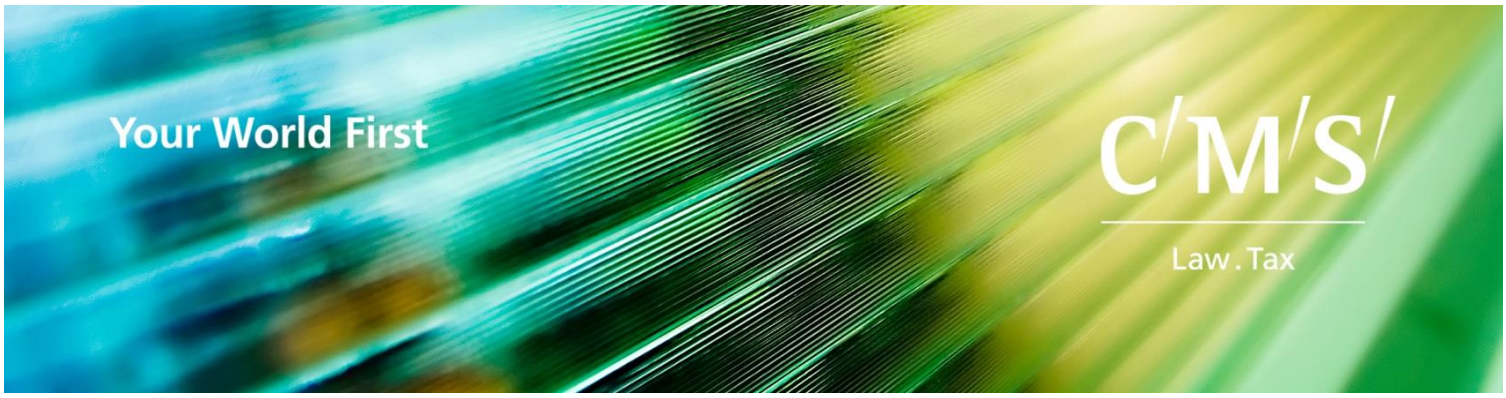

The Market Abuse Regulation - Impact on AIM Companies

AIM has recently announced the changes that will be made to the *AIM Rules for Companies* to bring them into line with the EU Market Abuse Regulation (MAR). AIM companies should now be taking steps to prepare themselves for the new regime, which comes into effect on 3 July 2016 and will make significant changes to the rules on director and senior employee share dealings and how inside information is dealt with.

Summary of changes

- A company that believes it may have inside information (currently known as unpublished price-sensitive information) will need to consider both the AIM Rules and MAR provisions to decide whether an announcement must be made immediately or whether a delay is permitted.
- If a company delays disclosing inside information to the market, when it does announce the information it must tell the FCA that it has delayed doing so and, if requested by the FCA, must provide the FCA with an explanation of why it believed a delay was justified.
- Companies must be rigorous in assessing and recording when inside information arises and, where its announcement is delayed, why a delay was permitted.
- Companies must keep lists of persons working for them who have access to inside information either regularly or in connection with a particular project (insider list). The insider list must follow a prescribed format.
- Companies will be required to have a share "dealing policy" that includes certain minimum provisions. The policy will need to provide that during the closed period of 30 days ahead of the publication of annual and half-yearly financial results (MAR closed periods) a person discharging managerial responsibilities (PDMR) must not deal in the company's shares, except in certain narrowly defined circumstances. A PDMR broadly means a director or senior executive.
- The dealing policy can, if the company chooses, also restrict dealings by PDMRs at other times (non-MAR closed periods), such as when the company is in possession of unpublished inside information, whether or not the PDMR who is proposing to deal happens to know about it. It can also apply to other individuals, such as employees who are on an insider list.
- Unless a company has good reasons for wanting to retain its existing policy (which will need to be updated to comply with MAR), it should adopt the new pro forma policy which is expected to be published by the ICSA very shortly. Companies should consider modifying the ICSA policy to suit their own circumstances.
- PDMRs and persons closely associated with them must notify both the FCA and the company of all transactions relating to shares in the company. (Companies can, however, decide to require such a person to notify only once a threshold of EUR 5,000 is reached.) The obligation to notify the FCA is new. A notification must be made promptly and no later than three business days after the date of the transaction. In turn the company must announce details of the transaction to the market promptly and no later than three business days after the transaction occurs. A specially prescribed form must be used.
- Company policies and procedures relating to share dealings by directors and others and the safeguarding and disclosure of inside information should be updated to reflect the new regime.
- AIM companies should decide which of their senior executives should be categorised as PDMRs from 3 July, and will need to update the list to reflect subsequent staff changes.

