

Consultation Paper

CP16/38*

DTR 2.5 changes: delay in the disclosure of inside information



November 2016

Contents

Abbreviations used in this paper	3
1 Overview	5
2 Analysis and proposed changes to the Handbook	8
Annexes	
1 List of questions	10
2 Cost benefit analysis	11
3 Compatibility statement	12
Appendix	
1 Draft Handbook text	13

We are asking for comments on this Consultation Paper by 6 January 2017.

You can send them to us using the form on our website at:
www.fca.org.uk/cp16-38-response-form.

Or in writing to:

Trading Conduct and Settlement Policy Team
Markets Policy Department
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

Telephone: 020 7066 3878
Email: cp16-38@fca.org.uk

We have developed the policy in this consultation paper in the context of the existing UK and EU regulatory framework. We will keep the proposals under review to assess whether any amendments will be required due to changes in the UK regulatory framework, including as a result of any negotiations following the UK's vote to leave the EU.

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

All our publications are available to download from www.fca.org.uk. If you would like to receive this paper in an alternative format, please call 020 7066 0790 or email publications_graphics@fca.org.uk or write to Editorial and Digital Department, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS

Abbreviations used in this paper

CP	Consultation Paper
DTR	Disclosure Guidance and Transparency Rules
ESMA	European Securities and Markets Authority
MAD	Market Abuse Directive
MAR	Market Abuse Regulation
NCA	National Competent Authority

1. Overview

Introduction

- 1.1** The Market Abuse Regulation No 596/2014 (MAR)¹ came into effect on 3 July 2016. It aims to update and strengthen the existing EU market abuse framework in order to enhance market integrity and investor protection. It achieves this by extending the scope of the Market Abuse Directive (MAD) to cover new instruments and platforms and extends manipulation offences to include attempted manipulation and manipulation of benchmarks.
- 1.2** The Regulation also includes a new regime for market soundings and certain disclosure obligations, including those on issuers relating to inside information.
- 1.3** In addition to developing technical standards and technical advice, MAR gave a mandate to the European Securities and Markets Authority (ESMA) to issue three sets of Guidelines. These Guidelines provide further clarity on the application of the provisions regarding:
- information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives
 - persons receiving market soundings, and
 - delay in the disclosure of inside information
- 1.4** On 20 October 2016 and 10 November 2016 ESMA published its official translations of two of the three sets of Guidelines: delay in the disclosure of inside information (ESMA/2016/1478²) and market soundings (ESMA/2016/1477³). In line with the process set out under Article 16(3) of Regulation EU No 1095/2010 (the ESMA Regulation) we have notified ESMA of our intention to comply with both sets of Guidelines.⁴
- 1.5** As part of our compliance we have reviewed our Handbook to ensure it is consistent with the Guidelines. Our review confirmed that it is not necessary to make any changes to the Handbook to comply with ESMA's Guidelines on market soundings and we do not propose to include any new provisions.
- 1.6** However, to comply with ESMA's Guidelines on delay in the disclosure of inside information, we do need to amend the disclosure section (DTR) of our Handbook, specifically DTR 2.5. Our proposed amendments are set out in this Consultation Paper (CP).

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN>

² www.esma.europa.eu/document/mar-guidelines-delay-in-disclosure-inside-information

³ www.esma.europa.eu/document/mar-guidelines-persons-receiving-market-soundings

⁴ www.fca.org.uk/markets/market-abuse/regulation

Relationship with other potential FCA consultations

- 1.7** ESMA published its third set of Guidelines on information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives on 30 September 2016. However, the official translations have not yet been published. Within two months of the publication of the translations, we must notify ESMA whether or not we intend to comply with them.
- 1.8** If the FCA decides to comply with these Guidelines we will review the Handbook and consult on any necessary changes.

Who does this consultation affect?

- 1.9** This CP will be of interest to:
- issuers of instruments in the scope of MAR, and
 - firms who advise these issuers

Is this of interest to consumers?

- 1.10** This CP will be of interest to consumers who directly or indirectly deal and invest in any of the financial instruments that fall within the scope of MAR.

