

# Client Alert

## Market Abuse risks arising from COVID-19

19 May, 2020

### Key Contacts

**Charles Evans**, Partner  
+44 20.7615.3090  
[cevans@milbank.com](mailto:cevans@milbank.com)

**William Charles**, Partner  
+44 20.7615.3076  
[wcharles@milbank.com](mailto:wcharles@milbank.com)

**Conrad Marinkovic**, Associate  
+44 20.7615.3085  
[cmarinkovic@milbank.com](mailto:cmarinkovic@milbank.com)

Market abuse risks for financial services firms have increased significantly as a result of the market turmoil arising from the COVID-19 pandemic and measures taken in response to it. Despite the prevailing constraints on normal operations, there has been no relaxation of regulatory requirements in relation to market abuse. As Mark Steward, the Financial Conduct Authority (“**FCA**”) Executive Director of Enforcement and Market Oversight, said in remarks reported on 4 May 2020, “*No one should think that the current circumstances, as unusual... as they are, mean that there is any call for [behavioural] standards to be reduced or lowered.*”<sup>1</sup>

In this article, we examine the increased risks of market abuse for UK financial sector firms (focusing on risks relating to ‘inside information’), the FCA’s stated position in respect of these issues, and certain steps firms should consider taking to mitigate such risks.

### (A) Increased exposure to market abuse risks

The increased market abuse risks arise for a number of reasons, including the following:

- The COVID-19 pandemic has already caused significant market volatility and disruption to businesses and the global economy. One consequence of this is likely to be that inside information (defined in Section (B) below) will be more prevalent. Further, the nature of the pandemic and the visibility of its effects on the performance of, and financial outlook for, companies means that it is likely that, within those companies, inside information will be more widely known.
- In response to the unprecedented challenges for companies in the face of the ongoing pandemic, on 21 March 2020 the FCA published a statement requesting companies admitted to the Official List to observe a moratorium of at least two weeks on the publication of their preliminary financial statements.<sup>2</sup> Subsequently, the FCA, jointly with the Financial Reporting Council (“**FRC**”) and Prudential Regulation Authority (“**PRA**”), announced a series of actions with respect to financial

---

<sup>1</sup> Financial News, “*FCA’s stark warning: Insider traders will be caught during Covid-19 crisis*”, 4 May 2020 (accessible at: <https://www.fn london.com/articles/fcas-stark-warning-insider-traders-will-be-caught-during-covid-19-crisis-20200504>).

<sup>2</sup> The FCA, “*FCA requests a delay to the forthcoming announcement of preliminary financial accounts*”, 21 March 2020 (accessible at: <https://www.fca.org.uk/news/statements/fca-requests-delay-forthcoming-announcement-preliminary-financial-accounts>).

reporting, including a two-month deadline extension for publishing listed companies' audited annual financial reports (though there is currently no equivalent extension for half-yearly reports) and encouraging listed companies to review their financial calendars to ensure sufficient time to make appropriate disclosures.<sup>3</sup> Although the FCA made it clear when announcing these measures that they did not impact existing obligations under the Market Abuse Regulation ((EU) No 596/2014) ("**MAR**") on companies to announce inside information to the market as soon as possible (unless there is a valid reason to delay disclosure), it is likely that more companies will (where permitted under MAR) delay the disclosure of inside information, during which time there is a heightened risk that inside information may be misused.

- It is likely that, particularly as 'lockdown' measures are relaxed and individuals start to return to work, many companies will look to the capital markets in order to raise new capital as part of their recovery. On 8 April 2020, the FCA announced a series of measures designed to assist companies to raise new capital "*to support the recovery to come*".<sup>4</sup> With more companies raising capital through measures such as rights issues, there is a heightened risk of inside information about forthcoming securities issuances being misused.
- Whilst inside information is, therefore, likely to be more prevalent, changes to working practices (in particular, remote working, often from home) are likely to mean less supervision and monitoring – or, at least, the perception of less supervision and monitoring. In particular, remote working is likely to give rise to opportunities for the disclosure of inside information via un-monitored channels (including the inadvertent disclosure to family, co-habitants or others): for example, the ability of firms to record telephone calls may be limited in the present circumstances. Relatedly, constraints on 'business as usual' working conditions may also disrupt the operations of firms' internal compliance departments, as well as impeding firms' ability to monitor trading activity and to report any suspicious events.

