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Insights

FCA PUBLISHES PRIMARY MARKET BULLETIN NO. 42 AND MARKET WATCH 71

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SUMMARY

The FCA has published Primary Market Bulletin No.42 which, amongst other things: (i) discusses themes from the FCA's enquiries into unlawful disclosure of inside information (ii) highlights the relationship between the National Security and Investment Act and market abuse; (iii) provides guidance for issuers disclosing against the TCFD framework; and (iv) reminds cash shell companies of the rules in relation to reverse takeovers.

This follows on from the government's recent publication of the 'Edinburgh Reforms' for '*Building a smarter financial services framework for the UK*' and reinforces the current focus to support market integrity and ensure a regulatory focus on growth and competitiveness.

In addition the FCA has published Market Watch 71 where they share their observations about changes in advisory firms' insider lists.

Themes from the FCA Market Oversight enquiries into unlawful disclosure

Earlier this year we reported (August briefing) on the fine imposed on Sir Christopher Gent for unlawful disclosure of inside information. Primary Market Bulletin No. 42 explains that although the FCA's enforcement division publishes disciplinary outcomes such as the Final Notice against Sir Christopher Gent, the source of such enforcement outcomes is enquiries carried out by the FCA's Market Oversight directorate and in particular the FCA's Primary Market Oversight department (PMO). The PMO carries out numerous enquiries into suspected unlawful disclosures and certain situations/behaviours repeatedly crop up. This is a useful reminder of the rules and procedures which should be followed by issuers:

- **Social Media** – there have been numerous enquiries by the PMO into suspected disclosure of inside information via issuers' social media offerings, particularly Twitter or in direct communications between issuers' executives and investors through open or private social

media channels. As a reminder inside information MUST be disclosed via a RIS to ensure disclosure to the 'public' and cannot be disclosed via social media alone.

- **Mainstream media** – there have been occasions where issuers have leaked significant (and possibly inside) information to mainstream media outlets often resulting in press articles being published before the RIS. Before any such communications, issuers should consider whether the information is inside information which needs to be announced via a RIS. The fact that an article is published out of market hours will not be a suitable defence in this situation.

- **Fundraisings** – there are numerous enquiries into potential leaks of inside information regarding issuers' fundraising activities, often in respect of smaller issuers and reported on bulletin boards or smaller media outlets or blogspots. Issuers should follow appropriate wall-crossing procedures and have tight systems and controls in place which restrict access to the information as far as possible.

- **Analyst and media briefings** – troublesome disclosures have arisen in analyst briefings, earnings calls or media events where issuers' senior executives are unsure about the detail of the results being presented, speak unscripted or where they are drawn off script in Q&A sessions. As a reminder executives must be thoroughly prepared for market and media events to avoid selective disclosure of inside information to people attending the event.

- **Systems and controls** – issuers tend to have some sort of written policy or procedure for handling inside information/social media policies but these vary in quality and many merely reproduce the relevant rules. The FCA have not seen a written policy/procedure that puts the issuer's legal obligations in the context of its day to day activities and identifies practical situations/behaviours that create risk nor have they seen any social media policy that explicitly recognises the specific risk of unlawful disclosure of inside information through the improper use of social media. Companies should review their policies to ensure they adequately address these risks.

The National Security and Investment Act (NSI Act)

The NSI Act allows the government to intervene in qualifying acquisitions which could harm the UK's national security. It covers 17 defined sensitive areas (for example civil nuclear, communications, defence, computing hardware and data infrastructure) and will apply where the acquirer gains a level of control over the entity. Such transactions require approval from the Secretary of State before they are completed otherwise the acquisition is void. See our earlier briefing on this.

Issuers need to continuously consider their obligations under the UK Market Abuse Regulation (MAR) to disclose inside information when acquisitions are subject to review, assessment or in relation to interim or final orders under the NSI system. They should contact BEIS and the FCA if

they consider that any information in interim or final orders could constitute inside information under MAR and if BEIS is considering imposing conditions requiring the non-disclosure of that inside information on national security grounds.

Issuers will also need to consider whether the void status of an acquisition, which has not been notified in accordance with the NSI Act, would constitute inside information under MAR.

Climate-related financial disclosures

The FCA is taking this opportunity to remind premium and standard listed companies of their disclosure obligations under the Listing Rules following the FCA's first review of TCFD-aligned disclosures by premium listed companies in 2022. Standard listed companies will be making these disclosures for the first time in their annual reports for accounting periods beginning on or after 1 January 2022 but all companies should familiarise themselves with the steps in the 'Getting ready for TCFD-aligned climate-related disclosures' section of the FCA's July review.

In addition companies in all sectors should undertake a detailed assessment of their disclosures against the TCFD's Guidance for All Sectors and should include forward-looking assumptions/projections to allow market participants to assess climate-related risks and opportunities. Further clarity is also required when reporting on climate-related risks in the financial statements. Companies need to show a clear connectivity between the climate disclosures in the front half of their annual report and their financial statement disclosures.

The FCA will continue to monitor listed companies' climate-related financial disclosures under the Listing Rules and intend to consult on strengthening their disclosure expectations for transition plans to net zero.

Reverse takeovers

This publication reminds cash shells and SPACs of the rules in relation to reverse takeovers as some companies may not be properly applying the definition of a reverse takeover to a prospective transaction or may not have considered that a transaction could be a reverse takeover requiring suspension of the shares and cancellation and re-admission of the enlarged entity.

The definition of a reverse takeover is broad and refers to a 'transaction' which is not just an acquisition of a company's entire issued share capital but is likely to include any transaction of an acquisitive nature including an acquisition of assets such as the issuance of a loan, a purchase of a minority stake or the entering into of a joint venture arrangement.

Insider Lists

Market Watch 71 reports that since Market Watch 60 there has been a marked reduction in the number of people categorised as 'permanent' insiders on insider lists of advisory firms. Methods to reduce access include:

- Top to bottom periodic reviews of the roles of all permanent insiders;
- Comparing records of electronic access to files with insider lists to determine whether those who did not access the information can have access withdrawn; and
- Consideration of the necessity of non-deal team employees in particular functions, as well as multiple jurisdictions, having access to inside information.

The FCA also notes that insider lists do not always contain the requisite personal information eg. personal telephone numbers and date of birth etc. These lists must be in the format and include the information set out in MAR. It is also worth noting that MAR does not contain any exemptions for the provisions of personal data and in a small number of cases, where individuals have refused to provide personal data, those firms have withdrawn access to the inside information.

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