SPOTLIGHT
STOCK MARKET

Guidance from Spotlight about the application of MAR

2.1.2017

Background

The aim of this guidance is to facilitate companies' compliance with Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (MAR), which entered into force on 3 July 2016. Spotlightwants to provide guidance and give an account of the marketplace's view of companies' obligations under MAR. The new rules entail changes for listed companies at Spotlight, primarily concerning public disclosure of insider information, transactions involving securities by persons discharging managerial responsibilities (previously insiders) and insider lists (previously logbooks). The aim of the rules in MAR is primarily to counteract market abuse and ensure that the market has fast access to relevant, clear information immediately. This is essential to the maintenance of confidence in the market, its operation and the listed companies.
The EU has also adopted Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (MAD) to ensure effective implementation of the provisions in MAR. To ensure that MAR and MAD are complied with in Sweden, the existing Market Abuse Act will be repealed and replaced with the Act (2016:1307) on criminal sanctions for market abuse on the securities market and the Act (2016:1306) with supplementary provisions to the EU Market Abuse Regulation. The new rules enter into force on 1 February 2017.
Spotlightwishes to draw the reader's attention to the fact that the information below may be affected by any further guidance from the EU, the European Securities and Markets Authority (ESMA) or the Swedish Financial Supervisory Authority (FI). If you have any questions about the content of this guidance, please contact our information surveillance by phone on +46 (0)8-511 680 00 or by email at info@spotlightstockmarket.com

Inside information

The term inside information is defined as information of a *precise nature*, which has not been made public, relating, directly or indirectly, to the company, and which, if it were made public, would be likely to have *a significant effect on the prices* of the company's financial instruments or on the prices of related derivative financial instruments.
An intermediate step in a protracted process may also be deemed to be inside information if, by itself, it satisfies the criteria of inside information. Spotlight wishes to draw the reader's attention to the fact that this may mean that the company may need to make the same underlying circumstance or event public several times. See more about the publication of inside information under section

Precise nature

Information shall be deemed to be of a *precise nature* if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where the information is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments in question. When assessing what may constitute information of a precise nature, it is possible to make an overall assessment based on the facts and circumstances available at a given time. Is there a *realistic prospect* that a set of circumstances or an event will occur, i.e. lead to the ultimate objective? A realistic prospect is a fairly low requirement, but it is also a clear indication that it must be information of some form of stability and concreteness. Information that completely lacks concreteness and cannot be deemed to have any effect on the price of the financial instrument cannot be deemed to be information of a precise nature.

A significant effect on the price

To assess whether information meets the requirement of having a *significant effect on the price*, it is necessary to consider whether a **reasonable investor** can be expected to use such information as part of the basis of their investment decisions.

The reasonable investor is a fictitious person who bases their investment decisions on available information, which the company must always use as its basis in its assessment. Such an assessment has to take into consideration factors including the following:

- the anticipated impact of the information in light of the totality of the company's activity,
- the reliability of the source of information, and
- any other market variables likely to affect the price of the shares or the related financial instruments.

An assessment of whether the information may affect prices must be made on a company-specific basis. Among other things, this means that previous price trends, industry affiliation and market trends must be taken into consideration.

Examples of information that is likely to have a significant effect on prices:

- orders and investment decisions,
- new share issues and other capitalisation decisions,
- partnership agreements or other significant agreements,
- acquisitions and divestments of companies,
- credit losses or bad debt losses,
- financial difficulties,
- significant change in profit or financial position,
- research findings, development of new products or important inventions,
- public authority decisions,
- initiation or settlement of legal disputes and relevant court orders,
- information leaks,
- profit warnings and reverse profit warnings,
- significant insider transactions,
- market maker agreements, and
- sweeping changes in the company's operations.

Please note that the magnitude criterion for each form of information is company-specific.

Assessment of what may constitute inside information

An assessment of what constitutes inside information must be based on facts and circumstances and be made on a case-by-case basis. In case of doubt, please contact Spotlight. Spotlight's staff have a duty of confidentiality. However, information is ultimately always supplied at the company's own risk.

The following factors may be considered when making an assessment:

- the expected scope of the decision or event or its importance in relation to the totality of the company's activity,
- the importance of the new information in relation to the factors that determine the price of the financial instruments, or
- other factors that could affect the price of the financial instruments.

Where the company has received information from an external party, the reliability of the source must also be taken into consideration.

Another ground for assessment is whether similar information has previously had an effect on the price of the financial instruments or whether the company has previously assessed certain decisions or events as inside information. If possible, managing similar information in different ways should be avoided.

