The City of London Law Society

The Law Society

FCA Consultation DP16/38

DTR 2.5 changes: delay in the disclosure of inside information

Law Society and City of London Law Society joint response

January 2017

The views set out in this paper have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).

The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The Law Society is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to capital markets.

Introduction

We set out our responses to the list of questions in the FCA consultation paper 16/38 which proposes changes to the Disclosure Guidance and Transparency Rule 2.5 (**DTR 2.5**) to ensure that it is consistent with the MAR Guidelines: Delay in the disclosure of inside information (ESMA/2016/1478) (the **MAR Guidelines**).

Q1: Do you have any comments or suggestions relating to our proposed signpost to the ESMA Guidelines (DTR 2.5.1BG and related Glossary term)?

We agree that it is helpful to have a signpost to the ESMA Guidelines at DTR 2.5.1BG. We suggest that the word "indicative" is inserted after the words "non-exhaustive" in the second line of DTR 2.5.1BG (see MAR 17(11)).

Q2: Do you have any comments or suggestions with our proposal to leave DTR 2.5.2G unchanged?

No.

Q3: Do you have any comments or suggestions on our proposed deletion of DTR 2.5.3G?

No.

Q4: Do you have any comments or suggestions on our proposed changes to DTR 2.5.4G?

Yes. In paragraph 2.10 of the consultation paper, the FCA states that paragraphs 5(1)(8)(a) and (b) of the MAR Guidelines should be read together, in line with recital 50 of MAR, and consequently, the FCA believes that there has been no intended change to scope regarding these legitimate interests and that the substance of DTR 2.5.4G should remain unchanged.

Consequently, the FCA's interpretation is that, subject to the conditions in Article 17(4), an issuer is permitted to delay disclosing the fact or substance of the negotiations to deal with its financial difficulties - but it is not permitted to delay the disclosure of the fact that it is in financial difficulty. This was the position that the FCA adopted when implementing Article 3(1) of the Market Abuse Implementing Directive (2003/124/EC). The FCA had

discretion in that case as it was an Implementing Directive, unlike the MAR and ESMA Guidelines. We do not understand why the FCA is proposing to provide commentary on and interpret the MAR Guidelines when its general position is merely to cross-refer to these Guidelines and leave issuers and their advisers to rely on them, while deleting guidance that overlaps or contradicts them.

We consider that the FCA's interpretation does not in fact accord with the MAR Guidelines as it restricts the scope of possible legitimate interests for issuers in financial difficulty to delay disclosure of inside information. It is noteworthy that:

(i) In the MAR Guidelines, each of the legitimate interests is split into separate limbs and consequently, provides a separate and standalone justification to delay disclosure. In particular, the legitimate interest of delaying the disclosure of negotiations conducted by the issuer in paragraph 5(1)(8)(a) is a standalone exemption and is separated from paragraph 5(1)(8)(b) which deals with the financial viability of the issuer being in 'grave and imminent danger'. This is reinforced by ESMA in paragraph 54 of its Final Report on the MAR Guidelines (ESMA/2016/1130) where ESMA states that "*these two cases, already mentioned in Recital 50 of MAR, are maintained in the guidelines and are separately listed as examples of situations where legitimate interests to delay the disclosure of inside information may exist.*"

(ii) Paragraph 5(1)(8)(b) of the MAR Guidelines provides that the immediate public disclosure of the '*inside information'*, which, in our view, is highly likely to include the fact that the issuer is in financial difficulty, would jeopardise the conclusion of the negotiations designed to ensure the financial recovery of the issuer. In practice, disclosing the fact that the issuer is in financial difficulty is generally going to be more likely to jeopardise the conclusion of the negotiations which are designed to ensure the financial recovery of the issuer, than disclosing the fact that those negotiations are under way.

(iii) There is further evidence to suggest that ESMA envisaged that issuers would rely on paragraph 5(8)(1)(b) to delay disclosing the fact that they are in financial difficulty (whilst conducting negotiations designed to ensure their financial recovery). In paragraph 85 of the Annex IV to ESMA's Final Report which outlines the consultation feedback to the MAR Guidelines, ESMA highlights that there were concerns raised of the potential damage to the interests of an issuer and other stakeholders that might occur "*just because of the disclosure of its financial difficulties before it could be rectified*". It is significant that ESMA does not comment that the exemption should not be used in these circumstances.

Consequently, we do not see any justification for the retention of DTR 2.5.4G(1) and propose that it is deleted.

Q5: Do you have any comments or suggestions on our proposed changes to DTR 2.5.5G?

We agree that the last sentence in DTR 2.5.5G should be deleted as it is not compatible with the MAR Guidelines which set out a non-exhaustive list of circumstances in which a delay would be justified. However, in paragraph 2.11 of the consultation paper, the FCA states that it proposes to delete this sentence as a '*non-exhaustive list leaves open the possibility for the list being amended in the future*'. Consequently, the FCA appears to suggest that an issuer is only permitted to delay disclosure under Article 17(4) of MAR if one of the legitimate interests listed in paragraph 5(1)(8) of the ESMA guidelines applies - unless and until that list is amended in the future.

We do not believe that this is correct. Article 17(11) of MAR expressly mandates ESMA to issue guidelines to establish a "non-exhaustive indicative list of the legitimate interests of issuers". The fact that the list of legitimate interests is expressed to be non-exhaustive and indicative means that there may be *other* circumstances in which a delay in disclosing inside information could be justified.

Whilst the proposed amendments to DTR 2.5 do not conflict with our interpretation of what is meant by a 'non-exhaustive list', it would be helpful if the FCA would confirm its position as regards this issue in its feedback statement to correct any confusion.

Q6: Do you have any other comments or suggestions regarding our changes to the Handbook as a result of our complying with both sets of ESMA Guidelines?

No.

Contact

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