

## THE CODE OF MARKET CONDUCT

## **Table of Contents**

Foreword	1
<b>1. Introduction</b>	<b>2</b>
1.1 Application and Interpretation	2
1.2 Using the Code of Market Conduct	5
<b>2. Descriptions of behaviours which amount to market abuse</b>	<b>5</b>
2.1 General Behaviour	5
2.2 <i>Manipulating Transactions</i>	6
2.3 <i>Manipulating Devices</i>	8
2.4 <i>Dissemination</i>	8
2.5 <i>Distortion</i>	9
<b>3. Descriptions of behaviours which do not amount to market abuse</b>	<b>10</b>
<b>4. Factors to be taken into account</b>	<b>12</b>
4.1 General Behaviour	12
4.2 <i>Manipulating Transactions</i>	14
4.3 <i>Manipulating Devices</i>	17
4.4 <i>Dissemination</i>	17
4.5 <i>Distortion</i>	17
4.6 Other Rules	18
<b>5. Other Considerations</b>	<b>19</b>
5.1 Relationship with criminal law and other regulatory requirements	19
5.2 Markets named under Section 41C(1) of the POI Law	19
APPENDIX 1	20

## **Foreword**

*Regulated markets* provide a mechanism by which the price or value of investments may be determined according to the market forces of supply and demand. When *market users* trade on *regulated markets* they expect the price or value of investments and volumes of trading to reflect the proper operation of market forces rather than the outcome of improper conduct by other *market users*. Improper conduct which gives *market users* a false or misleading impression results in *market users* no longer being able to rely on the prices formed in markets or volumes of trading as a basis for their investment decisions. This will undermine confidence in the integrity of the *regulated market* and overall market activity may decrease and transaction costs may rise, or both, to the detriment of *market users*, including investors.

# 1. Introduction

## 1.1 Application and interpretation

1.1.1. The Code of Market Conduct (“the Code”) is prepared and issued under Section 41B of the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended. The Code is relevant to all *persons* seeking guidance as to whether or not behaviour amounts to *market abuse*.

1.1.2. For the purposes of the Code:

“abusive squeeze” is as defined under Section 2.2.5 of the Code;

“the Bailiwick” means *the Bailiwick* of Guernsey;

“borrowing” is where a *person* receives credit under a credit agreement or where a *person* to whom the rights and duties of a borrower under a credit agreement have passed by assignment or operation of law;

“Chinese Wall” is an arrangement which requires information held by a *person* in the course of carrying on one part of its business to be withheld from, or not to be used for, *persons* with or for whom it acts in the course of carrying on another part of its business;

“the COB Rules” means the Licensees (Conduct of Business) Rules 2016;

“the Commission” means the Guernsey Financial Services Commission;

“commodity derivative” means an option or a future relating to a commodity;

“dissemination” has the meaning given in Section 2.4 of the Code;

“distortion” has the meaning given in Section 2.5 of the Code;

“the Insider Dealing Law” refers to the Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1996 as amended;

“Listing Rules” means the Listing Rules made by any entity licensed under section 4 of *the POI Law* to operate an investment exchange;

“market abuse” is as defined in Section 41A of *the POI Law*;

“the Market Abuse Regulations” means the Protection of Investors (Market Abuse) (Bailiwick of Guernsey) Regulations, 2008;

“misleading behaviour” has the meaning given in section 2.1.8. of the Code;

“painting the tape” is as described in 2.2.3(3) of the Code;

“person” includes a body corporate;

“the POI Law” means the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended;

“prescribed markets” has the same meaning as *regulated markets* (see below) and will be referred to as such within the Code;

“price stabilisation rules” means any such rules made under *the POI Law*;

“profit” also means potential *profit*, avoidance of loss or potential avoidance of loss;

“pump and dump” is as described under Section 2.3.1(2) of the Code;

“qualifying investments” are those investments that fall within the scope of the definition of *qualifying investments* set out in *the Market Abuse Regulations*. *The Market Abuse Regulations* cite the definition of controlled investments within schedule 1 to *the POI Law*; being Category 1 controlled investments, that is open and closed-ended collective investment schemes; and Category 2 controlled investments, that is general securities and derivatives;

“regular user/market user” is

(a) A *person* who is, in relation to a particular market, a reasonable *person* who regularly deals on that market in investments of the kind in question; or

(b) A *person* who is, in relation to a particular auction platform, a reasonable *person* who regularly makes bids on that market for investments of the kind in question;

“regulated markets” are those markets specified under Section 41A(3) of *the POI Law* and Regulation 1 of *the Market Abuse Regulations*;

“relevant information”, examples of such are given at Section 4.1.11. of the Code;

“repo” or “repurchase agreement” is an agreement in which an undertaking transfers securities subject to a commitment to repurchase them, or substituted securities of the same description, at a specified price on a future date specified, or to be specified, by the transferor. This is in respect of the party selling – and making the commitment to repurchase - the securities;

“reverse repurchase transaction” is an agreement in which an undertaking agrees to purchase securities subject to a commitment to sell the, or substitute securities of the same description, at a specified price on a future date specified in a *repurchase agreement*;

“safe harbour” is as defined within Section 3 of the Code;

“stock lending” is the lending of a *qualifying investment* to a counterparty, who will typically put up collateral;

“The Takeover Code” means the City Code on Takeovers and Mergers;

“trash and cash” is as described under Section 2.3.1.(3) of the Code;

“wash trades” is as described under Section 2.2.3.(2) of the Code.

- 1.1.3. Sections 41A to 41H of *the POI Law* contain provisions relating to *market abuse* which are described in the Code as the *market abuse* regime.
- 1.1.4. (1) *Market abuse* is behaviour (whether by one *person* alone or by two or more *persons* in concert) –
- (a) which occurs in relation to *qualifying investments* traded on a market to which sections 41A to 41H apply,
  - (b) which satisfies any one or more of the conditions set out in subsection (2), and
  - (c) which is likely to be regarded by a *regular user* of that market who is aware of the behaviour as a failure on the part of the *person* or *persons* concerned to observe the standard of behaviour reasonably expected of a *person* in his or their position in relation to the market.
- (2) The conditions are that –
- (a) the behaviour is based on information which is not generally available to those using the market but which, if available to a *regular user* of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected,
  - (b) the behaviour 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,
  - (c) 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.
- 1.1.5. The Code offers guidance under 41E of *the POI Law* to those determining whether or not behaviour amounts to *market abuse*.

