May 2016

EU Market Abuse Regulation: Implementation update

The FCA has published the changes to its handbook which will deal with the implementation of the Market Abuse Regulation ("MAR").

The FCA has confirmed that its proposed rule changes, dealing with implementation of the new market abuse regime, will be adopted broadly as proposed, with minor amendments and one significant exception in relation to its proposals on the Model Code (see below). The rules are set out in policy statement PS 16/13, published on 28 April 2016.

In this briefing we look at what has been clarified, what questions are outstanding and how listed companies should now proceed to ensure that their internal procedures are MAR-compliant.

For background on the proposals set out in consultation paper 15/35, please see our recent briefing: *EU Market Abuse Regulation: What must listed companies do now?*.

TIME TO ACT

Prior to publication of the policy statement, companies and their advisers have hesitated to finalise new MAR-compliant policies and procedures due to the uncertainties as to the FCA's position in certain areas. However, given the implementation date of **3 July 2016**, listed and AIM companies and their advisers must now work with the new rules, and what guidance is currently available, to ensure that they have MAR-compliant policies and procedures in place by 3 July.

SOME ANSWERS, MORE QUESTIONS

The policy statement gives answers to some questions that were expressly included in the consultation:

- the Model Code will be deleted, but the proposed new Annex to Listing Rule 9 – which suggested that issuers should refuse clearance to deal during additional periods (but lacked clarity as to what those periods should be) – will not be adopted. The FCA has recognised concerns that this would impose a two-tier clearance system without sufficient certainty;

- a threshold of EUR 5,000 for notifications of directors'/senior managers' dealings will be introduced (although disclosure may be made beneath this threshold); and

- with regard to delays in the disclosure of inside information, the FCA will not exercise its option to require explanations from issuers of every delay in disclosure, and explanations will only be required on request. However, proper records of the details of delays will need to maintained, and issuers will need to notify the FCA each time disclosure has been delayed.

The consultation gave rise to many other questions and requests for guidance. The FCA lists these in the policy statement, saying that it is considering the approach for these issues and that if it considers that it would be appropriate to address any of the matters with further guidance, it will endeavour to bring this forward, via either European level or domestic guidance.

THE OUTSTANDING ISSUES: HOW SHOULD LISTED COMPANIES PROCEED?

SHARE DEALING CODES: CLOSED PERIODS AND PDMR DEALINGS

Closed Periods

MAR imposes "closed periods" (during which directors and senior management (**PDMRs**) may not deal in the company's shares) of 30 days before the publication of annual and interim reports that are required to be published in a company's home jurisdiction. In its consultation on MAR implementation, the FCA proposed to replace the Model Code with guidance that required companies to consider imposing additional periods during which clearance to deal would not be granted. Although it appeared that such periods would correspond to the existing prohibited periods under the Model Code, it was not considered sufficiently clear what these periods should be.

The FCA has now confirmed that it will not proceed with this requirement, as it was persuaded by respondents' concerns that the proposed guidance did not contain the necessary certainty. However, the FCA noted and supported the statement by practitioners that it may be helpful for an industry body to produce a standard dealing code to be followed outside of the MAR closed periods.

We would recommend that companies now prepare new share dealing codes, complying with the MAR provisions on closed periods. In view of the fact that MAR does not contain the concept of a "prohibited period" outside of a closed period during which unpublished inside information exists, companies may wish to maintain such prohibited periods (and relevant exemptions), pending the introduction of any standard dealing code by an industry body.

Preliminary Statements

The FCA was asked for guidance as to whether a 30-day closed period under MAR will precede the announcement of a preliminary statement of annual results. Under the Listing Rules, preliminary statements are not mandatory but, if prepared, must be published and therefore, arguably, trigger a closed period. Practitioners are keen to ensure that (a) there will continue to be a closed period immediately preceding the publication of a preliminary statement and that (b) the subsequent publication of the company's annual report will not trigger a second closed period.

We hope that clarification on these points will be received before 3 July. In the absence of further guidance, companies should consider the implications of there being two 30-day closed periods, by reference to both the preliminary results and the annual report. This will have implications for share scheme timetables and dealing windows, particularly where companies wish to make awards following preliminary results.

