

# MAR for AIM Companies

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The Market Abuse Regulation (MAR) has direct effect as law in the United Kingdom from 3 July 2016. MAR extends the market abuse framework and its disclosure obligations to AIM companies. The key obligations relate to inside information, insider lists, dealing disclosure by persons discharging managerial responsibility (PDMRs) and procedures for market soundings. The key issues and actions for AIM companies are summarised below.

## What is changing for AIM companies?

While most AIM companies seek to comply with the provisions of the existing Market Abuse Directive, MAR extends the market abuse framework to require compliance by AIM companies. The detailed record-keeping requirements under MAR in relation to delaying the disclosure of inside information and insider lists require AIM companies to be clear on its definition of inside information as well as have systems and procedures in place to satisfy its record-keeping requirements. Likewise in relation to PDMRs, MAR requires additional record keeping and the amended AIM Rules require a dealing policy. MAR also introduces a new safe harbour for the disclosure of inside information in certain market soundings so long as relevant processes are satisfied.

## What rules are affected?

AIM companies must comply with both the AIM Rules and MAR. The AIM Rules are being amended in light of MAR but from 3 July 2016 AIM companies have a dual regulatory regime and compliance with one does not ensure compliance with the other. AIM companies must become familiar with MAR and the related guidelines as well as the implementing and regulatory technical standards. Relevant provisions of the Financial Services and Markets Act 2000 are also set for amendment to bring them into line with MAR. The outline below is based on the amended AIM Rules in force 3 July 2016. AIM Regulation and the FCA will enforce the AIM Rules and MAR respectively. AIM Regulation has indicated that it will work with the FCA to minimise duplication of activities but is clear it will not offer guidance on MAR obligations.

## What is the position on inside information?

The disclosure of inside information is to be governed by both the AIM Rules and MAR. The AIM Rule on the disclosure of price sensitive information (PSI) is to be retained but its guidance will signpost the AIM company's MAR obligations. Under MAR, inside information has a specific and technical definition, while under the AIM Rules the approach is principles-based in light of its objective to maintain a fair and orderly market. AIM companies must comply with both requirements.

The AIM Rules continue to require AIM companies to notify the market without delay of new developments that are not public but if they were public would likely lead to a significant movement in price of its securities. AIM Regulation enforces this Rule and if breached, securities may be suspended or AIM admission cancelled.

MAR sets out a separate obligation and requires an AIM company to ensure inside information is made public in a manner that enables fast access and complete, correct and timely assessment. Under MAR, inside

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information is information that is precise, not public, relating directly or indirectly to the company or its financial instruments which, if public, would have a significant effect on the price of those instruments. Such information is that which a reasonable investor is likely to use as the basis for an investment decision. Disclosure cannot be combined with marketing of the AIM company's activities. This inside information must be posted and maintained on the AIM company's website for five years.

#### Key actions

- Implement procedures to assess potential PSI and inside information under each regime
- Disclosed inside information maintained on company website for five years

## When can you delay disclosure of inside information?

From 3 July 2016, AIM companies also have this dual regulatory regime with regard to the delay of disclosure of inside information although the circumstances in which delays are permitted are broadly similar. Having said this, MAR sets out significant procedural requirements relating to the delay of disclosure of inside information which exceed those relating to PSI under the AIM Rules. Under MAR, an AIM company must keep and maintain records of how the conditions for delay were met. It must notify the FCA of the delay once the information is public. If the FCA requests, the AIM company must provide the FCA with its written records that set out specific details relating to the delay.

#### Key actions

- Procedure to assess whether disclosure of inside information can be delayed
- Written record of all decisions to delay the disclosure of inside information
- Process and use of form to notify FCA of delay on disclosure of inside information

## What are the new requirements for insider lists?

Under MAR, AIM companies and their advisers must maintain insider lists of all persons working for them with access to inside information. The prescribed form of insider list must include insiders' names and the reason they are insiders, as well as the date and time which they became insiders and the date of the list. MAR requires personal contact details be kept on the list. AIM companies are responsible for compliance even if their advisers keep their own lists and must have the right to access these lists. MAR also outlines triggers for updating insider lists and AIM companies must have systems and controls that allow the maintenance of insider lists. AIM companies must retain insider lists, which must be in electronic form, for five years and provide them, by electronic means, to the FCA on request. The FCA enforces compliance with these requirements. Under MAR, AIM companies must also take all reasonable steps to ensure insiders acknowledge in writing awareness of their obligations and related sanctions for insider dealing and unlawful disclosure of inside information.

If AIM becomes a designated SME Growth Market under MiFID II (expected January 2018), AIM companies should after that designation benefit from a reduction in the obligations relating to insider lists.

