Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2016/960. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details)EUR 2016 No. 960 may be subject to amendment by EU Exit Instruments made by the Financial Conduct Authority under powers set out in The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), regs. 2, 3, Sch. Pt. 1. These amendments are not currently available on legislation.gov.uk. Details of relevant amending instruments can be found on their website/s. (See end of Document for details) View outstanding changes*

Commission Delegated Regulation (EU) 2016/960 of 17 May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2016/960

of 17 May 2016

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings

(Text with EEA relevance)

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[(1)], and in particular the third subparagraph of Article 11(9) thereof,

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.

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(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[(2)].

(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:

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Article 1

General requirements

Disclosing market participants shall ensure that the arrangements and procedures they establish to comply with paragraphs 4, 5, 6 and 8 of Article 11 of Regulation (EU) No 596/2014 are regularly reviewed and updated where necessary.

Article 2

Procedures for the purposes of conducting market soundings

1 Disclosing market participants shall establish procedures describing the manner in which market soundings are conducted.

Disclosing market participants may communicate information for the purposes of market sounding to the persons receiving the market sounding orally, in physical meetings, in audio or video telephone calls, or in writing, by mail, fax or electronic communications.

2 Disclosing market participants shall establish procedures for conducting market soundings by telephone ensuring that recorded telephone lines are used where the disclosing market participant has access to such lines and the persons receiving the market sounding have given their consent to the recording of the conversation.

3 The procedures referred to in paragraphs 1 and 2 shall ensure that persons working for a disclosing market participant under contract of employment or otherwise only use equipment provided by the disclosing market participant when sending and receiving telephone calls and electronic communications for the purposes of market soundings.

Article 3

Standard set of information for the communications to persons receiving the market sounding

1 Disclosing market participants shall have in place procedures to exchange a standard set of information with the persons receiving the market sounding during market soundings, in a pre-determined sequence.

2 The standard set of information referred to in paragraph 1 shall be determined by the disclosing market participant for each market sounding, prior to conducting that market sounding. The disclosing market participant shall use that standard set of information with all the persons receiving that market sounding.

3 Where disclosing market participants consider that the market sounding will involve the disclosure of inside information, the standard set of information referred to in paragraph 1 shall include and be limited to the following, in the stated order:

a a statement clarifying that the communication takes place for the purposes of a market sounding;

b where the market sounding is conducted by recorded telephone lines, or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;

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c a request for and a 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 and the reply to that request;

d a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers to be inside information and a reference to the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;

e where possible, an estimation of when the information will cease to be inside information, the factors that may alter that estimation and, in any case, information about the manner in which the person receiving the market sounding will be informed of any change in such an estimation;

f a statement informing the person receiving the market sounding about the obligations laid down in Article 11(5) subparagraph 1 points (b), (c) and (d) of Regulation (EU) No 596/2014;

g a request for the consent of the person receiving the market sounding to receive inside information, as referred to in Article 11(5) subparagraph 1 point (a) of Regulation (EU) No 596/2014 and the reply to that request;

h where the consent required under point (g) is given, the information being disclosed for the purposes of the market sounding, identifying the information considered by the disclosing market participant to be inside information.

4 Where the disclosing market participant considers that the market sounding will not involve the disclosure of inside information, the standard set of information referred to in paragraph 1 shall include and be limited to the following, in the stated order:

a a statement clarifying that the communication takes place for the purposes of a market sounding;

b where the market sounding is conducted by recorded telephone lines or audio or video recording is being used, a statement indicating that the conversation is recorded and the consent of the person receiving the market sounding to be recorded;

c a request for and a 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 and the reply to that request;

d a statement clarifying that, if the contacted person agrees to receive the market sounding, that person will receive information that the disclosing market participant considers not to be inside information and a reference to the obligation laid down in Article 11(7) of Regulation (EU) No 596/2014;

e a request for the consent of the person receiving the market sounding to proceed with the market sounding and the reply to that request;

f where the consent required under point (e) is given, the information being disclosed for the purposes of the market sounding.

5 The disclosing market participant shall ensure that the same level of information is communicated to each person receiving the market sounding in relation to the same market sounding.

Article 4

Data regarding persons receiving the market sounding

1 For each market sounding conducted, the disclosing market participant shall draw up a list containing the following information: