FCA Consultation (CP15/35) related to the implementation of the MAR

Law Society and City of London Law Society

Company Law Committees Joint MAR Working Party Response

Introduction

The Law Society is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners ('the Society'). The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

The City of London Law Society ('CLLS') represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The MAR Joint Working Party is made up of senior and specialist corporate lawyers from both the Society and the CLLS who have a particular focus on issues relating to capital markets.

We have reviewed and support the comments of the Regulatory Law Committee of the CLLS, in particular with regard to the need for FCA to provide meaningful guidance and the maintenance of a single source of reference for the Market Abuse Regulation (**MAR**) and related Regulatory Technical Standards, Implementing Technical Standards made by the Commission and FAQ and guidance made by ESMA.

We also note paragraph 3.28 of the CP which states that the FCA "retain the power under section 139A to FSMA to provide guidance which we may choose to exercise to give clarification on EU MAR where necessary" and goes on to say that additional clarification may be done "either domestically or in conjunction with ESMA". As noted in our responses to specific questions below, there are a number of areas where provisions in MAR or in Level 2 or Level 3 legislation are unclear and where it would be appropriate for the FCA to exercise this power.

Q.1: ***Do respondents agree that the issuer/EAMP should provide a written explanation following notification of delayed disclosure to the FCA only upon its request?***

Yes we agree.

Q.3: ***Would it be too burdensome to automatically provide the explanation without waiting for a specific FCA request? Please could you provide data regarding the resources required?***

Yes we agree.

Q.4: ***Do you agree with our proposal to adopt the €5,000 threshold? If not, please specify the market conditions that you consider would justify the decisions to increase it to €20,000.***

Yes we agree.

Q.6: ***Do you have any comments or suggestions on the proposed amendments to MAR1.1? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We are concerned about the impact on the market and market participants of the proposed approach by the FCA, which, in the UK, will be the competent authority that has supervisory and investigatory authorities and will be responsible for enforcing the MAR. We think that, because of that role, the FCA should take the lead in providing assistance to the market in determining what will constitute market abuse and do not think that the proposed draft new guidance will do this. For example, expressions such as "may" or "[un]likely to be" do not provide sufficient clarity. (See also our further comments under Q7.)

We believe that many of the provisions in the Code of Market Conduct (see also the further comments under Q7) are helpful to the market and could and should be retained as they are not inconsistent with the MAR. We are pleased that some of the evidential provisions in the Code of Market Conduct are proposed to be retained as guidance.

Given that the Market Abuse Regulation is commonly referred to as the MAR (for example by ESMA) (and also by us in this response) we suggest that the abbreviation of the Market Conduct Sourcebook is changed: we suggest to MARCON or MARK.

What is stated in 1.1.9G is obvious but we think is very unhelpful. Readers should be directed to those specific parts of the MAR and Level 2 legislation that the FCA considers relevant.

The cross-reference in the Note to "sources referred to in MAR 1.6.6G" appears to be incorrect.

Q.7: ***Do you have any comments or suggestions on the proposed amendments to MAR1.2? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

As a general point, we note that the new MAR1 does not include the phrase "in the opinion of the FCA" which is used throughout the Code of Market Conduct. We note that in paragraph 4.17 of page 17 you state that "our view is that preserving its content as much as possible will help the industry to understand our views and

expectations about market abuse in more detail". It is clear from that sentence that the FCA does have views and understands that the market wants to understand what these are so in that context we think including the phrase "in the opinion of the FCA" is helpful (see the introduction to 1.2.5). Continuing that theme, we note that "are to" in the first line has been changed to "may". We think that market participants will find the watering down of the FCA guidance unhelpful, particularly where there is no clear reason for doing so.

We have the same comments in relation to the same changes to new 1.2.6, 1.2.8, 1.2.12 and 1.2.16. 1.2.12G(5) should be retained as it is consistent with recital (28) of the MAR.

Q.8: ***Do you have any comments or suggestions on the proposed amendments to MAR1.3? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We have the same comment as above in relation to the change in terminology in new 1.3.2E.

We note the changes and deletions to existing MAR 1.3 and 1.4. However we are nevertheless assuming that the following established market practices will still be permitted once the MAR comes into effect:

(a) signing an underwriting or placing agreement prior to the announcement of a new issue of securities;

(b) seeking and signing irrevocable commitments to take up a part of a new issue of securities prior to the announcement of an issue of securities (from an existing shareholder in relation to his entitlement, from an existing shareholder in excess of his entitlement or from a new investor);

(c) on block trades, prior to announcement, seeking and signing up purchasers; and the bank agreeing with the seller to take up in the event purchasers cannot be obtained;

(d) not disclosing (in the RIS announcing a bookbuild) the price at which an issue is underwritten

Although Article 9 is headed "Legitimate Behaviour", our view is that no definition of "legitimate behaviour" is given in the MAR, but examples appear to be given in recitals (29) and (30). Neither Articles 9(1) or 9(2) provide a safe harbour and Article 9(2) is unhelpful in not giving examples of own account dealing which is permitted. We therefore think that the FCA should be giving guidance in relation to this and that in particular paragraph 1.3.7 should be retained *or Recital (30) of MAR signposted*. The market finds the definition of trading information very helpful and it would be appreciated if ESMA could be asked to give guidance on legitimate behaviour and its relation to trading information.

1.3.11E has also been deleted and a reference to Article 9(3) of MAR inserted instead. In our view the two scenarios are slightly different as Article 9(3) talks about a legal or regulatory obligation which arose before the person concerned possessed the inside information whereas 1.3.11E states that if the person acted in contravention of a legal or regulatory obligation that would be a factor that would be taken into account in determining whether the behaviour is in pursuit of legitimate business. We therefore think it would be useful to retain 1.3.11E as guidance.

We note that you have replaced 1.3.12G and 1.3.13G with references to Articles 9(2)(b) and 9(3)(b) respectively. These articles are not the same, for example, 1.2.13G states that "a person that carries out an order on behalf of another will not, merely as a result of that action, be considered to have any inside information held by that other person" which is not repeated in Article 9(3)(b) and would be a helpful addition in guidance which we believe is not incompatible with MAR.

There are references to "may" in new 1.3.15E and 1.3.19E which as stated above we believe should be more emphatic. In addition, we note the wording "the following descriptions are intended to assist in understanding certain behaviours which may constitute insider dealing under the Market Abuse Regulation" in new 1.3.20G, 1.3.21G, 1.3.20G. and 1.3.23G. Again, we think that this could be strengthened by referring to the descriptions as "examples" as they were previously.

We should also like the FCA to give guidance on stake-building (Article 9(4) of the MAR. There is uncertainty in the UK market as to whether, and to what extent, stake-building is permitted under the MAR. Stake-building is defined in Article 3(31) as an acquisition of securities which does not trigger a legal or regulatory obligation to make an announcement of a takeover bid. Although the expression stake-building is used in the market in the context of the groundwork for a takeover bid, the MAR definition is broad enough to encompass any acquisition of securities below the mandatory takeover bid threshold.

