the financial enterprise. As soon as the court rules that emergency regulations are applicable, this ruling will have to be disclosed immediately. The application underlying the ruling need not be disclosed on that occasion, since the application is no longer the relevant price-sensitive fact.

Where a solvent bank cannot fulfil its obligations in the short term and is unable to attract funds via regular channels, DNB may provide liquidity support if the support is secured by adequate collateral. This subsection states that if DNB provides such support, an issuing institution may decide to delay public disclosure because a legitimate interest exists.

Subsection (2) implements Section 5:59(4) in combination with 5:59(3)(c). In the Market Abuse Decree, Subsection (2) contained the phrase “as part of their normal duties, profession or position within the legal person, company or institution”. This wording has been adjusted in the interests of clarity because the fact that a person from outside the issuing institution is aware of price-sensitive information will not be an impediment to guaranteeing the confidentiality of this information, if this person needs to be aware of the information as part of his normal duties, profession or position. In fact, confidentiality agreements and “standstill agreements” are concluded in practice in order to emphasise the obligation to observe the prohibition on disclosure and to counteract premature publicity regarding the price-sensitive information.

Obviously, the obligation of immediate disclosure will apply as normal if the confidentiality of the information is no longer guaranteed.

Chapter 5. Preventing investment recommendations from misleading the public

General notes

Section 5:64(1) of the Act stipulates with regard to the disclosure of investment recommendations that information must be provided on a number of subjects specified in that subsection. These rules are intended to protect investors by ensuring that a reliable foundation for taking investment decisions is created, in that the information provided in the disclosure of the recommendation will enlighten investors about, for example, the status or persuasive power of this recommendation or the interests of the publisher of the recommendation. In this way, investors will be able to determine how much value they want to attach to the investment recommendation. Section 5:64 of the Act and Sections 15 to 19 of this Decree implement the Implementing Directive on investment recommendations¹.

If no investment recommendation within the meaning of Section 5:53(6) of the Act is issued, Chapter 5 of this Decree will not be applicable.

Section 15

This section is based on Section 5:64(1) of the Act and replaces Section 15 of the Market Abuse Decree. This provision ensues from Article 2(1) of the Implementing Directive on investment recommendations.

Section 15 applies to anyone who publishes investment recommendations, i.e. who discloses information intended for the general public as referred to in Section 5:64(2) of the Act.

This is the only section in this chapter that also applies to persons who publish investment recommendations outside the scope of their profession or business. One of the subjects referred to in Section 5:64(1) of the Act is detailed in this section. The subject concerns the disclosure of the identity of the person who publishes the information intended for the general public (Section 5:64(1), opening words and (a) of the Act). It is important that the name and position of the natural person who drew up the information and the name of the person responsible for the publication of the investment recommendation are publicly disclosed, because investors may regard this as valuable information in making their investment decisions.

Section 16

This section is based on Section 5:64(1) of the Act and replaces Section 16 of the Market Abuse Decree. This provision ensues from Articles 3(1) and (3) and 4(1) of the Implementing Directive on investment recommendations.

Under Section 5:64(1), opening words and (b) of the Act, Subsection (1) specifies what information a publisher of an investment recommendation must include in the investment recommendation in order to ensure a fair representation of the facts.

The term "publisher of an investment recommendation" has been defined in Section 5:53(7) of the Act.

Subsection (1)(a) refers to the reliability of a source. A source may be reliable because the expertise of the relevant person is beyond question (first-hand information) or because the source proved to be reliable in the past. A reliable source is always known by name. An anonymous source is by definition unreliable, in which case the information should be verified with a second source before it may be assumed that the information is reliable.

An investment recommendation must make a clear distinction between facts and information that is not based on facts (Subsection (1)(b)). Examples of information not based on facts include interpretations, estimates and advice.

