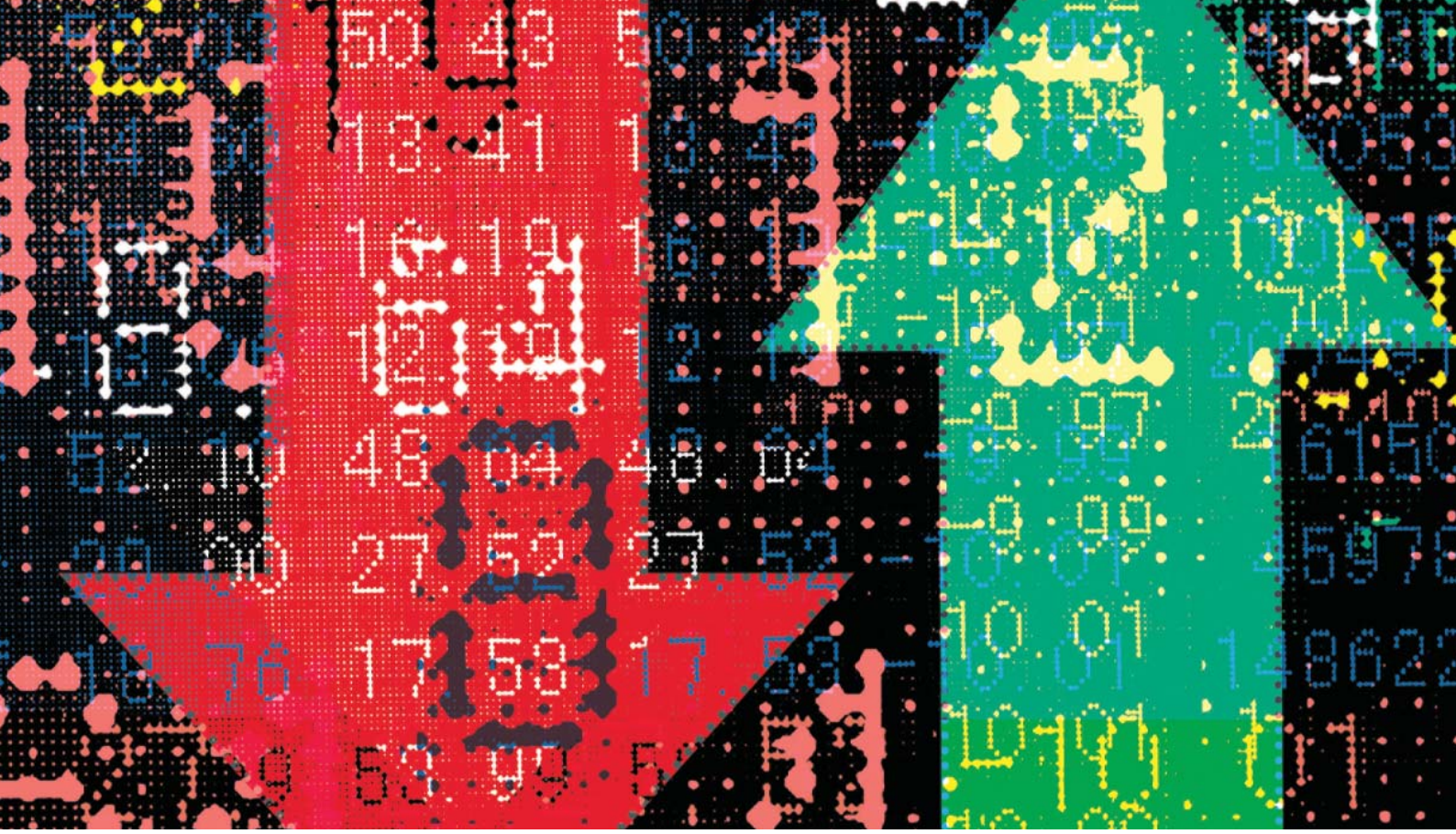

MARKET ABUSE REGULATION
ENSURING COMPLIANCE AMIDST UNCERTAINTY

Adrian West and Jane Bondoux of Travers Smith LLP consider how the Market Abuse Regulation will affect compliance procedures for UK listed and AIM companies.

The Market Abuse Regulation (*596/2014/EU*) (MAR) will repeal and replace the Market Abuse Directive (*2003/6/EC*) (MAD) and its implementing legislation on 3 July 2016. MAR will establish a common regulatory framework on insider dealing, market manipulation and the unlawful disclosure of inside information, and will expand and develop the existing framework to cover a wider range of securities on a wider group of markets.

In most EU member states, MAR is complemented by the Criminal Sanctions for Market Abuse Directive (*2014/57/EU*) (CSMAD), which sets out minimum criminal sanctions for market abuse. The UK and Denmark have opted out of CSMAD but in other member states it will be implemented by 3 July 2016 (*www.practicallaw.com/5-518-6444*). MAR and CSMAD are often referred to as MAD II.

MAR will bring in sweeping changes to the market abuse regime as a whole, for both sell-side parties such as companies and their brokers, and buy-side parties such as asset managers and other persons and businesses dealing in securities. This article looks at the effect of MAR on the compliance procedures for UK listed companies and AIM companies, including:

- The implementation of MAR in the UK.
- Policies and procedures for dealings by persons discharging managerial responsibility (PDMRs).
- The disclosure of inside information and delays in disclosure.
- Insider lists.

MAR IN THE UK

Although MAR is directly applicable, the implementation of MAR in the UK will require changes to the Financial Conduct Authority (FCA) Handbook and regulatory regime, as well as amendments to existing legislation. Many of the existing UK rules which are seen as incompatible with MAR will be deleted or conformed, and those which are compatible will be recast as guidance. Importantly, section 118 of the Financial Services and Markets Act 2000, which sets out the behaviours that constitute market abuse, and the Model Code, will be deleted. The FCA's Code of Market Conduct and the currently applicable Disclosure Rules (that is, Disclosure and Transparency Rules (DTR) 1 to 3) will, after the deletion or conforming of incompatible provisions, be recast as guidance.

Breaches of MAR will give rise to civil sanctions for market abuse including fines, public censure, injunctions and compensation. The FCA will have additional powers under MAR, such as the power to

Key actions for PDMR dealings

	Listed companies	AIM companies
Notification of PDMR dealings	**Identify and list persons discharging managerial responsibilities and persons closely associated**	
	• Persons discharging managerial responsibitilities (PDMRs) remain the same as under the current regime. • Send a notice to PDMRs to identify persons closely associated (PCAs). • Notify PDMRs in writing of their responsibilities regarding dealings and notifications and obtain acknowledgement. • PDMRs are responsible for informing PCAs of their obligations in writing and must keep a copy.	• Consider whether any senior managers who are not directors should be treated as PDMRs, as the reference to PDMRs and PCAs in Article 19 of the Market Abuse Regulation (*596/2014/EU*) (MAR) is wider than the reference to directors in the current AIM Rule 17. • Send a notice to PDMRs to identify PCAs. • Notify PDMRs in writing of their responsibilities regarding dealings and notifications and obtain acknowledgement. • PDMRs are responsible for informing PCAs of their obligations in writing and must keep a copy.
	Comply with new notification deadlines	
	• PDMR or PCA to notify company and Financial Conduct Authority (FCA) within three business days of the transaction, rather than the current four. • Company to announce transaction by same three business day deadline. • Company may apply a €5,000 threshold for PDMR notifications. This is not recommended due to, among other things, the likelihood of mistakes and the lack of clarity in respect of exchange rates.	• AIM Rule 17 no longer applies to directors' and their families' dealings. • PDMR or PCA to notify company and FCA within three business days of the transaction. • Company to announce transaction by same three business day deadline. • Company may apply a €5,000 threshold for PDMR notifications. This is not recommended due to, among other things, the likelihood of mistakes and the lack of clarity in respect of exchange rates.
Share dealing codes	**Prepare new share dealing code**	
	• Model Code deleted. • New share dealing code should comply with Article 19 of MAR (*see box "Share dealing codes"*). • In addition to the prohibition of PDMR dealings in MAR 30-day closed periods, consider: - applying the code to employees (or certain categories of employee) who are not PDMRs and any employees on insider lists; - refusing consent for dealing while inside information exists; - refusing consent for dealings of a short-term nature; and - requiring PDMRs to take steps to prevent dealings by PCAs.	• AIM definition of close periods deleted. • New share dealing code required to comply with both Article 19 of MAR and new AIM Rule 21 (*see box "Share dealing codes"*). • In addition to the prohibition of PDMR dealings in MAR 30-day closed periods, consider: - applying the code to employees (or certain categories of employee) who are not PDMRs and any employees on insider lists; - refusing consent for dealing while inside information exists; - refusing consent for dealings of a short-term nature; and - requiring PDMRs to take steps to prevent dealings by PCAs.
Share schemes	**Review all share schemes with advisers**	
	• The various exemptions and carve-outs under the Model Code which facilitated share schemes have been replaced with untested language under MAR. Review schemes to ensure that any anticipated dealing during close periods will be exempt, outside the scope of the prohibition or carried out outside a closed period. • Consider the process for the approval of any amendments.	

