

Policy Statement

PS17/2

# Changes to DTR 2.5: delay in the disclosure of inside information



February 2017



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In this Policy Statement we report on the main issues arising from Consultation Paper 16/38 (DTR 2.5 changes: delay in the disclosure of inside information) and publish the final rules.

Please send any comments or queries to:

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We have developed the policy in this policy statement in the context of the existing UK and EU regulatory framework. We will keep the policy 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.

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## Abbreviations used in this paper

**ESMA Regulation** Regulation EU No 1095/2010

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**MAR** Market Abuse Regulation

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# 1. Overview

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## Introduction

- 1.1** In this Policy Statement (PS) we summarise the feedback we received to our Consultation Paper CP16/38, which closed on 6 January 2017. Where appropriate we have made changes to DTR 2.5 in light of this feedback. We explain these changes below and set out the final rules in Appendix 1.

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## Who does this affect?

- 1.2** This PS will be of interest to:
- issuers of instruments in the scope of the Market Abuse Regulation (MAR), and
  - firms who advise these issuers

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## Is this of interest to consumers?

- 1.3** This PS may 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.

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## Context

- 1.4** On 20 October 2016 the European Securities and Markets Authority (ESMA) published its official translations of two of the three sets of Guidelines that it is mandated to produce under MAR. These Guidelines relate to market soundings (ESMA/2016/1477<sup>1</sup>) and delay in the disclosure of inside information (ESMA/2016/1478<sup>2</sup>).
- 1.5** The Guidelines on market soundings set out the factors a person receiving a market sounding must take into account, the actions they must take and the records they must keep when inside information is disclosed as part of the sounding regime. The Guidelines on delay in the disclosure of inside information provide a non-exhaustive, indicative list of situations in which the immediate disclosure of inside information is likely to prejudice the legitimate interests of the issuer. The Guidelines also include situations in which delay in the disclosure of inside information is likely to mislead the public and would therefore be inappropriate, notwithstanding the issuer's legitimate interests.

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<sup>1</sup> [www.esma.europa.eu/document/mar-guidelines-persons-receiving-market-soundings](http://www.esma.europa.eu/document/mar-guidelines-persons-receiving-market-soundings)

<sup>2</sup> [www.esma.europa.eu/document/mar-guidelines-delay-in-disclosure-inside-information](http://www.esma.europa.eu/document/mar-guidelines-delay-in-disclosure-inside-information)

- 1.6** In line with the process set out under Article 16(3) of the ESMA Regulation we have notified ESMA of our intention to comply with both sets of Guidelines.<sup>3</sup>
- 1.7** We do not need to make any changes to the Handbook to comply with the Guidelines on market soundings. However, to comply with the Guidelines on delay in the disclosure of inside information we need to amend DTR 2.5. We consulted on these changes in CP16/38.
- 1.8** The changes we proposed to DTR 2.5 are in line with our existing approach in implementing MAR. In the context of the Guidelines, this involves deleting any Handbook provision that conflicts with or duplicates the text of the Guidelines and, where we delete a provision, cross-referring to the Guidelines as appropriate.
- 1.9** This PS summarises the responses we received and the final changes we are making to the Handbook.

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<sup>3</sup> [www.fca.org.uk/markets/market-abuse/regulation](http://www.fca.org.uk/markets/market-abuse/regulation)



## 2. Summary of feedback and our response

- 2.1** We consulted on changes to DTR 2.5 and received one response.
- 2.2** The respondent suggested adding the word ‘indicative’ after ‘non-exhaustive’ in DTR 2.5.1BG. We have made this change.
- 2.3** The respondent also stated that by keeping DTR 2.5.4G(1) the FCA would be providing additional commentary on the Guidelines. The respondent suggested this would restrict the scope of possible legitimate interests for issuers in financial difficulty to delay disclosure of inside information.
- 2.4** We can issue guidance on such matters where we consider it desirable to do so. This includes the ability to issue guidance on MAR-related materials such as Guidelines. We view DTR 2.5.4(G) as a useful aid for issuers in interpreting the Guidelines and in understanding our expectations in this area. We also view it as consistent with the Guidelines.
- 2.5** However, following the feedback we received we have reconsidered the proposed scope of DTR 2.5.4G. As a result, we have amended DTR 2.5.4G to refer to paragraph 5(1)(8)(a) of the Guidelines only. We have also amended the wording of the final sentence to avoid any possible confusion arising from our proposed reference to ‘provision’.
- 2.6** We proposed minor changes to DTR 2.5.5G. While the respondent did not have feedback on these proposals, they asked for clarity on what is meant by the ‘non-exhaustive, indicative list’ referred to in ESMA’s Guidelines.
- 2.7** ESMA’s Final Report on the Guidelines reaffirms that assessing whether an issuer’s legitimate interests are likely to be prejudiced by immediate disclosure should be done on a case-by-case basis. Even though the list is non-exhaustive and indicative, it is our and ESMA’s expectation that Article 17(4) should be narrowly interpreted and that all the conditions set out in Article 17(4) must be met in order to delay the disclosure of inside information.

### Next steps

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- 2.8** The revised Handbook text set out in Appendix 1 will come into force on 24 February 2017.

### What do you need to do next?

- 2.9** We expect market participants to note both sets of Guidelines and comply with them. Issuers should also note the changes made to the FCA guidance in DTR 2.5.

### What will we do?

- 2.10** We will continue to monitor any further material that ESMA may issue on matters relating to MAR which may require further consequential changes to our Handbook.

- 2.11** On 18 January 2017 ESMA published the official translations of its Guidelines on information relating to commodity derivatives markets or related spot markets for the purpose of defining inside information on commodity derivatives (ESMA/2017/1480<sup>4</sup>). We will notify ESMA whether or not we intend to comply with this third set of MAR-related Guidelines in due course. If we decide to comply we will review the Handbook and consult on any necessary changes.

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<sup>4</sup> <https://www.esma.europa.eu/document/mar-guidelines-commodity-derivatives>

# Annex 1

## List of non-confidential respondents

Law Society and the City of London Law Society (joint response)

# Appendix 1

## Made rules (legal instrument)

**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 24 February 2017.

**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  
23 February 2017

## 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](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

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### 2.5 Delaying disclosure of inside information

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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](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, 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) ~~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 As this paragraph is not relevant to an issuer with a unitary board structure would be unable to take advantage of DTR 2.5.3G(2) and, therefore, DTR 2.5.3G(2) it should only be available 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. ~~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.~~

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Financial Conduct Authority



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