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Sounding bite



New rules on market soundings include a safe harbour to the offence of unlawfully disclosing inside information. The safe harbour will apply provided new procedures and record keeping requirements are met. Alex Haynes, a partner in our funds and financial services team, explains the new rules and the procedures that companies and brokers need to be put in place before 3 July to ensure compliance.

A new market soundings safe harbour to the offence of unlawfully disclosing inside information is introduced by MAR. The new rules on market soundings require procedures and record keeping requirements to be followed to fall within the safe harbour. Those wishing to make use of it, including companies and brokers, need to ensure that they have tailored arrangements and procedures in place by 3 July 2016. They should also be working on procedures to exchange a standard set of information with recipients as well as providing training to relevant individuals as to compliance with the safe harbour and the steps to be taken.

What is a "market sounding"?

A market sounding is a communication of information, before the announcement of a transaction, to one or more potential investors in order to gauge their interest in a possible transaction and the conditions relating to it, such as its potential size or pricing.¹

Where a person possesses inside information and discloses that information to any other person it would ordinarily amount to unlawful disclosure of inside information in breach of MAR. That is unless it is made in the normal exercise of an employment, a profession or duties.

MAR includes a safe harbour for market soundings undertaken in accordance with the specific safe harbour requirements, where 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.²

However, it is important to note that, as with other MAR safe harbours, if the requirements of the market soundings safe harbour have not been met, that does not necessarily mean that the "disclosing market participant" ("DMP") is committing market abuse. In respect of market soundings, ESMA is seeking to set out best market practice and, in situations whereby inside information will be, or might be, discussed by DMPs in communications, it would be prudent to consider adopting processes to meet the requirements of the safe harbour.

Who can benefit from the "market sounding" safe harbour?

The following can benefit from the safe harbour:

- an issuer;
- a secondary offeror of a financial instrument (in such quantity/value that is distinct from ordinary trading and involves a selling method based on prior interest from potential investors);
- an emission allowance market participant; or
- a third party, such as a broker, acting on behalf of, or on the account of, the above.

Disclosure of inside information by a person intending to make a takeover bid could also constitute a "market sounding" if:

- the information is necessary to enable target shareholder(s) to form an opinion on their willingness to accept the offer (Takeover Code considerations should still be borne in mind); and
- the willingness of shareholder(s) to offer their shares is reasonably required for the decision to make the takeover bid.

What steps must a disclosing market participant take to benefit from the safe harbour?

Before the market sounding:

- The DMP must consider whether the market sounding will involve the disclosure of inside information and record the conclusion and reasons. If the conclusion changes and inside information is subsequently disclosed during the market sounding, the DMP should update the written records accordingly. ESMA suggest that, as determining whether information is "inside information" is difficult, DMPs should consider adopting the market sounding procedure in all relevant meetings to assist the DMP in evidencing proper conduct.
- Have in place procedures which enable individual(s) to provide prescribed information to, and request necessary information from, recipients.

¹ Article 11(1) of MAR (Regulation 596/2014)

² Article 11(4) of MAR (Regulation 596/2014)

Prior to any disclosure of inside information:

- Obtain consent of the recipient to the receipt of the inside information. If a recipient refuses to receive inside information, DMP should also make a written record of that fact.
- Inform the recipient of their obligations under MAR in respect of inside information.
- Inform the recipient that they are obliged to keep such information confidential.
- Provide an estimate to the recipient as to when the information will cease to be inside information.

During the market sounding:

- Make a record of the identity of the individuals to whom the information has been given.
- If by telephone, the DMP should use recorded lines (consents to recording should be obtained in advance); if in person, record meetings or take written minutes.
- ESMA states that the same level of information should be communicated to each person receiving the market sounding.

After the market sounding:

- Where written minutes are taken, the DMP should send to the recipient a signed copy of the minutes to be countersigned by the recipient. If there is no agreement on the form of minutes, the DMP should retain a copy of its signed minutes and a copy of any alternative minutes put forward by the recipient.
- If the information ceases to be inside information, the DMP should inform the recipient as soon as possible and maintain a record of such correspondence.
- Records need to be kept for five years.

Notwithstanding the DMP's assessment, the recipient should also assess whether the information it receives is inside information and follow its own MAR-compliant processes to manage such inside information.

What should possible DMPs consider doing before 3 July 2016?

ESMA makes it clear that DMPs should ensure that they have arrangements and procedures in place to comply with MAR and that these must be regularly reviewed and updated.

It is important to tailor these procedures to meet the requirements of the business to ensure that MAR compliance does not have a negative impact on what is an important tool for issuers and their advisers.

Action points: Market soundings

- Ensure arrangements and procedures are in place to comply with MAR. These must be regularly reviewed and updated
- Work on procedures to exchange a standard set of information with recipients
- Provide training to relevant individuals as to compliance with the safe harbour and the steps to be taken

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