There is a view that MAR does not allow stake building at all on the basis of the sentence at the end of Article 9(4) "This paragraph shall not apply to stake-building" However it would seem that the "own knowledge" safe harbour in Article 9(5) could still apply so that If the only knowledge you have as a bidder is the fact that you intend to make the bid: In terms of MAR, you should be able to rely on Article 9(5) to allow you to stake-build (assuming there is no illegitimate reason for the dealing (Article 9(6)), the last sentence of Recital (30) and Recital (31)).

It is however not clear whether the reference in Article 9(5) to deciding to "acquire" financial instruments can include a person's own knowledge of a proposed takeover or whether it only applies to the knowledge of the intention to acquire the securities in question (i.e. those to be acquired in the stake-building) but not the takeover given the wording of Article 9(5) (and see also the last sentence of Recital (30) and Recital (31).).

It would be very helpful to have clarification from the FCA on the point as it is important that market participants and their advisers adopt the same approach in relation to stake-building.

Removing the ability of bidders to stake-build when the only inside information they have is knowledge of their own intention to bid would have a significant effect on the manner in which takeovers may currently be carried out in the UK.

Q.9: ***Do you have any comments or suggestions on the proposed amendments to MAR1.4? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We note the deletion of the words "in the opinion of the FCA" the substitution of "may" for "will" and the deletion of 1.4.5E(3) and 1.4.5AG – see above for our comments on this.

We think that 1.4.4 should refer to the disclosure requirements (as defined, but see our comments on the definition in the response to Q38 below) rather than the Part 6 rules and that "will" should replace "may" as, once disclosed in accordance with the MAR, information will not be "inside information" and so there will not be unlawful disclosure.

See above for comment on use of the language "these descriptions are intended to assist in understanding certain behaviours which may constitute unlawful disclosures under the Market Abuse Regulation". We suggest that 1.4.6G should read "the following examples are of certain behaviours that may constitute unlawful disclosure under MAR…..".. In addition, the deleted wording at the end of 1.4.6G(2) should be retained.

We think that MAR 1.4 should also include a signpost to Article 11 of the MAR, the RTS and ITS and the ESMA guidelines in relation to market soundings and that it would be misleading not to include this reference because it is a key part of the MAR regime for disclosure of inside information.

Q.10: ***Do you have any comments or suggestions on the proposed amendments to MAR1.6? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

Again, we note the "watering down" of the language in 1.6.3G by deleting the words "For the avoidance of doubt" and the inclusion of the words "does not of itself indicate behaviour described in Annex IA9(c) of the Market Abuse Regulation".

1.6.10E has been deleted with the comment box on page 23 of the CP referring instead to the Delegated Acts. However, we cannot see a specific reference to these factors in the Delegated Acts and think that these should be retained as guidance.

Paragraph 4.49 of the CP states that there is partial overlap between 1.6.15E and the Delegated Acts, however, we are not certain which specific provision you are referring to. In our view, Article 12 (2)(b) refers to buying or selling at the opening and closing

of the market which has or is likely to have the effect of misleading investors on the basis of the prices displayed but does not give specific examples. We therefore think that it would be helpful to include these examples in guidance.

Q11: ***As discussed in paragraph 4.49 above and also discussed in paragraphs 4.52, 4.55 and 4.86, we propose to delete some potential indicators of behaviour such as those included in MAR 1 and Sup 15.10 Annex 5 from the Handbook and, instead, direct the industry to the list of indicators provided under the delegated acts under Article 12(5). If you disagree with this approach, please suggest an alternative approach with rationale and indicate, if relevant, whether there are particular indicators proposed for deletion which should be preserved and why.***

We have no comments.

Q12: ***Do you have any comments or suggestions on the proposed amendments to MAR 1.7? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We have no comments.

Q13: ***Do you agree with the proposed amendments to MAR 1.8? If not, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We think that in 1.8.4E the words "could reasonably be expected to have known" are helpful in clarifying what is meant by "ought" in Article 12(1)(d) of the MAR and should be retained.

We think that in 1.8.6G of the MAR the examples are helpful and should be retained (and updated in the case of (1)). They are not inconsistent with the draft delegated acts.

Q14: ***Do you have any comments or suggestions on the proposed amendments to MAR 1.9? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We have no comments.

Q15: ***Do you have any comments or suggestions on the proposed amendments to MAR 1.10? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

Our view is that there is no need to amend 1.10.4C, 1.10.5C and 1.10.6C by replacing "does not" by "unlikely to".

Q.21: ***Do you have any comments or suggestions on the proposed amendments to COBS 12.4? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

In relation to investment recommendations (Articles 3(1)(34) and 20), we are concerned that when Directors are required, under the Listing Rules or the Takeover Code, to make recommendations to shareholders, they may become subject to Article 20. Statements made by Directors in circulars or offer documents might fall under Article 3(1)(34)(ii) as "information recommending or suggesting an investment strategy…produced by persons other than those referred to in point (i) which directly proposes a particular investment decision in respect of a financial instrument." Clarification is needed on this point.

Q.23: ***Do you have any comments or suggestions on our proposed amendments to DTR 1.1? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

It would assist users of the Handbook if DTR 1.1.2G were expanded to cross refer to relevant Commission delegated regulations, once these have all been published and adopted.

DTR 1.1.2 should include reference to the "disclosure requirements" rather than the "disclosure obligations" as "disclosure requirements" has been proposed as a defined term in the FCA Glossary to refer to the provisions of Articles 17, 18 and 19 of MAR.

Q.24: ***Do you have any comments or suggestions on our proposed amendments to DTR 1.2? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

DTR 1.2.4G covers the need for early consultation with the FCA and the process for seeking such consultation.

Should the reference in DTR 1.2.5 to where "a disclosure requirement refers to consultation with the FCA", instead be to where "the disclosure guidance" so refers (we note consultation with the FCA is referred to in DTR 2.2.9(4) but not in Articles 17-19 of MAR)?

Under MAR, an issuer may also be required to make an application or notification (see Article 17(6) of MAR by way of example) to the FCA. The FCA is to be granted powers pursuant to Articles 6 and 7 of The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 (DRAFT) (the 2016 Regulations) to direct the manner in which any such application or notification should be made. DTR 1.2 should be expanded to set out the manner in which the FCA directs any such application or notification be made.

Q.25: ***Do you have any comments or suggestions on our proposed amendments to DTR 1.3? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

The FCA's information gathering powers currently set out in DTR 1.3.1R are to be dealt with by proposed s.122A FSMA (see the 2016 Regulations). It may assist users of the Handbook to include a cross reference to such powers.

Similarly, the FCA's powers to require the publication of information will be dealt with by proposed s122G FSMA (see the 2016 Regulations). Again, it may assist users of the Handbook to include a cross reference to such powers.

It would be helpful, if possible, to retain DTR 1.3.4 (misleading information not to be published). It would also be helpful in this provision to make reference to the FCA's powers to require the publication of corrective statements (proposed s122H FSMA (see the 2016 Regulations)). We note that LR 1.3.3 is a provision in identical terms to DTR 1.3.4 and that this could be an alternative to keeping DTR 1.3.4.