Subsection (2) applies to independent analysts, investment firms and other publishers of investment recommendations as referred to in Section 5:64(2)(a) of the Act, whose main business consists of publishing investment recommendations, or to natural persons working for them under a contract of employment or otherwise as referred to in Section 5:64(2)(a) of the Act, or to legal persons affiliated to the investment firm.
This subsection specifies the information to be provided by the party involved. An independent analyst will publish his investment recommendations in the context of his profession or business and will therefore classify as a “relevant person” within the meaning of the Implementing Directive on investment recommendations.

This Decree does not mention credit institutions, because a credit institution that publishes investment recommendations in its capacity as a broker in financial instruments falls under the term “investment firm”. This is the group to which the Implementing Directive on investment recommendations relates, because a credit institution making investment recommendations will do so in its capacity as a broker in financial instruments.

An affiliated legal person within the meaning of the opening words of Subsection (2) may be, for example, a legal person that is part of the same group, a legal person that can directly or indirectly exercise voting rights or otherwise exercise certain rights by which material influence can be exerted on the commercial or financial policy of another entity in the group, or a legal person in which directors can directly or indirectly exercise voting rights or otherwise exercise certain rights by which material influence can be exerted on the commercial or financial policy of that legal person.

The term “material substantive sources” as referred to in Subsection (2)(a) may be understood to mean, among other things, information provided by the issuing institution concerned. The investment recommendation must also specify whether the information was communicated to the issuing institution concerned, whether this communication to the issuing institution led to a change in the information before it was disseminated, and if so, what was changed.

Subsection (2)(b) provides that the information must adequately explain the meaning of an investment recommendation and state how the investment recommendation is based on the main assumptions. The meaning of an investment recommendation must be understood to mean a discussion of the advice – for example – to buy, sell or hold. This discussion must also state the time horizon of the investment to which the investment recommendation relates.

The requirement that the information must specify the main assumptions on which the recommendation is based constitutes a deviation from Article 4(1) of the Implementing Directive on investment recommendations, which provides that an appropriate risk warning must be given, including among other things a sensitivity analysis of the relevant hypotheses. The decision to deviate from the Directive on this point was taken because the Directive in fact envisages an assessment of the quality of the assumptions, and the added value of any additional intention is hardly relevant. In this way, the administrative burden is restricted to a minimum.

Subsection (2)(d) provides that the information must specify the scheduled frequency of possible adjustments to the investment recommendation and of all major amendments to the publication policy announced earlier. There is no obligation to change the content of (“old”) investment recommendations disclosed earlier if facts and circumstances have changed over time and necessitate a different investment recommendation. Furthermore, this subsection does not require that a schedule be drawn up, but it does provide that there must be a disclosure of the scheduled frequency of any adjustments to the investment recommendation and of all major amendments to the publication policy disclosed earlier, if such a schedule is available.
Under Article 3(3) of the Implementing Directive on investment recommendations, the Member States must require that any recommendation can be substantiated as reasonable if the competent authorities so request (in the Netherlands the competent authority is the AFM). Since a recommendation is “reasonable” if the requirements of Article 3(1) are fulfilled, the inclusion of this requirement would have no added value. Furthermore, Section 1:74 of the Act already allows the AFM to request all the information that is relevant to its supervisory activities.

In the Dutch text of Article 4(1)(d) of the Implementing Directive on investment recommendations, the term “dekkingsbeleid” is used. The English text of this Directive refers to “coverage policy”. In the context of this Directive, this term can only refer to the publication policy regarding the disclosure of an investment recommendation, which is why Subsection (2)(d) of the present Decree uses the term “publication policy”. This policy specifies which financial instruments fall within the area of activity of an issuing institution or person, on what subjects reports are written, for example, and how frequently reports are issued about the financial instruments concerned.

Subsection (2)(f) provides that the information must state the fact that the advice laid down in the investment recommendation differs from the most recent advice with regard to the same financial instrument or the same issuing institution. This means, for example, that there must be a statement if advice to buy has changed into advice to sell, or if advice to hold has changed into advice to buy. The 12-month period referred to in Article (4)(1)(f) of the Implementing Directive on investment recommendations in all likelihood relates to the deviation from the most recent advice of the same publisher of an investment recommendation, because investors need to know that the new advice differs from the most recent advice; deviation from earlier advice than the most recent advice is far less relevant. In addition, a publisher of an investment recommendation will only be responsible for investment recommendations that it issued itself.

Section 17

This section is based on Section 5:64(1) of the Act and replaces Section 17 of the Market Abuse Decree. This provision ensues from Articles 5(1) and (2) and 6(1) and (4) of the Implementing Directive on investment recommendations.

Under Section 5:64(1), opening words and (c) of the Act, rules are laid down as regards the public disclosure of information that may reasonably be assumed to have the potential to affect the objectivity of the information given to the general public.

Subsection (1) applies to all publishers of investment recommendations, while Subsection (2) applies to publishers of investment recommendations that are legal persons.

Subsection (1) stipulates that an investment recommendation must state the interests or conflicts of interest that may reasonably be assumed to have the potential to affect the objectivity and reliability of the recommendation. In particular, this may involve situations where publishers of an investment recommendation have a material financial interest in one or more financial instruments to which the recommendation relates, or where such persons have a material conflict of interest in respect of the issuing institution to which the recommendation relates.
Experience has shown that a person’s own interests or conflicts of interest may affect the advice that they provide in an investment recommendation. This is not only a risk for investors, and for private investors in particular, but may also create a feeling of distrust on the financial market in question. From that perspective, it is essential to safeguard market integrity.

Subsection (3)(a) concerns the situation in which there are financial ties in the form of a “substantial shareholding” between the publisher of an investment recommendation and the issuing institution to which the investment recommendation relates. This situation comprises at least the following two cases:

1. the publisher of the investment recommendation owns more than five percent of the total issued share capital of the issuing institution involved, or
2. such an issuing institution owns more than five percent of the total issued share capital of the publisher of the investment recommendation.

“Another material financial interest” (Subsection (3)(b)) may be an outstanding loan, for example. Whether this is the case is assessed from the point of view of the publisher of an investment recommendation.

The party taking over or placing financial instruments of the issuing institution referred to in that subsection in a professional or commercial capacity when these financial instruments are issued (Subsection (3)(f)) may be the lead manager or the co-lead manager, for example.

In view of Article 6(1)(e) of the Implementing Directive on investment recommendations, the exemption of Section 17(4) does not apply to all of Subsection (1) (as included in the Market Abuse Decree), but only to Subsection (1)(e). In addition, Section 17(4) of the Market Abuse Decree erroneously made no reference to Subsection (3)(e). This omission has now been rectified in Subsection (4).

Article 6(4) of the Implementing Directive on investment recommendations does not give a definition of the term “investment banking services”, which is also used in Subsection (6) in the present Decree. It is likely that the following services or activities from Sections A and B of Annex I to the Markets in Financial Instruments Directive must be classified as investment banking services:

– reception and transmission of orders in relation to one or more financial instruments (see Section C of Annex I to the Markets in Financial Instruments Directive);
– execution of orders primarily but not exclusively on the account of professional clients (see Annex II to the Markets in Financial Instruments Directive);
– underwriting of financial instruments or placing of financial instruments on a firm commitment basis;
– placing of financial instruments without a firm commitment basis;
– granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the undertaking granting the credit or loan is involved in the transaction;
– advice to undertakings on capital structure, industrial strategy and related matters, and advice and services relating to mergers and the purchase of undertakings;

– foreign exchange services where these are connected to the provision of
investment services;
– investment research and financial analysis or other forms of general
recommendation relating to transactions in financial instruments;
– services related to underwriting.

Advice to buy, hold or sell will obviously be given if these terms are used
literally, but also, as stated in Subsection (6), if a comparable word or phrase is
used. A comparable word or phrase refers to situations in which these terms are
not used literally, but the advice is worded in such a way that the average investor
will interpret it as advice to buy, hold or sell.

It should also be noted that the obligation to disclose interests and conflicts of
interest for parties disclosing investment recommendations does not mean that
these parties are required to disregard existing information barriers that were
established in order to prevent and avoid conflicts of interest (the “Chinese
walls”).

