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## **FCA Publishes a Consultation on an Update to a Technical Note on Periodic Financial Information and Inside Information**

On June 11, 2018, the UK Financial Conduct Authority (the “FCA”) published a special edition of its Primary Market Bulletin containing a consultation (the “Consultation”)<sup>1</sup> on an update to its existing guidance on periodic financial information and inside information in the form of a technical note (the “Technical Note”).<sup>2</sup> The FCA’s Consultation and Technical Note appear to be intended as a reminder for issuers, subject to the EU Market Abuse Regulation (“MAR”),<sup>3</sup> and their advisers of the potential need, by reason of MAR, to accelerate the disclosure of financial information that comes to light as annual or interim results are being prepared in anticipation of public disclosure. Annual or interim results may well, prior to public release, constitute inside information and, in certain circumstances, it may not be appropriate to wait to disclose such information until the regularly scheduled earnings release, namely if the delay is likely to mislead the public. The responses to the Consultation are due by July 23, 2018.

We summarize below the key points raised in the Consultation and the Technical Note.

MAR generally requires<sup>4</sup> an issuer to inform the public as soon as possible of inside information which directly concerns the issuer. The inside information is defined<sup>5</sup> as information of a precise nature, which has not been made public, relating, directly or indirectly, to an issuer and/or its financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the prices of related derivative financial instruments. Notwithstanding the general requirement to publicly disclose inside information as soon as possible, MAR provides<sup>6</sup> that an issuer can delay disclosure of inside information as long as the following three conditions are met: (i) immediate disclosure is likely to prejudice the legitimate interest of the issuer; (ii) delay of disclosure is not likely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of that information.

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<sup>1</sup> A copy of the FCA Primary Market Bulletin No. 19 (June 11, 2018) is available [here](#).

<sup>2</sup> A draft of the updated Technical Note UKLA/TN/506.2 is available [here](#).

<sup>3</sup> Regulation (EU) No 596/2014, available [here](#).

<sup>4</sup> See Article 17(1) of MAR.

<sup>5</sup> See Article 7 of MAR.

<sup>6</sup> See Article 17(4) of MAR.

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Based on the MAR provisions and the related guidance<sup>7</sup> issued by the European Securities and Markets Authority (“ESMA”) that sets out examples of circumstances constituting the legitimate interest for delaying the disclosure of inside information and of situations where the delay may mislead the public, the FCA has revised the Technical Note to illustrate how inside information should be identified and handled when an issuer is in the process of preparing a periodic financial report.

Issuers preparing periodic financial reports should “assess on ongoing and case-by-case basis” whether any information they use in connection with the preparation of such reports falls within the MAR definition of inside information. This ongoing assessment should be done in good faith, while exercising proper judgment. While the Technical Note states that issuers should assume that “information relating to financial results could constitute inside information,” it cautions issuers against taking a blanket approach and concluding that such information always or never constitutes inside information.

Even if the information to be used in the periodic financial report is found to be inside information, legitimate interest may exist where the delay of disclosure of such information would be warranted. The Technical Note suggests that in connection with the preparation of periodic financial reports such legitimate interest could exist in circumstances where “immediate public disclosure of information to be included in the report would impact on the orderly production and release of the report and could result in the incorrect assessment of the information by the public.”

As noted in the Consultation, the FCA does not think, and the issuers should not assume, that this legitimate interest in connection with the preparation of financial reports will always be present. “By its nature, this legitimate interest is limited to situation in which the inside information emerges as part of the process of preparing a periodic financial report and is to be included in the report.” Accordingly, as stated in the Technical Note, issuers are responsible for an ongoing and case-by-case assessment of the existence of any such legitimate interest.

The Technical Note highlights the need for issuers to assess not only the existence of legitimate interest, but also whether the delay in disclosure of inside information may mislead the public as in such case, the inside information would need to be disclosed immediately. According to the ESMA guidance to which the FCA cites,<sup>8</sup> a delay of disclosure is likely to mislead the public in a situation in which the inside information is “materially different” than that which the issuer has previously publicly announced or otherwise regards the fact that the issuer’s previously announced financial objectives are not likely to be met. In addition, the ESMA guidance suggests that a delay is likely to mislead the public if the inside information contrasts with market expectations, where such expectations are based on signals from the issuer.

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<sup>7</sup> A copy of ESMA’s guidance “MAR Guidelines – Delay in the disclosure of inside information” (October 20, 2016) is available [here](#).

<sup>8</sup> *Id.*

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The Technical Note reminds issuers of the obligation, following the delayed disclosure of inside information to the public, to immediately inform the competent authorities that there was a delay and to provide, upon request from competent authority, a written explanation of how the conditions permitting for delayed disclosure were met.

While the Consultation and the Technical Note cover pre-existing requirements, they do serve as a useful reminder that there may well be situations where delaying the disclosure of financial results until the scheduled release date could constitute a violation of MAR.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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