

Market Soundings

Your obligations under MAR

What is a market sounding?

The definition is important because there are occasions when – even though no inside information is being disclosed – the prescribed disclosure procedure must be followed.

According to Article 11(1) MAR, a "market sounding" is:

"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, to one or more potential investors by:

- (a) an issuer;
- (b) ...
- (c) ...
- (d) a third party acting on behalf or on the account of a person referred to in point (a)..."

In addition, disclosure of inside information by a person intending to make a takeover bid for the securities of a company or merger with a company, to parties entitled to the securities, may also constitute a market sounding provided that (i) the information is necessary to enable the recipient to form an opinion on their willingness to offer their securities and (ii) the willingness of the parties entitled to the securities to offer their securities is reasonably required for the decision to make a takeover bid or merger.

There will be circumstances where a communication does not amount to a market sounding, but advice should be taken.

Procedure for conducting a market sounding

Disclosing market participants (**DMPs**) are required to establish arrangements and procedures for the conduct of market soundings to comply with MAR. The

arrangements and procedures must be regularly reviewed and updated where necessary. Records of the procedures should be kept in electronic form for at least five years and made available to the FCA on request.

The procedures must cover the exchange of a standard set of information in a pre-determined sequence with the market sounding recipient (**MSR**). The standard set of information must be determined by the DMP for each market sounding, prior to conducting that market sounding. **That standard set of information should be used with all recipients of the market sounding.** A record of the standard set of information should be kept in electronic form for at least five years and made available to the competent authority on request.

Steps to take before undertaking a market sounding

Before a potential MSR is contacted, the DMP should:

- check whether the proposed MSR is on the list of parties who do not wish to receive market soundings;
- check whether the proposed MSR has designated a specific person or contact point to receive market soundings;
- determine the information that it is necessary and appropriate to disclose;
- consider whether the market sounding will involve the disclosure of inside information, make a written record of the conclusion and the reasons for it. The written record must be provided to the FCA on request; and
- if the market sounding will involve the disclosure of inside information:

- consider how consent to receive inside information will be sought from the MSR without disclosing information which could on its own or with other information in the possession of the MSR itself amount to inside information; and
- determine, to the extent possible, when the inside information will cease to be inside information. When conducting a market sounding the DMP is, where possible, required to provide an estimate of when the information will cease to be inside information, the factors that may alter that estimate and, in any case, information about the manner in which the MSR will be informed of any change in such estimate.

The procedure for conducting a market sounding either involving the disclosure of inside information or not involving the disclosure of inside information, as applicable, should then be followed.

Means of communication and records

The regulatory technical standard (RTS) states that DMPs may communicate information for the purposes of market sounding orally, in physical meetings, in audio or video telephone calls, or in writing, by mail, fax or in electronic communications. The DMP should establish procedures describing the manner in which market soundings are conducted and these procedures should ensure that anyone working for the DMP only uses equipment provided by the DMP for telephone calls made and received and electronic communications used for such purposes. Records of these procedures should be kept in electronic form for at least five years and made available to the competent authority on request.

Regardless of the method of communication used, a record of the communication, the procedure followed and the information disclosed must be made and maintained. The record of the information disclosed includes not just the information that constitutes the market sounding and any documents disclosed, but also the information given in

accordance with Article 11(5)(a) to (d) of MAR:

- the fact that the MSR consented to receive inside information; and
- that they were informed about the prohibition on using or attempting to use the information and the obligation to keep the information confidential.

Information about the recipient of the market sounding

For each market sounding the DMP must draw up a list containing the following information:

- the names of all the natural and legal persons to whom information has been disclosed in the course of the market sounding;
- the date and time of each communication of information which has taken place in the course of or following the market sounding; and
- the contact details of the persons receiving the market sounding used for the purposes of the market sounding.

A separate list must be maintained for each market sounding.

Recorded telephone calls

If the market sounding is made by telephone and the DMP has access to a recorded telephone line, such a line should be used provided that the MSR has given their consent to the call being recorded.

Recorded video or audio meetings

If the market sounding is made by recorded video or audio meetings, the recordings of those meetings should be kept in electronic form for at least five years, provided that the MSR gave its consent to such a recording and made available to the competent authority on request.

Unrecorded meetings or telephone calls

If the market sounding has taken place during an unrecorded meeting or telephone

conversation, written minutes or notes of the meeting or telephone conversation must be drawn up. The notes or minutes shall include:

- the date and time of the meeting or telephone conversation and the identity of the participants;
- the details of the information related to the market sounding which were exchanged between the parties in the course of the market sounding, including the information provided to and requested from the MSR in accordance with the standard set of information referred to in Article 3 of the RTS (see below); and
- any document or material provided by the DMP to the MSR in the course of the market sounding.

