CLIFFORD
CHANCE

Briefing note January 2016

# Are you ready for the Market Abuse Regulation?

It is now less than six months until implementation of the EU Market Abuse Regulation (**MAR**), which takes effect in Member States across the EU on 3 July 2016. In the last few months we have seen the publication of the FCA's consultation on the changes to be made to our domestic regulation to ensure that it is consistent with the requirements of MAR and the publication by the European Commission of a delegated regulation setting out the detail of how certain provisions in MAR should be interpreted. HM Treasury has also made available a draft statutory instrument setting out the changes that will be required to primary legislation as a result of the introduction of MAR.

A significant number of questions still need answering about how certain areas of the new regime will operate in practice and industry groups are continuing to work with the FCA to seek clarification on these issues. Hopefully the position will become clearer over the coming months, but in the meantime we have identified the key issues for you to be aware of and which you will need to plan for over the coming months.

## What will the market abuse rulebook look like after 3 July 2016?

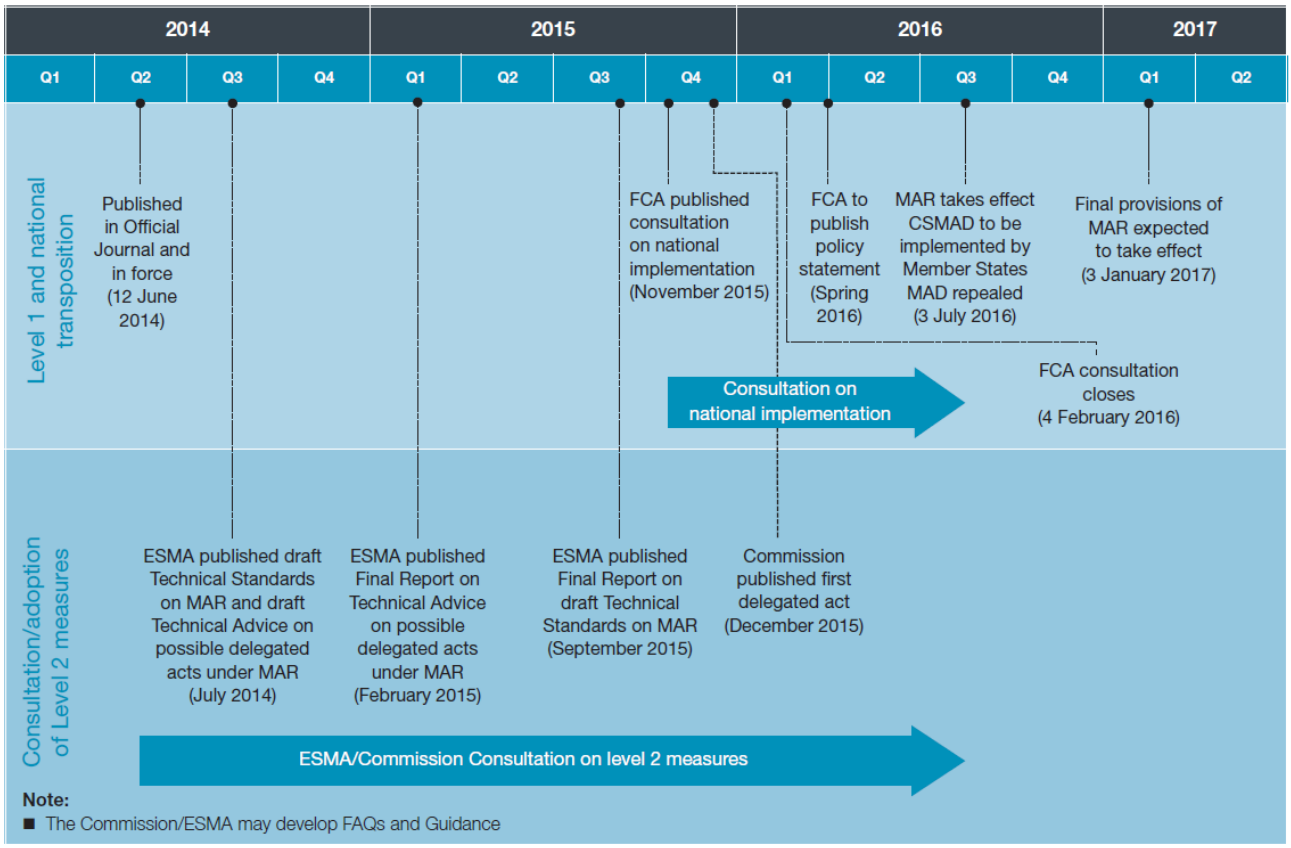
The FCA's consultation paper, CP15/35, addresses how the FCA Handbook will look after 3 July 2016. The answer is – very different! Those parts of the Handbook that will be most affected by implementation of MAR are the Disclosure and Transparency Rules (**DTRs**), the Listing Rules (in particular, the Model Code) and the Code of Market Conduct (**CMC**) (contained in MAR 1 of the FCA Handbook).

