

The Market Abuse Regulation & AIM

On 3 July 2016 the Market Abuse Regulation (MAR) introduced a new common regulatory framework on market abuse. Unlike the old Market Abuse Directive (which MAR replaces) the regulation extends to AIM companies.

The purpose of MAR is “to establish a more uniform and stronger framework in order to preserve market integrity, to avoid potential regulatory arbitrage, to ensure accountability in the event of attempted manipulation, and to provide more legal certainty and less regulatory complexity for market participants.”

The FCA has been designated as the competent authority for the purpose of enforcing MAR in the UK. This means that AIM companies now face two different regulators: AIM Regulation (which monitors compliance with the AIM Rules) and the FCA. The AIM Rules have recently been revised as a consequence of MAR (relevant changes are noted below). However, AIM Regulation has confirmed that there should not be significant change to the approach of an AIM company and its nominated adviser to considering disclosure obligations under the AIM Rules as a result. AIM Regulation has stated that it will continue to keep the operation of the AIM Rules under review and in particular will monitor how they work in practice following the implementation of MAR.

MAR PROHIBITS	MAR REQUIRES
<p>Insider Dealing</p>	<p>Disclosure of Inside Information</p>
<ul style="list-style-type: none"> • Engaging or attempting to engage in insider dealing; or • Recommending that another person engage in insider dealing or inducing another person to engage in insider dealing. <p><i>(Article 14(a) and (b) MAR)</i></p> <p>Inside information is essentially information which has not been made public, which, if it were made public, would be likely to effect a reasonable investor’s decision to invest <i>(Article 7(1) MAR)</i>.</p> <p>Insider dealing 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, financial instruments to which that information relates. This includes using inside information to cancel or amend an order placed before the inside information was obtained and to which that information relates <i>(Article 8(1) MAR)</i>.</p> <p>MAR presumes that a person who has inside information and ‘deals’ does so on the basis of the inside information.</p>	<ul style="list-style-type: none"> • An issuer must inform the public of inside information as soon as possible; • The information must be posted on the issuer’s website and must remain there for at least 5 years; • Disclosure of inside information must not be combined with marketing of the issuer’s activities; and • Announcements must meet specified criteria, including that they contain a clear indication that the information disclosed is inside information. <p><i>(Article 17(1) MAR)</i></p> <p>The MAR disclosure obligations are similar to, but not the same as, the requirements of AIM Rule 11. Both standards must be met, and will be enforced by the relevant regulator. AIM Regulation <i>(AIM Notice 44)</i> has stated that compliance with MAR does not mean that an AIM company will have satisfied its obligations under the AIM Rules and vice versa. It sees AIM Rule 11 as crucial to the integrity of AIM and to the maintenance of an orderly market but will work closely with the FCA to minimise duplication.</p> <p>Under MAR, disclosure of inside information may be delayed where all of the following conditions are met:</p> <ul style="list-style-type: none"> • Immediate disclosure is likely to prejudice the legitimate interests of the issuer; • Delay of disclosure is not likely to mislead the public (the European Securities and Markets Authority (ESMA) has issued guidelines on this); and

	<ul style="list-style-type: none"> The issuer is able to ensure the confidentiality of that information. <p>One key difference between MAR and AIM Rule 11 is that, where an issuer has delayed the disclosure of inside information, immediately after that information is disclosed to the public, under MAR the issuer must inform the FCA that disclosure of the information was delayed and must provide a written explanation of how the conditions set out above were met.</p>
<p>Unlawful Disclosure of Inside Information</p>	<p>Insider Lists</p>
<ul style="list-style-type: none"> Disclosing inside information other than ‘in the normal exercise of an employment, a profession or duties’ (<i>Article 10(1) MAR</i>). Disclosure pursuant to a new framework for market soundings is deemed to fall within this exemption (<i>Article 11 MAR</i>) (<i>Article 14(c) MAR</i>). 	<ul style="list-style-type: none"> Issuers must draw up a list of all persons who have access to inside information and who are working for them 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); The insider list must: <ul style="list-style-type: none"> be in the format prescribed by ESMA; contain specified information (including the date on which the list was created and the date and time at which the insider obtained access to inside information); be promptly updated; be kept for 5 years from the date of its last update; and be provided to the FCA as soon as possible upon its request. Issuers must take all reasonable steps to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information. (<i>Article 18 MAR</i>) <p>The ESMA template provides for deal-specific or event-based insiders as well as an optional “permanent insiders” list, for individuals who are considered to be insiders in respect of all types of inside information.</p> <p>The template also provides a third form of insider list, for issuers of financial instruments admitted to trading on SME growth markets. AIM falls within the SME growth market definition under another EU Directive (MiFIDII), which is expected to come into force in January 2018 at the earliest. Once MiFID II is in effect, and provided that AIM Regulation applies for SME Growth Market status, AIM companies will be able to utilise the SME Growth Market exemption under MAR meaning that they will no longer have to comply with the full insider list requirements. In the meantime, the full requirements of MAR will apply.</p> <p>The issuer remains fully responsible for compliance with its obligations under Article 18 of MAR where it outsources the maintenance of its lists.</p>