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MAR: general

As MAR is a Regulation, it has direct effect in all EU member states. All existing UK legislation and rules that cover the same ground as MAR, many of which derive from MAR's predecessor, the Market Abuse Directive, therefore need to be removed or modified to bring them into line with MAR. Other than in a few, relatively minor, respects the UK has no discretion as to how it implements MAR. As the "competent authority" in the UK, the FCA is primarily responsible for policing compliance with MAR.

MAR itself is supplemented by various pieces of secondary legislation, known as Delegated Regulations or Implementing Regulations, which will also come into force on 3 July and have direct effect. The European Securities and Markets Authority (ESMA) will also be publishing Guidelines on some aspects of MAR. Most of the Delegated and Implementing Regulations have now been published in final form; the others are expected to be published soon.

For convenience this note refers simply to "MAR", but in some cases the relevant provisions are in a Delegated or Implementing Regulation or the draft Guidelines that were published by ESMA in January. Hyperlinks to all the source materials for matters covered in this note can be found at the end.

Key provisions of MAR

As far as AIM companies (issuers) and their advisers are concerned, the most important provisions of MAR are:

Principal MAR article	Topic	Key provisions
Article 17	**When an issuer can delay announcing "inside information" to the market**	In particular, if an issuer delays disclosing inside information to the market, when it does announce the information the issuer must tell the FCA that it has delayed doing so and, if so requested by the FCA, it must provide the FCA with an explanation of why it believed a delay was justified.
Article 19(11) to (12)	**When PDMRs are restricted from dealing in their own company's securities**	Except in a few narrow circumstances, persons discharging managerial responsibility (PDMRs) must not "conduct transactions on their own account, or for the account of a third party, directly or indirectly", during the closed period of 30 days ahead of the publication of (i) "a year end report" or (ii) "an interim financial report" which, in either case, "the issuer is obliged to make public according to the rules of [the relevant stock market] or national law" (MAR closed periods). For dealings by PDMRs outside the MAR closed periods, the only MAR restriction is that the person concerned must not commit market abuse – e.g. by taking advantage of inside information that they have through their job.
Article 19(1) to (10)	**Notification of dealings by PDMRs**	MAR specifies which dealings by PDMRs and persons closely associated with them (PCAs) must be notified by the relevant individual to the FCA and the issuer and, in turn, announced by the issuer to the market - in each case within three business days of the dealing. For this purpose PDMRs and persons closely associated with them must use a form that is prescribed by the FCA.
Article 18	**Insider lists**	MAR prescribes the format and contents for permanent and project insider lists. As under the Market Abuse Directive, insider lists must be kept for at least five years.
Articles 5 and 11	**Types of behaviour that do not constitute market abuse**	MAR specifies "safe harbours" for, among other things, certain activities relating to a buyback programme or price stabilisation exercise that might otherwise constitute market manipulation, and disclosing inside information to an investor or other person as part of a market sounding exercise. In each case certain conditions must be satisfied.

Each of these provisions is discussed further below. The rest of MAR is principally concerned with (i) the various types of behaviour that constitute market abuse; (ii) preventing and detecting market abuse and the sanctions that apply; and (iii) requiring firms that publish investment research to present their recommendations and other information objectively and to disclose any conflicts of interest.

MAR's application to AIM

Unlike its predecessor, the Market Abuse Directive, MAR applies to companies with securities traded on a multilateral trading facility (MTF), such as AIM, as well as to companies with securities traded on an EU regulated market, such as the UK Main Market; and for the time being at least there are no special rules or dispensations for AIM companies. However, when MiFID II takes effect AIM will be able to apply for recognition as a "SME Growth Market", in which case AIM companies would be exempt from drawing up an insider list provided that certain conditions are met. But MiFID II is not expected to take effect until 3 January 2018, so in the meantime AIM companies are subject to all the rules in MAR.

The sections below summarise the relevant provisions of MAR and how the London Stock Exchange (Exchange) has decided to amend the AIM Rules for Companies (which are referred to below simply as the *AIM Rules*). Minor consequential changes are also being made to the *AIM Rules for Nominated Advisers* and the *Note for Investing Companies*.