- *Disclosure Rules:* The Disclosure Rules will be renamed the Disclosure Guidance. The bulk of the existing Disclosure Rules are to be deleted and readers will be signposted to the relevant provisions of MAR itself. Where possible, the FCA is seeking to retain those parts of the existing guidance in the current Disclosure Rules which offer assistance on the interpretation of the new legislative requirements.

## Key changes resulting from MAR

- MAR extends the application of the market abuse regime beyond issuers with shares admitted to trading on a regulated market to include issuers of securities traded on multilateral trading facilities and organised trading facilities.
- Issuers will be required to make an ex post notification to the regulator when the announcement of inside information is delayed: changes to record keeping will be required.
- Unlike the current regime, MAR will expressly prohibit PDMRs from dealing in an issuer's securities in a "closed period", and the range of permitted exceptions will be narrower than under the current Model Code.
- The FCA is advocating that all premium listed issuers must have in place "effective systems and controls" to require PDMRs to seek consent to deal in securities at all times (not just in the "closed periods" required by MAR); changes to share dealings codes will be required.
- Insider lists will require the inclusion of more detailed personal information.
- No notification of PDMR dealings will be required until an annual de minimis threshold is reached.
- Issuers and their advisers will be required to keep detailed records of all market soundings.

EU Market Abuse Regulation Implementation Timeline




- *Listing Rules:* The primary change to the Listing Rules is the removal of the Model Code in its current form. Again, readers will be signposted to MAR which, in a change to the position under the Market Abuse Directive (**MAD**), expressly prohibits persons discharging managerial responsibility (**PDMRs**) within an issuer from dealing during a closed period. See below for further information.
- *Code of Market:* Under current UK law, the FCA is required to issue the CMC which sets out guidance to assist those determining whether or not certain behaviours amount to market abuse. The Treasury is intending to repeal this requirement as a result of MAR, leaving the status of the CMC unclear. In CP15/35, the FCA has proposed retaining the CMC, in so far as legally permitted, but sadly, much of the existing CMC is to be deleted as it is no longer compatible with MAR. This is concerning as it will leave areas of uncertainty for issuers and other market participants.

Post 3 July 2016, the FCA Handbook should not be treated as a single rule book governing those matters covered by MAR. It will be crucial for market participants to familiarise themselves with the detail of the underlying European legislation, both MAR itself and the supporting level 2 measures (still in draft), which flesh out the detail of some of MAR's key requirements.

## New requirement to make ex post notification to the FCA when the announcement of inside information has been delayed

Under MAR, an issuer will still be able to delay announcing inside information so as not to prejudice its legitimate interests. However, there will be a new requirement that when the relevant information is announced, the issuer must also notify the regulator in writing of its decision to delay that announcement.

The notification to the regulator will need to include certain specified information, including the date and time of the decision to delay the disclosure of inside information and the identity of all persons with responsibilities for the decision to delay the public disclosure of such information.

In addition, ESMA draft technical standards (still to be formally adopted by the European Commission) set out details of the internal records that issuers are expected to maintain where the announcement of inside information has been delayed, including:

- the dates and times when the inside information first existed within the issuer, when the decision to delay announcement was first taken and when the issuer is likely to disclose such information;
- the identity of the persons responsible for (i) determining that the announcement of the information should be delayed, (ii) the ongoing monitoring of the conditions for delay, (iii) deciding when public disclosure should be made, and (iv) providing the requested information about the delay and a written explanation to the regulator;
- evidence of the initial fulfilment of the conditions permitting delay[1]. This will include information about any information barriers put in place internally to prevent access to inside information by those persons not entitled to received it and the arrangements put in place in cases where confidentiality is no longer ensured.

MAR also requires an issuer to provide a written explanation of its decision to delay the announcement of inside information. The FCA has a discretion as to whether to require the written explanation to be provided by an issuer at the same time as the initial notification of delay is given or for it to be provided only on request by the FCA. The FCA is consulting on this issue but has indicated that its preference is for the explanation to be provided only when requested by it.

It will be of critical importance that issuers can keep proper records of the decision making process that led to the delay in disclosure in order that full and accurate explanations can be provided to the FCA upon request. As such, issuers will need to review their existing disclosure policies and make any necessary changes and they should establish a disclosures register in which to record the required information.