## **1.2 Using the Code of Market Conduct**

- 1.2.1. The Code describes behaviours that, in *the Commission's* opinion, do not amount to *market abuse*. Section 41E(1) of *the POI Law* provides that such behaviours are to be taken, for the purposes of *the POI Law*, as not amounting to *market abuse*. These type of behaviours are referred to as a *safe harbours*.
- 1.2.2. In accordance with Section 41E(2) of *the POI Law*, the Code may be taken into account insofar as it indicates whether or not behaviour should be taken to amount to *market abuse*.
- 1.2.3. The Code does not exhaustively describe all factors to be taken into account in determining whether behaviour amounts to *market abuse*. If factors are described, they are not to be taken as conclusive indications, unless specified as such, and the absence of a factor mentioned does not, of itself, amount to an indication that *market abuse* has not occurred.
- 1.2.4. The Code does not have the effect of modifying any disclosure obligations of a *regulated market* or *The Takeover Code*.
- 1.2.5. Under Section 41A(5) of *the POI Law*, behaviour will fall within the scope of the Code if it occurs in *the Bailiwick*, or in relation to *qualifying investments* traded on a *regulated market* which is situated in *the Bailiwick* or which is accessible electronically in *the Bailiwick* (for example, the London Stock Exchange, the New York Stock Exchange or the Tokyo Stock Exchange).
- 1.2.6. *The Commission* may, subject to the provisions of *the POI Law*, alter or replace the Code at any time.

## **2. Descriptions of behaviours which, in the opinion of *the Commission*, amount to *market abuse***

### **2.1 General Behaviour**

- 2.1.1. Under Section 41B(2)(a) of the *POI Law*, *the Commission* may specify descriptions of behaviour that, in its opinion, amount to *market abuse*.
- 2.1.2. Statements in this section assume that one or more of the conditions in Section 41A(2) of *the POI Law* have also been met.
- 2.1.3. Under Section 41A(6) of *the POI Law*: “the behaviour which is to be regarded as occurring in relation to *qualifying investments* includes behaviour which:
  - (a) occurs in relation to anything which is the subject matter, or whose price or value is expressed by reference to the price or value, of those *qualifying investments*; or
  - (b) occurs in relation to investments (whether qualifying or not) whose subject matter is those *qualifying investments*.”
- 2.1.4. The definition of behaviour in relation to a *qualifying investment* in Section 41A(6) of *the POI Law* is not exhaustive. However, there must be a clear relationship between the behaviour and a *qualifying investment* for it to be regarded as occurring in relation to a *qualifying investment*.

- 2.1.5. Behaviour includes both action and inaction. For example, inaction may amount to *market abuse* in circumstances where a *person* is under a legal or regulatory obligation to make a particular disclosure and fails to do so.
- 2.1.6. Further, where behaviour is engaged in for the purpose of abuse in relation to a *qualifying investment*, it may be regarded as having occurred in relation to a *qualifying investment* even though the behaviour is not directly in a *qualifying investment*.
- 2.1.7. *The Commission* considers that the matters set out in Sections 2.2 – 2.5 are descriptions of behaviour that amount to *market abuse*. Such descriptions are likely to be regarded by a *regular user* as a failure on the part of the *person* or *persons* concerned to observe the standard of behaviour reasonably expected of a *person* in his or their position in relation to the market.
- 2.1.8. Behaviour will amount to *market abuse* of a type involving false or *misleading behaviour* where the behaviour 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 *qualifying investments* (commonly referred to as *misleading behaviour*). Behaviour will amount to *market abuse* if the behaviour engaged in is likely to give rise to, or to give an impression of, a price, or value, or volume of trading which is materially false or misleading.

## ***2.2 Manipulating Transactions***

- 2.2.1. Behaviour consisting of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which –
- (1) give, or are likely to give a false or misleading impression as to the supply of, or demand for, or as to the price of one or more *qualifying investments*; or
  - (2) secure the price of one or more qualifying investments at an abnormal or artificial level
- is considered by *the Commission* as behaviour which amounts to *market abuse*. This type of behaviour is commonly referred to in industry as *manipulating transactions*.
- 2.2.2. Behaviour will constitute *market abuse* where:
- (1) a *person* enters into a transaction or series of transactions in a *qualifying investment*; and
  - (2) the principal effect of the transaction or transactions will be, or will likely be, to inflate, maintain or depress the apparent supply of, or the apparent demand for, or the apparent price or value of a *qualifying investment* so that a false or misleading impression is likely to be given to the *regular user*; and
  - (3) the *person* knows or could reasonably be expected to know, that the principal effect of the transaction or transactions on the market will be, or will be likely to be, as set out at 2.2.2.(2);
- unless the *regular user* would regard:
- (a) the principal rationale for the transaction in question as having a legitimate commercial rationale; and
  - (b) the way in which the transaction is to be executed as proper – see 4.2.1.



2.2.3. The following behaviours amount to *market abuse* of a type which is commonly referred to in industry as *manipulating transactions*, and involving false or misleading impressions:

- (1) buying or selling *qualifying investments* at the close of the market with the effect of misleading investors who act on the basis of closing prices, other than for legitimate reasons;
- (2) *wash trades* – that is, a sale or purchase of a *qualifying investment* where there is no change in beneficial interest or market risk, or where the transfer of beneficial interest or market risk is only between parties acting in concert or collusion, other than for legitimate reasons (see Section 3.10 for transactions which may be confused with a *wash trade* but, in the opinion of *the Commission*, do not constitute a *wash trade*);
- (3) *painting the tape* – that is, entering into a series of transactions that are shown on a public display for the purpose of giving a misleading impression of activity or price movement in a *qualifying investment*;
- (4) entering orders into an electronic trading system, at prices which are higher than the previous bid or lower than the previous offer, and withdrawing them before they are executed, in order to give a misleading impression that there is demand for or supply of the *qualifying investment* at that price; and
- (5) buying or selling on the secondary market of *qualifying investments* or related derivatives prior to the auction with the effect of fixing the auction clearing price for the auctioned products at an abnormal or artificial level or misleading bidders in the auctions, other than for legitimate reasons.