Meaning of "inside information"

1. *"For the purposes of [MAR], inside information shall comprise the following types of information:*

   (a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;

   […]

2. *For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument […].*

3. *An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information […].*

4. *For the purposes of paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments [or] derivative financial instruments […] shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions."*

When an issuer can delay announcing inside information to the market

MAR provisions

Under article 17 of MAR, an issuer must announce to the market as soon as possible all *inside information* (see box on the previous page) that directly concerns the issuer.

All announcements of inside information must also be posted on the issuer's website, in chronological order in an easily identifiable section, and kept there for at least five years.

But an issuer can delay making an announcement if all the following conditions are satisfied:

- immediate disclosure is likely to prejudice the legitimate interests of the issuer;
- the delay is not likely to mislead the public;
- the issuer is able to ensure that the inside information remains confidential.

ESMA will be publishing Guidelines on when "immediate disclosure is likely to prejudice the legitimate interests of the issuer" and when "delay is not likely to mislead the public". Under the draft Guidelines published by ESMA in January, as well as being able to delay announcing inside information in the same circumstances as at present – in particular, while the issuer is conducting confidential negotiations the outcome of which would be likely to be jeopardised by immediate public disclosure – it will be made clear that an issuer can also delay making an announcement where:

- "*the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise [its] intellectual property rights*";
- "*the issuer is planning to buy or sell a major holding in another entity [but negotiations have not yet commenced] and the disclosure of such information would jeopardise the conclusion of the transaction*"; or
- "*a transaction previously announced is subject to a Public Authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction*". This is principally aimed at circumstances where, in the course of discussions with a competition authority about obtaining clearance for a merger, the authority indicates that in order to grant clearance it will require the company to dispose of a particular business, and if that requirement were made public it would jeopardise the company's ability to sell the business.

Situations in which a delay in disclosing inside information is *likely to mislead the public* include where the inside information:

- is materially different from a previous public announcement made by the company relating to the same matter;
- relates to the fact that the company's financial targets are likely not to be met, where such targets were previously publicly announced; or
- contradicts the market's expectations, where such expectations are based on signals that the company has previously given.

If an issuer decides to delay announcing inside information it must keep records of certain matters, including:

- when the inside information first arose and the decision was taken to delay announcing it;
- the reasons why a delay was permitted;
- when it expects to announce the information;
- which individuals are responsible for monitoring developments and deciding when an announcement will be made;
- what precautions have been taken to ensure that the information is kept confidential, including any internal information barriers that have been put in place to keep access to the information to those who strictly need to know it; and
- what the issuer intends to do if the information ceases to be confidential – e.g. to make a holding announcement in a pre-arranged form.

When the information is eventually announced, the issuer must notify the FCA that it has delayed doing so, using a prescribed form and, if requested by the FCA, the issuer must provide the FCA with an explanation of why it believed a delay was permitted.

The legal requirement to keep records, and the possibility of having to provide them to the FCA immediately upon request, should prompt companies to check that their internal procedures to identify potentially inside information, assess whether it is in fact inside information, decide whether the company can delay announcing it, and to document these matters, are sufficiently rigorous.

Compliance with article 17 will be policed by the FCA, as UK competent authority.

Changes to the AIM Rules

Existing Rule 11 and the related guidance notes in the AIM Rules are similar to article 17 of MAR. Under Rule 11 an AIM company must announce "without delay… any new developments which are not public knowledge which, if made public, would be likely to lead to a significant movement in the price of its AIM securities", including a change in its financial condition; its sphere of activity; the performance of its business; or its expectation of its performance.

But an AIM company need not make an announcement about "impending developments or matters in the course of negotiation", and can give information about such developments and matters to advisers involved in the development or matter, persons with whom the AIM company may be negotiating any commercial, financial or investment transaction, and certain other categories of recipient provided in each case that the information is kept confidential and recipients are aware that they must not trade in the company's shares before the information has been announced.

The AIM Regulation team could therefore have proposed simply to delete Rule 11. Instead, they have decided to retain Rule 11 unchanged and to amend the related guidance notes to highlight that all AIM companies **must also** comply with article 17 of MAR. But compliance with MAR will not automatically mean that the company has complied with Rule 11. For example, in some circumstances an AIM company that is permitted by MAR to delay announcing a development may nevertheless be required by Rule 11 to announce it as soon as possible. In practice, an AIM company will therefore need to consider both Rule 11 and article 17 of MAR to decide whether and when an announcement must be made. If necessary, the company's nominated adviser may need to consult the FCA as well as the Exchange.

