

European Securities and Markets Authority (ESMA)

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Consultation Paper
Draft Guidelines on the Market Abuse Regulation

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Response of:

European Investors' Association IVZW

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1. Introduction

The European Investors' Association ("**European Investors**") was established in July 2015. It is a unique association with individual membership that aims to strengthen the representation of retail investors and their interests in the EU, both in and out of court. Since retail investors are greatly affected by EU regulation but are often not in the position to exercise any influence on its making, we always welcome the opportunity to comment on regulatory initiatives on their behalf, including Level 3 work drafted by ESMA and the other European Supervisory Authorities.

2. General remarks on market abuse and the ESMA draft guidelines on the Market Abuse Regulation

Market abuse is an important issue to European Investors. Market abuse could lead to investors being unreasonably disadvantaged, e.g. by people using information which is not publicly available, through distortion of the price-setting mechanism for financial instruments, or by the dissemination of false or misleading information. As such, market abuse undermines the general principle that all investors should be treated equally and undermines investor confidence in financial markets. A clear legal framework that is enforced in a strict and pro-active manner by national competent authorities across the EU is required to protect investors from harmful practices and behaviour.

A. Guidelines for persons receiving market soundings

Market soundings are an important means for issuers to gauge the interests of potential investors. The guidelines under discussion ("**Guidelines**") concern the requirements for so-called Market Sounding Recipients ("**MSR**"). It is of great importance that any inside information disclosed to MSRs in the course of a market sounding is dealt with in an appropriate manner. The MSR needs to ensure, through effective internal procedures as well as staff training, that any inside information disclosed to its staff through market soundings is not used in an unlawful manner.

That said, we believe the Guidelines should not create a disproportionate burden on the buy-side. We believe it should be primarily the responsibility of the Disclosing Market Participant ("**DMP**") to assess whether information disclosed in the course of a market sounding constitutes inside information and to ensure inside information is disclosed in a proper manner. We are therefore supportive of ESMA's decision to omit from the Guidelines an obligation for MSRs to report to competent authorities in instances where they suspect improper disclosure of inside information. Such an obligation was included in the Discussion Paper, published in November 2013.

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

The term "legitimate interests" should be defined and interpreted strictly. We therefore support ESMA's revised proposal regarding legitimate interests in which any reference to "impending developments that could be jeopardised by premature disclosure" has been omitted. It is important to emphasize that the list of cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests is merely indicative. The decision of the issuer to delay disclosure of inside information should be based on an individual and careful assessment of the situation at hand. If an issuer finds itself in a situation which is similar to one of the cases listed in the Guidelines, this does not automatically entail that a legitimate interests for delaying disclosure of inside information exists. Each situation should indeed be assessed on a case by case basis.

Regarding situations in which delay of disclosure is likely to mislead the public, European Investors believes that in situations where the inside information the issuer intends to delay contradicts (i.e. is logically incompatible with) market's expectations, the delay of such information should be considered misleading. European Investors does not support the amendment introduced by ESMA which requires such market expectations to be based on signals set by the issuer.

3. Guidelines for persons receiving the market soundings

Q1: 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?

European Investors believes the assessment of whether information disclosed in the course of a market sounding constitutes inside information should primarily be the responsibility of the sell-side, i.e. the DMP. The DMP is in the best position to determine whether information is inside information or not. European Investors thinks that the DMP, in its assessment, should take into account the information that might (through other sources) already be in the possession of the market, including the MSRs.

European Investors would suggest that the obligation of MSRs to assess whether they are in the possession of inside information is only warranted in case the DMP has indicated that the information disclosed is not inside information (after all, the MSR might still be in the possession of inside information as a result of the market sounding due to information it has already received through other sources). If the DMP itself indicates the information disclosed is inside information, we believe there is no need for a separate assessment on the part of the MSR.

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

As stated in our answer to Question 1, European Investors thinks the obligation of MSRs to assess whether they are in the possession of inside information is only warranted in case the DMP has indicated that the information disclosed is not inside information.

European Investors would like to make the following suggestions regarding discrepancies of opinion between DMP and MSR:

- (i) where the DMP has indicated that the information provided in the course of market soundings does not constitute inside information, and the MSR concludes on the basis of its own assessment that it is in the possession of inside information *due to the combination with information it received through other sources than the DMP*, there should be no requirement for the MSR to inform the DMP as this is MSR-specific.
- (ii) where the DMP has indicated that the information provided in the course of market soundings does not constitute inside information, and the MSR concludes that it does, the MSR should inform the DMP in order for the DMP to be able to reconsider its assessment.

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent circulation of inside information?

See answer to Question 4.

