

Periodic financial reporting and inside information

FCA publishes updated Technical Note

April 2019

The FCA has finalised its guidance on periodic financial reporting and inside information. (For background, please see our [June 2018](#) briefing note). The guidance, in [Technical Note 506.2](#), sets out the process the FCA expects listed companies to follow when they are preparing periodic financial reports.

The FCA emphasises that companies should not take a blanket approach: companies should not assume that, even where financial results are expected to be in line with consensus forecasts, information relating to the results will never constitute inside information; nor should they assume that information relating to financial results will always be inside information. Instead, each time financial results are being prepared companies should assess at appropriate intervals throughout the process whether any of the information they then hold meets the definition of inside information.

Even when a company concludes that the information it holds does constitute inside information, the FCA recognises that a company may have a legitimate interest in delaying its disclosure until the results are scheduled to be published. For a delay to be permissible, MAR specifies three conditions that must be satisfied: (i) immediate disclosure would be likely to prejudice the company's legitimate interests; (ii) delaying disclosure would not be likely to mislead the public; and (iii) the company can ensure that the information remains confidential.

To satisfy the first of these conditions, the Technical Note specifies two criteria that the FCA considers must be met. First, disclosing the information in question "would impact on the orderly production and release" of the relevant

report; and, second, disclosure "could result in the incorrect assessment of the information by the public".

With respect to the second criterion, the FCA believes that, "in many cases", a company will be able to draft an announcement that does enable the public to assess the inside information correctly. However, it accepts that "in some cases" the public will be able to understand the import of the information correctly only when the full financial report is published.

In our view, the second criterion will be satisfied if companies can show that a proper assessment of the relevant specific line item(s) is only possible within the context of the results as a whole. The FCA has recognised the conclusions of the Upper Tribunal in *Hannam* that there will be circumstances where, as a practical matter, it would be very difficult for a company to formulate an announcement that does not risk misleading the market and that in these circumstances a company would be justified in delaying disclosure of the information.

Where both criteria in the Technical Note are satisfied, a delay is therefore permissible provided the other two conditions enabling delay are satisfied (delaying disclosure is not likely to mislead the public and the company can ensure that the information remains confidential).

When companies assess that inside information has arisen but that its disclosure can be delayed, they must provide the FCA with evidence of the assessment process on request. This means that, throughout the results preparation process, companies should record their thinking on whether information that will be included in the

SLAUGHTER AND MAY

results constitutes inside information and, if so, why any decision to delay disclosing it is justified. In particular, companies will need to record why they concluded that it was not possible to formulate an announcement in a way that did not risk the public assessing the information incorrectly.

What companies should do

Companies should ensure that their procedures around the preparation of financial results include a process for assessing on a regular basis whether information available at the relevant time is inside information and, if so, whether the conditions for delaying disclosure continue to be satisfied.

The FCA does not mandate who should conduct the assessment. It has said that the board or disclosure committee is not necessarily the best or the only body that can take these decisions. The FCA expects individuals at other levels, including those in the first line, to be trained sufficiently to recognise when information may become inside information and to be able to act accordingly.

Companies therefore need to ensure that these individuals are suitably trained to recognise when information may become inside information, whether a delay might be permissible and when to escalate matters to the disclosure committee or the board. A process should be established to ensure that relevant individuals make ongoing assessments throughout the preparation of results and record their conclusions in a form that can be shared with the FCA on request.

Companies should also review and, where necessary, update their procedures manuals to reflect the FCA guidance.

Please get in touch with your usual contact at Slaughter and May for support with the relevant training and processes and for assistance with any update of your procedures manual.