Gateley Plc

Get ready for the new market abuse regime

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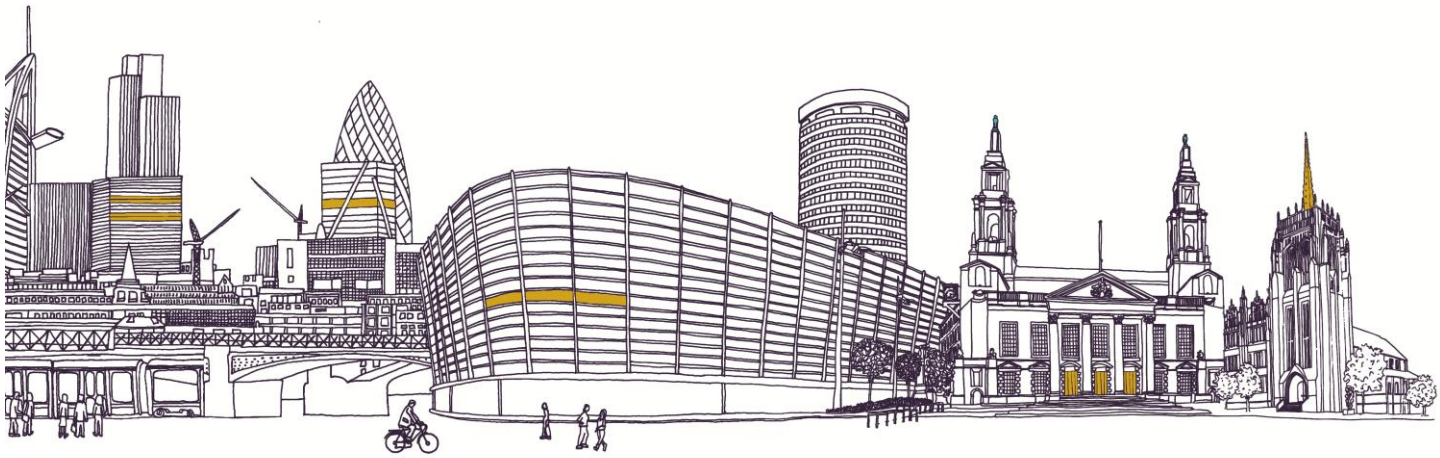

On 3 July 2016 the UK's civil market abuse regime is changing. The Market Abuse Regulation (MAR) has been introduced to provide a standard regulatory framework across EU member states to prevent market abuse and preserve the integrity of, and investor confidence in, the market for financial securities. MAR will have direct effect in the UK and, although there are many similarities with the existing regime, both Main Market and AIM companies need to ensure they are ready for the new system.

What is 'market abuse'?

According to MAR, market abuse is 'a concept that encompasses unlawful behaviour in the financial market'. This includes insider dealing, unlawful disclosure of inside information and market manipulation.

Under MAR it is an offence to:

• engage or attempt to engage in insider dealing;

• recommend that another person engage in insider dealing or induce another person to do so;

• unlawfully disclose inside information; or

• engage or attempt to engage in market manipulation.

What is 'inside information'?

The definition of inside information in MAR is broadly similar to the definition used in the UK's existing market abuse regime. To qualify as inside information under MAR, information must:

• be of a precise nature;

• not have been made public;

• relate, directly or indirectly, to one or more companies or to one or more financial instruments; and

• be likely to have a significant effect on the prices of the relevant financial instruments if the information were made public. Information will be likely to have a 'significant effect' on price if it is information that a reasonable investor would be likely to use as part of the basis for their investment decisions.

Market manipulation

The offence of market manipulation contained in MAR can be committed in a number of ways, including: publishing information which gives false or misleading information about the supply of, demand for or price of a financial instrument; using a fictitious device in a transaction which is likely to affect the price of a financial instrument; or dealing in financial instruments at the opening or closing of business so that investors are likely to be misled as to the opening or closing price of those instruments.

MAR creates a new offence of attempting to engage in market manipulation. This relates to any attempt to engage in any of the activities which amount to market manipulation. This could include situations where the relevant activity is started but not completed due to technical failures or because an instruction to trade is not acted on.