Section 18

This section is based on Section 5:64(1) of the Act and replaces Section 18 of
the Market Abuse Decree. This provision ensues from Articles 6(3) and 9(a) of the
Implementing Directive on investment recommendations.

Public disclosure of the details specified in this section will contribute to the
objectivity and reliability of investment recommendations.

Pursuant to Article 6(3), first and second paragraphs of the Implementing
Directive on investment recommendations, the Member States are obliged to
require that natural or legal persons working for an investment firm as referred to
in Section 5:64(2)(a) of the Act, under a contract of employment or otherwise, and
who were involved in preparing an investment recommendation, disclose whether
their remuneration is tied to investment banking transactions performed by the
investment firm or any related legal person and, if these natural persons receive
or acquire shares of an issuing institution prior to the public offering of such
shares, that they also disclose the price at which these shares were acquired and
the date of acquisition. To prevent these details from being disclosed in a place
other than that where the publisher discloses the investment recommendation
and the related information, the publisher of the investment recommendation must
disclose all details in the same place. Under Subsections (1) and (2), the person
drawing up the investment recommendation must enable the publisher of the
investment recommendation to fulfil its obligations (under Subsection (3)) by
providing the publisher with the said details. Obviously these details need not be
provided to the investment firm if they are already in the latter’s possession.

Investment banking transactions are transactions ensuing from investment
banking services (see the notes on Section 17 in this respect).

Section 19

This section is based on Section 5:64(1) of the Act and replaces Section 19 of
the Market Abuse Decree. This provision ensues from Articles 3(2), 4(2) and (3),
5(3) and (4) and 6(5) and (6) of the Implementing Directive on investment
recommendations.
A location directly and easily accessible to the public, as referred to in Subsection (1), may be an Internet site of the relevant person, for example. No reference is made to Section 15, because the quantity of information to be provided pursuant to that section will not be disproportionate in the case of a non-written recommendation. This is why Article 2(3) of the Implementing Directive on investment recommendations has not been implemented.

There is no general rule to determine the cases in which the information to be disclosed is disproportionately long in relation to the length of the recommendation. This will have to be assessed on a case-by-case basis. If the information is included immediately after the recommendation, it will be more easily accessible to an investor than if, for instance, the information can be retrieved from an Internet site. Therefore it should not be too readily assumed that it would be disproportionate to include the information with the investment recommendation.

Analysts, journalists and other professionals may draw up a self-regulatory system whose rules are equivalent in terms of substance to the rules laid down in Section 5:64 of the Act and in Sections 15 to 19 of this Decree. Obviously, such a self-regulatory system must have the same effect, and its enforcement and sanctions must correspond to the relevant requirements laid down in the Market Abuse Directive and the Implementing Directive on investment recommendations, such as the fact that sanctions must be effective, proportionate and dissuasive (Article 14(1) of the Market Abuse Directive). The AFM can take the existence of such a system into account when carrying out its risk-oriented supervisory duties.

Risk-oriented supervision means that supervised persons or institutions which, in the opinion of the AFM, have a limited risk profile, are monitored less closely in the supervision process. The AFM will be more likely to assume such a limited risk profile if the supervised person or institution has to observe standards equivalent to the Act in terms of substance and demonstrably complies with these standards. Another advantage is that the responsibility for guaranteeing the quality of investment recommendations will be borne primarily by the parties that should bear this responsibility.

Based on Section 5:64(7) of the Act, different rules may be laid down for the disclosure of investment recommendations by journalists or other professionals. This provision has not yet been implemented, for the following reason: Public debate is an essential condition for the operation of a democratic society. Journalists play a crucial part in public debate, and even bear a special responsibility. It will be difficult to restrict their contribution to this debate. However, this does not mean that the general public should be less well protected if a journalist publishes an investment recommendation in the context of his profession or business than if, for example, an analyst publishes the same investment recommendation. The Implementing Directive on investment recommendations concerns publishers of investment recommendations, whereby it is irrelevant who publishes a recommendation.