## Changes to existing share dealing codes will be required

In a change to the current position under MAD, MAR expressly prohibits trading by PDMRs in closed periods, save in very limited circumstances. A closed period is defined as the 30 day period before the announcement of an interim financial report or a year-end report which the company is *obliged to make public* according to the rules of the trading venue on which the company's shares are admitted to trading or national law. For companies with securities admitted to trading on the main market of the London Stock Exchange, they are obliged to publish half-year and full year results[2] but are not required to publish a preliminary results announcement (although may do so voluntarily).

Under the existing Model Code, there would currently be a closed period prior to publication of a preliminary results announcement. However, once the preliminary announcement is made, the company is no longer in a closed period and PDMRs are not prevented from dealing unless they are otherwise in possession of inside information.

Under MAR, publication of a preliminary results announcement will not bring a closed period to an end and the closed period will apply up to the publication of the company's annual financial report (often some weeks after the related preliminary results announcement). This could have the practical effect of significantly reducing the "open" period in which PDMRs can deal during the course of a year. In relation to dealings in share plans during a closed period, helpfully the Commission has published a delegated regulation (still in draft) which includes a non-exhaustive list of share plan dealings that will be permitted during closed periods. In broad terms, most of the share plan dealings currently possible during a "prohibited period" under the Model Code should still be permitted but there are some nuances that will need to be worked through.

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

2 DTR 4.

Premium listed companies are used to restrictions on PDMR dealings as a result of the requirement to have in place a share dealing code which is at least equivalent to the FCA's Model Code. In CP15/35, the FCA has set out its proposals to require premium listed companies to have "effective systems and controls" in order to require PDMRs to obtain clearance to deal in the company's securities *at all times*. This goes beyond the requirements of MAR, which only imposes restrictions on dealing in closed periods.

In determining whether a company has satisfied the requirement to have in place effective systems and controls, the FCA will have regard to whether the systems and controls address the aspects set out in proposed LR 9 Annex 2G. The Model Code in Annex 1 of the Listing Rules is to be deleted. Proposed new Annex 2G retains only certain limited provisions of the Model Code, such as the mechanics of the clearance procedures to be followed to obtain approval to deal. These broadly mirror the clearance procedures set out in paragraphs 4 – 6 of the current Model Code.

A key concern is the current lack of clarity as to what is a "dealing" for these purposes given that the current definitions in the Model Code as to what constitutes a dealing, and what dealings are to be excluded are to be deleted. CP15/35 defines dealing as *"conducting a transaction on a person's own account or for the account of another person"* (mirroring the language used in MAR), but the consultation paper does not expand on what this phrase means or what transactions would not otherwise constitute a dealing. Concerns about this super-equivalent requirement and its lack of clarity have been flagged to the FCA by respondents to the consultation.

Whilst it is clear that companies will need to make changes to their existing share dealing code, given the current uncertainties in this area, it would be prudent to wait to see the outcome of the FCA's consultation before undertaking this exercise.

## Insider lists will become more prescriptive

The substance of Disclosure Rule 2.8, which deals with the requirement to draw up an insider list, is to be deleted and readers directed to article 18 of MAR, which contains the underlying obligation to draw up an insider list. Article 18 is supplemented by technical standards prepared by ESMA which prescribe the precise format of the insider list.

In line with current market practice, issuers will be able to continue to split their insider lists into two parts: one for "permanent insiders" such as directors and other PDMRs who, by nature of their position, have (or are permitted to have) access to all inside information within the issuer and, the other for those persons within the issuer who have access to transaction or event-specific inside information.

MAR will require the list to be drawn up and kept up to date in electronic format and, as is currently the case, it must be kept for a period of at least five years after it is drawn up or updated.

However, the content of the insider list will be more prescriptive than is currently the case. The following additional information will be required:

- birth name of insider (if different to current name);
- professional telephone numbers (direct dial and mobile);
- date of birth;
- national identification number (if applicable). It is thought that this requirement will not be applicable to UK insiders who do not have a national identification number; and
- personal telephone numbers (home and mobile).

This will create an additional burden for issuers in collating this information. Note also that MAR requires that issuers take all reasonable steps to ensure that any person on the insider list acknowledges *in writing* the legal and regulatory duties that this entails. It is not necessary under current market abuse legislation for the acknowledgement to be in writing, although in practice most issuers require PDMRs to sign a written acknowledgement.

Despite the FCA's proposals to delete those provisions in the DTRs that allow issuers to make arrangements with their advisers for those advisers to maintain a list of persons working for them with access to inside information about the issuer (rather than require the issuer to maintain such information itself), it is understood that the FCA will still permit this practice to continue.

