

## Chapter 2

# Disclosure and control of inside information by issuers



2.5

Delaying disclosure of inside information

Delaying disclosure

- 2.5.1

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[deleted]
- 2.5.1A

UK

[article 17(4), (5) and (8) of the *Market Abuse Regulation*]
- 2.5.1B

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*Issuers* should be aware that *ESMA* has issued guidelines under article 17(11) of the *Market Abuse Regulation* which contain a non-exhaustive indicative list of the legitimate interests of *issuers* to delay disclosure of *inside information* and situations in which delayed disclosure is likely to mislead the public: see the *ESMA MAR delayed disclosure guidelines*.

Legitimate interests and when delay will not mislead the public

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(1) Delaying disclosure of *inside information* will not always mislead the public, although a developing situation should be monitored so that if circumstances change an immediate disclosure can be made.

(2) Investors understand that some information must be kept confidential until developments are at a stage when an announcement can be made without prejudicing the legitimate interests of the *issuer*.
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- 2.5.4

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(1) In the *FCA*'s opinion, paragraph 5(1)(8)(a) of the *ESMA MAR delayed disclosure guidelines* does not envisage that an *issuer* will:

(a) delay public disclosure of the fact that it is in financial difficulty or of its worsening financial condition and is limited to the fact or substance of the negotiations to deal with such a situation; or

(b) delay disclosure of *inside information* on the basis that its position in subsequent negotiations to deal with the situation will be jeopardised by the disclosure of its financial condition.

(2) Paragraph 5(1)(8)(c) of the *ESMA MAR delayed disclosure guidelines* refers to an *issuer* with a dual board structure (e.g. a management board and supervisory board) delaying the disclosure of *inside information* in certain circumstances. As this paragraph is not relevant

		to an <i>issuer</i> with a unitary board structure it should only be relevant to a very limited number of <i>issuers</i> in the <i>United Kingdom</i> .
2.5.5	G	An <i>issuer</i> should not be obliged to disclose impending developments that could be jeopardised by premature disclosure. Whether or not an <i>issuer</i> has a legitimate interest which would be prejudiced by the disclosure of certain <i>inside information</i> is an assessment which must be made by the <i>issuer</i> in the first instance.
2.5.5A	R	[deleted] [Note: article 17(5) of the <i>Market Abuse Regulation</i> ]
		Selective disclosure
2.5.6	R	[deleted]
2.5.6A	UK	[article 17(8) of the <i>Market Abuse Regulation</i> ]
2.5.7	G	(1) [deleted]  (2) Selective disclosure cannot be made to any <i>person</i> simply because they owe the <i>issuer</i> a duty of confidentiality. For example, an <i>issuer</i> contemplating a major transaction which requires shareholder support or which could significantly impact its lending arrangements or credit-rating may selectively disclose details of the proposed transaction to major shareholders, its lenders and/or credit-rating agency as long as the recipients are bound by a duty of confidentiality. An <i>issuer</i> may, depending on the circumstances, be justified in disclosing <i>inside information</i> to certain categories of recipient in addition to those employees of the <i>issuer</i> who require the information to perform their functions. The categories of recipient may include, but are not limited to, the following:  (a) the <i>issuer's</i> advisers and advisers of any other <i>persons</i> involved in the matter in question;  (b) <i>persons</i> with whom the <i>issuer</i> is negotiating, or intends to negotiate, any commercial financial or investment transaction (including prospective underwriters or placees of the <i>financial instruments</i> of the <i>issuer</i> );  (c) employee representatives or trade unions acting on their behalf;  (d) any government department, the Bank of England, the Competition Commission or any other statutory or regulatory body or authority;  (e) major shareholders of the <i>issuer</i> ;  (f) the <i>issuer's</i> lenders; and  (g) credit-rating agencies.

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Selective disclosure to any or all of the *persons* referred to in ■ DTR 2.5.7 G may not be justified in every circumstance where an *issuer* delays disclosure in accordance with article 17(4) and (5) of the *Market Abuse Regulation*.
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An *issuer* should bear in mind that the wider the group of recipients of *inside information* the greater the likelihood of a leak which will trigger full public disclosure of the information under article 17(8) of the *Market Abuse Regulation*.