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FCA Consultation Paper on the implementation of the Market Abuse Regulation in the UK

On November 5, 2015, the UK's Financial Conduct Authority ("FCA") published a consultation paper ("CP")¹ setting out proposed reforms to the FCA Handbook (the "Handbook") arising from the Market Abuse Regulation ("EU MAR").² The consultation closes on February 4, 2016, following which the FCA will publish a Policy Statement setting out the final Handbook provisions. The FCA consultation is premised on the existing working drafts of EU MAR implementing measures which have not yet been finalized. If these measures are subject to material change, the FCA may conduct a second consultation.

EU MAR was adopted by the European Parliament and published in the Official Journal of the European Union in June 2014. EU MAR updates the civil market abuse framework presently established under the Market Abuse Directive ("MAD").³ In the United Kingdom, the MAD is implemented through Part VIII of the Financial Services and Markets Act 2000 ("FSMA"), supplemented by the Handbook. The current regime will remain in force until July 3, 2016, when it will be replaced by the EU MAR.

Because EU MAR is a Regulation, which will apply directly in the UK with no need for its implementation through national legislation, it will be necessary to repeal or modify existing domestic provisions that conflict with EU MAR. In addition, the Handbook will no longer contain rules relating to the application of the market abuse regime. Instead, the provisions relating to market abuse will be framed as guidance.

This memorandum summarizes the key changes to the Handbook proposed by the FCA as a result of the EU MAR implementation and their practical implications.⁴

¹ CP 15/35 Policy proposals and Handbook changes related to the implementation of the Market Abuse Regulation (2014/596/EU). The text of the CP is available [here](#).

² Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. Text of the Regulation is available [here](#).

³ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). The text of MAD is available [here](#).

⁴ For more information on the provisions of MAD and EU MAR, together known as MAD II, please consult the relevant Cleary alert memorandum, available [here](#).

The FCA Consultation Paper – an overview

A. Limited Discretion

Although EU MAR is directly applicable in the UK, the EU MAR granted competent authorities limited discretion regarding the domestic implementation of certain provisions related to the public disclosure of inside information and managers' transactions:

(a) Public disclosure of inside information⁵

EU MAR requires issuers and emission allowance market participants ("**EAMP**") to inform the public of inside information which directly relates to the issuer. Public disclosure can be delayed⁶, provided that three conditions are met: (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer or EAMP; (ii) delay of disclosure is not likely to mislead the public; and (iii) the issuer or EAMP is able to ensure confidentiality of that information.

If a decision to delay disclosure is taken, the competent authority must be informed and a written explanation must be provided as soon as the information is disclosed to the public. EU MAR allows issuers and EAMPs to provide this explanation only if the competent authority requests it. The FCA considers that these notifications of delay could become burdensome for certain firms and it proposes to require such explanations only upon request.

(b) Managers' transactions⁷

As a preventative measure against market abuse, persons discharging managerial responsibilities ("**PDMRs**") within an issuer or EAMP, and persons closely associated with them, must notify all transactions in specified financial instruments to the issuer or the EAMP. The notification must be made once a threshold, within each calendar year, has been crossed. The information must then be made public.

The *de minimis* threshold is set at €5,000, but competent authorities may raise it to €20,000. The FCA proposes to retain the default threshold of €5,000.

⁵ Art 17 EU MAR

⁶ Art 17(4) EU MAR

⁷ Art 19 EU MAR

B. Proposed changes to the Handbook

Three areas of the Handbook are proposed to be redrafted:

- (a) To ensure consistency with EU MAR, the provisions within the FSMA that empower the FCA to provide guidance on conduct that constitutes market abuse will be repealed.⁸ As a result, the Code of Market Conduct (“**COMC**” or “**MAR 1**”), which currently provides such guidance, will be subject to significant amendment.
- (b) The Model Code forms part of the Listing Rules (“**LR**”) module of the Handbook. It requires PDMRs of premium listed companies to seek the issuer’s consent to deal in the company’s securities and prohibits such dealings during certain periods. The Model Code is partially incompatible with the EU MAR provisions which govern dealings by PDMRs during closed periods. It is proposed to replace the Model Code with FCA guidance for firms to use when developing their processes related to applications for clearance to deal.
- (c) Under EU MAR, the FCA will no longer be empowered to promulgate the Disclosure Rules, which are currently part of the Disclosure and Transparency Rules (“**DTR**”) in the Handbook. Consequently, the Disclosure Rules will be replaced with “Disclosure Guidance”. The Transparency Rules⁹ will remain unchanged.

