MILLS & REEVE

briefing

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The Market Abuse Regulation (MAR) An overview for AIM companies

The new Market Abuse Regulation (MAR) will apply to AIM companies with effect from 3 July 2016. AIM companies will also continue to be subject to market abuse provisions contained in the AIM Rules. Consequently, from 3 July 2016, companies traded on AIM will be subject to a dual regulatory regime as concerns market abuse.

The purpose of this note is to provide you with an overview of the new market abuse regime. It is not intended to be comprehensive and it is essential that professional advice is obtained if guidance is required on specific issues.

Key points

- The new Market Abuse Regulation (MAR) will apply to AIM companies with effect from 3 July 2016.
- Persons discharging managerial responsibilities (PDMRs) of AIM companies (essentially directors and senior managers), and persons closely associated with them, will need to disclose details of any dealings in the AIM company's shares.
- AIM companies will be required to have a MAR-compliant share dealing policy in place from 3 July 2016.
- The closed periods prescribed by MAR are 30 calendar days before (i) the announcement of the company's interim financial report and (ii) the announcement of prelims/publication of the company's annual report (shorter than the current two month period under the AIM Rules).
- AIM companies will be required to maintain insider lists.
- If an AIM company takes the decision to delay the disclosure of inside information it will need to carefully record certain prescribed information in relation to that decision. When it does eventually announce the information to the market, it will need to notify the FCA that it delayed disclosure of it.

Introduction

Currently companies traded on AIM are subject to market abuse provisions contained in the AIM Rules for Companies (the **AIM Rules**); they are not subject to the existing Market Abuse Directive (MAD).

The new Market Abuse Regulation (MAR), which will repeal and replace MAD, will apply to AIM companies with effect from 3 July 2016. AIM companies will also continue to be subject to market abuse provisions contained in the AIM Rules. Consequently, from **3 July 2016** companies traded on AIM will be subject to a dual regulatory regime as concerns market abuse. They will also have two regulators in relation to the regime: the Financial Conduct Authority (FCA) in relation to MAR and AIM Regulation in relation to the AIM Rules. This civil market abuse regime will continue to supplement the insider dealing provisions in the Criminal Justice Act 1993 (CJA).

Accordingly, a company in possession of inside information (currently referred to as "unpublished price sensitive information" under the AIM Rules) will need to consider both the AIM Rules and MAR in coming to a decision about whether it must announce that inside information to the market as soon as possible or whether it is permitted to delay disclosure. AIM Regulation has confirmed that it does not expect there to be any significant change to the approach of an AIM company and its nominated adviser to considering an AIM company's disclosure obligations under the AIM Rules. But it has also made it clear that compliance with MAR does not mean that an AIM company will have satisfied its obligations under the AIM Rules and likewise that compliance with the AIM Rules does not mean that an AIM company will have satisfied its obligations under MAR.

What is market abuse?

Recital 7 to MAR describes market abuse as "a concept that encompasses unlawful behaviour on the financial markets".

The six behaviours which currently constitute market abuse under the Financial Services and Markets Act 2000 (FSMA) (insider dealing, improper disclosure, manipulating transactions, manipulating devices, dissemination and misleading behaviour or market distortion) will be replaced by offences under MAR under three heads:

- insider dealing;
- unlawful disclosure of inside information; and
- market manipulation.

The new offences are not substantively different to the offences under FSMA; under MAR the focus is on the systems and procedures aimed at preventing and detecting market abuse that a company will be required to have in place in order to satisfy MAR's increased record-keeping and reporting obligations.

Insider dealing

Articles 14(a) and (b) of MAR prohibit engaging in insider dealing, including attempting to engage in insider dealing and recommending that another person engage in insider dealing or inducing another person to engage in insider dealing. MAR describes insider dealing as behaviour that "arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates" (Article 8(1), MAR).

Unlawful disclosure of inside information

Article 14(c) of MAR prohibits a person from unlawfully disclosing inside information "save in the normal course of his employment, profession or duties" (for example, where information is disclosed to persons with whom the company is negotiating, the company's lenders or the company's advisers; in any such circumstance, the company will need to ensure the information disclosed is kept confidential by the recipient). The definition of inside information is broadly unchanged.

Market manipulation

Article (15) of MAR prohibits market manipulation and attempted market manipulation.

