Client Alert | Capital Markets

MAR for GDR Issuers

23 June 2016

Authors: **Philip Broke, Allan Taylor, Stuart Willey, Robin Bolivar**

The Market Abuse Regulation (MAR) has direct effect as law in the United Kingdom from 3 July 2016. Broadly, it replaces the current regime in relation to the disclosure of and delaying the disclosure of inside information and insider lists, and imposes obligations on dealings and related notifications by persons discharging managerial responsibility (PDMRs), as well as establishing procedures for market soundings. The key issues and actions for issuers of GDRs are summarised below.

What is changing for GDR issuers?

While broadly the rules relating to inside information are not changing, the related record-keeping requirements under MAR are more onerous than under the existing regime. Of particular note, under MAR dealings by PDMRs in GDRs will now need to be disclosed. There are also significant new requirements relating to the scope and nature of disclosure of dealings by PDMRs, including in relation to processes and timing for notifications as well as in relation to closed periods. MAR also introduces a new safe harbour for the disclosure of inside information in certain market soundings so long as its procedures and record-keeping requirements are satisfied.

What rules are affected?

In relation to GDR issuers, MAR has the most significant impact on Disclosure and Transparency Rules 1 and 2. MAR replaces the majority of DTRs 1 and 2, while the existing provisions in DTR 3 on dealings by PDMRs will also be deleted and replaced, and will now be applicable to PDMRs of GDR issuers. As a result, the FCA Handbook will no longer be the single rule book for issuers. Issuers and PDMRs must become familiar with MAR, the related guidelines as well as the implementing and regulatory technical standards. Relevant provisions of the Financial Services and Markets Act 2000 are also set for amendment to bring them into line with MAR.

Is the definition of inside information changing?

MAR does not change the definition of inside information. It remains information that is precise, not public, relating directly or indirectly to the issuer or its financial instruments which, if public, would have a significant effect on the price of those instruments. Such information is that which a reasonable investor is likely to use as the basis for an investment decision. Given the definition in MAR is in essence unchanged, existing English and European case law, such as *Hannam v FCA* and *Lafonta v AMF,* should continue to provide guidance on whether information is inside information. However, determining when information becomes inside information is often a challenging assessment and in light of the new record-keeping requirements, set out below, GDR issuers should consider the definition and case law carefully in making the determination.

What are the requirements to disclose inside information?

MAR requires issuers to disclose publicly inside information which directly concerns them as soon as possible - identical to the current requirement. Issuers may continue to make inside information public on a RIS and are still prohibited from combining its disclosure with the marketing of their activities. Under MAR, an issuer must keep inside information posted on its website for five years rather than for one year.

When and how can you delay the disclosure of inside information?

MAR continues to allow the delay of disclosure of inside information and the main change from the current regime is the new procedural requirements when issuers delay disclosure. Under MAR, an issuer can delay disclosure to protect the legitimate interests of the issuer, so long as the delay will not mislead the public and confidentiality is ensured. However, under MAR if an issuer delays the disclosure of inside information, it must notify the FCA of the delay immediately once the information is disclosed. If the FCA requests, the issuer must provide a written explanation of how the conditions for delay were satisfied. These are new requirements.

What are the circumstances in which you can delay disclosure?

ESMA Guidelines, currently in draft, set out the legitimate interests of an issuer for delaying disclosure of inside information and when delay is likely to mislead the public. The FCA plans to retain its existing rules as guidance, reassessing when there is more certainty on these guidelines. As with the current regime, under MAR, if an issuer is the subject of a sufficiently accurate rumour, indicating breached confidentiality, it must announce the delayed information immediately. Likewise, in line with the current regime issuers can selectively disclose delayed inside information to a third party if it is in the normal course of his or her employment, profession or duties and the recipient owes a duty of confidentiality (e.g. under law or contract).

What is the process for delaying disclosure?

Under MAR, full and accurate records of the decision to delay the disclosure of inside information are crucial for an issuer to provide the FCA with the required information on request. An issuer's internal records relating to delayed inside information must contain: details of when the inside information first existed (i.e. date and time); when the decision to delay was taken; when the issuer expected to disclose the information; the persons responsible for (i) the decision to delay, (ii) ongoing monitoring, (iii) determining to disclose and (iv) notifying the FCA; evidence that initial conditions for delay (i.e. disclosure prejudicing the issuer's legitimate interest, delay not misleading the public and the issuer ensuring confidentiality) were met and monitored including setting out information barriers and processes where confidentiality is compromised.

Issuers must notify the FCA of the delay immediately when the inside information is disclosed using the FCA's online notification which includes basic information in relation the issuer, contact person, identification of the publicly disclosed inside information and the related announcement as well as those responsible.

Key actions

- Update inside information policy to reflect procedures for delaying disclosure of inside information
- Procedures for and maintenance of written records of the circumstances of delay
- Procedure for and notification to FCA of delay on disclosure of inside information

How are insider lists to be maintained?

Insider lists must follow the MAR template and the requirements are more detailed than currently required. MAR replaces the FCA's existing rules on insider lists. Technical standards prescribe the precise format of insider lists and provide templates. Under MAR, the insider list must include insiders' names, the reason they are insiders, when they became insiders (i.e. the precise time the person acquired inside information) as well as the date and time of the list. MAR requires additional personal details compared to the existing regime including the insider's birth name, professional and personal telephone numbers, birth date and national identification number (if applicable).

MAR also requires the issuer take "all reasonable steps" to ensure insiders acknowledge in writing their related legal and regulatory duties as well as applicable sanctions. While in practice PDMRs have generally signed a written acknowledgement, these requirements go beyond the existing regime.

Issuers will be able to continue to divide their list into "permanent insiders" and "project insiders". However, under the technical standards permanent insiders are individuals having access "at all times to all inside information" and issuers should give serious consideration to whether any individual would satisfy this description. As a result while there are two templates, the template relating to insiders with transaction- or event-specific inside information is most relevant. Issuers must have systems and controls that allow maintenance of their insider lists. MAR also outlines triggers for updating the lists, including a change in the reason for including an insider, a new insider and a person ceasing to be an insider. Insider lists must be held in electronic form, as currently required, and retained for five years. Issuers must provide lists to the FCA on its request via the electronic means which the FCA will detail on its website.

Key actions

- Update inside information policy to reflect requirements for insider lists
- Procedures to collect and update insider details
- Maintain insider lists based on MAR templates
- Written acknowledgement from insiders of their obligations and possible sanctions

What dealings must PDMRs disclose?

MAR imposes new obligations on PDMRs of GDR issuers as compared to the existing regime (where DTR 3 is not applicable to GDR issuers or their PMDRs). Under MAR, PDMRs and persons closely associated with them (PCAs) must disclose transactions on their own account in the issuer's shares, depositary receipts or connected financial instruments, expanding on the current requirement by including dealings in GDRs (and the underlying shares, irrespective of where or whether the relevant shares are listed) and EU-listed debt instruments of the issuer. MAR also introduces new procedural requirements.

The definitions of PDMRs and PCAs are, broadly, the same under MAR as under the existing regime of PDMRs and connected persons respectively, with a bit less detail around PCAs. Under MAR, issuers must keep lists of PDMRs and PCAs. It also requires issuers to notify PDMRs of their obligations in writing and PDMRs must notify their PCAs of their obligations regarding disclosure of dealings, keeping a copy of the notification.

MAR provides an annual minimum threshold before PDMRs (and PCAs) must disclose transactions. The threshold is €5,000 per calendar year of un-netted transactions which the FCA has decided to maintain rather than increasing the limit to €20,000 as MAR allows. The FCA has indicated that voluntary disclosure may be made, however, without regard to the threshold. On this basis, compliance requires PDMRs (and PCAs) to keep detailed records to determine when the threshold is reached. ESMA is considering the issue of currency conversion from Euros to different applicable currencies.

Under MAR, PDMRs (and PCAs) must notify not only the issuer but also the FCA within three business days of each transaction using the FCA's online form. The issuer, in turn, must make the information public. Under MAR this must be done within the same three business days from the transaction which may raise logistical issues.

Key actions

- Consider implementing dealing codes to reflect changes in the PDMR disclosure regime
- Maintain lists of PDMRs and their PCAs
- Written notification of PDMRs of their obligations (related notification by PDMRs of PCAs)
- Assist with PDMR and PCA record keeping to assess annual threshold (if being applied)
- Ensure use of FCA notification forms of PDMR and PCA dealings

What are the closed periods for dealing?

MAR prohibits PDMRs trading in newly defined closed periods subject to limited exceptions. Under MAR, the definition of "closed period" is the 30 calendar days before the announcement of interim financial and year-end reports that issuers are *required* to make public. For GDR issuers, this technically means only full year results.

Under the current regime for premium listed issuers, the "close period" is the shorter of 60 days before the preliminary announcement of the full year results or from the end of the accounting period up to their announcement. Currently, the "close period" ends with the publication of a preliminary results announcement. The FCA has indicated that pending clarification from the EC and ESMA, its view is that where an issuer announces preliminary results, the closed period is 30 days prior to such publication. A wider issue is whether there are two closed periods in these circumstances (i.e. before preliminary results and before the report), on which clarification is awaited.

