



Brussels, 17.5.2016
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COMMISSION DELEGATED REGULATION (EU) .../...

of 17.5.2016

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 11(4) of Regulation (EU) No 596/2014 (MAR) states that when a disclosing market participant discloses inside information to a person receiving the market sounding in the course of a market sounding in accordance with the conditions in Article 11(3) and (5), this should be deemed to have been made in the normal course of the exercise of a person's employment, profession or duty, and therefore not to constitute market abuse.

Article 11(9) of MAR requires the European Securities and Markets Authority (ESMA) to develop draft regulatory technical standards to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements laid down in Article 11(6) and (8) of MAR. This empowerment ensures that the framework foreseen in MAR for market soundings is effectively managed and controlled. On the one hand, the rules laid down in this delegated act provide the details for the criteria to comply with in order to benefit from the assumption that inside information is disclosed lawfully, i.e. in the normal course of business. On the other hand the rules will facilitate the conduct of investigations by competent authorities in cases of suspected infringements of MAR.

The draft regulatory technical standards were submitted to the Commission on 28 September 2015. In accordance with Articles 10 to 15 of Regulation (EU) No 1095/2010 establishing ESMA, the Commission shall decide within three months of receipt of the draft regulatory technical standards whether to endorse them. The Commission may also endorse the draft regulatory technical standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA published its Final Report on draft technical standards on MAR and submitted it to the Commission on 28 September 2015.¹ The report takes into account the views expressed by stakeholders during the public consultation on the draft regulatory technical standards and the opinion of the Securities and Markets Stakeholder Group (SMSG) set up in accordance with Article 37 of Regulation (EU) No 1095/2010.

The ESMA Final Report sets out the feedback statement to the Consultation Paper which provided an analysis of responses to the consultation, described any material changes (or confirmed that there have been no material changes as respondents broadly agreed with ESMA's suggested approach), and explained the reasons for this in the light of feedback received.

ESMA adapted the draft regulatory technical standards in order to improve their clarity and also to ensure consistency with the legal basis under MAR. ESMA explained in the feedback statement the balance it found between ensuring certainty of the content of the information communicated and minimising compliance costs. On the issue of market soundings where the disclosing market participant has assessed that the information that will be disclosed is not inside information, some respondents noted that this part of the script should be removed since it is outside ESMA's mandate. Some respondents emphasized it could be confusing to investors and the disclosing market participant should have the flexibility to use a script if it considers it appropriate. However, some respondents supported this type of script. Some

¹ The Final Report is available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf.

respondents, including the Securities and Markets Stakeholder Group, disagreed with the script on the expected time when information ceased to be inside information. Some respondents suggested it is not in ESMA's mandate and that there were also legal and regulatory risks in requiring an exact date when information ceased to be inside information. The same respondents also mentioned that the requirement under MAR to cleanse the person receiving the market sounding should be deemed fulfilled when a transaction was launched at the anticipated date. A group of respondents stated that the provisions on the format for recordings stressing were burdensome. A number of respondents made also specific comments on the written record provisions.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted an Impact Assessment, including analysis of the costs and benefits related to the draft technical standards submitted to the Commission.

The estimated costs of the draft regulatory technical standards have been established in an impact assessment report by ESMA. Despite preferring a cleansing strategy, most stakeholders did not believe that the lack of a cleansing strategy would significantly impact the quality of the information obtained in the pre-transaction information gathering process. Some stakeholders noted that the lack of such a strategy would not dramatically alter current market practices and therefore the information would probably not be of any lower quality than it is currently. In other words, the impact of the technical standards on the quality of information gathered through market soundings would likely be minimal.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 11(1) of MAR describes a "market sounding" as a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. MAR provides a framework within which such disclosures can legitimately be made and, provided that some requirements are complied with, disclosing market participants (DMPs) can benefit from protection against unlawful disclosure of inside information. However, where the requirements set out in MAR and further specified in the draft technical standards are not complied with, DMPs cannot benefit from such protection.

Article 1 requires DMPs to regularly review and update, where necessary, the arrangements and procedures they establish to comply with paragraphs 4 to 6 and 8 of Article 11 of MAR. Article 2 lays down the procedures for the purpose of conducting market soundings. It also determines the means as well as situations under which recordings are necessary. Article 3 deals with the standard set of information for the communications to persons receiving the market sounding. Article 4 obliges the disclosing market participant to draw up a list with prescribed details regarding persons to whom information has been disclosed in the course of the market sounding. It also includes rules where investors have informed the disclosing market participants they do not wish to receive market soundings. Article 5 lays down the list of information elements to be notified to the recipient when the information has ceased to be inside information. Article 6 contains record keeping requirements addressed to disclosing market participants. It ensures that the records, as covered by this Article, are made available, upon request, to the competent authority. Article 7 provides that the Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC², and in particular the third subparagraph of Article 11(9) thereof,

Whereas:

