

Chapter 2

Disclosure and control of inside information by issuers

2.1 Introduction and purpose

Introduction

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An *issuer* should be aware that matters that fall within the scope of this chapter may also fall within the scope of:

- (1) the market abuse regime set out in the *Market Abuse Regulation*;
- (2) Part 7 (Offences relating to Financial Services) of the Financial Services Act 2012 relating to misleading statements and practices;
- (3) Part V of the Criminal Justice Act 1993 relating to insider dealing; and
- (4) the *Takeover Code*.

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An *issuer* that is involved in a matter which also falls within the scope of the *Takeover Code* should be mindful of its obligations under the *Market Abuse Regulation*.

Purpose

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The purpose of this chapter is to:

- (1) promote prompt and fair disclosure of relevant information to the market; and
- (2) give guidance on aspects relating to disclosure of such information, including the circumstances allowing delayed disclosure.

2.2 Disclosure of inside information

Requirement to disclose inside information

2.2.1 **R** [Note: see ■ DTR 6.3.2R, regarding the disclosure of *inside information*]

2.2.1A **EU** [article 17(1) of the *Market Abuse Regulation*]

2.2.2 **R** [deleted]

Identifying inside information

2.2.3 **G** Information is *inside information* if each of the criteria in the definition of *inside information* is met.

2.2.4 **G**

- (1) [Note: article 7(4) of the *Market Abuse Regulation*]
- (2) In determining whether information would be likely to have a significant effect on the price of *financial instruments*, an *issuer* should be mindful that there is no figure (percentage change or otherwise) that can be set for any *issuer* when determining what constitutes a significant effect on the price of the *financial instruments* as this will vary from *issuer* to *issuer*.

2.2.5 **G** An *issuer* may wish to take account of the following factors when considering whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions:

- (1) the significance of the information in question will vary widely from *issuer* to *issuer*, depending on a variety of factors such as the *issuer's* size, recent developments and the market sentiment about the *issuer* and the sector in which it operates; and
- (2) the likelihood that a reasonable investor will make investment decisions relating to the relevant *financial instrument* to maximise his economic self interest.

2.2.6 **G** It is not possible to prescribe how the reasonable investor test will apply in all possible situations. Any assessment may need to take into consideration the anticipated impact of the information in light of the totality of the *issuer's* activities, the reliability of the source of the information and other market variables likely to affect the relevant *financial instrument* in the

given circumstances. However, information which is likely to be considered relevant to a reasonable investor's decision includes information which affects:

- (1) the assets and liabilities of the *issuer*;
- (2) the performance, or the expectation of the performance, of the *issuer's* business;
- (3) the financial condition of the *issuer*;
- (4) the course of the *issuer's* business;
- (5) major new developments in the business of the *issuer*; or
- (6) information previously disclosed to the market.

2.2.7 G An *issuer* and its advisers are best placed to make an initial assessment of whether particular information amounts to *inside information*. The decision as to whether a piece of information is *inside information* may be finely balanced and the *issuer* (with the help of its advisers) will need to exercise its judgement.

Note: ■ DTR 2.7 provides additional guidance on dealing with market rumour.

2.2.8 G The *directors* of the *issuer* should carefully and continuously monitor whether changes in the circumstances of the *issuer* are such that an announcement obligation has arisen under article 17 of the *Market Abuse Regulation*.

When to disclose inside information

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- (1) [deleted]
- (2) If an *issuer* is faced with an unexpected and significant event, a short delay may be acceptable if it is necessary to clarify the situation. In such situations a holding announcement should be used where an *issuer* believes that there is a danger of *inside information* leaking before the facts and their impact can be confirmed. The holding announcement should:
 - (a) detail as much of the subject matter as possible;
 - (b) set out the reasons why a fuller announcement cannot be made; and
 - (c) include an undertaking to announce further details as soon as possible.
- (3) If an *issuer* is unable, or unwilling to make a holding announcement it may be appropriate for the trading of its *financial instruments* to

be suspended until the *issuer* is in a position to make an announcement.

