Briefing

BURGES SALMON

Fraud and White Collar Crime

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Method in the MADness: The new Market Abuse Regulation

The EU's market abuse framework will shortly be overhauled. The Market Abuse Directive is being repealed by the Market Abuse Regulation (MAR). MAR will have direct effect in each EU member state, making it immediately effective in UK law when it comes into force on 3 July 2016. The UK's existing market abuse provisions in the Financial Services and Markets Act 2000 will also be replaced by the new regime.

MAR intends to strengthen and broaden the existing regime and establish a common regulatory framework for market participants in respect of unlawful behaviour in financial markets - including insider dealing and market manipulation.

We summarise the key changes to the existing market abuse regime, below.

Extended scope

The market abuse regime will continue to apply to financial instruments traded on all regulated markets. MAR will extend the regime further to regulate conduct related to securities traded on Multilateral Trading Facilities (non-exchange trading venues) and Organised Trading Facilities (trading systems focused on non-equities).

The new regime will also extend to attempted market abuse and the cancellation of orders. This means that infringements will occur even in circumstances were no securities were actually acquired as a result of market abuse.

Furthermore, non-EU market participants, trading primarily outside of the EU, will now be captured by the regime, provided those securities are also traded at one of the EU venues.

Inside information

Whilst broadly similar to the previous regime, MAR expands the definition of inside information.

To be inside information, information must be precise, not in the public domain, be related directly or indirectly to an 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. It is information that a "reasonable investor" would be likely to use as part of his or her investment decision.

Issuers are still required to disclose inside information directly concerning them to the public, as soon as possible. However, under MAR, an issuer will be able to delay its disclosure if:

- The delay is intended to protect a legitimate interest;
- The issuer can ensure that the information remains confidential; and
- The delay is not likely to mislead the market.

There is now also an obligation for an issuer to, immediately after the information is made public, notify the relevant competent authority of its decision to delay disclosure and, if requested by the competent authority, particularise how the conditions for delay were satisfied. Market participants will also be obliged to ensure that they maintain adequate records of the circumstances surrounding the delay.

Insider lists

The rules relating to insider lists are largely preserved under MAR. Issuers remain obliged to maintain a list of those people working for it who have access to insider information, relating directly or indirectly to the issuer, whether on a regular or occasional basis.

However, a new pro-forma, proposed by the draft ESMA technical standards, specifies the format and contents of the insider lists on a more prescriptive basis than the previous regime, requiring, for example, the inclusion of insiders' personal contact information.

MAR provides for greater flexibility for issuers admitted to SME growth markets (which is likely to include AIM in the UK) and exempts them from maintaining insider lists, provided they take all reasonable steps to ensure that any person with access to inside information acknowledges the legal and regulatory duties that this entails, and is aware of the relevant sanctions in respect of insider dealing and the unlawful disclosure of inside information. The issuer will also need to be able to provide an insider list to the competent authority, if requested.

Market sounding

Market soundings are communications made to selected investors in advance of new issues in the capital market. The purpose of the communication is to "sound out" the issue's likely success. These soundings will often conflict with the prohibition against the disclosure of unauthorised inside information.

The new regime introduces a carve-out from the general prohibition against disclosure of inside information. Prior to the announcement of a transaction, the disclosing market participant can communicate information, to one or more potential investors, to gauge their interest in the proposed transaction and the conditions relating to it.

Before conducting its market sounding, an issuer or other disclosing market participant, must assess whether the market sounding will involve the disclosure of inside information, and must make a written record of its determination, which is to be made available to the regulator on request.

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The market soundings exemption will apply where the disclosing market participant:

- Obtains the consent of the person receiving inside information;
- Informs the recipient about the prohibitive provisions relating to insider trading contained in MAR; and
- Informs the potential investor that it will be obliged to keep the inside information confidential.

The disclosing market participant must create and maintain a record of all information given to potential investors who receive a market sounding, and those records must be provided to the competent authority on request. Records must be kept for five years.

Person Discharging Managerial Responsibilities (PDMR)

A PDMR continues to be defined as a director of the issuer or a senior executive, not being a director, who has regular access to inside information concerning the issuer and has power to make managerial decisions affecting the issuer's future development and business prospects.

The market abuse regime continues to require public disclosure of transactions in shares, debt instruments and derivatives, or other financial instruments linked to them, by a PDMR or persons closely associated with them (broadly, spouses, dependent children, co-habiting family members, and companies controlled by the PDMR).

The PDMR (or associated person) is obliged to notify both the issuer and the relevant competent authority of the dealing within three business days of the transaction, a reduction from four days under the previous regime. The issuer must make the information public within the same three day period.

MAR dictates, however, that an aggregated threshold of €5,000 will apply to dealings before the notification requirement bites, and it provides that the competent authority has scope to increase this de-minimis threshold to €20,000.

In a significant change, MAR also stipulates a legal closed period which expressly prohibits trading by PDMRs on their own account, or for the account of a third party, except in limited specified circumstances, 30 days prior to the publication of financial results.

The FCA is considering supplementing MAR in this area by introducing new rules requiring PDMRs of premium listed companies to obtain clearance before dealing in their company's securities at any time, not just during MAR's "closed periods".

Next steps for market participants

Issuers and market participants should consider taking the following steps in order to prepare themselves for the 6 July 2016 enactment of MAR:

- Update policies and procedures in respect of disclosure of inside information, and the creation and maintenance of records in situations where disclosure is delayed.
- Monitor whether the ESMA draft template for insider lists is adopted and, if necessary, update insider lists accordingly to ensure compliance.
- Amend internal policies with regards to share dealings on the account of PDMRs or persons associated with them.
- Ensure that directors and other PDMRs are fully briefed on their new obligations

The FCA, as the UK's competent authority, has discretion regarding the detailed implementation of MAR. On 5 November 2015, the FCA began its consultation regarding its proposals for the changes to the FCA Handbook required in order to implement MAR in the UK. The deadline for responding to the consultation was 4 February 2016 and the FCA is due to publish its feedback statement in Spring 2016. We will cover these, and future, developments in respect of the new market abuse framework in a further briefing.

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