## Issuers of securities traded on MTFs or OTFs are brought within the market abuse regime

Under the current market abuse regime, only securities admitted to trading on a regulated market or for which a request for admission to trading on a regulated market are caught. MAR widens the market abuse regime to apply to other financial instruments, such as those traded on other trading platforms, including MTFs (multilateral trading facilities) and OTFs (organised trading facilities). As such, issuers with relevant securities listed on such platforms will be brought within the scope of the regime and will be subject to the prohibitions on inside dealing, unlawful disclosure of inside information and market manipulation. They will also be required to comply with the provisions in MAR in relation to the maintenance of insider lists, the disclosure of managers' transactions and the maintenance of appropriate records where a decision is taken to delay the disclosure of inside information.

## A de minimus threshold will apply for notification of managers' transactions

MAR introduces a de minimis threshold for notification by a PDMR (or a person closely associated with them) of transactions in an issuer's securities of €5,000 per calendar year (to be calculated by adding, without netting, all relevant transactions). Whilst the FCA has a discretion to raise this threshold on implementation of MAR to €20,000, it has indicated in CP15/35 that its preference is not to do so and is consulting on this point.

The impact of the de minimis threshold should mean that fewer PDMR notifications are required, but it will be necessary for each PDMR to keep a detailed record of all transactions in order to be able to identify when the threshold has been tripped and a notification required.

The time limit for notification of dealings by PDMRs is to be reduced to three business days, rather than the current four.

However, as dealing notifications should, in any event, be made as soon as possible, it is to be hoped that this will not raise too many concerns for PDMRs. Issuers will be required to announce such information to the market within the same time frame[3].

## Detailed record keeping requirements will apply when conducting market soundings

In contrast to MAD, MAR contains provisions which expressly govern the conduct of market soundings[4] both by issuers and by persons acting on their behalf[5] (e.g. brokers or investment banks), referred to in MAR as disclosing market participants (**DMPs**).

Amongst other obligations, MAR will require any DMP, prior to conducting a market sounding, to consider whether the sounding will involve the disclosure of inside information and to keep a written record of its conclusions and reasoning.

The effect of this is that, even where information is deemed not to be inside information, a written record will need to be kept. These records may be requested by the regulator.

DMPs will also be required to establish procedures prescribing the manner in which market soundings are to be conducted, including procedures to provide to, and request from, persons receiving the market sounding a standard set of information. In particular, the consent of the recipient to receive the sounding must be obtained, they must be reminded that they are prohibited from using the

3 The current obligation in DTR 3 is to announce such information as soon as possible and, in any event, not later than the end of the business day following receipt of the information by the issuer.

4 Described in MAR as a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more investors.

5 MAR, article 11.

information and that they are subject to obligations of confidentiality with regard to the disclosed information.

Ideally, market soundings should be conducted on recorded telephone lines, but where this is not the case, DMPs must maintain a written record of the communication. ESMA has published draft technical standards which contain templates for the form of the written record which is to be kept by a DMP undertaking a market sounding. Different templates should be used depending on whether or not inside information has been disclosed.

It is usual for a listed issuer to undertake market soundings in conjunction with its financial adviser or broker. The record keeping arrangements referred to above raise concerns as they appear to require all DMPs (i.e. both the issuer and its advisers) to keep records. This issue has been raised at a European level in order that it might be addressed by the European Commission in its delegated measures. In particular, it would be more workable if only one DMP were required to keep a record of the sounding to which the other DMPs would have access.

Issuers, and any financial institutions carrying out market soundings on their behalf, will need to review their existing procedures and ensure they are brought into line with these new requirements. Training is also likely to be required to ensure all employees understand their enhanced obligations.

## The test of what constitutes inside information has not changed in substance

The definition of "inside information" is broadly unchanged. It remains the case that information must:

- be precise;
- have not been made public;
- relate, directly or indirectly, to the issuer or its financial instruments; and
- if made public, be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments.

Information which, if made public, would be likely to have a significant effect on the price of relevant financial instruments means information a reasonable investor would be likely to use as part of the basis of his or her investment decision.

Over the last 18 months we have seen decisions of the UK Upper Tribunal[6] and the EU Court of Justice[7] focusing on what constitutes inside information and, in particular, when information is precise. These decisions will continue to inform the assessment of what amounts to inside information when MAR is implemented.