- (4) An *issuer* that is in any doubt as to the timing of announcements required under the *Market Abuse Regulation* should consult the *FCA* at the earliest opportunity.

Communication with third parties

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The *FCA* is aware that many *issuers* provide unpublished information to third parties such as analysts, employees, credit rating agencies, finance providers and major shareholders, often in response to queries from such parties. The fact that information is unpublished does not in itself make it *inside information*. However, unpublished information which amounts to *inside information* is only permitted to be disclosed in accordance with the requirements of the *Market Abuse Regulation*.



2.3 Publication of information on internet site

[Note: article 17(1) of the *Market Abuse Regulation*, in relation to the period for which an *issuer* must maintain on its website *inside information* which it is required to disclose publicly; article 17(9) of the *Market Abuse Regulation*, in relation to the maintenance of such information by *issuers* with *financial instruments* admitted to trading on an SME growth market.]

2.3.1 **R** [deleted]

2.3.2 **R** [deleted]

2.3.3 **R** [deleted]

2.3.4 **G** [deleted]

2.3.5 **R** [deleted]



2.4 Equivalent information

2.4.1 **R** [deleted]

2.4.2 **R** [deleted]

2.5 Delaying disclosure of inside information

Delaying disclosure

2.5.1 **R** [deleted]

2.5.1A **EU** [article 17(4), (5) and (8) of the *Market Abuse Regulation*]

2.5.1B **G** *Issuers* should be aware that *ESMA* has issued guidelines under article 17(11) of the *Market Abuse Regulation* which contain a non-exhaustive indicative list of the legitimate interests of *issuers* to delay disclosure of *inside information* and situations in which delayed disclosure is likely to mislead the public. The *ESMA MAR delayed disclosure guidelines* are available here: https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf.

Legitimate interests and when delay will not mislead the public

- 2.5.2 **G**
- (1) Delaying disclosure of *inside information* will not always mislead the public, although a developing situation should be monitored so that if circumstances change an immediate disclosure can be made.
 - (2) Investors understand that some information must be kept confidential until developments are at a stage when an announcement can be made without prejudicing the legitimate interests of the *issuer*.

2.5.3 **G** [deleted]

- 2.5.4 G
 - (1) In the *FCA's* opinion, paragraph 5(1)(8)(a) of the *ESMA MAR delayed disclosure guidelines* does not envisage that an *issuer* will:
 - (a) delay public disclosure of the fact that it is in financial difficulty or of its worsening financial condition and is limited to the fact or substance of the negotiations to deal with such a situation; or
 - (b) delay disclosure of *inside information* on the basis that its position in subsequent negotiations to deal with the situation will be jeopardised by the disclosure of its financial condition.
 - (2) Paragraph 5(1)(8)(c) of the *ESMA MAR delayed disclosure guidelines* refers to an *issuer* with a dual board structure (e.g. a management board and supervisory board) delaying the disclosure of *inside information* in certain circumstances. As this paragraph is not relevant to an *issuer* with a unitary board structure it should only be relevant to a very limited number of *issuers* in the *United Kingdom*.

2.5.5 G An *issuer* should not be obliged to disclose impending developments that could be jeopardised by premature disclosure. Whether or not an *issuer* has a legitimate interest which would be prejudiced by the disclosure of certain *inside information* is an assessment which must be made by the *issuer* in the first instance.

2.5.5A R [deleted]
 [Note: article 17(5) of the *Market Abuse Regulation*]

Selective disclosure

2.5.6 R [deleted]

2.5.6A EU [article 17(8) of the *Market Abuse Regulation*]

- 2.5.7 G
 - (1) [deleted]
 - (2) Selective disclosure cannot be made to any *person* simply because they owe the *issuer* a duty of confidentiality. For example, an *issuer* contemplating a major transaction which requires shareholder support or which could significantly impact its lending arrangements or credit-rating may selectively disclose details of the proposed transaction to major shareholders, its lenders and/or credit-rating agency as long as the recipients are bound by a duty of confidentiality. An *issuer* may, depending on the circumstances, be justified in disclosing *inside information* to certain categories of recipient in addition to those employees of the *issuer* who require the information to perform their functions. The categories of recipient may include, but are not limited to, the following:
 - (a) the *issuer's* advisers and advisers of any other *persons* involved in the matter in question;
 - (b) *persons* with whom the *issuer* is negotiating, or intends to negotiate, any commercial financial or investment transaction (including prospective underwriters or places of the *financial instruments* of the *issuer*);

- (c) employee representatives or trade unions acting on their behalf;
- (d) any government department, the Bank of England, the Competition Commission or any other statutory or regulatory body or authority;
- (e) major shareholders of the *issuer*;
- (f) the *issuer's* lenders; and
- (g) credit-rating agencies.

2.5.8 **G** Selective disclosure to any or all of the *persons* referred to in **■** DTR 2.5.7 G may not be justified in every circumstance where an *issuer* delays disclosure in accordance with article 17(4) and (5) of the *Market Abuse Regulation*.

2.5.9 **G** An *issuer* should bear in mind that the wider the group of recipients of *inside information* the greater the likelihood of a leak which will trigger full public disclosure of the information under article 17(8) of the *Market Abuse Regulation*.



2.6 Control of inside information

Denying access to inside information

2.6.1 G An issuer should establish effective arrangements to deny access to inside information to persons other than those who require it for the exercise of their functions within the issuer.

Breach of confidentiality

2.6.2 R [deleted]

2.6.2A EU [article 17(7) of the Market Abuse Regulation]

2.6.3 G If an issuer is relying on article 17(4) or 17(5) of the Market Abuse Regulation to delay the disclosure of inside information it should prepare a holding announcement to be disclosed in the event of an actual or likely breach of confidence. Such a holding announcement should include the details set out in DTR 2.2.9 G (2).

2.6.4 G We recognise that an issuer may not be responsible for breach of article 17(4) or 17(5) of the Market Abuse Regulation if a recipient of inside information under article 17 of the Market Abuse Regulation breaches his duty of confidentiality.

2.7 Dealing with rumours

- 2.7.1** **G** Where there is press speculation or market rumour regarding an *issuer*, the *issuer* should assess whether a disclosure obligation arises under article 17(1) of the *Market Abuse Regulation*. To do this an *issuer* will need to carefully assess whether the speculation or rumour has given rise to a situation where the *issuer* has *inside information*.
- 2.7.2** **G** [deleted]
[**Note:** article 17(7) of the *Market Abuse Regulation*]
- 2.7.3** **G** The knowledge that press speculation or market rumour is false may not amount to *inside information*. If it does amount to *inside information*, the *FCA* expects that there may be cases where an *issuer* would be able to delay disclosure in accordance with article 17(4) or 17(5) of the *Market Abuse Regulation*.



2.8 Insider lists

Requirement to draw up insider lists

2.8.1 **R** [deleted]

2.8.1A **EU** [article 18(1)(c) of the *Market Abuse Regulation*]

Providing insider lists to the FCA on request

2.8.2 **R** [deleted]

2.8.2A **EU** [article 18(1)(c) of the *Market Abuse Regulation*]

Contents of insider lists

2.8.3 **R** [deleted]

2.8.3A **EU** [article 18(3) of the *Market Abuse Regulation*]

Maintenance of insider lists

2.8.4 **R** [deleted]

2.8.4A **EU** [article 18(4) of the *Market Abuse Regulation*]

2.8.5 **R** [deleted]

2.8.5A **EU** [article 18(5) of the *Market Abuse Regulation*]

2.8.6 **G** [deleted]
[Note: article 18(2) of the *Market Abuse Regulation*]

2.8.7 **G** [deleted]
[Note: article 18(1)(a) of the *Market Abuse Regulation*; article 18(2) of the *Market Abuse Regulation*]

2.8.8 **G** [deleted]

Acknowledgement of legal and regulatory duties

2.8.9 **R** [deleted]

2.8.9A **EU** [article 18(2) of the *Market Abuse Regulation*]

2.8.10 **R** [deleted]

2.8.10A **EU** [article 18(2) of the *Market Abuse Regulation*]