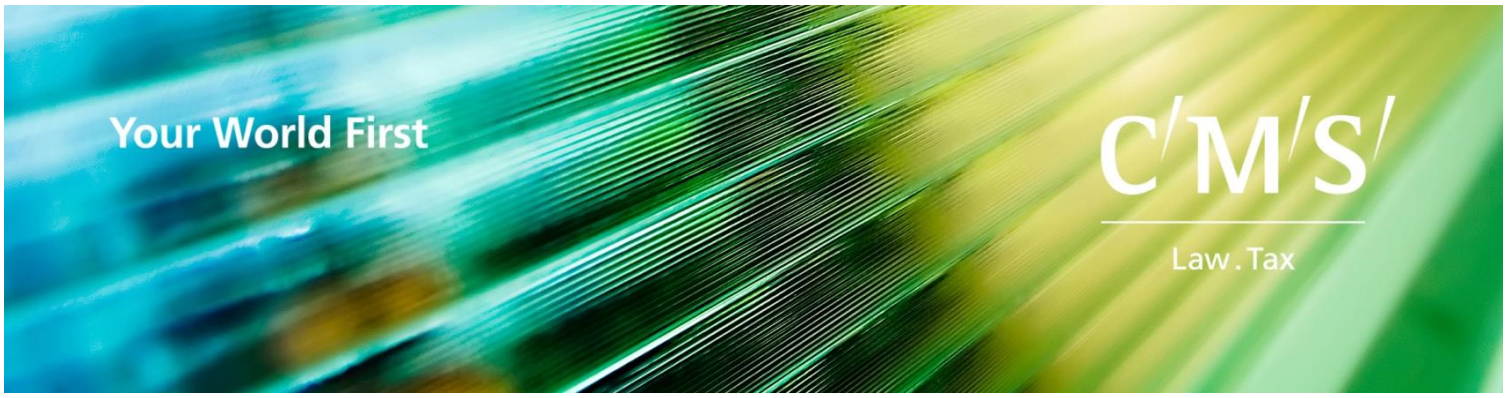

The Market Abuse Regulation - Impact on Main Market Companies

Now that the FCA has announced the changes it proposes to make to the Listing Rules to bring them into line with the EU Market Abuse Regulation (MAR), Main Market companies should be taking steps to prepare themselves for the new regime, which comes into effect on 3 July 2016 and will make significant changes to the rules on director and senior employee share dealings and how inside information is dealt with.

Summary of changes

- Companies must be rigorous in assessing and recording when inside information arises and, where its announcement is delayed, why a delay was permitted.
- If there is a delay, the company must record when the inside information first arose and the decision was taken to delay announcing it and why. When the information is eventually announced, the company must notify the FCA of the delay and, if requested by the FCA, provide the FCA with an explanation why. Disclosure policies and similar materials may need amending.
- Insider lists must now follow a prescribed format, and more information needs to be recorded about each individual on the list.
- Companies are no longer required by the Listing Rules to have a share dealing policy that is no less rigorous than the Model Code (which is being withdrawn). However, we expect most companies to continue with a share dealing policy.
- The share dealing policy will need to be amended to bring it into line with MAR. In particular, under MAR a PDMR must not deal in the company's shares during the closed period of 30 days ahead of the publication of annual and half-yearly financial results (MAR closed periods), except in certain narrowly defined circumstances.
- Unless a company has good reasons for wanting to retain its existing policy (which will need to be updated to comply with MAR), it should adopt the new pro forma share dealing policy to be published by the ICSA very shortly. Companies should consider modifying the ICSA policy to suit their own circumstances.
- PDMRs and persons closely associated with them (PCAs) will have to notify the company of all transactions relating to shares in the company, and in turn the company must announce details to the market. Such transactions must also be notified to the FCA. A prescribed form must be used.
- Dealings by PDMRs and their PCAs will have to be notified and announced more quickly: notification to the company must be made within three business days (currently four); and the company must announce details within the same three business days (currently by no later than the end of the business day when the company receives details from the individual).
- Companies can decide to require PDMRs and their PCAs to notify dealings only once a threshold of EUR 5,000 is reached, but we expect most companies will want *all* dealings to be notified.

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MAR: general

As MAR is a Regulation, it has direct effect in all EU member states. All existing UK legislation and rules that cover the same ground as MAR, many of which derive from MAR's predecessor, the Market Abuse Directive, therefore need to be removed or modified to bring them into line with MAR. Other than in a few, relatively minor, respects the UK has no discretion as to how it implements MAR. As the "competent authority" in the UK, the FCA is primarily responsible for policing compliance with MAR.