On 20 November 2015, the FCA published a second consultation paper, CP15/38, on proposed amendments to the provisions in DTR 2 regarding the delay of disclosure of inside information. Under the existing DTRs, an issuer may only delay the disclosure of inside information where not to do so could prejudice its legitimate interests, the delay will not mislead the public, the person receiving the information owes the issuer a duty of confidentiality and the issuer can ensure the confidentiality of the inside information. DTR 2.5.3R sets out a non-exhaustive list of matters that may constitute a legitimate interest, including ongoing negotiations, the outcome of which would be prejudiced by public disclosure. DTR 2.5.5G then sets out the FCA's view that, other than in relation to impending developments or the specific events referred to in DTR 2.5.3R and DTR 2.5.5AR[8], there are unlikely to be other circumstances where delay would be justified.

Based on both the views of the Upper Tribunal expressed in the *Hannam* case and the provisions of MAR, the FCA proposes to amend the guidance in DTR 2.5.5G to clarify that issuers may have legitimate reasons to delay disclosure in circumstances other than the non-exhaustive examples listed in DTR 2.5.3R or the circumstances described in DTR 2.5.5AR. This is extremely welcome news for issuers as, potentially, it creates greater scope to delay the announcement of inside information than is currently the case provided that to do so will not mislead the market or itself create a false market.

## Next Steps

The FCA consultation closes on 4 February 2016 and the FCA intends to publish a policy statement (and possibly, further consultation) shortly afterwards. In the meantime, ESMA is expected to start work on Q&A to assist market participants to understand the detail of the new MAR

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6 FCA v Hannam [2014] UKUT 0233.

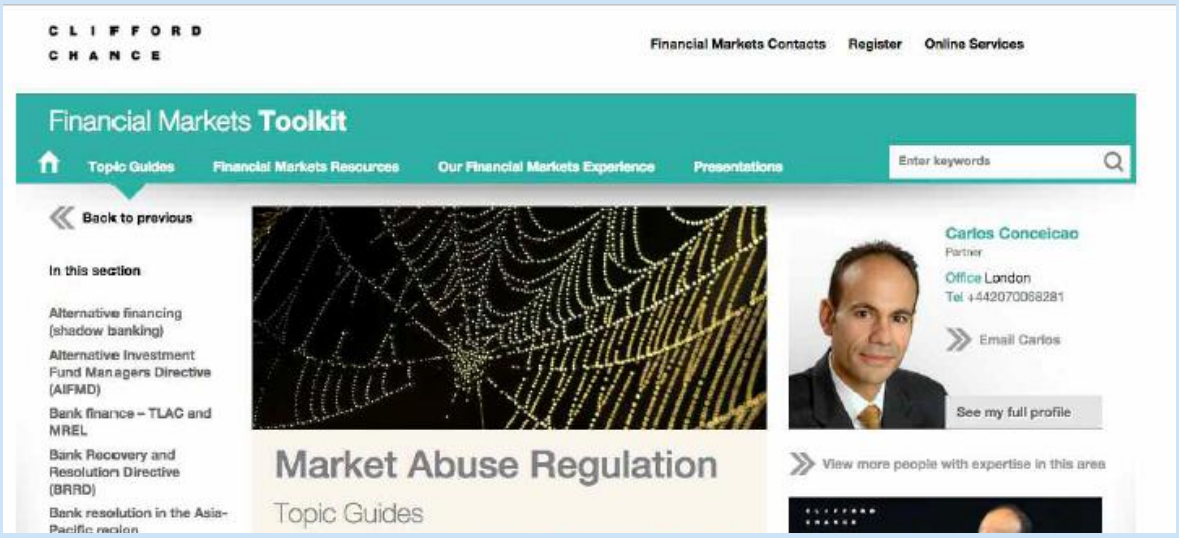
7 Lafonta v AMF (case C-628/13).

8 An issuer may have a legitimate interest to delay disclosing inside information concerning the provision of liquidity support by the Bank of England or another central bank to it or a member of its group.

requirements. Unfortunately, we do not have yet a complete picture of how the regime will look and operate after 3 July 2016. As such, whilst issuers should take steps to familiarise themselves with the forthcoming changes and to prepare to make changes to internal documentation such as their share dealing code, they will not be able to finalise those changes at this stage. Our advice is to plan ahead to ensure that sufficient time is available in advance of July to amend relevant internal policies and record keeping arrangements and to ensure that comprehensive training is provided to those directors and other employees affected by these changes.

## Market Abuse Regulation Topic Guide

**For more information about the new market abuse regime, see our Market Abuse Regulation Topic Guide available on our Financial Markets Toolkit. You can access a copy of MAR, the draft ESMA implementing measures and the FCA consultation paper, along with other helpful Clifford Chance briefings and materials, from this online Topic Guide. You can also locate and contact our MAR experts from around our European network via the Guide.**
**http://financialmarketstoolkit.cliffordchance.com/en/home.html**



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