- (1) Appropriate arrangements, procedures and record keeping requirements are necessary to ensure that market sounding activities are managed and controlled effectively. As part of the appropriate arrangements, disclosing market participants should establish procedures describing the manner in which market soundings are conducted. Such procedures should set out a standard set of information to be provided to and requested from the persons receiving the market sounding, ensuring that no unnecessary potentially sensitive information is disseminated and that all the persons receiving the market sounding receive the same level of information.
- (2) It is necessary to provide certainty as to the content of the information communicated in the course of market soundings. Therefore, where the market soundings are conducted by telephone and the disclosing market participant has access to recorded telephone lines, the disclosing market participant should use those lines. Where market soundings are conducted through channels other than by recorded telephone lines, records of the market sounding communications should be kept in the form of audio or video recordings or in written form. For personal data protection reasons, when the market sounding is made by recorded telephone lines or audio or video recording is being used, a consent to the recording should be obtained from the person receiving the market sounding.
- (3) To facilitate the conduct of investigations by competent authorities on suspected market abuse, disclosing market participants should, for each market sounding, keep a record of the persons who received the market sounding.

² OJ L 173, 12.6.2014, p. 1.

- (4) In order to minimise the risk of improper disclosure of inside information, a disclosing market participant should keep a record of the potential investors that have informed it that they are not willing to receive market soundings. Potential investors should be able to express their wish not to receive market soundings in relation to all potential transactions or only particular types of transactions.
- (5) When conducting a market sounding the disclosing market participants should be able to benefit from a presumption that inside information is disclosed in the normal exercise of a person's employment, profession or duties for the purposes of Article 10(1) of Regulation (EU) No 596/2014. In this respect, the disclosing market participant should be considered to be acting within the normal course of employment, profession or duties only in so far as it complies with all requirements, including record-keeping requirements set out in Article 11 of Regulation (EU) No 596/2016 and this Regulation.
- (6) Given that an assessment of what constitutes inside information, undertaken in accordance with Article 11(3) of Regulation (EU) No 596/2014, can be complex, disclosing market participants should keep records of all market soundings, including the ones that are considered by the disclosing market participant not to involve disclosure of inside information. Such records assist disclosing market participants in providing evidence of proper conduct to the competent authorities, in particular where the nature of the information changes after the market sounding or where the competent authority would like to review the process of categorisation of the information.
- (7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (8) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³.
- (9) In order to ensure the smooth functioning of the financial markets, it is necessary that this Regulation enters into force as a matter of urgency and that the provisions laid down in this Regulation apply from the same date as those laid down in Regulation (EU) No 596/2014,

HAS ADOPTED THIS REGULATION:

Article 1
General requirements

Disclosing market participants shall ensure that the arrangements and procedures they establish to comply with paragraphs 4, 5, 6 and 8 of Article 11 of Regulation (EU) No 596/2014 are regularly reviewed and updated where necessary.

³ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 2

Procedures for the purposes of conducting market soundings

1. Disclosing market participants shall establish procedures describing the manner in which market soundings are conducted.

Disclosing market participants may communicate information for the purposes of market sounding to the persons receiving the market sounding orally, in physical meetings, in audio or video telephone calls, or in writing, by mail, fax or electronic communications.

2. Disclosing market participants shall establish procedures for conducting market soundings by telephone ensuring that recorded telephone lines are used where the disclosing market participant has access to such lines and the persons receiving the market sounding have given their consent to the recording of the conversation.
3. The procedures referred to in paragraphs 1 and 2 shall ensure that persons working for a disclosing market participant under contract of employment or otherwise only use equipment provided by the disclosing market participant when sending and receiving telephone calls and electronic communications for the purposes of market soundings.

Article 3

Standard set of information for the communications to persons receiving the market sounding

1. Disclosing market participants shall have in place procedures to exchange a standard set of information with the persons receiving the market sounding during market soundings, in a pre-determined sequence.
2. The standard set of information referred to in paragraph 1 shall be determined by the disclosing market participant for each market sounding, prior to conducting that market sounding. The disclosing market participant shall use that standard set of information with all the persons receiving that market sounding.
3. Where disclosing market participants consider that the market sounding will involve the disclosure of inside information, the standard set of information referred to in paragraph 1 shall include and be limited to the following, in the stated order:
 - (a) a statement clarifying that the communication takes place for the purposes of a market sounding;
 - (b) where the market sounding is conducted by recorded telephone lines, or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;
 - (c) a request for and a confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the potential investor to receive the market sounding and the reply to that request;
 - (d) a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers to be inside information and a reference to the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;
 - (e) where possible, an estimation of when the information will cease to be inside information, the factors that may alter that estimation and, in any case,