MAR itself is supplemented by various pieces of secondary legislation, known as Delegated Regulations or Implementing Regulations, which will also come into force on 3 July and have direct effect. The European Securities and Markets Authority (ESMA) will also be publishing Guidelines on some aspects of MAR. Most of the Delegated and Implementing Regulations have now been published in final form; the others are expected to be published soon.

For convenience this note refers simply to "MAR", but in some cases the relevant provisions are in a Delegated or Implementing Regulation or the draft Guidelines that were published by ESMA in January. Hyperlinks to all the source materials for matters covered in this note can be found at the end.

Key provisions of MAR

As far as Main Market companies (issuers) and their advisers are concerned, the most important provisions of MAR are:

Principal MAR article	Topic	Key provisions
Article 17	**When an issuer can delay announcing "inside information" to the market**	In particular, if an issuer delays disclosing inside information to the market, when it does announce the information the issuer must tell the FCA that it has delayed doing so and, if so requested by the FCA, it must provide the FCA with an explanation of why it believed a delay was justified.
Article 19(11) to (12)	**When PDMRs are restricted from dealing in their own company's securities**	Except in a few narrow circumstances, persons discharging managerial responsibility (PDMRs) must not "conduct transactions on their own account, or for the account of a third party, directly or indirectly", during the closed period of 30 days ahead of the publication of (i) "a year end report" or (ii) "an interim financial report" which, in either case, "the issuer is obliged to make public according to the rules of [the relevant stock market] or national law" (MAR closed periods). For dealings by PDMRs outside the MAR closed periods, the only MAR restriction is that the person concerned must not commit market abuse – e.g. by taking advantage of inside information that they have through their job.
Article 19(1) to (10)	**Notification of dealings by PDMRs**	MAR specifies which dealings by PDMRs and persons closely associated with them must be notified by the relevant individual to the FCA and the issuer and, in turn, announced by the issuer to the market - in each case within three business days of the dealing. For this purpose PDMRs and persons closely associated with them must use a form that is prescribed by the FCA.
Article 18	**Insider lists**	MAR prescribes the format and contents for permanent and project insider lists. As under the Market Abuse Directive, insider lists must be kept for at least five years.
Articles 5 and 11	**Types of behaviour that do not constitute market abuse**	MAR specifies "safe harbours" for, among other things, certain activities relating to a buyback programme or price stabilisation exercise that might otherwise constitute market manipulation, and disclosing inside information to an investor or other person as part of a market sounding exercise. In each case certain conditions must be satisfied.

Each of these provisions is discussed further below. The rest of MAR is principally concerned with (i) the various types of behaviour that constitute market abuse; (ii) preventing and detecting market abuse and the sanctions that apply; and (iii) requiring firms that publish investment research to present their recommendations and other information objectively and to disclose any conflicts of interest.

When an issuer can delay announcing inside information to the market

Under article 17 of MAR, an issuer must announce to the market as soon as possible all *inside information* (see box on the next page) that directly concerns the issuer. The definition of "inside information" is very similar to the current definition in the Financial Services and Markets Act 2000, which derives from the Market Abuse Directive.

All announcements of inside information must also be posted on the issuer's website, in chronological order in an easily identifiable section, and kept there for at least five years. This is longer than the one year that is currently required.

But an issuer can delay making an announcement if all the following conditions are satisfied:

- immediate disclosure is likely to prejudice the legitimate interests of the issuer;
- the delay is not likely to mislead the public;
- the issuer is able to ensure that the inside information remains confidential.

ESMA will be publishing Guidelines on when "immediate disclosure is likely to prejudice the legitimate interests of the issuer" and when "delay is not likely to mislead the public". Under the draft Guidelines published by ESMA in January, as well as being able to delay announcing inside information in the same circumstances as at present – in particular, while the issuer is conducting confidential negotiations the outcome of which would be likely to be jeopardised by immediate public disclosure – it will be made clear that an issuer can also delay making an announcement where:

- "*the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise [its] intellectual property rights*";
- "*the issuer is planning to buy or sell a major holding in another entity [but negotiations have not yet commenced] and the disclosure of such information would jeopardise the conclusion of the transaction*"; or
- "*a transaction previously announced is subject to a Public Authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction*". This is principally aimed at circumstances where, in the course of discussions with a competition authority about obtaining clearance for a merger, the authority indicates that in order to grant clearance it will require the company to dispose of a particular business, and if that requirement were made public it would jeopardise the company's ability to sell the business.

