

MAR UPDATE FOR ISSUERS

One Year After Entering into Force – September 2017

MAR¹ entered into force on 3 July 2016 and in respect of issuers primarily addresses market abuse activities as well as the duty to disclose inside information. Almost all of these provisions became directly applicable to EU Member States on the effective date of the regulation. Consequently, all issuers at Nasdaq Nordic¹ Exchanges and Nasdaq First North must be aware of the content and proper legal meaning of MAR's provisions as well as Nasdaq's regulatory framework for issuers.

MAR kept the old concepts that inside information must be announced as soon as possible, but that delay is permitted if certain conditions are met. It brought in new record-keeping and reporting requirements where disclosure of inside information is delayed. The new requirements may have seemed purely procedural, but they have been far from straightforward to implement, as issuers have discovered during the course of the last year. This is because of the need to specify the exact time and date when inside information first arises and to identify inside information as such when it is announced. The current regime can also be said to require a more disciplined approach and more elaborate documentation of decisions taken as well as underlying reasons.

Much like before MAR was introduced, issuers should apply internal processes to properly evaluate the nature of information to determine when inside information arises. Identifying inside information is not an exact science; views may differ or be judged wrong in hindsight. The key is that issuers take a conscious and consistent approach and that their assessments and decisions are based upon the requirements of the regulation. Many issuers have formalized their matter escalation procedures and created disclosure committees, or similar, to ensure this is done.

Treating information as if it is inside information, even when it is not, can be the prudent thing to do in certain circumstances – for example, imposing confidentiality obligations and dealing restrictions for a broader category of sensitive information may be a good idea. But this does not extend to using the “this contains inside information” rubric/category in announcements as a default. Issuers should be wary of setting themselves too low a bar in determining what is inside information, as this could set an unhelpful precedent for the future.

While issuers should avoid a too broad definition of what is considered inside information it is of course imperative that the definition is not too narrow either. In this context it is important to acknowledge that a specific process does not need to be finalized for information about it to be considered inside information. For example, an issuer does not have to be totally sure that a significant project will materialize because inside information exists, according to MAR, already when a set of circumstances may reasonably be expected to come into existence or occur. The task of identifying when inside information exists can be challenging but it is the responsibility of the issuer and it governs when the issuer should disclose information or decide to delay disclosure and establish a log book (insider list).

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>

Labeling an announcement as containing inside information will also mean that issuers will have to be able to demonstrate that it was announced as soon as possible or that there was a legitimate reason for delaying. In the latter case, they should ensure:

- An insider list is kept
- The FSA is notified of the delay in disclosure when the announcement is made
- The requisite records are kept of when the inside information first arose and how the conditions for delaying disclosure were met including who took the decision, if it was decided to delay a disclosure.

After significant announcements, issuers should be prepared for the FSA or the Exchange to ask questions if the correct procedures have not been followed, or if an announcement has not been labeled as inside information but triggers a price movement.

Q. What can be considered inside information?

According to MAR, inside information shall comprise information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, i.e. information a reasonable

investor would be likely to use as part of the basis of his or her investment decisions. An intermediate step in a protracted process can also be deemed to be inside information if it, by itself, satisfies the criteria of inside information.

The concept of what is inside information has to be evaluated on a case by case basis. In evaluating what may constitute inside information the factors to be considered may include:

- i. The expected extent or importance of the decision, fact or circumstance compared to the issuer's activities as whole;
- ii. The relevance of the information as regards the main determinants of the price of the issuer's financial instruments; or
- iii. All other market variables that may affect the price of the financial instruments.

Q. How should inside information be disclosed?

According to MAR an issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.

The issuer shall disclose inside information using technical means that ensure that the inside information is disseminated to as wide a public as possible on a non-discriminatory basis, free of charge and simultaneously throughout the EU. The information shall be simultaneously provided to the Exchange in the way prescribed by the Exchange and as soon as possible after disclosure be made available on the company's website. The company should not combine the disclosure of inside information to the public with the marketing of its activities or other type of investor news that are not required by MAR or by the rules of the Exchange.