The rules on public disclosure of investment recommendations will only come into play where an investment recommendation is made, i.e. where an investment strategy is recommended or proposed either explicitly (“buy”, “sell” or “hold” or words to that effect, which the average investor will interpret as advice to buy, sell or hold) or implicitly (reference to a guide price) in information intended for the general public with regard to financial instruments or an issuing institution.
In general, a journalist will not be likely to publish investment recommendations in the context of his profession or business. If a journalist does not publish the investment recommendation in the context of his profession or business, he will be obliged only to disclose the name and position of the natural person who drew up the investment recommendation and the name of the person who is responsible for the publication of the information.

Obviously these rules will not be applicable in situations involving, for example, a description of facts rather than an investment recommendation.

Sections 15 to 19, in combination with Section 5:64 of the Act, are intended to prevent investment recommendations from misleading the public. In order to ensure that investors can base their decisions on accurate information and enable them to interpret recommendations correctly, a number of standards have been detailed, based on Section 5:64 of the Act, which specify the additional information to be provided with an investment recommendation. The purpose of these rules is therefore to guarantee the creation of a reliable foundation for taking investment decisions.

If there proves to be a need to do so, the practical impact of the Act and the Decree on journalists will be investigated. If it turns out that access to free information is nevertheless hampered in certain specific circumstances, the basis provided by Section 5:64(7) of the Act may still be used, pursuant to which different rules may be laid down for the disclosure of investment recommendations by journalists and other professionals.

Chapter 6. Operating on markets in financial instruments

Chapter 6 applies to the categories of enterprises listed in Section 5:68(1) of the Act. For the record, it should be noted that the list given also includes the 'interprofessional' collective investment schemes and their management companies (cf. Section 1:12(1)(b) and (2)(b) of the Act), as well as the portfolio managers associated with a pension fund (cf. Section 1:15(b) of the Act). The said categories were also subject to securities-related market conduct supervision pursuant to the Wte 1995.

6.1 General provisions

Section 20

Conflicts of interest with regard to financial instruments may arise where an enterprise combines various activities that involve financial instruments. This will not apply in equal measure to all of the respective categories of enterprises. Investment firms in particular must structure their activities in such a way as to avoid conflicts of interest. In accordance with the point of departure of the present regulation, the enterprises themselves may determine how they fulfil this requirement, as long as the measures taken are sufficient to achieve their objective in the specific situations concerned. Section 20(3) of the Further Regulations, under which investment firms had to notify the AFM in advance of significant changes in their structuring measures, has not been retained. This helps to restrict the administrative burden entailed by the Decree.
Section 21

This section has also been greatly simplified compared to the Further Regulations. The purpose of the provision is to ensure that enterprises handle price-sensitive information with due care. To this end, they will have to take measures that are increasingly elaborate as they deal more and more often with price-sensitive information. Enterprises dealing with such information only on an occasional basis will have to be particularly alert when such a situation (nevertheless) arises. In that case, there may be cause for taking temporary measures, for as long as is necessary, in order to ensure that the persons concerned are adequately instructed. Such a measure could also mean that persons who are aware of price-sensitive information must temporarily refrain from carrying out private transactions in financial instruments to which that information relates.

Section 22

Under this section, an enterprise must designate an internal supervisor who is responsible for the supervision of compliance with the provisions of this chapter. In accordance with the point of departure set out in the introduction to this chapter, this section has been worded in general terms as well, so that enterprises have freedom of choice as regards how to organise this internal supervision. An important point, obviously, is that the internal supervisor ("compliance officer") needs to have the necessary powers in order to perform his duties with sufficient authority and independence. In addition, the persons to whom the internal rules apply must be obliged to provide the information enabling the compliance officer to perform his duties, and to cooperate in any investigations that may be conducted. It follows that a breach of the internal rules should carry an appropriate penalty.

