

MAR BRIEFING: Special Edition

Developments in Market Abuse Regulation

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A. Updated ESMA Guidelines on Delay of Disclosure of Inside Information under MAR

1. On 5 January 2022 the European Securities and Markets Authority (ESMA) published its final report on the amendment to the Market Abuse Regulation (MAR) guidelines on issuers' ability to delay the disclosure of inside information under Article 17 of MAR in relation to prudential supervision (Updated Guidelines).
2. The Updated Guidelines mainly concern listed credit institutions, and specifically cater for the interaction between their obligation to publish inside information pursuant to MAR and the EU prudential supervisory framework.

B. Background

1. Article 17 of MAR requires issuers to publicly disclose any inside information that directly concerns them as soon as possible. By way of example, an issuer's decision to carry out redemptions, reductions and repurchases of own funds instruments and the related share premium accounts could technically qualify as inside information under MAR, which would therefore require public disclosure. However, issuers (including credit institutions) may delay the disclosure of inside information under Article

17(4) and Article 17(5) of MAR, when certain conditions are met.

2. Under Article 17(4) of MAR, issuers can delay the disclosure of inside information under the following conditions:
 - a. immediate disclosure is likely to prejudice an issuer's legitimate interest;
 - b. delay of disclosure is not likely to mislead the public; and
 - c. the issuer is able to ensure the confidentiality of the information.
3. Previously, ESMA had issued guidelines to provide:
 - a. a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information; and
 - b. a list of situations where delay of disclosure is likely to mislead the public.

C. The Updated Guidelines

1. ESMA notes that the Updated Guidelines are adding certain cases to the list of legitimate interests of issuers for delaying public disclosure of inside information, and are aimed at providing clarity, enhancing legal certainty and fostering supervisory convergence and should assist issuers in conducting their assessment as to whether they meet the conditions to delay inside information in accordance with MAR.
2. The Updated Guidelines also introduce clarifications on the institutions' case-by-case assessment as to whether they would be in possession of inside information in relation to the institution-specific SREP decisions received from their prudential competent authority, with particular reference to the P2R and P2G.

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3. The Updated Guidelines clarify the following:
 - a. in case of redemptions, reductions and repurchases of own funds subject to supervisory authorisation, the institutions have a legitimate interest to delay the disclosure of inside information until the prudential competent authority has authorised the transactions;
 - b. there is a legitimate interest for the institution to delay the disclosure of the draft SREP decision informally communicated to an institution, until that decision becomes final, following the completion of the decision-making process of the prudential competent authority;
 - c. in respect of the content of the SREP decisions, the P2R are expected to be considered as inside information and as highly likely to be price sensitive whereas P2G may only be inside

information. Examples of situations where price sensitivity is expected are when:

- i. the difference between the P2G and the institution's level of capital is not minor and is likely to involve a major reaction by the institution, such as a capital increase; and
- ii. the institution's P2G is not in line with market expectations, so a price impact can be expected.

D. Next Steps

1. A translation procedure will follow after the publication of ESMA's final report. The regular comply or explain procedure will be carried out ahead of the full application of the Updated Guidelines. The Updated Guidelines will be applicable two months after the publication of the translations.

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