



## **GUIDELINES ON DISCLOSURE OF INSIDE INFORMATION RELATING TO CHANGES IN MANAGEMENT**

*17 May 2023*

### **Introduction**

11 May 2023, the Danish Financial Supervisory Authority (the “DFSA”) published new guidelines on disclosure of inside information relating to changes in management<sup>1</sup> (the “DFSA Guidelines”) as regulated in Regulation (EU) no. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (“MAR”).

The purpose of the DFSA Guidelines is to clarify what the DFSA deems important when assessing whether a change in management constitutes inside information; at what stage in a process such inside information may occur; and whether a delay of disclosure is permitted.

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<sup>1</sup> Danish Financial Supervisory Authority: Guidelines no. 9365 of 3 May 2023 on disclosure of inside information relating to changes in management.

The term “management” is not defined in MAR but under Danish law, management comprises at minimum members of the board of directors and the chief executive officer (in Danish: *administrerende direktør*). Notably, the DFSA states that regardless of whether an employee form part of a company’s management or not, dismissal or hiring of certain employees may constitute inside information if the employee is deemed material for the business of the company. As an example, such employees could be the key persons mentioned in a prospectus.

The DFSA Guidelines are to be read in conjunction with the rules for Nasdaq Copenhagen and Nasdaq First North Growth Market Denmark. Pursuant to these rules, any change to the board of directors, the CEO and CFO<sup>2</sup>, must be disclosed as soon as possible. The DFSA states that these rules only apply if the change does not constitute inside information, e.g., changes to ordinary members of the board of directors or a reshuffle of members. As described below, these do not, generally, constitute inside information but must be disclosed pursuant to Nasdaq rules. Based on the DFSA statement, it is unclear how inside information delayed pursuant to MAR should be treated under Nasdaq rules, i.e., will an issuer act in violation of Nasdaq rules if it delays disclosure of a change in management? As the additional disclosure obligations in Nasdaq’s rules follow the disclosure regime of MAR, we assume that an issuer may delay disclosure of changes in management labelled as inside information without acting contrary to Nasdaq rules.

### **Elements to consider when assessing whether a Change in Management constitutes Inside Information**

A change in management does not automatically constitute inside information. Whether or not any change in management constitutes inside information must be assessed in accordance with the general criteria for inside information. Inside information is information that is (1) precise information; (2) that has not been made public; (3) that relates directly or indirectly to an issuer or its financial instruments; and (4) which would be likely to have a significant effect on the prices of such financial instruments<sup>3</sup>.

Based on the new DFSA Guidelines, when facing changes in management, an issuer should consider the following in relation to each criterion:

#### Precise Information (Criterion no. 1)

As inside information comprises circumstances or events which have not yet come into existence, but which may reasonably be expected to, any issuer should assess whether a decision relating to the change in management has been made or whether the decision is reasonably

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<sup>2</sup> For Main Market.

<sup>3</sup> MAR, Section 7(1)(a).

expected to be made, regardless of whether the decision is made by the issuer or the management member. The change in management will in such case be deemed precise information if a conclusion can be drawn on the effect on the prices of the financial instrument(s). Consequently, changes in management can only be precise information if it is possible to make an assessment of the effect of the information on the price of the financial instruments.

#### Non-Public Information (Criterion no. 2)

The issuer should consider whether information about the change in management is already public, e.g., because a termination occurs in accordance with a publicly known agreement on retirement or fixed-term employment. Market expectations are typically too uncertain to use as a basis for assessing whether information has already been made public. Re-election to the board of directors will therefore, as a general rule, constitute non-public information but will typically not have any significant effect on the price of the financial instruments and consequently not constitute inside information.

#### Information relating directly or indirectly to an Issuer or its Financial Instruments (Criterion no. 3)

A change of management in an issuer will always meet this criterion. However, if the decision is made by a member of management, e.g., in the event of resignation, the information will relate indirectly to the issuer until the issuer becomes aware of the decision. As soon as the issuer becomes aware, the information will relate directly to the issuer. Only inside information which relates directly to the issuer must be disclosed pursuant to MAR.

#### Significant Effect on the Price (Criterion no. 4)

Circumstances that could lead to a change in management having a significant effect on the price of an issuer's financial instruments include, inter alia, the position of the management member; whether the person is crucial to the business of the company; how long the person has been employed; and whether the company has publicly indicated that the person should hold a particular role/position going forward.

An issuer should also consider whether the change in management occurs in a business line which is of particular importance to the issuer and the size of such business line's proportionate share of the company's total earnings, the influence on the company's overall business or future business opportunities or growth, and whether the business line is particularly important to the company's core business lines. Different circumstances may be deemed to have a significant effect on the share price depending on the nature of the financial instruments issued –

e.g., the price of mortgage-credit bonds may not be affected significantly due to management changes in a mortgage-credit institution.

### **Hypotheticals from the DFSA Guidelines**

Below is a brief summary of the hypotheticals set out in the DFSA Guidelines:

#### Situations which generally constitute Inside Information

1. Change of CEO/Chairman of the Board of Directors. The issuer should, however, also take into consideration how important the person is to the issuer, and what the issuer has already disclosed to the market.