In light of the above and with remote working likely to continue for some time, firms should take seriously the possibility that certain individuals may try to take advantage of the situation, in particular by engaging in insider dealing or other forms of market abuse. In keeping with this, Mark Steward was recently reported to have acknowledged this risk and that the FCA expected an uptick in market abuse cases in the coming months.<sup>5</sup>

## **(B) The UK market abuse regime: a reminder**

Inside information is defined under MAR as information which: (i) relates, directly or indirectly, to one or more financial instruments or to one or more issuers; (ii) is of a precise nature; (iii) has not been made public; and (iv) if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments.<sup>6</sup> Some important points to note include:

---

<sup>3</sup> The FCA, FRC and PRA, "*Joint statement by the FCA, FRC and PRA*", 26 March 2020 (accessible at: <https://www.fca.org.uk/news/statements/joint-statement-fca-frc-pra>).

<sup>4</sup> The FCA, "*Additional primary market measures to aid listed companies*", 8 April 2020 (accessible at: <https://www.fca.org.uk/news/press-releases/additional-primary-market-measures-aid-listed-companies>). See further: The FCA, "*Statement of Policy: listed companies and recapitalisation issuances during the coronavirus crisis*", 8 April 2020 (accessible at: <https://www.fca.org.uk/news/statements/listed-companies-recapitalisation-issuances-coronavirus>).

<sup>5</sup> Financial News, "*FCA's stark warning: Insider traders will be caught during Covid-19 crisis*", 4 May 2020 (accessible at: <https://www.fn.london.com/articles/fcas-stark-warning-insider-traders-will-be-caught-during-covid-19-crisis-20200504>).

<sup>6</sup> MAR, Article 7(1)(a).

- MAR provides that information is likely to have a significant effect on price if it is information which a reasonable investor would be likely to use as part of the basis of an investment decision.<sup>7</sup>
- Information will be considered precise if it: (i) 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; and (ii) is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the price of the financial instruments or the related derivative financial instruments.<sup>8</sup> In the case of a protracted process which occurs in a series of intermediate steps (such as the negotiation of a contract or the placement of financial instruments), each step may be deemed to be precise and an assessment needs to be made as to whether that information is inside information.
- The assessment of what constitutes inside information can be complex and may require consideration of all the information which an individual has obtained from different sources. Whilst each individual piece of information may not, of itself, be inside information, it is possible that, when combined with the other pieces of information, the totality constitutes inside information.

Insider dealing occurs where a person possesses inside information and uses that information by acquiring or disposing of, directly or indirectly, financial instruments to which that information relates.<sup>9</sup> MAR prohibits a person from, among other things: engaging, or attempting to engage, in insider dealing; and recommending that another person, or inducing another person to, engage in insider dealing.<sup>10</sup> MAR also prohibits the disclosure of inside information other than in the normal exercise of a (natural or legal) person's profession, employment or duties, as well as, more generally, market manipulation.<sup>11</sup>

### (C) The FCA's response

During the pandemic, the FCA is particularly focused on ensuring that markets remain orderly and their integrity is maintained in the face of the increased risks of market abuse, in particular concerning the misuse of inside information. Its prevailing guidance and recent statements provide (among other things):

- *"Firms should continue to take all steps to prevent market abuse risks. This could include enhanced monitoring, or retrospective reviews. We will continue to monitor for market abuse and, if necessary, take action."*<sup>12</sup>
- *"Firms should continue to record calls, but we accept that some scenarios may emerge where this is not possible. Firms should make us aware if they are unable to meet these requirements. We expect firms to consider what steps they could take to mitigate outstanding risks if they are unable to comply with their obligations to record voice communications. This could include enhanced monitoring, or retrospective review once the situation has been resolved."*<sup>13</sup>
- In a joint statement with the PRA and the FRC of 26 March 2020, the FCA confirmed: *"companies will still need to observe their other disclosure obligations, in particular those concerning inside*

---

<sup>7</sup> MAR, Article 7(4).

<sup>8</sup> MAR, Article 7(2).

<sup>9</sup> MAR, Article 8(1).

<sup>10</sup> MAR, Article 14.

<sup>11</sup> MAR, Articles 10 and 15 (respectively).

<sup>12</sup> The FCA, *"Coronavirus (Covid-19): Information for firms"*, last accessed 14 May 2020 (accessible at: <https://www.fca.org.uk/firms/information-firms-coronavirus-covid-19-response#market-trading-reporting>).