So why retain Rule 11? In *Inside AIM*, published on 29 April 2016, the Exchange said:

> *"The purpose of AIM Rule 11 is to maintain a fair and orderly market in securities and to ensure that all users of the market have simultaneous access to the same information in order to make investment decisions. The disclosure obligation in respect of inside information under Article 17 of MAR protects investors from market abuse...Whilst there is clearly overlap in respect of both sets of obligations, they should be considered separately…*
>
> *An AIM company should continue to consider its AIM Rules disclosure obligations in conjunction with the advice and guidance of its nominated adviser pursuant to AIM Rule 31. It will not be a defence to a breach of the AIM Rules that the AIM company had received legal advice that it was MAR compliant… The AIM Rules are principles based and accordingly, as is the case currently, the consideration of AIM Rule 11 disclosure obligations should not be overly narrow or technical. We consider this approach to compliance with AIM Rules 11 and 31 is fundamental to ensuring market integrity. Failure by an AIM company to comply with AIM Rule 11 or to seek the advice and guidance of its nominated adviser (and take that guidance into account) pursuant to AIM Rule 31, will be regarded as a serious breach of the AIM Rules…*
>
> *In practice, where there is a query as to whether an AIM company should make a disclosure, we will continue to liaise with the AIM company's nominated adviser regarding its AIM Rules obligations and will provide the FCA with information about these discussions, where relevant to MAR. It is open to the FCA to consider an AIM company's compliance with MAR at any time."*

And in its Feedback Statement published alongside the final changes to the AIM Rules the Exchange added:

> *"We consider that retaining a disclosure obligation which is principles-based and which can be enforced by the Exchange* [rather than by the FCA]*, is important for the maintenance of the integrity of AIM."*

However, recognising that this leaves AIM companies having to comply with two rules that are similar but slightly different, the Exchange has promised to keep the operation of Rule 11 under close review.

Disclosing inside information to third parties

As a general rule, a person who has inside information will commit market abuse if they disclose the information to any other person otherwise than in the normal course of their employment, profession or duties.

However, under MAR there is a clear "safe harbour" for persons who disclose inside information in connection with a "market sounding", provided that certain conditions are met. To a large extent, the conditions reflect existing best practice. A "market sounding" occurs where information is communicated to one or more potential investors, prior to the announcement of a transaction, to gauge their interest in a possible transaction and its potential size, pricing and other key terms.

Where a person discloses inside information in the course of a market sounding (a "disclosing market participant" or DMP), such disclosure is treated as made in the normal exercise of the person's employment, profession or duties provided that, among other things, the DMP complies with all the following conditions:

- Before conducting the market sounding, the DMP must specifically assess whether the market sounding will involve the disclosure of inside information. It must make a written record of its conclusion and the reasons for reaching it, and provide the written record to the FCA on request.
- Before making the disclosure, the DMP must obtain the consent of the person receiving the market sounding to receive inside information. It must also inform the person receiving the market sounding that he is prohibited from taking improper advantage of the information, and that he must keep it confidential.
- The DMP must inform the recipient which information the DMP believes is inside information. It must also provide details of when it expects the information to be announced, and the factors that could change this timetable.
- The same information must be given to each recipient of the market sounding.
- Where the DMP believes that information disclosed in the course of a market sounding has ceased to be inside information, it must inform the recipient of this as soon as possible.
- The DMP must keep a record of all information given to each natural and legal person receiving the market sounding, including the date and time of each disclosure. If information is disclosed orally other than via a recorded line or equivalent, the DMP must make a written note of what was disclosed, using a prescribed template, and seek to agree the note with the recipient. All such records must be kept by the DMP for at least five years.

Other circumstances where disclosing inside information to another person would be in the normal course of a person's employment, profession or duties are likely to include where information is disclosed to the company's advisers; persons with whom the company is negotiating; or the company's lenders. In any such case, the company must ensure that the information is kept confidential by the recipient. Rule 11 of the AIM Rules allows a company to disclose information about impending developments and matters in the course of negotiation in confidence to similar categories of person.

Insider lists

Like the Market Abuse Directive, article 18 of MAR requires an issuer or any person acting on its behalf or on its account to draw up a list of "all persons who have access to inside information and who are working for [it] under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies" (insider list), and to promptly update the insider list when a change occurs.