2.2.4. The following behaviours amount to *market abuse* of a type which is commonly referred to in industry as *manipulating transactions*, and involving securing the price of a *qualifying investment*:

- (1) transactions or orders to trade by a *person*, or *persons* acting in collusion, that secure a dominant position over the supply of or demand for a *qualifying investment* and which have the effect of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions, other than for legitimate reasons;
- (2) transactions where both buy and sell orders are entered at, or nearly at, the same time, with the same price and quantity by the same party, or different but colluding parties, other than for legitimate reasons, unless the transactions are legitimate trades carried out in accordance with the rules of the relevant trading platform;
- (3) entering small orders into an electronic trading system, at prices which are higher than the previous bid or lower than the previous offer, in order to move the price of the *qualifying investment*, other than for legitimate reasons;
- (4) an *abusive squeeze* (see further detail below under 2.2.5.);
- (5) parties, who have been allocated *qualifying investments* in a primary offering, colluding to purchase further tranches of those *qualifying investments* when trading begins, in order to force the price of the *qualifying investments* to an artificial level and generate interest from other investors, and then sell the *qualifying investments*;
- (6) transactions or orders to trade employed so as to create obstacles to the price falling below a certain level in order to avoid negative consequences for the issuer, for example a downgrading of its credit rating;
- (7) trading on one market or trading platform with a view to improperly influencing the price of the same or a related *qualifying investment* that is traded on another *regulated market*; and
- (8) conduct by a *person*, or *persons* acting in collusion, that secure a dominant position over the demand for a *qualifying investment* which has the effect of fixing, directly or

indirectly, auction clearing prices or creating other unfair trading conditions, other than for legitimate reasons.

2.2.5. An *abusive squeeze* is a situation in which a *person*:

- (a) has a significant influence over the supply of, or demand for, or delivery mechanisms for, a *qualifying investment* or related investment or the underlying product of a derivative contract;
- (b) has a position (directly or indirectly) in an investment under which quantities of the *qualifying investment*, related investment, or product in question are deliverable; and
- (c) engages in behaviour with the purpose of positioning at a distorted level the price at which others have to deliver, take delivery or defer delivery to satisfy their obligations in relation to a *qualifying investment* (the purpose need not be the sole purpose of entering into the transaction or transactions, but must be an actuating purpose).

The effects of an *abusive squeeze* are likely to be influenced by the extent to which other *market users* have failed to protect their own interests or fulfil their obligations in a manner consistent with the standards of behaviour to be expected of them in that market. The *regular user* is likely to expect other *market users* to settle their obligations and not to put themselves in a position where, to do so, they have to rely on holders of long positions lending when they may not be inclined to do so and may be under no obligation to do so. Important factors to be taken into account with regard to *abusive squeezes* are given at sections 4.2.8. and 4.2.9.

### 2.3 *Manipulating Devices*

2.3.1. The following behaviours, in the opinion of *the Commission*, each amount to *market abuse*. These types of behaviours consist of effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance. These are commonly referred to in industry as *manipulating devices*:

- (1) Taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a *qualifying investment* (or indirectly about its issuer, if applicable) while having previously taken positions on that *qualifying investment* and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way;
- (2) *pump and dump* – that is, taking a long position in a *qualifying investment* and then disseminating misleading positive information about the *qualifying investment* with a view to increasing its price; and
- (3) *trash and cash* – that is, taking a short position in a *qualifying investment* and then disseminating misleading negative information about the *qualifying investment*, with a view to driving down its price.

### 2.4 *Dissemination*

2.4.1. The following types of behaviours, in the opinion of *the Commission*, each amount to *market abuse* of a type which is commonly referred to in industry as *dissemination*. It consists of the *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 expected to have known that the information was false or misleading:

- (1) where a *person* knowingly or recklessly spreads false or misleading information about a *qualifying investment* through the media;

- (2) where a *person* undertakes a course of conduct in order to give a false or misleading impression about a *qualifying investment*;
- (3) where a *person* disseminates information which is, or if true would be, *relevant information*;
- (4) where the *person* knows, or could reasonably be expected to know, that the information disseminated is false or misleading;
- (5) where the *person* disseminates the information in order to create a false or misleading impression (this need not be the sole purpose for disseminating the information, but must be an actuating purpose);
- (6) where a *person* responsible for the submission of the information to an accepted channel for the *dissemination* of information submits information which is, or if true would be, *relevant information* which is likely to give the *regular user* a false or misleading impression as to the supply of, or demand for, or the price or value of a *qualifying investment*; and
- (7) where the *person* who submitted the information has not taken reasonable care to ensure it is not false or misleading.

2.4.2. *The Commission* recognises the importance of information disseminated through accepted channels for information purposes. Users of such information should be able to rely on the accuracy and integrity of information carried through these channels. It is, therefore, appropriate that those who disseminate information through them, for example, the company itself, its financial advisers or its public relations advisers, take reasonable care to ensure the information is not inaccurate or misleading. Where they do not, and the information is likely to give rise to a false or misleading impression, they will be regarded as engaging in behaviour which amounts to *market abuse*.

