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The Market Abuse Regulation – Overview for AIM Companies

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The Market Abuse Regulation ("**MAR**") applies from 3 July 2016 and will mean a number of changes for AIM companies. The main practical issues to be aware of are listed below:

- There will be additional rules around inside information and its disclosure, including detailed requirements about record-keeping when a decision has been made not to disclose inside information.
- The current requirements for directors to disclose share dealings under the AIM Rules will be extended to all "Persons Discharging Managerial Responsibilities" and various new requirements, including a new mandatory closed period, will apply.
- AIM companies will now be required to keep insider lists. Most AIM companies will be doing this already as a matter of good practice but it will be mandatory under the MAR.
- There will be new regulations relating to gauging interest in possible investments in companies ("market soundings") that bring in requirements to analyse whether there will be a disclosure of inside information, deal appropriately with any disclosure if so and ensure detailed record keeping.

Inside information

The current position under AIM Rule 11 is that AIM companies are required to 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 their securities. AIM is proposing to retain this obligation but the MAR requirement in relation to inside information will also apply. The MAR requirement is that companies will be required to disclose inside information to the market as soon as possible, with delay only permissible in certain circumstances. This requirement is similar to the AIM Rule requirement but not identical. Therefore, analysis under both the AIM Rules and the MAR will be required whenever there is a development or a new piece of information.

Under the MAR, AIM companies need to ensure the form and content of the disclosure comply with the MAR. This includes a requirement to post inside information on the company's website for at least five years.

A key new requirement for AIM companies under the MAR applies when a decision is made not to disclose inside information immediately. If there is a decision to delay disclosure

- detailed records must be made, including (amongst other things), noting the time and date the decision was made, the persons responsible for making the decision to delay and evidence of the circumstances that permit the delay under the MAR; and
- there is a requirement to notify the FCA, at the time the information is disclosed to the market, that the disclosure was delayed.

The FCA can request a written explanation of how the conditions permitting the delay were satisfied.

Insider lists

AIM companies will be required to keep insider lists under the MAR. Most AIM companies will already be doing this as a matter of good practice but they are now required to do so. Insider lists must contain prescribed detailed information about the individuals on that list. The insider lists can be kept under two categories; transaction-specific insider lists for particular deals or events and a "permanent" insider list, which would include all people who would have access to inside information if it existed. Any individuals added to an insider list will need to be made aware of their legal and regulatory responsibilities and the sanctions for insider dealing or

improper disclosure of inside information. AIM companies will need to ensure they have written confirmation from each insider acknowledging this. Both types of insider list will need to be sent to the FCA on request.

Persons discharging managerial responsibilities ("PDMRs")

The MAR require PDMRs and AIM companies to comply with detailed disclosure obligations in relation to their own share dealings and share dealings by their "closely associated persons". There are restrictions on any dealing during "closed periods" which are 30 days prior to annual and interim results (which is shorter than the current two month period under the AIM Rules).

At the moment, under AIM Rule 17, directors are required to disclose all dealings but a *de minimis* threshold applies under the MAR which will be set at €5,000 per calendar year. Companies do not need to apply this *de minimis* threshold and can require their PDMRs to disclose all dealings if they prefer. The PDMR must disclose their dealings to the AIM company and the AIM company is required to disclose the dealings to the FCA, in both cases within three business days of the dealing. If this requirement is applied as set out in the MAR, a PDMR might not notify the company until the end of the third business day after dealing, which would give the company very little time to notify the FCA. Therefore AIM companies may prefer to implement procedures requiring PDMRs to notify the company of any dealing within one business day of dealing. Again, the form of the disclosure must comply with the MAR requirements.

The current proposal is for AIM Rule 17 to be deleted insofar as it relates to directors' dealings because the MAR requirement will provide an even greater level of transparency. Those provisions will be replaced in the AIM Rules with a signpost to the relevant MAR requirement.

The definition of "closed period" under the AIM Rules is more extensive than under the MAR but there are different exemptions under the AIM Rules (e.g. relating to acceptances of takeover offers or rights issues) that cannot be used to avoid the MAR prohibition on dealings. AIM Rule 21 is going to be amended to incorporate the MAR requirement for AIM companies to have a share dealing code in place. AIM companies are expected to ensure compliance with new AIM Rule 21 by 3 July, 2016.

Market soundings

The MAR introduces requirements relating to gauging the interest of potential investors in the company. A person who is disclosing information in the context of a "market sounding" must:

- assess whether that information is "inside information";
- write a note of the conclusion (with the reasons for it);
- inform the recipient of the consequences of possessing inside information and their duty of confidentiality;
- ensure the recipient's consent to being made an insider;
- record the information given and the date and time of the disclosure;
- notify the recipient when the information ceases to be inside information; and
- retain the records for a minimum of five years.

The table below contains a checklist of issues that AIM companies will need to deal with to ensure compliance with the MAR.

The Market Abuse Regulation – Checklist for AIM companies

Inside Information

Record keeping	• **Produce templates for recording decisions taken in relation to inside information (including detailed reasons for any decision to delay disclosure).**
Disclosure	• Does the company currently have a disclosure committee? • If not, is it appropriate to put one in place? • If not, the Board should ensure it is clear who is responsible for taking decisions around disclosure (especially any decision to delay disclosure).
Permanent insiders	• Identify "permanent" insiders and others likely to have regular access to inside information and set up a permanent insider list. • Check the company have the necessary information in relation to these individuals (date of birth, personal telephone numbers/address etc.). • Consider whether any data protection or similar rules apply that require consent to be obtained or other steps taken in respect of gathering/storing information on individuals in relevant jurisdictions.
Transactions	• Identify any existing transactions that might be inside information. • Take the same steps in respect of individuals involved in those transactions as in respect of "permanent" insiders. • Identify any new transactions that might be inside information.

Current systems and controls	• Train relevant individuals on the new regime.
	• Ensure MAR information requirements are reflected in systems and procedures – for example:
	  ◦ ensure arrangements are in place to obtain "written" acknowledgement of duties/obligations on being added to insider lists;
	  ◦ update personal information and any necessary consents given before to disclosing inside information to relevant individuals; and
	  ◦ identify any specific or additional consents that may be required under data protection or similar legislation.

FCA	• Appoint an appropriate person to liaise with the FCA. • Discuss with nominated adviser how interaction with the FCA in respect of MAR will impact on the company's compliance with AIM Rules and consider a process for ensuring that the nominated adviser is kept informed of all communication with the FCA.

Website	• Ensure compliance with MAR requirements regarding disclosure of inside information on the company's website (note the requirement for inside information to be included on the website for at least five years).

Persons Discharging Managerial Responsibilities

Employees	• **Consider whether any employees undertake market soundings.** • **If any employees do, ensure they are appropriately briefed.**
Written procedures and notifications	• Implement appropriate record keeping procedures. • Produce a pro forma agreement for recipients of inside information in the course of market soundings to sign. • Introduce systems to ensure notification requirements are complied with.

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