A separate insider list must be kept for each matter or project that could involve inside information (a project insider list). In addition, a company may keep a list of individuals who may have regular access to inside information because of their role or seniority (a permanent insider list). In both cases, the format of the insider list and the information about each individual that must be recorded is prescribed by MAR. The information that must be recorded is more extensive than at present: it includes the time at which the individual obtained access to the information; their function and why they are an insider; and their date of birth, home address and personal telephone numbers.

A company can allow its advisers and other organisations working for it to keep a list of the adviser's or organisation's own employees or advisers provided that the company retains a right to access each list kept by the adviser or organisation.

As at present, insider lists must be kept for at least five years, and must be provided to the FCA on request as soon as possible.

Companies must take all reasonable steps to ensure that each person who is added to an insider list acknowledges in writing the legal and regulatory duties entailed and that they are aware of the sanctions that can be imposed on them if they disclose inside information unlawfully or otherwise misuse it.

Changes for AIM companies

Currently AIM companies are not strictly required to keep insider lists, although many do so as a matter of best practice. However, they will be required to do so under MAR. The Exchange has decided not to include a signpost to article 18 of MAR in the AIM Rules.

As noted above, when MiFID II takes effect AIM will be able to apply for recognition as a "SME Growth Market", in which case AIM companies would be exempt from drawing up an insider list provided that certain conditions are met. But MiFID II will not take effect until 3 January 2017, or possibly a year or so later, so in the meantime AIM companies must keep insider lists.

PDMRs and PCAs

Persons discharging managerial responsibility (PDMRs)

MAR includes a definition of PDMR that is unchanged from the Market Abuse Directive. It means a person within an issuer who is either

- *a member of the main board of the parent company; or*
- "*a senior executive who is not a member of the [board of the parent company] who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity*".

Persons closely associated with a PDMR (PCAs)

(a) a spouse, civil partner or other person considered to be equivalent to a spouse under UK law;

(b) a dependent child – i.e. a child or stepchild who:

i. is under the age of 18 years;

ii. is unmarried; and

iii. does not have a civil partner;

(c) a relative who has shared the same household for at least one year on the date of the transaction concerned; or

(d) a legal person, trust or partnership, the managerial responsibilities of which are discharged by the PDMR or by a person referred to in point (a), (b) or (c), which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person

When PDMRs are restricted from dealing in their own company's securities

MAR provisions

As noted above, under article 19(11) to (12) of MAR during the closed period of 30 days ahead of the publication of (i) "a year end report" or (ii) "an interim financial report" which, in either case, "*the issuer is obliged to make public according to the rules of [the relevant stock market] or national law*" (MAR closed periods), as a general rule a PDMR must not "*conduct transactions on their own account, or for the account of a third party [e.g. a spouse or relative], directly or indirectly*". A few narrow and rather opaque exceptions, when dealings are permitted during a MAR closed period if clearance is given, are set out in a Delegated Regulation.

The FCA has stated that if an issuer announces preliminary annual results, the prelims will be treated as ending the MAR closed period of 30 days, and there will be no "second" closed period ending on the publication of the annual report, provided that the preliminary announcement contains all inside information expected to be included in the annual report. (This is broadly consistent with existing practice for AIM companies, where the Exchange has often been prepared to treat the close period as ending on the publication of prelims: for further details see issue 4 of *Inside AIM* published in September 2011.)

The FCA's statement is helpful because many companies usually make share awards just after they have published their prelims, and such awards typically vest three years later. PDMRs with awards that were granted to them in 2013 or later, in a period between the publication of prelims and final results, could otherwise have found that on the third anniversary of grant the company was in a MAR closed period and, as a result, they were unable to receive their shares or to sell some of them to meet associated tax liabilities until the MAR closed period ended (unless the dealing fell within one of the narrow exemptions in MAR).

There is some uncertainty about what counts as a "transaction conducted on a PDMR's own account". For example, does it include the automatic vesting of an award of shares and/or the automatic sale of shares to meet associated tax liabilities, or a transaction carried out by a third party discretionary investment manager? It is hoped that the FCA or ESMA may also provide guidance on this before 3 July.

