

## Client Alert

### Delayed Disclosure of Inside Information: The FCA's Review of the Notification Regime Under MAR

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In November 2020, the Financial Conduct Authority (the “**FCA**”) published a review of the Delayed Disclosure of Inside Information (“**DDII**”) notifications that it had received since the implementation of the Market Abuse Regulation (596/2014) (“**MAR**”) in July 2016.<sup>1</sup> In the review, the FCA identifies a number of areas where it considers disclosure to have been below the level it would expect and concludes that issuers may not be complying with their obligations under MAR in relation to delayed disclosure (potentially because they are unaware of these notification requirements). This is an area which will therefore be the subject of increased focus and scrutiny by the FCA. Accordingly, issuers would be well-advised to review their systems and controls concerning inside information, disclosures to the market, and notifications to the FCA, particularly in light of the increased market turmoil arising from the current pandemic.

#### Regulatory framework: a refresher<sup>2</sup>

Under Article 17(1) of MAR, an issuer of financial instruments<sup>3</sup> must publicly disclose inside information which directly concerns it as soon as possible. However, under Article 17(4), an issuer may, on its own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:

- immediate disclosure is likely to prejudice the legitimate interests of the issuer;
- a delay in the disclosure is not likely to mislead the public; and
- the issuer is able to ensure the confidentiality of the information.

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<sup>1</sup> The FCA, “*Review of Delayed Disclosure of Inside Information*”, November 2020, p.2 (accessible at: <https://www.fca.org.uk/publication/primary-market/pmb-31-review-delayed-disclosure-inside-information.pdf>).

<sup>2</sup> The position outlined in this section is expected to continue after the end of the Brexit transition period as, subject to the ultimate arrangements reached between the UK and the EU in respect of financial services, it is intended that MAR will be broadly “onshored” into UK law: see *ibid.*, p.3.

<sup>3</sup> As defined in the FCA Handbook.

As to the first of these conditions, the European Securities and Markets Authority (“**ESMA**”) has produced a non-exhaustive list of “legitimate interests” (for example, where the issuer is conducting negotiations and the outcome of those negotiations would likely be jeopardised by immediate public disclosure). As to the second condition, ESMA has also produced a list of instances where a delay in disclosure is likely to be misleading (for example, where the inside information in question is materially different to the issuer’s previous public announcement on the same subject).<sup>4</sup>

There is statutory liability for an issuer where it dishonestly delays publication of information relating to securities and a person who acquires, continues to hold or disposes of the securities suffers loss in respect of the securities as a result of the issuer’s delay in publishing the information.<sup>5</sup>

Where an issuer has delayed the disclosure of inside information, it must immediately after making the delayed disclosure: (i) inform the competent authority of its home member state of such delay; and (ii) explain in writing to that authority how the conditions set out in Article 17(4) of MAR were met in the circumstances.<sup>6</sup>

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>7</sup> Some important points to note include:

- 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>8</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>9</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.

## Focus and findings

In total, the FCA analysed 1,610 DDII notifications that it had received from 4 July 2016 to 12 November 2018 (the “**Relevant Period**”) relating to a diverse range of announcements.<sup>10</sup> The FCA also considered

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<sup>4</sup> ESMA, “*MAR Guidelines: Delay in the disclosure of inside information*”, 20 October 2016 (accessible at: [https://www.esma.europa.eu/sites/default/files/library/2016-1478\\_mar\\_guidelines\\_-\\_legitimate\\_interests.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf)), pp.4-5. In addition, the Disclosure Guidance and Transparency Rules (the “**DTR**”) provide guidance on these conditions: see DTR, Section 2.5. For example, DTR 2.5.4G(1)(a) notes that, in the FCA’s opinion, ESMA’s “legitimate interests” example set out above does not envisage that an issuer will delay public disclosure of the fact that it is in financial difficulty or of its worsening financial condition and is limited to the fact or substance of the negotiations to deal with such a situation.

<sup>5</sup> Financial Services and Markets Act 2000, Section 90A.

<sup>6</sup> MAR, Article 17(4). The FCA is the competent authority in the UK.

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

<sup>8</sup> MAR, Article 7(4).

<sup>9</sup> MAR, Article 7(2).

