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Insights

UK COVID-19 – MAR: INSIDE INFORMATION DISCLOSURE

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SUMMARY

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On 26 March 2020, the United Kingdom's Financial Conduct Authority ("**FCA**"), Prudential Regulation Authority and the Financial Reporting Council ("**FRC**"), published a joint statement introducing temporary measures to provide a degree of accommodation and flexibility to issuers of financial instruments in connection with various reporting obligations, including the publication of financial results. See our earlier article 'temporary changes to publication of accounts, publication of FRC guidance on corporate reporting and temporary changes to dividend procedure timetable'.

Critically, however, the FCA made it clear (as it has done from the outset of the pandemic), that issuers must continue to comply in full with their obligations under the EU Market Abuse Regulation ("**MAR**") in relation to the timely public disclosure of inside information concerning the issuer and/or its listed financial instruments. In fact, the FCA has expressly stated that the temporary relaxation of certain reporting obligations means that the requirement to provide timely disclosure of inside information to the market becomes even more critical in ensuring that the market and investors are kept appropriately informed. This position has also been unequivocally supported by ESMA at EU level.

Accordingly, it is highly likely that once the current crisis is over, regulators will look very closely at the how issuers behaved from a public disclosure perspective during this stressed situation. They

will invariably analyse whether issuers ought to have been more forthcoming in their disclosure obligations and will do so in the cold light of day, as is always the case with any inside information assessment by regulators.

This short note does not purport to restate the relevant legal tests for public disclosure, but rather seeks to provide practical guidance on balancing disclosure vs non-disclosure of inside information.

CONTINUOUS AND ON-GOING ASSESSMENT BY THE ISSUER

Given the rapidly developing COVID-19 crisis, issuers and their advisors must continually assess whether they are in possession of inside information. What may not constitute inside information today, could become inside information tomorrow if, for example, market dynamics change, or context within which a piece of information sits materially changes. Accordingly, the board/disclosure committees should ensure the following:

- consider, on an ongoing (sometimes daily) basis all of the relevant information they have about the business and its prospects. This requires receiving appropriate and timely management information from the business and support units and other relevant stakeholders;
- assess whether that information constitutes inside information. Depending on the nature of the information in question, obtaining independent third-party advice may be appropriate to assist with this assessment; and
- consider whether the issuer can legitimately delay disclosure of inside information.

The issuer should maintain accurate, complete and contemporaneous records of its decision making in relation to these assessments so that it can justify, after the fact, why it took the view that it did. Conversely, a failure to keep proper records could result in adverse inferences being drawn by regulators in the future.

BALANCING DISCLOSURE VS NON-DISCLOSURE

Issuers will need to assess and balance (on an ongoing basis) the potential for misleading the market by non-disclosure against the potential for prematurely disclosing information which is not sufficiently precise and/or not relevant to the reasonable investor and which could, therefore, also mislead the market. This is a delicate balancing act. Moreover, given the fairly limited bases under MAR for formally delaying disclosure, it is much more likely that issuers will need to form a view that they are not yet in possession of inside information in the first place to avoid making a public disclosure.

In the current situation, this type of analysis will be particularly relevant when assessing information relating to the performance of particular business units and their funding options and the consequential financial impact of these matters. Further, while at this point most businesses are still reeling from and adjusting to the sudden impact of the pandemic, there will come a point, in the near future, at which the nature of the impact(s) (whether they be operational, commercial or financial) become more certain. Therefore the obligation to make public disclosure will increase over time from the present position.

It is highly likely for most issuers this current crisis has shifted, in a significant way, the sorts of matters they would previously have considered when assessing whether an issuer had inside information. This may, for example now include disruption of supply chains or suppression of customer demand even when the reasons for the disruption is publicly known.

We note that some issuers have opted to make voluntary public disclosures outlining their high level generic approach to the pandemic. While such disclosures do not involve the disclosure of inside information, they may be regarded by issuers as useful tools in communicating with the market and their investor base.

