MARKET ABUSE REGIME

OVERVIEW FOR AIM COMPANIES

INTRODUCTION

The Market Abuse Regulation (**"MAR"**) introduces a new market abuse regime from 3 July 2016. MAR is designed to introduce a common regulatory framework on market abuse across the EU and generally will extend the scope and impact of the existing UK market abuse regulations, most notably in relation to AIM companies. In addition to MAR and accompanying EU regulations and guidance (some of which is still in draft form), the new regime will also require changes to be made to the Financial Services and Markets Act 2000 and the AIM Rules. The London Stock Exchange is consulting on proposed changes to the AIM Rules. Based on the consultation drafts, set out below is a brief overview of the key changes which will affect UK AIM companies.

DEALINGS BY PDMRS

Disclosure

Under the existing regime, the AIM Rules require all directors to disclose details of their dealings in an AIM company's shares. This obligation will be deleted and replaced with disclosure obligations set out in MAR applying to persons discharging managerial responsibilities (**"PDMRs"**) (and persons closely associated with them). The differences between the existing regime set out in the AIM Rules and the new regime under MAR include:

- broader application: PDMRs are all persons discharging managerial responsibility not just directors, although in many cases in AIM companies they will be the same people;
- increased scope: in addition to disclosures regarding shares and related financial instruments, the new regime extends to any dealings in an AIM company's debt instruments and related financial instruments;
- de minimis threshold: a de minimis threshold of €5,000 per calendar year will be introduced, below which transactions will not require disclosure. Whilst there is flexibility in MAR for competent authorities to increase the threshold up to €20,000, the FCA has confirmed that it does not intend to do so;
- PDMR disclosure: a PDMR must disclose details of his or his closely associated persons dealings in the AIM company's shares or debt or other financial instruments, using a specific template which is set out in EU regulations, to both the AIM company and the FCA within three business days of dealing. The AIM company is required to publish the information to the market within three business days of the dealing (even if it only receives notification from the PDMR on the third business day). Currently, the AIM Rules require disclosure by the company "without delay" and do not prescribe any specific time limit for the disclosure of dealings by directors to the company; and
- systems and controls: the proposed changes to the AIM Rules will require AIM companies to have a

reasonable and effective dealing policy setting out the requirements and procedures for directors' and applicable employees' dealings in any of its AIM securities.

Dealings during closed periods

Under the existing regime, directors and applicable employees are restricted from dealing during close periods. Broadly, this restriction remains but there are some noteworthy differences under MAR including:

- duration of prohibition on dealings: the new closed periods will be: (i) 30 calendar days before the announcement of the company's interim half year report; and (ii) 30 calendar days before the publication of the company's year end report which the company is required to publish under local laws or the rules of its trading venue. This is shorter than the current two month period under the AIM Rules;
- requirement for a dealing policy: whilst many AIM companies have a share dealing code in place, there is currently no requirement for them to do so. Revisions to the AIM Rules will require a dealing policy to be in place (with minimum content requirements being set out in the AIM Rules); and
- different exceptions to the prohibition: the AIM Rules currently permit the sale of shares during a close period in order to alleviate severe personal hardship; dealings where a director entered into a binding commitment prior to an AIM company being in a close period; acceptance of a takeover offer; and participation in a rights issue. Under MAR, an AIM company will be able to permit PDMR dealings in closed periods (i) in exceptional circumstances (for example severe financial difficulty), (ii) where the dealing is pursuant to an employee share scheme and it is not possible, under the terms of the scheme, for the dealing to take place outside the closed period, and (iii) where the dealing does not change the beneficial interest in the security.

ACTION TO TAKE:

- Ensure suitable processes are put in place to: (i) record the identity of PDMRs and persons closely associated with them; (ii) notify PDMRs of closed periods; and (iii) record clearances to deal;
- Revise the share dealing code so that it is MAR compliant and also complies with the minimum requirements set out in the AIM Rules (giving consideration to, for example, whether to require PDMRs to notify the company of dealings within 1 day so as to enable the company to have sufficient time to make its own notification with the 3 day deadline) and ensure the revised share dealing code is available to all relevant individuals; and
- Train PDMRs on the new regime and processes and inform them in writing of their obligations under the new regime.