Q. What does "as soon as possible" mean?

If a delay is not permitted, inside information must be announced "as soon as possible". This is not new. However, the need to record the time and date when inside information first arises and disclosure is delayed puts any gap between that time and the announcement under scrutiny. What does "as soon as possible" mean in practice? A short delay may be permissible to verify the facts, but in most cases issuers should be making an announcement within hours, if not minutes. Especially when the issuer could reasonably have expected that potential inside information would arise.

Q. What are legitimate reasons for delaying disclosure of inside information?

Article 17 (4) in MAR requires all of the following conditions to be met for a delay to be considered lawful:

- (1) Immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
- (2) Delay of disclosure is not likely to mislead the public;
- (3) The issuer or emission allowance market participant is able to ensure the confidentiality of that information.

ESMA guidance on the legitimate reasons a listed company might have to delay disclosure, and when delay would be likely to mislead the public, was finalized shortly after MAR took effect. This guidance contains an indicative, non-exhaustive list. However, ESMA has stressed that the ability to delay is the "exception to the rule" so should be narrowly interpreted.

Checklists

Inside information is information that:

- Is precise
- Has not been made public
- Relates, directly or indirectly, to the issuer or its financial instruments
- If made public, would be likely to have a significant effect on the price of the issuer's financial instruments (it is information which a reasonable investor would be likely to use as part of the basis for their investment decisions).

Legitimate reasons for delay are:

Under the ESMA guidance, legitimate interests could include decisions approved by a management body that need approval from a supervisory body (i.e. in issuers with dual board structures) and situations where immediate disclosure would jeopardize:

- The outcome of ongoing negotiations
- The implementation of the issuer's plans to buy or sell a major holding in another entity
- The issuer's ability to meet requirements that might be imposed by a public authority where a previously announced transaction is subject to that authority's approval
- The interests of shareholders and conclusion of negotiations when the financial viability of the issuer is in grave and imminent danger
- The intellectual property rights of the issuer when it has developed a product or invention.

Example of internal inside information decision process

- Potentially significant matter is identified (even if at an early stage).
- Escalate to nominated person(s) or disclosure committee immediately.
- Nominated person(s) or disclosure committee (or equivalent) decides ASAP if information is inside information.
- If yes, can disclosure be delayed? Are all three conditions for delaying disclosure fulfilled?
 - If yes, record time of decision and who was involved, how conditions for delay are satisfied and all other required records. A log book should be opened.
 - If no, disclose ASAP and mark it as inside information.

Decisions from the Nasdaq Disciplinary Committee's

Each of the Nasdaq Nordic exchanges has a disciplinary committee. The disciplinary committee's in Denmark, Finland and Sweden have so far dealt with five cases relating to MAR. The decisions give an understanding of the Exchanges' view on for example the interpretation of "as soon as possible" as well as legitimate reasons for delaying disclosure of inside information together with the disciplinary committee's opinion.

The decisions can be found here:

NASDAQ COPENHAGEN

<http://www.nasdaqomx.com/listing/europe/surveillance/copenhagen>

NASDAQ HELSINKI

<http://www.nasdaqomx.com/listing/europe/surveillance/helsinki>

NASDAQ STOCKHOLM

<http://www.nasdaqomx.com/listing/europe/surveillance/stockholm/disciplinarycommittee/decisions>

FAQ

Nasdaq Nordic has published a set of Q&A's on MAR, please see:

http://business.nasdaq.com/media/MAR_QA_161213%20-%20Final%20version_tcm5044-35878.pdf

In addition Nasdaq Stockholm has published a more extensive list of Q&A's including also other topics than MAR, please see <http://business.nasdaq.com/list/Rules-and-Regulations/European-rules/nasdaq-stockholm/faq/english/index.html>

Other material

Model for disclosure policy and examples of assessing inside information (in Finnish), see

<https://cgfinland.fi/materiaalipankki/tiedottaminen/>