The minutes or notes should be drawn up in an electronic format and, to facilitate the keeping of records and to ensure consistency, ESMA has developed templates to be used (see below).

The minutes or notes must be provided to the MSR to be countersigned.

Written communication

Where the communication of information takes place in writing, the DMP should keep a copy of the correspondence in electronic form.

Where the market sounding involves the disclosure of inside information

Article 3(3) of the RTS sets out the standard set of information to be exchanged with the MSR when the DMP considers that the market sounding involves the disclosure of inside information. The information to be exchanged includes, and is limited to, the following, which should be exchanged in the stated order:

- A statement that the communication is taking place for the purposes of a market sounding.
- Where the market sounding is being conducted by recorded telephone lines or audio or video recording is being used, a statement that the conversation is being

recorded and the consent of the MSR to be recorded.

- A request for and a confirmation from the contacted person that they are the person entrusted by the potential investor to receive the market sounding.
- A statement that, if the contacted person agrees to receive the market sounding, that they will be receiving information that the DMP considers to be inside information and that, in accordance with Article 11(7) of MAR, the MSR is required to assess for itself whether it is in possession of inside information and when it ceases to be in possession of inside information.
- Where possible, an estimate of when the information will cease to be inside information, the factors that may alter that estimate and, in any case, information about the manner in which the MSR will be informed of any change in such estimate. This will enable the MSR to decline a market sounding if the likely period during which it will be in possession of inside information might have negative consequences on its activities.
- A statement informing the MSR that:
 - he is prohibited from using, or attempting to use, the information by acquiring or disposing of, directly or indirectly, financial instruments relating to that information for either his own account or that of a third party;
 - he is prohibited from using, or attempting to use, the information by cancelling or amending an order which has already been placed concerning a financial instrument to which the information relates; and
 - he is obliged to keep the information confidential.
- A request for the consent of the MSR to receive inside information as required by Article 11(5)(a) of MAR and the reply to that request.

- Assuming the consent to receive inside information is given, the information being disclosed for the purposes of the market sounding, identifying the information considered by the DMP to be inside information.

Where the communication takes place in writing, the DMP will need first to request and obtain the consent of the MSR to the market sounding and then to communicate the information being given for the market sounding.

Where the market sounding does not involve the disclosure of inside information

Article 3(4) of the RTS sets out the standard set of information to be exchanged with the MSR when the DMP considers that the market sounding does not involve the disclosure of inside information. The information to be exchanged includes, and is limited to, the following which should be exchanged in the stated order:

- A statement that the communication is taking place for the purposes of a market sounding.
- Where the market sounding is being conducted by recorded telephone lines or audio or video recording is being used, a statement that the conversation is being recorded and the consent of the MSR to be recorded.
- A request for and confirmation from the contacted person that they are the person entrusted by the potential investor to receive the market sounding.
- A statement that, if the contacted person agrees to receive the market sounding, that they will be receiving information that the DMP considers not to be inside information and that, in accordance with Article 11(7) of MAR, the MSR is required to assess for itself whether it is in possession of inside information and when it ceases to be in possession of inside information.
- A request for the consent of the MSR to proceed with the market sounding and the reply to that request.

- Assuming the consent to proceed with the market sounding is given, the information being disclosed for the purposes of the market sounding.

It is possible that recipients are sounded out in relation to transactions that are already public knowledge. Certain details of the transaction may nonetheless amount to inside information. Care must be taken by the discloser in such circumstances and a cautious approach would instead suggest following the procedure required, for when inside information is disclosed.

After having made the market sounding

Minutes or notes

If the market sounding took place during an unrecorded meeting or telephone conversation, the written minutes or notes of the meeting or conversation should be provided to the MSR to be signed. If the DMP and the MSR do not agree on the content of the minutes or notes within five working days of the market sounding, the DMP shall record the version signed by the DMP and the version signed by the MSR (if such a version is provided).

When inside information has been provided

Under Article 3(3)(e) of the RTS, a DMP is required to provide the MSR with information about the manner in which the MSR will be informed of any change in the estimate of when the information provided in the market sounding will cease to be inside information. The DMP should therefore keep this in mind in the period following the market sounding.

The DMP will also need to assess when any inside information it has disclosed during a market sounding has ceased to be inside information. It is obliged under Article 11(6) of MAR to inform the MSR that any such inside information has ceased to be inside information as soon as possible. It is clear that when a proposed transaction is announced publicly the status of the information has changed. The situation is considerably less clear where the parties have decided not to proceed with the transaction. To add to the difficulty, notifying an MSR that the proposed transaction has been aborted may in itself

constitute inside information, especially if reasons are given to justify the decision. It should be noted that ESMA does not consider it appropriate to presume that the DMP has complied with its obligation under Article 11(6) of MAR because the proposed transaction that was the subject of the market sounding has been made public. It notes that, depending on the characteristics of the transaction and the information disclosed, the information disclosed in the market sounding may still be, at least partially, inside information.