Section 23

This section deals with keeping records of transactions in financial instruments. This section only concerns the transactions that enterprises conduct on their own account. Investment firms must also keep a detailed record of transactions they conducted on behalf of their clients (see Section 4:14(2)(c) of the Act and the order in council based on it). The transactions referred to in this section need not be recorded separately. The record of these transactions may also be part of the records kept by the enterprise in another context.

6.2 Code of conduct for private transactions

Section 24

Under Subsection (1), the enterprises described in Subsection (2) must have a code of conduct for private transactions in financial instruments by persons associated with the enterprise who are directly or indirectly involved in the transactions in financial instruments conducted by the enterprise, or who possess or may possess inside information otherwise, on a regular basis, on account of their duties. The terms "associated" and "association" with an enterprise must be interpreted broadly. A contract of employment is not a prerequisite in this respect. The association may involve employment, but it may also concern persons who work for the enterprise as temporary workers or who work under a management agreement. The code of conduct will be applicable primarily
to persons who are directly involved in the provision of investment services or who play a part in the investment policy of the enterprise, and therefore not (for example) to the staff of the claims department of an insurance company or the pension department of a pension fund.

The enterprise must ensure that the code of conduct is known to all those concerned and must supervise compliance with this code. The supervision of compliance also means that the relevant staff members must be obliged in some way to comply with the code of conduct. This Decree leaves it up to the enterprises to make their own arrangements in this respect.

The code of conduct must fulfil a number of requirements, which have been laid down in Sections 25 to 29 (formerly Annex 3 and Annex 3a respectively to the Further Regulations).

Subsection (2) specifies the categories of enterprises to which the obligation to have a code of conduct for private transactions applies. In this context, a distinction is made between the categories referred to in Subsection (2)(a), whose core business consists of providing investment services, conducting transactions in financial instruments or finalising these transactions, and the other categories referred to in Subsection (2)(b) (institutional investors), whose assets consist to a greater or lesser extent of financial instruments. The obligation in Subsection (1) applies to all enterprises belonging to the categories referred to in Subsection (2)(a), except where an enterprise, in application of Section 25(3), decides not to designate any insiders (see also Section 25).

The other categories, as referred to in Subsection (2)(b), are required to have a code of conduct for private transactions if one of the following two circumstances applies: the enterprise owns a qualified shareholding in an issuing institution, or is active on the markets in financial instruments to more than a limited extent. The former circumstance means that there is a special relationship between the enterprise and the issuing institution involved. For the same reason, the natural or legal person that owns a qualified shareholding in an issuing institution, and possesses inside information, will be deemed to know or reasonably suspect that inside information is involved, such that the latter is not an element in the prohibition in Section 5:56(1) of the Act.

The latter circumstance means that enterprises that are active on markets in financial instruments to a limited extent only will be exempt from the obligation to have a code of conduct, as was also the case under the old regulation. In this context, the same limit is applied as previously under the Exemption Regulations pursuant to the Wte 1995, i.e. € 20 million, measured by the volume of the transactions in financial instruments in the last calendar year. Since the exact magnitude of the said transaction volume (of year t-1) will only become known in the course of year t, the foregoing means that during the first months of year t it is the transaction volume of year t-2 that must be taken into account.

As the enterprises referred to in Subsection (2)(b) may have branch offices or subsidiaries, or themselves be a branch office of a foreign enterprise, it is important to specify the term “transactions in financial instruments” in further detail. The point of departure of Subsection (3) is that only the transactions of the Dutch offices will be taken into account. Transactions of branch offices outside the Netherlands or of subsidiaries will therefore be disregarded, as will transactions of the foreign (head) office if the enterprise is a branch office itself.
In calculating the transaction volume, certain transactions are disregarded pursuant to Subsection (4). Subsections (4)(a) and (b) derive from the old regulation. The wording of Subsection (4)(a) has been adjusted in such a way as to correspond to the terms used in Subsection (b) of the definition of “professional market party” in Section 1:1 of the Act. Subsection (4)(c) provides that transactions in index-linked funds and ‘institutional unit trusts’ may also be disregarded when determining the transaction volume. As is the case for the transactions referred to in Subsections (4)(a) and (b), there is no risk of potential market abuse here.