<sup>13</sup> *Ibid.*

*information under the Market Abuse Regulation, recognising that the global pandemic and policy responses to it may alter the nature of information that is material to business prospects.”<sup>14</sup>*

The FCA has devoted considerable resources to pursuing instances of suspected insider dealing.<sup>15</sup> Investigations into market abuse account for a significant proportion of the investigations which are opened by the FCA each year.<sup>16</sup> Speaking in 2019 following the conviction of a senior compliance officer at UBS AG and an associated financial securities trader for five offences of insider dealing (and the sentencing of each individual to three years’ imprisonment), Mark Steward stated, “*The FCA is determined to attack all forms of insider dealing, from opportunistic insiders to those who devise dishonest schemes to exploit and manipulate sources of inside information*”.<sup>17</sup> Further, in his recent comments referred to above, Mark Steward was reported to have warned that the FCA’s “*market-surveillance radar is working at full speed in order to ensure we can see exactly what’s happening in the market in real time.... No one should be tempted to think they’re immune from detection.*”<sup>18</sup>

## **(D) Steps to mitigate market abuse risks**

In light of the above, firms need to remain vigilant and take appropriate steps to mitigate the increased risks of market abuse by employees, clients and third parties in the circumstances arising out of the COVID-19 pandemic. The following steps are likely to be relevant:

- Maintaining market abuse surveillance systems and controls that are, so far as possible, effective for monitoring trading activities and information dissemination, particularly in a remote working environment, and enhancing these systems where necessary.
- Ensuring continued engagement on these issues between Compliance, Business and Management personnel, notwithstanding the need to continue remote working for the time being.
- Carrying out supplementary electronic training on market abuse for all relevant personnel.
- Reviewing, updating (if necessary), and effectively disseminating to relevant personnel the firm’s policies and guidance relating to market abuse.

---

<sup>14</sup> The FCA, FRC and PRA, “*Joint statement by the FCA, FRC and PRA*”, 26 March 2020 (accessible at: <https://www.fca.org.uk/news/statements/joint-statement-fca-frc-pra>).

<sup>15</sup> As at 31 March 2019, the FCA had 96 open cases relating to insider dealing, compared to 75 as at 31 March 2018: The FCA, “*Enforcement annual performance report 2018/19*”, July 2019, p.8 (accessible at: <https://www.fca.org.uk/publication/corporate/annual-report-2018-19-enforcement-performance.pdf>); The FCA, “*Enforcement annual performance report 2017/18*”, July 2018, p.6 (accessible at: <https://www.fca.org.uk/publication/corporate/annual-report-2017-18-enforcement-performance.pdf>).

<sup>16</sup> The FCA, “*Annual Report and Accounts 2018/19*”, July 2019, pp.41-2 (accessible at: <https://www.fca.org.uk/publication/annual-reports/annual-report-2018-19.pdf>): “*Following our 484 preliminary market abuse reviews, we have initiated 91 enforcement investigations and 72 non-enforcement actions, including supervisory interventions and issuing letters of education. The number of market abuse-related investigations we opened in 2018/19 is broadly in line with 2017/18, when we opened 87 enforcement investigations. While this level of activity cannot be used as a proxy for the level of market abuse in UK financial markets, it demonstrates our focus on detecting and investigating market abuse, deterring wrongdoers and educating market participants on the harm market abuse causes to the economy.*”

<sup>17</sup> The FCA, “*Two found guilty of insider dealing*”, 27 June 2019 (accessible at: <https://www.fca.org.uk/news/press-releases/two-found-guilty-insider-dealing>).

<sup>18</sup> *Ibid.* (footnote 5).

- Maintaining up-to-date insider lists (i.e., a list of persons working for, or on behalf of, an issuer who have access to inside information, as required under MAR).<sup>19</sup>
- Ensuring that appropriate records are kept of all measures taken to mitigate the risks of market abuse on an ongoing basis.
- Remaining vigilant and proactive in relation to the obligation under MAR to report to the FCA all orders and transactions (including any modifications or cancellations) that could constitute attempted or actual insider dealing or market manipulation without delay (i.e., under the suspicious transaction and order report regime (STOR)).<sup>20</sup>

Overall, firms should also remain mindful of the FCA's stated intention to continue to move away from rules-based regulation (or, at least, purely rules-based regulation), and rather to concentrate more on outcomes- and Principles-based regulation. In the FCA's 2020/21 Business Plan, published on 7 April 2020, the FCA stated, "*The current [regulatory] framework is too focused on rules and process, and not enough on principles and outcomes.*"<sup>21</sup> Accordingly, in responding to the increased market abuse risks identified above, firms would be well-advised to focus not only on the applicable rules, but also on the outcome of a particular course of conduct and whether that outcome satisfies the FCA's aims and Principles, including the obligation to observe proper standards of market conduct.<sup>22</sup>

---

<sup>19</sup> MAR, Article 18.