INSIDE INFORMATION

Disclosure of Inside Information

Currently, AIM companies have to announce, without delay, any new developments which are not public knowledge which, if made public, would be likely to lead to a significant movement in the price of its AIM securities.

The AIM Rules indicate that information that would be likely to lead to a significant movement in the price of its AIM securities includes, but is not limited to, information which is of a kind which a reasonable investor would be likely to use as part of his investment decisions.

It is proposed that this obligation will remain in place and that AIM companies will also be required to comply with similar, but not identical, disclosure obligations under MAR. In relation to any given development or piece of information, an analysis of the disclosure obligations under both the AIM Rules and MAR will be required - compliance with one does not guarantee compliance with the other.

Delaying disclosure of inside information

As with the obligation to disclose inside information to the market, a dual regulatory regime will apply to AIM companies when determining whether disclosure can be delayed and AIM companies will need to consider both the provisions of the AIM Rules and the MAR regime when making this decision. Whilst the circumstances in which delay is permitted are broadly similar under each, they are not identical.

Under MAR, an AIM company will be required to notify the FCA if it has delayed the disclosure of inside information. This notification must be made immediately after announcement of the delayed inside information and must include specified information such as the date and time a 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. Therefore, AIM companies will need to keep careful records of decisions made by the board or any committee of the board to delay the disclosure of inside information to the market.

Insider lists

AIM companies and their advisers will be required to keep insider lists (ie lists of individuals who possess or have access to inside information) in a prescribed electronic format which is set out in EU regulations. This format requires detailed information to be included, including: personal home and mobile numbers, date of birth and personal home address. The new insider lists must be kept up to date in the prescribed electronic format.

AIM companies must take all reasonable steps to ensure that any person included 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. Even if third parties (eg advisers) maintain their own insider lists, the AIM company remains fully responsible for compliance and must always retain a right to access them.

ACTION TO TAKE:

- Ensure suitable procedures are in place in relation to: (i) making decisions on whether information is inside information and, if so, whether it needs to be disclosed; (ii) recording the reasons for any delay in disclosing inside information; (iii) ensuring written explanations of a decision to delay the disclosure of inside information can be provided promptly to the FCA; (iv) ensuring that inside information is clearly identified on the company's website and is available for a period of at least five years; and (v) obtaining a written acknowledgement from insiders of their duties/obligations as insiders;
- Prepare an insider policy and ensure this is made available to all relevant employees; and
- Prepare insider lists in the prescribed format (differentiating between permanent insiders and insiders relating to specific pieces of information) and, to the extent that information required to be included in the insider lists is not already held, gather this information.

MARKET SOUNDINGS

MAR will introduce new regulation around gauging the interest of possible investors in, for example, potential fundraisings or significant transactions by AIM companies. 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;
- inform the recipient of the consequences of possessing inside information (including the duty of confidentiality) and obtain his or her consent to being made an insider;
- make a record of the information given, the identity of the recipient (entity and individual) and the date and time of the disclosure;

- notify the recipient when the information provided ceases to be inside information; and
- retain the written records for a minimum of five years.

ESMA has published a consultation draft of guidelines for persons receiving market soundings.

ACTION TO TAKE:

- Train any employees who undertake market soundings on the new regime; and
- Ensure suitable procedures are put in place in relation to: (i) satisfying the record-keeping requirements; and (ii) the notification obligations.

SHARE BUY-BACKS

Currently, share buy-backs which fall within certain safe harbours do not constitute market abuse. Share buy-backs will continue to benefit from a safe harbour under the new market abuse regime provided that certain conditions are satisfied. These conditions include disclosure obligations and restrictions regarding the volume of shares that can be bought back. Whilst the conditions are similar to the existing safe harbour conditions, it is important to note that the method to calculate trading volumes is different under the new regime.

FURTHER GUIDANCE

For further guidance and advice on the market abuse regime, please get in touch with Alex Tamlyn, Martin Penn, Michael McKee, Tony Katz, Sam Millar, Ian Mason or your usual corporate contact at DLA Piper.