Briefing note

February 2017

# THE MARKET ABUSE REGIME SIX MONTHS ON

The Market Abuse Regulation (EU) No 596/2014 (**MAR**) has now been in force for over six months. As market participants become more familiar with MAR and its related implementing and delegated regulations, and further guidance is published by ESMA (and, in some cases, national regulators), some of the initial concerns about how MAR would operate in practice are being laid to rest and we are beginning to see certain market norms emerge. We expect MAR will continue to be a hot topic throughout 2017 as the new regime continues to bed down and the detection, prevention and prosecution of market abuse remain areas of focus for the Financial Conduct Authority (**FCA**). In this briefing, we consider some of the market practices and trends that have emerged since the implementation of MAR in July 2016.

## A greater focus on the identification and control of inside information

Undoubtedly, the introduction of MAR has been an opportunity for many issuers to update and refresh their practices and procedures for the identification and handling of inside information. Whilst the definition of what constitutes inside information remains unchanged under the new regime, other changes to the regime, such as a new requirement to notify the regulator where an issuer has delayed the announcement of inside information (and the potential for the regulator to then request a detailed explanation of the circumstances surrounding the delay) have prompted issuers to examine and, in many cases, update their internal procedures relating to the management of inside information. This has included taking action such as formalising the role and function of the "disclosure committee", the body of key executives with responsibility for monitoring the existence of inside information and determining when any such information must be announced. In addition, we have seen issuers adopt a practice of maintaining a "disclosure record", a detailed written register which provides a clear record of when inside information came into existence and who knew what and when. This record will form the basis of any written explanation requested by the FCA following a notification of delayed disclosure of inside information or other request from the regulator for information. In addition, the introduction of MAR has provided an opportunity for many issuers to provide updated training to those employees with access to inside information about the manner in which such information must be handled.

## Financial results announcements

As we move into a period where the bulk of listed issuers are beginning to prepare their final year results, the question of whether such results give rise to inside information comes into sharper focus.

Since the implementation of MAR, we have seen a mixed approach from issuers regarding whether financial results should be treated as inside information. Note that where issuers do treat such results as inside information, MAR requires them to include rubric in the announcement to that effect.

Broadly speaking, in the months that followed MAR's implementation, the majority of issuers appeared to take the view that where their interim results were in line with market expectations, those results did not give rise to inside information. However, there were some issuers that took a

different view and included the inside information rubric on their interim results even where those results appeared to be in line with market expectations. This may have resulted from an abundance of caution, given issuers were operating under a new market abuse regime. To date, the majority of final year results announcements that are in line with market expectations have not included the inside information rubric, indicating that issuers continue to take the view that where results are in line with market expectations no inside information exists in relation to those results.

As practice develops, and pending any further guidance from the regulators on this area, issuers will need to exercise particular care; each case must be assessed on its facts and the views of brokers and legal advisers should be sought to assist in determining whether any particular development or piece of information should be treated as inside information. It is important to ensure relevant discussions and decisions are properly documented in the event of a future investigation by the FCA. Where information comes to light during the preparation of the final results that indicates that the issuer's results will not be in line with market expectations, then the issuer must take immediate action to investigate such information and its likely impact. If the outcome of that investigation is such that the issuer believes that its results may not be in line with market expectations, then the issuer will need to consider its announcement obligations, including in the context of its due reporting date, the Upper Tribunal's decision[1] in connection with Ian Charles Hannam's appeal against an earlier decision of the FCA and any other relevant factors.

## Ability to delay disclosure of inside information

As was the case under the previous market abuse regime, MAR permits issuers to delay the announcement of inside information provided that certain conditions are met: (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer; (ii) delayed disclosure is not likely to mislead the public; and (iii) the issuer must be able to maintain the confidentiality of the information.

In October 2016, ESMA published its final guidelines on the delay in disclosure of inside information (ESMA/2016/1478). These guidelines establish a non-exhaustive list of the legitimate interests of issuers to delay the disclosure of inside information and situations in which delaying disclosure of inside information is likely to mislead the public. In particular, delay is likely to mislead the public in circumstances where:

- the inside information in question is materially different from previous public announcements of the issuer on the subject; or
- the inside information regards the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or
- the inside information is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously communicated to the market, such as interviews, roadshows or any other type of communication organised by the issuer or with its approval.