prohibit an individual from dealing on their own account or carrying out a management function in an investment firm, and it will have new investigative powers. The criminal offence of insider dealing under the Criminal Justice Act 1993 will remain unaffected by the changes to the civil offence of market abuse. In addition, the government has indicated that it intends to implement criminal sanctions for market abuse.

The FCA consulted on its proposed changes to the FCA Handbook in connection with the implementation of MAR in November 2015 (the consultation) (*www.practicallaw.com/1-620-4528*). In April 2016, the FCA published

a policy statement (the policy statement) which confirmed that it would be going ahead with most of the changes outlined in the consultation, except for its proposal to introduce a new annex replacing the Model Code, which was criticised by respondents as it was seen as imposing super-equivalent restrictions outside MAR closed periods without sufficient clarity (*www.practicallaw.com/1-628-4110*).

The FCA has not yet answered most of the questions on interpretation that were raised as a result of the consultation, although several of these questions have been listed in the policy statement for further consideration and possible further guidance (*see "Outstanding questions" below*). The FCA's ability to give guidance independently of the European Securities and Markets Authority (ESMA) is limited as EU law does not allow member states to make rules that interfere with the direct effect of EU regulations. In addition, some of the delegated legislation and guidelines under MAR are still being finalised.

It is unclear whether all of the technical standards and guidelines which are to be made under MAR will be in final form before 3 July 2016. In spite of these areas of uncertainty, companies and their advisers are under pressure to establish compliance procedures before 3 July 2016.

PDMR DEALINGS

The current rules on the disclosure of dealings by PDMRs in DTR 3, and directors and their "family" in AIM Rule 17, and the restrictions on those dealings that are currently set out in the Model Code and AIM Rule 21, will be replaced from 3 July 2016 by Article 19 of MAR (Article 19) (*see box "Key actions for PDMR dealings"*).

Article 19 and the delegated legislation made under it will apply to both listed and AIM companies. Article 19 sets out:

- Restrictions on dealing in closed periods.
- Requirements for the notification of PDMRs' and PCAs' transactions.

Restrictions on dealing in closed periods

Under Article 19(11), a PDMR within an issuer will be prohibited from conducting any transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public, according to the rules of the trading venue where the issuer's shares are admitted to trading, or under national law.

The FCA's current position is that the preliminary announcement of a company's annual results will put an end to the relevant closed period (*see "Preliminary statements" below*).

Article 19(12) provides the limited exception that an issuer may allow a PDMR to trade on its own account or for the account of a third party during a closed period either:

- On a case-by-case basis due to the existence of exceptional circumstances that require the immediate sale of shares, such as severe financial difficulty.
- Due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change.

