CLEARY GOTTLIEB

ALERT MEMORANDUM

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THE NEW MARKET ABUSE REGIME: THE FRAMEWORK SO FAR

On July 3, 2016, the Market Abuse Regulation ("**MAR**") will replace the civil market abuse framework established under the Market Abuse Directive ("**MAD**")[1]. As a regulation, MAR will have direct effect in the UK and will be enforced by the Financial Conduct Authority ("**FCA**")[2].

The European Securities and Markets Authority ("**ESMA**") published draft technical standards on 28 September 2015 ("**DTS**")[3] and a consultation paper on 28 January 2016 ("**CP**")[4]. These publications are currently in draft form and open to further amendment, but nevertheless provide an increasingly clear sense of the future framework under MAR. Many of the changes are likely to require significant updates to the systems and controls of market participants, including investment banks and companies with publicly traded securities in Europe as well as investors in those securities.

This memorandum sets out the key features of the proposed changes and provides practical guidance on how to deal with them.

SUMMARY OF KEY CHANGES

Scope and application MAD covers European regulated markets only. MAR will govern activities on European regulated markets, multilateral trading facilities and organised trading facilities (European Trading Platforms, "**ETP**"). MAR will therefore be triggered by the trading of a financial instrument on a single ETP, even if the admission to that ETP is not as a result of an application by the issuer.

Disclosure of managers' dealings MAD requires persons discharging managerial responsibilities ("**PDMRs**") of issuers of shares admitted to trading on a regulated market to report dealings in shares. MAR will extend this reporting requirement to PDMRs of issuers of shares, GDRs, debt securities and derivatives admitted to trading on any ETP, and requires reporting of dealings in a wide array of financial instruments, including debt.

Inside information MAR contains an updated definition of inside information, which is likely to widen the circumstances in which information must be reported to the market. The regime may afford greater flexibility to delay disclosure, but will result in enhanced regulatory scrutiny in relation to the reasons for delay. Prescribed systems and controls are required, including new recording requirements and more extensive insider lists.

Insider dealing MAR broadens the scope of insider dealing with the addition of new offences.

1 For an overview of the changes under MAR, please click here.
2 For an overview of the proposed changes in the UK, please click here.
3 Draft technical standards published on 28 September 2015, available here.
4 Draft guidelines published on 28 January 2016, available here.

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Market soundings ESMA guidance sets out extensive record keeping and other procedures which must be followed in relation to market soundings in respect of any non-public information, whether that information is inside information or not.

Suspicious order reporting The overall expansion of scope of the market abuse regime under MAR (for example, in the application to all ETPs) will result in additional obligations on market participants to report suspicious transactions and orders.

Investment recommendations Both MAR and ESMA guidance set out an updated investment recommendations regime with a significantly broader scope, incorporating a lower ownership threshold to trigger the regime and a new category of persons subject to the obligation.

SCOPE AND APPLICATION

MAD applies to financial instruments trading on a regulated market and related financial instruments. MAR will extend the scope of the regime to include financial instruments admitted to any ETP. In the UK, companies quoted on AIM will for the first time be covered by the European market abuse regime. Perhaps more importantly, international companies which to date have never been subject to the European market abuse regime will from July have to ensure that their behaviour does not fall foul of an unfamiliar set of rules.

Example:
A US listed company would be caught by the European market abuse regime if it has a single security (for example, a bond) admitted to trading on a single ETP, even if that platform is not a European regulated market and even if the issuer was not the one who arranged for that admission. The regime will therefore catch many companies whose securities are admitted to an ETP at the behest of a broker.

Many companies around the world that are unprepared to comply with the European market abuse regime will need to consider overhauling systems and procedures to deal with these rules, which may be significantly different to the equivalent rules in their home jurisdiction.

MANAGERS' DEALINGS

MAR appears to substantially enlarge the universe of senior employees[5] worldwide who will have to report transactions in securities. These changes may affect thousands of companies that currently have not been required to follow EU reporting requirements.

5 Senior employees covered will be those who fall within the definition of 'PDMR'. This includes members of the administrative, management or supervisory body of the entity, or senior executives who may not be board members but who do have regular access to inside information relating to the entity and have the power to take managerial decisions affecting the future development and business prospects of the entity.

