An update on the practical application of MAR

April 2019

Company Matters (part of Link Group) and EQS Group have undertaken a survey to ascertain how companies are managing the Market Abuse Regulation (MAR), almost three years on. The results are fascinating. While some practices have become common, how companies implement MAR varies widely, particularly for:

- disclosure
- managing permanent insiders, and
- confirming MAR obligations

In one way or another, MAR is here to stay - soft, hard or no Brexit - so to help you meet your obligations, we've summarised the results below and suggested ways to make sure your company is compliant, while increasing efficiency.

Is MAR having the desired effect?

MAR was introduced to make capital markets more attractive, by harmonising the interpretation of the EU market abuse framework, and enhancing market integrity and investor protection.

At the time, there were mixed feelings about the value MAR would bring to the existing regime, especially in the UK where it was already quite robust. The reality for company secretarial and legal teams across Europe is that MAR has introduced a much larger administrative burden.

But when asked whether MAR had improved transparency and compliance practices, only 16% of respondents think it hasn't, although 44% haven't been persuaded one way or another. A relatively positive outcome in the circumstances.

Has MAR improved transparency and compliance practices?

16% of respondents think it hasn't

44% haven't been persuaded one way or the other

Has your company got a MAR 'state of mind'?

The FCA has emphasised that complying with MAR requires:

- 'a state of mind'
- vigilance
- the capacity to exercise strong judgement
- the awareness of what steps to take

38% of companies said that MAR underpinned their thinking at all times, and another 18% reported they were roughly in between that approach and one which looks at MAR as a series of procedures executed at readily identified set intervals and the occasional ad hoc event.

What should you do?

Make sure MAR is embedded into the everyday thinking of all relevant people within the organisation, to make sure that inside information is accurately identified on a timely basis and that appropriate action is then taken.

Has your company got a MAR 'state of mind'

38%
of companies said that MAR underpinned their thinking at all times

How often do you keep track of inside information?

The level of activity around inside information varies widely across companies. Some will come across inside information far more frequently than others, especially highly acquisitive companies.

Since MAR came into effect:

- most respondents (54%) have had between one and five (closed) projects
- 9% have had over 30 projects and
- 13% have not had any at all.

54%
have had between one and five (closed) insider projects

9%
have had over 30 projects

13%
have not had any projects

How should you track insiders?

The method of managing insider lists also varies. While **40% of respondents use a specialised insider management software**, the remainder are still using Excel spreadsheets and emails to document their insider lists.

This is surprising as specialised software that is secure and **compatible with MAR and data protection legislation** helps company secretarial teams ensure compliance and reduce the administrative burden for a relatively minor cost. Using Excel spreadsheets to maintain insider lists can be difficult, less secure and prone to loss of data as at a particular date and time.

As expected, in all companies but one the company secretariat is responsible for managing insider lists; in a limited number of cases compliance, legal or HR are also involved.

Creating **'confidential'**, **'grey'** or **'shadow lists'** has also become common practice, to track individuals who are aware of confidential information, that could become inside information; **59%** of respondents reported creating these types of lists.

59%
of respondents
use confidential,
grey or shadow lists

40%
of respondents use
specialised insider
management software

"Using Excel spreadsheets to maintain insider lists can be difficult, less secure and prone to loss of data."

There is also a question as to whether organisations open a project insider list when inside information has been identified, a decision has been made to release it as soon as possible, but there is likely to be a short delay (a few hours) before the announcement is released.

In this scenario, 46% of respondents stated that they would create a project insider list, 33% said they would not, and the remainder said that it would depend on different factors, for example, how long the delay was going to last.

46%
of respondents would create a
project insider list if there was
a short delay in announcing
inside information

33%
said they would not

Always be prepared for an FCA request

Interestingly, less than 10% of respondents have received an insider list request from the FCA.

While this isn't a large proportion, it's important not to become complacent and always be prepared for an FCA request. No one wants a surprise request and to be pulling together lists, acknowledgement dates and times at the last minute.

In fact, this is actively discouraged by MAR and the FCA as it carries a significant risk of tipping off an individual that they may be under investigation – which is in itself an offence.

FCA

10%
less than 10% of
respondents had
received an insider list
request from the FCA

Managing insiders – what's best?