Q4: Do you agree with the proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

European Investors agrees with ESMA's proposal regarding internal procedures and staff training as well the obligation of MSRs to draw up a list of staff that are in possession of the information communicated in the course of the market sounding. It is important that all persons within an MSR that receive and process information in the course of a market sounding are properly trained on the relevant internal procedures and on the prohibitions arising from being in possession of inside information.

Regarding the listing of staff that is in possession of information communicated in the course of market soundings, we believe the following procedures could be considered a good practice:

1. The MSR provides proper training to all staff that is likely to receive market soundings in the performance of their professional duties (List A).
2. Once a person on List A receives a market sounding, he or she informs the MSR's function or body entrusted to assess whether the MSR is in possession of inside information.
3. Subsequently, this same function or body manages and controls the internal communication of the information received through the market sounding and draws up, for each market sounding, a separate list of persons that are in possession of the information (List B).
4. If a person who is not on List A needs to know the information, this function or body ensures that this person first obtains the necessary training before it actually receives the information.

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?

European Investors agrees that there should be no requirement for MSRs to record telephone calls. Such obligation should fall on the DMPs. It should be up to the MSR to decide for itself whether or not to record telephone calls (provided that the DMP consents to its use). It is also important that the MSR explicitly consents to the use of recording devices by the DMP. Since the DMP is obliged to record telephone calls, no call can take place if the MSR does not consent.

Q6: 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?

European Investors believes it is not always necessary for the MSR to provide an alternative version of the written minutes in case of disagreement. If there is disagreement on certain specificities, we believe it suffices when the MSR proposes amendments in the margin of the written minutes or notes drafted by the DMP. If the DMP agrees with these amendments, it can put its signature below these amendments. If the DMP disagrees (and there is an agreement to disagree), the final minutes should include the alternative text as set out by the MSR in the margin as well as the original text proposed by the DMP.

If there is disagreement of a more general nature on the minutes or notes provided by the DMP which cannot be resolved by amending specific sentences/words, then the MSR should provide its own minutes in accordance with the procedure proposed in the Guidelines.

Q7: Can you provide possible elements of compliance costs with reference to the regime proposed in the guidelines for MSRs?

When evaluating compliance costs for MSRs, we believe ESMA should keep in mind that the primary responsibility to ensure market soundings do not harm the integrity of financial markets should be with the DMP. This means that compliance costs for MSRs should not create a disproportionate burden for MSRs. Otherwise, MSRs might prefer not to receive any market soundings anymore.

On a more a general note, we feel strongly that investors should not be overloaded with piecemeal regulation. The Guidelines deal with the obligations investors have when they receive inside information that is disclosed to them in the course of market soundings. Ideally, there should be one single set of principles applicable to all disclosures of inside information to investors that do not constitute market abuse (i.e. disclosures in the normal exercise of an employment, a profession or duties).

4. 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: Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

European Investors is supportive of the revised list of cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests. In particular, we support the omission of any reference to "impending developments that could be jeopardised by premature disclosure". Such a provision would indeed be too generic and open-ended.

It is important to emphasize that the list should be considered indicative. The decision of the issuer to delay disclosure of inside information should be based on an individual and careful assessment of the situation at hand. If an issuers finds itself in a situation which is similar to one of the cases listed in the Guidelines, this does not automatically entail that a legitimate interests for delaying disclosure of inside information exists. Each situation should indeed be assessed on a case by case basis.

Q9: Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

In response to the Discussion Paper, it has been argued by some stakeholders that a delay should not be considered misleading merely because the undisclosed inside information contradicts market's expectations. It is argued that inside information always contradicts market's expectations. In response, ESMA has decided to amend the Guidelines. A delay is considered misleading only if the market's expectations are based on signals as previously set by the issuer.

European Investors does not support this amendment. Information does not need to contradict (i.e. be logically incompatible with) market's expectations in order to have a significant effect on the price of a financial instrument. A differentiation can be made between inside information that contradicts market's expectations and inside information that simply confirms, reinforces, supplements, or brings nuances to market's expectations. Also, inside information can raise market's expectations where there were not such expectations before. European Investors believes that if inside information contradicts market's expectations, a delay should be considered misleading, regardless of whether those expectations are based on signals previously set by the issuer or not.

Further to what is stated under paragraph 103 of the Consultation Paper, we would like to emphasize that if expectations emerge that relate to information that is under delay and that information under delay contradicts those market's expectations (regardless of whether these expectations are based on signals previously set by the issuer), the issuer should disclose that information even though the expectations did not exist yet when the decision to delay the information was made.

Q10: Do you see other elements to be considered for assessing market expectations?

Market sentiment, for instance considering the consensus among financial analysts, provides a good starting point. What is stated in the media could also help to assess such sentiment. In our view, the issuer should also consider trading data (e.g. price and trading volumes).