The existing market abuse regime

Which managers must report? PDMRs (and their connected persons) of issuers of shares admitted to trading on a regulated market.	**Which transactions must be reported?** Transactions in shares, derivatives or any other financial instruments related to those shares.

The new market abuse regime

Which managers must report? PDMRs (and their associates) of issuers of shares or related financial instruments, GDRs, debt instruments, derivatives or other financial instruments linked to them if any of those securities are admitted to trading on an ETP.	**Which transactions must be reported?** Transactions in shares or related financial instruments, GDRs, debt instruments, derivatives or other financial instruments linked to them. The obligation to report will extend to transactions entered into by a discretionary asset manager.

Example:
PDMRs of a company with bonds admitted to trading on a multilateral trading facility will now be subject to the reporting obligation if they conduct a transaction in any of the following:

- *the public bonds of the issuer; or*
- *shares, GDRs, debt instruments, derivatives or other related financial instruments of the issuer, even if the PDMR holds no public bonds in the issuer and even if the only admission to trading is of those bonds.*

The obligation applies even if the transaction was conducted on a market that is not covered by MAR.

This unprecedented expansion of scope will, if confirmed by regulators, require all issuers with securities traded on an ETP to reconsider the position of PDMRs, update dealing codes and undertake comprehensive training.

In addition, the new regime also introduces the following changes:

- PDMRs and connected persons must disclose transactions within three business days (disclosure is currently required within four business days). Issuers must then publish the information to the market within three business days (disclosure is currently required as soon as possible, and in any event no later than the end of the business day following the receipt of the information).
- Reporting requirements will only apply if transactions over the value of €5,000 are carried out in a calendar year. A competent authority may raise this threshold to €20,000 if it informs ESMA and is able to justify its decision. In the UK, the FCA has indicated it will retain the €5,000 threshold.

The UK rules for PDMRs are currently set out in the Disclosure and Transparency Rules and the Model Code. The Model Code will be removed and replaced with MAR provisions, although the FCA seeks to retain some elements as guidance[6].

6 The result of this may be a two-tier dealing code, possibly with added requirements for premium-listed issuers, although details have not yet been confirmed by the FCA.

A number of issues with the application of the new regime in the UK are set out below.

Close periods	Connected persons
In the UK, PDMRs of premium listed companies are currently prevented under the Model Code from trading during "close periods", which consist of a specified number of days before the release of financial results. For issuers who publish preliminary results, "close periods" end with the announcement of those preliminary results to the market rather than the full audited accounts, on the basis that the market is then normally updated with all relevant information. Under MAR, close periods will end with the publication of the relevant financial report itself (in other words, the full audited accounts). If, as is common in the UK, a preliminary announcement is made with the full audited accounts following some time later, the PDMR and their connected persons appear to be prevented from dealing until the later publication date. MAR also does not adopt all of the exemptions to the "close period" rule currently available to PDMRs. The ability to trade in close periods may therefore be limited.	The FCA Handbook definition of "connected person" will be replaced with the MAR definition of "person closely associated" ("**PCA**"). However, this definition is not supplemented by the same level of detail that was given to the "connected person" definition. It will be crucial to establish clear definitions under the new regime, as both PDMRs and issuers are required to identify persons closely associated with them: PDMRs for the purpose of notifying PCAs of their obligations and issuers for the purpose of compiling a list of PCAs.

INSIDE INFORMATION

Changes in the definition of inside information

MAR defines inside information as follows: *"Information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments*". This will replace the current definition under MAD, which is broadly similar[7]. However, MAR also states that information likely to have a "significant effect" on price is information that a "*reasonable investor would be likely to use as part of the basis of his or her investment decisions*".

Under the current regime, the reasonable investor test is generally used as a guide to the meaning of price sensitive information. In other words, the determining test is whether information is price sensitive, and the reasonable investor test is used to assist in the identification of this information[8].

As the reasonable investor test becomes part of the definition of inside information under MAR, one will need to consider whether the information is such that a reasonable investor would be likely to use it as part of his or her investment decision, even if it

7 MAR also extends the definition of inside information to cover information relating to commodity derivatives.
8 For an example of the current approach in practice, please see Hannam v FCA (2014) (Upper Tribunal).

would not move the price of the relevant securities in any significant way[9]. The market will need to determine to what extent there has been a shift in the definition of 'inside information' from materiality towards mere relevance, and even if the market takes a narrower interpretation than the language permits, the courts may take a different view. The potential impact on disclosure of inside information and the insider dealing offence will therefore need careful thought on a case by case basis.