89%
of respondents inform insiders when a project is closed

98%
inform them of closed periods

In a few areas market practice is clear. For example, 89% of respondents inform insiders when a project is closed and 98% inform them of closed periods.

But practices still differ:

- **Permanent insiders – to have them or not?**

72%
do have permanent insiders

28%
don't have any permanent insiders

Of our respondents, 28% don't have any permanent insiders. Of the 72% that do, the number of permanents vary from less than 3 individuals (6% of respondents) to more than 20 individuals (42% of respondents).

This is an interesting area. While having permanent insiders does reduce the administrative burden around insider lists, according to MAR a permanent insider is someone who has access to **all** inside information **at all** times.

In practice, few if any people meet this criteria. Given that inside information should only be disclosed to persons who require the information to perform their functions, it's important that the permanent insider list doesn't become disproportionately large, veering away from the MAR definition.
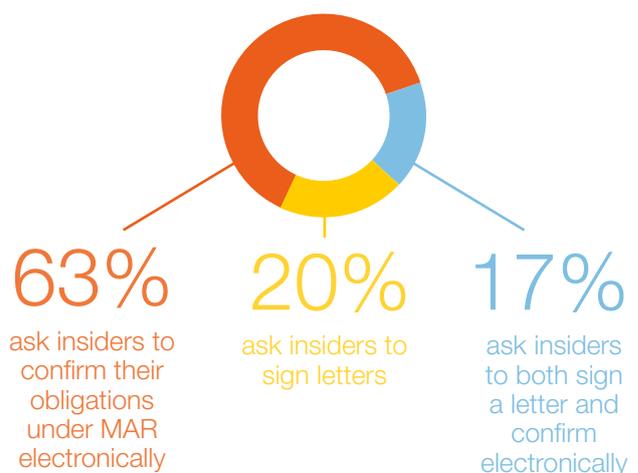
What should you do?

All companies, but particulary those with a large number of insiders should review the definition of a permanent insider that is being used internally to make sure it corresponds with the MAR definition.

- **Restricted persons list**

If the permanent insider list is being used to capture employees who should always seek permission to deal in the company's securities, consider setting up a separate "restricted persons" list and make sure they are captured by the provisions of the company's securities dealing code.

- **Confirmation of obligations – reducing admin**

63%
ask insiders to confirm their obligations under MAR electronically

20%
ask insiders to sign letters

17%
ask insiders to both sign a letter and confirm electronically

While 63% of respondents ask insiders to confirm their obligations under MAR electronically, 20% are asking insiders to sign letters and 17% to both sign a letter and confirm electronically.

💡 What should you do?

Streamline this process as much as possible so that all MAR-related information can be saved easily in one location. Electronic confirmations are sufficient.

- **Insider instruction letters – general or project-specific?**

While 30% of respondents only issue project-related instruction letters, 68% issue a general instruction letter for the insider to confirm their obligations (before any inside information arises). Following this they remind insiders of their obligations for each project but whereas 48% ask them to re-acknowledge their obligations each time, 20% only remind them of their obligations and don't request re-acknowledgement.

30%
issue project-related
instruction letters

68%
issue a general
instruction letter

💡 What should you do?

All these approaches are correct, but make sure that actual or potential insiders re-acknowledge their obligations at least once a year.

- **Educating insiders – how far do you go?**

66% of respondents educate insiders about their obligations as insiders and the general topic of insider dealing beyond the prescribed legal requirements.

66%
of respondents educate
insiders beyond legal
requirements

Methods include:

- online training – the most popular
- training sessions with the company secretariat
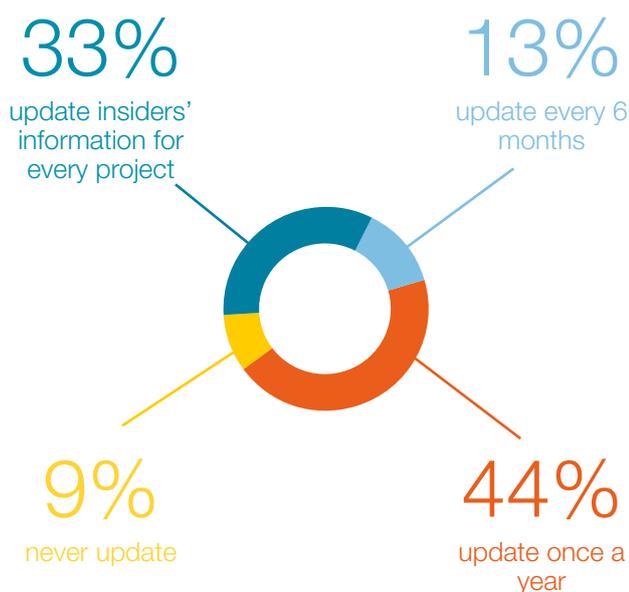- one-to-one training
- distributing the policy

💡 What should you do?

Train actual or potential insiders beyond the legal requirements. Make sure that all relevant staff understand what could constitute inside information and how they should respond to it in accordance with their company's MAR procedures ,encouraging a MAR state of mind.

Managing insider data

MAR requires companies to make reasonable efforts to make sure that insider information is kept up to date. Practices in this area differ. 33% of respondents ask insiders to update their data whenever they are included in a project, 13% ask all individuals who have been insiders to update their information every six months, 44% once a year and 9% never.

33%
update insiders' information for every project

13%
update every 6 months

9%
never update

44%
update once a year

What should you do?

Reach out to insiders at least once a year to make sure that the relevant personal data is kept current.

MAR also requires companies to keep insider's personal data up to date for the required five years even after they've left the company. Here, the results were almost split down the middle. 51% of companies comply with this while 49% don't.

Maintaining a person on the list for the five years after they leave is understood, but there are questions about how practical it is to update that information once the person has left the business.

What information is inside information?

Determining whether information is inside information is rarely straightforward. But companies generally have processes in place to be able to do this. For example, 65% of respondents have a disclosure committee (9% had one before MAR). Nevertheless, 30% of respondents stated that they have difficulty determining precisely when information becomes inside information.

65%
of respondents have a disclosure committee

30%
of respondents stated that they have difficulty determining precisely when information becomes inside information

What should you do?

Again after reflecting the FCA's 'state of mind' comments, make sure that the decisions and reasonings around whether information is inside information is always thoroughly documented. There is often no objectively right or wrong answer, but you need to be able to prove the reasoning used.

Other practical findings:

- Preliminary results

63%

consider preliminary results in line with forecast not to be inside information

When preliminary results are in line with the forecast, 63% of respondents consider that they don't comprise inside information. Interestingly 38% would say that they do.

What should you do?

Market practice appears to have evolved and preliminary results in line with forecasts are not considered inside information.

- **Out of hours**

When inside information emerges while regulatory information services (RIS) are closed, 77% of respondents announce the information at 7 a.m. the following day, whereas 23% follow the procedure outlined in DTR.1.3.6 G – distributing the information as soon as possible to:

- Not less than two national newspapers in the UK

- Two newswire services operating in the UK

- And a regulatory information service for release as soon as it opens

Not all RIS providers do close, and the dissemination of inside information out of hours for some is straightforward.

What should you do?

It would be useful for regulators to provide clarity in this area. In the meantime, consider the timing of your announcements on a case-by-case basis, and seek input from your advisers.

What should you prioritise now?

MAR has strived to harmonise the interpretation of the market abuse regime across the EU, but companies have adopted different approaches to compliance. Now might be a good time to review your MAR policies and procedures, as well as your actual MAR practices, to ensure they are efficient and compliant.

Mindset approach to MAR

Confidential, grey or shadow lists

Permanent insiders – truly?

Specialist software

Restricted persons

Confirmations

Documentation

Out of hours

Training

Methodology

Company Matters – part of Link Group – and EQS Group conducted this survey to understand how issuers are implementing the regulation. In total, 51 companies, ranging from companies with only debt listing, FTSE 100 to AIM quoted companies, participated in the survey.

The FCA's Market Watch 58, published in December 2018 [Link: https://www.fca.org.uk/publication/newsletters/market-watch-58.pdf] was about the implementation of MAR within the financial services industry but includes relevant pointers for issuers. Many of the findings reflect what we have seen in our survey.

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