Key changes

- **Regulatory changes:** Significant amendments will be made to the FCA Handbook, including the deletion of the Model Code and the bulk of the Disclosure Rules. The AIM Rules will be updated as the scope of the market abuse regime is extended to include AIM companies
- **Dealings by PDMRs:** The regime for the approval and reporting of PMDR dealings is changing to include an express ban on dealings in a close period, a narrower range of permitted exceptions and an annual threshold
- **Disclosure of inside information:** Inside information must be clearly identified on a company's website and available for five years. Delayed disclosures must be notified to the FCA and a record must be kept of the reasons for the delay
- **Control of inside information:** Insider lists must follow a new prescribed format and insiders must acknowledge in writing that they are aware of their obligations
- **Market soundings:** Conducting market soundings (or 'pre-marketing') will not amount to an unlawful disclosure of inside information provided new procedures are followed

Regulatory changes

The UK's current civil market abuse offences are set out in section 118 Financial Services and Markets Act 2000 which is supplemented by the FCA's Code of Market Conduct. From 3 July 2016 section 118 will be replaced by provisions in MAR which will apply directly to UK companies. Although the Code of Market Conduct will be retained, much of it will be deleted as it will not be compatible with MAR.

MAR extends the application of the market abuse regime beyond companies with shares admitted to trading on a regulated market (such as the UK's Main Market) so that it will also apply to multi-lateral trading facilities (**MTFs**) and other organised trading facilities (**OFTs**). MAR will therefore apply to AIM companies and the AIM Rules will be updated as a result.

The Listing Rules will be changed by the deletion of the Model Code which currently regulates dealings in shares by 'persons discharging managerial responsibilities' (**PDMRs**). Readers will be signposted directly to the relevant provisions in MAR.

The Disclosure Rules in the Disclosure and Transparency Rules (**DTRs**) will be renamed the 'Disclosure Guidance'. Again, much of the existing content will be deleted and readers will instead be signposted to the relevant MAR

provisions. The FCA is hoping to retain those parts of the existing rules which provide guidance on interpreting the new legislative requirements.

Action point

- Update share dealing codes and other documents to include references to MAR and remove references to obsolete materials.

Dealings by PDMRs	
Old regime	**New regime**
Regulated by Chapter 3 DTR and the Model Code	Regulated directly by Article 19 of MAR. Chapter 3 DTR and Model Code to be removed (although guidance related provisions may be retained)
Applies to PDMRs and 'connected persons'	Applies to PDMRs and 'closely associated persons'
PDMR and connected persons must notify company of relevant dealings within four business days	PDMR and closely associated persons must notify company and FCA (using prescribed template) of relevant dealings promptly and in any event within three business days of the transaction
Company must notify an RIS of relevant dealings by the end of the next business day following receipt by the company of a notification from a PDMR	Company must notify an RIS of relevant dealings promptly and in any event within three business days of the transaction
Reporting obligations apply to all relevant dealings	Reporting obligations only apply to transactions above an annual threshold of €5,000 per person
PDMRs should not be given clearance to deal in 'close periods' of 60 days before announcement of yearly or half-yearly results	Ban on dealings by PDMRs during close periods of 30 days before interim financial report or year-end report required by national law (not expected to apply to preliminary announcement of results which is not 'required by law')
Model Code contains various exemptions to the 'close period' rule	MAR contains a narrower list of exemptions: only dealings in exceptional circumstances (eg severe financial difficulties), certain dealings pursuant to employee share schemes and dealings where there is no change in the beneficial interest in the security are permitted
Model Code does not apply to AIM companies but AIM Rule 21 requires companies to ensure directors and applicable employees do not deal in a close period	Article 19 of MAR will apply to AIM companies. AIM Rule 21 will be changed to require all companies to have a dealing policy

Action points

- Update share dealing codes, and related policies and procedures, to be consistent with new regime:
  - consider whether to apply the permitted annual threshold or still require notification of all dealings
  - consider a reduced time period for notifications by PDMRs of one or two business days to give company time to give required notification within three business days of dealing
- Communicate changes to all PDMRs
- PDMRs will need to keep detailed records of all transactions if the permitted annual threshold is adopted to know when that threshold is reached

Disclosure of inside information

As noted above the definition of inside information under MAR is broadly the same as that under the current regime. Helpfully, the FCA has also indicated that it will retain the existing provisions of the DTRs about factors to be taken into account when considering whether information would be likely to be used by a reasonable investor as part of the basis for their investment decision.

Companies will continue to be under an obligation to disclose all inside information relating to the company as soon as possible. However, AIM companies will also continue to be subject to the obligation to disclose price sensitive information under AIM Rule 11. Unfortunately, compliance with AIM Rule 11 will not necessarily amount to compliance with MAR and vice versa, so AIM companies will need to ensure they are familiar with their dual obligations.

Companies will still be able to delay the disclosure of inside information if the following conditions are met:

• disclosure is likely to prejudice the company's legitimate interests;

• the delay is not likely to mislead the public; and

• the company can maintain the confidentiality of the information.

There is a new obligation to notify the FCA, in writing, of any delay once the information is subsequently disclosed. The notification must include the date and time a decision to delay disclosure was made, together with the identity of those responsible for making that decision. The FCA can request a written explanation of the decision to delay disclosure and how the three conditions set out above were satisfied in respect of a particular piece of information.

The disclosure of any inside information should be made through an RIS. The company must also publish the information on its website and it must remain there for at least five years.

Action points

• Keep detailed records of all decisions to delay disclosure of inside information and justifications for those decisions

• Put in place procedures to ensure the FCA is notified immediately once disclosure is made where disclosure of that information was delayed

• Ensure information is clearly identified on the company's website and maintained for at least five years

Control of inside information

Companies will continue to be required to maintain up to date lists of all those who have access to inside information. The format of those lists is now prescribed by MAR and the content has been extended to include:

• Insider's birth name (if different)

• Professional (direct dial and mobile) and personal (home and mobile) telephone numbers

• Date of birth

• National identification number (if any – not relevant for the UK)

Insider lists may continue to be divided into separate parts, one for 'permanent insiders' (those with access to all inside information within the company, such as directors) and the other for those who have access to transaction or event-specific inside information.

Companies will have to take all reasonable steps to ensure that any person on the insider list acknowledges in writing that they are aware of the obligations involved and the sanctions applicable to insider dealing and unlawful disclosure of inside information. Although there is no current requirement to obtain such an acknowledgement in writing most companies do require PDMRs to sign a written acknowledgment.

It is understood that the FCA will continue to permit companies to make arrangements with advisers to maintain insider lists on their behalf provided the company retains a right to access the lists. The company will, however, remain fully responsible for compliance with the requirement to maintain the list.

Action points

• Update format of insider lists to new prescribed format

• Gather additional required information for inclusion in insider lists

• Obtain written acknowledgment from each insider

Market soundings

MAR contains new provisions which regulate the conduct of market soundings by companies and their advisers. 'Market soundings' refers to the communication of information, before the announcement of a transaction, such as a fundraising, to potential investors in order to gauge their interest in that transaction and the conditions relating to it, such as size or pricing (also known as 'pre-marketing'). The new provisions effectively create a 'safe harbour' for market soundings from the offence of unlawfully disclosing inside information.

To come within the safe harbour:

• before conducting the market sounding, the company will need to consider whether it will involve the disclosure of inside information;

• a written record must be kept of the company's conclusion and the reasoning behind that decision;

• the company must give the person to whom the disclosure will be made certain information about the consequences of possessing inside information (including the duty of confidentiality) and get their written consent to being made an insider;

• a written record must be kept of the identity of anyone to whom inside information is disclosed, the date and time of disclosure and the information given;

• a recipient must be notified once the information ceases to be inside information; and

• all records must be kept for at least five years.

Action points

• Establish procedures to comply with the disclosure and record keeping requirements relating to conducting market soundings

• Train all staff involved in market soundings on the new regime

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