Changes in disclosure of inside information to the market

The DTS state that inside information should be publicly disclosed, enabling *'fast access and complete, correct and timely assessment of the information by the public*'. The information should also be posted on the issuer's website and maintained there for a minimum of five years. The website must contain the information in an easily identifiable location and clearly indicate the date and time of the disclosure.

The DTS seem to suggest that a party making such disclosure on its website must form a definitive judgment that the information constitutes 'inside information' and label it as such. In practice, it is often the case that issuers disclose information out of prudence because it *might* be inside information, without making a definitive determination on price sensitivity. A requirement to draw concrete conclusions at the point of each disclosure, and to label the information disclosed as inside information (if that is what is in fact required) will set a clearly identifiable precedent and may make it more difficult for issuers not to disclose similar information in the future, even where they consider that information not to be inside information. This practice may result in an unwarranted increase, by degrees, in the level of disclosure made by issuers.

Changes in the ability to delay disclosure of inside information

MAR retains the same wording for the basic criteria which must be met if an issuer is to delay disclosure of inside information[10], and additionally permits disclosure of inside information to be delayed in order to preserve the stability of the financial system[11]. Currently, the basic criteria that govern a delay of disclosure are interpreted very narrowly. ESMA's CP sets out a number of applicable situations in which delays may

9 The wording of this reasonable investor test is arguably broader than the US approach, which expressly turns on materiality of the information - in broad terms, information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment or considers the information as significantly altering the "total mix" of information available.

10 The criteria are: (i) disclosure is likely to prejudice the legitimate interests of the issuer; (ii) delay in disclosure is not likely to mislead the public; and (iii) the issuer can ensure the confidentiality of the information.

11 This is subject to a number of requirements and conditions, including that it must be in the public interest to delay the disclosure, that the confidentiality of the information can be ensured, and that the competent authority has consented to the delay on the basis that the relevant conditions are met.

be justified. If these proposals are adopted, the practical scope of the criteria under MAR will be broadened, as the examples indicate that “legitimate interests” could be varied and manifold.

Negotiations	The issuer is conducting negotiations, the outcome of which would likely be jeopardised by immediate public disclosure of the information. This is a situation that could justify delay in disclosure under the current regime.
Financial viability in grave and imminent danger	The financial viability of the issuer is in grave and imminent danger, although not within the scope of applicable insolvency law, where immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders, jeopardising the conclusion of the negotiations which are aimed at ensuring the issuer’s financial recovery. The ESMA guidance does not make clear whether the inside information that may be delayed is the status of the financial viability of the issuer, or something ancillary to that (for example, the existence or status of negotiations aimed at ensuring the issuer’s financial recovery). This is an important distinction, and was of great significance during the financial crisis. Currently, in the UK at least, it is not possible to delay disclosure on the status of the issuer’s financial viability itself: only the fact or substance of the negotiations to deal with such a situation may be delayed.
Dual-approval requirements	The inside information relates to decisions taken or contracts entered into by the management body of an issuer which need the approval of another body of the issuer to become effective (provided the issuer can meet additional conditions set out in ESMA guidance[12]). This situation will be less relevant for UK companies, which generally adopt a unitary board structure. This is also a situation that could justify delay in disclosure under the current regime.
Product development	The issuer has developed a product or an invention and the immediate public disclosure of the information is likely to jeopardise the intellectual property rights of the issuer.
Buying or selling major holdings	The issuer plans to buy or sell a major holding in another entity and immediate disclosure would jeopardise the conclusion of the transaction.
Public authority approval pending	If the issuer is involved in a transaction, the fact that this transaction is ongoing may be inside information and must be disclosed to the market unless the issuer can rely on another exemption (for example, that the issuer is conducting negotiations). However, if the transaction is subject to public authority approval and is conditional upon additional requirements, disclosure of these additional requirements may be delayed. This exemption only covers circumstances in which immediate publication of the requirements would likely affect the ability to fulfill them, and would therefore prevent the final success of the transaction.