Key changes

The following table sets out the key changes as a result of MAR:

Topic	Change	Action
PDMRs	Under the current regime the AIM Rules require directors and "applicable employees", and their family, to disclose details of any	All directors will be PDMRs. An AIM company will need to decide which

Topic	Change	Action
	dealings in the AIM company's shares. Under the new regime, this requirement applies to persons discharging managerial responsibilities (PDMRs) (essentially directors and senior managers) and persons closely associated with them. All directors of an AIM company will be PDMRs, but not all individuals who are currently categorised as "applicable employees" will be considered to be PDMRs. This is because to be a PDMR an individual must have "… regular access to inside information relating to [the company] and power to take managerial decisions affecting the future developments and business prospects of [the company]". This is a narrower sub-group than that of "applicable employees" who were in essence employee insiders, not senior manager insiders. A form prescribed by the FCA must be used for the purposes of making a disclosure of any dealing. The requirement in Rule 17 of the AIM Rules that an AIM company must make a notification without delay of directors' dealings will be deleted. New guidance to Rule 17 will direct AIM companies to Article 19 of MAR.	of its senior managers should be categorised as PDMRs. An AIM company will need to keep an up-to-date list of PDMRs and persons closely associated with them. AIM companies are required to notify their PDMRs in writing of their obligations in relation to dealings under MAR. PDMRs in turn are required to notify persons closely associated with them of their obligations and to keep copies of those notifications.
Share dealing policy	Even though many AIM companies do in practice have a share dealing code in place, there is currently no requirement under the AIM Rules for them to do so. The revised AIM Rules, which come into force on **3 July 2016**, will require companies traded on AIM to have a share dealing policy in place and will set out the minimum provisions that must be included in it. The existing AIM Rule 21 (Restriction on deals) will be deleted and replaced by a new Rule 21 entitled "Dealing policy" which will set out the requirement for an AIM company to have a dealing policy in place. Many existing AIM company share dealing codes make reference to the Model Code which is set out in the Listing Rules. However, in its current form, the Code does not comply with MAR and so it is to be deleted from those Rules from 3 July 2016. The FCA has taken the decision not to create a replacement for the Model Code. ICSA has published a specimen share dealing code in conjunction with the GC100 and the QCA.	Put in place or update share dealing policy and ensure it complies with the minimum requirements set out in the AIM Rules. Consider whether it should apply just to PDMRs or also to "employee insiders" – those individuals who under the AIM Rules were previously categorised as "applicable employees" – see box above entitled "PDMRs". Circulate share dealing policy to PDMRs requiring them to circulate on to persons closely associated with them.
Disclosure of dealings by PDMRs	A PDMR must disclose details of his (or his closely associated persons') dealings in the AIM company's shares on a specified template to both the company and the FCA within three business days of dealing and the company must publish this information to the market within three business days of dealing (not, as previously prescribed in the AIM Rules, "without delay"). There will be a de minimis threshold of €5,000 per calendar year below which transactions will not need to be disclosed; however, in order to avoid mistakes arising it is anticipated that most AIM companies will require notification of all dealings.	Consider requiring (in the share dealing policy) PDMRs to notify the company of dealings within one or two business days, so as to allow the company enough time to make its own notification to the market within the three business day deadline specified by MAR. Consider whether PDMRs should be required (in the share dealing policy) to notify the company and the FCA of all their transactions