<sup>10</sup> The FCA, “*Review of Delayed Disclosure of Inside Information*”, November 2020, p.4.

the price movements that occurred on the day that the announcement was made in respect of the vast majority of these notifications.<sup>11</sup>

While the FCA divides the DDII notifications during the Relevant Period into nine categories, the focus of its review is on the following:<sup>12</sup>

1. **“Periodic Financial Information”** notifications, which relate to *“scheduled financial reporting such as annual or interim financial information”*.<sup>13</sup> The FCA expected these notifications: (i) to entail a longer period of delay than Unscheduled Financial Information (see below) on the basis that issuers would be likely to treat results generally as inside information (with that information also being potentially available to the issuer for a longer period between its production and scheduled publication); (ii) to involve delays of a few weeks in line with issuers’ year-end processes; (iii) to entail few significant price movements (as a larger price movement would indicate the presence of information that should have been subject to a separate, earlier announcement); and (iv) to be significant in volume, as all issuers produce such information.
2. **“Unscheduled Financial Information”** notifications, which concern *“ad hoc announcements regarding the financial performance in-between the periodic financial reports”*.<sup>14</sup> The FCA expected these notifications: (i) to be lower in volume when compared to announcements of Periodic Financial Information, due to the limited grounds on which issuers can delay disclosure of such information;<sup>15</sup> (ii) to be shorter in length of delay and have a higher likelihood of significant share price movements generally; (iii) to be relatively low in volume as such information would usually be disclosed quickly; and (iv) to entail higher mean price movements than other categories.
3. **“Director/Board Changes”** notifications. The FCA expected these notifications: (i) to involve relatively short delays on the basis that, once inside information has arisen in respect of the departure or recruitment of a director, it might be challenging for the company to establish grounds to delay the disclosure; and (ii) to entail a varied range of share price movements but a lower mean movement overall compared to other categories.

The FCA’s key findings in relation to these categories were as follows:<sup>16</sup>

1. **Periodic Financial Information:** The FCA was surprised to find that Periodic Financial Information represented only 10% of all DDII notifications reviewed.<sup>17</sup> Further, the average delay for the announcement of this information was 17 days compared to 21 days for Unscheduled Financial Information. This suggested *“that profit warnings and other trading updates were on average, delayed longer than disclosures of Periodic Financial Information.”* As expected, however, Periodic Financial Information announcements showed *“a very narrow distribution of price movement.”*
2. **Unscheduled Financial Information:** In line with its expectations, the FCA found that Unscheduled Financial Information constituted only 3% of the total number of DDII notifications reviewed, and that such announcements were *“generally much more price sensitive than those for Periodic Financial Information.”* However, it noted that, during the Relevant Period, only 18 constituents of the Official

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<sup>11</sup> *Ibid.* The FCA carried out this review in respect of 1,550 of the 1,610 notifications reviewed.

<sup>12</sup> The FCA, *“Review of Delayed Disclosure of Inside Information”*, November 2020, pp. 5-6.

<sup>13</sup> *Ibid.*, p.4. See further: The FCA, *“Technical Note: Periodic Financial information and inside information”*, April 2019 (accessible at: <https://www.fca.org.uk/publication/ukla/tn-506-2.pdf>).

<sup>14</sup> The FCA, *“Review of Delayed Disclosure of Inside Information”*, November 2020, p.4.

<sup>15</sup> In this regard, DTR 2.2.9G is clear that a short delay in the face of a *“significant and unexpected event”* may be acceptable *“if it is necessary to clarify the situation,”* in which case the issuer should consider whether a holding announcement might be appropriate in interim (i.e., if there is a risk of leakage).

<sup>16</sup> The FCA, *“Review of Delayed Disclosure of Inside Information”*, November 2020, pp.7-9.

<sup>17</sup> Further, only 48 constituents of the Official List submitted DDII notifications regarding this information during the Relevant Period: see *ibid.*, p.9.

List submitted DDII notifications relating to Unscheduled Financial Information in circumstances where, during the same period, 3,132 trading statements had been disseminated by UK issuers.