12 ESMA indicates that this does not cover decisions which are referred between boards as a matter of usual practice.

ESMA notes that there may be other cases which justify a delay in disclosure, but it is for the issuer to explain the way in which immediate disclosure of the information will prejudice the issuer's legitimate interests.

ESMA also sets out three situations in which delay of disclosure would be likely to mislead the public and therefore would not be permitted:

- The inside information is materially different from a previous public announcement of the issuer on the matter to which the inside information relates;
- The inside information relates to the fact that the issuer's financial objectives are not likely to be met, where such objectives had previously been publicly announced; and
- The inside information is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously set.

MAR puts in place a potential requirement for issuers to immediately disclose the conditions that allow them to delay disclosure, as well as the justifications for their use, to a competent authority. This additional scrutiny over decisions to delay disclosure is likely to cause market participants to act with greater caution, and issuers may seek legal advice in relation to each decision to support any required justification to the regulator. MAR gives competent authorities the option to require this information only upon specific request, as opposed to imposing an automatic requirement on every occasion. In the UK, the FCA has indicated that it intends to invoke this option.

The DTS require an issuer to maintain a minimum level of organisation to assess whether information is inside information and to appoint at least one person to take responsibility for decisions. Issuers may have already established such an internal organisational structure as a matter of good practice, but the DTS provide clear and prescriptive guidance on the minimum standards that the process must meet.

In addition, the DTS set out requirements to record and retain the following:

- the identity of the issuer;
- the identity of the person making the notification, their position within the issuer and their contact details;
- the title of the disclosure statement, the reference number (if applicable) and the date and time of the disclosure;
- the date and time that the inside information first existed, when the decision to delay the disclosure was made, and when it is expected to be published[13]; and
- the identity of all persons with responsibilities for the decision to delay (including making the decision to delay, monitoring the conditions of the delay, deciding about public disclosure and providing information to the relevant authority).

13 As ESMA acknowledges in the CP, many market participants find the requirement to disclose the date and time of the decision to delay is greatly problematic, as the decision often evolves over a period of time.

As noted above, the FCA has indicated that issuers will be required to provide this information only upon specific request, as is permitted by MAR. However, internal records of the circumstances surrounding the delay must still be maintained.

Changes to insider lists
MAR retains the current requirement for issuers to compile insider lists, but requires more extensive information to be recorded. The required content of the lists is set out in an EU-wide template, and includes details such as phone numbers, email addresses and dates of birth, as well as the date of the creation of the list and the date at which inside information was received. In making the argument for these requirements, ESMA acknowledges the concerns of market participants that privacy may be at risk, but maintains that the proposals reach a balance between data protection and the ability of competent authorities to conduct effective investigations.

INSIDER DEALING – THE OFFENCES

MAR retains the substance of the existing regime, covering insider dealing (and recommendations to another person to engage in insider dealing), improper disclosure of inside information and market manipulation.

However, MAR extends the scope of the offences in the following ways:

Attempts and cancellations	MAR introduces a specific offence of attempting to commit market abuse and a specific offence of cancelling orders on the basis of acquired inside information. Offences may therefore be committed despite an absence of new trades, which extends the scope of the regime considerably. In the UK, the existing regime is wide enough to cover this behaviour[14] and the extension of scope may therefore be of less significance where there is a UK nexus.
Benchmarks	Market manipulation is extended to include a new category relating to manipulation of benchmarks. 'Benchmark' is very widely defined[15], indicating that the new offence will catch a broad range of behaviour. The UK market abuse regime already includes a criminal offence relating to benchmarks[16], so this extension of scope may again be of less significance where there is a UK nexus.
Spot commodity contracts	MAR extends the definition of market manipulation to cover spot commodity contracts.

14 Section 118(1) Financial Services and Markets Act 2000.
15 "Any rate, index or figure, made available to the public or published that is periodically or regularly determined by the application of a formula to, or on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates or other values, or surveys, and by reference to which the amount payable under a financial instrument or the value of a financial instrument is determined" (Article 3(29) MAR).
16 Section 91 Financial Services Act 2012.

INSIDER DEALING – THE EXCEPTIONS

Legitimate behaviours

A person undertaking a legitimate behaviour is deemed not to be engaging in insider dealing unless a competent authority establishes an illegitimate reason for the transaction. Legitimate behaviours include market-making, brokerage, discharge of supervening obligations and public takeovers and mergers. As under the current regime, a person's use of the knowledge of their own intention to acquire or dispose of financial instruments will not constitute market abuse.