In summary, the FCA proposes four alternative approaches to the alignment of certain Handbook provisions with MAR. The current text may be (i) removed and replaced with a “signpost” to the relevant EU MAR provision; (ii) maintained unchanged – if no equivalent EU MAR clause is available; (iii) maintained and conformed to EU MAR; or (iv) removed altogether, because they are no longer compatible with EU MAR.

Abolition of the Model Code

One of the most noteworthy consequences of the implementation of EU MAR is the proposed abolition of the Model Code.¹⁰ The Model Code, which is part of the LR, presently prohibits dealing by a PDMR in the securities of a premium listed company of which he or she is a PDMR during prohibited periods and requires a PDMR to seek

⁸ Sections 119 and 122 FSMA

⁹ Promulgated to ensure compliance with Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. Text of the Directive available [here](#).

¹⁰ The Model Code can be found in the Annex 1, Chapter 9 of the LR in the Handbook.

clearance for any dealing. As such, the Model Code provides a means of ensuring consistency in approach across the market.

Subject to certain exceptions, EU MAR prohibits dealings by a PDMR during a closed period of 30 days before the announcement of an interim financial report or of a year-end report which the issuer is obliged to make public according to national law or to the rules of the trading venue where its shares are admitted to trading. EU MAR does not, however, include any provisions requiring a PDMR to seek clearance to deal outside of such a closed period.

As a result, the FCA has taken the view that the Model Code is incompatible with EU MAR so far as it relates to dealing during a closed period. However, the FCA proposes to require premium listed issuers to maintain effective systems and controls requiring PDMRs to apply for clearance to deal in securities of the issuer. The FCA will issue guidance for premium listed companies when developing these procedures.

The guidance is intended to assist issuers in creating their own procedures. It will cover matters such as: (i) the circumstances in which a PDMR must obtain clearance to deal; (ii) who can grant such a request within a company and timeframes to respond to such requests; (iii) the periods in which PDMRs may deal once they received clearance; and (iv) the nature of assessments carried out in relation to granting clearance, and associated record-keeping obligations. The FCA will consult separately on the provisions regarding company dealings during closed periods.¹¹

The provisions of EU MAR with respect to dealings by PDMRs during closed periods have been the subject of criticism from practitioners due to the lack of clarity with respect to the definition of “closed period”, as well as with respect to the definition of “dealing” and the applicability of exemptions. In particular, the FCA has been asked to clarify whether the language of EU MAR can accommodate a closed period which commences on the announcement of a preliminary statement of annual results, as under the Model Code, rather than upon publication of the annual report.

The new requirements for systems and controls regarding PDMR dealings also run the risk of creating a parallel regime, super-equivalent to the EU MAR, but based upon definitions within EU MAR which lack clarity. In practice, it is likely that such an approach will result in two confusing sets of rules, which will generate inconsistent enforcement of the rules and increased compliance costs for the issuers.

¹¹ LR 9.2 and LR 12 Handbook

Main changes to the COMC

The FCA proposes that it will retain as much as possible of the COMC in order to assist market participants to understand the new market abuse regime and the FCA's expectations.

A. Market abuse – general¹²

- (a) Market abuse offences such as insider dealing¹³ and improper disclosure¹⁴ employ the concept of “inside information”. Inside information is information of a precise nature which would, if generally available, be likely to have a *significant effect on the price* of the qualifying investments or on the price of related investments.¹⁵ The current regime¹⁶ also provides that information would be likely to have a significant effect on price only if it is information of a kind which a *reasonable investor* would be likely to use as part of the basis of his investment decisions. There has been much debate around these concepts and the interplay between the two tests (i.e., the “price sensitivity test” and the “reasonable investor” one).
- (b) The existing market abuse test¹⁷ will be removed and replaced with signposts to EU MAR provisions.¹⁸ The test itself has not changed, but under the new regime it is possible that the “reasonable investor” assessment might take precedence over the “price sensitivity test”, depending on the manner in which this provision will be interpreted, once EU MAR takes effect.
- (c) The FCA guidance illustrating behavior amounting to market abuse¹⁹ will be removed, because it is incompatible with EU MAR. Existing provisions concerning the degree to which behavior prior to a request for admission to trading could constitute market abuse²⁰ and the guidance on the factors to consider when deciding if omissions may be indications of

¹² MAR 1.2

¹³ S 118(2) FSMA

¹⁴ S 118 (3) FSMA

¹⁵ S 118C(2) FSMA

¹⁶ S 118C(6) FSMA

¹⁷ MAR 1.2.2

¹⁸ Art. 2, 14, 15 EU MAR

¹⁹ MAR 1.2.4.G

²⁰ MAR 1.2.5E

market abuse²¹ will be retained with amendments, because the FCA has concluded that EU MAR does not cover these aspects.