2.4.3. Refer to sections 3.11 and 3.12 for qualifications to this section.

## **2.5 Distortion**

- 2.5.1. Behaviour will amount to *market abuse*, of a type commonly referred to in industry as *distortion*, where the behaviour would be, or would likely be regarded by a *regular user* of the market, as behaviour that would distort, or would be likely to distort, the market in such a *qualifying investment* and is likely to be regarded by a *regular user* of the market as a failure on the part of the *person* concerned to observe the standard of behaviour reasonably expected of a *person* in his position in relation to the market.
- 2.5.2. Behaviour will amount to *market abuse* if the behaviour engaged in interferes with the proper operation of market forces, including the interplay of proper supply and demand, with the purpose of positioning prices at a distorted level. This need not be the sole purpose of entering into the transaction or transactions, but must be a foreseeable consequence.
- 2.5.3. It is unlikely that the behaviour of *market users* when trading at times and in sizes most beneficial to them (whether for the purpose of long term investment objectives, risk management or short term speculation) and seeking the maximum *profit* from their dealings will of itself amount to *distortion*. Such behaviour, generally speaking, improves the liquidity and efficiency of markets.

### **3. Descriptions of behaviours which, in the opinion of *the Commission*, do not amount to *market abuse***

- 3.1. Under Section 41B(2)(b) of the POI Law, *the Commission* may specify descriptions of behaviours that, in its opinion, do not amount to *market abuse*.
- 3.2. Section 41E(1) of the POI Law states that “if a *person* behaves in a way which is described (in any code in force under section 41B at the time of the behaviour) as behaviour that, in *the Commission*’s opinion, does not amount to *market abuse*, that behaviour of his is to be taken, for the purposes of this Law, as not amounting to *market abuse*.”
- 3.3. Where activity relates to certain overseas regulated markets please see section 5.2 for additional matters that do not amount to *market abuse*.
- 3.4. Section 41A(8) of *the POI Law* states: “Behaviour does not amount to *market abuse*:
  - (a) if it conforms with:
    - (i) price stabilisation rules made by *the Commission*; or
    - (ii) guidance issued by *the Commission* on the management of conflicts of interests;and
  - (b) the rules or guidance include a provision to the effect that behaviour conforming with the rules or (as the case may be) the guidance does not amount to *market abuse*.”
- 3.5. Statements in this section refer to descriptions of behaviours which, in the opinion of *the Commission*, do not amount to *market abuse*. These sections are referred to as *safe harbours*.
- 3.6. *The Commission* will not regard a *person* as requiring or encouraging others to deal if he or she passes information which is *relevant information* and not generally available to:
  - (1) his or her employees (or, where appropriate, his or her fellow employees or employees of a group or associated company) for the purpose of enabling them to perform their functions in circumstances where the possession of the information in question is necessary for the proper performance of those functions; or
  - (2) his or her professional advisers, and or the professional advisers of any *persons* involved or who may be involved in any transaction or takeover bid with or involving him or her, for the purpose of obtaining advice; or
  - (3) any *person* with whom he or she is negotiating, or intends to negotiate, any commercial, financial, or investment transaction (including prospective underwriters or issuers of securities) for the purpose of facilitating the proposed transaction; or
  - (4) any *person* from whom he or she is seeking or intends to seek an irrevocable commitment or expression of support in relation to an offer which is subject to *The Takeover Code*, for the purpose of obtaining that commitment or expression of support; or
  - (5) representatives of his or her employees or trade unions acting on their behalf in fulfilment of a legal obligation; or
  - (6) any department of the States of Guernsey, States of Alderney or the Chief Pleas of Sark, *the Commission*, the Takeover Panel or any other statutory or regulatory body or authority for the purposes of fulfilling a legal or regulatory obligation or otherwise in connection with the performance of the functions of the body to which the information has been passed.

3.7. In the context of a takeover bid, a *person*, A, will not be regarded as having required or encouraged another *person*, B, to engage in behaviour amounting to *market abuse* in circumstances where:

- (1) A is an adviser to B, and B is considering the acquisition or disposal of an equity stake; and
- (2) A advises B to acquire or dispose of an equity stake in the target company.

3.8. Where an intermediary has acted on behalf of an originator of a transaction who appears to have engaged in *market abuse* the intermediary's behaviour will not amount to *market abuse* unless the intermediary knew or ought reasonably to have known that the originator was engaging in *market abuse*.

#### Qualifications to Section 2 which amount to *safe harbours*

3.9. The following paragraphs provide qualifications to descriptions of behaviour outlined in Section 2 which would otherwise be demonstrative of behaviour amounting to *market abuse*.

3.10. Section 2.2.3.(2) explains that, in the opinion of *the Commission*, *wash trades* amount to *market abuse*. A *stock lending/borrowing* or *repurchase agreement/reverse repurchase transaction*, or another transaction involving the provision of collateral, may be confused with a *wash trade* but, in the opinion of *the Commission*, such behaviour does not constitute a *wash trade* under Section 2.2.3(2) and thus does not amount to *market abuse*.

3.11. Section 2.4. sets out scenarios in which the *dissemination* of information amounts to *market abuse*. In an organisation where effective *Chinese Walls* (or similar arrangements) have been put in place, if it can be shown that the individual disseminating the information could only have known that the information was false or misleading if he had access to other information that was being held behind the *Chinese Wall* (or a similarly effective arrangement), that indicates that the *person* disseminating did not know and could not reasonably be expected to have known that the information was false or misleading. Therefore the *person's* behaviour does not amount to *market abuse*.

3.12. Without prejudice to Section 2.4, making a report or disclosure will not, of itself, give rise to a false or misleading impression if:

- (1) the report or disclosure was made in accordance with the way specified by any applicable legal or regulatory requirement; or
- (2) the report or disclosure was expressly required or expressly permitted by the rules of a *regulated market* or the rules of *The Takeover Code* or by any other applicable law, ordinance or regulation, or the rules of any competent statutory, governmental or regulatory authority.