DTR 1.3.6 – why has the wording in this provision been changed from "must" to "may"? If issuers are still to be required to publish information in this manner when a RIS is not open for business then this should read "must" in order to ensure there is no ambiguity. This appears to be a substantial change and we do not understand why it is being made in the context of implementing the MAR. We note that "must" is retained in DTR 1A.3.3.

DTR 1.3.8 – Article 17(10) of MAR refers to the adoption of "implementing" technical standards, rather than "regulatory technical standards" as referred to in the signpost in DTR 1.3.8.

Q.26: ***Do you have any comments or suggestions on our proposed amendments to DTR 1.4? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

The FCA's powers to suspend trading currently set out in DTR 1.4.1 – 1.4.3 are to be dealt with by proposed s.122I FSMA (see the 2016 Regulations). It may assist users of the Handbook to include a cross reference to such powers.

We would suggest that the cross-reference to "the Market Abuse Regulation" in DTR 1.4.4G(1) should be amended to "article 17 of the Market Abuse Regulation", to assist in identifying the relevant provisions.

Q.27: ***Do you have any comments or suggestions on our proposed amendments to DTR 1.5? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

With regard to sanctions, these are now to be dealt with by proposed s.123 FSMA (see the 2016 Regulations). It would assist users of the Handbook to include a cross reference to such powers.

Q28: ***Do you have any comments or suggestions on our proposed changes to DTR 2.1? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

No comments.

Q29: ***Do you have any comments or suggestions on our proposed changes to DTR 2.2? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

- **DTR 2.2.1:** It would be of assistance to issuers if the cross-references could be as specific as possible. We would suggest replacing the generic reference to "Commission-adopted Regulatory Technical Standards under Article 17(10) of the Market Abuse Regulation" with a reference to "[the final form of Article 2(1) of the draft Commission Implementing Regulation included in Annex XII of ESMA/2015/1455], in relation to the means for public disclosure of inside information", to make it easier for issuers to identify the relevant provisions.

- **DTR 2.2.5:** We note that revised DTR 2.2.5G(2) refers to the "likelihood" that a reasonable investor will make investment decisions relating to the relevant financial instrument to maximise his economic self-interest, as opposed to the assumption that they will do so. It would be helpful if the FCA could clarify whether the changes to this provision reflect any change in policy.

As a more general point, we note the requirement in Article 1(b)(i) of the draft delegated Regulation set out in Annex XII to ESMA/2015/1455 that communications clearly identify that the information communicated is inside information. In order to ensure a consistent approach by issuers, it would be helpful to have guidance from the FCA on the approach that may be taken to complying with this requirement. We would suggest that including a rubric that "The information contained in this announcement may constitute inside information" should be considered sufficient for these purposes and would avoid placing a disproportionate burden on issuers to conduct expensive and unnecessary analysis (in particular in situations where the analysis is potentially unclear) which would have no regulatory value.

We also note that Article 1(b)(iii) of the same draft Regulation requires the communication to identify the person making the notification. We assume that this should refer to the individual that arranges for the announcement to be released but again it would be helpful to have guidance from the FCA on this point to ensure consistency of approach.

Q30: ***Do you have any comments or suggestions on our proposed changes to DTR 2.3? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

In DTR 2.3 we would suggest adding a cross-reference to "[the final form of Article 3 of the draft Commission Implementing Regulation included in Annex XII of ESMA/2015/1455], in relation to the posting of inside information on a website".

Q31: ***Do you have any comments or suggestions on our proposed changes to DTR 2.4? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

No comments, although if the entire section is to be deleted and no cross-reference added, it might be appropriate to delete the heading as well as the text.

Q32: ***Do you have any comments or suggestions on our proposed changes to DTR 2.5? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We note that since CP15/35 was published (i) the FCA has published CP15/38 in relation to delay in disclosure of inside information, in which it is proposed to delete the last sentence of current DTR 2.5.5G and (ii) ESMA has published its consultation paper on Draft Guidelines under MAR (ESMA/2016/162) which includes draft disclosure guidelines which cover both the circumstances in which an issuer may have a legitimate interest to be protected by a delay in disclosure and the circumstances in which delay is likely to mislead.

While the ESMA Guidelines will (subject to the observations below) cover most of the issues that need to be addressed we see a role for FCA guidance in a revised DTR 2.5 in two respects:

(i) clarifying the application of ESMA Guidelines to the UK markets and their usual practices; and

(ii) dealing with practical aspects of compliance.

Clarifying the application of ESMA Guidelines

Until the ESMA Guidelines are finalised it will not be possible to identify definitively the areas where clarification is required. The aspects of those Guidelines that we think need further work and should be amended include:

- the question whether the process of preparing results (annual and interim) for publication gives rise to inside information is difficult to answer with precision (except where it is clear that the results to be published are so divergent from expectations that a profit warning announcement is required); under the existing regime it has been acceptable to delay announcement of the results until the planned announcement date. In the Hannam decision of the Upper Tribunal it was suggested that this was an exercise of the right to delay. The alternative explanation of why this practice is acceptable (which the Upper Tribunal did not favour) is that results that are in line with expectations are not inside information (as a consequence of which there is no basis for prohibiting dealings by those with knowledge of the outcome of the process). Paragraph 64 of the CP could be read as casting doubt on whether the existing practice can continue as it suggests that as each significant subsidiary reports an assessment should be made as to whether the information is inside information and potentially an announcement should be made and the ability to delay does not apply. It also says that the time needed for the parent to check the information received could fall within Article 17(1) where it is provided that issuers should inform the public "as soon as possible". It may be that in paragraph 64 ESMA is referring to information relating to accounting issues (a "black hole") but even if that is clarified we think the FCA should provide guidance to issuers confirming that the current practice is acceptable and whether that is based on (i) the right to delay; or (ii) on a narrower

view of when the information is inside information; or (iii) on an interpretation of the words “as soon as possible”.

- the ability to delay for a short time while facts are ascertained (existing DTR 2.2.9 G) is an important point in practice. We understand ESMA's position set out in paragraph 67 of the CP to be that they acknowledge that the issuer may need some time to clarify the situation but they do not propose to include something to deal with the short delay in the list of legitimate interests and instead consider that this may fall within Article 17(1) which says that the issuer shall inform the public “as soon as possible” Given the importance of this for issuers it we think the FCA should confirm that the principle set out in DTR 2.2.9G remains acceptable;

- the omission of a general reference to "impending developments", which ESMA does not propose to include (paragraph 69 of the CP). Again, this is an important part of the framework within which UK issuers have operated and FCA should confirm that in this regard nothing has changed;

- paragraph 3.2.4 of the draft Guidelines, which ESMA explains in paragraph 87 of the CP relates to planning the acquisition or disposal of shares where negotiations have not yet started . We do not understand why planning this particular kind of transaction where negotiations have not started is singled out and if this paragraph is retained by ESMA we will be looking for confirmation by FCA that there is a more general ability to delay disclosure of the planning stages of other kinds of transactions/corporate development where, if applicable, negotiations have not started;

- the approach in the Guidelines to the question of when a delay would be misleading is stated too definitively, in particular in paragraph 3.4.2 (b) and (c) of the draft Guidelines (and paragraph 100 of the CP). We suggest that all of the issuer’s disclosures around prospective financial information should be taken into account to determine whether a subsequent divergence is misleading (for example a forecast accompanied by appropriate disclosure of assumptions/risks to achievement would not be misleading if a subsequent divergence was due to one of those assumptions not being met). It may be only on rare occasions that there will be a legitimate interest to be protected by a delay of such a disclosure but it would be wrong to rule out that possibility where the previous disclosure was such that investors cannot be said to be misled by the delay.