#### Situations which generally do not constitute Inside Information

1. Reshuffle in the Board of Directors. However, special circumstances may entail that the reshuffle is inside information, e.g., if the reshuffle is an indication of a change in corporate strategy.
2. An appointment of an ordinary member of the board of directors.
3. An appointment of a deputy executive director as an interim CEO, provided that a new permanent CEO will be appointed.
4. Effective resignation of a CEO prior to a termination date that has already been disclosed.

### **When does Information about Changes in Management become Inside Information?**

Three typical situations are relevant to consider relating to management changes, where a person:

1. resigns from their position;
2. is dismissed by the board of directors; or
3. is hired.

The DFSA deems other types of changes in management, e.g., maternity leave, to not constitute inside information, as situations such as the example of maternity leave typically do not meet the criterion of having a significant effect on the price of the financial instrument(s).

Typically, a change in management occurs over a period of time. As with contract negotiations, inside information often comes into existence prior to formal steps having been taken, e.g., the signing of a contract. For example, the board of directors may have discussed, formally or informally, over a period of time the potential dismissal of a CEO, or a director has informed the board of directors or the chairman that the director intends to terminate their position. In such situations, an issuer should continuously assess whether the information constitutes inside information. Specifically for candidate soundings, the DFSA has stated that in the initial phase of a sounding, discussions with potential candidates will typically not be precise enough to constitute inside information.

As mentioned above, if a management member decides to resign, such information only becomes directly related to the issuer and is thus covered by the disclosure obligation when the issuer becomes aware of it.

#### Guidelines to when Inside Information comes into Existence

Below is a brief summary of the guidelines provided by the DFSA on when inside information relating to a change in management comes into existence.

1. The time of formalization, e.g., the signing of contract or a formal decision by the board of directors, is not conclusive;
2. Inclusion of senior/key employees or executives in the deliberations regarding the change in management;
3. In the event of a CEO's resignation, when the chairman of the board of directors can likely expect that the CEO will resign;
4. In the event of a CEO's termination, when, and if, all members of the board of directors have had the change to deliberate regarding the change in management and have made a recommendation to be implemented, e.g., in a nomination committee;
5. In the event of a CEO being hired, if the chairman or a member of the board of directors has been given a mandate to negotiate from the board of directors and the candidate is reasonably expected to be hired; or
6. In relation to hiring or firing of employees of particular importance to the business of the company, when the company can reasonably expect that it will reach an agreement with the employee in question.

### **Delay of Disclosure of Inside Information relating to Changes in Management**

As a starting point, inside information should be disclosed as soon as possible. However, an issuer may delay the disclosure of inside information provided that certain conditions are met. The issuer may delay the disclosure of inside information if all the following conditions have been met<sup>4</sup>:

1. Any immediate disclosure is likely to prejudice the legitimate interests of the issuer;
2. Any delay of disclosure is not likely to mislead the public; and
3. The issuer is able to ensure the confidentiality of that information.

Below is a brief summary of the guidelines provided by the DFSA as to when an issuer may delay disclosure of changes in management:

1. Negotiations with a candidate for management;
2. In case of resignations/dismissals:
  - a. if material terms, e.g., notice periods, are not regulated by contract and are still being negotiated;
  - b. if the board of directors wishes to deviate from notice periods set out in the contract and for that purpose enters into negotiations;
  - c. If the board of directors receives a proposal from in-house legal department or other parts of the organization where it is necessary that the board conducts further investigations and/or discussions; or
  - d. if a member of management contemplates resigning and informs the issuer hereof, disclosure may be delayed until the management member in question has made a final decision.

Below is a brief summary of the guidelines provided by the DFSA as to when an issuer may not delay disclosure of changes in management:

1. As a general rule, negotiations in connection with resignation or dismissal will not constitute a legitimate reason to delay disclosure, especially if the terms of the resignation are governed by contract (however, also see above);
2. In cases of dismissal, if the board of directors has sole competence to make the decision; or

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<sup>4</sup> MAR, Section 17(4).

3. If the board of directors receives a proposal from inhouse legal department or other parts of the organization and no further investigations and/or discussions are needed.

Specifically in relation to parallel processes, i.e., where an issuer is searching for one or more new candidate(s) and at the same time has an ongoing process of resignation/dismissal of a current member of management, the issuer should treat these as separate processes. This means that only in situations where the processes are interdependent, e.g., if the issuer is conducting candidate soundings before making a decision to dismiss a current member of management, the issuer may delay disclosure with reference to the interdependency of the processes.

An issuer should always be wary of whether a delay may mislead the public, e.g., if the issuer previously has disclosed contrasting information. An issuer should, at all times, be able to secure the confidentiality of the information of which disclosure was delayed. Moreover, even though an issuer may delay disclosure, the issuer must ensure progress in the process and avoid any undue delay of disclosure. This obligation does not apply to the issuer, however, in situations where the decision lies solely with the management member in question, e.g. if the management member is considering terminating their position.

Link to the DFSA's Guidelines can be found [here](#) (in Danish).

**If you have any questions or require further information regarding any of the above, please do not hesitate to contact us.**



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