Context

- 1.11** MAR is a directly applicable European regulation. In order to ensure compliance with MAR the UK had to make changes to relevant domestic legislation.
- 1.12** In November 2015 we consulted on a series of changes required to make our Handbook compliant with MAR (CP15/35 and CP15/38⁵). In PS16/13⁶ we responded to the feedback we received during these consultations. In our response we stated that we would reassess DTR 2.5 once ESMA had published its Guidelines on delay in the disclosure of inside information.
- 1.13** Following ESMA's publication of the official translations of its Guidelines on delay in the disclosure of inside information and market soundings on 20 October 2016 and 10 November 2016 we announced our intention to comply with both sets of Guidelines.⁷
- 1.14** We have developed the policy in this CP in the context of the existing UK and EU regulatory framework. We will keep the policy under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework, including as a result of any negotiations following the UK's vote to leave the EU.

⁵ CP15/35 *Policy Proposals and Handbook changes related to the implementation of the Market Abuse Regulation (2014/596/EU)* (November 2015) and CP15/38 *Provisions to delay disclosure of inside information within the FCA's Disclosure and Transparency Rules* (November 2015)

⁶ www.fca.org.uk/publication/policy/ps16-13.pdf

⁷ www.fca.org.uk/markets/market-abuse/regulation

Summary of our proposals

- 1.15** This CP consults on proposed amendments to the Handbook to ensure we comply with ESMA's Guidelines.

Equality and diversity considerations

- 1.16** We have considered the equality and diversity issues that may arise from our proposals in this CP. Overall we do not consider that our proposals raise concerns with regards to equality and diversity issues.
- 1.17** We do not consider that our proposals adversely impact any of the groups with protected characteristics, i.e. age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment.
- 1.18** We will continue to consider the equality and diversity implications of our proposals during the consultation period, and will revisit them when we publish the final rules. In the interim we welcome any input to this consultation on such matters.

Next steps

What do you need to do next?

- 1.19** We want to hear what you think of our proposals. Please send us your comments in writing by 6 January 2017.

How?

- 1.20** Use the online response form on our website or write to us at the address on page 2.

What will we do?

- 1.21** We will consider your feedback and publish our guidance in a Policy Statement in Q1 2017.

2. Analysis and proposed changes to the Handbook

Introduction

- 2.1** To comply with ESMA's Guidelines on delay in the disclosure of inside information we need to make changes to DTR 2.5. These are presented in this CP.
- 2.2** We are not seeking views on the content of ESMA's Guidelines or the FCA's decision to comply with them, and we ask respondents to restrict their comments to our proposed changes to the Handbook.

Analysis of impact of Guidelines on delay in the disclosure of inside information on the Handbook

- 2.3** ESMA was mandated to issue Guidelines establishing a non-exhaustive, indicative list of:
- the legitimate interests of issuers to delay the disclosure of inside information, and
 - situations in which delaying disclosure of inside information is not likely to mislead the public
- 2.4** These Guidelines should be read jointly with Article 17 MAR. In particular, we flag that:
- Article 17(1) requires an issuer to inform the public as soon as possible of inside information which directly concerns the issuer.
 - Article 17(2) sets out a similar provision regarding emission allowance market participants.
 - Specifically related to delaying disclosure, Article 17(4) states that an issuer or an emission allowance market participant may delay disclosing inside information to the public provided that all the following conditions are met:
 - a.** immediate disclosure is likely to prejudice the legitimate interest of the issuer or emission allowance market participant
 - b.** delay of disclosure is not likely to mislead the public and
 - c.** the issuer or emission allowance market participant is able to ensure the confidentiality of that information
- 2.5** Due to an overlap we have identified between ESMA's Guideline on delay in the disclosure of inside information and some provisions of DTR 2.5, we are proposing to update this section of

the Handbook. An alternative option would be to maintain the existing guidance. However, we consider this could create confusion and could conflict with the ESMA Guidelines, so do not propose this course of action.

- 2.6** In amending DTR 2.5 we intend to follow the approach adopted to implement MAR as described in CP15/35 and PS16/13.⁶ This entails deleting any Handbook material that conflicts with or duplicates the ESMA Guidelines and, where a provision is deleted, cross-referring to the Guidelines as appropriate.
- 2.7** At the start of the chapter of the Handbook which addresses the delayed disclosure of inside information (DTR 2.5), we intend to add a general sign post (DTR 2.5.1BG) to direct readers to ESMA's Guidelines on delay in the disclosure of inside information. Given the length of the chapter, we think a general signpost to the Guidelines at the start is more helpful for readers than specific references on a provision by provision basis.
- 2.8** We are not proposing to make changes to DTR 2.5.2G as we do not think there is an overlap with ESMA's Guideline.
- 2.9** Paragraph 5(1)(8)(a)-(f) of ESMA's Guideline directly overlaps with the guidance provided in DTR 2.5.3G. We therefore propose to delete our provision.
- 2.10** We consider that 2.5.4G has no direct equivalent in ESMA's Guideline. However, it is related to DTR 2.5.3G which are proposing to delete. As the substance of the guidance in DTR 2.5.3G now forms part of the ESMA Guidelines, we propose maintaining DTR 2.5.4G as we consider that it contains useful information for issuers when considering the scope and application of paragraph 5(1)(8)(a)-(c). However, we are proposing minor amendments to DTR 2.5.4G so that it cross-refers to the relevant paragraphs of ESMA's Guideline. We note that, when read together, paragraphs 5(1)(8)(a) and (b) of the Guideline refer to the first example listed in recital 50 of MAR. We consider that these paragraphs should also be read together, in line with recital 50, and that there has been no intended change in scope regarding this particular legitimate interest.
- 2.11** In relation to DTR 2.5.5G we propose retaining the first two sentences as there is no equivalent provision in ESMA's Guideline. However, in relation to the third sentence which considers other circumstances in which delay would be justified, our view is that it is not compatible with the Guideline since they are a non-exhaustive list. A non-exhaustive list leaves open the possibility for the list being amended in the future. We therefore propose deleting this sentence.
- 2.12** For ease of reference, we propose to define the ESMA Guideline on delay in the disclosure of inside information and add the term to the Glossary.
- 2.13** The changes we are proposing to the Handbook are not intended to extend the scope for issuer non-disclosure. We do not expect the proposed changes to have a negative impact on the type of transparency that we expect the regime to produce, or the quality or amount of disclosures, compared with our position in recent years.
- 2.14** Disclosure should only be delayed where all the conditions in Article 17(4) or, where applicable, Article 17(5), are met. We remind issuers of their obligations under MAR to disclose information as soon as possible and not to mislead the market through inaccurate, partial or non-disclosure.
- 2.15** We do not propose any changes to the section titled 'Selective disclosure', which contains provisions DTR 2.5.6A to DTR 2.5.9G. Our view is that they are not impacted by the ESMA Guidelines.

⁶ Cf. CP15/35, Chapter 3 and PS16/13, Chapter 2

Annex 1

List of questions

- Q1:** Do you have any comments or suggestions relating to our proposed signpost to the ESMA Guidelines (DTR 2.5.1BG and related Glossary term)?
- Q2:** Do you have any comments or suggestions with our proposal to leave DTR 2.5.2G unchanged?
- Q3:** Do you have any comments or suggestions on our proposed deletion of DTR 2.5.3G?
- Q4:** Do you have any comments or suggestions on our proposed changes to DTR 2.5.4G?
- Q5:** Do you have any comments or suggestions on our proposed changes to DTR 2.5.5G?
- Q6:** Do you have any other comments or suggestions regarding our changes to the Handbook as a result of our complying with both sets of ESMA Guidelines?

Annex 2

Cost benefit analysis

1. Section 138I of the FSMA requires us to publish a cost benefit analysis (CBA) of proposed changes to our rules. It also requires us to estimate these costs and benefits, unless these cannot reasonably be estimated or it is not reasonably practicable to produce an estimate. If we consider that, in making the appropriate comparison, there will be no increase in costs, or there will be an increase in costs but that it will be of minimal significance, we do not need to carry out a CBA under section 138L of the FSMA.
2. Our proposed addition of 'ESMA Guidelines' to the Glossary constitutes a rule change. As a result, this change is eligible for a CBA. However, it is our view that this addition would not give rise to costs of more than minimal significance. As such we have not performed a CBA.