Practical aspects

As noted elsewhere, cross-references should be as specific as possible to assist issuers in identifying the relevant provisions. We suggest therefore that the FCA’s Disclosure Guidance (DTR 2.5.1) should include a reference to the need for an issuer which delays disclosure of inside information to comply with the requirements set out in Article 17(4) and to the final form of Article 4 of the draft Commission Implementing Regulation included in Annex XII of ESMA/2015/1455, in relation to the notification of delayed disclosure of inside information and provision of a written explanation of the delay for issuers relying on Article 17(4) of the Market Abuse Regulation, and the final

form of Article 5 of the draft Commission Implementing Regulation included in Annex XII of ESMA/2015/1455 in relation to the notification of intention to delay the disclosure of inside information by an issuer that is a credit institution or financial institution relying on Article 17(5) of the Market Abuse Regulation.

The guidance should include a statement about the format and method of notification to the FCA of the fact that there has been a delay in disclosure, as required by the last paragraph of Article 17(4). For example does the FCA intend to issue a standard form for use by issuers for this purpose and how is the notification to be submitted to the FCA?

Article 4(1)(a)(i) of the RTS on public disclosure of inside information and delaying public disclosure (Annex XII to the ESMA Final Report on draft technical standards on MAR) could be read as requiring identification of a precise moment when information about a particular matter became inside information and/or was known to the issuer. It is often the case that this point in time cannot be precisely ascertained and if construed in this way issuers will incur considerable expense with complex analysis which has no regulatory value. We suggest the FCA should include guidance that it will accept reports that indicate a date when information "was or may have been" inside information.

It would also be of assistance if the guidance noted that for the purposes of the last paragraph of Article 17(4) the UK has opted not to require a written explanation of how the conditions have been satisfied to be provided to it automatically but that such an explanation will still need to be available on request from the FCA.

In relation to the timing for the application of the new requirement to notify the FCA if there has been a delay, our view is that it only applies where the delay in the disclosure of inside information commences on or after 3 July 2016. It would be helpful for the FCA to confirm this.

DTR 2.5.7

We note the addition of the word “may” to the end of the first paragraph of DTR 2.5.7(2). It would be helpful if the FCA could confirm the reason for this addition and whether it represents a change in policy. As the sentence before already makes clear that these are categories of recipient to which issuers only “may” be able to disclose, the point that not every category will be appropriate for disclosure in all circumstances seems already to be covered. We think that a signpost should be inserted in DTR 2.5.7 to Article 11 of the MAR, the RTS and ITS, and ESMA Guidelines as regards market soundings. The market soundings provisions apply to issuers when they are "disclosing market participants" and they are an important new aspect of the selective disclosure regime.

Q33: ***Do you have any comments or suggestions on our proposed changes to DTR 2.6? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We welcome the proposed retention of guidance in DTR 2.6.

- **DTR 2.6.1:** In DTR 2.6.1 we would suggest including a cross-reference to the final form of Article 4(1)(c)(i) of the draft Commission Implementing Regulation included in Annex XII of ESMA/2015/1455], in relation to the requirement to record evidence of the information barriers put in place where disclosure of inside information is delayed in reliance on Article 17(4) of the Market Abuse Regulation.

- **DTR 2.6.3:** In DTR 2.6.3 we would suggest including a cross-reference to the final form of Article 4(1)(c)(ii) of the draft Commission Implementing Regulation included in Annex XII of ESMA/2015/1455, in relation to the evidence required of information barriers and the arrangements put in place where confidentiality is no longer ensured.

Q34: ***Do you have any comments or suggestions on our proposed changes to DTR 2.7? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

We welcome the proposed retention of guidance in DTR 2.7.

We note that the proposed language of DTR 2.7.3 weakens existing guidance. Under the draft wording knowledge that press speculation or market rumour is false only "may not" amount to inside information and there only "may be cases" where an issuer would be able to delay disclosure. In contrast, the existing language is stronger, stating that it "is not likely" to amount to inside information and that "in most of those cases" an issuer would be able to delay disclosure "often indefinitely". We think that the current guidance remains consistent with the MAR and so do not think that any change should be made to the current guidance. We would therefore ask that the FCA explain this change, in particular why in its view the MAR has changed the likelihood that knowledge of false press speculation or market rumour will be inside information and the likelihood that an issuer would be able to delay disclosure of such information. If there will be a change in the FCA's expectations regarding issuer comment on false rumours, it would be helpful if this could be set out clearly in feedback to the market.

Q35: ***Do you have any comments or suggestions on our proposed changes to DTR 2.8? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

In DTR 2.8.3 we would suggest replacing the generic reference to "Commission-adopted Implementing Technical Standards under Article 18(9) of the Market Abuse Regulation" with a reference to "[the final form of Article 2 of the draft Commission Implementing Regulation included in Annex XIII of ESMA/2015/1455], in relation to the format for drawing up and updating the insider list".

In relation to the deletion of DTR 2.8.7 and DTR 2.8.8, we note that you refer to DTR 2.8.8 as being not compatible with MAR. We do not think that it is incompatible and we think that guidance needs to be included to clarify how issuers should deal with the part of the insider list that is maintained by advisers. In particular to confirm that it will still be the case that this list can be maintained separately by the adviser but that

the issuer needs to be able to require the adviser to send the list directly to the FCA in order for example to respond to a request for the insider list from the FCA. Given the amount of personal information required to be disclosed in the ESMA format for insider lists and the compliance requirements under data protection legislation, we do not consider it appropriate that insider lists be circulated outside the entity that maintains the insider list other than to the FCA. Therefore we do not think that the issuer should be able to require an adviser to send its own insider list to the issuer – instead the adviser should only be required to send it to the FCA. Guidance is needed for issuers on this point given their responsibility for insider lists. Also, will the issuer still be expected to keep a note of the contact at the adviser responsible for the maintenance of the advisor's insider list on the issuer's insider list or elsewhere for this purpose? It would be helpful to state that in FCA guidance.

It would also be helpful to clarify that advisers acting on behalf of an issuer (e.g. an underwriter or financial adviser) do not need to keep on their insider lists information about employees of persons acting for them (e.g. the advisers' advisers, such as lawyers acting for an underwriter or financial adviser) and so that it will be sufficient for advisers' advisers to keep their own insider lists.

The draft implementing regulation for insider lists set out in the ESMA September 2015 Final Report (Article 2(5) of the draft implementing regulation) states that each competent authority must publish on their website the electronic means by which an insider list must be submitted to the competent authority. It would be helpful if issuers could know as soon as possible what the FCA is proposing in this respect in order that issuers can understand, in advance of MAR coming into force, what format their insider list will need to be in in order to allow it to be submitted in the manner required by the FCA. We also think it would be helpful if in DTR 2.8, guidance were included of the fact that the FCA provides a statement on its website as to the manner in which the submission must be made (in a similar way to the reference currently in DTR 5 as to the manner of submission of notifications of interests in securities).