A Commission Delegated Regulation (*2016/522/EU*) (the Delegated Regulation) made under Articles 19(13) and 19(14) sets out a non-exhaustive list of circumstances in which PDMRs may trade in closed periods and the transactions that will trigger notification under Article 19(1) (*www.practicallaw.com/2-627-0688*). Transactions that may take place in closed periods (provided that they could not have been carried out at any other time) include:

Applicable employees, PDMRs and PCAs

The definition of an applicable employee for the purposes of the new AIM Rule 21 is an employee of an AIM company, its subsidiary or parent undertaking other than a director who is a person discharging managerial responsibilities (PDMR). This is narrower than the existing definition which may include any employee who is likely to be in possession of unpublished price-sensitive information.

A PDMR is a person within an issuer, an emission allowance market participant or another entity referred to in Article 19(10) of the Market Abuse Regulation (*596/2014/EU*), who is either:

- A member of the administrative, management or supervisory body of that entity.
- A senior executive who is not a member of the bodies referred to above, who has regular access to inside information relating directly or indirectly to that entity and the power to take managerial decisions affecting the future developments and business prospects of that entity.

A "person closely associated" (PCA) with a PDMR means any of the following:

- A spouse, or a partner considered to be equivalent to a spouse in accordance with national law (which includes a civil partner in the UK).
- A dependent child, in accordance with national law.
- A relative who has shared the same household for at least one year on the date of the transaction concerned.
- A legal person, trust or partnership, the managerial responsibilities of which are discharged by a PDMR or by a person referred to in the three points above, which is directly or indirectly controlled by that person, which is set up for the benefit of that person, or the economic interests of which are substantially equivalent to those of that person.

- Awards or grants under an employee scheme, provided that the scheme has been approved by the issuer in accordance with national law, where there is no discretion on the part of the PDMR as to acceptance and the issuer has no discretion as to the timing or amount of the award.

- Awards or grants under an employee scheme where a pre-planned and organised approach is followed regarding the conditions, the periodicity, the time of the award, the group of entitled persons and the amount of the awards or grants so that any inside information cannot influence the award or grant.

- The exercise of options or warrants, or the conversion of bonds under an employee scheme that expire during a closed period, and sale of resulting shares, as long as the PDMR has notified the company of its intention to exercise the option four months before the expiry date, the election is irrevocable and the company has authorised the PDMR to proceed.

- Acquisitions under an employee saving scheme, provided that the PDMR enters into the scheme outside a closed period, does not alter the conditions of his participation in the scheme or cancel his participation during the closed period and has no right to alter it during a closed period.

- Transfers between two accounts of a PDMR which do not result in a change in price.

- Taking up shares under a qualification or entitlement where the final date for the acquisition falls during the closed period, provided that the PDMR submits evidence satisfactory to the issuer of the reasons for the acquisition not taking place at another time.

For UK companies and their advisers who are accustomed to the Model Code, and to similar share dealing codes under the AIM Rules, Article 19(11) and the Delegated Regulation represent uncharted territory. It is not clear in all cases which transactions formerly allowed under the Model Code (for example, certain transactions involving share incentives) will continue to be permissible under MAR. It remains to be seen whether any guidance will be provided by the FCA or ESMA (*see "Outstanding questions" below*).

Share dealing codes

There is currently no guidance from the Financial Conduct Authority (FCA) as to the form of share dealing code to be put in place from 3 July 2016. The FCA has welcomed the suggestion that an industry body may prepare a standard code. Until standard practice crystallises in respect of dealing codes, companies should bear in mind the following points.

The new AIM Rule 21 that will come into effect on 3 July 2016 requires that, as a minimum, an AIM company's dealing policy must set out the following:

- The AIM company's closed periods during which directors and applicable employees cannot deal.

- When a director or applicable employee must obtain clearance to deal in the AIM securities of the AIM company.

- An appropriate person(s) within the AIM company to grant clearance requests.

- Procedures for obtaining clearance for dealing.

- The appropriate timeframe for a director or applicable employee to deal once he has received clearance.