- (d) The concept of a “regular user” will no longer exist from July 2016, as it is not compatible with EU MAR. The regular user is essentially a hypothetical reasonable person who regularly deals on the market. Under the current regime, the regular user test²² determines, amongst other things, whether behavior creates or is likely to create a false or misleading impression or distorts the market.
- (d) Furthermore, the COMC provisions²³ relating to the behavior which amounts to requiring or encouraging persons to engage in market abuse will also be repealed, because EU MAR merely prohibits recommending or inducing a person to engage in market abuse.

B. Insider dealing²⁴

- (a) EU MAR introduces a new definition of insider dealing. This definition is broader than the concept under the current regime and governs instances where a person acquires or disposes of financial instruments in relation to which it possesses inside information, on his own account or for a third party, directly or indirectly. Cancelling or amending orders on the basis of inside information, even in circumstances in which the person did not possess that inside information at the time the order was originally placed, will constitute insider dealing.²⁵

Nevertheless, the FCA intends to retain the non-exhaustive list of conduct that amounts to market abuse²⁶ in order to assist the market when determining the types of behavior that constitute insider dealing.

- (b) The “Chinese wall”²⁷ safe harbor is not compatible with EU MAR and will be removed. The FCA will no longer be able to conclude definitively that insider dealing did not occur, merely because a Chinese wall was in

²¹ MAR 1.2.6E

²² S 118 FSMA and MAR 1.2.20G – 1.2.21G

²³ MAR 1.2.22

²⁴ MAR 1.3

²⁵ Art 8(1) EU MAR

²⁶ MAR 1.3.2.E

²⁷ MAR 1.3.5E: *An arrangement that requires information held by a person in the course of carrying on one part of its business to be withheld from, or not to be used for, persons with or for whom it acts in the course of carrying on another part of its business.*

place. However, it is likely that information barriers will continue to be used by market participants.

- (c) To avoid narrowing the scope of the EU MAR, the FCA proposes removing a provision which currently provides that the conduct of market makers and persons lawfully dealing on their own account when pursuing their legitimate business of such dealing, will not in itself constitute market abuse.²⁸ The related guidance²⁹ will also be removed.

*C. Improper disclosure*³⁰

- (a) The offence of improper disclosure will be replaced by the EU MAR offence of unlawful disclosure.³¹ The FCA notes a clear overlap between both offences, which apply to an insider who unlawfully discloses information other than in the proper course of his employment or duties. The factors to be considered when deciding whether conduct amounts to improper disclosure³² will be conformed with EU MAR and re-issued as guidance.

D. Trading information

- (a) Information related to investments that have been or are to be acquired or disposed of, or that an acquisition or disposal of investments is under consideration or the subject of negotiation constitutes “trading information”.³³ The EU MAR changes to insider dealing and improper disclosure (discussed above) have led the FCA to conclude that the concept of trading information is no longer compatible with the new market abuse regime. Trading solely on the basis of trading information will no longer be considered acceptable and all the existing provisions related to trading information will accordingly be deleted.

²⁸ MAR 1.3.7C

²⁹ MAR 1.3.8G

³⁰ MAR 1.4: (...) *where an insider discloses inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duties.*

³¹ Art 10 EU MAR: *Unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.*

³² MAR 1.4.5.E

³³ MAR 1.3.2E

E. Manipulating transactions, Dissemination, Misleading behaviors, Market distortions

- (a) The COMC sets out descriptions of behavior to assist market participants in deciding whether specific types of conduct amount to manipulating transactions.³⁴ The FCA will retain most of these provisions, to the extent compatible with EU MAR, in order to provide additional guidance on the application of the new regime. The European Commission (“**EC**”) will also provide further guidance on an EU MAR list of indicators of manipulative behavior relating to price securing and to false or misleading signals.³⁵
- (b) The FCA will replace its examples of manipulative behaviors³⁶ with a signpost to EU MAR, but will retain with amendments the guidance setting out certain factors to be considered when determining whether or not a person disseminating information did know, or could reasonably have been expected to know, that the information was false or misleading.³⁷

These changes result from an overlap between the existing FCA provisions³⁸ and the EU MAR prohibition on the dissemination of false or misleading information.³⁹

- (c) The majority of the COMC provisions concerning misleading behavior and distortion⁴⁰ will be removed and, where appropriate, replaced with a signpost to EU MAR, because the COMC guidance is not compatible with EU MAR.

