MARKET ABUSE REGIME

OVERVIEW FOR OFFICIAL LIST COMPANIES

INTRODUCTION

The Market Abuse Regulation (**"MAR"**) will replace the existing market abuse regime from 3 July 2016. MAR is designed to introduce a common regulatory framework on market abuse across the EU and generally will extend the scope and impact of the existing UK market abuse regulations. In addition to MAR and accompanying EU regulations and guidance (some of which is still in draft form), the new regime will also require changes to be made to the Financial Services and Markets Act 2000, the Listing Rules and the Disclosure and Transparency Rules. Set out below is a brief overview of the key changes affecting UK Official List companies.

DEALINGS BY PDMRS

Disclosure

The obligation on persons discharging managerial responsibilities (**"PDMRs"**) (and persons closely associated with them) at a listed company to disclose their dealings in a listed company will be altered in a number of ways, including:

- increased scope: in addition to disclosures regarding shares and related financial instruments, the new regime extends to any dealings in a listed company's debt instruments and related financial instruments;
- de minimis threshold: a de minimis threshold of €5,000 per calendar year will be introduced, below which transactions will not require disclosure. Whilst there is flexibility in MAR for competent authorities to increase the threshold up to €20,000, the FCA has confirmed that it does not intend to do so;
- PDMR disclosure: a PDMR must disclose details of his or his closely associated person's dealings in the listed company's shares or debt or other financial instruments, using a specific template which is set out in EU regulations, to both the listed company and the FCA within three business days of dealing (the time limit is currently four working days). The listed company is required to publish the information to the market within three business days of the dealing (even if it only receives notification from the PDMR on the third business day); and
- broader range of relevant transactions: the disclosure obligation will apply to more types of transactions, including: (i) transactions executed by a third party under an asset/portfolio mandate on behalf of PDMRs; (ii) entering into contracts for differences; and (iii) subscriptions to a debt instrument issuance.

Dealings during closed periods

Currently many listed companies have adopted share dealing codes which are based on the Model Code set out in the Listing Rules. However, the Model Code is incompatible with the new market abuse regime so the FCA has confirmed it will be deleted. The FCA had considered introducing rules and guidance regarding the process for PDMRs to obtain clearance to deal. However, following consultation, they have decided not to do so, therefore the only requirements will be those set out in MAR. The duration of the prohibition on dealings is changing under the new market abuse regime. The new closed periods will be:

- 30 calendar days before the announcement of the company's interim/half-year report; and
- 30 calendar days before the announcement of the company's year end report which the company is required to make under local laws or the rules of its trading venue.

This is different to the current prohibition in a number of respects, including: (i) a shorter prohibited period of 30 days as opposed to 60 days under the Model Code; and (ii) no specific provision allowing the publication of a company's preliminary results announcement to end the closed period - the position on this remains unclear.

A listed company will only be able to permit PDMR dealings in these closed periods: (i) in exceptional circumstances (for example severe financial difficulty); (ii) where the dealing is pursuant to an employee share scheme and it is not possible, under the terms of the scheme, for the dealing to take place outside the closed period; or (iii) where the dealing does not change the beneficial interest in the security. It should be noted that these exemptions are narrower than those currently available.

ACTION TO TAKE:

- Ensure suitable processes are put in place to: (i) record the identity of PDMRs and persons closely associated with them; (ii) notify PDMRs of closed periods; and (iii) record clearances to deal;
- Revise the share dealing code so that it is MAR compliant (giving consideration to, for example, whether to require PDMRs to notify the company of dealings within 1 day so as to enable the company to have sufficient time to make its own notification with the 3 day deadline) and ensure the revised share dealing code is available to all relevant individuals; and
- Train PDMRs on the new regime and processes and inform them in writing of their obligations under the new regime.