Share buy-backs

MAR retains an exemption for share buy-backs, but will repeal the current Buy-Back and Stabilisation Regulation 2003. On a practical level, companies that currently include a reference to this Regulation in AGM circulars should consider any required amendments to the wording of buy-back resolutions.

In order to fall within the exception, a number of conditions must be complied with, and a key selection of these are set out below.

Issuers that do not fulfill these conditions will not automatically commit market abuse, but should undertake buy-backs with caution.

Volume

Currently, the issuer must not purchase more than 25% of the average daily volume of shares traded over a period of reference[17]. Under MAR, the issuer must not purchase over 25% of the average daily volume of the shares on each relevant venue.

Disclosure

Under MAR, the information that must be disclosed remains broadly the same as under the current regime. However, transactions will be required to be disclosed on a transaction by transaction basis and on an aggregated basis, as well as being broken down in relation to each trading venue[18]. Disclosure must cover each day's trading in the course of a buy-back programme and must be published on the website of the issuer, although the existing seven market day deadline for publication is maintained.

On-market trades

Buy-backs must take place on the market on which the securities are admitted to trading in order to ensure equal treatment and enhance transparency. Accordingly,

17 In cases of extremely low liquidity, the 25% limit may be exceeded if the issuer provides information and explanations to the competent authority in advance, as well as disclosing this adequately to the public and remaining within an overall cap of 50% of average daily volume. This exception is removed under MAR.

18 MAR's expansion of scope of trading venues results in an increased likelihood that issuers conducting buy-back programmes will have to report to more than one competent authority across Europe.

OTC trades will not benefit from the revised safe harbour. The existing safe harbour under MAD is silent on OTC buy-backs.

Derivatives
Derivatives are excluded from the exemption on the basis that "their complexity and particular features make them not appropriate for the purposes of buy-back programmes". Given this wording, it will be difficult for market participants to be comfortable that the use of derivatives in the context of buy-backs could ever be permissible, even outside of the scope of the prescribed safe harbour.

Auctions
In relation to markets that have continuous trading and auctions during the trading day, the buy-back safe harbour will not apply to trades conducted during auctions (whether they are opening, intraday or closing auctions, or auctions conducted after particular levels of volatility) as ESMA is concerned that trades towards the end of an auction are especially sensitive to potential market manipulation. This is the case, notwithstanding that many exchanges provide their own protections (for example, time extensions if the auction price has departed by a specified level from the pre-auction price). Shares that are solely traded through auctions will benefit from the safe harbour so long as market participants have sufficient time to react to orders relating to the buyback programme[19].

Multi-listed shares
MAR requires issuers to report to competent authorities in all the European trading venues on which the relevant securities are admitted to trading or are traded. The relevant price rules for multi-listed shares are tied to the venue on which they are actually bought back.

Stabilisation
MAR retains an exemption for stabilisation measures. In order to fall within the exception, a number of conditions must be complied with. The key conditions are set out below.

Issuers that do not fulfill these conditions will not automatically commit market abuse, but should undertake stabilisation measures with caution.

Significant distribution
MAR provides a clear and useful definition of significant distribution: "*an initial or secondary offer of securities that is distinct from ordinary trading both in terms of the amount in value of the securities to be offered and the selling method to be employed".*
This definition should reduce the uncertainty which exists under the current regime in relation to the availability of the safe harbour for stabilising the market after block trades.

19 "Sufficient time" is not defined.

However, further guidance that stabilisation as a price support measure is not designed to assist an investment bank in placing a line of stock among clients appears to reintroduce a measure of doubt.

Sell-side trading

The exemption will not cover sell-side trading during stabilisation periods. The guidance clarifies that this includes "refreshing the Greenshoe" (in other words, selling securities acquired through stabilisation transactions to undertake further purchases for stabilisation), putting beyond doubt the generally accepted view that refreshing the Greenshoe does not currently fall within the safe harbour.

