

2024-10-31

Will Information Documented During a Delayed Disclosure Become Publicly Accessible?

When issuers on Nasdaq First North Growth Market delay the disclosure of inside information, they should carefully document that the conditions for delaying the disclosure are met. This is usually done directly in the digital insider list (logbook) that the issuer uses. When the inside information is eventually disclosed, the issuer must immediately notify the Swedish Financial Supervisory Authority (SFSA) that the information has been subject to delayed disclosure. The question we review below is what documentation is sent to the SFSA in this notification and to what extent the information sent to the SFSA becomes publicly accessible or is subject to confidentiality.

Disclosure of inside information

According to Article 17.1 of the Market Abuse Regulation (596/2014) (MAR), an issuer must inform the public as soon as possible about inside information that directly concerns the issuer. However, under certain circumstances, the issuer may delay the disclosure of the inside information. The following conditions must, according to Article 17.4 of MAR, be met for the disclosure to be delayed:

- immediate disclosure is likely to prejudice the legitimate interests of the issuer,
- delay of disclosure is not likely to mislead the public, and
- the issuer is able to ensure the confidentiality of that information.

If any of the above conditions are not met, the issuer must disclose the inside information as soon as possible. The issuer must make this assessment on an ongoing basis.

Documentation requirements – different rules for different markets

Article 4 of the EU Implementing Regulation (2016/1055) imposes an obligation on issuers listed on a regulated market to document information related to the delay of disclosure using technical means. In practice, this is often done using a digital insider list. The documentation requirement includes both the information that must be immediately submitted to the SFSA when the inside information that was subject to delayed disclosure is disclosed, and evidence that the conditions for a delayed disclosure were met at the time of the decision. However, the latter information only needs to be submitted to the SFSA if the authority requests it (see below).

By an exception in Article 17.4 fourth subparagraph of MAR, issuers on a growth market for small and medium-sized enterprises (such as Nasdaq First North Growth Market) do not need to retain documentation regarding the explanation provided that the issuer can justify its decision to delay the disclosure. However, in practice, issuers should still carefully document and retain information related to the delay of disclosure, as it may otherwise be difficult to justify the decision afterward. The documentation can also be helpful if, for example, the company's management is replaced.

Notification to the Swedish Financial Supervisory Authority regarding delayed disclosure

When the information is disclosed, the issuer must immediately notify the SFSA that the disclosure has been delayed. According to the practice of the SFSA, a notification submitted one hour after the disclosure does not meet the requirement for immediate notification.

The notification must include information about:

- the name and contact details of the person sending the information,
- the title of the disclosure and any reference number,
- the date and time of the disclosure,
- the date and time of the decision to delay the disclosure, and
- the identity of the persons responsible for the decision to delay the disclosure.

The SFSA has created a template for the notification available on the authority's website, which follows the requirements of the Market Abuse Regulation.¹ The information that the logbook tools send to the SFSA when the information is disclosed corresponds to the requirements in the template.²

The Financial Supervisory Authority can request a written explanation

The SFSA can after the disclosure request a written explanation from the issuer regarding how the conditions in Article 17.4 of MAR were met at the time of the decision to delay the disclosure.

The scope of the written explanation can vary from case to case. The explanation must be informative enough for the SFSA to assess whether the conditions for delaying the disclosure were met. This means that short, general descriptions of how the conditions were satisfied are not sufficient. If the issuer refers to internal procedures in its explanation, they must be attached to or clearly described in the explanation.

Are the details submitted to the Financial Supervisory Authority confidential or publicly accessible?

The documentation that the issuer submits to the SFSA becomes a public document (Sw. *allmän handling*) when it is received by the authority. The question then is whether the information provided by the issuer becomes publicly accessible or is subject to confidentiality. Here, it is difficult to give a definite answer. According to Chapter 30 Section 4 of the Swedish Public Access to Information and Secrecy Act, it can vary depending on the type of information. Information about the issuer's business or operational conditions is generally publicly accessible unless the disclosing of the information is likely to harm the issuer. For other information, e.g. regarding the issuer's counterparties, confidentiality generally applies. Such information is therefore normally not publicly accessible.

¹ <https://www.fi.se/sv/blanketter/#Marknadsmisbruk>.

² Confirmed by email by several major logbook service providers.

Summary

When issuers on Nasdaq First North Growth Market delay the disclosure of inside information, they should document that the conditions for delaying the disclosure are met. The information documented can be sensitive. The information to be sent to the SFSA in the notification of a delayed disclosure is, however, limited and does not include the written explanation. It is only if the SFSA requests a specific explanation from the issuer regarding how the conditions for the delayed disclosure were met that the issuer is required to submit additional information.

By an exception in MAR, issuers on a growth market for small and medium-sized enterprises (such as Nasdaq First North Growth Market) do not have an obligation to document their explanation provided that the issuer can justify its decision to delay the disclosure. However, it is recommended that the issuer in practice carefully documents its explanation. This is because the issuer has an obligation to provide a written explanation to the SFSA justifying its decision to delay the disclosure if the SFSA requests it. The information the issuer provides about its own operations in such an explanation is generally publicly accessible, while information about counterparties is confidential.

Henric Stråth
Attorney at law, partner
Moll Wendén Law Firm

Gunnar Bramstång
Associate
Moll Wendén Law Firm

About Moll Wendén Law Firm and the authors

[Moll Wendén](#) is a law firm with over 40 employees working in 15 business law areas, each led by experienced and well-renowned lawyers. [Henric Stråth](#), responsible partner, and Gunnar Bramstång, associate, work in Moll Wendén's capital markets group.