Situations in which a delay in disclosing inside information is *likely to mislead the public* include where the inside information:

- is materially different from a previous public announcement made by the company relating to the same matter;
- relates to the fact that the company's financial targets are likely not to be met, where such targets were previously publicly announced; or
- contradicts the market's expectations, where such expectations are based on signals that the company has previously given.

If an issuer decides to delay announcing inside information it must keep records of certain matters, including:

- when the inside information first arose and the decision was taken to delay announcing it;
- the reasons why a delay was permitted;
- when it expects to announce the information;
- which individuals are responsible for monitoring developments and deciding when an announcement will be made;
- what precautions have been taken to ensure that the information is kept confidential, including any internal information barriers that have been put in place to keep access to the information to those who strictly need to know it; and
- what the issuer intends to do if the information ceases to be confidential – e.g. to make a holding announcement in a pre-arranged form.

When the information is eventually announced, the issuer must notify the FCA that it has delayed doing so, using a prescribed form and, if requested by the FCA, the issuer must provide the FCA with an explanation of why it believed a delay was permitted.

The legal requirement to keep records, and the possibility of having to provide them to the FCA immediately upon request, should prompt companies to check that their internal procedures to identify potentially inside information, assess whether it is in fact inside information, decide whether the company can delay announcing it, and to document these matters, are sufficiently rigorous.

Meaning of "inside information"

1. *"For the purposes of [MAR], inside information shall comprise the following types of information:*

   (a) 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 prices of those financial instruments or on the price of related derivative financial instruments;

   […]

2. *For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument […].*

3. *An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information […].*

4. *For the purposes of paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments [or] derivative financial instruments […] shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions."*

Disclosing inside information to third parties

As a general rule, a person who has inside information will commit market abuse if they disclose the information to any other person otherwise than in the normal course of their employment, profession or duties.

However, under MAR there is a clear "safe harbour" for persons who disclose inside information in connection with a "market sounding", provided that certain conditions are met. To a large extent, the conditions reflect existing best practice. A "market sounding" occurs where information is communicated to one or more potential investors, prior to the announcement of a transaction, to gauge their interest in a possible transaction and its potential size, pricing and other key terms.

Where a person discloses inside information in the course of a market sounding (a "disclosing market participant" or DMP), such disclosure is treated as made in the normal exercise of the person's employment, profession or duties provided that, among other things, the DMP complies with all the following conditions:

— Before conducting the market sounding, the DMP must specifically assess whether the market sounding will involve the disclosure of inside information. It must make a written record of its conclusion and the reasons for reaching it, and provide the written record to the FCA on request.

— Before making the disclosure, the DMP must obtain the consent of the person receiving the market sounding to receive inside information. It must also inform the person receiving the market sounding that he is prohibited from taking improper advantage of the information, and that he must keep it confidential.

— The DMP must inform the recipient which information the DMP believes is inside information. It must also provide details of when it expects the information to be announced, and the factors that could change this timetable.

— The same information must be given to each recipient of the market sounding.

— Where the DMP believes that information disclosed in the course of a market sounding has ceased to be inside information, it must inform the recipient of this as soon as possible.

— The DMP must keep a record of all information given to each natural and legal person receiving the market sounding, including the date and time of each disclosure. If information is disclosed orally other than via a recorded line or equivalent, the DMP must make a written note of what was disclosed, using a prescribed template, and seek to agree the note with the recipient.

— All such records must be kept by the DMP for at least five years.

Other circumstances where disclosing inside information to another person would be in the normal course of a person's employment, profession or duties are likely to include where information is disclosed to the company's advisers; persons with whom the company is negotiating; or the company's lenders. In any such case, the company must ensure that the information is kept confidential by the recipient.

Insider lists

Like the Market Abuse Directive, article 18 of MAR requires an issuer or any person acting on its behalf or on its account to draw up a list of "all persons who have access to inside information and who are working for [it] under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies" (insider list), and to promptly update the insider list when a change occurs.

