

18 November 2024

UK Market Abuse Regulation

FCA Publishes Additional Guidance on Identifying Inside Information and Communicating with Shareholders

SUMMARY

On 15 November 2024, the UK Financial Conduct Authority (“FCA”) [published](#) Primary Market Bulletin No. 52 (“PMB 52”), setting out guidance on applying the UK Market Abuse Regulation (“UK MAR”). PMB 52 addresses (among other things) identifying inside information and communicating information during shareholder calls or meetings. It is directed at companies with financial instruments traded on UK regulated markets (e.g., the main market of the London Stock Exchange), multilateral trading facilities (e.g., AIM) or organised trading facilities. Although there is no new law in PMB 52, the guidance it gives on how the FCA applies UK MAR is instructive for those companies and their advisers.

KEY TAKEAWAYS FROM PMB 52

A. Identifying inside information

- **Takeovers.** Companies should assess on a case-by-case basis whether a takeover approach constitutes inside information before it has been recommended by the board. An approach may amount to inside information if there is a “more than fanciful chance” of the offer proceeding (a lower threshold than “more likely than not”). An offer need not be final to amount to inside information. In addition:
 - While UK MAR does not require companies to correct false rumours about takeover bids, companies should evaluate whether knowing that a rumour is false constitutes inside information.
 - Companies that delay disclosure of inside information which subsequently ceases to be inside information (because, e.g., an offer falls away), are still required to maintain records, including insider lists, in relation to the relevant inside information that was originally held.
 - Although the UK Takeover Code (the “Code”) includes stringent announcement obligations that are intended to prevent false markets occurring, UK MAR may require companies subject to both the Code and UK MAR to make an announcement during a takeover even where the Code does not.
 - **Financial results.** Existing [FCA guidance](#) already makes clear that it is assumed that information relating to financial results could constitute inside information and emphasises that companies should
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assess on an ongoing and case-by-case basis whether the information they hold is inside information. Building on this approach, PMB 52 clarifies that:

- Internal financial information presented to the board of a company some time before its scheduled earnings announcement may be sufficiently price-sensitive to constitute inside information if, for example, it is significantly behind internal forecasts and external consensus. This applies even where it is expected that below-forecast performance may be compensated by significant over-performance later in the year. Similarly, the loss of a major contract may constitute inside information even if the effects of such loss are not yet certain.
- If there is inside information and its disclosure is not permitted to be delayed (i.e., where the legitimate interests exception does not apply), then the inside information will need to be disclosed as soon as possible (e.g., by way of a trading statement before the scheduled earnings announcement).¹
- **Board changes.** In light of the FCA's concerns that companies have, in situations where press speculation has arisen that an incumbent CEO is standing down and a successor is in the process of being appointed, delayed disclosure until the appointment has been finalised, PMB 52 makes clear the FCA's view that:
 - The resignation and the appointment of a CEO are distinct events and inside information assessments should be carried out separately for developments in each process.
 - Inside information may arise at an early stage, before the formal resignation of the CEO and/or appointment of a replacement. Companies will need to continuously assess when developments in any CEO succession process might constitute inside information, despite the long lead time such processes can have.
- **Internal process.** To ensure inside information is correctly identified, the FCA recommends that companies establish a disclosure committee to assess when information constitutes inside information and that senior executives be empowered to make announcements on performance and event-based inside information without requiring prior approval from any disclosure committee or other person. Relevant staff should also be trained to identify inside information.

B. Disseminating information during shareholder calls and meetings

- Private communications with shareholders (e.g., via apps such as Whatsapp, Telegram, or LinkedIn and/or calls) may risk breaches of UK MAR. These potential breaches include unlawful disclosure of inside information, market abuse (such as insider dealing) and market manipulation (if the communication gives false or misleading signals as to the prices of financial instruments).
- Statements made through private channels may be perceived as price-sensitive or material new information even when they are not. Moreover, selectively communicating inside information, the disclosure of which has legitimately been delayed, will trigger an announcement because its confidentiality can no longer be maintained.
- To mitigate these risks, the FCA recommends that:
 - Calls or other private communications with shareholders are avoided during UK MAR closed periods and are instead scheduled for after the publication of financial results.
 - Companies reconfirm before any such calls that all inside information, in particular information concerning the company's current trading and financial position, has been published.
 - During such calls, management should reiterate that no inside information will be disclosed, stick to previously published statements, and use pre-prepared scripts. If calls are not recorded, contemporaneous notes should be taken.
 - Companies may consider publishing an announcement after any such call confirming it took place, setting out any information shared and confirming that such information is not inside information.²

ENDNOTES

- ¹ Under UK MAR, companies can delay disclosing inside information if immediate disclosure is likely to prejudice their legitimate interests, provided that the delay is not likely to mislead the public and that they are able to ensure the confidentiality of the information.
- ² In May, the European Securities and Markets Authority (“ESMA”) published similar [guidance](#) setting out measures companies can take to ensure compliance with the EU Market Abuse Regulation (“EU MAR”) when communicating with analysts ahead of closed periods under EU MAR. The FCA’s guidance is of broader application in that it addresses communications with shareholder groups.

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