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Market Abuse Regulation Practical issues 9 months on

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Identifying Inside Information

- Publish “as soon as possible”
- Rubric on announcement
- If delay:
 - date and time
 - record keeping
 - insider list
 - confidentiality
 - “restricted person” under Share Dealing Code
 - FCA delayed disclosure form
- Are financial results inside information and, if so, when?

Identifying Inside Information (cont'd)

- Identifying inside information in announcements – no consistency in approach
- Announcements with both inside and non-inside information
- No consistency in wording:
 - “This announcement contains inside information as stipulated under the Market Abuse Regulation (EU) no. 596/2014 (“**MAR**”)”
 - “This announcement contains inside information”
 - “This announcement contains information which, prior to its disclosure, was inside information for the purpose of the Market Abuse Regulation”

Delaying disclosure (1)

- Can only delay when:

- (a) immediate disclosure likely to prejudice legitimate interests of the issuer
- (b) Delay of disclosure not likely to mislead public; and
- (c) Issuer is able to ensure confidentiality of the information

Article 17(4) MAR

- FCA and ESMA say:

- assessment should be done on a case-by-case basis
- expectation that Article 17(4) be narrowly interpreted (FCA PS 17/2)

Practical issues – Delaying disclosure (2)

- ESMA Guidelines 20/10/16

Non-exhaustive indicative list of legitimate interests, including:

- negotiations when outcome would likely be jeopardised
- financial viability of issuer in grave or imminent danger although not within scope of applicable insolvency law and disclosure would jeopardise conclusion of negotiations designed to ensure financial recovery
- developing product or invention, disclosure likely to jeopardise IP rights
- transaction previously announced subject to public authority's approval, including additional requirements, disclosure of which will likely affect ability for issuer to meet them...

Delaying disclosure (3)

- FCA revised guidance in DTR 2.5 with effect 24.02.17:
 - repeats DTR 2.5.4(1)G that in FCA's view ESMA guidelines do not envisage that issuer will:
 - (a) delay public disclosure that issuer in financial difficulty or worsening financial condition and limited to fact or substance of negotiations to deal with this; or
 - (b) delay disclosure of inside information on the basis that its position in subsequent negotiations will be jeopardised by disclosure of its financial condition
 - retains DTR 2.5.5G that issuer should not be obliged to disclose impending developments that could be jeopardised by premature disclosure
 - retains selective disclosure (DTR 2.5.7(2)G)
- See also MAR Article 17(8) where person owes issuer a duty of confidentiality
- See also notes to AIM Rule 11

Delaying disclosure (4)

- ESMA Guidelines where delay “likely to mislead the public”
- Inside information:
 - is materially different from previous public announcement on same matter; or
 - regards the fact that financial objectives previously publicly announced are not likely to be met; or
 - is in contrast with market expectations, where such expectations based on “signals the issuer has previously sent to the market, such as interviews, roadshows or any other type of communication organised by the issuer or with its approval”

Market soundings

- Relation to disclosure in normal exercise of an employment, profession or duties
- Previous public announcement
- At what point does MAR apply in the period ahead of an IPO?
- FCA's views
- Selective disclosure to parties acquiring shares in a placing – does this stop the ability to delay disclosure?
- Code of Market Conduct 1.4 still relevant

PDMRs, Insider Lists, FCA webpage

- PDMRs
 - Notification process painful
 - LEI column
 - Effect of MAR closed period on transactions
 - Former PDMR dealing following resignation
- Insider lists
 - what does “take all reasonable steps” to ensure any person on the list acknowledges obligations in writing mean?
- FCA
 - FCA updated webpage with links to Levels 1 and 2 legislation, ESMA Guidelines and Q&A and relevant parts of FCA handbook
<https://www.fca.org.uk/markets/market-abuse/regulation>



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