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UPDATE

GFSC: A new Code of Market Conduct

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The Guernsey Financial Services Commission issued a new Code of Market Conduct on 5 November 2018. The purpose of the Code is to provide guidance on the types of behaviour that may or may not constitute market abuse. This update considers the Code and its potential implications to market participants

Background

The development of financial services has resulted in the broadening of the types of behaviour that may constitute market abuse. In a welcome move, the Guernsey Financial Services Commission (the **GFSC**) has issued a new Code of Market Conduct (the **Code**) under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (the **POI Law**) which is intended to provide guidance on what behaviour it considers may or may not amount to 'market abuse'.

What is market abuse?

Market abuse is set out in the POI Law and is, essentially, behaviour, in relation to a 'qualifying investment'[1] traded on a 'regulated market'[2] which:

- is based on information which is not generally available to those using the market but would be likely to be regarded by a regular user as relevant when deciding the terms on which transactions in investments of the kind in question should be effected
- is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question, or
- a regular user of the market would, or would be likely to, regard the behaviour as behaviour which would, or would be likely to, distort the market in investments of the kind in question, and

which is likely to be regarded by a regular user as a failure by the person(s) concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.

The behaviour must occur in the Bailiwick of Guernsey or on a regulated market located in the Bailiwick or which is accessible electronically in the Bailiwick.

Key points

The key points to take from the Code include the following:

[1] ie all controlled investments (category 1 and category 2) under the POI Law which term includes, without limitation, collective investment schemes and general securities and derivatives

[2] as defined under The Protection of Investors (Market Abuse) (Bailiwick of Guernsey) Regulations 2008 and which includes, without limitation, the London Stock Exchange, The International Stock Exchange, Euronext and the New York Stock Exchange

1 Behaviour includes both action and inaction

The Code makes clear that behaviour includes both action and inaction, for example, where a person is under a legal or regulatory duty to make a particular disclosure and fails to do so.

2 Behaviours that amount to market abuse

Sections 2.2 to 2.5 (inclusive) of the Code set out descriptions of behaviour that amount to market abuse and include:

- **manipulating transactions**: transactions otherwise than for legitimate reasons which give or are likely to give a false or misleading impression about the supply or demand for a qualifying investment, or its pricing, or which secure the price of a qualifying investment at an abnormal or artificial level
- **manipulating devices**: effecting transactions or orders to trade which employ fictitious devices (eg 'pump and dump' (taking a long position in a qualifying investment and disseminating misleading positive information with a view to increase its price) and its opposite 'trash and cash')
- **dissemination**: dissemination of information by any means which gives, or is likely to give, a false or misleading impression as to a qualifying investment by a person who knew or could reasonably be expect to have known that the information was false or misleading (eg knowingly or recklessly spreading false or misleading information about a qualifying investment through the media or not taking reasonable care to ensure it was not false or misleading), and
- **distortion**: where the behaviour would distort, or would likely be regarded by a regular user as behaviour that would distort or be likely to distort, the market and is likely to be regarded by the regular user as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected.

3 Behaviours that do not amount to market abuse ('safe harbours')

The Code also sets out descriptions of behaviour which, in the GFSC's opinion, do not amount to market abuse (known as 'safe harbours'). These include:

- passing on information which is not generally available to: (i) employees or fellow employees to enable them to perform their functions; (ii) professional advisers for the purpose of obtaining advice; (iii) the counterparty of a transaction to facilitate that transaction; (iv) any person from whom an irrevocable commitment or expression of support is sought for an offer which is the subject of the City Code on Takeovers and Mergers (the **Takeover Code**); or (v) the GFSC, the Takeover Panel or other statutory or regulatory body for the purposes of fulfilling a legal or regulatory obligation; and
- where an intermediary has acted on the instruction of another who appears to have engaged in market abuse, the intermediary's actions generally will not amount to market abuse unless the intermediary knew or ought to have reasonably known that the other person was engaging in market abuse.

4 The Takeover Code

Helpfully, the Code clarifies that behaviour which conforms with the Takeover Code (or guidance issued in relation to it in the UK) will not amount to market abuse in circumstances where, if the behaviour were undertaken in the UK, it would not amount to market abuse in respect of that regulated market.

The Code also indicates that, in respect of transactions relating to companies that are not within the scope of the Takeover Code, the GFSC will consider applicable codes or guidance of the authorities in the country of incorporation of the relevant company or, where necessary, the country in which the shares are listed and, in the absence of which, the GFSC may consider whether the Takeover Code offers any appropriate guidance.

Conclusions and recommended actions

The Code is to be welcomed as a pragmatic guide of behaviours which the GFSC considers may or may not constitute market abuse.

Transactions which may be subject to market abuse are typically complex and may involve a number of laws, regulatory regimes and jurisdictions, including insider dealing considerations, rules of the relevant market and the Takeover Code. It is therefore important to remember that conformity with the Code is not necessarily the only consideration to take into account.

The Code is clear that it is not intended to be exhaustive. In particular, it highlights that where a person is proposing to undertake an 'innovative' transaction, the onus is on the person to ensure compliance with the Code.

It is important to recognise that the Code may engage intermediaries and service providers of market participants. Market participants, their administrators and other service providers should review their own procedures and training programmes to ensure compliance with the Code.

This update is not intended to be exhaustive or a substitute for reading the Code in its entirety, which is available here. However, please do not hesitate to get in contact with us or your usual Mourant contact should you require any further information or assistance.

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