Public disclosure of inside information

MAR specifies that a company shall disclose inside information concerning the company to the public *as soon as possible*. The aim of the rule is to counteract information asymmetry and thus ensure that all stakeholders on the market have access to inside information at the same time. The company must therefore ensure that inside information is treated as confidential before it is disclosed to the public and that no unauthorised party has access to such information. This means that inside information may not be disclosed to shareholders, the media, analysts or any other parties, whether individually or in a group, unless the information is disclosed to the public at the same time. In exceptional cases, a company may, at its own risk, delay public disclosure of inside information. See also under section 4 below.

Companies may not combine public disclosure of inside information with marketing information. Information that is disclosed to the public by a company must be accurate, relevant, clear and not misleading. The information must be sufficiently detailed to permit an assessment of its importance to the company and its financial instruments. Information that is omitted may also mean that the company's disclosure of information is incorrect and misleading.

As from 3 July 2016, the public disclosure of inside information must bear a *label*. However, please note that the label should not be used where the information disclosed is not inside information. Provided that the name and position of a contact are given in the press release, the label may be as follows:

This information is insider information that [• AB] is obliged to make public pursuant to the EU Market Abuse Regulation. The information was submitted for publication through the agency of the contact person set out above, on [date].

The label does not have to indicate the time as the press release is timestamped by

Cision's press release distribution tool for companies listed at Spotlight.

Delayed public disclosure of inside information

Under MAR, a company may, at its own risk, delay disclosure to the public of inside information provided that the conditions in MAR are met. Therefore, inside information must generally be disclosed to the public as soon as possible unless an exception applies. A company may delay public disclosure of inside information if:

(i) immediate disclosure is likely to prejudice the company's *legitimate interests*,
(ii) delay of disclosure is not likely to *mislead the public*, and
(iii) the company is able to ensure the *confidentiality* of that information.

ESMA has issued written guidelines[1] on what should be taken into consideration to determine what constitutes legitimate interests and misleading the public. A guideline from ESMA has the same status as general guidelines from FI, i.e. it must be followed or the company must be able to explain why it does not follow the guideline.

[1] https://www.esma.europa.eu/system/files_force/library/esma-2016-1478_sv.pdf?download=1

Legitimate interests

Below is a non-exhaustive list of examples of what may be deemed legitimate interests for delaying disclosure of inside information:

(i) Ongoing negotiations, where disclosure would affect the outcome or the normal negotiating process – for example, agreements relating to acquisitions.

(ii) Information on a decision or the signing of an agreement by executive and shareholder functions of a company that requires the approval of higher executive and shareholder functions, given that public disclosure of the information before approval, along with simultaneous notice that approval is still pending, could jeopardise the ability of the general public to make a correct assessment, provided that the company ensures that a final decision is made as soon as possible.

(iii) The company has developed a product or invention and immediate public disclosure of this is likely to jeopardise the company's ability to obtain intellectual property rights for the product/invention.

(iv) Information that the company is planning to acquire or divest a major holding in another company and the planning of said (planned) measures is affected – for example, situations in which the planning has started but not the negotiations.

(v) Information about a transaction that has been previously announced and is subject to public authority approval, where such approval is a requirement for implementation of the transaction and public disclosure is likely to affect the company's ability to meet the conditions and thus prevents the implementation of the transaction.

(vi) The financial viability of the company 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 prejudice the interests of existing and potential shareholders by jeopardising the conclusion of the negotiations designed to ensure the financial recovery of the company.

Misleading the public

ESMA's guidelines contain examples of situations in which delayed disclosure of inside information is likely to mislead the public and is therefore not permitted.[2] Below, a few examples are discussed. The examples are not intended to be exhaustive.

(i) Information that is materially different from information previously announced by the company.

(ii) Information to the effect that the company will not achieve its financial objectives that were previously publicly announced by the company.

(iii) Information that is in contrast with the market's expectations, where such expectations are based on signals that the company has previously sent to the market, such as interviews, company presentations or any other type of communication organised by the company or made public with its approval.

The *misleading the public* criterion therefore involves the company having led the market in a certain direction in the information it has disclosed, and the information of which the company intends to delay disclosure directly contradicts the information that the company has previously announced to the market. The criterion will probably be of most importance in connection with profit warnings, forecast adjustments and other information of which the company intends to delay disclosure that would fully or partially change the image of the company or give it a new image.

It is also necessary for the company to be able to ensure that the information remains confidential to be able to delay disclosure of inside information. When it is no longer possible to ensure that the information can remain confidential, the company must disclose the information to the public as soon as possible.