Annex 3

Compatibility statement

The FCA's objectives and regulatory principles: compatibility statement

1. The proposals set out in this CP are compatible with our strategic objective of ensuring the relevant markets function well and are primarily intended to advance our operational objectives of:
 - Enhancing market integrity – protecting and enhancing the integrity of the UK financial system, by ensuring that the market abuse regulation is applied in a proportionate and effective manner.
 - Securing consumer protection – maintaining and securing an appropriate degree of protection for consumers by ensuring that investors benefit from appropriate disclosure.
2. In preparing our proposals, we have had regard to the regulatory principles set out in section 3B FSMA. In particular:

The desirability of exercising our functions in a way that recognises differences in the nature and objectives of businesses carried on by different persons.

We do not think that our proposals discriminate against any particular business model or approach.

The principle that we should exercise our functions as transparently as possible.

We believe that by consulting on our proposals we are acting in accordance with this principle.

The need to use our resources in the most efficient and economical way.

The proposals in this CP will have minimal impact on our resources.

The principle that a burden or restriction should be proportionate to the benefits.

We think that the proposals in this CP containing burdens or restrictions are proportionate to the benefits.

The desirability of publishing information relating to persons.

We think that our proposals are consistent with this principle.

Expected effect on mutual societies.

Section 138K of FSMA requires us to state whether, in our opinion, our proposed rules have a significantly different impact on authorised persons who are mutual societies, compared with other authorised persons. The relevant rule we propose to add will apply equally to persons regardless of whether they are a mutual society or another authorised person.

Appendix 1

Draft Handbook text

**DISCLOSURE GUIDANCE AND TRANSPARENCY RULES SOURCEBOOK
(DELAYED DISCLOSURE) INSTRUMENT 2017**

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (the “Act”):
- (1) section 137A (The FCA’s general rules);
 - (2) section 137T (General supplementary powers); and
 - (3) section 139A (Power of the FCA to give guidance).

Commencement

- B. This instrument comes into force on [*date*].

Amendments to the Handbook

- C. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- D. The Disclosure Guidance and Transparency Rules sourcebook (DTR) is amended in accordance with Annex B to this instrument.

Citation

- E. This instrument may be cited as the Disclosure Guidance and Transparency Rules Sourcebook (Delayed Disclosure) Instrument 2017.

By order of the Board
[*date*]

Annex A**Amendments to the Glossary of definitions**

Insert the following definition in the appropriate alphabetical position. The text is not underlined.

ESMA MAR delayed disclosure guidelines *ESMA's* guidelines on 'Delay in the disclosure of inside information' (ESMA 2016/1478). These are available at:
https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf.

Annex B

Amendments to the Disclosure Guidance and Transparency Rules sourcebook (DTR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2 Disclosure and control of inside information by issuers

...

2.5 Delaying disclosure of inside information

...

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 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.

...

2.5.3 G For the purposes of article 17 of the *Market Abuse Regulation*, legitimate interests may, in particular, relate to the following non-exhaustive circumstances:

- (1) ~~negotiations in course, or related elements where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long term financial recovery of the issuer; or~~
- (2) ~~decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between these bodies, provided that a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public. [deleted]~~

2.5.4 G (1) ~~DTR 2.5.3G(1) does~~ In the FCA's opinion, paragraphs 5(1)(8)(a) and (b) of the ESMA MAR delayed disclosure guidelines do 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~~ are 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) ~~The legitimate interest described in DTR 2.5.3G(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 ~~if and to the extent that decisions of the management board require ratification by the supervisory board~~) delaying the disclosure of *inside information* in certain circumstances. An *issuer* with a unitary board structure would be unable to take advantage of ~~DTR 2.5.3G(2)~~ this provision and, therefore, ~~DTR 2.5.3G(2)~~ it should only be available 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. ~~However, the FCA considers that, other than in relation to impending developments or matters described in DTR 2.5.3G or article 17(5) of the Market Abuse Regulation, there are unlikely to be other circumstances where delay would be justified.~~

...



PUB REF: 005323

© Financial Conduct Authority 2016
25 The North Colonnade Canary Wharf
London E14 5HS
Telephone: +44 (0)20 7066 1000
Website: www.fca.org.uk
All rights reserved