- How the AIM company will assess whether clearance to deal may be given.

- Procedures on how the AIM company will notify deals required to be made public under the Market Abuse Regulation (*596/2014/EU*) (MAR).

Although there is no express requirement for a dealing policy in MAR or the Listing Rules, in practice, a share dealing code should be put in place broadly covering the points set out above.

In addition to a prohibition on dealing by PDMRs during closed periods, companies may wish to consider:

- Prohibiting dealings by persons discharging managerial responsibility (PDMRs) during "prohibited" periods during which inside information exists.

- Extending the requirements of the share dealing code to employees (or certain categories of employees) who are not PDMRs, and any employees on insider lists.

- Requiring PDMRs to take steps to prevent persons closely associated with PDMRs (PCAs) dealing in closed periods.

- Prohibiting clearance for dealings of a short-term nature.

- Specifying circumstances in which discretion may be given for dealings by non-PDMRs or outside MAR closed periods.

Outstanding questions

Respondents to the consultation raised a number of questions as to the implementation of MAR, however, many of these remain unanswered.

Preliminary statements. Respondents to the consultation asked the FCA for guidance as to whether a 30-day closed period under MAR will precede the announcement of a

Key actions for delaying disclosure

Action	Documents
Where companies delay the disclosure of inside information under Article 17(4) of the Market Abuse Regulation (*596/2014/EU*), they must maintain records of: • The date and time that: the inside information first existed; the decision was taken to delay; and the issuer is likely to disclose the information. • The identity of the person or persons responsible for decisions concerning the delay. • Evidence of the fulfilment of conditions for the delay, including information barriers and arrangements for where confidentiality is no longer ensured.	• Pro forma records for delayed disclosure.
Companies must notify the Financial Conduct Authority (FCA) of the delay as soon as the information has been publicly disclosed and set out: • The identity of the issuer. • The identity and contact details of the person making the notification, including an email address and phone number. • The inside information that was subject to delayed disclosure. • The date and time of the decision to delay disclosure. • The identity of the person or persons responsible for decisions concerning the delay. If required, a company must provide the FCA with an explanation of the delay.	• Notification to the FCA of the delay (FCA form).

preliminary statement of annual results. Under the Listing Rules, preliminary statements are not mandatory but, if prepared, must be published and therefore, arguably, trigger a closed period.

Practitioners were keen to ensure that there will continue to be a closed period immediately preceding the publication of a preliminary statement and that the subsequent publication of the company's annual report will not trigger a second closed period. Otherwise, there would be implications for share scheme timetables and dealing windows, particularly where companies wish to make awards following the publication of preliminary results.

On 26 May 2016, the FCA announced that, pending clarification from the European Commission and ESMA, it will continue to take the view that, where an issuer announces preliminary results that contain all of the inside information that is expected to be included in the year-end report, the closed period is the 30-day period immediately before the preliminary results are announced.

In AIM Notice 45, published on 14 June 2016, AIM Regulation stated that it welcomes this approval and will consider making changes to its rules once clarification is received from ESMA.

Dealing during closed periods. Practitioners have requested guidance on what dealings may take place during the new 30-day closed periods under MAR. This is particularly important in relation to all-employee share schemes.

The FCA's list of issues for further consideration set out in the policy statement includes supplementing the non-exhaustive list of transactions that are permitted during a closed period, which are set out in Article 9 of the Delegated Regulation.

In the absence of further guidance, listed companies should review their incentive schemes, in particular their all-employee share schemes, with their advisers and seek advice about any transactions involving PDMRs which may take place in MAR closed periods to ensure that these will either be exempt from the prohibition on dealing during closed periods, fall outside the prohibition or take place outside closed periods. The legal profession is working to come to a collective view on various types of transactions, including investment programmes and trading plans.

Dealing outside closed periods. Following the deletion of the Model Code, companies may also want to consider what, if any, dealings outside the closed periods they will allow to take place at times when inside information exists, particularly where these dealings are currently permitted under the Model Code. Under MAR, there is a new presumption that a person who deals while in possession of inside information has used that information.

Share dealing codes should not allow clearance to deal when the relevant person is in possession of inside information.

Notification of transactions

Under Article 19(1), a PDMR of a listed or AIM company must notify the company and the FCA of every transaction conducted on its own account relating to the shares

Key actions for insider lists

Action	Documents
Draw up permanent and deal-specific insider lists. There is also a separate form for issuers of securities admitted to SME growth markets. The insider list must contain the following information: • Name. • Birth surname. • Work direct dial and mobile telephone numbers. • Company name and address. • Function and reason for being an insider. • The date and time that access to inside information was obtained. • The date and time when access to inside information ceased. • Date of birth. • National identification number (not applicable for UK citizens). • Personal home and mobile telephone numbers. • Home address.	European Securities and Markets Authority standard form insider lists. Explanatory letters to insiders explaining obligations and containing acknowledgement forms.
Ensure that persons acting on the company's behalf, such as advisers, maintain their own insider lists and comply with the requirement to obtain acknowledgement from insiders of their duties and their awareness of applicable sanctions. The company will remain responsible for compliance, and must retain access to the insider list.	Explanatory letters to insiders explaining obligations and containing acknowledgement forms.

or debt instruments of that issuer or to derivatives or other financial instruments linked to them. The range of instruments caught by the new notification rules is wider than that under DTR 3 and includes debt instruments. The notification must be made promptly and no later than three business days (rather than the current four business days) after the date of the transaction. The same notification obligation applies to PCAs of the PDMR.

Companies must inform all PDMRs of their obligations under Article 19 in writing. They must maintain a list of all PDMRs and PCAs. All PDMRs must inform their PCAs in writing of their obligations under Article 19 and keep a copy of this notification.

The notification obligation is subject to a threshold of €5,000 per calendar year. The threshold of €5,000 should be calculated by adding, without netting, all transactions for the period. However, given that certain questions arise from this provision, including as to the exchange rate to be used for a conversion into euro, and the potential for mistakes to be made, it is likely that companies will choose to ignore the threshold and instead require PDMRs to notify transactions.

Article 19(6) sets out the prescribed content of the notification and a draft of the FCA's standard form of notification is available on its website. The notification must include the following information:

- The name of the person.
- The reason for the notification.
- The name of the relevant issuer or emission allowance market participant.
- A description and the identifier of the financial instrument.
- The nature of the transaction (for example, acquisition or disposal).
- The price and volume of the transaction.

The company must announce the above information through a Regulatory Information Service (RIS) no later than three business days following the transaction.

DISCLOSURE OF INSIDE INFORMATION

Article 17 of MAR (Article 17) requires an issuer to inform the public as soon as possible of inside information that directly concerns that issuer. For listed companies, Article 17 contains requirements relating to the disclosure and control of inside information that are similar to those currently covered in DTR 2. From 3 July 2016, DTR 2 will contain guidance and signposts to Article 17. Although the definition of inside information under MAR will change, there is little substantive difference between the current and the new definitions.

While Article 17 will apply to both listed and AIM companies, AIM has decided that it intends to retain AIM Rule 11 in the interests of the integrity of AIM and the maintenance of an orderly market. Therefore, AIM companies will need to comply with both AIM Rule 11 and Article 17 in respect of the disclosure of inside information. While the information covered by both rules is likely to be similar, they should be analysed separately.

Technical requirements

MAR contains technical requirements for the disclosure of inside information, including public disclosure (that is, through an RIS) and on the company's website. The most significant change is that all inside information that a company is required to disclose publicly will need to be maintained on its website for at least five years, rather than the current one year (*Article 17(1)*).

Delaying disclosure

AIM companies may currently delay the disclosure of inside information if it is an impending development or a matter in the course of negotiation, provided that this information is kept confidential.

Under Article 17(4) (as under the current regime for listed companies), a company may delay disclosure to the public of inside information provided that all of the following conditions are met:

- Immediate disclosure is likely to prejudice the legitimate interests of the company.
- The delay of disclosure is not likely to mislead the public.
- The issuer or emission allowance market participant is able to ensure the confidentiality of that information.