To meet the confidentiality requirement, the company must ensure that relevant persons who receive inside information are included in the insider list (see more about this in section 5 below). The company must make it clear to the recipient of information that they must treat the information as confidential and that, by receiving the information, they become an insider and are therefore forbidden by law from making use of it for their own or others' gain. The recipient must confirm in writing to the company that they are aware of their obligations and the applicable sanctions. This can be done appropriately by the company sending an email to the recipient, who replies by email to confirm that they have received, read and understood their obligations.
In particularly sensitive cases, it may be appropriate for the company to draw up a non-disclosure agreement with the recipient, for example in bid situations or in contact with major suppliers that, in their ongoing contact with the company, may obtain information about the company that is not in the public domain.
Spotlightwishes to emphasise that if the company is no longer able to ensure that the information remains confidential, the company must disclose the information to the public as soon as possible.

Information to Spotlightand FI
In cases in which a company decides to delay public disclosure of inside information, the company must, under Spotlight's listing agreement, *inform Spotlight*of this. Such information must be provided immediately after a decision has been made (but preferably as soon as the company considers making such a decision). The company must (preferably in writing) give an account of the event or set of circumstances in question and indicate the circumstances that are deemed to entail compliance with the three criteria above. It is appropriate for the company to appoint an individual to ensure management of the above procedure, including how long disclosure may be delayed.
A press release that contains inside information that has been subject to a delay in disclosure does *not* need to indicate that the information has been subject to a delay in disclosure. However, immediately after the press release has been published, the company must notify FI of this in an encrypted email to finansinspektionen@fi.se. Companies registered abroad that are listed at Spotlightnotify the competent authority in their country of registration accordingly. The subject line of the email must contain Article 17 MAR and the company's full official name. The email must include the following information:

- name and contact details of the person sending the information (email and phone number),
- publication heading,
- date and time of publication,
- date and time of decision to delay disclosure, and
- identity of all persons responsible for the decision to delay disclosure.

At the request of FI or its foreign equivalent, the company must submit a written explanation of how the criteria for delaying disclosure were met.
For further information, see http://www.fi.se/sv/marknad/marknadsmissbruk-mar/kontakta-fi-om-mar/. There are as yet no clear statements on delayed disclosure of information ahead of the publication of a financial report, but ESMA will probably issue guidance on this. Pending such guidance from ESMA, Spotlightis of the opinion that companies may assume until further notice that there is a legitimate interest in delaying disclosure of information until the preadvised report time, provided that other conditions for delayed disclosure are met. If the financial report is not deemed to contain inside information, neither the rules on delayed disclosure nor the rules on insider lists are relevant.

Market soundings

In connection with share issues, there is often a need to contact one or more potential investors before information about the issue is made public.

In these situations, the company often needs to assess potential investors' interest in a possible transaction and its price, size and structure. Market soundings may involve an initial or secondary offer of relevant securities, and are distinct from ordinary trading.

The person who discloses the information

Conducting market soundings may require disclosure to potential investors of inside information.

Disclosure of inside information is permitted in these situations, provided that the company meets the requirements in MAR (Article 11). The rules in MAR mean, in brief, that the company must:

- document its assessment of whether the market sounding will entail the disclosure of inside information,
- before the information is disclosed, obtain from the recipient their consent to receive inside information,
- notify the recipient of the ban on insider trading and the requirement to keep the information confidential,
- keep and maintain registers of:
    - all information disclosed to the person who receives the market sounding, and
    - the persons who have received the market sounding.

The person who receives the information

The provisions on market soundings also require a recipient to assess whether the information received is inside information or not.

ESMA will issue guidelines for persons who receive market soundings. These have not yet been decided on, but when a decision has been made, FI will provide information about the guidelines on its website.

Insider list (previously logbook)

MAR requires that companies keep an insider list of persons who have access to inside information <u>and</u> work for the company. For example, they may be employees and contractors (such as advisers or accountancy firms). Other persons such as counterparties should not be included in the insider list. For them, it is sufficient for the company to ensure that the information is kept confidential in other ways – for example, by signing a non-disclosure agreement. Please note that only persons who need inside information in their work should have access to it.

The new rules on insider lists require:

(i) that the information in the insider list follow a standardised template (see FI's website), and

(ii) that companies *take all reasonable steps* to ensure that all persons who are on the insider list confirm in writing that they are aware of their obligations and applicable sanctions.

Such written confirmation under (ii) should contain at least confirmation that the person:

- has received inside information about the company,
- is aware of their obligations in connection with inclusion in the insider list,

- is aware of the prohibition on insider crime in the Act (2005:377) on criminal sanctions for market abuse in connection with trade in financial instruments and on the prohibitions of insider trading in MAR, which means that it is prohibited to make use of inside information by trading (on your own behalf or on behalf of others) in shares and/or other financial instruments in the company, by inducing, via advice or in any other way, someone else to trade in shares and/or other financial instruments in the company and by disclosing inside information to another person, except where such disclosure takes place as a normal part of the discharge of duties, activities or obligations. Non-compliance with the prohibitions may entail criminal liability or administrative sanctions from FI.