#### **4. Factors that, in the opinion of *the Commission*, are to be taken into account in determining whether or not behaviour amounts to *market abuse***

##### **4.1 General Behaviour**

###### Factors to be taken into account in respect of 41A(2) of *the POI Law*

- 4.1.1.(1) For *market abuse* to have occurred, the behaviour must have occurred in relation to an investment “traded on” a *regulated market*. The behaviour must satisfy one or more of the three conditions identified in Section 41A(2) of *the POI Law*. It is difficult to see how these tests could be satisfied where there is no ongoing market on the *regulated market* in the *qualifying investment*.
- (2) The *qualifying investment* on the *regulated market* in question must have an ongoing market because, if not, market participants are unlikely to rely on the *regulated market* for price discovery or price formation. Equally, any trading in such a *qualifying investment* that is not associated with the *regulated market* is unlikely to damage confidence in the *regulated market*. The question of whether there is an ongoing market will depend on a number of factors, including how recently and in what volumes the *qualifying investment* has traded. The importance of these factors is likely to vary from market to market.
- 4.1.2. In the majority of cases there will be no dispute that an investment is “traded on” a *regulated market*. However, in a small number of cases, for example, where an investment has traded in the past but not recently, and where an investment has not yet started trading, the answer may be less obvious. *The Commission* considers that, *prima facie*, the following investments would be “traded on” a *regulated market*:
- (1) investments which have not yet traded but are still subject to the rules of a *regulated market*;
- (2) investments which are currently trading subject to the rules of a *regulated market*.
- 4.1.3. *The Commission* considers that investments and securities admitted to trading on a *regulated market* in respect of which no holders of such investments or securities rely on the *regulated market* for price discovery or price formation would not be “traded on” a *regulated market*.
- 4.1.4. An example shows how Sections 4.1.2. and 4.1.3. might be applied. An investment has not traded for a long time or only in insignificant volumes but it can still be traded subject to the rules of a *regulated market*. The investment will be “traded on” a *regulated market* for the purposes of the Code. There will probably be no ongoing market in this investment since it has not traded for a long time or only in insignificant volumes. For that reason, behaviour in the investment is unlikely to amount to *market abuse*.
- 4.1.5. Users of markets on which investments in *commodity derivatives* are traded are to be treated as expecting to receive information which is:
- (1) routinely made available to the users of those markets; or
- (2) required to be disclosed in accordance with any statutory provision, market rules, or contracts or customs on the relevant underlying commodity market or *commodity derivatives* market.

Factors to be taken into account in respect of Section 41A(1)(c) of the POI Law

4.1.6. *The Commission* considers that in determining whether behaviour falls below the standards expected, the *regular user* is likely to consider all the circumstances of the behaviour, including, but not limited to:

- (1) the characteristics of the market in question, the investments traded on that market, and the users of that market;
- (2) the rules and regulations of the market in question and any applicable laws. For example, it is likely that it will be relevant to consider the extent to which the behaviour is in compliance with the rules of the particular market and, if the *person* is based overseas, it may be relevant to consider the extent to which the behaviour is in compliance with the standards prevailing in that overseas jurisdiction;
- (3) prevailing market mechanisms, practices, and codes of conduct applicable to the market in question;
- (4) the position of the *person* in question and the standards reasonably to be expected of that *person* at the time of the behaviour in the light of that *person's* experience, level of skill, and standard of knowledge. For example, the standards which it would be reasonable to expect of a retail investor are likely to differ from those to be expected of an industry professional; and
- (5) the need for *market users* to conduct their affairs in a manner that does not compromise the fair and efficient operation of the market as a whole or unfairly damage the interests of investors.

Factors to be taken into account in respect of Section 41F(1)(b) of the POI Law

4.1.7. Whether a *person's* taking or refraining from taking action might be regarded as requiring or encouraging others will depend on circumstances such as acceptable market practices, the experience, level of skill, and standard of knowledge of the *person* concerned, and the control or influence the *person* has in relation to the *person* who engages in the behaviour in question. However, early or selective disclosure of information which a *regular user* would expect *market users* to have is what *the Commission* would generally presume to constitute requiring or encouraging unless there is a legitimate purpose for making the disclosure, for example, as permitted or required by the rules of a *regulated market*, the rules made by *the Commission*, or the rules of *The Takeover Code*. Any such disclosure should be accompanied by a statement, at or before the time the information is passed, that the information is given in confidence and that the recipient should not base any behaviour in relation to the *qualifying investment* which would amount to *market abuse* on the information until after the information is made generally available. Such a statement may be incorporated in the express or implied terms of any contract governing the relationship between the *persons* making and receiving the disclosure.

4.1.8. In all *regulated markets*, *market users* rely on the timely *dissemination* of such *relevant information* as they may reasonably expect to receive. Those who possess *relevant information* ahead of general *dissemination* should, therefore, refrain from basing their behaviour on that information and from requiring or encouraging others to engage in behaviour until it is disseminated. Otherwise, the confidence of *market users* in the ability of the market to ensure access to such information will be undermined. The extent to which *market users* may reasonably expect to have access to information differs between different markets. Further all *persons* are also reminded of the existence of *the Insider Dealing Law* and that similar laws exist in other jurisdictions.

- 4.1.9. Whether, in a particular case, a particular piece of information would, or would likely to, be regarded as *relevant information* by the *regular user* will depend on the circumstances of the case. In making such determination, the *regular user* is likely to consider whether the information is publically available. Section 41A(7) of *the POI Law* states that information which can be obtained by research or analysis is to be regarded as generally available to users of a market. In addition, the *regular user* is likely to consider the extent to which:
- (1) the information is specific and precise;
  - (2) the information is material;
  - (3) the information is current;
  - (4) the information is reliable, including how near the *person* providing the information is, or appears to be, to the original source of that information and the reliability of that source;
  - (5) there is other material information which is already generally available to inform users of the market; and
  - (6) the information differs from information which is generally available and can therefore be said to be new or fresh information.
- 4.1.10. In the case of information relating to possible future developments (which do not currently give rise to an expectation of disclosure), the following additional factors are to be taken into account when determining the relevance of that information:
- (1) whether the information provides, with reasonable certainty, grounds to conclude that the possible future developments will, in fact, occur; and
  - (2) the significance those developments would assume for *market users* given their occurrence.
- 4.1.11. Examples of *relevant information* include the following:
- (1) where the *qualifying investment* in question is issued by a company, or is a derivative relating to a *qualifying investment* issued by a company, information concerning the business affairs or prospects of the company or a related company;
  - (2) where the *qualifying investment* is a derivative relating to a commodity, information or events affecting the deliverable supply of the commodity, such as, for example, information as to the business operations of major suppliers; and
  - (3) information as to official statistics, and fiscal and monetary policy announcements before they are announced.