Market Manipulation	Notification of Managers' Transactions
<ul style="list-style-type: none"> Engaging or attempting to engage in market manipulation (<i>Article 15 MAR</i>). <p>Articles 12(1) and 12(2) of MAR list activities and behaviours which comprise market manipulation, such as giving false or misleading signals as to the supply of, demand for, or price of, a financial instrument.</p>	<ul style="list-style-type: none"> Persons discharging managerial responsibilities (PDMRs, as defined in <i>Article 3(35) MAR</i>), as well as persons closely associated with them, must notify the issuer and the FCA of every transaction conducted on their own account relating to the shares or debt instruments of that issuer (or to related derivatives or other financial instruments); Notifications must: <ul style="list-style-type: none"> be made promptly and no later than three business days after the date of the transaction; be in the format prescribed by ESMA; and include specified information (such as the nature of the transaction and the date and price); The issuer has three business days from the date of the transaction (NB. not from the date of notification by the PDMR) to make the information public; Issuers must notify the PDMR of their obligations in writing, and PDMRs are similarly required to notify the persons closely associated with them of their obligations (and keep a copy); A €5,000 aggregate annual threshold applies, below which PDMRs are not required to notify transactions; PDMRs are prevented from conducting any transactions in relation to the issuer's securities during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report. This is subject to limited exceptions where dealing is permitted during a closed period, including: <ul style="list-style-type: none"> in exceptional circumstances; certain transactions under an employee share scheme; and transactions where a beneficial interest does not arise. (<i>Article 19 MAR</i>) <p>Article 19 of MAR widens and therefore largely replaces the AIM Rules relating to the disclosure of directors' dealings and restrictions on directors' dealings (<i>AIM Rules 17 and 21 respectively</i>). As a result, the requirement to disclose directors' dealings has been removed from AIM Rule 17 (with a note in the guidance instead pointing to <i>Article 19 MAR</i>) and AIM Rule 21 has been replaced with a requirement to have a dealing policy (with minimum provisions).</p> <p>A summary of the key changes:</p> <ul style="list-style-type: none"> The MAR PDMR definition catches wider categories of people than just directors; Debt instruments have been added to the regime; MAR requires notification of transactions to be made by the PDMR to the issuer, and by the issuer to the FCA, within three business days; MAR introduces a new €5,000 de minimis threshold before transactions must be notified;

	<ul style="list-style-type: none"> • The AIM Rules now include a requirement for AIM companies to have a share dealing policy (although common, this was not previously mandatory); • There is a new (shorter) closed period of 30 days under MAR; and • There are differences to the permitted dealings during closed periods under MAR. <p>The Model Code (upon which many AIM companies based their dealing codes) has also been withdrawn by MAR. At the suggestion of the FCA, ICSA: the Governance Institute (in collaboration with GC 100, the Quoted Companies Alliance and other market participants) has published an industry-led specimen dealing code, a group wide dealing policy and a specimen manual which have been submitted to the FCA and the London Stock Exchange for their review and comment.</p>
--	---

ARE YOU COMPLIANT?	
INSIDER LISTS	<ul style="list-style-type: none"> • Identify insiders; • Create lists in ESMA format; • Inform insiders of duties and responsibilities; • Consider which advisors are insiders and ensure they are maintaining appropriate lists; and • Establish policy / process for identifying future insiders (either permanent or deal-specific). <p>NB. Don't forget to consider data protection implications.</p>
DISCLOSURE OF INSIDE INFORMATION	<ul style="list-style-type: none"> • Maintain announcements of inside information on website for 5 years; and • Ensure new record keeping requirements and administrative rules re. delayed disclosure of inside information are understood and reflected in policies and procedures. Who makes decisions to announce or delay?
SHARE DEALING	<ul style="list-style-type: none"> • Implement / update share dealing code and employee policy (possibly adopting industry-led ICSA templates); • Update & maintain list of PDMRs and persons "closely associated"; • Issue memorandum of duties and responsibilities under MAR to PDMRs (and maintain record of such issues); and • Inform PDMRs of their duty to pass on information to people "closely associated" with them (and to maintain a record of having done so).
OTHER	<ul style="list-style-type: none"> • Be aware of new regime for market soundings. ESMA's guidelines explain: <ul style="list-style-type: none"> ○ the factors for potential investors to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information; ○ the steps that such persons are to take if inside information has been disclosed to them; and ○ the records that such persons are to maintain in order to demonstrate that they have complied with MAR; • Consider whether employee share plans need updating in light of MAR (employee share plan dealings may be caught by the new disclosure rules); and • Ensure all standard contractual "market abuse" clauses are compliant (i.e. those used in confidentiality agreements).

SANCTIONS

A breach of MAR may lead to the FCA:

- issuing fines;
- publishing a statement to censure the offending person;
- imposing temporary (or in some cases permanent) prohibitions on individuals being involved in the management of investment firms or dealing in securities; or
- suspending or restricting a person's permission to carry on a regulated activity for a period of up to 12 months.

Criminal offences under the Criminal Justice Act 1993 and the Financial Services Act 2012, both punishable by fines and/or imprisonment, are also retained (with appropriate amendments).

FURTHER INFORMATION

[Market Abuse Regulation](#)

[AIM Rules: July 2016 \(mark-up\)](#)

[AIM Notice 44](#)

[ESMA Guidelines on the Market Abuse Regulation](#)

[ESMA Draft technical standards on the Market Abuse Regulation, including Annex XIII – Draft implementing technical standards on the format of the insider lists and format for updating the insider lists](#)

Or contact S&B's Head of Corporate & Commercial James Waddell, or your usual contact at S&B.



James Waddell
Corporate Partner

+44 (0)1483 734223
james.waddell@stevens-bolton.com

The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

© Stevens & Bolton LLP 2016

Wey House, Farnham Road, Guildford, Surrey GU1 4YD Tel: 01483 302246 Fax: 01483 302254
www.stevens-bolton.com

Stevens & Bolton LLP is a limited liability partnership registered in England with registered number OC306955 and is authorised and regulated by the Solicitors Regulation Authority with SRA number 401245. A list of the members may be inspected at its registered office.