#### Key actions

- Insider policy
- Collect and maintain insider details
- Insider lists following MAR template
- Written acknowledgement from insiders of their obligations and possible sanctions
- Systems and controls respecting insider lists kept by advisers

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## What rules apply to dealings by PDMRs?

Under the current AIM Rules, an AIM company's directors must disclose their dealings in its shares; however, as a result of MAR, this aspect of the Rule is to be deleted and replaced by the provisions of MAR on the basis it has the appropriate level of transparency. Broadly, MAR requires PDMRs and person closely associated (PCAs) to notify the AIM company and the FCA of every transaction in relation to the company's shares, debt instruments, derivatives or other financial instruments within three working days once their dealings reach the annual €5,000 threshold. PDMRs and PCAs must use the FCA template to make these notifications electronically. The AIM company must also publish the information within the same overlapping three business day period, while currently an AIM company must simply notify without delay.

The MAR requirements are wider than the existing requirements in a number of respects. AIM companies going forward must keep lists of PDMRs and their PCAs and must notify their PDMRs of their obligations in writing. Under MAR, the requirements apply to PDMRs and their PCAs and this extends beyond the current AIM Rule which applies to directors. Likewise, disclosure under MAR includes dealings in more types of securities including the AIM company's debt instruments. However, under MAR the disclosure requirement only bites when un-netted dealings reach €5,000 in a calendar year. To take advantage of this threshold PDMRs and PCAs will need to keep detailed records of their dealings. Issues relating to currency conversion of the Euro amount under MAR are still being considered.

### Key actions

- Dealing policy addressing PDMRs
- Compile and maintain list of PDMRs and PCAs
- Written notification to PDMRs of their dealing obligations (related notification by PDMRs of PCAs)
- Use of FCA notification forms of PDMR and PCA dealings

## What are the new mandatory closed periods?

Under the existing AIM Rule, directors and relevant employees cannot deal in "close periods". As a result of MAR, the existing restrictions are to be replaced with the requirement for a dealing policy which must be in place by 3 July 2016. While many AIM Companies have such a policy, it is not currently required. In broad terms, the policy should address closed periods, when clearance is required, who grants clearance, the process to obtain clearance, timeframe to deal when clearance is received, how to assess the grant of clearance and procedures to notify.

MAR prohibits trading in closed periods and provides limited exemptions. Under MAR, closed periods are the 30 days before the announcement of an interim financial report or year-end report that the AIM company *must* make public. This raises issues in relation to preliminary results on which the FCA has commented pending clarification from the EC and ESMA. The FCA's view is that the 30 days before the publication of preliminary results is the closed period. The wider issue is whether there are two closed periods in these circumstances (i.e. before preliminary results and before the report) on which clarification is awaited. The exemptions are limited to share schemes, where beneficial interest does not change, and exceptional circumstances requiring the immediate sale of shares such as severe financial difficulty of the PDMR. This is narrower than the existing AIM Rules that provide exemptions to alleviate severe personal hardship, where a binding commitment was entered before the close period, acceptance of a takeover and taking part in a rights issue.

### Key actions

- Share dealing policy
- Ensure PDMRs are aware of the changes to dealings regime and closed periods

## What are the procedures for market soundings?

MAR provides a new safe harbour for the disclosure of inside information in market soundings, so long as its conditions are satisfied. MAR defines market soundings as communications before the announcement of a transaction to gauge the interest of potential investors. It also addresses market soundings in the context of

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takeovers. MAR requires AIM companies and advisers to follow procedures and keep records of market soundings, to take advantage of the safe harbour, that are not currently required. If an AIM company and its nominated adviser conduct joint market soundings, both must comply with the related requirements and procedures.

In this context, before a market sounding, MAR requires a disclosing market participant (DMP) to consider whether it will involve the disclosure of inside information and record its conclusions and their basis. So even where information is determined not to be inside information, DMPs must keep a written record. DMPs must provide these records to the FCA if it requests them.

MAR also requires DMPs to establish procedures regarding the conduct of market soundings. The DMP must obtain the consent of recipients to receive the information and remind the recipients that they are prohibited from either trading (or cancelling or amending trades) on the basis of the inside information and that they must maintain the confidentiality of the information. DMPs must also maintain a record of all information provided and to whom (including persons acting on behalf of potential investors) along with the date and time of disclosure. Soundings should be either recorded or a written record kept and technical standards provide templates for the form of written record. These must be kept for five years and provided to the FCA on request. Once information is no longer inside information, DMPs must inform recipients as soon as possible. Market sounding recipients must comply with separate guidelines.

### Key actions

- Update inside information policy to reflect market sounding procedure or consider market sounding policy
- Training on new market soundings procedure
- Maintain market sounding records in writing (based on MAR templates) or as recordings
- Procedures for notification, based on MAR template, that information provided is no longer considered inside information

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