E. Stabilization⁴¹

- (a) Certain of the stabilization rules which describe the extent to which stabilization can provide a safe harbor for market abuse will be replaced by EU MAR provisions.⁴² The FCA intends to retain the provisions which

³⁴ MAR 1.6

³⁵ EU MAR Annex 1(A) (Indicators of manipulative behaviour relating to false or misleading signals and to price securing)

³⁶ MAR 1.8.6E

³⁷ MAR 1.8.5E

³⁸ MAR 1.8

³⁹ Art 12(1)(c) EU MAR

⁴⁰ MAR 1.9

⁴¹ MAR 2

⁴² Art 5 EU MAR

provide guidance in relation to “adequate public disclosure”⁴³ and the guidance which outlines details of where notifications should be made.⁴⁴

*F. Benchmarks*⁴⁵

- (a) EU MAR introduces a new civil prohibition on manipulating benchmarks⁴⁶, which will supplement the existing UK regime⁴⁷ which governs conduct in relation to the submission and administration of eight specific benchmarks. These new requirements will apply to a larger number of market participants and to a wider range of benchmarks. However, the Handbook provisions relating to the UK regime will be retained. A signpost to EU MAR⁴⁸ will be added to the COMC in order to assist the benchmark submitters and administrators in understanding the EU MAR requirements.

Main changes to the DTR

The implementation of EU MAR in the UK will impact not only on the COMC section of the Handbook, but also on the DTR. The most significant changes are set out below.

*A. Application and purpose*⁴⁹

- (a) DTR 1 provides details on the application and purpose of the DTR rules on suspension of trading, market abuse safe harbors and sanctions. EU MAR⁵⁰ contains a series of broadly parallel provisions. Accordingly, the rule describing the applicability of the DTR to various types of issuers and PDMRs⁵¹ will be removed and replaced by guidance. While the FCA will no longer have the power to make Disclosure Rules, the market participants will continue to be able to consult with the regulator on disclosure requirements.⁵²

⁴³ MAR 2.3.6G describes “adequate public disclosure” as, amongst other things, disclosure through a regulatory information service.

⁴⁴ MAR 2.3.9G

⁴⁵ MAR 8

⁴⁶ Art 15 EU MAR: *A person shall not engage in or attempt to engage in market manipulation.* According to Art 2(2) (Scope) EU MAR, Art 15 also applies to *behaviour in relation to benchmarks.*

⁴⁷ MAR 8

⁴⁸ Art 2(2), 12 and 15 EU MAR

⁴⁹ DTR 1.1

⁵⁰ Art 17-19 EU MAR

⁵¹ DTR 1.1.1R

⁵² DTR 1.2.4G and 1.2.5G will be maintained

*B. Information gathering and publication*⁵³

- (a) The provisions establishing various FCA powers in relation to information gathering⁵⁴ conflict with the EU MAR Articles governing both the powers of competent authorities and the public disclosure of inside information (see below)⁵⁵ and will largely be removed.
- (b) An upcoming Treasury Statutory Instrument will grant the FCA powers to request information from issuers, PDMRs and their connected persons . These powers will be similar to those that the FCA is empowered currently to exercise under the current regime.⁵⁶ This Statutory Instrument is also intended to furnish the FCA with powers to require the issuer to publish information in a format and timeframe that the regulator regards as appropriate for the purposes of investor protection. In effect, the current Handbook rule⁵⁷ will be replaced by secondary legislation. Moreover, the FCA is currently discussing with the Treasury the most appropriate manner by which it may retain its powers to require issuers to take all reasonable care to ensure the notified information is not false, misleading or incomplete.

*C. Suspension of trading*⁵⁸

- (a) The FCA power to suspend trading in financial instruments if they suspect a breach of the DTR will be removed. However, in order to comply with EU MAR requirements⁵⁹, similar powers of suspension will be included in the UK legislation.

*D. Disclosure of inside information*⁶⁰, *Delaying disclosure of inside information*⁶¹

- (a) The current rules and guidance on the disclosure and control of inside information, including rules on permissible delays in disclosing such information to the market⁶² will be replaced by EU MAR provisions

⁵³ DTR 1.3

⁵⁴ DTR 1.3

⁵⁵ Art 17(1) and Art 23 EU MAR

⁵⁶ DTR 1.3.1R

⁵⁷ DTR 1.3.3R

⁵⁸ DTR 1.4

⁵⁹ Under Art 23(2)(j) EU MAR, the competent authorities will be granted the power to suspend trading of financial instruments. A similar power will be inserted in Part 8 FSMA.