Disclosure

ESMA indicates that disclosure obligations will remain the same as they are now, subject to two further requirements. Firstly, prior to stabilisation, issuers must adequately disclose where the stabilisation measure may occur, whether it be on or outside a trading venue. Secondly, after stabilisation, issuers must disclose the trading venue on which the stabilisation transactions were carried out. The issuer, offeror and entities carrying out stabilisation must appoint a central point for disclosure and for handling the requests of competent authorities.

Prospectus Directive exemption

Under the current regime, an exemption is provided for offers made under the Prospectus Directive: no additional disclosure over and above the requirements for disclosure in prospectuses (under the Prospectus Directive) is required. This exemption will no longer be available under the new regime.[20]

Multi-listed shares

Securities admitted to trading on multiple markets or stabilisation programmes taking place simultaneously in different Member States will require reporting to all competent authorities responsible for the relevant trading venues. The place where stabilisation measures occur must be disclosed to the market.

Accepted market practices

This exemption will continue in effect unless the competent authority withdraws an accepted market practice following consultation with ESMA. There are currently no UK accepted market practices in force.

20 Current practice may not be significantly affected by the removal of this exemption, as additional disclosure announcements are commonly made as a matter of course.

Chinese walls

A firm will not commit insider dealing if it has Chinese walls ensuring that the person making the decision to deal and anyone who may have an influence on the decision are not in possession of inside information.

Market soundings

A disclosing market participant (a "**Discloser**" - generally, an investment bank), market sounding beneficiary (a "**Beneficiary**"[21] - generally, an issuer or selling shareholder) and market sounding recipient (a "**Recipient**" - generally, an existing investor) must comply with a new set of formalities.

Issuers that do not fulfill these formalities will not automatically commit market abuse, but should undertake market soundings with caution.

Duties of the Discloser	Duties of the Recipient
• Assess whether the market sounding will involve the disclosure of inside information and make a written note of reasons for the determination	• Put in place procedures to communicate wishes not to receive market soundings, whether this wish relates to specific transactions or transactions in general. Ensure that those in charge of receiving inside information are properly trained • Establish, implement and maintain internal procedures ensuring the flow of information is managed and controlled on a confidential basis
• Inform Recipient of the determination on whether the disclosure will include inside information and the consequent restrictions and confidentiality obligations. Obtain Recipient's consent to receiving the information	• Designate a person or contact point who will receive the market sounding • Keep a list of all staff who are in possession of the information communicated in the course of market soundings (whether or not the information constitutes inside information)
• Provide Recipient with a certain set of information, including a statement that a market sounding is being conducted and clarifying whether the Discloser believes inside information will be disclosed or not	• Make an independent assessment of whether the disclosure included inside information and, if so, when this might cease to be the case. Where this assessment indicates that inside information has been disclosed, identify all the issuers and financial instruments to which the information relates

21 A Beneficiary is an entity on behalf of whom the market sounding activity is conducted. A Discloser approaching investors on its own initiative, without being mandated by a Beneficiary (for example, brokers receiving inside information from an advisor during a market sounding and in turn sounding their clients) will not be covered by the exemption. Market abuse is not automatically committed in this case, but appropriate safeguards should be put in place (for example, behaving in a way that mirrors the terms of the exemption as far as possible).

<table>
<tr><td>Maintain a detailed record of all of these requirements, including to whom the information is disclosed and what information was disclosed (even if the Discloser has determined that no inside information was disclosed). Maintain these records for at least five years</td><td>Maintain a detailed record of all of these requirements, including notifications to Disclosers of the wish not to receive market soundings and disagreements between Discloser and Recipient on the classification of information. Maintain these records for at least five years</td></tr>
<tr><td colspan="2">Procedures</td></tr>
<tr><td colspan="2">If the Discloser has access to recorded telephone lines, they should use them (if the Recipient consents).
If the Discloser does not have access to recorded lines (or the Recipient does not consent), written minutes or notes should be drawn up, agreed and signed by both parties. If the parties do not agree the record within five working days after the market sounding, the Discloser should keep two versions, each signed by one party. If the Recipient does not provide signed written minutes or notes, the Discloser should retain its own signed copy.
Disclosers will be required to give Recipients an estimate of when information will cease to be inside information, if applicable (for example, when it is estimated that information will be publicly announced or when it is expected to become stale) as well as the factors that could affect that estimate and the manner in which changes to that estimate will be communicated to the Recipient.
Disclosers will also be required to monitor the status of information disclosed to Recipients – if it has ceased to be inside information, Disclosers should inform Recipients as soon as possible.</td></tr>
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These procedures place a heavy burden on Disclosers, and also to a lesser extent on Recipients. It is likely that the market will move towards increased reliance on recorded lines for market soundings to avoid protracted discussions about the content of information disclosed. The duty to monitor the status of information disclosed and to notify as soon as it ceases to be inside information can be fraught with difficulty, particularly as regards information ceasing to be inside information because it has become stale.