The MSR should be informed in writing that the inside information has ceased to be inside information and the following information should be provided:

- The identity of the DMP.
- An identification of the transaction subject to the market sounding.
- The date and time of the market sounding.
- The fact that the information disclosed has ceased to be inside information.
- The date on which the information ceased to be inside information.

A record of the information communicated should be made using the template in Annex III of the ITS (below). In addition to the information required to be provided to the MSR, the template in Annex III requires the following to be recorded:

- the identity of the person receiving the market sounding (their full name and the contact details used for the communication);
- the date and time of the communication (including the time zone); and
- the date and time of the disclosure of inside information as part of the market sounding.

The DMP must keep records of the information that led to the assessment that the information communicated during the market sounding ceased to be inside information and the notifications to the MSR referred to above

in electronic form for at least five years and make it available to the competent authority on request.

Record keeping requirements

To summarise the record keeping requirements, DMPs must ensure that records of the following are kept in electronic form for a period of at least five years:

- The procedures referred to in Articles 1 (arrangements and procedures established to comply with Article 11(4), (5), (6) and (8) of MAR) and 2 (procedures for the purposes of conducting market soundings) of the RTS (*Article 6(1)(a), RTS*).
- The standard set of information determined for each market sounding in accordance with Article 3 of RTS (standard set of information for the communications to MSRs).
- The data regarding MSRs referred to in Article 4 of the RTS (data regarding persons receiving the market sounding).
- All communications of information which have taken place between the DMP and all persons that received the market sounding for the purposes of the market sounding, including any documents provided by the DMP to the MSR. The DMP shall keep:
 - Where the communication of information has taken place by telephone on recorded lines, recordings of telephone conversations provided that the persons to whom the information is communicated have given their consent to such a recording.
 - Where the communication of information has taken place in writing, a copy of the correspondence.
 - Where the communication of information has taken place during video or audio recorded meetings, the recordings of those meetings, provided that the persons to whom

the information is communicated have given consent to such a recording.

- o Where the communication of information has taken place during unrecorded meetings or telephone conversations, the written minutes or notes of those meetings or telephone conversations.
- The information leading to the assessment that the information communicated during the market sounding ceased to be inside information and the relevant notifications referred to in Article 5 of the RTS (*Article 6(1)(e), RTS*).

The records must be made available to the competent authority on request.

Obligations on recipients of market soundings

MSRs are subject to certain requirements under MAR and under the Guidelines. Under MAR, an MSR is required to assess for itself whether it is in possession of inside information and whether inside information has ceased to be inside information. The MSR should also be mindful of other obligations under MAR to which it may be subject (such as the obligation not to unlawfully disclose inside information and the prohibition on insider dealing) including those not expressly referred to in Article 11 (such as the obligation to maintain an insider list under Article 18).

What happens if a transaction does not proceed?

On the buy-side, a wall-crossed recipient will cease to be an insider once an announcement is made which discloses the proposed transaction. At that stage, the restrictions imposed upon the recipient fall away.

Article 6 MAR imposes on the disclosing party the obligation to inform the receiving party as soon as possible after inside information that is disclosed as part of a market sounding ceases to be inside information. It is not generally current market practice for issuers to make cleansing announcements if a proposed transaction is no longer going ahead and

instead reliance is placed on the information turning stale through the passage of time or being superseded by other events. Also, care must be taken when informing recipients that a transaction is not being pursued, particularly where a reason is given, because this information may itself constitute inside information.

Cripps LLP

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Market Soundings

Your obligations under MAR

Template for the written minutes and notes referred to in Article 6(2)(d) of Delegated Regulation (EU) 2016/960 where inside information is disclosed

