# Client Update
# The Market Abuse Regulation: Practical Tips for Compliance with the New Regime

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The Market Abuse Regulation ("MAR") came into force throughout the European Union on 3 July 2016. As we explained in our update on MAR dated 27 April 2016, the new market abuse regime under MAR is broader in scope than its predecessor and is one of the most significant new regulations to apply to companies with securities listed and traded in the European Union. Many of the new requirements contained in MAR are supplemented by detailed technical standards set out in delegated regulations, many of which were only published very recently. Given the complexity of this new regime, there are many questions about how the new rules apply and how to ensure compliance. Some practical tips on compliance are discussed below.

## SCOPE

The new market abuse regime imposes new obligations on share, note and depositary receipt (ADR and GDR) issuers listed on the London Stock Exchange ("LSE") or another EU-regulated market, and also those with securities trading on unregulated exchanges (such as LSE's AIM or Ireland's GEM or Luxembourg's MTF markets, popular venues for Eurobonds) and those that trade on an unlisted basis (for example, on the LSE's ATT-Only platform). It is worth noting that, with the exception of the buy-back and stabilisation provisions, it does not extend to instruments traded without the request/approval of the issuer.

From the relevant wording in MAR, it is not entirely clear whether or not the reporting obligation extends to depositary receipts (ADRs and GDRs), or to the securities represented by them, which may be listed outside the European Union. Whilst formal guidance on this point is still pending, we understand that the likely interpretation by the Financial Conduct Authority ("FCA") of Article 19 of MAR will be that depositary receipts traded in the European Union and the underlying shares, regardless of whether or not such shares are traded in the European Union, are within the scope of this requirement. Until any formal guidance is issued, it would be prudent for issuers with depositary receipts (ADRs

and GDRs) listed or traded in the European Union to require their "persons discharging managerial responsibilities" ("PDMRs") to comply with the MAR regime.

## MANAGERS' TRANSACTIONS

Many of the queries we have received related to the provisions of MAR which apply to PDMRs.

MAR requires PDMRs and those closely associated with them ("PCAs") to disclose any dealings in an issuer's financial instruments (above a threshold of €5,000 for each PDMR and his/her PCAs on an aggregate basis) within three business days of the date of the transaction. The issuer is required to make the information public within the same three-business-day period.

The €5,000 threshold applies to the total amount of all transactions by a PDMR *and* all of its PCAs added together over a calendar year. As soon as the total transaction value exceeds €5,000, all transactions for the remainder of the calendar year, regardless of their value, must be disclosed. Given the logistical hurdles of ensuring that all transactions of a PDMR and its PCAs are aggregated and that notifications are made as soon as the threshold is exceeded, the vast majority of FTSE100 companies have indicated that they intend to notify the market, and require their PDMRs to notify the issuers, in respect of all transactions, not just once the €5,000 threshold is exceeded.

PDMRs must inform both the issuer and the relevant regulator "promptly and no later than three business days after the date of the transaction". The calculation of this three-day period does not include the date of the transaction, which means that when a transaction occurs, notification must be made by no later than the end of three business days later (day 4). The issuer must make this information public by the same deadline—either via an RIS (Regulated Information Service, like the LSE's RNS) or through "such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the Union". Merely posting on an issuer's website will not be sufficient for these purposes. To avoid a situation where a PDMR does not notify the issuer until the end of the three-business-day period, giving the issuer inadequate time to fulfil its notification obligation, issuers should consider requiring their PDMRs to notify them within a shorter time period (i.e., within one or two business days following the transaction) to give themselves time to comply with their obligation to publish the information.

Where an issuer is listed in one Member State of the European Union, but domiciled in another (for example, listed in London, but domiciled in Cyprus),

the notification referred to above must be made to the regulator of the Member State where the issuer is registered—in this case, Cyprus—and not where the financial instruments are listed, i.e., the United Kingdom.

Another important aspect of the PDMR regime is the restriction on PDMRs conducting any transactions in the issuers' financial instruments during a "closed period" of 30 calendar days before the announcement of an interim financial report or a year-end report (subject to certain narrow exceptions for exceptional circumstances). In contrast to the disclosure regime described above, this trading restriction only applies to PDMRs and not to their PCAs. Although as a practical point, if the PDMR has shared any confidential information with a PCA about, for example, the annual results that are the reason for the closed period, then that PCA will be in possession of inside information, and therefore, unable to transact in the securities of the issuer.

There had been some confusion around the practice of releasing preliminary results and whether or not a closed period should be determined by reference to the announcement of the preliminary results or to the release of the annual report. The position has now been clarified by the European Securities and Markets Authority, which confirmed that announcement of preliminary financial results agreed by the management body of the issuer will constitute the announcement marking the end date of the closed period under MAR. However, this will only be the case where those preliminary financial results contain all the key information relating to the financial figures expected to be included in the annual report. If the information announced changes after publication, this will not trigger another closed period, but should be addressed in accordance with the MAR requirements on public disclosure of inside information.

## INSIDER LISTS

MAR requires all issuers to draw up a list of everyone who has access to inside information. These lists must be in a prescribed format and must include detailed information, such as full work and home addresses, date of birth, and role and reason for being an insider. The list must also indicate the date *and time* at which at each individual obtained, and ceased to have access to, the inside information. One of the fields of the insider list is "National Identification Number—if applicable". In countries where national ID numbers are not issued, this field can be marked "not applicable".

Insider lists must be maintained in electronic format and kept up to date. The regulator may make a request for an issuer's insider list at any time. The FCA has confirmed that when it makes a request for an insider list, it will expect it to be submitted though a system on the FCA's website, which "will be free to use and

will offer sufficient security to protect the personal data contained within insider lists". The FCA contemplates providing details of the method of transmission to issuers or their nominees as part of any request for information that the FCA makes.

Companies can request that insiders keep insider lists on their behalf; however, the issuer remains fully responsible for complying with the MAR requirements.

Given the level of personal information that must be included in an insider list, there is potential for running afoul of data protection rules when storing and distributing data included in the lists. There is no exception from data protection rules when compiling insider lists, and issuers are expected to obtain any required permissions to do so and otherwise process the required data with a view to protecting the information contained in the lists.

## DELAYING DISCLOSURE OF INSIDE INFORMATION

MAR requires issuers to inform the public via a RNS as soon as possible of "inside information" which directly concerns the issuer. All such RNS releases must state that they contain inside information and must be kept on the website of the issuer for five years. MAR allows companies to delay the disclosure of inside information where it is necessary to protect an issuer's "legitimate interests," so long as the confidentiality of the information can be maintained. Importantly, MAR requires issuers to inform the applicable regulator (the FCA, in the case of companies with securities listed on the LSE) of any such delay after the inside information is disclosed, and provide a written explanation of the reasons for the delay. The FCA has opted not to require a written explanation to be provided automatically, but may request such an explanation. Other regulators in the European Union may, however, require the automatic submission of such explanation. It is, therefore important that a written record of the explanation for the delay is kept so that it can be submitted to the FCA if requested. Notification that disclosure of inside information was delayed must be provided as soon as the inside information is announced. In the case of notification to the FCA, this must be on a standard form (available from, and to be submitted through, the FCA website). Information as to date and time of the decision to delay the disclosure of inside information and the names of all persons with responsibilities for the decision must be included.

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Please do not hesitate to contact us with any queries that you might have.