

Simmons & Simmons' market abuse column: November 2023

by Simmons & Simmons LLP

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On a regular basis, members of the multi-disciplinary market abuse team at Simmons & Simmons, including Partners [Alex Ainley](#) (Financial Services Regulatory), [Jamie Corner](#) (Corporate) and [Emma Sutcliffe](#) (Disputes and Investigations), and Senior Professional Development Lawyer [Caroline Chambers](#) (Corporate), share their views with Practical Law subscribers on key developments and publications relating to market abuse that will be of interest to companies, individuals and financial services institutions.

In their first column, the team consider the FCA's observations on market soundings, which are set out in Market Watch 75 (published on 31 October 2023).

Market Watch 75: maintaining the integrity of the market soundings regime

In [Market Watch 75](#), the FCA has made startling observations on the practice of some market participants trading in relevant securities in the period between having received an initial communication of a market sounding and consenting to receive the information.

The market soundings regime under UK MAR is a useful tool by which issuers can determine interest in a transaction from investors prior to its announcement. For example, it can provide comfort to issuers that their shareholders support their intentions and helps de-risk any potential volatility in the price of the securities where a company pursues a transaction, but does not have such support.

It is important that market soundings are conducted in the proper fashion and that recipients of an invitation to receive a market sounding do not seek to benefit from any information imbalance between them and other investors.

The FCA has therefore highlighted room for improvement for both the sell-side and the buy-side when participating in a market sounding. In particular, in Market Watch 75 it identifies the following:

- Disclosing market participants (DMPs) inviting an investor to receive a market sounding must take care to ensure that the initial

communication does not provide sufficient information for the recipient to establish the identity of the issuer.

In practice, this means that additional care needs to be taken in preparing the market sounding script or email that is used in that first communication. Typically, DMPs will try and give a flavour of the type of issuer (for example, by referring to the sector in which it operates or its size by reference to whether it is a constituent of the FTSE indices). However, this information could be too much if, for example, it would be possible for the investor to establish the identity of the issuer by putting those details together with the identity of the person making the DMP (perhaps the broker of the issuer). As such, while there will always be a tension between providing the investor with sufficient information to agree to accept the market sounding and not giving the game away, it is important that the DMP errs on the side of caution.

- DMPs should enforce shorter periods between the initial communication and the requirement for the recipient of the invitation to accept a market sounding to consent. The FCA believes this would reduce the risk of insider dealing in the intervening period.
- The responsibilities for ensuring that market soundings are conducted appropriately do not just lie with the DMP. If recipients of information (market sounding recipients

or MSRs) can establish from an initial communication the identity of the issuer (perhaps on account of a poorly drafted script or email, or because they have other information that, together with what has been received, allows them to put two and two together), the FCA points out that they cannot trade in the securities. This is because the market sounding regime only provides protections against the unlawful disclosure of inside information and not insider dealing by MSRs.

- To the extent they have not done so already, MSRs should put in place "gatekeepers" to whom any request for a market sounding should be directed. These individuals, with proper training and relevant internal procedures, can act as an intermediary to ensure that the information is controlled and not shared with persons who might seek to make use of it.

Larger investors will have such processes in place, but there is a cost to implementing

such procedures that may be unattractive to smaller houses or investors whose focus is not UK (and EU) securities.

The FCA suggests that, where DMPs are approaching private individuals (and presumably investors without a UK and EU focus) and where there is not a gatekeeper, further care is taken to ensure that the MSR understands the process and is aware of possible breaches.

The FCA's decision to once again share its observations on market soundings (after previously sharing them in [Market Watch 51](#) (published in September 2016) and [Market Watch 58](#) (published in December 2018)) demonstrates its concern that parts of the market are not complying with the requirements in this area. In our view, there is a real risk for firms and individuals that they will become the subject of increased scrutiny, and possibly FCA enforcement action, if this clear warning shot is not heeded.

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