



DANISH BANKERS ASSOCIATION



DANISH SECURITIES DEALERS ASSOCIATION



Realkreditrådet  
ASSOCIATION OF  
DANISH MORTGAGE BANKS

DANISH MORTGAGE  
BANKS' FEDERATION



Confederation of Danish Industry

## Response regarding ESMA's Consultation Paper - draft guidelines on the Market Abuse Regulation

31 March 2016

Please find below the response from the Danish Bankers Association, Danish Securities Dealers Association, Association of Danish Mortgage Banks, Danish Mortgage Banks' Federation and Confederation of Danish Industry.

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### Key points

It is important that the implementation of the Market Abuse Regulation (MAR) is done in a way that prevents any form of market abuse but care must be taken to ensure that the functioning of the securities markets in the European Union is not hampered.

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Generally we find that the suggested documentation and assessments required by MSR's on daily activities are too extensive and burdensome in comparison with the potential benefits in the event that a case of market abuse arises and is to be investigated by the authorities.

It is important that ESMA provides further guidance in relation to when the disclosure obligation occurs. We especially see merit in ESMA commenting on and taking into account the concept of the two fold notion, where it is generally accepted that inside information can be used for insider trading before an issuer has an obligation to disclose this information following article 17, e.g. when the inside information may not be sufficiently precise.

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### Guidelines for persons receiving market sounding

Q1	<i>Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?</i>	<p>It is important that the implementation of the Market Abuse Regulation (MAR) is done in a way that prevents any form of market abuse but care must be taken to ensure that the functioning of the securities markets in the European Union is not hampered.</p> <p>Generally we find that the suggested documentation and assessments required by MSR's on daily activities are too extensive and burdensome in comparison with the po-</p>
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		<p>tential benefits e.g. making authorities' investigation easier in the case there is a specific suspicion</p> <p>We sincerely fear that the requirements for both DMP and MSR to register and assess potential inside information followed by a 5 year record keeping can hamper the functioning of securities markets as market participants might decline from accepting market soundings due to the legal requirements and associated cost that the participant must comply with as MSR.</p> <p>Also it is important that exchange of information that is not inside information is not being subjected to regulation under MAR.</p>
Q2	<i>Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?</i>	Cf. the answer to Q1
Q3	<p><i>Do you agree with this proposal regarding internal procedures and staff training?</i></p> <p><i>Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?</i></p>	<p>We agree with the proposal on establishing internal procedures and staff training. However the guidelines should not be more detailed and specific. It should be left to MSR's discretion to make their own internal procedures and staff training that matches the specific MSR. The reason for this is that the frequency, scope and content of soundings differ between MSR's and the MSR's are the best suited to establish internal procedures and staff training that matches the degree of sounding activity in the MSR.</p>
Q4	<i>Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?</i>	<p>Insider lists are already an established part of the regulation and in the operation of businesses where this is relevant. We see some overlap of the use of insider lists and lists of sounded people at the MSR.</p> <p>To secure a lean operation and to avoid redundant double registration we suggest to make the use of insider lists a first priority to keep track of who has access to inside information. Only if the MSR prefer to register sounded persons on a dedicated list regarding a specific sounding this should be allowed.</p> <p>Also it is important that exchange of infor-</p>

		<p>mation that is not inside information is not being subjected to regulation under MAR.</p>
Q5	<p><i>Do you agree with the revised approach regarding the recording of the telephone calls?</i></p>	<p>Yes. We support that only the DMP is required to record telephone calls.</p>
Q6	<p><i>Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?</i></p>	<p>No. The MSR should not be obliged to draw up their own version of minutes or written notes in case of disagreement. To reduce the cost and burdens on the MSR it should be sufficient for the MSR to object to specific parts in the minutes or written notes with a specification of where the MSR disagrees with the DMP. The MSR should however be allowed to draw up their own version of minutes or written notes in case of disagreement if the MSR deems this appropriate.</p>
Q7	<p><i>Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?</i></p>	<ul style="list-style-type: none"> <li>• Potential cost for MSR (non-exhaustive):</li> <li>• IT development, implementation, operation and maintenance of system to handle soundings</li> <li>• Establishing of new organisational function to handle soundings. E.g. as part of existing legal or compliance department</li> <li>• Resources to monitor and document sounding activity</li> <li>• Establishing internal procedures and staff training</li> <li>• Recordkeeping</li> <li>• Ongoing monitoring and assessment: When is knowledge no longer inside information?</li> </ul>

### **Guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public**

Q8	<p><i>Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?</i></p>	<p><b>Article 54 in the guidelines</b></p> <p>In article 54 ESMA refers to Article 17 (1) of Regulation (EU) No 596/2014 (MAR) which sets forth that issuers should inform the public as soon as possible of inside information which directly concern them. However, ESMA provides no further guidance in relation to when the disclosure obligation occurs.</p> <p>It is of utmost importance for the issuer to have as specific guidance as possible on this issue and it is a prerequisite for assessing whether the issuer can delay the disclosure</p>
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		<p>of inside information. Therefore we suggest that ESMA should - as an introduction - note that Article 17(1) requires issuers of a financial instrument to publicly disclose as soon as possible inside information in a manner which enables fast access and complete, correct and timely assessment of the information by the public. ESMA should note that these criteria are the ones set out in Directive 2003/124/EC implementing MAD and thus a continuation of the applicable law.</p> <p>In order to properly use the guidelines there is a need for further guidance in determining when an issuer is in a position to delay public disclosure. We especially see merit in ESMA commenting on and taking into account in the guidelines the concept of two fold notion, where it is generally accepted that the situation can occur that inside information is used for insider trading before an issuer has an obligation to disclose this information following article 17, e.g. when the inside information may not be sufficiently precise. Without guidance from ESMA in this regards we see the risk of alleged insider trading being challenged with an argument, that an issuer had not decided to delay this information, therefore there is no inside information and no violation of the prohibition on insider trading. We therefore see it as clearly within the ESMA mandate to further define when an obligation to disclose sets in under article 17 (1) in order to provide proper guidance towards the use of the delay possibility.</p> <p>Further, we find it important that further guidance is provided with regard to situations where inside information concerns a process which occurs in stages and that each stage of a process as well as the overall process could constitute inside information.</p> <p>Finally, we find it important in the guidelines to specify even further that it is a case by case assessment whether the issuer has</p>
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		<p>a disclosure obligation or not.</p> <p><b>Article 63 in the guidelines</b> According to Article 17(4) an issuer may, on its own responsibility, delay disclosure to the public of inside information if different conditions are met. We agree with ESMA 's view in relation to Article 17(4)(a) that a resignation of CEO doesn't represent an example of legitimate interest to delay disclosure of inside information, until CEO 's successor has been appointed.</p> <p><b>Article 74 in the guidelines</b> We like-minded believe that an example of legitimate interest in Article 17(4)(a) could be where the liquidity supply or short funding of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and immediate public disclosure of the inside information would seriously risk the funding and jeopardize the negotiations meant safeguarding the financial recovery of the issuer.</p>
Q9	<i>Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?</i>	<p><b>Article 99 in the guidelines</b> We share the vision that the examples in a) and b) of point 99 are clear examples of when the delay of disclosure is likely to mislead the public. However the illustration in c) is too vague and we are not in agreement with the suggested wording.</p>
Q10	<i>Do you see other elements to be considered for assessing market's expectations?</i>	Cf. the answer to question 9.