A separate insider list must be kept for each matter or project that could involve inside information (a project insider list). In addition, a company may keep a list of individuals who may have regular access to inside information because of their role or seniority (a permanent insider list). In both cases, the format of the insider list and the information about each individual that must be recorded is prescribed by MAR. The information that must be recorded is more extensive than at present: it includes the time at which the individual obtained access to the information; their function and why they are an insider; and their date of birth, home address and personal telephone numbers.

A company can allow its advisers and other organisations working for it to keep a list of the adviser's or organisation's own employees or advisers provided that the company retains a right to access each list kept by the adviser or organisation.

As at present, insider lists must be kept for at least five years, and must be provided to the FCA on request as soon as possible.

Companies must take all reasonable steps to ensure that each person who is added to an insider list acknowledges in writing the legal and regulatory duties entailed and that they are aware of the sanctions that can be imposed on them if they disclose inside information unlawfully or otherwise misuse it.

When PDMRs are restricted from dealing in their own company's securities

Current rules

Main Market companies are currently required by the Listing Rules to adopt a share dealing policy that is no less rigorous than the Model Code annexed to the Listing Rules. Among other things, the Model Code prohibits PDMRs dealing (i) during certain closed periods ahead of the publication of financial results; (ii) at any time when the company has inside information, whether or not the PDMR concerned knows of it; and (iii) on "considerations of a short term nature" – i.e. dealings that attempt to take advantage of short-term movements in the company's share price.

Having a share dealing policy under which most or all dealings require prior clearance is partly designed to protect PDMRs and their company from the serious reputational and other risks of making a bad judgement call about whether they have inside information or inadvertently giving false signals to the market. It can also help companies keep an eye on dealings by their PDMRs and to ensure that all such dealings are announced to the market as required.

MAR provisions

As noted above, under article 19(11) to (12) of MAR during the closed period of 30 days ahead of the publication of (i) "a year end report" or (ii) "an interim financial report" which, in either case, "*the issuer is obliged to make public according to the rules of [the relevant stock market] or national law*" (MAR closed periods), as a general rule a PDMR must not "*conduct transactions on their own account, or for the account of a third party [e.g. a spouse or relative], directly or indirectly*". A few narrow and rather opaque exceptions, when dealings are permitted during a MAR closed period if clearance is given, are set out in a Delegated Regulation.

The FCA has stated that if an issuer announces preliminary annual results, the prelims will be treated as ending the MAR closed period of 30 days, and there will be no "second" closed period ending on the publication of the annual report, provided that the preliminary announcement contains all inside information expected to be included in the annual report.

The FCA's statement is helpful because many companies usually make share awards just after they have published their prelims, and such awards typically vest three years later. PDMRs with awards that were granted to them in 2013 or later, in a period between the publication of prelims and final results, could otherwise have found that on the third anniversary of grant the company was in a MAR closed period and, as a result, they were unable to receive their shares or to sell some of them to meet associated tax liabilities until the MAR closed period ended (unless the dealing fell within one of the narrow exemptions in MAR).

There is some uncertainty about what counts as a "transaction conducted on a PDMR's own account". For example, does it include the automatic vesting of an award of shares and/or the automatic sale of shares to meet associated tax liabilities, or a transaction carried out by a third party discretionary investment manager? It is hoped that the FCA or ESMA may also provide guidance on this before 3 July.

For dealings by PDMRs outside the MAR closed periods, the only MAR restriction is that the person concerned must not commit market abuse – e.g. by taking advantage of inside information that they have through their job. Although this may sound straightforward, and a relaxation of the current position under the Listing Rules and Model Code, in some circumstances it will be difficult for an individual PDMR to know with sufficient certainty whether they have inside information: they may need to decide, for example, whether an anticipated event "may reasonably be expected to occur", and they will always need to decide whether, if the information were made public, it would have a significant effect on the issuer's share price. Even a CEO or CFO may not have sufficient information to be confident about making such a judgement alone. This is one good reason for requiring PDMRs to seek clearance for all dealings: if all information known to them that *might* be inside information is also known to those who give clearance, the cleared PDMR is unlikely to commit market abuse or be suspected of doing so. In any event, case by case analysis will continue to be needed for employee share awards, exercises and vestings.

Impact of MAR on share dealing policies

In its current state the Model Code is not compatible with MAR. As MAR does not generally require PDMRs to seek permission from their company to deal, or issuers to have a share dealing policy/code, the FCA has decided to withdraw the Model Code and no longer require companies to adopt any specified form of share dealing policy.