Our view is that the concept of a "National Identification Number" does not apply in the UK so that this column in the insider list can be left blank for UK employees. Given the uncertainty in the market on this point we think that the FCA should confirm this.

It would also be helpful if the FCA could confirm that the column is not applicable to UK issuers more generally and they do not have to seek the national identification numbers of insiders who are UK nationals, nationals of another EU member state or third country nationals whether based in the UK or anywhere in the world.

Q.36: ***Do you have any comments or suggestions on our proposed changes to DTR 3? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.***

In DTR 3.1,1 in order to avoid any confusion, we suggest that the reference to "connected person" is replaced by "person closely associated", with the Glossary definition being "as defined in Article 3(1) (26) of the Market Abuse Regulation". Also,

it might be clearer to amend the end of DTR 3.1.1 to reflect the wider scope of Article 19 of the MAR, so it refers not only to shares and derivatives and other financial instruments related to those shares, but also to debt instruments and derivatives and other financial instruments related to those shares.

As regards the definition of a "person closely associated" (**PCA**) with a PDMR, we note that the definition of "connected person", which is currently in Schedule 11B to FSMA, will be deleted. This will mean that the definition of a PCA set out in Article 3(1)(26) of the MAR will be supplemented only by the definition of spouse and child which are set out in the 2016 Regulations.

Limb (d) in the definition of PCA in the MAR deals with companies, trust or partnerships that are treated as persons closely associated with a PDMR and it reads:

"a legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities 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".

This is essentially the same as the current definition of a connected person in the Market Abuse Directive (**MAD**), but Schedule 11B then implements the MAD provision by adding extra detail and by going wider than the MAD definition in some respects.

Listed companies are required to create a list of PCAs and PDMRs are required to notify their PCAs of their obligation to disclose dealings in securities. They therefore need to be sure who their PCAs are.

The issues which we consider arise as regards the interpretation of limb (d) of the definition in Article 3(1)(26) because of the removal of schedule 11B, and our views on these issues, are:

- Definition of Control – We assume a test of whether the PDMR or PCA has over 50% of the voting power or board control of the relevant entity can be used to determine whether there is control over that entity. The Schedule 11B definition includes an associate test which is based on a 20% threshold but that does not form part of the definition in the MAR.

- Do the tests apply separately to the PDMR and each PCA, rather than looking at them all jointly – e.g. do you need to consider whether the PDMR and their spouse jointly control a company? Schedule 11B requires the joint position to be looked at. The MAR definition does not expressly require the joint position to be looked at but it can be argued that as a matter of substance the joint position should nevertheless be considered.

- What is meant by "the managerial responsibilities of which are discharged" by the PDMR/PCA – The market interpretation of the current provision in Schedule 11B

which relates to this test is based on the guidance given in the FSA Market Watch No.12 published in June 2005 (when the relevant, equivalent definition was in the Companies Act). This stated that the test will only be met if the director is a sole director or personally has control over management decisions. This ensures that, for example, if a non-executive director of one listed company is an executive director of another listed company that does not make the second company a connected person of the first. Our view is that this interpretation can still be applied under the MAR definition.

We also suggest that the reference should be to Article 19(1) (or possibly to Article 19 (1) to (10)) of the Market Abuse Regulation and not to the whole of Article 19 as the prohibition on PDMR dealing in Article 19(11) is quite separate. And that cross-reference is made to the list of notifiable transactions set out in Article 10(2) of the Draft Commission Delegated Regulation published on 17 December 2015 ("Delegated Regulation"), which includes transactions which a PDMR cannot be said to have "conducted" such as automatic conversion of a financial instrument and inheritance received.

DTR 3.1.2 should cross refer to Article 10 of the Draft Regulation which specifies the types of transactions that are required to be disclosed under Article 19(1).

In DTR 3.1.2B it would be helpful to set out the threshold in pounds sterling which is applicable for the purposes of Article 19(8).

DTR 3.1.3 should cross refer to the relevant implementing regulation to be issued pursuant to Article 19(15) which contains the form for notification of interests for the purposes of Article 19(6).

In DTR 3.1.4 it would be helpful to include a cross-reference to "article 19(3) of the Market Abuse Regulation", as this provision includes the time period in which issuers must make public the information notified to it under Article 19(1).

We assume that a template will be prepared of the notification form, that is separate from the implementing regulation containing it, for use by PDMRs as the form that they need to complete to comply with Article19(6). Will there be a template for notifications which will be made available as a UK version on the FCA website? If so the guidance should cross refer to where that template can be found. If the FCA is not creating a separate template for the UK, will there be a template prepared by ESMA which could be cross-referred to? We note that the template in the current draft of the implementing regulation includes cross-references to other EU regulations, including MIFID regulations which have not yet been created, and so is not in a form that is usable in practice by PDMRs and their PCAs and so there needs to be a version of the form which could be used in practice by them for their notifications.

Also in DTR 3.1.3, it would be helpful if the FCA could provide guidance confirming that an issuer may submit a dealing notification form to the FCA on behalf of a PDMR or PCA as this is in practice likely to be needed and will facilitate compliance.

In relation to the timing of application of the new notification requirements, our view is that the new requirements should apply to PDMR and PCA dealings occurring on or after 3 July 2016 and that dealings that have taken place in the prior week which have not yet been announced should be disclosed in accordance with the current DTR 3 requirements. It would be helpful if the FCA could confirm this.

DTR 3 is intended to cover the requirements relating to "Transactions by persons discharging managerial responsibility and their connected persons". The proposed guidance to be retained in DTR 3 only refers to notification of transactions by persons discharging managerial responsibility and it does not include any reference to the restrictions on dealings by PDMRs during closed periods, that is any references to the provisions in Articles 19(11) and 19(12) of MAR. We think that it is vital to include a cross-reference to these closed period requirements in MAR Article 19 in DTR 3 and that it would be misleading to only include guidance in relation to disclosure when a key aspect of the MAR provisions in relation to PDMRs in Article 19 is the closed periods. The cross references should be to both Articles 19(11) and 19(12) and to the relevant implementing measures published pursuant to Article 19(13).

We refer you to our comments under Qs 37 to 39 of this response to issues relating to the MAR closed periods, transactions that are restricted under Article 19(11) and the permitted exceptions during the closed periods under Article 19(12).

Q37: ***Do you agree with the proposal to delete the provisions of the Model Code and replace it with rules and guidance on systems and procedures for companies to have clearance procedures regarding PDMR dealing?***

We agree that since the MAR closed periods, the circumstances in which trading by a PDMR during a closed period may be permitted and the definition of “dealing” in the MAR are very different from the provisions of the Model Code (as shown in our comments below), it will not be possible to retain the Model Code in its current form so far as the MAR closed periods are concerned, when the MAR comes into force.

