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FIRMS IN THE FINANCIAL SERVICES SECTOR

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MARKET SOUNDINGS

A **market sounding** is defined as a communication of information prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction, and the conditions relating to it such as its potential size or pricing.



GUIDELINES FOR MARKET SOUNDING RECIPIENTS (“MSR”) - SUMMARY OF KEY POINTS

The following list sets out the key points contained within the Guidelines. It is important to note that these requirements will apply to all MSRs, whether they are regulated firms or not:

Contacts for market soundings

MSRs may choose to designate a person or contact point within their organisations to receive market soundings, although importantly, this is not mandatory. If MSRs do choose to have such a contact, they should ensure that the relevant contact information is made available to Disclosing Market Participants (“DMP”) - for example, directly or through intermediaries or via a website.

ACTION: You should designate one person to be the contact for Market Soundings. Newgate believes this should be the CF10, in order to act as a triage.

Notification of desire not to receive market soundings

After being contacted by a DMP, an MSR should notify the DMP whether or not the MSR wishes to receive future market soundings and, if so, whether in relation to all potential transactions or only particular types of potential transactions. In practice, some firms may prefer to make this known in the same way as they make known their contacts for market soundings (if any), rather than awaiting the first contact from a DMP.

ACTION: Meeting notes should be kept detailing who the firm has agreed will be its DMP(s)

MSRs to assess whether information communicated during the sounding is inside information

MAR requires MSRs to perform their own independent assessments of whether the information that they receive from a DMP during a sounding is inside information and when it ceases to be inside information. [See further information below.](#)

Written minutes or notes of unrecorded meetings or conversations in relation to a market sounding:

Where a market sounding is not recorded (for instance, where it is made at a face-to-face meeting), the Technical Standards would require the DMP to maintain a written record of the relevant discussion which, if agreed, must be signed by the DMP and the MSR. Where the MSR disagrees with the DMP's record, the DMP's record must be kept with the MSR's signed alternative version of the meeting or conversation. The Guidelines mirror the requirements in the Technical Standards by requiring MSRs to either sign the DMP's minutes if they agree with their content, or otherwise provide the DMP with a signed version of the MSR's own set of minutes within five working days of the sounding if they do not agree with the DMP's record of events.

ACTION: the CF10 should agree the DMP minutes and sign

Internal procedures to control the flow of information received during a market sounding

MSRs will be required to establish, implement and maintain internal procedures to manage the flow of any information received during a market sounding within the firm, and to ensure that such information is communicated only through specified internal reporting lines on a "need-to-know" basis. For firms that only maintain an external perimeter and do not currently restrict access to information within the firm, this will require new policies and procedures to ensure that information obtained during a sounding is only available to those individuals who have a justifiable interest in accessing it. This may pose a difficulty in smaller firms and/or in firms whose internal structure does not easily accommodate separate lines of communication.

ACTION: Use the Insider List on The GATEway

Insider lists

For each market sounding, MSRs must draw up a list of persons working for them who are in possession of information communicated during the course of the sounding. Although ESMA has published a separate set of technical standards relating to the required format of insider lists that apply to issuers and firms acting on behalf of, or for the account of, issuers, these do not apply to MSRs. MSRs therefore have more flexibility about the precise format in which to compile and maintain insider lists about market soundings, but the Guidelines indicate that a separate list should be maintained for each separate sounding. Where multiple soundings take place about a transaction, this will therefore necessitate separate lists being maintained in relation to the information provided under each sounding. As a result, these requirements may be onerous in nature.

ACTION: Use the Insider List on The GATEway

Internal training

MSRs will need to ensure that the function or body within the firm that is responsible for assessing whether inside information has been received because of a market sounding is composed of staff that have been properly trained for that purpose. In addition, staff who receive or process information during a market sounding must

receive proper training on the MSR's internal procedures and on the prohibitions under MAR relating to insider dealing and improper disclosure of inside information.

ACTION: Newgate training courses

Identification of related issuers and financial instruments

Where the MSR considers that it has received inside information during a market sounding, the MSR must identify all issuers and financial instruments to which that inside information relates. This may be an onerous obligation to the extent that it could require the identification of a wide range of instruments which may be connected with securities of the issuer to whom the inside information relates. Not all related financial instruments will be capable of identification.

Record Keeping

MSRs must maintain records in a durable medium of each of the following for at least five years:

- any notification to a DMP relating to whether the MSR wishes to receive market soundings;
- any assessment carried out by the MSR as to whether information received during a market sounding is inside information (including the reasoning supporting that assessment);
- any differences in opinion between the DMP and the MSR as to whether information communicated during a market sounding is inside information;
- the MSR's internal procedures relating to the control of the flow of inside information and to training;
- any insider lists drawn up in connection with a market sounding; and
- any assessment of related instruments and issuers following receipt of inside information during a market sounding.

The MSR's assessment of whether information that has been received during a market sounding constitutes inside information must be carried out independently from the DMP's analysis of that information – i.e. the MSR should not simply adopt the DMP's opinion of the status of the information. The MSR must consider all information available to it, which may include information that is not available to the DMP.

- In some circumstances, the MSR is required to notify the DMP that it has reached a different conclusion from the DMP about the status of the information, but this depends upon the basis for the MSR's analysis:
 - if the DMP has originally concluded that the information provided during the market sounding was not inside information and the MSR, after performing its own analysis, disagrees with that assessment, the MSR must inform the DMP of the reasons for the difference in opinion if the assessment is based exclusively upon the information received from the DMP;
 - however, if the difference in opinion is based in part or in whole upon other information that is available to the MSR, but which was not communicated by the DMP as part of the market sounding, the MSR must not inform the DMP that it has reached a different conclusion. This is to ensure that the MSR does not disclose any other information within its possession which may itself amount to inside information.

- Where the DMP informs the MSR that the information provided during the sounding is inside information and the MSR, after carrying out its own analysis, concludes that the information is not in fact inside information, the Guidelines do not impose an obligation on the MSR to inform the DMP of this fact.
 - In such a situation, the MSR may choose to use the relevant information as it wishes, but the MSR will be liable if it subsequently transpires that the information is inside information and the MSR's actions have contravened one or more provisions in EU MAR. Given the significant risks in such a scenario, MSRs would need to be certain of the accuracy of their analysis before disclosing, or trading based on, such information.

- The DMP must notify the MSR if information provided under a market sounding no longer constitutes inside information. A similar approach to that outlined above applies in relation to such notifications - i.e. the MSR must carry out its own independent assessment to satisfy itself that the information has in fact ceased to be inside information. If the MSR disagrees with the DMP, it must inform the DMP of the reasons for the difference in opinion, unless that difference is based on information other than which was received from the DMP under the market sounding.