

Sydbank A/S
Attn: Group Executive Management
Peberlyk 4
6200 Aabenraa, Denmark

26 August 2019

Ref. SLO

File No. 6376-0166

PUBLICATION VERSION

Reprimand for delayed disclosure of inside information and for absence of insider lists

**THE DANISH FINANCIAL
SUPERVISORY AUTHORITY**

Århusgade 110
2100 Copenhagen Ø
Denmark

Tel +45 33 55 82 82
Fax +45 33 55 82 00
CVR No 10 59 81 84
finansstilsynet@ftnet.dk
www.finanstilsynet.dk

1. Reprimand

The Danish Financial Supervisory Authority (FSA) reprimands Sydbank A/S (hereinafter referred to as Sydbank or the company) for violating the Market Abuse Regulation

- Article 17(1) by not making public as soon as possible inside information about a downward revision of the company's forecasts
- Article 18(1) by not drawing up an insider list in connection with the inside information about the downward revision occurring.

**DANISH MINISTRY OF
BUSINESS AND GROWTH**

The FSA notes that Sydbank did not report the inside information to the FSA in accordance with section 25 of the Danish Capital Markets Act.

2. Case summary

On 31 October 2018 Sydbank published a company announcement with the heading "Sydbank's Interim Report – Q1-Q3". According to the company announcement Sydbank made a downward revision of its expectations for the financial year 2018:

"Profit after tax is forecast to be in the range of DKK 1,250m-1,325m. In our interim report for the first half-year profit after tax was expected to be in the lower part of the range of DKK 1,340m-1,540m."

The downward revision thus represented up to 14% (the difference between the upper ranges) compared with the previous announcement.

On 30 October 2018 the price was 174.5. On 31 October 2018 it dropped to 152.3. The price decline totalled 12.7%.

2.1 Danish FSA inspections

The FSA sent a consultation letter to Sydbank on 3 January 2019 in which the FSA requested a statement from Sydbank as to whether it was the assessment of the company that the downward revision constituted inside information and if so, whether the company had made public the inside information as soon as possible.

Sydbank submitted a reply on 31 January 2019. In its reply Sydbank stated that it was not the assessment of the company that the downward revision constituted inside information. The reason was that Sydbank did not believe that the downward revision would affect the price significantly as the downward revision corresponded to the market's expectations. In this context Sydbank attached importance to the average of the forecasts published by analysts. Furthermore Sydbank stated that following the publication of the downward revision the company learned that its estimate was incorrect as the market had in fact reacted to the downward revision.

Subsequently the FSA requested Sydbank to provide more information on the course of events including to submit relevant insider lists. In response to the requests by the FSA, Sydbank provided further details on the course of events over the telephone on 18 and 19 February 2019 and by email on 24 April 2019, 26 April 2019, 6 May 2019, 11 June 2019, 21 June 2019 and 15 August 2019.

According to the statements made by Sydbank, the company's CFO sent an updated interim report to the CEO on Sunday 21 October 2018 at 22:46. It appeared from the updated interim report that already on 21 October 2018 the CFO believed that it might be necessary to revise downwards the expectations for the financial year 2018 from the range of DKK 1,340m-1,540m to the range of DKK 1,250m-1,325m.

The following day, Monday 22 October 2018, the CFO and the CEO met to discuss the situation and it was agreed that the CFO was to review the material again including discuss the figures realised and the expectations for Q4 at a chairmanship meeting.

At the chairmanship meeting, which was held on Tuesday 23 October 2018, it was decided to recommend to the board of directors that they make an assessment and a decision regarding whether to make a downward revision of the expectations for the result for the year. The matter was placed on the agenda of the next board meeting:

"The decision was then recommended to the board of directors and as a board meeting had already been convened in the beginning of the following week, the matter was scheduled for consideration at this board meeting."

Furthermore it appeared from Sydbank's statements that Sydbank did not make an assessment of whether this was inside information until Monday 29 October 2018. It was at this meeting that Sydbank assessed that the conditions for inside information were not met. As a result Sydbank delayed the disclosure of the downward revision and the company did not draw up an insider list.

In an email to the FSA on 6 May 2019, Sydbank confirmed that the company had not drawn up an event-based insider list but informed the FSA that the persons who knew of the downward revision were either on the company's permanent list or on a confidential list.

In an email to the FSA on 15 August 2019, Sydbank stated that the company assessed that inside information did not exist until 23 October 2018 at the earliest.

3. Legal basis

The rules concerning the disclosure of inside information and the drawing up of insider lists appear from Article 17(1) and Article 18(1) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation).

3.1. Public disclosure of inside information

An issuer must inform the public as soon as possible of inside information which directly concerns that issuer. This appears from Article 17(1) of the Market Abuse Regulation. Inside information is defined in Article 7(1)(a) as:

- 1) information of a precise nature,
- 2) which has not been made public,
- 3) relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and
- 4) which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Pursuant to Article 7(2) information is deemed to be of a precise nature if the following two conditions are met at the same time:

- The information must indicate a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur.
- The information must be specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or

event on the prices of the financial instruments or the related derivative financial instruments.

When a set of circumstances may reasonably be expected to exist or when an event may reasonably be expected to occur will always be subject to specific assessment. Consequently no general criteria can be established regarding when such reasonableness exists.

Information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, means information which a reasonable investor would be likely to use as part of the basis of his or her investment decision, cf Article 7(4).

3.2. Drawing up of insider lists

An issuer must draw up an insider list of all persons who have access to inside information and who are working for the issuer under a contract of employment or otherwise performing tasks through which they have access to inside information, such as advisers and accountants, cf Article 18(1)(a) of the Market Abuse Regulation.

4. Guide

Changed expectations as regards an issuer's financial targets may constitute inside information if this information has not previously been publicly disclosed, cf Guide No. 9973 of 9 October 2017 concerning the time at which an issuer must publicly disclose information in financial reports as inside information. The guide contains a number of examples, eg:

“Example 3 – New expectations to the full year differ from the expectations previously announced (DKK)

An issuer has previously announced the expectations for the annual result for 2015 to be in the range of DKK 70m-90m before tax. In the period preceding the presentation of the interim report for the first half-year, the issuer assesses that the issuer now expects the result to be in the range of DKK 60m-80m before tax.

The issuer is therefore not able to uphold the publicly disclosed financial targets. This information is thus non-public information and consequently the issuer must assess whether the other conditions of inside information have been met.”

Moreover an issuer may not delay disclosing inside information until the presentation of a financial report but is obliged to make public inside

information arising during the preparation of for instance the annual report as soon as possible, cf page 5 of the guide. Concerning management estimates to make upward or downward adjustments of the financial targets, page 6 states:

“The issuer has a relatively short period to assess the specific information before the issuer must make public the information as inside information. Management has some latitude to make an estimate regarding possible inside information, for instance a downward or an upward revision. The latitude of management estimates depends on the actual situation in which there exists a balance between a “safe estimate” and a “quick estimate”. There is also a difference as to whether the inside information is obvious or whether there is a need to further assess the specific information.”

In a newsletter dated 28 November 2017 entitled “What does “as soon as possible” mean in connection with public disclosure of inside information?”, the FSA describes the situation in which eg a board of directors assesses inside information. The following is taken from page 5 of the newsletter:

“The FSA accepts that in the circumstances it may be more expedient for the issuer to have a committee or the board of directors assess questions concerning classification of inside information, delay and disclosure but it is important for the FSA to emphasise that the issuer’s organisational structure must support the public disclosure of inside information “as soon as possible”.”

5. Assessment

In the FSA’s assessment the downward revision made public by Sydbank on 31 October 2018 constituted inside information and this inside information was not made public as soon as possible. Moreover the FSA assesses that given that the downward revision constituted inside information, Sydbank should have drawn up an event-based insider list.

It is therefore the FSA’s assessment that Sydbank has violated Article 17(1) and Article 18(1) of the Market Abuse Regulation.

5.1. Inside information

Four conditions must be met for inside information to exist. The conditions are listed in section 3.1.

Regarding the question of whether the information was of a precise nature, the FSA attaches importance to the fact that on 21 October 2018 Sydbank's CFO sent an updated interim report to the CEO from which it appeared that the CFO assessed that it might be necessary to make a downward revision to the range of DKK 1,250m-1,325m. The FSA's decision is therefore based on the fact that the downward revision at this point in time could reasonably be expected to occur. Information may constitute inside information even if it turns out later that the set of circumstances or events that the information concerns do not come into existence or occur. Furthermore the information in question was deemed to be specific enough to enable a conclusion to be drawn as to the effect of the downward revision on the price of the Sydbank share.

The downward revision to an expected result of DKK 1,250m-1,325m was outside the range of DKK 1,340m-1,540m previously announced by Sydbank. Consequently the information had not been made public. Moreover the information directly concerned Sydbank.

Seeing that this was a downward revision of up to 14% compared to the previous announcement, it must be assumed that a reasonable investor would be likely to use this information as part of the basis of his or her decision to invest in Sydbank. Consequently it must also be assumed that the information would be likely to affect the price significantly. It is not a condition that the price is affected significantly but an actual impact on price may support the assessment that inside information existed. The price dropped by 12.7% following the publication. Sydbank has stated that it was the company's assessment that the downward revision would not affect the price as the downward revision corresponded to the average of the forecasts published by analysts. The FSA does not find that analyst forecasts can form part of this assessment. One reason for this is that analysts do not have the same knowledge of the business as Sydbank itself and consequently analyst forecasts are subject to greater uncertainty.

On the basis of the above the FSA assesses that all four conditions of inside information were met on 21 October 2018. As mentioned under the case summary Sydbank has stated that following the publication of the downward revision, the company learned that its estimate was incorrect as the market had in fact reacted to the downward revision. The FSA therefore assesses that Sydbank agrees with the FSA that the downward revision of the company's expectations constituted inside information pursuant to Article 7(1)(a) of the Market Abuse Regulation.

5.2. Publication as soon as possible

Sydbank discussed the figures realised and the expectations for Q4 at a chairmanship meeting on 23 October and at this meeting it was decided to

recommend the downward revision of the company's expectations to the board of directors. Consequently the FSA finds that the assessment by the board of directors to make the downward revision including to make public the downward revision should have been made around 23 October 2018 at the latest.

The FSA finds it problematic that Sydbank chose to schedule the consideration of the matter of making a downward revision for the next board meeting, which was not until a week later, instead of convening a board meeting as soon as possible. Moreover the FSA finds it problematic that Sydbank did not assess until 29 October 2018 whether the downward revision constituted inside information.

Considering the fact that the downward revision was made public on 31 October 2018 it is the FSA's assessment that the inside information was disclosed too late. The FSA does not believe that the fact that Sydbank on 29 October 2018 assessed that the downward revision did not constitute inside information can lead to any other outcome.

5.3. Insider lists

As a result of Sydbank not assessing that the downward revision constituted inside information, the company did not draw up an event-based insider list. Considering the fact that several persons not included on Sydbank's permanent insider list had access to the inside information on 29 October 2018, the FSA finds that the company also did not meet its obligation to draw up insider lists.

The fact that the persons having access to inside information who were not included on Sydbank's permanent insider list were included on the company's confidential list cannot lead to any other outcome.