## **4.2 Manipulating Transactions**

- 4.2.1. A transaction will be executed in a proper way where it is executed in a way which takes into account the need for the market as a whole to operate fairly and efficiently. The way in which a transaction was executed would be unlikely to be regarded as proper by the *regular user* where a transaction was executed in a particular way with the purpose of creating a false or misleading impression. In most cases the rules of *regulated markets* include a requirement that transactions be executed in a proper way (for example, rules on reporting and executing cross-transactions). Transactions would not necessarily be considered to have been executed in an improper way simply because the way in which they were executed did not disclose the firm's intentions or positions to the market.
- 4.2.2. The following factors are to be taken into account when determining whether a *person's* behaviour amounts to *market abuse* as described in Section 2.2.2 and are indicative that it does:



- (1) whether those involved in the transaction are connected parties;
  - (2) whether the transaction causes the market price of an investment in question to increase or decrease, following which the market price immediately returns to its previous level; and
  - (3) whether a *person* places a bid (or offer) which is higher (or lower) than the previous bid (or offer) only to remove the bid (or offer) from the market before it is executed.
- 4.2.3. A transaction which creates a false or misleading impression will not normally be considered to have a legitimate commercial rationale where the purpose behind the transaction was to induce others to trade in, or to position or move the price of, a *qualifying investment*. This need not be the sole purpose for entering into the transaction or transactions, but must be an actuating purpose. Equally, transactions will not automatically be considered to have a legitimate commercial rationale simply because the purpose behind the transaction was to make a *profit* or avoid a loss (whether directly or indirectly).
- 4.2.4. Behaviour which incorporates a purpose of positioning the price at a distorted level cannot have a legitimate commercial rationale. The Code does not restrict *market users* trading significant volumes where there is a legitimate purpose for the transaction (for example, index tracking which can involve trading significant volumes on the close) and where the transaction is executed in a proper way, that is, a way which takes into account the need for the market as a whole to operate fairly and efficiently. In most cases the rules of a *regulated market* include a requirement that transactions be executed in a proper way (for example, rules on reporting and executing cross-trades). Such behaviour is unlikely to distort the market in the investments in question, even if it causes the market to move. But trading significant volumes with the purpose of controlling the price of a *qualifying investment* and positioning it at a distorted level will amount to *market abuse*.
- 4.2.5. In the opinion of *the Commission* the following factors are to be taken into account when considering whether behaviour is for “legitimate reasons”, and are indications that it is:
- (1) if the transaction is pursuant to a prior legal or regulatory obligation owed to a third party;
  - (2) if the transaction is executed in a way which takes into account the need for the market as a whole to operate fairly and efficiently;
  - (3) the extent to which the transaction generally opens a new position, so creating an exposure to market risk, rather than closes out a position and so removes market risk; and
  - (4) if the transaction complied with the rules of the relevant *regulated markets* about how transactions are to be executed in a proper way (for example, rules on reporting and executing cross-transactions).
- 4.2.6. In the opinion of *the Commission*, the following factors are to be taken into account when considering whether behaviour is for “legitimate reasons”, and are indications that it is not:
- (1) if the *person* has an actuating purpose behind the transaction to induce others to trade in, or to position or move the price of, a *qualifying investment*;
  - (2) if the *person* has another, illegitimate, reason behind the transactions, or orders to trade; and
  - (3) if the transaction was executed in a particular way with the purpose of creating a false or misleading impression.

4.2.7. In the opinion of *the Commission*, the following factors are also to be taken into account in determining whether or not a *person's* behaviour amounts to *market abuse*, of a type involving *manipulating transactions*:

- (1) the volume or size of the *person's* transaction or transactions in relation to reasonable expectations of the depth and liquidity of the market at the time in question;
- (2) the extent to which orders to trade given, or transactions undertaken, represent a significant proportion of the daily volume of transactions in the relevant *qualifying investment* on the *regulated market* concerned, in particular when these activities lead to a significant change in the price of the *qualifying investment*;
- (3) the extent to which orders to trade given, or transactions undertaken, by *persons* with a significant buying or selling position in a *qualifying investment* lead to significant changes in the price of the *qualifying investment* or related derivative or underlying asset admitted to trading on a *regulated market*;
- (4) the extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant *qualifying investment* on the *regulated market* concerned, and might be associated with significant changes in the price of a *qualifying investment* admitted to trading on a *regulated market*;
- (5) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;
- (6) the extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument admitted to trading on a *regulated market*, or more generally the representation of the order book available to market participants, and are removed before they are executed;
- (7) the extent to which the *person* had a direct or indirect interest in the price or value of the *qualifying investment*;
- (8) the extent to which price, rate, or option volatility movements, and the volatility of these factors for the investment in question, are outside their normal intra-day, daily, weekly, or monthly range; and
- (9) whether a *person* has successively and consistently increased or decreased his bid, offer, or the price he has paid for a *qualifying investment*.

4.2.8. Section 2.2.5. describes behaviour which, in the opinion of *the Commission*, constitutes an *abusive squeeze* and thus amounts to *market abuse*. It must be noted that squeezes occur relatively frequently when the proper interaction of supply and demand leads to market tightness, but this is not of itself considered by *the Commission* to be abusive. Further, having a significant influence over the supply of, or demand for, or delivery mechanisms for, an investment, for example, through ownership, *borrowing* or reserving the investment in question, is not of itself an *abusive squeeze*.