3. **Director/Board Changes:** The average delay in DDII notifications relating to Director/Board Changes was “*rather small*” at 16 days but the FCA was surprised by the number of notifications in this category (representing 5% of all notifications reviewed), “*given it is not a specified legitimate interest in the ESMA guidelines.*” The FCA also observed that most announcements within this category of DDII notifications had “*muted price impacts.*”

More generally, the FCA found that the overall number of unique issuers that had submitted a DDII notification in the Relevant Period was 718, which was only a quarter of the total number of unique issuers with securities admitted to the Official List, AIM and the NEX Growth market as at 15 November 2019. The FCA considered that, while it would not have been the competent authority for all of these issuers, “*it will have been for the large majority.*”<sup>18</sup>

## The review’s conclusions

The above findings prompted the FCA to draw a number of conclusions:<sup>19</sup>

- The limited number of DDII notifications relating to Periodic Financial Information concerned the FCA because it suggested that “*some issuers may not be adequately identifying (and notifying the FCA of) instances where periodic financial information is itself or otherwise contains inside information.*”<sup>20</sup> Further, the volume suggested that “*many issuers may be unaware of the current notification requirements under MAR.*”
- Similarly, the FCA considered that the “*large disparity*” between the number of DDII notifications received and the number of trading statements issued during the Relevant Period could arise “*from issuers either failing to recognise the information as being inside information early enough or failing to comply with the notification requirements of MAR where disclosure is delayed.*” The FCA would therefore be increasing its monitoring in this area.
- The FCA also noted that the number of DDII notifications relating to Director/Board Changes was surprisingly significant, and so it would also be increasing its monitoring in this area.

Generally, the FCA considered that the low number of issuers that had submitted DDII notifications during the Relevant Period indicated “*a lack of awareness of the obligation to submit DDII notifications*”, and so it would be “*stepping up*” monitoring activities accordingly.<sup>21</sup> In this regard, it was noted that issuers should consider obtaining advice on the disclosure of inside information and review their training and governance arrangements and, where disclosure of inside information is being delayed, their ability to assess whether the conditions for delaying the announcement are met on an ongoing basis. Finally, the FCA warned that while raising awareness of its findings would be its main focus in the coming months, “*serious or repeated failures to comply*” may result in enforcement action.<sup>22</sup>

## Comment

Market abuse risks have increased significantly as a result of the market turmoil arising from the prevailing health crisis. However, despite the difficulties of operating in this environment, there has been no relaxation

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<sup>18</sup> *Ibid.*, pp.9-10.

<sup>19</sup> *Ibid.*, pp.8-9.

<sup>20</sup> It was recognised that this result could be due to issuers being strictly disciplined in identifying inside information (in respect of Periodic Financial Information) and disclosing it without delay, though this possibility was considered “*probably unlikely.*”

<sup>21</sup> The FCA, “*Review of Delayed Disclosure of Inside Information*”, November 2020, p.10. In drawing this conclusion, the FCA recognised that a lack of notification “*will not always equate to an inability to identify and disseminate inside information without delay and to delay its disclosure only where appropriate.*”

<sup>22</sup> *Ibid.*, p.2.

of regulatory requirements in relation to market abuse and inside information. Moreover, the FCA has publicly stated its determination “*to attack all forms of insider dealing*” and issued a warning that its “*market-surveillance radar is working at full speed*”. Please see our previous article, “*Market Abuse risks arising from COVID-19*”, for more information in this regard.<sup>23</sup>

Against this background, the FCA’s findings in relation to DDII notifications and proposed next steps indicate that the regulator will be significantly stepping up its oversight of issuers and their compliance with MAR, including looking at whether any delay in the disclosure of inside information is properly justified. Issuers, therefore, would be well-advised to review their systems and controls concerning inside information, disclosures to the market, and notifications to the FCA.

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<sup>23</sup> Accessible at: <https://www.milbank.com/images/content/1/3/v2/132326/London-Litigation-Client-Alert-Covid-MAR-and-Insider-Info-risk.pdf>. See also our previous article, “*Coronavirus Outbreak: Implications for the UK Listed Company Reporting Timetable*”, accessible at: <https://www.milbank.com/images/content/1/2/v2/129920/Milbank-Client-Alert-Company-Reporting-4829-5860-1913-v.1.pdf>.

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