

MAR Guidelines

Delay in the disclosure of inside information and interactions with prudential supervision



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1 Scope

Who?

1. These guidelines apply to Competent Authorities **designated under Article 22 of MAR** and issuers.

What?

2. These guidelines provide a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information and situations in which delay of disclosure is likely to mislead the public, according to Article 17(11) of Regulation (EU) No 596/2014 ~~of the European Parliament and Council~~. In addition, these guidelines provide, according to Article 16(1) of the ESMA Regulation, clarifications concerning the existence of inside information in relation to Pillar 2 Capital Requirements and Capital Guidance.

When?

3. These guidelines apply from ~~20/12/2016~~ 13/06/2022.

2 **Legislative** references, abbreviations and definitions

Legislative references

CRD	Capital Requirements Directive – Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ¹
CRR	Capital Requirements Regulation - Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 ²
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation)

¹ OJ L 176, 27.6.2013, p. 338.

² OJ L 176, 27.6.2013, p. 1.

and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC³

ESMA Regulation Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC⁴

Abbreviations

CRD NCA	National Competent Authority as defined under Article 3(1)(36) of CRD
ECB	European Central Bank
ESFS	European System of Financial Supervision
P2G	Pillar 2 Capital Guidance
P2R	Pillar 2 Capital Requirements
Prudential Competent Authorities	CRD NCAs and the ECB
SREP	Supervisory Review and Evaluation Process

Definitions

Institutions	Credit institutions and institutions as defined under Article 4(1) and (3) of CRR respectively, combined with Article 11(2) of CRR
Issuer	A legal entity as defined in Article 3(1)(21) of MAR and that is subject to the transparency obligations under Article 17(1) of MAR.

³ OJ L 173, 12.6.2014, p. 1.

⁴ OJ L 331, 15.12.2010, p. 84.

3 Purpose

4. ~~The purpose of~~ These guidelines ~~is to~~ are based on Article 17(11) of MAR and on Article 16(1) of the ESMA Regulation. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure common, uniform and consistent application of Articles 7(1), 17(1) and 17(4) of MAR. In particular, these guidelines provide guidance by giving examples to assist the issuers in their decision to delay public disclosure of inside information under Article 17(4) of MAR, through a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information and situations in which delay of disclosure is likely to mislead the public. In addition, these guidelines provide clarifications concerning the existence of inside information in relation to P2R and P2G.

4 Compliance and reporting obligations

4.1 Status of the guidelines

5. ~~This document contains guidelines issued under Article 17(11) of MAR. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.~~

6. Competent authorities to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

4.2 Reporting requirements

7. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA (to [\[MARguidelinesGL3@esma.europa.eu\]](mailto:MARguidelinesGL3@esma.europa.eu)) whether they (i) comply, (ii) do not comply, but ~~or~~ intend to comply, or (iii) do not comply and do not intend to comply with the guidelines. ~~within two months of the date of publication by ESMA to [MARguidelinesGL3@esma.europa.eu]. In the absence of a response by this deadline, competent authorities will be considered as non-compliant.~~

8. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for non-compliance. A template for notifications is available ~~from~~ on ESMA website. Once the template has been filled in, it shall be transmitted to ESMA.

9. Issuers are not required to report whether they comply with these guidelines.

5 Guidelines on legitimate interests of issuers to delay the disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public

1. Legitimate interests of the issuer for delaying disclosure of inside information

Guideline 1:

10. For the purposes of point (a) of Article 17(4) of MAR, the cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests could include but are not limited to the following circumstances:

- a. the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure. Examples of such negotiations may be those related to mergers, acquisitions, splits and spin-offs, purchases or disposals of major assets or branches of corporate activity, restructurings and reorganisations.
- b. the financial viability of the issuer 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 issuer;
- c. the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer's bylaws, the approval of another body of the issuer, other than the shareholders' general assembly, in order to become effective, provided that:
 - i. immediate public disclosure of that information before such a definitive decision would jeopardise the correct assessment of the information by the public; and
 - ii. the issuer arranged for the definitive decision to be taken as soon as possible.
- d. the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the issuer;
- e. the issuer is planning to buy or sell a major holding in another entity and the disclosure of such an information would likely jeopardise the implementation of such plan;
- f. a transaction previously announced is subject to a public authority's approval, and such approval is conditional upon additional requirements, where the immediate

disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction-;

- g. the issuer is an institution subject to the CRR and a decision to carry out a redemption, reduction, repurchase, repayment or call of own funds instruments or a reduction, distribution or reclassification as another own funds item of the share premium accounts related to own funds instruments has been taken but not yet authorised by the competent authority as defined under Article 4(1)(40) of CRR, pursuant to Article 77 of CRR;
- h. the issuer is an institution subject to prudential supervision under the CRD and has received a draft SREP decision or preliminary information related thereto which will become final at a later stage upon completion of the decision-making process of the Prudential Competent Authority. In such case, a premature announcement of any inside information constituting the draft SREP decision or preliminary information related thereto would be in contrast with the SREP procedure and in particular with the institution's right to be heard, potentially unduly prejudicing the institution's interest for a fair appreciation of the impact of that information by the market.

11. ESMA recalls that, pursuant to Article 17(7) of MAR, even in those cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests, whenever the confidentiality is no longer ensured the issuer shall disclose that inside information to the public as soon as possible.

2. Situations in which delay of disclosure of inside information is likely to mislead the public

Guideline 2:

12. For the purposes of point (b) of Article 17(4) of MAR, the situations in which delay of disclosure of inside information is likely to mislead the public includes at least the following circumstances:

- a. the inside information whose disclosure the issuer intends to delay is materially different from the previous public announcement of the issuer on the matter to which the inside information refers to; or
- b. the inside information whose disclosure the issuer intends to delay regards the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or
- c. the inside information whose disclosure the issuer intends to delay is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously sent to the market, such as interviews, roadshows or any other type of communication organized by the issuer or with its approval.

3. P2R and P2G and inside information

Guideline 3:

13. For the purposes of the assessment of whether draft or final P2R constitutes inside information according to Article 7(1)(a) of MAR, issuers that are institutions subject to prudential supervision under the CRD should verify that their **P2R** is:

- a. non-public information;
- b. directly relating to the institution that has received it;
- c. of precise nature.

14. P2R is also highly likely to be price sensitive. Institutions should assess the price sensitivity of P2R considering the magnitude of the difference between the institution's P2R and the current level of capital. Price sensitivity should not be excluded even where the institution's current level of capital is higher than its P2R.

15. Except for a very limited number of cases and as a result of a thorough assessment by the institution, P2R is expected to be considered as inside information.

Guideline 4:

16. For the purposes of the assessment of whether draft or final P2G constitutes inside information according to Article 7(1)(a) of MAR, issuers that are institutions subject to prudential supervision under the CRD should verify that their **P2G** is:

- a. non-public information;
- b. directly relating to the institution that has received it;
- c. of precise nature.

17. P2G may also be price sensitive. Institutions should assess the price sensitivity of P2G also considering the magnitude of the difference between the institution's P2G and the current level of capital, whether a corporate reaction is expected to be necessary to meet the P2G and the relevant timing to launch it and complete it.

18. Examples of situations where P2G is expected to be price sensitive are where:

- a. the difference between the P2G and the institution's level of capital is not minor and is likely to involve a major reaction by the institution, such as a capital increase;
- b. the institution's P2G is not in line with market expectations, so a price impact can be expected.