Companies are able to distinguish, in insider lists, between permanent and situation-specific insiders (both versions are included in FI's template). A company may choose to keep a section for permanent insiders. Permanent insiders are *persons who always have access to all insider information*. In Spotlight's judgement, there should be few officers who meet the requirements in this definition, but it is incumbent on each company to decide on this issue in the light of how operations are organised.

Transparency reporting

Under MAR, persons discharging managerial responsibilities and persons closely associated with them must report their transactions in the company's financial instruments to FI and to the company. Persons in companies registered abroad must report to the competent authority in the country of registration.
MAR contains a number of important changes in relation to reporting by persons discharging managerial responsibilities:

(i) the group of people under an obligation to report comprises only members of Group management and Board members (including any deputies), plus other executive officers with regular access to inside information and the power to make decisions at executive level that affect the future development of and business opportunities for the company ('persons discharging managerial responsibilities'),
(ii) auditors and major shareholders are no longer included – however, owners with a shareholding of more than 50% are automatically classified as persons discharging managerial responsibilities. Nor does any compliance function or internal audit function constitute persons discharging managerial responsibilities.
(iii) the company must notify persons discharging managerial responsibilities and keep a list of them and persons closely associated with them,
(iv) the definition of closely associated legal person has been changed. There is no explicit requirement for ownership in a legal person for the legal person to be considered closely associated. It is sufficient for managerial tasks in the legal person to be performed by the person discharging managerial responsibilities (for example a Board member of the company who is also a Board member or CEO of an owner company),
(v) closely associated persons have their own obligation to report and must also be notified in writing by the person discharging managerial responsibilities,
(vi) as the company keeps a list of persons discharging managerial responsibilities and the persons closely associated to them, changes in this group of persons do not have to be reported to FI,
(vii) no initial values need to be reported to FI,
(viii) the obligation to report comprises trading in all of the company's financial instruments, even if they are not listed,
(ix) the obligation to report also comprises, for example, pledging and lending of financial instruments,
(x) the obligation to report must be met within three (3) business days, and a report must be submitted to both the company and FI,
(xi) endowment insurance transactions are covered by the obligation to report, and
(xii) a threshold of EUR 5,000 per calendar year is applied – the obligation to report takes effect only when this value is exceeded. To calculate the amount, all transactions are added up without netting. The obligation to report also applies to the transaction that causes the threshold of EUR 5,000 to be reached or exceeded.

The company must notify persons discharging managerial responsibilities in writing of their obligations and keep a copy of the notice. The notice should state that:

- the person is being notified in their capacity as a person discharging managerial responsibilities for the company and that the person has been informed of their obligations to report changes in the holdings of the company's shares and/or other financial instruments,
- the obligation to report applies when a total transaction amount of EUR 5,000 has been reached by the person during the calendar year. Total transaction amount means the accumulated total of purchases, sales and other transfers. The transaction that causes the threshold of EUR 5,000 to be reached or exceeded constitutes the first transaction that must be reported. Subsequently, all transactions during the year must be reported,
- reports must be submitted to both the company (specify how) and FI within three (3) business days after the transaction date.
- it is prohibited for persons discharging managerial responsibilities at the company to implement transactions, directly or indirectly, on their own behalf or on behalf of third parties, involving the company's shares or other financial instruments linked to them during a closed period of 30 calendar days before the publication of an interim report or year-end report. It is not permitted to trade before publication on the publication date. However, it is permitted to trade on the same date after publication.
- a closely associated *natural person* is a spouse, partner, child or relative with whom the person in question has shared a household for at least one year. A closely associated *legal entity* is an entity in which managerial tasks are performed by you or a closely associated natural person or which is directly or indirectly controlled by you or formed for the benefit of such a person or the economic interests of which mainly correspond with the interest in you.

Persons discharging managerial responsibilities must, in turn, notify their closely associated persons of corresponding obligations, as above, and must also keep a copy of the notice. The notice should, as a minimum, state that:

- the person is being notified in their capacity as a closely associated person of a person discharging managerial responsibilities for the company and that the person has received information and been informed of their obligations to report holdings and changes in the holdings of the company's shares and/or other financial instruments,
- the obligation to report applies when a total transaction amount of EUR 5,000 has been reached during the calendar year. Total transaction amount means the accumulated total of both purchases and sales. The transaction that causes the threshold of EUR 5,000 to be reached or exceeded constitutes the first transaction that must be reported. Subsequently, all transactions during the year must be reported,
- reports must be submitted to both the company (specify how) and FI within 3 business days after the transaction date.