4.2.9. In the opinion of *the Commission*, the following factors are to be taken into account when determining whether a *person* has engaged in an *abusive squeeze*. These factors do not impose new obligations on *market users*. The factors are as follows:

- (1) the extent to which a *person* is willing to relax his control or other influence in order to help maintain an orderly market, and the price at which he is willing to do so;
- (2) the extent to which the *person's* activity causes, or risks causing, settlement default by other *market users* on a multilateral basis and not just a bilateral basis. The more widespread the risk of multilateral settlement default, the more likely that an *abusive squeeze* has been effected;

- (3) the extent to which prices under the delivery mechanisms of the market diverge from the prices for delivery of the investment or its equivalent outside those mechanisms. The greater the divergence beyond that to be reasonably expected, the more likely that an *abusive squeeze* has been effected; and
- (4) the extent to which the spot or immediate market compared to the forward market is unusually expensive or inexpensive or the extent to which *borrowing* rates are unusually expensive or inexpensive.

### **4.3 Manipulating Devices**

- 4.3.1. In the opinion of *the Commission*, the following factors are to be taken into account in determining whether or not a fictitious device or form of contrivance has been used, and are indications that it has:
  - (1) if orders to trade given, or transactions undertaken, in *qualifying investments* by *persons* are preceded or followed by *dissemination* of false or misleading information by the same *persons* or *persons* linked to them; and
  - (2) if orders to trade are given, or transactions are undertaken in *qualifying investments* by *persons* before or after the same *persons* or *persons* linked to them produce or disseminate research or investment recommendations which are erroneous or biased or demonstrably influenced by material interest.

### **4.4 Dissemination**

- 4.4.1. There are a number of channels through which information relating to *qualifying investments* which are traded on *regulated markets* is formally disseminated to other *market users*. Some information is required to be disseminated through one of these channels, for example, under the rules of the *regulated market* or the *Listing Rules*. Investment exchanges also use these channels to disseminate information about trades which have been executed on their markets.
- 4.4.2. A factor to be taken into account in determining the purpose of the *person* in question is whether that *person* has an interest in a *qualifying investment* to which the information is relevant. This factor, if present, will tend to suggest that the *person* had disseminated the information in order to create a false or misleading impression. That said, the absence of any such interest does not conclusively demonstrate that the behaviour does not amount to *market abuse*.
- 4.4.3. The *dissemination* of information by a *person* acting in the capacity of a journalist is to be assessed taking into account the codes governing his or her profession unless he or she derives, directly or indirectly, any advantage or *profits* from the *dissemination* of the information.

### **4.5 Distortion**

- 4.5.1. In the opinion of *the Commission*, the following factors are to be taken into account in determining whether or not behaviour has interfered with the proper operation of market forces, and so with the interplay of proper supply and demand, and so has a distorting effect:
  - (1) the experience and knowledge of the *regular users* of the market in question;
  - (2) the structure of the market, including its reporting, notification and transparency requirements;

- (3) the legal and regulatory requirements of the market concerned and accepted market practices;
- (4) the identity and position of the *person* responsible for the behaviour which has been observed (if known); and
- (5) the extent and nature of the visibility or disclosure of the *person's* activity.

4.5.2. In the opinion of *the Commission*, the following factors are to be taken into account in determining whether or not behaviour that creates a false or misleading impression as to, or distorts, the market for a *qualifying investment* has also failed to meet the standard expected by a *regular user*:

- (1) if the transaction is pursuant to a prior legal or regulatory obligation owed to a third party;
- (2) if the transaction is executed in a way which takes into account the need for the market as a whole to operate fairly and efficiently;
- (3) the characteristics of the market in question, including the users and applicable rules and codes of conduct (including, if relevant, any statutory or regulatory obligation to disclose a holding or positions);
- (4) the position of the *person* in question and the standards reasonably to be expected of him in light of his experience, skill and knowledge;
- (5) if the transaction complied with the rules of the relevant *regulated markets* about how transactions are to be executed in a proper way (for example, rules on reporting and executing cross-transactions); and
- (6) if an organisation has created a false or misleading impression, whether the individuals responsible could only know they were likely to create a false or misleading impression if they had access to other information that was being held behind a *Chinese Wall* or similarly effective arrangements.

## 4.6 Other Rules

4.6.1. It will often be appropriate to take into account the extent to which the behaviour is in compliance with other applicable rules including the rules of a *regulated market*, *The Takeover Code*; and regulations, rules and codes made by *the Commission*.

4.6.2. Compliance with such regulations, rules and codes may not be sufficient for the behaviour not to amount to *market abuse*, since they may not be specifically directed at the types of behaviour prohibited by *the POI Law* or because compliance with them is only one consideration among others. Greater weight is likely to be given to compliance with a rule or regulation that expressly requires or permits particular behaviour. However, this will not in itself be determinative. Similarly, failure to comply with a rule will not of itself create a presumption that there has been *market abuse*. If the *regulated market* or the Takeover Panel has granted a dispensation from, or given guidance in advance on, its rules, this is likely also to be a relevant factor in considering whether the behaviour amounts to *market abuse*.

4.6.3. Where a *person's* behaviour occurs on an overseas market, but has an impact on a *regulated market*, the *regular user* is likely to consider that it will be relevant to have regard to the local rules, practices, and conventions prevailing in the relevant market, and whether or not the *person* is in *the Bailiwick*. However, compliance with such rules will not of itself be determinative.

4.6.4. As stated above it is likely to be relevant to consider whether to take into account the extent to which the behaviour conforms with standards that are generally accepted by users

of the market, but again this will not of itself be determinative. Such standards will be acceptable where they promote the fair and efficient operation of the market as a whole and do not unfairly damage the interest of investors. In circumstances where there is a range of practices which are generally accepted by users of the market, each practice is to be judged objectively on its own merits.

4.6.5. *The Commission* does not anticipate that divergences between standards that are generally accepted by users of the market and the standards expected by the *regular user* will be frequent. In future, *the Commission* may identify a practice which is accepted in the market, but which, in *the Commission's* opinion, is likely to fall short of the standards expected by the *regular user*. In such cases *the Commission* will consider whether to signal its views on the practice in the form of guidance, or through some other statement, or by revising the Code.

## 5. Other Considerations

### 5.1 Relationship with criminal law and other regulatory requirements

5.1.1. The Code is not exhaustive in its description of behaviour that does or does not amount to *market abuse*. In circumstances where a *person* is proposing to undertake an innovative transaction, he should consider it in the light of the guidance provided within the Code.

