QUOTED COMPANIES ALLIANCE

QCA Legal Expert Group

Case studies regarding the Market Abuse Regulation (MAR)

1. Regarding a Main Market company with a market cap of around £250m.

"We had an issue with the company's SAYE scheme and MAR. The issue was that, as is usual for SAYE schemes, employees had a six month window in which to exercise their SAYE options. One of the directors had SAYE options, but by the time the options could have been exercised she was in possession of inside information (a transaction which was underway) which prevented her from exercising under MAR.

We were notified a couple of months into the window, meaning it was just too late for the director to give four months' notice of an irrevocable decision to exercise the option under Article 9(c) of the Delegated Regulation.

To compound issues, the company was due to go into its closed period at the same time as the transaction which gave rise to the inside information was to go public, and as a PDMR she would be unable to exercise the options during that period too.

Having run through this with a partner, there was no way around this, so that if the director had insider information and/or was within the closed period the entire time, she would have to let her options lapse (and these were generous options given the share price movement in the seven years since grant, so that it was obvious that any rational shareholder would exercise them). For some of our clients who are constantly looking at acquisitions, it is not uncommon for main board directors to have inside information for very significant periods of time.

Fortunately the transaction in this case exchanged in time for the deal to be made public so that she could exercise the SAYE options before the closed period began, but that was something outside of our control."

2. Market soundings – the impact on how quoted SMEs raise capital

A. Accelerated book builds

"The area where MAR has had the most impact, in my experience, has been in relation to the Market Soundings regime and the fundamental impact this has had on the way fundraising is now done by quoted SMEs.

It has given birth to a complete legal fiction, the so called "Accelerated Book Build". The theory is that 'insiders' cannot trade while in possession of inside information.

This has led to the growth of announcements to the market stating that a fundraising is about to take place on the back of an announcement setting out details of the proposed transaction at, say, 7a.m on the morning on which the proposed transaction is expected to take place.

Such an announcement is then followed up with a further announcement, very often within half an hour of the original or certainly before 8am on the same morning when the markets open, that an "accelerated book build has been successfully conducted" and that the fundraising is now complete (usually subject only to Admission of the new shares to trading on AIM).

The idea is that investors – to whom presentations have been made – are not supposed to have made the decision to invest until after the information on which their decision is based is in the public domain. However the practice is, of course, a complete fiction. Often, at best, a few phone calls are made behind the scenes confirming with investors that they still want to "go ahead" with their investment. This is clearly not the point at which the decision is made.

However while this scheme is a fiction, it leaves corporates in the position that, at the time they have to go to the market and announce their intentions, they have a fundamental uncertainty that their fundraising is in place and that everyone on the placing list will, in fact, confirm their participation. By this point in a proposed transaction corporates will have spent a lot of money on legal and accountancy fees, public relations advisers, nominated advisers and brokers but are left with a fundamental uncertainty.

As brokers have not underwritten placings for many, many years and most fundraising obligations have been expressed to take place on a "reasonable endeavours" basis for so long it is regarded as standard market practice, the new arrangement increases the pressure on the threads of trust between corporate and broker.

In the pre-MAR regulatory scheme there was a specific exemption for fundraisings from the insider dealing legislation. We understand that, under MAR, the FCA has the ability to establish "market practice" in relation to specific issues. This would be a very helpful place for the FCA to recognise a "market practice" and provide some parameters around it."

B. Process

"Another issue which has changed as a result of MAR is that, when conducting market soundings, it is now more difficult to get in front of the same investors than it used to be simply because the first action which has to be taken is to issue a confidentiality letter. At that point, the recipient of the confidentiality letter will almost always send it to their legal department rather than opening his diary to make an appointment to see the relevant company.

It is not unknown for legal departments to advise that their firm does not accept market soundings as they never want to be in possession of inside information. That's the end of the dialogue. Pre-MAR the investing professionals all tended to act on the basis that they knew what they were doing."