- information about the manner in which the person receiving the market sounding will be informed of any change in such an estimation;
- (f) a statement informing the person receiving the market sounding about the obligations laid down in Article 11(5) subparagraph 1 points (b), (c) and (d) of Regulation (EU) No 596/2014;
 - (g) a request for the consent of the person receiving the market sounding to receive inside information, as referred to in Article 11(5) subparagraph 1 point (a) of Regulation (EU) No 596/2014 and the reply to that request;
 - (h) where the consent required under point (g) is given, the information being disclosed for the purposes of the market sounding, identifying the information considered by the disclosing market participant to be inside information.
4. Where the disclosing market participant considers that the market sounding will not involve the disclosure of inside information, the standard set of information referred to in paragraph 1 shall include and be limited to the following, in the stated order:
- (a) a statement clarifying that the communication takes place for the purposes of a market sounding;
 - (b) where the market sounding is conducted by recorded telephone lines or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;
 - (c) a request for and a confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the potential investor to receive the market sounding and the reply to that request;
 - (d) a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers not to be inside information and a reference to the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;
 - (e) a request for the consent of the person receiving the market sounding to proceed with the market sounding and the reply to that request;
 - (f) where the consent required under point (e) is given, the information being disclosed for the purposes of the market sounding.
5. The disclosing market participant shall ensure that the same level of information is communicated to each person receiving the market sounding in relation to the same market sounding.

Article 4

Data regarding persons receiving the market sounding

1. For each market sounding conducted, the disclosing market participant shall draw up a list containing the following information:
- (a) the names of all natural and legal persons to whom information has been disclosed in the course of the market sounding;
 - (b) the date and time of each communication of information which has taken place in the course of or following the market sounding;

- (c) the contact details of the persons receiving the market sounding used for the purposes of the market sounding.
2. Disclosing market participants shall draw up a list of any potential investors that have informed them that they do not wish to receive market soundings, in relation to either all potential transactions or particular types of potential transactions. The disclosing market participant shall refrain from communicating information for the purposes of market soundings to such potential investors.

Article 5

Procedure for notifying where the information has ceased to be inside information

Where disclosing market participants assess as referred to in Article 11(6) of Regulation (EU) No 596/2014, that the inside information disclosed in the course of a market sounding has ceased to be inside information, they shall provide the person having received the market sounding with the following information:

- (a) the identity of the disclosing market participant;
- (b) an identification of the transaction subject to the market sounding;
- (c) the date and time of the market sounding;
- (d) the fact that the information disclosed has ceased to be inside information;
- (e) the date on which the information ceased to be inside information.

Article 6

Record keeping requirements

1. Disclosing market participants shall ensure that records of the following are kept on a durable medium that ensures their accessibility and readability over the period of retention laid down in Article 11(8) of Regulation (EU) No 596/2014:
- (a) the procedures referred to in Articles 1 and 2;
 - (b) the standard set of information determined for each market sounding in accordance with Article 3;
 - (c) the data regarding persons receiving the market sounding referred to in Article 4;
 - (d) all communications of information which have taken place between the disclosing market participant and all persons that received the market sounding for the purposes of the market sounding, including any documents provided by the disclosing market participant to the persons receiving the market sounding;
 - (e) the information leading to the assessment that the information communicated during the market sounding has ceased to be inside information and the relevant notifications referred to in Article 5.
2. For the purposes of Article 6(1)(d), the disclosing market participant shall keep:
- (a) where the communication of information has taken place by telephone on recorded lines, recordings of telephone conversations provided that the persons to whom the information is communicated have given their consent to such a recording;

- (b) where the communication of information has taken place in writing, a copy of the correspondence;
 - (c) where the communication of information has taken place during video or audio recorded meetings, the recordings of those meetings provided that the persons to whom the information is communicated have given their consent to such a recording;
 - (d) where the communication of information has taken place during unrecorded meetings or telephone conversations, the written minutes or notes of those meetings or telephone conversations.
3. The written minutes or notes referred to in paragraph 2(d), shall be drawn up by the disclosing market participant and duly signed by both the disclosing market participant and the person receiving the market sounding and shall include:
- (a) the date and time of the meeting or telephone conversation and the identity of the participants;
 - (b) the details of the information related to the market sounding which were exchanged between the disclosing market participant and the person receiving the market sounding in the course of the market sounding, including information provided to the person receiving the market sounding and requested from the person receiving the market sounding in accordance with the standard set of information referred to in Article 3;
 - (c) any document and material provided by the disclosing market participant to the person receiving the market sounding in the course of the market sounding.

Where the disclosing market participant and the person receiving the market sounding have not agreed within five working days after the market sounding on the content of the written minutes or notes, the disclosing market participant shall record both a version of the written minutes or notes signed by the disclosing market participant and a version thereof signed by the person having received the market sounding.

Where the person having received the market sounding has not provided the disclosing market participant with a signed version of the written minutes or notes within five working days after the market sounding, the disclosing market participant shall keep a copy of the written version of the minutes or notes signed by the disclosing market participant.

4. The records referred to in paragraphs 1, 2 and 3 shall be made available to the competent authority upon request.

Article 7
Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 3 July 2016.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17.5.2016

For the Commission
The President
Jean-Claude JUNCKER