Dealing During MAR Closed Periods

Practitioners have requested guidance on what dealings may take place during the new 30-day closed periods under MAR. This is particularly important in relation to all-employee share schemes.

The FCA's list of issues for further consideration includes supplementing the non-exhaustive list of transactions that are permitted during a closed period, set out in Article 9 of Commission Delegated Regulation 2016/522.

In the absence of further guidance, listed companies should review their share schemes (in particular their all-employee share schemes) with their advisers and seek advice about any transactions involving PDMRs which are likely to take place in MAR closed periods, to ensure that these will be exempt from the prohibition on dealing during closed periods.

Dealing Outside MAR Closed Periods

Following the deletion of the Model Code, companies may also want to consider what, if any, dealings outside the MAR closed periods may take place at times when inside information exists. Under MAR, there is a new presumption that a person who deals while in possession of inside information has used it. Such dealings should only be entered into in circumstances in which the presumption of insider dealing can be rebutted, for example, where a pre-existing commitment is involved.

DEALINGS BY DIRECTORS AND PDMRS: NOTIFICATION

Companies should update their procedures to ensure that PDMRs notify them and the FCA of any dealings within the new deadline of three business days and that the company will be in a position to announce the dealing by the same deadline.

The FCA may provide further guidance as to the timing issues which arise from the PDMR and the company being subject to the same disclosure deadline, but companies should not delay in putting these procedures in place pending such guidance. The FCA may also provide guidance on the exchange rate applicable to the new EUR 5,000 de minimis threshold under MAR, below which dealings need not be notified. In our view however, it may be simpler for companies to continue to announce all PDMR dealings.

INSIDER LISTS

Companies should now put in place procedures for keeping insider lists in the new format prescribed by ESMA as set out in Commission Implementing Regulation 2016/347.

Certain questions remain, such as:

- whether UK PDMRs are required to provide a "National Identification Number";
- whether advisers to the company can require their own advisers (e.g. lawyers to the financial advisers) to maintain their own insider lists; and
- what happens if a person refuses to provide personal information.

The FCA may provide guidance on these and other technicalities, but the important thing for an issuer is to put the systems in place to produce the new-style insider lists from 3 July.

DELAY IN DISCLOSURE OF INSIDE INFORMATION

With regard to the circumstances in which companies may be justified in delaying disclosure of information, the FCA consulted, in a separate consultation paper (CP15/38) as to whether it should amend the Disclosure and Transparency Rules to clarify that issuers may have a legitimate reason to delay disclosure in circumstances other than the examples listed in DTR 2.5.

ESMA Guidelines to be made under MAR will set out a non-exhaustive set of circumstances in which an issuer may have a legitimate interest to be protected by a delay in disclosure. However these have not been finalised, so the FCA has decided not to make this amendment yet.

Companies should nevertheless consider the draft ESMA Guidelines when deciding when disclosure may be delayed. As set out in our previous *briefing*, listed companies must put in place procedures to ensure compliance with the record keeping and notification requirements under MAR with regard to delaying disclosure.

AIM companies should also note that they need to continue to comply with AIM Rule 11 (Disclosure of price sensitive information) as well as their disclosure obligations in relation to inside information under MAR, and that compliance with the AIM Rules will not necessarily mean that they have satisfied their obligations under MAR (or vice versa).

MARKET SOUNDINGS

When putting in place the policies and procedures required for MAR compliance, companies should also ensure at they will be able to comply with the new market soundings provisions under the new regime. For further information please see our recent briefings: *EU Market Abuse Regulation: What must listed companies do now?* and *EU Market Abuse Regulation and Asset Managers: Guidelines for Persons Receiving Market Soundings*.

This memorandum is necessarily only a summary of the key issues for listed companies arising from the incoming EU MAR regime. It should not be taken as a substitute for bespoke advice. We are happy to provide more detailed guidance for clients upon request.

FOR FURTHER INFORMATION, PLEASE CONTACT

10 Snow Hill
London EC1A 2AL
T: +44 (0) 20 7295 3000
F: +44 (0) 20 7295 3500
www.traverssmith.com

Adrian West
Partner, Corporate Finance

E: Adrian.west@traverssmith.com
T: +44 (0) 20 7295 3419

Richard Spedding
Partner, Corporate Finance

E: richard.spedding@traverssmith.com
T: +44 (0) 20 7295 3284