This latter limb has resulted in issuers and their disclosure committees needing to monitor very closely whether, where inside information arises, such information could be said to contrast with signals already given by the issuer to the market.

The FCA is intending to comply with these guidelines and has consulted on amendments to DTR 2.5 (delay in the disclosure of inside information) in order to bring it in line with the ESMA guidelines. As with previous amendments to the DTRs in relation to MAR, the FCA intends to delete material that conflicts with or duplicates the ESMA guidelines and to cross-refer to the ESMA guidelines where appropriate. The consultation closed at the beginning of January 2017 and we expect the amendments to DTR 2.5 to come into effect in the first quarter of this year.

## Announcing inside information

As referred to above, where an issuer is announcing inside information to the market it must include rubric to that effect, and include the identity of the person making the notification and their position within the issuer. The form of rubric varies slightly but most announcements include the following wording – "This announcement contains inside information" – which is usually found in a prominent position at the top of the announcement.

Announcements of inside information must be located in an easily identifiable and freely accessible section of the issuer's website for five years. There is no need for a separate website section – these announcements can be included along with the other regulatory announcements but should be in chronological order.

1 [2014] UKUT 0233 (TCC)

## Insider lists

Issuers should have amended the form of their insider lists to ensure that they comply with the prescribed format laid down in the MAR Implementing Regulation (EU) No 347/2016. In addition, they should have updated systems in place to capture the additional information required, such as each insider's date of birth, birth name and personal mobile number. A number of issuers are now using bespoke software solutions to create and update their insider lists.

There is a divergence in approach to permanent insider lists. A permanent insider is someone who has "access at all times to all inside information". This is quite a high bar. Some issuers are taking the view that they have no permanent insiders and instead are drawing up project/event specific lists each time there is clear potential for a new piece of inside information to come into existence, such lists then become insider lists at the time the project or event is considered to have become inside information. Other issuers (often smaller companies with fewer compliance staff) are keeping permanent insider lists which may include the board of directors, the executive committee and the company secretary. Each employee of an issuer on the insider list must provide written acknowledgement of the legal and regulatory duties that being on the insider list entails and the related sanctions – we are seeing some issuers requesting this acknowledgement from all potentially relevant employees (even if they are not an insider at the time) and other issuers refreshing this acknowledgement annually.

Professional advisers are continuing to maintain their own separate insider lists. Issuers should inform advisers when they are sharing inside information with them and check that all relevant adviser engagement letters require advisers to maintain MAR-compliant insider lists. When issuers share inside information with professional advisers who are not likely to be familiar with the requirements of MAR (such as surveyors), we suggest issuers remind such advisers of their obligations under MAR.

One area of confusion that does appear to have arisen under the new regime is that we are seeing some issuers seeking to impose an obligation to put in place and maintain an insider list on counterparties to a transaction with the issuer. Whilst an issuer should put in place confidentiality arrangements with a counterparty, MAR does not require an issuer to impose an obligation on third parties who are not acting on behalf of the issuer to maintain an insider list.

## Share dealing codes

Whilst the express requirement in the Listing Rules to put in place a share dealing code was deleted and there is no MAR requirement for issuers to have a share dealing code, given the restrictions in MAR on persons discharging managerial responsibilities (**PDMRs**) dealing during a closed period, the majority of issuers have adopted the ICSA, GC100 and QCA specimen share dealing code or a bespoke version of this. A number of issuers have chosen voluntarily to extend their closed periods beyond the required 30-day period and others have imposed an additional requirement on PDMRs to use best endeavours to prevent those persons closely associated (**PCAs**) with them from themselves dealing during closed periods.

## Notification of PDMR transactions

Whilst MAR enables PDMRs and their PCAs to notify transactions in the issuer's securities only once the value of the transactions has exceeded €5,000 in any calendar year, our experience is that many issuers in the UK have ignored this requirement and require PDMRs and their PCAs to notify all transactions in order to avoid the additional administrative burden of having to establish if/when this threshold is reached. However, we understand that this is not the case in all European countries and the Central Bank of Ireland, for example, will not accept notifications under the €5,000 threshold.

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