Section 25

The Further Regulations contained a non-exhaustive list of persons who were classified as insiders in any event and who accordingly had to comply with the rules of conduct applicable to insiders. As explained in the introduction to this chapter, the present section is organised differently. The enterprise itself is responsible for designating as insiders persons who possess or may possess inside information on a regular basis. The decisive factor in this context is not the position of the person concerned, but the extent to which this person comes across or may come across inside information. Nevertheless, Subsection (2), by way of refutable presumption, specifies some categories of persons that normally have to be designated as insiders. Under Subsection (3), however, an enterprise may refrain from such designation if the relevant person or persons do not regularly possess inside information in practice.

Under Subsection (4), an enterprise must provide for procedures relating to the designation of insiders, because it should be clear at any moment who has been designated as an insider and what criteria are applied when new staff members are employed, staff members are given a different position, or when there is a change in circumstances.

Section 26

This section contains the general rule with regard to the private transactions of the persons to whom a code of conduct applies as referred to in Section 24(1) that these persons must keep their business and private interests strictly separate.

Section 27

Insiders possess or may possess price-sensitive information on a regular basis. The duty to disclose regulated in this section with regard to their private transactions is meant to help prevent insider trading and contributes to controlled and sound business operations on the part of the enterprise involved. The manner in which the disclosure must be made and the details that it must contain depend on the provisions laid down in this regard in the code of conduct. The present Decree does not contain any detailed requirements in this respect. Where the investments of third parties related to the insider are concerned, the insider is obliged to do everything that he can: he must do whatever he can, to the best of his abilities, to ensure that the aforementioned third parties provide information on the investments concerned when requested to do so.

Transactions in specific financial instruments need not be disclosed if there is a provision accordingly in the code of conduct. However, this is subject to the condition that the transactions are transactions in financial instruments that cannot involve market abuse. Examples include transactions in government bonds or in certain unit trusts.
Section 28

To ensure proper monitoring of the private transactions of an insider at an investment firm, the point of departure (which was also previously applied) is that the insider should carry out those transactions via the enterprise with which he is associated. Alternatively, he may conclude a discretionary management agreement with another investment firm. Pursuant to Subsection (c), the investment firm may also prescribe or allow other arrangements. The market consultation procedure revealed that investment firms should have scope for shaping their internal monitoring of private transactions in the manner that is most appropriate for the enterprise. In this way, account can be taken (for example) of the possibility that the investment firm is part of a group of several investment firms. Furthermore, a distinction can be made between private transactions for one’s own account and transactions on behalf of third parties that are also classified as private transactions within the framework of this Decree (see Section (1)(b) and the corresponding notes).

Section 29

This section contains a number of specific provisions for market makers (Subsection (a)) and for the staff members of investment firms who are involved in issues and initial public offerings (Subsections (b) and (c)). The persons who play a part are not allowed to subscribe for the issue concerned; the persons who are associated with the investment firm without playing a part in the issue are allowed to subscribe, but they must retain the instruments for a minimum period of six months. The latter condition is meant to prevent subscription on speculative grounds.

Chapter 7. Final provisions

Section 30

The obligations ensuing from Chapter 6 are new for some categories of enterprises. It is fair that an enterprise that must comply with Section 24 for the first time and introduce a code of conduct for private transactions is allowed a reasonable period for doing so, because both the preparation and the implementation of such a code of conduct take a considerable amount of time, among other things to ensure that insiders are designated and that these insiders are familiar with the code of conduct and know what requirements they have to fulfill. Therefore Section 30 provides for a transitional period of six months for enterprises that were exempt under the Wte 1995 but are no longer exempt now. As Section 24 incorporates a significant part of the criteria laid down in the Exemption Regulations pursuant to the Wte 1995, the latter group of enterprises is not expected to be large.

The Minister of Finance,
G. Zalm
Annex

Table of concordance

<table>
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¹ As the sections in Chapter 6 differ in many places from the sections in the Further Regulations from which they derive, the references shown above are for general orientation purposes only.

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