<sup>20</sup> MAR, Article 16.

<sup>21</sup> The FCA, "*Business Plan 2020/21*", 7 April 2020, p.4. (accessible at: <https://www.fca.org.uk/publication/business-plans/business-plan-2020-21.pdf>).

<sup>22</sup> FCA Handbook, PRIN 2.1.1, Principle 5 (Market conduct); FCA Handbook, APER 2.1A.3, Statement of Principle 3.

## Global Litigation Contacts

London | 10 Gresham Street, London EC2V 7JD

Tom Canning	tcanning@milbank.com	+44-20-7615-3047
William Charles	wcharles@milbank.com	+44-20-7615-3076
Charles Evans	cevans@milbank.com	+44-20-7615-3090
Julian Stait	jstait@milbank.com	+44-20-7615-3005
Mona Vaswani	mvaswani@milbank.com	+44-20-7615-3002

New York | 55 Hudson Yards, New York, NY 10001-2163

Wayne M. Aaron	waaron@milbank.com	+1-212-530-5284
Antonia M. Apps	aapps@milbank.com	+1-212-530-5357
Thomas A. Arena	tarena@milbank.com	+1-212-530-5828
George S. Canellos <i>Global Head of Litigation</i>	gcanellos@milbank.com	+1-212-530-5792
James G. Cavoli	jcavoli@milbank.com	+1-212-530-5172
Scott A. Edelman <i>Firm Chairman</i>	sedelman@milbank.com	+1-212-530-5149
Adam Fee	afee@milbank.com	+1-212-530-5101
Christopher J. Gaspar	<a href="mailto:cgaspar@milbank.com">cgaspar@milbank.com</a>	+1-212-530-5019
David R. Gelfand	dgelfand@milbank.com	+1-212-530-5520
Katherine R. Goldstein	kgoldstein@milbank.com	+1-212-530-5138
Robert C. Hora	rhora@milbank.com	+1-212-530-5170
Alexander Lees	alees@milbank.com	+1-212-530-5161
Grant Mainland	gmainland@milbank.com	+1-212-530-5251
Atara Miller	amiller@milbank.com	+1-212-530-5421
Sean M. Murphy	smurphy@milbank.com	+1-212-530-5688
Daniel Perry <i>Practice Group Leader</i>	dperry@milbank.com	+1-212-530-5083
Tawfiq S. Rangwala	trangwala@milbank.com	+1-212-530-5587
Stacey J. Rappaport	srappaport@milbank.com	+1-212-530-5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1-212-530-5651
Jed M. Schwartz	jschwartz@milbank.com	+1-212-530-5283
Alan J. Stone	astone@milbank.com	+1-212-530-5285
Errol B. Taylor	etaylor@milbank.com	+1-212-530-5545

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

David S. Cohen	dcohen2@milbank.com	+1-202-835-7517
----------------	---------------------	-----------------

Andrew M. Leblanc	<a href="mailto:aleblanc@milbank.com">aleblanc@milbank.com</a>	+1-202-835-7574
Michael D. Nolan	<a href="mailto:mnolan@milbank.com">mnolan@milbank.com</a>	+1-202-835-7524
Aaron L. Renenger	<a href="mailto:arenenger@milbank.com">arenenger@milbank.com</a>	+1-202-835-7505
Los Angeles   2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019		
Lauren N. Drake	<a href="mailto:ldrake@milbank.com">ldrake@milbank.com</a>	+1-424-386-4320
Gary N. Frischling	<a href="mailto:gfrischling@milbank.com">gfrischling@milbank.com</a>	+1-424-386-4316
David Isaac Gindler	<a href="mailto:dgindler@milbank.com">dgindler@milbank.com</a>	+1-424-386-4313
Robert J. Liubicic	<a href="mailto:rliubicic@milbank.com">rliubicic@milbank.com</a>	+1-424-386-4525
Jerry L. Marks	<a href="mailto:jmarks@milbank.com">jmarks@milbank.com</a>	+1-424-386-4550

### Litigation & Arbitration Group

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our Litigation & Arbitration Group.

This Client Alert is a source of general information for clients and friends of Milbank LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.

For additional insights related to business and legal implications as a result of COVID-19, please visit our [Knowledge Center](#).

© 2020 Milbank LLP All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome.