

Background: The Prohibition

The EU Regulation on Market Abuse (“MAR”) prohibits a person from unlawfully disclosing inside information relating to securities within the scope of the legislation. An unlawful disclosure is made when a person possesses inside information and discloses it to any other person, except in the normal exercise of their employment, profession or duties.

MAR applies to financial instruments:¹

- (a) traded (or which have applied to trade) on a regulated market in an EU Member State;
- (b) traded (or which have applied to trade) on a multilateral trading facility (“MTF”);
- (c) traded on an organised trading facility (“OTF”); or
- (d) the price or value of which depends on or has an effect on the price of a financial instrument referred to in (a), (b) or (c), including derivative instruments.²

The legislation applies to actions and omissions in the EU and in a third country, so a U.S. bank performing market soundings on behalf of an issuer subject to MAR will need to comply and be aware of the requirements summarised in this note.

Inside Information

Inside information means information **of a precise nature**, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments and which, if it were made public, would be **likely to have a significant effect** on the price of any of those financial instruments or on the price of related derivative financial instruments.

Information shall be deemed to be “of a precise nature” if it indicates:

- a set of circumstances which exists or which may reasonably be expected to come into existence, or
- an event which has occurred or which may reasonably be expected to occur,

where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instrument or the related derivative financial instrument.

Information “likely to have a significant effect” if it were made public means information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.

Market Soundings Safe Harbour

A disclosure of inside information made in the course of a market sounding is deemed to be made in the normal exercise of a person’s employment, profession or duties where the disclosing market participant (“DMP”) complies with certain specified conditions. DMPs and market sounding recipients (“MSRs”) must comply with certain conditions whenever conducting a market sounding, whether or not the market sounding involves the disclosure of inside information.

Compliance

Prior to conducting a market sounding, a DMP must specifically assess whether the market sounding will involve the disclosure of inside information and make a written record of its conclusion and the reasons therefor. This obligation applies to each separate disclosure of information during a market sounding.

Where information that has been disclosed in the course of a market sounding ceases to be inside information according to the assessment of the DMP, the DMP shall inform the MSR accordingly, as soon as possible.

¹ For the purposes of MAR, the definition of “financial instruments” is found in Section C, Annex I to Directive 2014/65/EU (“MiFID II”). This is wide enough to cover debt securities.

² MAR Article 2(1). Note that the action/behaviour itself does not have to occur on a trading venue (see Article 2(3) MAR).

If the DMP concludes that the market sounding involves inside information, the communication from the DMP to the MSR must:

- include a statement that the communication is for the purposes of a market sounding;
- if the conversation is being recorded, include a statement to that effect and a statement obtaining consent to record the conversation;
- include confirmation from the MSR individual that they are the person entrusted by the recipient institution to receive the sounding;
- clarify that if the person agrees to receive the sounding (i) that inside information will be disclosed and (ii) the recipient is obliged to separately consider for itself whether it is inside information;
- if possible, include an estimation of when the information will cease to be inside information, the factors that might affect that estimation and how the recipient will be informed of any change;
- inform the recipient of their obligation to keep the information confidential and not to trade (or amend a pre-existing instruction to trade) on the basis of it;
- obtain the recipient's consent to receiving inside information; and
- if the MSR consents, identify the information that is inside information.

If the DMP concludes that the market sounding does not involve inside information, the communication from the DMP to the MSR must include:

- a statement that the communication is for the purposes of a market sounding;
- if on a recorded telephone line, a statement that the conversation is being recorded and obtaining consent to recording the conversation;
- confirmation that the individual is the person entrusted by the recipient institution to receive the sounding;
- a statement that (i) the recipient will receive information which the discloser considers not to be inside information and (ii) reminds the recipient that they are obliged to separately consider for themselves whether it is inside information; and
- the recipient's consent to receive the market sounding.

The same level of information must be communicated to each recipient of each market sounding.

Recordkeeping Requirements

The DMP must also comply with certain recordkeeping requirements, even where it is decided that the market sounding does not contain inside information.

All records must be made available to the competent authority on request.

Records of the following must be kept for five years:

- the list of all persons receiving information (including contact details), date/time of sounding and any follow-up;
- the list of any potential investors refusing to receive any soundings;
- the obligation to refrain from sounding out these investors;
- the facts relevant to the assessment that any inside information has ceased to be such;
- the discloser's written procedures and standard set of information on market soundings;
- all communications with recipients of market soundings including documents provided to them (i.e., copies of written correspondence, audio/video recordings or minutes); and
- if conversations are not recorded, then minutes are required, drawn up by discloser in accordance with a European Securities and Markets Authority template and which include the date/time, identity of parties, information and materials disclosed, and the consents obtained. If minutes are not agreed within five business days after the sounding, then records of both the discloser's and recipient's versions of the minutes must be retained.

ESMA has published guidelines for the recipients of market soundings.

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