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By email: cp15-35@fca.org.uk

4 February 2016

Dear Sirs

CP15/35: Policy proposals and Handbook changes related to the implementation of the Market Abuse Regulation (2014/596/EU)

The City of London Law Society ("**CLLS**") represents approximately 14,000 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, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the **"Committee"**). The Regulatory Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

1. **Scope of Market Conduct Sourcebook (MCS)**

   We note the direct application of the Market Abuse Regulations (596/2014) ('MAR') and hence the requirement that the FCA no longer makes rules in this area, and adjusts its guidance to reflect MAR.

   However, we consider that the FCA's power to issue general guidance under section 139A in relation to the discharge of its functions is not in principle curtailed under these circumstances, and that it is desirable for the FCA to issue guidance to explain its stance in relation to a new regime where a number of the fundamental definitions have changed, and the core defence in section 123 (reasonable belief/steps) is no longer available.

   The UK is the largest and most developed securities market in the EU, and the FCA is the regulator of this market, responsible for supervising its operations, and for exercising the powers required by MAR in relation to suspected market abuse. While we welcome

the decision by the FCA to retain the MCS on a guidance basis, insofar as compatible with MAR, we believe that it would be of greater benefit to UK market participants if the MCS continued to offer more in the way of meaningful practical guidance to market participants, as outlined in greater detail below.

We believe that, given the broad and in some instances extra-territorial application of the Market Abuse regime, it is important that the FCA takes this opportunity to make the scope of MAR clear to those relying primarily on the MCS for guidance. In particular, we consider that it would be helpful if the FCA confirmed whether its view is that the territorial application is unchanged from that as implemented under the Market Abuse Directive, and comment on the FCA's view of impacts on third country firms and individuals. We would further suggest that, in light of the wide applicability of MAR and the MCS, the MCS be better signposted with references to MAR.

It is apparent from the draft Market Abuse Regulations, upon which the Treasury is at present consulting, that the FCA retains discretion in determining whether a person has committed market abuse, and whether to impose a penalty. Draft section 123 provides (in extract and emphasis added):

(1) This section applies *if* the FCA is satisfied …

(2) The FCA *may* impose a penalty …

This section highlights the role of the FCA as supervisor of, and enforcer in relation to, the activities of market participants within the scope of MAR and thus the need for the FCA to provide meaningful guidance in relation to indicative circumstances when it is likely to be satisfied that market abuse has been committed, and the circumstances when, despite this, it may be inclined not to impose a penalty.

One example of such circumstances might be where the person would at present have fallen within section 123 by reason of having reasonable belief or having taken all reasonable steps. In light of recent Tribunal and case law *dicta* on these elements we believe that the FCA should feel able to set out such circumstances, which would be of considerable use to the market, and also assist in preventing the occurrence of market abuse by indicating what type of preventative steps should be taken.[1] While acknowledging that these cases are decided under current legislation, there are a number of elements that remain of application to MAR or which the FCA could use to illustrate what it may (or may not) consider could amount to circumstances where it would be less likely to impose a penalty.

Such guidance would, furthermore, be consistent with the requirement of MAR Article 16 that market operators and participants take steps to prevent market abuse from occurring, and also assist firms in the discharge of the requirement imposed by section 131B(2).

We therefore consider that the FCA should take the opportunity of issuing the MCS to state (insofar as practicable) its stance towards the anticipated operation and enforcement of MAR in order to assist market participants to understand this. For example, MCS should (within the framework of MAR):

(1) Incorporate commentary derived from Tribunal, Court of Appeal and ECJ cases on market abuse.

(2) Where possible, provide guidance that is couched in clearer or more concrete terms, such as "The following factors *are* to be taken into account" (MAR 1.4.5). If the FCA is comfortable providing guidance in relation to the factors it will take into account in determining whether disclosure is made in the

[1] These cases include *Hannam v FSA* Upper Tribunal FS 2012/0013 27 May 2014 and *FCA v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch)

proper course of employment etc., and hence considerably expand upon the provision of MAR Article 10(1), it is difficult to see why it does not feel able to do this in relation to other comparable provisions, such as:

a) the circumstances when the FCA is likely to view an act or omission as constituting market abuse; and

b) the circumstances when the FCA is unlikely to impose a penalty where it considers market abuse has been committed.

(3) Retain existing guidance (or provide new guidance) in relation to Chinese walls and systems and controls, or at the very least cross-refer to the relevant sections of MAR to aid understanding; we note in this respect that the FCA proposes to delete the evidential provision at MAR 1.3.5E based on incompatibility with MAR, but we consider that the point is still relevant having regard to MAR Article 9(1)(a) and that, in view of the FCA/FSA's extensive focus on this area in recent years,[2] it would be inappropriate for the MCS to be silent on the point. We would also suggest adding a reference to Article 9(2)(a) at MAR 1.3.5 (market makers), on which the current draft provision refers only to Article 9(5).

(4) Cross-refer to ESMA material when appropriate (see following section).

(5) Explain what procedures the FCA would expect employers to have in place under the proposed amendments to section 131B(2) of FSMA, until such time as ESMA provides guidance on this requirement.

2. **Maintenance of a single source of reference for MAR**

The Consultation Paper correctly comments that persons within the scope of MAR must comply with it, and with implementing measures and EU guidelines (CP 15/35 1.5), and notes that the FCA sourcebook will not be the sole source of material on market abuse (CP 15/35 3.22).

The scope of MAR extends well beyond regulated financial services providers to issuers, their PDMRs, connected persons and investors. In order to facilitate compliance with a complicated and now fragmented regime, and one where important elements are liable to be changed at EU as well as domestic level, we invite the FCA to consider a single online source including all of this material. As the ECB has said:

> "*In order to … ensure that rules are accessible to all interested parties – a precondition for their correct application – a user friendly tool bringing all the different legal sources (Directives, Regulations, RTS, ITS, GL and Q&A) together in an orderly manner to the benefit of the general public*. "[3]

We recognise and welcome the FCA's proposal to include signpost provisions to the relevant EU MAR article or implementing measure. We believe it would be more user-friendly, particularly for those who are not regulated and not accustomed to having to find EU legislative texts, to include a hyperlink to MAR or the relevant implementing measure. In order to reduce the need to make multiple changes to the handbook each time a link is changed, we would suggest that the hyperlink could be included in the glossary definition relating to each measure (to which the MCS would link in the usual way).

[2] Taking into account "Market Watch" guidance and recent investigative and enforcement activity.

[3] EBA: Speech by Andrea Enria: The Single Rulebook in banking: is it 'single' enough? (University of Padua, 28 September 2015)

3. **Response to specific questions**

   Q1 – we agree with and support the FCA's proposal on Art 17 public disclosure of information

   Q4 – we agree with the FCA's proposal on Art 19 managers' transactions

   Q6 – 39 – we support the comments made by the Company Law Committee.

4. **Proposed changes to Model Code**

   We have reviewed and support the comments made by the Company Law Committee.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours faithfully

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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