

# ESMA Consults on Market Abuse Regulation Guidelines on Market Soundings and Delayed Disclosure of Inside Information

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Financial Services and Regulation

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On January 28, 2016, the European Securities and Markets Authority (“ESMA”) published a [consultation paper](#) on draft guidelines under the Market Abuse Regulation (Regulation 596/2014) (“MAR”) (ESMA/2016/162). The consultation requests feedback on guidelines for persons receiving market soundings together with guidelines on the legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public.

## Background

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The law on market abuse in the European Union (“EU”) is changing. MAR will become law from July 3, 2016 and will strengthen the existing market abuse framework by extending its scope to new markets, new platforms and new behaviours. It contains prohibitions for insider dealing and market manipulation and provisions to prevent and detect these. In the lead-up to implementation, ESMA has been developing the detailed, technical measures and advice to the European Commission required for the delegated legislation and implementing acts which will govern the more detailed aspects of MAR.

Article 11(11) of MAR provides that ESMA shall issue guidelines addressed to persons receiving market soundings. In addition, article 17 (11) of MAR provides that ESMA shall issue guidelines on legitimate interests of issuers to delay inside information and the situations in which the delay of disclosure is likely to mislead the public. Accordingly, ESMA is now consulting on its proposed guidelines to meet this requirement. The consultation paper follows the Discussion Paper issued by ESMA in November 2013 (Discussion Paper on ESMA’s policy orientations on possible implementing measures under MAR (ESMA/2013/1649)).

The consultation sets out draft versions of both sets of guidelines. Section 2 of the Consultation Paper contains the draft guidelines for persons receiving market soundings; and section 3 sets out the draft guidelines on legitimate interests and omissions likely to mislead the public.

## Guidelines for Persons Receiving Market Soundings: Background

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Article 11(1) of MAR describes a “market sounding” as “a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it, such as its potential size or pricing, to one or more potential investors”. MAR provides further descriptions in Recitals

32 and 33. Article 11(4) states that when a Disclosing Market Participant (“DMP”) discloses inside information to a person receiving the market sounding (a “MSR”) in the course of a market sounding complying with the required conditions, this should be deemed to have been made in the normal course of the exercise of a person’s employment, profession or duty and therefore, would not constitute market abuse.

On September 28, 2015, ESMA submitted for approval to the European Commission draft regulatory and implementing technical standards (“RTS” and “ITS”) respectively to determine the appropriate arrangements, procedures and record keeping requirements and to specify the systems and notification templates to be used by DMPs when conducting market soundings.

The current consultation relates to ESMA’s mandate to issue guidelines regarding:

- the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;
- the steps that such persons are to take into account when information is disclosed to them in order to comply with MAR; and
- the records that such persons are to maintain in order to demonstrate that they have complied with MAR.

## **The Proposed Guidelines for Persons Receiving Market Soundings**

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ESMA is proposing the following:

1. **Designated persons or contact point within the MSR entitled to receive market soundings**

Where the MSR designates a specific person or contact point to receive the market sounding, the MSR should ensure that the information is made available to the DMPs.

2. **Communicating the wish not to receive market soundings**

After being addressed by a DMP, the MSR should notify it whether they wish not to receive future market soundings in relation either to all potential transactions or particular types of potential transactions.

3. **MSR’s assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information**

- MSRs must take into account the DMP’s assessment and should also independently assess whether they are in possession of inside information as a result of the market sounding, taking into consideration all the information available to them, including the information obtained from sources other than the DMP.
- While taking into account the DMP’s notification that the information disclosed in the course of the market sounding is no longer inside information, MSRs should independently assess whether they are still in possession of inside information, taking into consideration all the information available to them, including the information obtained from sources other than the DMP.

**4. Discrepancies of opinion between DMP and MSR**

The guidelines cover the cases where, according to the DMP, no inside information is disclosed and where the MSR assesses to the contrary that they are in possession of inside information; and conversely, where the DMP asserts that inside information has been disclosed and the MSR disagrees with that conclusion.

**5. Internal procedures and staff training**

The guidelines require the MSR to establish, implement and maintain internal procedures covering internal communication; clear identification of the function or body entrusted with assessing whether the MSR is in possession of inside information and to ensure that it is composed of staff properly trained for the purpose; and the management and control of the flow of inside information.