For dealings by PDMRs outside the MAR closed periods, the only MAR restriction is that the person concerned must not commit market abuse – e.g. by taking advantage of inside information that they have through their job. Although this may sound straightforward, and a relaxation of the current position under the AIM Rules, in some circumstances it will be difficult for an individual PDMR to know with sufficient certainty whether they have inside information: they may need to decide, for example, whether an anticipated event "may reasonably be expected to occur", and they will always need to decide whether, if the information were made public, it would have a significant effect on the issuer's share price. Even a CEO or CFO may not have sufficient information to be confident about making such a judgement alone. This is one good reason for requiring PDMRs to seek clearance for all dealings: if all information known to them that *might* be inside information is also known to those who give clearance, the cleared PDMR is unlikely to commit market abuse or be suspected of doing so. In any event, case by case analysis will continue to be needed for employee share awards, exercises and vestings.

Changes to the AIM Rules

Although MAR does not generally require PDMRs to seek permission from their company to deal, or issuers to have a share dealing policy/code, all AIM companies will now be required to have a "dealing policy". Such a policy is partly designed to protect PDMRs and their company from the serious reputational and other risks of making a bad judgement call about whether they have inside information or of simply forgetting that the company is in a closed period. It will also help companies keep an eye on dealings by their PDMRs and to ensure that all such dealings are announced to the market in accordance with MAR.

The AIM Rules will not prescribe the detailed content of the dealing policy, but they will set out the minimum provisions that must be included. A new Rule 21 of the AIM Rules will replace the existing one (see box on the next page).

New Rule 21 of the AIM Rules and related guidance note

*"An AIM company must have in place from admission a reasonable and effective dealing policy setting out the requirements and procedures for directors' and applicable employees [*which now means non-director PDMRs*] dealing in any of its AIM securities. At a minimum, an AIM company's dealing policy must set out the following:*

- *the AIM company's close periods during which directors and applicable employees cannot deal;*
- *when a director or applicable employee must obtain clearance to deal in the AIM securities of the AIM company;*
- *an appropriate person(s) within the AIM company to grant clearance requests;*
- *procedures for obtaining clearance for dealing;*
- *the appropriate timeframe for a director or applicable employee to deal once they have received clearance;*
- *how the AIM company will assess whether clearance to deal may be given; and*
- *procedures on how the AIM company will notify deals required to be made public under MAR."*

Guidance note on Rule 21

"In determining whether it is appropriate to give clearance under its dealing policy, the Exchange would expect an AIM company to consider its wider obligations under MAR [e.g. to ensure that PDMRs do not deal during a MAR closed period, and that individuals do not deal on the basis of inside information].

The Exchange would expect an AIM company to appoint independent staff of sufficient seniority to grant clearance requests. The procedures should also give consideration as to an alternate person where such person is not independent in relation to a clearance request."

The current definition of "close period" in the AIM Rules broadly specifies (i) the period of two months ahead of the publication of annual or half-yearly results and (ii) any other time when the company is in possession of unpublished price sensitive information or it has become reasonably probable that such information will have to be announced. This will be deleted. From 3 July AIM companies will need to prohibit PDMRs dealing during the 30 day MAR closed periods, and they may choose also to prohibit PDMRs (and other employees) dealing at other times.

The current definition of "deal" will also be deleted. Similarly, companies will need to ensure that PDMRs do not carry out during a MAR closed period any transaction that under MAR is treated as *conducted on the individual's own account*, unless the transaction falls into one of the narrow exceptions in MAR; but for dealings that will take place outside a MAR closed period, but during a non-MAR closed period, companies can choose to specify which types of dealing should be prohibited and the exceptional circumstances when such dealings may be permitted.

PDMRs

MAR includes a definition of PDMR that is unchanged from the Market Abuse Directive, which Main Market companies are familiar with: see the box on page 7.

All directors of an AIM company will be PDMRs. But not all individuals who are currently categorised as "applicable employees" will be PDMRs. This is because "applicable employee" for this purpose currently means an employee of an AIM company or any member of its group who is likely to be in possession of inside information (currently known as "unpublished price sensitive information") in relation to the company because of his or her employment in the group – i.e. employee insiders; whereas to be a PDMR an individual must also have "power to take managerial decisions affecting the future developments and business prospects of [the AIM company]". Each AIM company will need to decide which of its senior executives should be categorised as PDMRs from 3 July, and will need to update the list of PDMRs to reflect subsequent staff changes.

An AIM company's dealing policy must apply to all PDMRs but, contrary to the Exchange's original proposals, it need not apply to employee insiders. Nevertheless, for the reasons outlined above we expect many AIM companies will want to apply their dealing policy to employee insiders as well.