One notable omission from the requirements is the Recipient's obligation to notify the competent authority if they suspect improper disclosure of inside information. ESMA proposed this suggestion in a previous discussion paper, but has removed it on the basis that it may be counter-productive for the market sounding regime and overly burdensome. However, MAR retains a provision requiring competent authorities to establish procedures for the reporting of actual or potential infringements of MAR, so a market participant may make use of these procedures if they choose to do so[22].

22 Article 32 MAR. This Article also requires employers who are regulated by financial services regulation to put in place appropriate internal procedures for their employees to report infringements of MAR.

SUSPICIOUS TRANSACTION AND ORDER REPORTS

The current requirement under MAD to report suspicious transactions to the relevant competent authority will continue under MAR, and ESMA provides an updated template for notifications. However, the broadening of the market abuse regime under MAR as set out in this memorandum (for example, the application of MAR to all ETPs), and the expansion of the reports of suspected market abuse to orders (as well as transactions, as is currently the case) will require an update to market participants' procedures. For example, it will be necessary to contemplate abusive orders in the primary markets, as well as the secondary markets.

In addition, ESMA requires records to be kept for five years. This obligation covers every report submitted and every transaction examined, even if not reported. ESMA also requires entities to put in place automated surveillance systems, which are intended to be supplemented by human analysis.

INVESTMENT RECOMMENDATIONS

Investment recommendations will continue to be regulated, and MAR is likely to broaden the scope of the regime even further. Along with a number of prescriptive disclosure requirements set out in the DTS, the most notable changes are as follows:

- the obligation to take 'reasonable care' to ensure that information is objectively presented and to disclose conflicts of interest is extended. This obligation currently covers financial institutions and persons who directly recommend a particular investment decision, and the changes will extend the obligation to include "experts" who repeatedly propose investment decisions ("experts" covers those creating an impression of possessing financial expertise and experience, or those putting forward their recommendations in such a way that other persons would reasonably believe that they have financial expertise and experience);
- the trigger for a disclosure of a potential conflict of interest arising from the holding of shares in an issuer has been lowered from a shareholding of 5% to a net long or short position of 0.5%; and
- non-written recommendations made in a series of informal contexts[23] will be subject to the requirements of the regime.

The scope of these requirements is currently unclear. For example, there is an open question as to whether recommendations made by directors in circulars to shareholders would fall within the regime. Market participants should therefore be aware that the overall expansion of the investment recommendations regime will require changes to internal procedures, policies and training programmes.

23 For example: meetings, road shows, audio or video conferences, and radio, TV or website interviews.

HOW TO PREPARE FOR THE CHANGES UNDER THE NEW MARKET ABUSE FRAMEWORK

- Determine whether you will become subject to the regime as a result of the expansion to all ETPs.
- Update internal policies and procedures relating to managers' transactions.
- Review position of current PDMRs following changes in scope and definition.
- Provide training or updates to PDMRs who may be affected by the changes.
- Consider required updates to internal procedures for identifying and disclosing inside information to the market and the processes in place for delaying disclosure.
- Update internal trading restrictions to deal with new close periods and new definitions, particularly the definition of PCAs.
- Update insider lists to reflect new content requirements.
- Update insider dealing policies to take account of reporting changes and new offences.
- Update market sounding procedures, in particular in relation to record-keeping obligations.
- Ensure that those involved in market soundings are aware of their duties. Carry out relevant training programmes.
- Update share buy-back shareholder resolutions and procedures, particularly as regards disclosure obligations.
- Update stabilisation procedures.
- Set up appropriate processes to deal with the expansion in scope of suspicious transaction and order reports.
- Consider whether the newly extended investment recommendations regime will necessitate updates to training and internal guidance.

Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Capital Markets" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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