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FCA Publishes Guidance for Listed Companies on Market Conduct and Discipline and Grants Further Relief on Financial Reporting Deadlines

In its most recent Market Watch Newsletter (available [here](#)), the UK Financial Conduct Authority (“FCA”) has published guidance on market conduct and transaction reporting issues in light of COVID-19. The key message in the guidance is that market participants are expected to continue to comply with relevant rules and regulations, in particular the Market Abuse Regulation (“MAR”). Concurrently, the FCA published a new edition of its Primary Market Bulletin (“PMB”) (available [here](#)) setting forth relief in respect of financial reporting deadlines, as well as the FCA’s views on going concern assessments and shareholder engagement (including so-called “soft pre-emption”). The guidance and related matters apply to companies listed in the United Kingdom.

FCA Market Watch Newsletter

The FCA notes that, in light of the unprecedented effects that the outbreak of COVID-19 has had on markets and companies globally and the resulting increase in capital raising events and alternative working arrangements, it is critical that companies have the proper controls in place to ensure that inside information continues to be properly identified, handled and disclosed. Below we summarize the key focus areas identified by the FCA in relation to market conduct and discipline in the context of the COVID-19 crisis.

MAR inside information obligations

Assessing inside information. The FCA notes that the recent increase in recapitalizations and fund-raising activities by issuers as well as changes in working arrangements (moving to alternative sites and/or remote working from home) have resulted in increased flows of inside information, calling into question whether existing systems and controls for restricting and monitoring access to inside information are sufficient. The FCA urges all market participants to review and to update, if necessary, their identified material risks and to consider whether their existing systems and controls continue to mitigate the risks effectively.

Issuers and their advisers are urged to continue to assess what constitutes inside information, in particular in light of the evolving public policy response to COVID-19. The FCA notes that COVID-19 and public policy responses may alter what information is material to an issuer’s prospects. Issuers should continually

reassess, in the context of COVID-19, what information a reasonable investor would be likely to consider as part of its investment decision. The FCA cites, by way of example:

- details on future financial performance, including access to finance and funding, such as availability of relief under government schemes, significant changes in cash flow patterns, force majeure or termination rights in material contracts or financial arrangements, and changes to dividends or buy-back schemes; and
- the ability to continue or resume business, such as changes in strategy or business plans, business resumption plans, arrangements for staff returning to work, and supply chains.

Issuers are reminded to monitor whether information is materially different from prior forecasts, guidance or signals that previously were announced and would now likely be misleading to investors.

Insider lists. The FCA reminds issuers of their obligations to maintain current insider lists of all their staff, and those acting on their behalf, with access to inside information. Given the current prevalence of remote working arrangements, issuers are advised to ensure that persons included on their insider lists are reminded of their obligations relating to insider dealing and unlawful disclosure of inside information. A specific reason must be provided for why a person has been included on an insider list and why he/she needs to see the information. Those on a list should be reminded about restrictions on handling the information and that the information they have is inside information.

Delaying disclosures. Issuers are obligated under MAR to disclose inside information as soon as possible, which may be more of an issue where financial reporting deadlines have been extended. The FCA reminds issuers that delaying disclosure of inside information is only possible when all the conditions of MAR Article 17(4) (or where applicable Article 17(5)) are met. The FCA advises issuers to be particularly careful regarding any leaks and rumors and any possible breaches of confidentiality given the current unprecedented market uncertainties and working arrangements.

The FCA also notes that if an issuer has created market expectations through statements or signals, it would be likely to mislead if the disclosures that the issuer intends to delay are materially different from those statements or in contrast to the expectations reasonably created. Issuers must also be able to ensure the confidentiality of inside information when delaying disclosure, which could include considering whether arrangements for how the information is accessed, stored and communicated continue to be appropriate in light of COVID-19 mitigation measures.

Insider trading. The FCA reminds all market participants (issuers, advisors, firms and natural persons) that the prohibitions on unlawful disclosure and insider dealing also apply to natural persons and information may become inside information when combined with other information held by an individual.

Selective disclosure. Disclosure of inside information on a selective basis is only permitted where it is necessary in the normal exercise of employment, a profession or duties but not simply because the person owes a duty of confidentiality.

Market soundings. Issuers are also reminded about the requirements for engaging in market soundings, such as keeping strict control of inside information that is disclosed (*e.g.*, by means of recorded lines or written records) and making recipients aware of the fact that they are receiving inside information and are prohibited from trading based on such information.

Short selling

While the FCA is generally of the view that short selling encourages liquidity and price discovery, it is critical that it is done in accordance with the requirements of the Short Selling Regulation (SSR). The SSR restricts so-called “naked” short selling (*i.e.*, uncovered short sales in shares) and permits investors to enter into a short sale only if they have: (i) borrowed the shares; (ii) entered into an agreement to borrow the shares, or (iii) have an arrangement with a third party who can confirm that the shares have been allocated (which arrangement should enable settlement of the short sale to be effected when it is due).

The SSR requires investors to report to the FCA when they hold a net short position that equals or exceeds 0.1% of the issued share capital of the company and each time the position increases or reduces by 0.1%. (The threshold recently was temporarily reduced by the European Security and Markets Authority.)

The FCA will continue to monitor the short selling activity and may ask firms to disclose the nature, purpose and construction of the net position. Where abusive behavior is suspected or occurs, the FCA has power to investigate, censure and impose fines.

Managing conflicts when providing corporate finance facilities

The FCA is monitoring the potential conflicts of interests in cases where banks have been alleged to pressure issuers to assign them roles on equity mandates when negotiating new and existing debt facilities.

Market conduct during credit events

The FCA is monitoring the engagement between issuers and their creditors for any signs of “opportunistic strategies” that may lead to breaches of relevant MAR obligations and negatively affect integrity and confidence of markets.

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Under Disclosure Guidance and Transparency Rule (DTR) 4.2, listed issuers are required to publish their half yearly financial reports within three months after the end of the relevant reporting period. If an issuer

misses the filing deadline, the FCA expects it to request the suspension of its listed securities, or if no request is made, the FCA may impose unilateral suspension. Under temporary relief, listed companies that need additional time to complete the preparation of their half yearly financial reports will be granted an additional month in which to publish the reports. As long as the reports are published within four months, the FCA will not expect the issuer to request a suspension of its securities and will not take any steps unilaterally to suspend the issuer's listing. The granting of the temporary relief is in line with ESMA's recent statement¹ on financial reporting deadlines. The FCA indicated that is not specifying at this time when this one-month extension will lapse.

This latest relief complements the relief granted on March 26, 2020 permitting listed companies to delay the publication of their annual audited financial statements from four to six months after the end of the financial year.²

The FCA recognizes the concerns companies have expressed regarding the appropriate way to address COVID-19 related uncertainties in "going concern" assessments in their financial statements. The FCA advises issuers and their auditors to be clear and transparent about the impact of COVID-19 on their going concern assessments but also notes that market participants should take into account the unique circumstances posed by COVID-19 that may result in uncertainty concerning an issuer's financial position and not draw unduly adverse inferences from these disclosures or from an issuer taking additional time to publish its financial statements.

Finally, the FCA underscores the importance of issuers engaging with shareholders through regular formal disclosures to the market by way of financial reports and trading updates and by finding a way for shareholders to ask questions of management and exercise their voting rights. The FCA also encourages issuers to assist, where possible, with delivering "soft pre-emption rights" to shareholders in placings. One such route is to extend participation in placings (typically limited to institutional investors) to retail shareholders, which would be subject to appropriate restrictions.

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¹ ESMA's Public Statement on Actions to mitigate the impact of Covid-19 on the EU financial markets regarding publication deadlines under the Transparency Directive, ESMA31-67-742, March 27, 2020 (available [here](#)).

² For a summary on the March 2020 FCA relief, see our prior Client Memorandum entitled "Joint Statement by the FCA, FRC and PRA Regarding Capital Markets Reporting in Light of Recent COVID-19 Developments" (available [here](#)).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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