The Market Abuse Regulation: Disclosure of Inside Information

Introduction

Timely and accurate disclosure of information to the market is a key obligation of listed companies. These obligations are set out in the Financial Conduct Authority’s (FCA) Listing Rules and, until 3 July 2016, the Disclosure and Transparency Rules. The EU Market Abuse Regulation (MAR) will come into force on 3 July 2016 and replaces the Market Abuse Directive governing regulations concerning market abuse. Many of the requirements under MAR are similar to those currently reflected in the Disclosure Rules. However, changes to the Disclosure Rules in order to comply with MAR will include deleting many of the rules, amending others and providing hyperlinks in other instances directly to the relevant MAR provision.

**Listing Principle 1**
A company must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations.

**Premium Listing Principle 6**
A listed company must communicate information to holders and potential holders of its listed equity shares in such a way as to avoid the creation of a false market in such listed equity shares.

What is market abuse?

One of the principle aims of MAR and the Market Abuse Directive before it, is to prevent market abuse. MAR specifies that market abuse includes insider dealing, unlawful disclosure of inside information and market manipulation.

What is inside information?

Under MAR the definition of inside information remains the same as under the Market Abuse Directive – i.e. it is information which is:

- precise;
- has not been made public;
- relates directly or indirectly to the company’s shares or other financial instruments;
- which, if it were made public, would be likely to have a significant effect on the price of those shares or financial instruments.
What has changed is that MAR includes further specifications in relation to inside information which have developed under case law. For example, information will be regarded as of a precise nature if it indicates:

- a set of circumstances which exists or which my reasonably be expected to come into existence; or
- an event which has occurred or which may be reasonably expected to occur; and
- where the information is specific enough to enable a conclusion to be drawn about its possible effect on the price of shares or financial instruments.

MAR now expressly states that information that is likely to have a significant effect on price means information which a reasonable investor would be likely to use as part of the basis for investment decisions.

What are the obligations for disclosure of inside information?

As is the case now, MAR requires listed companies to disclose inside information to the public as soon as possible. This disclosure should not be combined with marketing material and should be posted on the company’s website for at least five years.

Delaying disclosure of inside information

The disclosure of inside information may be delayed under a limited set of circumstances which are if:

- immediate disclosure is likely to prejudice the company’s legitimate interests;
- the delay is not likely to mislead the public; and
- the company can ensure the confidentiality of the information.

There are now additional requirements to be satisfied under MAR if disclosure is to be delayed. Once the inside information has been announced by the company, the FCA must be notified immediately that there was a delay and, if requested by the FCA, a written explanation for the delay must be provided of how the conditions for the delay were met.

Rumours

Rumours are dealt with in a similar way under MAR to the current regime in DTR 2.7. If a company is the subject of an accurate rumour and speculation, which indicates that confidentiality has been breached, an immediate announcement must be made. The FCA intends to keep the guidance in DTR 2.7.3 on dealing with rumours. This states that the knowledge that press speculation or market rumours are false is not likely to amount to inside information and that even if it does amount to inside information it is likely that the appropriate circumstances will exist to delay any announcement.
Market Soundings

There is a new provision in MAR which gives a safe harbour from the offence of improper disclosure of inside information for market soundings. Market soundings are defined as communications prior to the announcement of a transaction, in order to gauge the interest of potential investors. MAR sets out certain conditions which must be satisfied in order to fall within the safe harbour. These include:

- obtaining the consent of the person receiving the market sounding to receive inside information;
- informing the person that they are prohibited from using that information to acquire or dispose of financial instruments relating to that information;
- informing the person that they are obliged to keep the information confidential;
- keeping a record of all information given to the person receiving the market sounding and identity of the potential investors which must be provided to the FCA on request.

What Do I Need To Do?

Listed companies will already have in place a disclosure or communications policy governing how inside information is to be identified and disclosed to the market. This policy should be thoroughly reviewed and amended to take account of the changes made by MAR. The policy needs to be approved by the Board and distributed to relevant employees who should include directors and senior management from the finance and investor relations departments.

What should the Disclosure Policy cover?

Suggested content for a disclosure or communications policy includes:

- Introduction: Why the policy is necessary and summary of MAR, Listing and Disclosure Rule requirements;
- Definition of inside information: consider including some practical examples of relevance to the business sector;
- Reporting: allocation of responsibilities for internal reporting and escalation of important information;
- Decision making: identify who is responsible for the decision as to whether information is inside information and when the release of inside information may be delayed.
- Emergencies: what to do in the event of an emergency and use of ‘holding’ announcements;
- Advisors: identify those external advisors that need to be involved with the decision making process such as brokers and lawyers;
- Approval and verification of announcements: identify who is responsible for approving the release of and verification of information in announcements;
- Routine announcements: how are routine announcements (such as TR1s – major shareholder announcements) to be approved and released;
Control of inside information: rules in order to limit knowledge of inside information to those who need to know;
- Record keeping: identify who is responsible for keeping records relating to the disclosure of inside information, decisions to delay disclosure and market soundings;
- External communications: include guidelines for communication with the press, analysts, how to deal with rumours, use of social media;
- Insider Lists: identify who is responsible for keeping insider lists and communicating closed periods to employee insiders;
- Contact details of key personnel: for example Chairman, Chief Executive Officer, Chief Financial Officer, external advisors.
- Draft memorandum to be sent to relevant employees informing them of the disclosure policy and the requirement for them to comply.

Training and Communication

It is vitally important that the disclosure or communication policy is communicated clearly to the right people. As a first step the group of employees who need to understand about the policy should be identified – this will include those on the company’s insider list. The recipient must be obliged to acknowledge that they have read and understood the policy. A record needs to be kept of who has been issued with the policy, the date of acknowledgement of receipt and other training given. It is advisable to also provide training either in person or online. A company intranet can be used to disseminate information and test employees on their knowledge. Communicating the disclosure policy is often done in conjunction with notifying relevant employees of the Company’s share dealing code.

Ensuring the Board receives the right information at the right time

It is clearly of prime importance to ensure that the Board is fully informed of any potential inside information as soon as it is identified. Internal reporting procedures should be included in the disclosure policy setting out responsibilities for escalating information in a timely manner. Responsibility needs to be allocated at operational level to heads of business divisions, project managers and key financial employees. Use of a flow chart and examples relevant to the business of scenarios that may constitute inside information are useful to include in the company’s procedures. In addition some companies use minimum thresholds, both financial and non-financial, with the requirement that if any event is likely to go over the threshold the Board must be informed. It goes without saying that financial reporting procedures should be robust including a system of ‘flash’ reports to the Board outside of regular activity reports in the event of a material incident.
Enforcement Activity

The introduction of MAR presents an opportunity for reviewing and strengthening company procedures surrounding the disclosure of inside information. The imposition of a fine of £2.4 million on Lamprell plc by the FCA in 2013 for failing to release information on their deteriorating financial performance in a timely manner should serve as a warning to listed companies that they cannot be complacent and should continuously review and amend procedures and systems.

Useful Sources

ESMA September 2015 Final Report
FCA: Policy Statement (PS16/13)
FCA: Listing Rules, Final Notice Lamprell plc
Prism Briefing – The Market Abuse Regulation: A Summary
Prism Briefing – The Market Abuse Regulation: Inside Information
Prism Briefing – The Market Abuse Regulation: Share Dealing Code

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