Nevertheless, as there remain good reasons for having a share dealing policy, we expect most companies will want broadly to continue with their existing policy, at least until market practice develops. However, the share dealing policy will need to be amended to bring it into line with MAR and, in particular, with the prohibition on dealing during a MAR closed period except in certain narrowly defined circumstances.

For this purpose, the ICSA is expected very shortly to publish a pro forma share dealing code that can be adopted by Main Market (and AIM) companies. The ICSA code is likely to become market standard and in due course might even be endorsed by the FCA and/or the Exchange.

PDMRs and PCAs

Persons discharging managerial responsibility (PDMRs)

MAR includes a definition of PDMR that is unchanged from the Market Abuse Directive. It means a person within an issuer who is either

- *a member of the main board of the parent company; or*
- "*a senior executive who is not a member of the [board of the parent company] who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity*".

Persons closely associated with a PDMR (PCAs)

(a) a spouse, civil partner or other person considered to be equivalent to a spouse under UK law;

(b) a dependent child – i.e. a child or stepchild who:

i. is under the age of 18 years;

ii. is unmarried; and

iii. does not have a civil partner;

(c) a relative who has shared the same household for at least one year on the date of the transaction concerned; or

(d) a legal person, trust or partnership, the managerial responsibilities of which are discharged by the PDMR or by a person referred to in point (a), (b) or (c), which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person

Notification of dealings by PDMRs

MAR provisions

Under article 19 of MAR PDMRs and persons closely associated with them (PCAs) (see the box on the previous page) must notify both the FCA and the issuer of all transactions conducted on their own account relating to shares in the company or derivatives or financial instruments related to such shares. The current rule is very similar but it applies to PDMRs and their "connected persons", which has a slightly different definition (although usually the same entities and individuals will be caught). However, the obligation to notify the FCA is new. In practice, companies may want to notify the FCA on behalf of their PDMRs and PCAs.

Such a notification must be made promptly and no later than three business days after the date of the transaction. In turn the company must announce details of the transaction to the market promptly and no later than three business days after the transaction occurred. (Currently the Disclosure and Transparency Rules require notification to be made to the company within four business days, and the company to announce details by no later than the end of the business day when the company receives details from the individual, so the new timescale is tighter.)

The same prescribed form must be used by both PDMRs and their PCAs when notifying the company and by the company when announcing the dealing to the market. Details that must be supplied about the transaction include its nature (e.g. an acquisition or disposal), the price and volume of securities involved, and the date and place of the transaction. Companies may also wish to make an RIS announcement in traditional form giving additional details of the transaction.

Under MAR, a transaction need be notified only "*once the total amount of transactions* [by that person] *has reached the threshold* [of EUR 5,000] *within a calendar year*". However, to avoid PDMRs making mistakes in calculating whether the threshold has been reached, or adopting a different approach to other PDMRs in the company, we expect that most companies will want *all* dealings to be notified.

Issuers must also notify each PDMR in writing of their obligations under article 19 of MAR (i.e. both the obligation to notify own account transactions and the obligation not to deal during MAR closed periods), and require them to notify in writing every person closely associated with them of the obligation to notify own account transactions.

Examples of transactions that must be notified

- *Acquisition, disposal, short sale, subscription or exchange of securities.*
- *Acceptance or exercise of a share option, including a share option granted to a manager or employee as part of their remuneration package, and the disposal of shares resulting from the exercise of a share option.*
- *Transactions in or related to derivatives, including a cash-settled transaction.*
- *Transactions executed by a third party under an individual portfolio or asset management mandate on behalf or for the benefit of a PDMR or a person closely associated with them.*
- *Pledging or lending of financial instruments by or on behalf of a PDMR or a person closely associated with them.*
- *Transactions undertaken by persons professionally arranging or executing transactions or by another person on behalf of a PDMR or a person closely associated with them, including where discretion is exercised.*

Actions for companies

Unless a company has good reasons for wanting to retain its existing share dealing code (which will need to be updated to comply with MAR), we recommend that Main Market (and AIM) companies should adopt the new ICSA code. Companies may, however, want to consider modifying the ICSA code to suit their own circumstances.

The points below are all addressed in the ICSA code. If a company chooses to retain its existing code, it will need to update it to address these points.

