

## **Chapter 6**

# **Commission Delegated Regulation (EU) 2016/960**

Preamble

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) 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/EC, and in particular the third subparagraph of Article 11(9) thereof,

01/01/2021

Whereas:

(1) Appropriate arrangements, procedures and record keeping requirements are necessary to ensure that market sounding activities are managed and controlled effectively. As part of the appropriate arrangements, disclosing market participants should establish procedures describing the manner in which market soundings are conducted. Such procedures should set out a standard set of information to be provided to and requested from the persons receiving the market sounding, ensuring that no unnecessary potentially sensitive information is disseminated and that all the persons receiving the market sounding receive the same level of information.

(2) It is necessary to provide certainty as to the content of the information communicated in the course of market soundings. Therefore, where the market soundings are conducted by telephone and the disclosing market participant has access to recorded telephone lines, the disclosing market participant should use those lines. Where market soundings are conducted through channels other than by recorded telephone lines, records of the market sounding communications should be kept in the form of audio or video recordings or in written form. For personal data protection reasons, when the market sounding is made by recorded telephone lines or audio or video recording is being used, a consent to the recording should be obtained from the person receiving the market sounding.

(3) To facilitate the conduct of investigations by competent authorities on suspected market abuse, disclosing market participants should, for each market sounding, keep a record of the persons who received the market sounding.

(4) In order to minimise the risk of improper disclosure of inside information, a disclosing market participant should keep a record of the potential investors that have informed it

that they are not willing to receive market soundings. Potential investors should be able to express their wish not to receive market soundings in relation to all potential transactions or only particular types of transactions.

(5) When conducting a market sounding the disclosing market participants should be able to benefit from a presumption that inside information is disclosed in the normal exercise of a person's employment, profession or duties for the purposes of Article 10(1) of Regulation (EU) No 596/2014. In this respect, the disclosing market participant should be considered to be acting within the normal course of employment, profession or duties only in so far as it complies with all requirements, including record-keeping requirements set out in Article 11 of Regulation (EU) No 596/2014 and this Regulation.

(6) Given that an assessment of what constitutes inside information, undertaken in accordance with Article 11(3) of Regulation (EU) No 596/2014, can be complex, disclosing market participants should keep records of all market soundings, including the ones that are considered by the disclosing market participant not to involve disclosure of inside information. Such records assist disclosing market participants in providing evidence of proper conduct to the competent authorities, in particular where the nature of the information changes after the market sounding or where the competent authority would like to review the process of categorisation of the information.

(7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(8) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.

(9) In order to ensure the smooth functioning of the financial markets, it is necessary that this Regulation enters into force as a matter of urgency and that the provisions laid down in this Regulation apply from the same date as those laid down in Regulation (EU) No 596/2014,

HAS ADOPTED THIS REGULATION: