

## MARKET SOUNDINGS: THE BUY-SIDE PERSPECTIVE

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### INTRODUCTION

The Market Abuse Regulation (MAR) comes into force on 3 July 2016. The MAR provisions relating to market soundings will be of particular interest to many buy-side institutions. Yesterday, ESMA published for consultation its long-awaited proposed guidance for firms receiving market soundings and related enquiries (Recipients).

This article summarises key aspects of the proposed guidelines and considers their potential practical impact by reference to the recommendations from the FCA's thematic review, *"Asset management firms and the risk of market abuse"*, in which the FCA set out good and poor practices on soundings last year (TR15/1).

In summary, many of the proposed guidelines are similar to practices endorsed by the FCA in TR15/1. Therefore a firm that has followed the FCA's recommendations should not need to make significant operational or procedural changes.

ESMA invites comments on the guidelines by 31 March 2016.

### PROPOSED GUIDELINES FOR MARKET SOUNDING RECIPIENTS

#### Internal procedures and training

- ◆ Recipients must **establish, implement and maintain internal procedures** to ensure that information received from a market sounding is communicated within firms on a "need to know" basis and through pre-determined reporting lines only. Firms must **appropriately train staff** who receive and process information from soundings on internal procedures and the relevant provisions of MAR. These provisions apply to all information received from market soundings and not only information identified by the Discloser as "inside information".
- ◆ There must be a **clearly identified function or body responsible for assessing whether the information received from the market sounding is "inside information"** and it should have **properly trained staff**.

#### Internal contact points

- ◆ Recipients may **designate an internal "contact point" or a specific person to receive market soundings**. Similarly, in TR15/1 the FCA observed that an initial point of contact independent from the fund manager enabled the assessment of sounding enquiries without sharing information with the manager.
- ◆ ESMA requires Recipients to record evidence of the decision to appoint a designated person (or contact point) and how this information is shared with Disclosers.

### WHAT IS A MARKET SOUNDING?

A communication of information, before the announcement of a transaction, aiming to gauge the interest of potential investor(s) in a transaction.

#### Recipient lists

- ◆ For each market sounding, recipients must draw up a **list of those employees who possess information communicated by a market sounding**. Likewise, in TR15/1 the FCA encourages firms to maintain a detailed log of insiders and to keep that group as small as possible. Accordingly, we expect many firms already comply with a similar requirement.

#### Independent assessment

- ◆ After a market sounding approach, or when informed by a Discloser that information is no longer inside information, **Recipients should independently assess whether they have inside information**, including taking into consideration information it may hold from sources other than the Discloser. We expect that many institutions will already be taking such steps in practice.
- ◆ Where a Recipient disagrees with a Discloser that it is **not in possession of inside information** and the Recipient based its assessment exclusively on the information that the Discloser shared, it must tell the Discloser. However, if the Recipient based its assessment additionally on information not given by the Discloser, it need not notify the Discloser that it disagrees.
- ◆ Similarly, where a Discloser notifies a Recipient that it is "cleansed" (that is, the information is no longer inside information), but the Recipient considers that it is still "inside" it must tell the Discloser if it considers that this is because of information provided by the Discloser only. If the Recipient considers that the information remains inside information because it has information from other sources, it should not tell the Discloser.

#### Declining a market sounding enquiry

- ◆ Recipients should notify Disclosers if they do not wish to receive future market soundings for a particular transaction, type of transaction, or for all transactions.

#### Inadvertent receipt

- ◆ In TR15/1, the FCA stressed that firms should have in place **policies for when inside information is received unintentionally**, particularly from a conversation about a proposed sounding when the firm does not accept the sounding. The FCA found that most firms do not have effective policies for this and encouraged firms to review their practices in this area. Notifying a Discloser of a wish not to receive market soundings would not alleviate a Recipient from its obligations if it has in fact received inside information.

## Identifying issuers and instruments

- ◆ When a Recipient has inside information, it should **identify all the issuers and financial instruments** to which that information applies. In practice, we expect that this is already common practice.

## Record-keeping and recording calls

- ◆ Where a sounding approach does not lead to the Recipient being wall crossed, ESMA previously suggested that the Recipient should record any follow up calls to the Discloser. However, in its proposed guidelines, ESMA removes this requirement; instead the obligation falls on the Discloser.
- ◆ If the market sounding took place during an unrecorded meeting or telephone conversation, the Recipient should sign the minutes or notes written by the Discloser, if it agrees with their content. If the Recipient disagrees with the content, it must provide the Discloser with its own version of signed minutes or notes within five working days from the market sounding. If there is disagreement, Disclosers will keep two versions of the written minutes or notes, each signed by one party. However, as unrecorded market soundings are uncommon the impact of this should be minimal.
- ◆ Recipients have to **keep records for five years** which is a similar period to many FCA record-keeping requirements. It is likely that many firms already adopt this standard.

## Reporting improper disclosure

- ◆ Despite ESMA previously putting forward this suggestion, **Recipients do not have to report suspected improper disclosure** of information to competent authorities. However, an actual or potential suspicion of improper disclosure of insider information can be reported under national implementation of Article 32 which applies to infringements of MAR generally.

## PRACTICALITIES FOR FIRMS

In the wake of TR15/1, buy-side firms are already likely to satisfy various of ESMA's proposed guidelines. However, firms will need to ensure they have policies in place to satisfy the formalities required in the specific scenarios outlined. We anticipate that such scenarios should be few and far between in practice.

While these ESMA guidelines remain open to consultation, firms should consider reviewing their existing policies and procedures in readiness for the implementation of MAR on 3 July 2016. At the very least (and for the time being), firms should ensure that they have appropriately addressed the FCA's findings in TR15/1.

Also, before MAR applies, and on an on-going basis, firms must educate staff on the new requirements. Training sessions should be tailored accordingly and cover all staff that are:

- ◆ approached about market soundings;
- ◆ assessing whether information gained is inside information;
- ◆ making lists of those holding the information;
- ◆ signing minutes issued by the Discloser (or drafting minutes where there is disagreement); and
- ◆ identifying all the issuers and financial instruments to which that information relates.

### CONTACT DETAILS

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