

# MAR - Finalised market sounding guidelines for buy-side institutions

The Market Abuse Regulation (MAR) came into force on 3 July 2016. ESMA has just published its finalised guidance for firms receiving market soundings (Recipients), having previously consulted in January 2016 (see our previous bulletin, Market soundings: the buy-side perspective). This article highlights the key changes to ESMA's draft January 2016 guidelines. Importantly (and from a practical perspective), we do not regard these changes as particularly significant (albeit that they are likely to be viewed as broadly positive by the Recipient community).

The guidelines will apply two months after ESMA has published the various EU language versions of the guidelines. Within this two-month period, the FCA has to confirm to ESMA whether or not it intends to comply with the guidelines, stating its reasons if it does not intend to comply. We anticipate that the FCA will confirm such compliance.

## Internal procedures and training

- To allow smaller firms greater flexibility, the guidelines now refer to a proportionality principle, whereby a Recipient's internal procedures and staff training relating to market soundings should be appropriate and proportionate to the scale, size and nature of their business activity. In line with this, the guidelines clarify that "individual(s)", and not just a "function or body", may be entrusted to assess whether the information received from the market sounding is "inside information".

## Recipient lists

- ESMA has clarified the scope of persons caught by the Recipient list requirement, to now include persons working for the Recipient "under a contract of employment or otherwise performing tasks through which they have access [to the information communicated during a market sounding]".
- The guidelines also now set a time reference, as Recipients must list the individuals "in a chronological order" for each market sounding.

## Independent assessment

- When a Recipient makes its own assessment of whether it has received inside information, or whether it ceases to hold inside information, the guidelines additionally clarify that the relevant individual(s), function or body making that assessment should not be required to access information behind any information barrier established within the Recipient.

- Significantly, the draft guidance on how a Recipient must act if there are any discrepancies of opinion between it and the Discloser has been deleted. This is because the further dialogue between a Discloser and Recipient could risk additional information inadvertently being disclosed and the requirement was not strictly included in ESMA's mandate to develop these guidelines.

## Identifying issuers and instruments

- If a Recipient has inside information, they must now only identify all the issuers and financial instruments to which the Recipient "believe[s]" that information relates. ESMA refers to this as a best effort principle.
- The guidelines also now clarify that the level of detail for this assessment should be linked to the complexity of the Recipient's trading activity, by explicitly referring to the MAR prohibition on insider dealing, as this is the rationale behind this guidance.

## Written minutes or notes

- For market soundings that take place during unrecorded meetings or telephone conversations, the guidelines now provide that the Recipient respond to the Discloser within five working days after receiving the Discloser's written minutes or notes. As under the draft guidelines, if the Recipient agrees with the content of the minutes or notes they should sign them. If they disagree with the content, they should provide the Discloser with their own version of signed minutes or notes.

## Contact details

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