ESMA consulted in January 2016 on guidelines on the legitimate interests of issuers to delay inside information (*www.practicallaw.com/7-623-5131*). ESMA set out the following non-exhaustive list of six cases in which it considers that immediate disclosure is likely to prejudice an issuer's legitimate interests:

- Where the issuer is participating in negotiations where the outcome would likely be jeopardised by the immediate public disclosure of that information. ESMA notes that mergers and acquisitions would generally be considered to fall within this case.
- Where the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and the immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders, and jeopardise the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer.
- Where the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need the approval of another body of the issuer in order to become effective, provided that certain conditions are met. This is aimed only at companies with a dual board structure, that is, with supervisory and management boards.
- Where the issuer has developed a product or an invention and the immediate public disclosure of the information is likely to jeopardise the intellectual property rights of the issuer.
- Where the issuer is planning to buy or sell a major holding in another entity and the disclosure of the information would jeopardise the conclusion of the transaction.
- Where a transaction that has been announced previously is subject to a public authority's approval which is conditional on additional requirements, if the immediate disclosure of those requirements will likely affect the ability of the issuer to meet them and therefore prevent the final success of the deal or transaction.

However, in the policy statement, the FCA declined to amend its current position that, except in relation to impending developments or matters under negotiation, there are unlikely to be other circumstances where delay would be justified. Without further guidance or rule changes from the FCA or AIM once ESMA's list is finalised, it would be difficult to rely on these guidelines at this stage.

MAR imposes a requirement on a company to keep detailed records of the decision-making process when a decision is taken to delay disclosure (*see box "Key actions for delaying disclosure"*). The company must also notify the FCA immediately after announcement when disclosure has been delayed and, if required by the FCA, provide an explanation of how the conditions for the delay were met. ESMA has published draft technical standards that set out the prescribed content of the records to be kept and the notification to be made to the FCA (*www.practicallaw.com/8-619-7015*).

INSIDER LISTS

Listed companies will already be accustomed to keeping insider lists. Article 18 of MAR (Article 18) replaces the requirement for insider lists under DTR 2. Although many AIM companies already keep insider lists as a matter of good practice, they will be required to keep them from 3 July 2016 under MAR.

Article 18 requires companies and persons acting on their behalf to:

- Draw up a list of all persons who have access to inside information and who are working for them under a contract

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of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies (the insider list).

- Promptly update the insider list.
- Provide the insider list to the FCA as soon as possible on its request.

Insider lists will need to be in an ESMA-prescribed format and will include more personal information on insiders. MAR formalises the process for keeping lists of permanent insiders, comprised of those who are considered to have access to all inside information within the issuer at all times, as well as deal-specific lists. All those on the permanent list will automatically be deemed to be on each relevant deal-specific list.

Compliance

Companies must take all reasonable steps to ensure that any person on the insider list acknowledges in writing his legal and regulatory duties in respect of inside information and is aware of the sanctions applicable to insider dealing and the unlawful disclosure of inside information.

Where another person acting on behalf of the company maintains the insider list, the company remains fully responsible for complying with Article 18. The issuer must retain a right of access to the insider list (*see box "Key actions for insider lists"*).

AIM and MiFID II

It is possible that, subject to the satisfaction of certain criteria, AIM will look to apply for registration as an SME growth market under the MiFID II regime when it comes into force (which is now expected to happen in January 2018). This would mean some limited relaxation of MAR's requirements for AIM-traded companies, most notably as regards the requirement for issuers to draw up insider lists. That said, AIM-traded companies would still be required to: ensure that insiders acknowledge their legal and regulatory duties and are aware of the sanctions for breach; and provide an insider list to the competent authority on request.

It is not yet clear how much of a concession this would turn out to be in practice. It is clear, however, that from 3 July 2016 and until such time as AIM is registered as an SME growth market, AIM companies will be subject to MAR in full.

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