OTHER PRACTICAL ISSUES

As mentioned above, the FCA and London Stock Exchange have recently announced a moratorium on publishing prelims (for those issuers that do voluntarily) and an extension for publishing their annual and half–yearly accounts. This will provide issuers with a little bit of breathing space in considering the impact of the pandemic on their business and prospects. However, this will not override, as discussed above, the obligation to notify the market of any changes to a company's trading and/or financial position under MAR and the AIM Rules for Companies.

It is also worth noting that any delay in publishing prelims/accounts will move the MAR closed period and this may have an impact on any planned shares issuances. Issuers should be discussing these issues with their sponsor/nomad and legal advisers.

Non-EU issuers and other securities

Even if an issuer is located outside of the EU, but it has instruments listed on an EU market, it will be subject to the MAR inside information disclosure rules. Some issuers will have a primary equity listing outside the EU but will have debt listings (including medium term note programmes for funding purposes) on an EU market. These situations give rise to unique considerations given such issuers will need to make public disclosures under two or more regulatory regimes.

DEBT INSTRUMENTS

It is important to keep in mind that the MAR inside information disclosure obligation relates to information about the listed financial instruments of the issuer or about the issuer itself. As a

general observation, debt instruments tend to be less price sensitive to information about the issuer than equity instruments. Nevertheless, information which relates to the solvency or credit position of the issuer, or otherwise to its cash flow position, would be pertinent to listed debt instruments and it is likely for some issuers that these matters have become much more relevant given the economic shock caused by the pandemic.

LISTED SECURITISATIONS

Listed securitisations could also present unique issues under the ongoing MAR disclosure requirements in the current environment. For example, often in a securitisation of a loan book, the issuer will be a special purpose vehicle but not the lender of record nor the servicer of the underlying loans. It may receive regular periodic information from the lender of record/servicer but that information may not be sufficient to deal with the nature of the impact of the pandemic. Accordingly, the servicer may be best placed to understand the impact of the pandemic on the performance of the underlying loan portfolio and questions will arise as to what each party's legal obligations are under MAR and the relevant contractual documentation. Likewise, issues which threaten the financial viability of a servicer of a loan portfolio that has been securitised, are likely to be highly relevant to the listed securitised instruments.

BACKGROUND – WHAT IS "INSIDE INFORMATION"?

REASONABLE INVESTOR ASSESSMENT

The materiality test for inside information under MAR is expressed in terms of information which is "likely to have a significant effect on the price" of the relevant financial instruments and which, if it were made public, would be information a reasonable investor would be likely to use as part of the basis of his/her investment decisions.

As reported on in our briefing of 26 March, the FRC have published an infographic outlining five key questions that investors are asking issuers in the current climate. While this was prepared in the context of formal corporate and financial reporting, these questions nevertheless a provide a useful starting point for considering what a "reasonable investor" is interested in for the purposes of inside information disclosure under MAR in the current circumstances.

In addition, given the range of public policy and regulatory initiatives being rolled out in response to the pandemic, a key piece of information that is likely to investors is how an issuer is deciding to address such initiatives and whether it is fundamentally changing its own policies in response to the pandemic. For example, in the lending space, an issuer's approach to payment holidays, borrowers in arrears and any collection forbearance may in itself be disclosable.

WHEN IS INFORMATION SUFFICIENTLY PRECISE

One of the most challenging questions concerning disclosure in the context of the current situation is at what point does non-public information becoming sufficiently precise such that it becomes disclosable. There is already a substantial amount of information in the public domain concerning the very likely adverse financial impact that the pandemic will have on particular types of business. Accordingly, issuers will need to consider very carefully, whether:

- they are in possession of non-public information (ie. information over and above that which is already in the public domain); and
- the information in question has become sufficiently precise, in the sense that the information indicates circumstances which *actually exist*, or circumstances which *may reasonably be expected to come into existence*.

On this basis, an issuer cannot argue that information is not inside information simply because there is a degree of uncertainty relating to the whether the matter in question will arise. The matter in question does not need to be absolutely certain. A view will need to be taken about the nature of any degree of uncertainty that exists. If the view is that matter in question is reasonably likely to arise, then it will be sufficiently precise for the purpose of disclosure.

RELATED CAPABILITIES

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- M&A & Corporate Finance
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