The Model Code for Directors' Dealings and the new ICSA code

Because the Model Code for Directors' Dealings annexed to chapter 9 of the Listing Rules is in its current form incompatible with MAR, on 3 July it will be withdrawn and Main Market companies will no longer be required to have a share dealing policy that is at least as rigorous as the Model Code, or indeed to have any share dealing policy at all. Although the FCA has decided not to create a replacement for the Model Code, the ICSA is expected very shortly to publish a pro forma share dealing code that can be adopted by both Main Market and AIM companies. The ICSA code is likely to become market standard and in due course might even be endorsed by the FCA and/or the Exchange.

Notification of dealings by PDMRs

MAR provisions

Under article 19 of MAR PDMRs and persons closely associated with them (PCAs) (see the box on page 7) must notify both the FCA and the issuer of all transactions conducted on their own account relating to shares in the company or derivatives or financial instruments related to such shares. The obligation to notify the FCA is new to both AIM and Main Market companies.

Examples of transactions that must be notified

- *Acquisition, disposal, short sale, subscription or exchange of securities.*
- *Acceptance or exercise of a share option, including a share option granted to a manager or employee as part of their remuneration package, and the disposal of shares resulting from the exercise of a share option.*
- *Transactions in or related to derivatives, including a cash-settled transaction.*
- *Transactions executed by a third party under an individual portfolio or asset management mandate on behalf or for the benefit of a PDMR or a person closely associated with them.*
- *Pledging or lending of financial instruments by or on behalf of a PDMR or a person closely associated with them.*
- *Transactions undertaken by persons professionally arranging or executing transactions or by another person on behalf of a PDMR or a person closely associated with them, including where discretion is exercised.*

Such a notification must be made promptly and no later than three business days after the date of the transaction. In turn the company must announce details of the transaction to the market promptly and no later than three business days after the transaction occurred. (Currently the AIM Rules require both types of notification to be made "without delay", but do not specify a maximum number of days.)

For this purpose PDMRs and persons closely associated with them must use a form that is prescribed by the FCA. Details that must be supplied about the transaction include its nature (e.g. an acquisition or disposal), the price and volume of securities involved, and the date and place of the transaction. Companies may also wish to make an RIS announcement in narrative form giving additional details of the transaction.

Under MAR, a transaction need be notified only "*once the total amount of transactions* [by that person] *has reached the threshold* [of EUR 5,000] *within a calendar year*". However, to avoid PDMRs making mistakes in calculating whether the threshold has been reached, or adopting a different approach to other PDMRs in the company, we expect that most companies will want all transactions to be notified.

Issuers must also notify each PDMR in writing of their obligations under article 19 of MAR (i.e. both the obligation to notify own account transactions and the obligation not to deal during MAR closed periods), and require them to notify in writing every person closely associated with them of the obligation to notify own account transactions.

Changes to the AIM Rules

The Exchange considers that article 19 of MAR provides an appropriate level of transparency, so the requirement in Rule 17 of the AIM Rules to disclose directors' dealings will be deleted. New guidance to Rule 17 will remind AIM companies, their PDMRs and persons closely associated with them that they must comply with article 19 of MAR.

Actions for AIM companies

All AIM companies should already have a dealing policy that applies to its directors and applicable employees. In many cases, the policy is likely to be based on the Model Code, modified to reflect the slightly different terms of the AIM Rules. AIM companies should update their share dealing policy for directors and senior employees (or create one if they do not have one) to reflect the new regime. Unless a company has good reasons for wanting to retain its existing code (which will need to be updated to comply with MAR), we recommend that AIM companies should adopt the new ICSA code. Companies may, however, want to consider modifying the ICSA code to suit their own circumstances.

We expect all the points below to be addressed in the ICSA code. If a company chooses to retain its existing code, it will need to update it to address these points.