Share dealing policy
Ensure that at a minimum the policy prohibits PDMRs conducting transactions on their own account, or for the account of a third party, directly or indirectly, during each closed period of 30 days, rather than the existing two months, ahead of the publication of the company's annual and half-yearly results (MAR closed periods), other than in the exceptional circumstances specified by MAR.
Ensure the policy includes or is tied to a robust procedure which requires individuals who are subject to the policy, and persons closely associated with them, to notify the company and the FCA of the relevant details of all their dealings using the form prescribed by the FCA and within a timescale that will allow the company to announce the dealing to the market within the three business days specified by MAR.
Specify whether PDMRs and persons closely associated with them should notify the company and the FCA of all their transactions, or only those above the annual threshold of EUR 5,000 specified in MAR.
Consider making other changes to the policy. In particular: — Should there be other, non-MAR, closed periods? In particular, should the closed period ahead of the publication of annual and half-yearly financial results continue to be broadly two months, rather than 30 days? Should there continue to be a closed period when the company is in possession of inside information, whether or not the director or applicable employee who is proposing to deal happens to know about it? — Should PDMRs and others still be required to seek clearance for all proposed dealings in advance? Does the clearance procedure need to be updated to reflect the company's corporate governance arrangements? — Should the policy continue to specify that clearance will be given for certain types of dealings – such as certain dealings relating to executive share plans - that will take place outside a MAR closed period but during a non-MAR closed period? Should the wording of such exemptions be updated to reflect the way the company's share plans operate in practice? — Should the policy (continue to) apply to anyone else – e.g. employees who are on an insider list; and persons closely associated with a PDMR and investment managers who act for them?
Review the operation of employee share plans to check that the company and the plan participants will comply with the new regime.
Check whether employment handbooks and directors' service contracts need to be amended to reflect the new dealing policy.

Companies also need to update their policies and procedures for safeguarding inside information and announcing it to the market when required. Such policies and procedures might include terms of reference for a Disclosure Committee of the board and guidance and protocols for monitoring the company's share price and press comment and relating to the making of announcements.

Policies and procedures for safeguarding inside information and announcing it to the market
Update policies and other materials relating to the safeguarding and disclosure of inside information to refer to MAR and the FCA's Disclosure Guidance, rather than chapter 2 of the Disclosure and Transparency Rules. Such materials might include terms of reference for a Disclosure Committee of the board and guidance and protocols for monitoring the company's share price and press comment and relating to the making of announcements.
Ensure the company keeps a record of the reasons why it decided that a delay in announcing inside information to the market was permitted and the other matters detailed in *When an issuer can delay announcing inside information to the market*.
Update the company's insider list template to comply with the new MAR prescribed form.
Notify each PDMR in writing of their obligations under MAR (particularly the obligation to notify own account transactions and the obligation not to deal during MAR closed periods), and get them to notify in writing every person closely associated with them of the PCA's obligation to notify own account transactions.
Ensure that all announcements of inside information, once they have been announced to the market via a RIS, are posted onto the company's website and kept there, in chronological order in an easily identifiable section, for at least five years.
Update policies and other materials to refer to the new market abuse offences and safe harbours set out in MAR, rather than UK legislation.

Where possible, the board should approve the relevant policies and practices. Companies should also consider offering briefings to PDMRs and others on the new rules and procedures, with appropriate refreshers from time to time.

Further developments to be taken into account

Although companies should start taking these steps now, they will need to review the relevant documents and systems when the final versions of certain MAR legislation are published in the EU Official Journal and in light of guidance that is published by the FCA or ESMA. Companies will also want to take account of emerging market practice, particularly over the next six months or so.

How we can help

Please contact us if you would like to discuss any of the points in this note, arrange suitable briefings or training for employees and directors affected by the changes or would like help reviewing relevant documents.

Source materials

EU Market Abuse Regulation 596/2014

Delegated Regulation 2016/522 on the types of transactions by PDMRs and persons closely associated with them that must be notified, and when transactions by a PDMR can be permitted during a MAR closed period

Implementing Regulation 2016/347 specifying the format and contents of an insider list

Draft ESMA Guidelines on when immediate disclosure is likely to prejudice the legitimate interests of the issuer and when delay of disclosure is not likely to mislead the public

FCA Policy Statement PS16/13 setting out how the FCA proposes to amend the rules for Main Market companies, including deleting the Model Code

Primary Market Bulletin no.15, which includes draft online forms for a company to notify the FCA when it has delayed announcing inside information, and for a PDMR or PCA to notify the FCA of a dealing.