⁶⁰ DTR 2.2

⁶¹ DTR 2.5

⁶² DTR 2

covering inside information and its public disclosure, as well as requirements relating to insider lists.⁶³

- (b) The FCA plans to retain as guidance the rule which requires issuers involved in a matter falling within the scope of the Takeover Code to comply with the DTR.⁶⁴ This approach is taken to indicate that such issuers will also have to comply with their disclosure obligations under EU MAR.
- (c) The existing FCA rules applying to the decision to delay disclosing inside information⁶⁵ will be largely replaced by EU MAR.⁶⁶ In particular, the rule governing the nature of a “legitimate interest”⁶⁷ will be retained as guidance only. Where the “legitimate interest” test is met, an issuer may delay the disclosure of inside information, in particular when the information is at an unformed stage and of little benefit to the market. At the moment, a legitimate interest may arise in the context of (i) ongoing negotiations where the outcome of those negotiations would be likely to be affected by public disclosure or (ii) decisions taken or contracts made by the management of an issuer which have to be approved by another body of the issuer in order to become effective. In order to maintain the integrity of the regime and to ensure consistency with MAD and EU MAR, the FCA is consulting separately on the DTR provisions to delay disclosure of inside information and will issue its conclusions in early 2016.⁶⁸

The EU MAR rules regarding delays in disclosure of inside information will be supplemented by a set of the European Securities and Markets Authority (“**ESMA**”) guidelines, a list of indicative legitimate interests of issuers and a list of circumstances in which delays could be justified. The FCA has retained for the time being much of the existing guidance, but expects that a significant number of changes will have to be made once the ESMA guidelines are published in summer of 2016.

⁶³ Art 7, Art 17 and Art 18 EU MAR

⁶⁴ DTR 2.1.2R

⁶⁵ DTR 2.5

⁶⁶ Art 4, 5, 17 EU MAR

⁶⁷ DTR 2.5.3R

⁶⁸ FCA Consultation Paper on Provisions to delay disclosure of inside information within the FCA's Disclosure and Transparency Rules, CP 15/38

E. Control of inside information⁶⁹, Insider lists⁷⁰

- (a) The majority of the rules relating to the control of inside information and on access to inside information by issuers to persons other than those who require it for the exercise of their functions within the issuer will be replaced by EU MAR.⁷¹ The current rule⁷² setting out the arrangements that an issuer must have in place to permit such access to inside information will be converted to guidance.
- (b) Rules on the contents and maintenance of insider lists will be replaced by EU MAR⁷³ supplemented by technical standards, which will indicate both the format and the process for updating insider lists. It is expected that the new requirements will impose significant obligations on market participants, which will need to adapt their systems and controls regarding insider lists to ensure compliance with EU MAR.

F. Transactions by PDMRs and their connected persons⁷⁴

- (a) The current regime requires PDMRs and their connected persons to notify the issuer in writing of the occurrence of all transactions conducted on their own account in the shares of the issuer, or derivatives or any other financial instruments relating to those shares within four business days of the day on which the transaction occurred. This rule will be removed and replaced by EU MAR⁷⁵ and by the related technical standards, which are expected to specify the level of information that must be reported, as well as the forms which must be used to report it. The threshold of €5,000 within a calendar year which will trigger disclosure obligations (discussed above) will be reflected in the amended Handbook.

Future developments

The FCA is consulting separately on the DTR for delaying disclosure of inside information⁷⁶, which may impact some of the chapters covered by the consultation

⁶⁹ DTR 2.6

⁷⁰ DTR 2.8

⁷¹ Art 17 EU MAR

⁷² DTR 2.6.1R

⁷³ Art 18 EU MAR

⁷⁴ DTR 3

⁷⁵ Art 19

⁷⁶ See footnote 68

discussed above. A separate consultation on the implementation of MiFID II⁷⁷ will also follow, which may result in additional changes to the proposals. Moreover, the FCA has noted that the Handbook provisions may be subject to further modification following the release of the ESMA guidance. Issuers and their advisers will have to monitor these developments closely in order to ensure compliance with the full EU MAR regulatory framework.

Further Information

For further information on market abuse in general, please do not hesitate to contact [Simon Jay](#) or [David Toubé](#) in the London office, or any of your regular contacts at Cleary Gottlieb.

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⁷⁷ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. Text of the Directive available [here](#).

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