Where a GDR issuer also publishes half-year results, while these are not *required* to be made public (unless the underlying shares are admitted to trading on an EU trading venue), GDR issuers should also give effect to a similar application of a closed period commencing 30 days prior to the publication of such half-year results, but the FCA has not issued guidance on this issue to date.

MAR's exemption to the closed period restrictions include in relation to employee share schemes, where beneficial interest does not change and exceptional circumstances requiring the immediate sale of shares such as severe financial difficulty of the PDMR. The PDMR must demonstrate the transaction cannot be executed outside the closed period and request permission from the issuer in writing in the case of a share sale. MAR does not include exemptions in relation to rights issues, takeover offers or trading plan dealings in which the PDMR has no influence or discretion (which exist in the current UK regime).

The FCA has invited an industry-led response on guidance for issuers in relation to "effective systems and controls" for PDMRs to seek consent to deal whether in closed period or not.

Key actions

- Consider implementing dealing code to reflect prohibition on dealing in closed periods
- Ensure PDMRs are aware of changes to dealings regime and closed periods
- Monitor market for industry-led code of best practice

What are the new procedures for market soundings?

MAR provides a new safe harbour for the disclosure of inside information in market soundings, so long as its conditions are satisfied. MAR defines market soundings as communications before the announcement of a transaction to gauge the interest of potential investors. It also addresses market soundings in the context of takeovers. MAR requires issuers and advisers to follow procedures and keep records of market soundings, to take advantage of the safe harbour, that are not currently required. If an issuer and its financial adviser conduct joint market soundings, both must comply with the related requirements and procedures.

In this context, before a market sounding, MAR requires a disclosing market participant (DMP) to consider whether it will involve the disclosure of inside information and record its conclusions and their basis. So even where information is determined not to be inside information, DMPs must keep a written record. DMPs must provide these records to the FCA if it requests them.

MAR also requires DMPs to establish procedures regarding the conduct of market soundings. The DMP must obtain the consent of recipients to receive the information and remind the recipients that they are prohibited from either trading (or cancelling or amending trades) on the basis of the inside information and that they must maintain the confidentiality of the information. DMPs must also maintain a record of all information provided and to whom (including persons acting on behalf of potential investors) along with the date and time of disclosure. Soundings should be either recorded or a written record kept and technical standards provide templates for the form of written record. These must be kept for five years and provided to the FCA on request. Once information is no longer inside information, DMPs must inform recipients as soon as possible. Market sounding recipients must comply with separate guidelines.

Key actions

- Update inside information policy to reflect market sounding procedure or consider market sounding policy
- Training on new market soundings procedure
- Maintain market sounding records in writing (based on MAR templates) or as recordings
- Procedures for notification, based on MAR template, that information provided is no longer considered inside information

Round-Up of Key Actions for GDR Issuers

- Review and update inside information policy
  - To reflect procedures for delaying disclosure of inside information
  - To reflect requirements for insider lists
  - To reflect market sounding procedures (or adopt market sounding policy)
- Establish procedures for and maintenance of record keeping relating to inside information
  - To collect and update insider details and maintain insider lists based on MAR templates
  - To obtain written acknowledgement from insiders of their obligations and possible sanctions
  - To keep written records of the circumstances of delayed disclosure of inside information
  - To notify the FCA of the delay on the disclosure of inside information
- Consider implementing dealing codes
  - To reflect PDMR disclosure regime and to impose restrictions as to when PDMRs and PCAs may deal in the GDRs
  - To monitor market for industry-led code of best practice
- Establish procedures for and maintenance of record keeping relating to PDMRs
  - To maintain lists of PDMRs and their PCAs
  - To provide written notification to PDMRs of their obligations (related notification of PCAs)
  - To assist with PDMR and PCA record keeping to assess annual threshold (if being applied)
  - To ensure use of FCA notification forms of PDMR and PCA dealings
  - To update PDMRs on changes to dealings regime and closed periods
- Consider the adoption of market sounding policy
  - To reflect the procedure to be followed before and during market sounding process
  - To reflect the notification process when information ceases to be considered inside information
- Establish procedures for and maintenance of record keeping for market soundings
  - To maintain market sounding records in writing (based on MAR templates) or as recordings
  - To notify recipients, based on MAR template, that information provided is no longer considered inside information
  - To assess and provide training on new market soundings procedure

White & Case LLP
5 Old Broad Street
London EC2N 1DW

T +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.