5.1.2. *Persons* will, therefore, need to ensure that, even if their behaviour does not amount to *market abuse*, it does not breach:

- (1) any applicable criminal law, for example the insider dealing provisions of *the Insider Dealing Law*; or
- (2) any applicable rules made by *the Commission*, for example the relevant sections of *the COB Rules*; or
- (3) the rules of a *regulated market* or other relevant rules, regulations or codes of conduct or good practice; or
- (4) any other legal or regulatory requirements to which they are subject, the provisions of *The Takeover Code*, the Companies (Guernsey) Law, 2008, any applicable overseas rules and regulatory requirements.

### 5.2 Markets named under section 41C(1) of the POI Law

5.2.1. The Commission has decided under Section 41C(1) of *the POI Law* that, in respect of *The Takeover Code*, behaviour conforming with it or guidance issued in relation to takeovers and mergers in the UK does not amount to *market abuse* in the circumstances where if the behaviour were undertaken in the UK it would not amount to *market abuse* in respect of that regulated market. *Persons* should refer to Section 3 of *The Takeover Code* to determine whether it applies to them.

5.2.2. In respect of offers and transactions relating to companies that are not within the scope of *The Takeover Code*, the Commission considers it appropriate to consider any applicable code or guidance issued by the authorities in the country of incorporation of the subject company, or where necessary, the country in which the company's shares are listed. In the absence of such guidance or code the Commission may consider whether *The Takeover Code* offers any appropriate guidance.

## 1. Examples of behaviours which may fall within Section 2 of the Code

### 1.1. General behaviour

There are many ways in which a *person*, A, may, by taking or refraining from taking any action, requires or encourages another *person*, B, to engage in behaviour which, if engaged in by A, would amount to *market abuse*. An example of behaviour that might fall within the scope of Section 41F(1)(b) of *the POI Law* is as follows: a director of a company, while in possession of inside information, instructs an employee of that company to deal in *qualifying investments* on the basis of the inside information held by the director.

### 1.2. Manipulating Transactions

The following are examples of behaviour that may amount to *market abuse*:

- (1) a trader simultaneously buys and sells the same *qualifying investment* (that is, trades with himself) to give the appearance of a legitimate transfer of title or risk (or both) at a price outside the normal trading range for the *qualifying investment*. The price of the *qualifying investment* is relevant to the calculation of the settlement value of an option. He does this while holding a position in the option. His purpose is to position the price of the *qualifying investment* at a false, misleading, abnormal or artificial level, making him a *profit* or avoiding a loss from the option;
- (2) a trader buys a large volume of commodity futures, which are *qualifying investments*, (whose price will be relevant to the calculation of the settlement value of a derivatives position he holds) just before the close of trading. His purpose is to position the price of the commodity futures at a false, misleading, abnormal, or artificial level so as to make a *profit* from his derivatives position;
- (3) a trader holds a short position that will show a *profit* if a particular *qualifying investment*, which is currently a component of an index, falls out of that index. The question of whether the *qualifying investment* will fall out of the index depends on the closing price of the *qualifying investment*. He places a large sell order in this *qualifying investment* just before the close of trading. His purpose is to position the price of the *qualifying investment* at a false, misleading, abnormal, or artificial level so that the *qualifying investment* will drop out of the index so as to make a *profit*; and
- (4) a fund manager's quarterly performance will improve if the valuation of his portfolio at the end of the quarter in question is higher rather than lower. He places a large order to buy relatively illiquid shares, which are also components of his portfolio, to be executed at or just before the close. His purpose is to position the price of the shares at a false, misleading, abnormal or artificial level.

Examples of behaviour which might give rise to a false or misleading impression and in respect of which the principal rationale may not be a legitimate commercial rationale include:

- (1) arrangements for the sale or purchase of a *qualifying investment* (other than on repo or on *stock lending* or *borrowing* terms) whereby there is no change in beneficial interests or market risk, or the transfer of beneficial interest or market risk is only between *persons* who are acting in concert or collusion;
- (2) a transaction or series of transactions that are designed to conceal the ownership of a *qualifying investment*, so that disclosure requirements are circumvented by the holding of the *qualifying investments* in the name of a colluding party, such that disclosures

- are misleading in respect of the true underlying holding of the security. These transactions are often structured so that market risk remains with the seller. This subsection is not intended to describe nominee holdings; and
- (3) a fictitious transaction.

### **1.3. Dissemination**

An example of disseminating false or misleading information would be: a *person* posts information on an Internet bulletin board or chat room which contains false or misleading statements about the takeover of a company whose shares are *qualifying investments* and the *person* knows that the information is false or misleading.

### **1.4. Distortion**

The exact nature of conduct that might give a false or misleading impression will vary according to the characteristics of the market. The following are examples of behaviour which might give a false or misleading impression to the *regular user*:

- (1) the movement of physical commodity stocks, which might create a misleading impression as to the supply of, or demand for, or price or value of, the deliverable into a commodity futures contract; and
- (2) the movement of an empty cargo ship, which might create a false or misleading impression as to the supply of, or demand for, or the price or value of the deliverable into a commodity futures contract.

## **2. Examples of behaviours which may fall within Section 3 of the Code**

### **2.1. General behaviour**

The following examples of behaviour will not give rise to a false or misleading impression even though the conditions described in Section 2.2.2.(1),(2) and (3) are also satisfied, provided that the conditions in Section 2.2.2.(a) and (b) are satisfied:

- (1) transactions which effect the taking of a position, or the unwinding of a position taken, so as to take legitimate advantage of:
  - (a) differences in the taxation of income or capital returns generated by investments (whether such differences arise solely because of the identity of the *person* entitled to receive such income or capital or otherwise); or
  - (b) differences in the prices of investments or commodities as traded in different locations; or
  - (c) transactions which effect the lending or *borrowing* of *qualifying investments* or commodities so as to meet an underlying commercial demand for the investment or commodity.