We also agree with the comment in paragraph 4.135 of the CP that the Model Code “provides a benchmark for premium listed companies to manage the reputational risk associated with PDMR trading and encourages a consistency in approach across the market”.

We understand the reasons behind the FCA proposals for continuing with a system that requires clearance of relevant dealings at all times, whether or not in a MAR closed period. We also recognise the advantages for issuers and investors of a standardised approach being taken for dealing restrictions so far as that is possible under the new regime.

Problems with the approach proposed in CP 15/35

Our concern is that the FCA’s proposals will mean that premium listed companies will need to have a two tier dealing code, but with no guidance from the FCA as to what the tier governing dealing outside the MAR closed periods should provide, what dealing it should cover and in particular, as to what exceptions should be available.

In addition the potential for inconsistency of enforcement with PDMR trading in a MAR closed period being subject to sanctions under proposed section 123 FSMA on the one hand and the FCA applying sanctions for breach of LR 6.1.29R and LR 9.2.8R only to premium listed companies, through enforcement of the Listing Rules, on the other will be unhelpful.

We do not think it is correct or workable to put the burden on issuers to determine where it is appropriate to give clearance to deal without any express guidance from the FCA on the circumstances when it might be appropriate to give clearance and to require systems and controls to address this. We do not think that issuers can operate their controls in practice on the basis of the statement in proposed LR 9.2.8B G that "in considering whether a listed company has satisfied LR 9.2.8R, the FCA will consider whether the systems and controls at least address the aspects set out in LR Annex 2G". It is not clear what this means and that lack of clarity is then made greater by the fact that the provision goes on to say that "for the avoidance of doubt, compliance with LR9.2.8R does not mean that a listed company will have satisfied its obligations under article 19 of the Market Abuse Regulation".

In our view the FCA needs to determine as a policy matter whether it wishes to impose super-equivalent, longer closed periods outside the MAR closed periods. What is confusing and we think unworkable is paragraph 5(b) of Annex 2G which reads "If this is not the case [i.e. the proposed dealing is not to take place in a MAR closed period] the FCA would expect a company to give due consideration as to whether there are circumstances in which it would not be appropriate to give clearance. A company may wish to consider …" where inside information does not exist, whether there are timeframes during the year in which it would not be appropriate to give clearance to deal, due to the perception of shareholders or the market that inside information may exist". This appears to us to be re-introducing an additional 30 day period to run immediately in advance of the MAR closed periods; in other words, as if the Model Code close periods still existed, but paragraph 5(b) does not expressly state what the extended period should be, leading to uncertainty and inconsistency. We think that there needs to be certainty and consistency as to whether there are to be super-equivalent closed periods outside the MAR closed periods.

If there are to be extended closed periods then the exemptions that could be permitted during any extended non-MAR closed period should be wider than those under the MAR. No suggestions are given in Annex 2G as to the exceptions to be permitted during any extended period, but, in contrast, the description of these exceptions make up the bulk of the current Model Code.

The proposal in the CP is to use the wider definition of dealing in the MAR but as described below this is very different to the current definition of dealings requiring clearance in the Model Code which could make it problematic to apply this as an LR systems and controls requirement at all times, rather than being required to do so only during the MAR closed periods.

In conclusion, we do not think that the provisions in Annex 2G create a workable basis for listed companies to comply with a systems and control requirement but would instead create uncertainty and inconsistency.

Alternative Proposals

FCA guidance on what would be an appropriate clearance procedure during the MAR closed period similar to the current clearance procedure under the Model Code, including the keeping of records, is helpful and paragraphs 2,3, 4 and 6 of new proposed LR9 Annex 2 achieve this.

In order to minimise the additional costs of compliance that will arise from implementation of MAR, issuers will reasonably look to the FCA to clarify to what extent it will be possible to operate in the same way as under the Model Code outside the MAR closed periods.

In order to achieve clarity on the differences between dealing under Article 19(11) of the MAR and the exceptions in Article 19(12), issuers will need to know how the definition of 'dealings' in the Model Code and the dealings excluded from its requirements by paragraph 2 compare with (i) the MAR insider dealing prohibition, (ii) the Article 19(11) prohibition on dealings during a MAR close period, and (iii) the obligations to notify dealings under Articles 19(1) to (7). We have set out below our analysis of the differences.

We suggest that a standard dealing code that applies to PDMR dealing outside the MAR closed periods could be produced by the FCA (and its adoption made a requirement of the Listing Rules) or by an industry body. We are inclined to think the latter a better solution but the benefits of that approach will be significantly enhanced if the FCA in some way endorses the code. Such a code could also incorporate any clearance procedures required (as mentioned above) for clearance during the MAR closed periods.

To reduce disruption and cost for issuers who already have systems to comply with Model Code, we assume that issuers would want a standard code to follow the Model Code as far as possible so far as the periods outside the MAR closed periods are concerned.

Because the scope and effect of the MAR close period restriction on dealings (Article 19(11)) differs materially from the scope and effect of the Model Code, there would be a two tier system with the Model Code applying (so far as possible without amendment) at all times other than during MAR closed periods.

Differences between the Model Code and the MAR closed period restrictions

"Dealing" for the purposes of the Model Code

In the Model Code, "dealing" is quite broadly defined. Whilst many of the actions described in the definition such as "acquisition or disposal", "entering into a contract" and "using as security" (paragraph 1 (c) (i), (ii) and (v)) imply positive action on behalf

of the PDMR, others are, or may be, passive such as the grant of an option (paragraph 1(c)(iii)) and a right to acquire or dispose of any securities (paragraph 1(c)(vii)). In addition some dealings are excluded from the provisions of the Model Code altogether by paragraph 2 (for example paragraph 2(a) to (d) in respect of rights issues and 2(i) in respect of HMRC approved SAYE option schemes or share incentive plans); in other words no clearance is required for these dealings.

Close period and prohibited period under the Model Code

Close periods are 60 days prior to the publication of a preliminary announcement of annual results or the annual report (where there is no preliminary announcement) and of the half-yearly report. The Model Code prohibits dealing during a "prohibited period" which includes, as well as the closed period, any period where there exists any matter which constitutes inside information in relation to the company and requires clearance for any proposed PDMR dealing, including outside the prohibited period (unless one of the exemptions in paragraph 2 applies).

Closed periods under the MAR

Under the MAR, there is a different concept of "dealing" (see below), the closed period is 30 days before the announcement of an interim financial report or a year-end report (the status of preliminary announcements currently being unclear – see comment below) and clearance to deal from the issuer is only required for dealing during a closed period.

Dealing under the MAR

PDMR notifiable transactions

In our view there is a difference between the scope of notifiable transactions under Article 19(1) to (7) and the scope of the restriction in Article 19(11) for transactions during MAR closed periods. MAR Article 19(1) requires notification "of every transaction conducted on their [PDMR and PCA's] own account" and this is broadened under Article 19(7) to include:

(a) pledging or lending financial instruments of the issuer by or on behalf of a PDMR or a PCA;

(b) transactions undertaken by persons professionally arranging or executing transactions or by another person on behalf of a PDMR or a PCA, including where discretion is exercised;

(c) transactions under a life insurance policy, where the policy holder is a PDMR or a PCA, the investment risk is borne by the policy holder and the policy holder has the power or discretion to make investment decisions regarding specific instruments in the policy or to execute transactions regarding specific investments in the policy.

