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Insights

FCA: UNLAWFUL DISCLOSURE OF INSIDE INFORMATION AND M&A TRANSACTIONS

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SUMMARY

The FCA has published Primary Market Bulletin (PMB) No 54 outlining its concerns around the unlawful disclosure of inside information during the course of M&A transactions.

BACKGROUND

Under the UK Market Abuse Regulation (MAR) it is an offence for a person who possesses inside information to disclose that information to any other person except where disclosure is made in the normal exercise of an employment, a profession or duties. Breach of these rules can result in unlimited fines or injunctions.

STRATEGIC LEAKS AND UNLAWFUL DISCLOSURE

In PMB No 54 the FCA reports that it is seeing an increase in instances where material information on 'live' M&A transactions appears to have been deliberately leaked to the press. These concern leaks which occur inadvertently, by hinting at market sensitive information (even if specific details are not mentioned) and strategic leaks where inside information is deliberately given to the press by individuals at an issuer or its advisers.

Individuals involved in the transactions seem to be poorly handling the inside information, failing to take adequate measures to prevent leaks and seem to be part of a culture where strategically leaking inside information to the media is acceptable. The consequence can include significant movement in share prices, the improper dissemination of information and damage to the integrity of the markets.

Examples of leaks include details of discussions between the board of an offeree company and a potential offeror following an approach for a possible offer, or where the offeree board has rejected an approach but an increased offer is likely. In many cases, the information leaked constituted

inside information under MAR and resulted in a significant effect on the share price of the offeree company and/or the offeror.

RESPONSIBILITIES OF ISSUERS AND ADVISERS

There are various actions issuers can take to prevent unlawful disclosure of inside information including:

- adopting procedures to control access to the information – for example, password and/or restricted access to key documents and the use of code names;
- not disclosing inside information selectively, except in very limited circumstances, or leaking inside information;
- restricting access to inside information to those who need to access it within the group;
- having in place a disclosure committee and policy for determining whether information is inside information and when it should be announced. This should reflect the issuer's (and its employees' and executives') legal obligations in the context of the issuer's day-to-day activities and identifies practical situations/behaviours that create risk;
- policies and procedures can have limited effectiveness if they are not accompanied by culture and practices which actively discourage leaks. Employees should receive regular training with real examples of what is inside information and the process for dealing with this;
- maintaining "insider lists" and ensuring that persons acting on the issuer's behalf (for example advisers) also maintain such lists;
- if an issuer can satisfy the conditions and delay disclosure of the inside information, it should keep a record of that decision and if there is a leak or market rumour that indicates a possible leak, the information should be announced as soon as possible; and
- enquiries from the press seeking disclosure of any information should be directed to the appropriate person in accordance with the issuer's disclosure policy. Insiders who confirm information put to them by a journalist may commit market abuse by disclosing inside information.

Issuers and advisers are also reminded of Rule 2.1(a)of the Takeover Code which states that "*Prior to the announcement of an offer or possible offer, all persons privy to confidential information, and particularly price-sensitive information, concerning the offer or possible offer must treat that information as secret and may only pass it to another person if it is necessary to do so and if that person is made aware of the need for secrecy. All such persons must conduct themselves so as to minimise the chances of any leak of information.*"

RELATED PRACTICE AREAS

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