

## The Market Abuse Regulation

### FCA consults on periodic financial reporting and inside information

June 2018

#### Quick read

The FCA is consulting on proposed changes to its guidance on periodic financial reporting and inside information. If adopted, the new guidance would provide a degree of clarity on the ability of listed companies to delay the announcement of inside information comprised in financial results under the Market Abuse Regulation (MAR) regime. This is potentially significant for companies in deciding whether an immediate announcement of such inside information is required. It is helpful that the FCA is looking to provide additional guidance on this issue as views and practices have differed.

The FCA is consulting on a proposed update to its technical note on "Periodic financial information and inside information". The updated note would, if adopted, recognise that companies may have a legitimate interest in delaying the announcement of inside information if such a delay is necessary to preserve their orderly reporting processes.

#### Background

In the course of preparing their full year and half year results, companies build up a picture of what the results are likely to be. Any listed company preparing its results needs to consider whether it has become aware of information that is inside information and, if so, whether that information needs to be announced in advance of the scheduled results date.

It is generally accepted that companies are not expected to make announcements ahead of this scheduled date except where those results are "outside consensus" - that is where there is a marked divergence from the company's (or in some cases the market's) expectations - in which case a "profit warning" announcement will be required.

Two different approaches have developed to the treatment of "within consensus" financial results:

- Some companies start from the presumption that financial results within consensus generally do not constitute inside information and so the timing of their release can follow the company's public reporting schedule.
- Others have taken a broader view of when results are inside information and have relied on the ability to delay announcement when premature disclosure would prejudice their legitimate interests. On this view, inside information may arise relatively early in the process, but any announcement can be delayed (until the scheduled reporting date) as the company has a legitimate interest in adhering to an orderly reporting process.

Although each approach leads to the same result as regards the timing of the results announcement, they give rise to different consequences. Those taking the first approach will not need to follow any MAR requirements. By contrast, those following the second approach must include in their results announcement the rubric that the information is inside information. They are also required to create insider lists and to impose restrictions on insiders in accordance with their dealing codes. Finally, they will be required to inform the FCA of the delay in

# SLAUGHTER AND MAY

releasing the information and, where requested, to explain how the conditions permitting delay were met.

## **The FCA's proposal**

The FCA has clarified its view in relation to the second approach outlined above. It warns that, when preparing results, companies should assess on an ongoing basis whether the information is inside information and should begin from the assumption that information relating to financial results could constitute inside information.

As a counterbalance, the FCA recognises that companies could have a legitimate interest in delaying disclosure, provided that the other conditions for delay under MAR are satisfied. The FCA suggests two elements in assessing the ability to delay in this context. First, that public disclosure of the information in question would “impact on the orderly production and release” of the results and, second, that this may “result in the incorrect assessment of the information by the public”.

The second element is the more important one - the FCA indicates that this test will not be satisfied if careful drafting of the announcement would avoid an incorrect assessment and it expects this will apply in many cases. In our view, this test will be satisfied if companies can show that a proper assessment of the relevant specific line items is only possible within the context of the results as a whole.

The FCA has suggested that it will expect companies to provide it with evidence of the assessment process on request. This would mean that companies will need to record their thinking on whether the results constitute inside information throughout the preparation process.

If a conclusion is reached that inside information does exist, companies will then need to consider whether they can delay on the basis that early announcement would impact on the orderly release of the results and could result in the incorrect assessment of the results.

## **Our view**

The FCA is proposing that companies take an analytical approach to their results to assess on an ongoing basis whether the relevant information is inside information. A blanket approach is being discouraged.

We do not believe that the FCA's proposals mean that there will be a substantial change in the frequency of financial results being announced before the scheduled date. Instead, we think the proposed guidance will allow companies to take a broader view of when results information is inside information (which will facilitate the taking of steps to combat insider dealing) without driving companies to make a multitude of early results announcements (which would not be in the interests of companies or the wider market).

The FCA's consultation may also have a broader significance - if the preservation of an orderly results process constitutes a legitimate interest, then additional legitimate interests also might be available and the ability of companies to delay the announcement of inside information will need to be reassessed more generally.

The FCA's proposals are to be welcomed for the increased clarity they provide on the treatment of financial results and when the announcement of those results can be delayed.

The consultation closes on 23 July 2018.