

Insights

5 TIPS FOR ISSUERS FOLLOWING FCA DELAYED DISCLOSURE REVIEW

Nov 25, 2020

SUMMARY

The Financial Conduct Authority (FCA) conducted a review of Delayed Disclosure of Inside Information (DDII) notifications which identified a number of areas where it will be increasing its oversight in the future. This note considers what issuers should be doing to comply with their disclosure requirements under the Market Abuse Regulation (MAR).

Delaying disclosure of inside information

As a reminder, an issuer is only able to delay disclosure of inside information where:

- immediate disclosure would prejudice legitimate interests of the issuer;
- delay would not be likely to mislead the public; and
- the issuer is able to ensure the confidentiality of such information.

Where inside information has been delayed, the issuer must inform the FCA (using the prescribed form) of the delay immediately after disclosing the inside information to the public. If requested by the FCA, an issuer must provide a written explanation of the delayed disclosure.

Summary of FCA findings

From July 2016 to November 2018, the FCA received 1,610 DDII notifications. In total, 718 issuers submitted DDII notifications (239 were premium-listed issuers). Some interesting results revealed by the FCA's review include:

- there was, on average, a longer delay (average delay of 21 days) for notifications relating to unscheduled financial information (e.g. profit forecasts), than for periodic financial information (average delay of 17 days). The FCA felt this was unusual in that instances regarding the delayed disclosure of periodic financial information (i.e. annual accounts) may

be able to benefit from the legitimate interest test, but it is less clear to see what specific legitimate interest would be prejudiced by a delay in the disclosure of unscheduled financial information; and

- the large number of DDII notifications for director/board changes based on the assumption that once an issuer establishes that inside information has arisen within the process of someone leaving/being recruited, it might be challenging to establish grounds to delay disclosure.

In light of these findings, the FCA will be stepping up their monitoring in this area and plan to revisit, refine and replicate this review in the future. [FCA Review](#).

Action for issuers

Based on these findings and in light of COVID, issuers should consider the following:

1. **Correctly identify what is inside information** - Assess on an 'ongoing' and case-by-case basis whether information is inside information and record this. If in doubt, seek appropriate advice. Have your employees received update to date training on assessing and handling inside information? Can they recognise inside information early on especially as what constitutes inside information may have changed because of COVID?
2. **Periodic financial information can contain inside information** - When assessing periodic financial information, exercise judgement and good faith and start from the assumption that information relating to financial results 'could' constitute inside information. If the financial results contain information which is not in line with market expectations, this should be announced as soon as possible unless immediate disclosure is likely to prejudice the legitimate interests of an issuer (e.g. the issuer is in the process of preparing the annual report and accounts and the immediate public disclosure of this information would impact the orderly production and release of the report which could result in the incorrect assessment of the information by the public).
3. **Notify proposed board changes promptly** – Consider when such proposed changes constitute inside information. The FCA have commented that once the issuer establishes that inside information has arisen within the process of someone leaving/being recruited, it might be challenging for the issuer to establish grounds for delay.
4. **Conditions to delay disclosure apply on an ongoing basis** - If you want to delay disclosure of inside information, can you satisfy all of the conditions set out above and on an ongoing basis? For example, are your employees able to keep that information confidential, particularly in light of increased remote working as a result of the pandemic?
5. **Failure to identify delayed disclosure can indicate a lack of systems and controls** - Do you have sufficient procedures, systems and controls in place to identify inside information? ESMA recently

commented, in its review of MAR, that the low number of DDII notifications across the EU indicated a need for issuers to invest in appropriate procedures, systems and controls. Continue to maintain insider lists and consider re-affirming that persons on those lists understand their legal and regulatory duties in relation to insider dealing and the unlawful disclosure of inside information given the different risks that arise from working from home.

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