

MAR Moves Closer - FCA Releases Consultation Paper on Policy Proposals and Changes to Its Handbook

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Financial Services and Regulation

Introduction

The Financial Conduct Authority (FCA) has begun consulting on policy proposals and changes to its Handbook of Rules and Guidance (the FCA Handbook) that are required by the implementation of the Market Abuse Regulation (MAR)¹ in the United Kingdom (UK). The consultation paper (CP15/35) was published on November 5 and includes as appendices drafts of the necessary UK legislation to effect the changes². CP15/35 requests industry and stakeholder views on its proposals for MAR implementation, and more specifically, on the alternative implementation options being offered to European Union (EU) Member States in relation to the new regimes for public disclosure of inside information and managers' transactions. The consultation period closes on February 4, 2016 and the FCA expects to publish a policy statement with final rules later next spring.

Background

The European Commission published its legislative proposals for an updated and more stringent market abuse regime in the EU in the form of a regulation (MAR), which relates to the civil regime, and a directive on criminal sanctions (CSMAD)³ (together referred to as MAD II) in autumn 2011. Both MAR and CSMAD came into force on July 2, 2014 and will apply for the most part from July 3, 2016. Those Articles detailed in Article 39(2) of MAR have applied since July 2, 2014. However, certain provisions interact closely with the new Markets in Financial Instruments Directive and Regulation (known together as MiFID II) and will not apply until January 3, 2017, the date from which those reforms will apply.

¹ Regulation (EU) 2014/596

² The draft Market Abuse Regulation (Primary) Instrument 2016 and draft Market Abuse Regulation (Consequential Amendments) Instrument 2016. Please note that the MAR implementation process will also require changes to the Financial Services and Markets Act 2000 and a preliminary draft statutory instrument setting out the necessary changes is available for comment on the HM Treasury website.

³ The UK Government has elected not to opt into CSMAD (2014/57/EU) at this time and, therefore, the UK criminal regime for market abuse is not affected by CP15/35.

Alternative options for implementation of specific requirements

Since MAR is a regulation, it is directly applicable in all EU Member States and, therefore, it offers little scope for discretion to the UK authorities when deciding how to implement its requirements. However, in two specific areas MAR does offer discretion to Member States in the form of alternative options for implementation.

(a) Public disclosure of inside information

Under Article 17(4), MAR, issuers and Emission Allowance Market Participants (EAMPs) are allowed to delay the requirement under Article 17 to inform the public of inside information, which directly concerns the issuer or EAMP, provided that certain criteria set out in Article 17(4) are met. Where such a delay is used, the issuer or EAMP must inform its Competent Authority about the decision and provide a written explanation of how the criteria in Article 17(4) have been met as soon as the information is made public.

The alternative option, which the FCA are consulting on, allows for an issuer or EAMP only to provide a written explanation where the relevant Competent Authority requests it. Note that the alternative option does not relieve an issuer or EAMP of its duty to notify the Competent Authority after the delay. The FCA states that it prefers this alternative option since providing a written explanation in every case of delay may prove to be unduly burdensome on some firms, for whom such delays could be a regular occurrence. It therefore requests feedback on the numbers of notifications firms will expect to make under Article 17 and whether the requirement for automatic written explanation would indeed be too administratively burdensome.

(b) Managers' transactions

Broadly, Article 19, MAR requires managers or "persons discharging managerial responsibilities" (PDMRs) within issuers or EAMPs, as well as persons closely associated with them, to notify to the issuer or EAMP of transactions in specific financial instruments (including shares and debt instruments) that they undertake on their own account. The notification is required once a threshold of EUR 5,000⁴ for the value of total transactions undertaken has been passed during a calendar year. In addition, the PDMR or closely associated persons must also send the notification to the relevant Competent Authority and the issuer or EAMP is required to make the information public.

The alternative option allows the relevant Competent Authority to increase the threshold before the requirement to notify is triggered to EUR 20,000. Where a Competent Authority chooses this option, it must inform the European Securities and Markets Authority (ESMA) before implementation and provide its reasons for doing so (with specific reference to market conditions). The FCA comments that the notification of such transactions is a useful tool which provides it with valuable information for the purposes of supervision. On this basis it intends to implement the lower threshold and requests feedback on this decision, as well as data on the

⁴ Article 19(8). In calculating whether the threshold has been reached, all transactions within the scope of Article 19 and any related implementing measures should be added together without netting.

number of transactions PDMRs would have to notify in a calendar year under each threshold.

Approach to amending the UK regime

The implementation of MAR also requires changes to the structure of the current UK market abuse regime. As MAR is directly applicable in the UK without the need for it to be transposed into UK legislation, national law must be changed to ensure that it complies with and does not contradict MAR's provisions. This will include deleting sections from the FCA Handbook where MAR contains an equivalent provision and various amendments to FSMA and other relevant UK legislation.

CP15/35 states that directly applicable provisions and any delegated acts and implementing acts made under MAR will govern matters including the scope of the civil market abuse regime in the UK, the disclosure of inside information, managers' transactions and investment recommendations. The directly effective provisions immediately listed above will be supplemented by legislation made by HM Treasury and a revised FCA Handbook. From July 3, 2016 the FCA Handbook will provide only guidance on market abuse rather than binding rules as it does now, and such guidance will only appear where the FCA decides it to be necessary or appropriate. This means that the FCA Handbook will no longer be the only source containing provisions on market abuse in the UK, and any persons to whom MAR will apply must be aware of this fact and where to find the provisions which apply to them.

CP15/35 explains that the structure and content of the FCA Handbook will remain as close as possible to its current form so long as it does not conflict with MAR. The areas of the FCA Handbook that will be most affected by the implementation of MAR are those relating to the Code of Market Conduct, the Model Code and the Disclosure and Transparency Rules (DTRs). Chapter 4 of CP15/35 discusses these changes and the others required within the FCA Handbook in more detail.

In addition, the FCA has clarified in the consultation that it will still have the power to issue guidance on MAR where it feels this to be necessary⁵. Should this be required, the FCA may produce such guidance either domestically or in conjunction with ESMA.

Upcoming consultations

The FCA has expressed its intention to consult separately in the future on a number of issues which are relevant to the implementation of MAR in the UK. These include:

- proposed modifications to the current guidance provided in the DTRs for delaying the disclosure of inside information (which may have an effect on the information provided in CP15/35);
- the framework for requirements which govern the production and dissemination of investment research (which overlap with provisions in MiFID II); and
- future changes to the Decision Procedures and Penalties Manual (DEPP) and Enforcement Guide (EG) of the FCA Handbook.

⁵ Under section 139A, FSMA.

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Where the consultations overlap and cross-over, the FCA has stated that it will assess all of the feedback on specific points to ensure it has taken all perspectives into account when making any final changes to the FCA Handbook.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services and Regulation practice group:

Charlotte Hill	+44 20 7067 2190	chill@cov.com
William Maycock	+44 20 7067 2191	wmaycock@cov.com

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