INSIDE INFORMATION

Definition of Inside Information

The definition of inside information under the new regime is very similar to the current definition. Under the new regime it is information of a precise nature, which has not been made public … and which, if it were made public, would be likely to have a significant effect on the price. Although EU technical standards and ESMA Guidance are not yet finalised, in its policy statement published on 28 April 2016, the FCA appears to be proceeding on the basis that implementation of MAR is not likely to significantly change how the definition of "inside information" is currently interpreted and applied in the UK. The FCA has retained the guidance in the Disclosure and Transparency Rules (which are to become the Disclosure Guidance and Transparency Rules) regarding the factors to take into account when considering whether information would be likely to be used by a reasonable investor as part of the basis of his investment decision.

Insider lists

Listed companies and their advisers will be required to keep insider lists (ie lists of individuals who possess or have access to inside information) in a prescribed electronic format which is set out in EU regulations. This format requires more information to be included than currently required. For example, personal home and mobile numbers, date of birth and personal home address will be required. The new insider lists must be kept up to date in the prescribed electronic format.

Listed companies will be required to take all reasonable steps to ensure that any person included on the insider list acknowledges in writing that they are aware of the obligations involved and the sanctions applicable to insider dealing and unlawful disclosure of inside information. Even if third parties (eg advisers) maintain their own insider lists, the listed company remains fully responsible for compliance and must always retain a right to access them.

Delaying disclosure of inside information

As now, listed companies will be able to delay the public disclosure of inside information so as not to prejudice its legitimate interests if:

- the delay is not likely to mislead the public; and
- confidentiality of that information can be maintained.

Going forward, a listed company will be required to notify the FCA if it has delayed the disclosure of inside information. This notification must be made immediately after announcement of the delayed inside information and must include specified information such as the date and time a decision to delay disclosure was made and the identity of the persons responsible for that decision. If requested by the FCA, the company must also provide a written explanation of its decision to delay disclosure. Therefore, listed companies will need to keep careful records of decisions made by the board or any committee of the board to delay the disclosure of inside information to the market.

ACTION TO TAKE:

- Ensure suitable procedures are in place in relation to: (i) making decisions on whether information is inside information and, if so, whether it needs to be disclosed; (ii) recording the reasons for any delay in disclosing inside information; (iii) ensuring written explanations of a decision to delay the disclosure of inside information can be provided promptly to the FCA; (iv) ensuring that inside information is clearly identified on the company's website and is available for a period of at least five years; and (v) obtaining a written acknowledgement from insiders of their duties/obligations as insiders;
- Update the insider policy and ensure this is made available to all relevant employees; and
- Prepare insider lists in the new format (differentiating between permanent insiders and insiders relating to specific pieces of information) and, to the extent that information required to be included in the insider lists is not already held, gather this information.

MARKET SOUNDINGS

MAR will introduce new regulation around gauging the interest of possible investors in, for example, potential fundraisings or significant transactions by listed companies. A person disclosing information for the purposes of market sounding must:

- assess whether there will be a disclosure of inside information;
- write a note of its conclusion and the reasoning behind its decision;
- inform the recipient of the consequences of possessing inside information (including the duty of confidentiality) and obtain his or her consent to being made an insider;
- make a record of the information given, the identity of the recipient (entity and individual) and the date and time of the disclosure;
- notify the recipient when the information provided ceases to be inside information; and
- retain the written records for a minimum of five years.

ESMA has published a consultation draft of guidelines for persons receiving market soundings.

ACTION TO TAKE:

- Train any employees who undertake market soundings on the new regime; and
- Ensure suitable procedures are put in place in relation to: (i) satisfying the record-keeping requirements; and (ii) the notification obligations.

SHARE BUY-BACKS

Currently, share buy-backs which fall within certain safe harbours do not constitute market abuse. Share buy-backs will continue to benefit from a safe harbour under the new market abuse regime provided that certain conditions are satisfied. These conditions include disclosure obligations and restrictions regarding the volume of shares that can be bought back. Whilst the conditions are similar to the existing safe harbour conditions, it is important to note that the method to calculate trading volumes is different under the new regime.

FURTHER GUIDANCE

For further guidance and advice on the market abuse regime, please get in touch with Alex Tamlyn, Martin Penn, Michael McKee, Tony Katz, Sam Millar, Ian Mason or your usual corporate contact at DLA Piper.

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