Share dealing policy
Ensure that at a minimum the policy prohibits PDMRs and their PCAs conducting transactions on their own account, or for the account of a third party, directly or indirectly, during each closed period of 30 days, rather than the existing two months, ahead of the publication of the company's annual and half-yearly results (MAR closed periods), other than in the exceptional circumstances specified by MAR.
Ensure the policy includes or is tied to a robust procedure which requires individuals who are subject to the policy, and persons closely associated with them, to notify the company and the FCA of the relevant details of all their dealings using the form prescribed by the FCA and within a timescale that will allow the company to announce the dealing to the market within the three business days specified by MAR.
Specify whether PDMRs and their PCAs should notify the company and the FCA of all their transactions, or only those above the annual threshold of EUR 5,000 specified in MAR. As noted above, we expect most companies will want all transactions to be notified.
Ensure the policy includes the other minimum provisions specified in the new AIM Rules and the related guidance note. Where the company's existing dealing policy is based on the current Model Code it is likely already to comply with these minimum provisions.
Consider making other changes to the policy. In particular: — Should there be other, non-MAR, closed periods? In particular, should the closed period ahead of the publication of annual and half-yearly financial results continue to be broadly two months, rather than 30 days? Should there continue to be a closed period when the company is in possession of inside information, whether or not the director or applicable employee who is proposing to deal happens to know about it? — Should PDMRs and others still be required to seek clearance for all proposed dealings in advance? (We think there are good reasons for doing so.) Does the clearance procedure need to be updated to reflect the company's corporate governance arrangements? — Should the policy continue to specify that clearance will be given for certain types of dealings – such as certain dealings relating to executive share plans - that will take place outside a MAR closed period but during a non-MAR closed period? Should the wording of such exemptions be updated to reflect the way the company's share plans operate in practice? — Should the policy (continue to) apply to anyone else – e.g. a PDMR's PCAs and investment managers; employees who are on an insider list? Again, we think there are good reasons for applying the policy to all of these persons.
Review the operation of employee share plans to check that the company and the plan participants will comply with the new regime.
Check whether employment handbooks and directors' service contracts need to be amended to reflect the new dealing policy.

AIM companies also need to update their policies and procedures for safeguarding inside information and announcing it to the market when required. Such policies and procedures might include terms of reference for a Disclosure Committee of the board and guidance and protocols for monitoring the company's share price and press comment and relating to the making of announcements.

Policies and procedures for safeguarding inside information and announcing it to the market
Update policies to refer to the need to comply with MAR, as well as the AIM Rules, particularly when deciding whether the company can delay announcing new developments.
Ensure the company keeps a record of the reasons why it decided that a delay in announcing inside information to the market was permitted and the other matters detailed in *When an issuer can delay announcing inside information to the market.*
Create or update an insider list template to comply with the new MAR prescribed form, and ensure that all insider lists are kept for at least five years.
Notify each PDMR in writing of his obligations under MAR (particularly the obligation to notify own account transactions and the obligation not to deal during MAR closed periods), and require each PDMR similarly to notify in writing each of their PCAs of their obligation to notify own account transactions.
Ensure that all announcements of inside information, once they have been announced to the market via a RIS, are posted onto the company's website and kept there, in chronological order in an easily identifiable section (perhaps a subsection of the "Rule 26 information"), for at least five years.
Update policies and other materials to refer to the new market abuse offences and safe harbours set out in MAR, rather than UK legislation.

Where possible, the board should approve the relevant policies and practices. AIM companies should also consider offering briefings to PDMRs and others on the new rules and procedures, with appropriate refreshers from time to time.

Further developments to be taken into account

Although AIM companies should be taking these steps now, they will need to review the relevant documents and systems in light of emerging market practice and any guidance published by the Exchange, particularly over the next six months or so. ESMA guidance is likely to take longer to emerge, and until it does the AIM Regulation team and the FCA may be reluctant to provide guidance of their own except where they know that ESMA shares their view.

How we can help

Please contact us if you would like to discuss any of the points in this note, arrange suitable briefings or training for employees and directors affected by the changes or would like help creating or reviewing relevant documents.

Source materials

AIM Notice 45, setting out how the Exchange has decided to change the AIM Rules and related rules on 3 July 2016, including a redline showing the changes to the AIM Rules

EU Market Abuse Regulation 596/2014

Delegated Regulation 2016/522 on the types of transactions by PDMRs and persons closely associated with them that must be notified, and when transactions by a PDMR can be permitted during a MAR closed period

Implementing Regulation 2016/347 specifying the format and contents of an insider list

Primary Market Bulletin no.15, which includes draft online forms for a company to notify the FCA when it has delayed announcing inside information, and for a PDMR or PCA to notify the FCA of a dealing

Draft ESMA Guidelines on when immediate disclosure is likely to prejudice the legitimate interests of the issuer and when delay of disclosure is not likely to mislead the public

FCA Policy Statement PS16/13 setting out how the rules for Main Market companies will be changed, including the withdrawal of the Model Code

Editions of Inside AIM, including guidance for nomads on helping AIM companies prepare for the new rules