It is clear from the list of notifiable transactions in Article 10 of the draft Commission Delegated Regulation made pursuant to MAR Article 19(14) and published on

17 December 2015 (C(2015) 8943 final) that these include a number of transactions where the PDMR's involvement is purely passive, such as gifts and donations received and inheritance received (Article 10(2)(k)) and automatic conversion of a financial instrument into another financial instrument (Article 10(2)(j)). Other examples are automatic vesting of share awards and the transfer of shares on completion of a scheme of arrangement by order of court.

PDMR transactions during MAR closed periods

The wording of Article 19(11) is different to that of Article 19(1) and is active rather than passive. Article 19(11) of the MAR states that a PDMR "shall not conduct any transaction on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them". Article 19(12) of the MAR permits an issuer to allow a PDMR to "trade on its own account or for the account of a third party" during a closed period in the circumstances set out in Article 19(12)(a) or (b). Article 19(13) empowers the Commission to specify circumstances under which "trading during a closed period may be permitted by the issuer".

The difference in wording between Article 19(1) and 19(11) suggests that the meaning is different. Although the type of transactions within scope of each provision is the same, the restriction in Article 19(11) only applies if it is the PDMR who conducts the transaction. It does not seem to us that it can be the case that the prohibition applies to a PDMR covering events over which he has no control. Furthermore, the exemptions in Article 18(12) (and further specified in the Delegated Regulation) are based on an issuer permitting the PDMR to deal and therefore assume that the dealing is within the control of the PDMR. (We do not think that the Delegated Regulation is correct in including awards or grants under employee schemes under Article 9(a) and (b) as Article 19(12) refers to transactions made by a PDMR).

It is vital that there is clarity on the type of dealing that is within the scope of the prohibition in Article 19(11) and guidance is therefore needed from the FCA or ESMA on this point in order for issuers and PDMRs to be confident they can apply the MAR closed period restrictions when they came into force.

Another way in which we believe that a distinction should be made between the provisions in Article 19(11) and the disclosure requirements in Article 19(1) is in relation to conditional dealings. Conditional dealings do not need to be disclosed (see Article 10(2)(i) of the Delegated Regulation). But we would find it surprising if the prohibition in Article 19(11) did not apply to them.

There is one further important point, which we ask the FCA to seek clarification on from ESMA, is that the issuer of which the person is a PDMR is not deemed to be a third party for the purposes of MAR Article 19(11). If the issuer were a third party, the exceptions set out in Article 9(a) and (b) of the Delegated Regulation could not be workable as some of the issuer's PDMRs (excluding the recipient of the award or grant) would have participated in the decision to make the award or grant.

Share buybacks

We note the comment in 4.141 that the FCA is considering the interaction of LR12 dealing restrictions on issuers with the MAR. As share buyback authorities are routinely proposed at AGMs, we hope that the FCA will clarify its intentions on this point in the near future.

Q.38: ***Do you have any suggestions on how the formulation of the rule (LR 6.1.29R and LR 9.2.8R) could be improved?***

Definition of "dealing"

For the purposes set out in our answer to Q37 we do not agree with the proposed amendment to the glossary definition of "dealing" and would amend the definition of "deal" and "dealing" to provide a signpost to Article 19(11) of the MAR. We suggest that paragraph (1) of the glossary definition should commence "(1) (other than for the purposes of Article 19 of the Market Abuse Regulation) (in accordance with paragraph 2 of Schedule 2 to the Act (Regulated Activities))…" and new paragraph (3) should be deleted and replaced by "for the purposes of Article 19 [(11) and (12)] of the Market Abuse Regulation, conducting a transaction on a person's own account or for the account of another person, directly or indirectly,, relating to the shares or debt instruments of an issuer or to derivatives or other financial instruments linked to them".

We note the definition proposed of "disclosure requirements", namely "Article 17, 18 and 19 of the Market Abuse Regulation". We think it would be helpful to include a separate definition of "dealing requirements" or "PDMR dealing requirements", namely "Article 19 (11) and (12) of the Market Abuse Regulation". This would require consequential amendments to LR 7.1.1R (1) and (2); LR 7.1..3G; LR 7.2.2G; LR 7.2.3G; LR 8.2.1R(5); LR 8.2.2R, LR 8.,2.3R; LR 8.3.1R(2): LR 8.3.4R; LR 8.3.5AR; LR 8.4.2R (3); LR 8.4.12R(2); LR 8.4.15R(3); LR 8.6.9B; LR 8.6.16B; LR 9.2.5G; LR 9.2.6R; and LR 9.2.1R.

We suggest that new LR 6.1.29 R and LR 9.2.81R should be amended by adding at the end of the proposed rule immediately after the words "clearance to deal, either directly or indirectly, in the securities of the company" the words "during a closed period as referred to in Article 19(11) of the Market Abuse Regulation".

New LR 6.1.3 G and LR 9.2.8 B is then redundant and should be deleted.

Preliminary Announcements and Interpretation of MAR "closed period"

A preliminary announcement is a preliminary statement of annual results which must be agreed by the issuer with its auditor prior to publication and shows the figures in the form of a table that will be shown in the annual accounts for the relevant financial year and includes any significant additional information necessary for the purposes of assessing the results (LR 9.7A.1 R). The auditor will then provide the issuer with a letter confirming its agreement to the release of the preliminary announcement to the market. That letter is provided in accordance with APB Bulletin 2008/02 which states

that “there is an expectation that the information in a preliminary announcement will be consistent with that in the audited financial statements”. It is because it has long been accepted in the market that there is unlikely to be additional price sensitive information relating to a company’s annual results contained in the audited annual report and accounts that the Model Code close period is calculated by reference to the preliminary announcement. There can be no justification for interpreting Article 19(11) to require a second closed period that would apply after publication of the preliminary announcement and prior to publication of the audited annual report and accounts. This interpretation is consistent with the reference to “announcement” in Article 19(11) and recital (61) of the MAR.

It is vital that the UK issuers and the UK Market have clear guidance as to the interpretation of the “closed period” in Article 19(11) of MAR. We note that in paragraph 138 of ESMA’s Final Report (2015/224) on Delegated Acts (ESMA Final Report), ESMA states that “if the “preliminary announcement” of annual report is required either by national or trading venue rules, it would start the closed period" (this should presumably be read as “would **end** the closed period”)

Where a premium listed issuer prepares a preliminary announcement of annual results, it is required to publish it as soon as possible in accordance with LR9.7A.1R(1). In our view, this means that the preliminary announcement is an announcement of a year-end report that the issuer is obliged to make public according to national law (on the basis that national law includes the rules of the competent authority). We therefore would interpret LR9.7A.1R(1) as meeting the test in Article 19(11) so that it sets the end of a closed period. It may be helpful to change the description in LR9.7A.1R so that it refers to a preliminary "report" rather than “statement” in order to align it with the terminology in Article 19(11).

In addition, specific guidance is required to confirm that a second closed period does not commence in the 30 days prior to the publication of the audited annual report and accounts.