The MSR is required to ensure that staff receiving and processing the information in the course of the market sounding are properly trained.

**6. List of MSR's staff that are in possession of the information communicated in the course of the market soundings**

MSRs are required to draw up a list of persons working for them that are in possession of information communicated in the course of market soundings.

**7. Assessment of related financial instruments**

The MSR is required to identify all issuers and financial instruments to which inside information as a result of a market sounding relates.

**8. Written minutes or notes**

Where the DMP has drafted written minutes or notes of unrecorded meetings or unrecorded telephone conversations, these should be signed by the MSRs to signify their agreement. Otherwise, the MSRs should provide the DMP with their own version of the minutes or notes within five working days of the market soundings, where they disagree with the DMP's version.

**9. Record keeping**

Records must be kept in "a durable medium that ensures accessibility and readability" for a period of five years.

## **Guidelines on Legitimate Interests of Issuers to Delay Inside Information and Situations in Which the Delay of Disclosure Is Likely to Mislead the Public**

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Article 17(1) of MAR provides that issuers should inform the public as soon as possible of inside information which directly concerns them. There is a similar provision relating to emission allowance market participants. Disclosure may be delayed providing certain conditions are met:

- where immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
- delay of disclosure is not likely to mislead the public; and
- the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

For disclosure to be delayed, all these conditions must be met.

Article 17(11) of MAR requires ESMA to issue guidelines to establish a “non-exhaustive and indicative list” of:

- the legitimate interests of the issues that are likely to be prejudiced by immediate disclosure of inside information; and
- situations in which the delay of disclosure is likely to mislead the public.

The draft Guidelines in the consultations paper are aimed at meeting this mandate.

## **The Proposed Guidelines on the Delay of Disclosure of Inside Information**

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ESMA is proposing the following Guidelines.

### **1. Legitimate interests of the issuer for delaying disclosure of inside information.**

The guidelines provide certain cases where immediate disclosure of the inside information is considered likely to prejudice the issuer’s legitimate interests. However, it is stated that these “could include but are not limited to the following circumstances” - so, in other words, the list is by no means exhaustive. The cases mentioned are as follows.

- Where the issuer is conducting negotiations and where the outcome of such negotiations would be likely to be jeopardised by immediate public disclosure of that information.
- Where disclosure might jeopardise the conclusion of negotiations aimed at insuring the financial recovery of the issuer, in circumstances where that issuer’s financial viability is in “grave and imminent danger”.
- Where the inside information relates to decisions taken or contracts entered into by the issuer’s management body, but which need the approval of another body of the issuer in order to become effective. A number of conditions are required for this, including that immediate public disclosure of the information before such a definitive approval would jeopardise the correct assessment of the information by the public.
- Where the issuer has developed a product or an invention and disclosure would jeopardise the intellectual property rights of the issuer.
- Where the issuer is planning to buy or sell a major holding in another entity and disclosure would jeopardise the conclusion of that transaction.
- Where a transaction previously announced requires approval by a public authority, which is conditional upon additional requirements and where the immediate disclosure of those requirements would be likely to affect the ability of the issuer to meet the requirements and would therefore prevent the final success of the deal or the transaction.

2. **Situations in which delay of disclosure of inside information is likely to mislead the public**

ESMA provides three situations in which the delay of disclosure of information would be considered to be likely to mislead the public. Again, this is not exhaustive, as ESMA states that this would “include at least the following circumstances”. The three situations provided are as follows.

- the inside information whose disclosure the issuer intends to delay is materially different from a previous public announcement of the issuer on the matter to which the inside information refers;
- the inside information whose disclosure the issuer intends to delay regards the fact that the issuer’s financial objectives are likely not to be met, where such objectives were previously publically announced; and
- the inside information whose disclosure the issuer intends to delay is in contrast with the market’s expectations, where such expectations are based on signals that the issuer has previously set.

## Next Steps

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The consultation closes to responses on March 31, 2016. ESMA will consider the feedback received with a view to finalising the two sets of guidelines and publishing a final report by early in the third quarter of 2016.

ESMA is currently preparing a consultation paper on a third set of guidelines required under MAR, relating to the information expected or required to be published in relation to commodity derivatives.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services and Regulation practice group:

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