Topic	Change	Action
		rather than just those over the de minimis threshold to avoid a situation where a PDMR makes a mistake in calculating whether he has reached the threshold.
'Closed periods'	These will now be: (i) the period of 30 calendar days before the announcement of the company's interim financial report and (ii)(a) if a company announces preliminary annual results, the period of 30 calendar days before the announcement of prelims, where the announcement contains all inside information expected to be included in the annual report or (b) if a company does **not** announce preliminary annual results, the publication of the annual report – the FCA has recently confirmed this position. This is shorter than the current two month period under the AIM Rules. Accordingly, if a company announces preliminary annual results (and the preliminary announcement contains all inside information expected to be included in the annual report), the prelims will be treated as ending the closed period of 30 days, and there will be no "second" closed period ending on the publication of the annual report. This is broadly consistent with existing practice for AIM companies, where the Exchange has been prepared to consider the close period as ending on the publication of prelims (notwithstanding that the concept of notification of preliminary results does not exist under the AIM Rules) – see Issue 4 of Inside AIM published in September 2011. Companies will often make share awards just after they have published their prelims and such awards usually vest at least three years later. The FCA's clarification is helpful because directors and employees with awards that were granted to them in 2013 or later, after publication of prelims but before publication of the annual report, could otherwise have found that on the third anniversary of grant the company was in a 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 closed period ended. Note that for dealing outside the prescribed closed periods, the only restriction under MAR on dealing is that the person concerned must not commit market abuse – eg,by taking advantage of inside information that they have through their job.	Ensure that the company's share dealing policy prohibits PDMRs and their closely associated persons from dealing during closed periods (save for in the exceptional circumstances set out in MAR). Consider whether there should continue to be a closed period when the company is in possession of inside information, whether or not the director or other person proposing to deal knows about it.
Insider lists*	AIM companies will, under MAR, be required to maintain "insider lists" (project related and, if warranted, permanent lists) giving details of persons with access to inside information. The European Securities and Markets Authority (ESMA) has produced a mandatory electronic template for insider lists. In particular, the insider list must contain the date and time on which each insider obtained and ceased to have access to inside information.	Put together insider lists in the prescribed electronic format. An insider list must be kept for at least five years after it is drawn up or updated. Consider whether there are any data protection issues in relation to obtaining and storing such information.

Topic	Change	Action
		Obtain written acknowledgements from individuals added to an insider list that they understand their legal and regulatory duties and the sanctions for insider dealing/unlawful disclosure of inside information.
Delaying disclosure of inside information	Under Article 17 of MAR, a company must announce inside information to the market as soon as possible. However, companies will continue to be allowed to delay the disclosure of inside information in order to protect their "legitimate interests", so long as the public is not misled and confidentiality can be maintained – ESMA has published draft Guidelines on this point. When the information is eventually announced, the company will be required to notify the FCA, in a prescribed form, that it has delayed announcing the information. The form requires certain specified information to be included such as the date and time on which the decision to delay disclosure was made and the identity of the persons responsible for that decision. If requested by the FCA, the company must also provide a written explanation of its decision to delay disclosure. AIM companies will need to comply with the rules on disclosing inside information contained in both MAR and AIM Rule 11.	Make sure suitable procedures are in place to record and disclose this information. Ensure that all inside information disclosed to the market is posted on a dedicated section of the company's website for at least five years.
Market sounding	A "market sounding" takes place where information is communicated to potential investors to gauge their interest in a possible transaction, such as a fundraising. It will be used to evaluate key terms such as the size of the fundraise and the pricing. As a general rule, a person who has inside information will commit market abuse if he discloses the information to any other person, otherwise than in the normal course of his employment, profession or duties. Under MAR, there is a "safe harbour" for persons who disclose inside information in connection with a "market sounding", provided that certain conditions are met. On the whole, these reflect existing best practice. MAR provides that a person disclosing information for the purposes of market sounding must assess whether there will be a disclosure of inside information, write a note of its conclusion and the reasoning behind its decision, obtain the prior consent of the recipient, inform the recipient that he is restricted from trading and must keep the information confidential, ensure that all recipients receive equality of information, inform recipients when the information ceases to be inside information, keep detailed written records of recipients and the information given.	Make sure suitable procedures are in place to record this information. All such records must be kept for at least five years. Consider making market soundings on a recorded telephone line (obtain permission to record the telephone conversation) to avoid the need to agree a set of minutes with the recipient afterwards. The company may consider the rules sufficiently onerous to always use advisers to carry out this exercise on their behalf.

* Depending on the progress of Brexit negotiations, it is possible that AIM will apply for registration as an “SME growth market” under MiFID II when it comes into force (expected to be in January 2018). Such registration would mean that AIM companies would be exempt, subject to certain conditions being met, from the requirement to draw up insider lists. However, AIM companies will be subject to MAR in full, including the obligation to draw up insider lists, in the meantime.

Further advice

Please get in touch with Stephen Hamilton, Shubhu Patil or your usual contact at Mills & Reeve if you have any questions about any of the points covered in this briefing or about the new market abuse regime more generally. We can create or review relevant internal procedure and policy documents (including share dealing codes and insider lists) and can also provide suitable training to directors, other PDMRs and relevant employees on their obligations under the new regime.

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