We consider that ensuring both:

- that there is a closed period for the 30 days prior to the preliminary statement of results; and
- that there is no second 30 day period ending on the publication of the annual report ,

is important for the integrity and proper operation of the UK market.

As regards the need for the MAR 30 day closed period to be calculated so that it ends on publication of the preliminary announcement, this is an important investor protection and market abuse issue as it is during this period when there is potential for misuse of inside information. If the period ended only on publication of the annual report, there could be a very short closed period of much less than 30 days prior to the preliminary announcement which would not protect the market.

As regards there not being a second closed period in the 30 day period leading to the publication of the annual report, we do not think that it can have been envisaged that Article 19(11) of the MAR would create two closed periods for financial results covering the same financial period. Having a closed period which continues after the preliminary announcement is issued is not necessary to protect investors or the market and would interfere with existing market practice and arrangements, such as the vesting of share awards which often are mandated to occur in the few days following the preliminary announcement being released. It could also encourage behaviours which would not be beneficial to the market including a delay in publication of a preliminary announcement in order to align the timing with that of the publication of the full annual report or alternatively delaying the publication of the annual report so that there is a gap of more than 30 days between the publication of the preliminary announcement and the annual report so as to create a short open window immediately after the preliminary announcement is published.

The position of standard listed and debt issuers to whom LR 9.7A.1R(1) does not apply, will also need to be considered. They will also expect the closed period to end on the publication of the preliminary announcement, particularly where they also have equity listed on a non-EEA exchange.

Quarterly Reports

It is not clear whether quarterly reports issued by companies listed on non-EEA exchanges where quarterly reports are compulsory are subject to the MAR closed periods. Paragraph 137 of ESMA Final Report seems to suggest that quarterly reports are "interim financial reports" for the purposes of Article 19(11), but this is not free from doubt and again specific guidance from the FCA or ESMA is needed for issuers and the market.

Clearance procedure

As stated in our answer to Q37, we do not agree that new LR 9.2.8R is necessary or appropriate. The statement in LR 9.2.8B (and there is a similar statement in LR 6.1.3G) that "for the avoidance of doubt, compliance with LR 9.2.8R does not mean that a listed company will have satisfied its obligations under article 19 of the Market Abuse Regulation" illustrates the confusion that the FCA's proposals will cause.

Different considerations are required where clearance is to deal is requested during a MAR closed period (the exceptions being different from, and more restrictive than, the exceptions currently in the Model Code) and at other times, including where there is inside information and so under what is currently a "prohibited period" under the Model Code (when it would seem that the Model Code exceptions could be applied). As stated in our answer to Q.37, we think that, rather than being prescriptive and making a PDMR dealing code a listing rule requirement for premium listed companies, it would be preferable for an industry body to develop its own PDMR dealing codes with endorsement by the FCA. Some form of PDMR dealing code is likely to be required in any event in order to demonstrate compliance with LR 6.1.29, as amended as we suggest.

Q39: ***Do you have any suggestions for additions or deletions on the content of the proposed guidance in LR9 Annex 2G including on the areas noted above on which we have not included provisions? Please could you also justify your suggestions?***

We think that the guidance should be limited to the clearance procedure and the need to keep records (paragraphs 1, 2, 3, 4 and 6). Paragraph 5, if retained at all should refer to Articles 7 to 9 (inclusive) of the Draft Commission Delegated Regulation published on 17 December 2015 and the section commencing "If this is not the case [i.e. if there is no obligation under the MAR]" should be deleted. As stated in our comments on Q37 under the heading "Problems with the approach proposed in CP15/35", we think that this section and in particular paragraphs 5(a) and (b) are not workable. In relation to paragraph 5(c), we agree with the premise that dealing should not be based on considerations of a short nature (currently prohibited under paragraph 8(b) of the Model Code. We do not, however, think that companies will find it helpful that the FCA simply says this is a factor to be taken into account but does not give guidance as to when dealing may be permitted. We do not think that paragraph 5(d) is necessary because "exceptional circumstances" are specifically covered in Article 8 of the Delegated Regulation.

We think that it would be very helpful if the FCA were to give guidance in relation to circumstances in which an issuer may permit a PDMR to deal during a MAR closed period in addition to those circumstances set out in the Delegated Regulation, having regard to Article 19(12)(b) of the MAR and the statement in Article 9 of the Delegated Regulation that the circumstances set out in Article 9 are "not limited to". This guidance should not be limited to PDMRs of premium listed issuers.

We suggest that such guidance should cover the following items, which include in substance some of the exceptions set out in the Model Code.

- *Rights issue entitlements*. We think that these fall within Article 12(b) as transactions made under an entitlement of shares.
- *Transfer out of employee scheme into a savings scheme investing in securities of the issuer following exercise of an option under an approved SAYE option scheme ("ShareSave option") or release of shares from an HMRC approved share incentive plan ("SIP")* in the circumstances set out under Article 9((a), (b) or (d) of the delegated regulation. The beneficial interest does not change but it is not entirely clear that it is a transfer between two accounts of the PDMR for the purposes of Article 9(e).
- *Cancellation or surrender of an option under an employee scheme* A PDMR would not be conducting a transaction but clarification would be helpful.
- *Grant of a Sharesave option or SIP award.* Confirmation the FCA agree this falls within Article 9(b) of the Delegated Regulation would be helpful.

- *Automatic vesting of a conditional award.* This would not be a transaction conducted by a PDMR but it would be helpful if the FCA would confirm this.

- *Transfer of securities by an independent trustee of an employee scheme to a beneficiary who is not a restricted person.* Clarification that such a transfer is outside the scope of Article 19(11) and (12) because is not a transaction conducted by a PDMR would be helpful.

- *Transfer of securities already held by means of a matched sale and purchase into a saving scheme or pension scheme in which the PDMR is a participant or beneficiary.* This is a transaction where the beneficial interest in the relevant securities will not change. It does not fit directly under Article 9(e) as it would not be a transfer between "two accounts" of the PDMR and so confirmation from the FCA that such a transfer is permitted would be helpful.

- *An investment by a PDMR in a scheme or arrangement where the assets of the scheme (not being a scheme which invests only in the securities of the issuer) or arrangement are invested at the discretion of a third party*. Provided that the 20% threshold is not breached such an investment will be excluded from the notification obligation in Article 19(1) and so it must be intended that it would not be subject to the prohibition under Article 19(11). The wording of Article 19(11) is very broad, however, and so express guidance that such an investment is permitted should be given.

- *A dealing by a PDMR in the units of an authorised unit trust or authorised contractual scheme or authorised OEIC (and presumably the equivalent in other EEA jurisdictions).* This should be excluded on the same basis as set out above in relation to a scheme or arrangement.

- *Saving schemes and trading plans.* We consider that transactions under saving schemes now falling under paragraph 17 of the Model Code and under trading plans could be permitted during a MAR closed period on the basis that the trading is not conducted by the PDMR, but by the independent manager of the scheme once it has been set up and so the prohibition should only apply to the establishment or entry into the scheme during a MAR closed period. Express guidance on this point would be helpful.

4 February 2016