

The European Securities and Markets Authority (ESMA)
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March 31, 2016

Consultation Paper – Draft guidelines on the Market Abuse Regulation (ESMA/2016/162)

Comments by Nasdaq

Nasdaq has no objections regarding the draft guidelines on the Market Abuse Regulation. However, we would like to take the opportunity to make some general comments or to raise a couple of questions in relation to the issue on delay of disclosure.

The requirement of disclosure as soon as possible

Two general matters are not mentioned in the draft (or in MAR). First, the technical preparations of disclosure and measures relating to checking the validity of certain information have an impact on the timing of the disclosure. Second, drafting an announcement and other measures to be taken in order to facilitate the disclosing of inside information of course takes some time. Naturally, a delay process relating to this is not either required or even applicable according to MAR.

Nasdaq assumes that the two elements described above, relating to the disclosure process, are included in the phrase “as soon as possible” and, thus, do not need to be addressed when giving guidance on delay situations.

Disclosure of financial reports

It is, in some jurisdictions, a common procedure that a Board meeting is held in evening after trading hours to approve a financial report whereas the report is disclosed well before trading starts the next morning. Clarity regarding ESMA’s view on such procedure would be valuable. Also whether such timing of a disclosure would be considered to qualify within the definition of “as soon as possible” or if it would be considered as a delayed disclosure.

Nasdaq would further propose that ESMA provide further guidance with regards to how it expects issuers to handle the process whereby information is compiled for inclusion in financial reports. In those recurring processes, pieces of information are added together and will gradually become more concrete and precise until the report is finalized and made public. Some issuers seem to consider whether a decision to delay disclosure of inside information is needed during the course of such standardized and recurring process. It can of course be argued that the prohibition for managers to conduct transactions in the relevant instruments during a period prior to disclosure of a financial report is intended to mitigate the risk for misuse of such information that is gradually developing into insider information, but further clarity and guidance with regards to such processes would benefit issuers and reduce uncertainty.

Partial delay of disclosure of inside information

It is Nasdaq's experience that some issuers argue that certain, otherwise relevant, details are left out in a disclosure of inside information based on a decision to delay those specific pieces of information. Clarity regarding ESMA's view regarding such partial delay of inside information would be appreciated.