Item	Text field
i. Identity of the disclosing market participant	<i>Full names of the disclosing market participant and of the person within the disclosing market participant providing the information and the contact details used for the communication.</i>
ii. Identity of the person receiving the communication	<i>Full name of the person receiving the communication and the contact details used for the communication.</i>
iii. Date and time of the communication	<i>Date and time(s) of the communication specifying the time zone.</i>
iv. Clarification of the nature of the conversation in accordance with Article 3(3)(a) of Delegated Regulation (EU) 2016/960	<i>Record of the statement that the communication takes place for the purposes of a market sounding.</i>
v. Confirmation of the identity of the person receiving the market sounding in accordance with Article 3(3)(c) of Delegated Regulation (EU) 2016/960	<i>Record of the information about the confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the potential investor to receive the market sounding.</i>
vi. Clarification in accordance with Article 3(3)(d) of Delegated Regulation (EU) 2016/960 that inside information will be communicated	<i>Record of the statement clarifying that, if agreeing to receive the market sounding, the person receiving the communication of information will receive information which the disclosing market participant considers to be inside information and a reference to the obligation set forth in Article 11(7) of Regulation (EU) No 596/2014.</i>
vii. Information on the estimation of when the information ceases to be inside information, in accordance with Article 3(3)(e) of Delegated Regulation (EU) 2016/960	<i>Record of the information given, if any, on the estimated time when the information is expected to be made public or the transaction launched, with an explanation of why this may be subject to change and how the person receiving the market sounding will be informed in case the estimated time is no longer valid.</i>
viii. Statement regarding the obligations of the person receiving the communication in accordance	<i>Record of the statement explaining to the person receiving the communication the obligations that apply to the possession of inside information, in accordance with</i>

with Article 3(3)(f) of Delegated Regulation (EU) 2016/960	<i>points (b), (c) and (d) of subparagraph 1 of Article 11(5) of Regulation (EU) No 596/2014.</i>
ix. Confirmation of consent in accordance with Article 3(3)(g) of Delegated Regulation (EU) 2016/960	<i>Record of the information about the consent of the person receiving the market sounding to receive the inside information, as referred to in point (a) of subparagraph 1 of Article 11(5) of Regulation (EU) No 596/2014 (request and reply).</i>
x. Disclosure of information in accordance with Article 3(3)(h) of Delegated Regulation (EU) 2016/960	<i>Description of the information disclosed for the purposes of the market sounding, identifying the information considered to be inside information.</i>

ANNEX II

Template for the written minutes and notes referred to in Article 6(2)(d) of Delegated Regulation (EU) 2016/960 where no inside information is disclosed

Item	Text field
i. Identity of the disclosing market participant	<i>Full names of the disclosing market participant and of the person within the disclosing market participant providing the information and the contact details used for the communication.</i>
ii. Identity of the person receiving the communication	<i>Full name of the person receiving the communication and the contact details used for the communication.</i>
iii. Date and time of the communication	<i>Date and time(s) of the communication specifying the time zone.</i>
iv. Clarification of the nature of the conversation in accordance with Article 3(4)(a) of Delegated Regulation (EU) 2016/960	<i>Record of the statement that the communication takes place for the purposes of a market sounding.</i>
v. Confirmation of identity in accordance with Article 3(4)(c) of Delegated Regulation (EU) 2016/960	<i>Record of the information about the confirmation from the contacted person that the disclosing market participant is communicating with the person entrusted by the potential investor to receive the market sounding.</i>
vi. Clarification in accordance with Article 3(4)(d) of Delegated Regulation (EU) 2016/960 that no inside information will be communicated	<i>Record of the statement clarifying that, if agreeing to receive the market sounding, the person receiving the communication of information will receive information which the disclosing market participant does not consider inside information and a reference to the obligation set forth in</i>

	<i>Article 11(7) of Regulation (EU) No 596/2014.</i>
vii. Confirmation of consent in accordance with Article 3(4)(e) of Delegated Regulation (EU) 2016/960	<i>Record of the information about the consent of the person receiving the market sounding to proceed with the market sounding (request and reply).</i>
viii. Disclosure of information in accordance with Article 3(4)(f) of Delegated Regulation (EU) 2016/960	<i>Description of the information disclosed for the purposes of the market sounding.</i>

ANNEX III

Template for recording the communication given in accordance with the first subparagraph of Article 11(6) of Regulation (EU) No 596/2014 to inform the person having received the market sounding that the information disclosed has ceased to be inside information

Item	Text field
i. Identity of the disclosing market participant	<i>Full names of the disclosing market participant and of the person within the disclosing market participant providing the information and the contact details used for the communication.</i>
ii. Identity of the person receiving the communication	<i>Full name of the person receiving the communication and the contact details used for the communication.</i>
iii. Date and time of the communication	<i>Date and time(s) of the communication specifying the time zone.</i>
iv. Identification of the transaction	<i>Information to identify the transaction that was subject to the market sounding. It may include information about the type of transaction, e.g. IPO, secondary offer, merger, block trade, private placement, share capital increase.</i>
v. Date and time of the market sounding	<i>Information about the date and time when the inside information was disclosed as part of the market sounding.</i>
vi. Communication that the information has ceased to be inside information	<i>Statement to inform the market sounding recipient of the fact that the information disclosed has ceased to be inside information.</i>
vii. Date when the information ceased to be inside	<i>The date when the information disclosed as part of the market sounding ceased to be inside information.</i>

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