LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins Capital Markets Practice May 16, 2016 | Number 1969

Final Preparations for the Market Abuse Regulation

With less than two months until MAR takes effect, we set out below the practical steps London-listed issuers should take.

On 3 July 2016, the Market Abuse Regulation (2014/596/EU) (MAR) will come into force and replace the Market Abuse Directive (2003/6/EC). MAR will introduce a common EU-wide regulatory framework to combat market abuse. This regime will also apply to issuers listed on AIM.

As MAR is an EU regulation, it will be directly applicable in the UK and therefore existing UK legislation and regulation need to be conformed to MAR. The new regime is broadly similar to the existing UK regime, but there are a number of differences which will affect issuers' procedures, systems and controls which we discuss further below.

On 28 April 2016, the Financial Conduct Authority (the FCA) published its policy statement on the "Implementation of the Market Abuse Regulation" (the FCA Policy Statement), including a draft of the Market Abuse Regulation Instrument 2016 which sets out proposed changes to the FCA Handbook, which will come into force on 3 July 2016.

Legislative changes

The UK Government will amend relevant primary and secondary legislation to ensure compatibility with MAR. These amendments will be made by statutory instrument — a draft of the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 has been made available for comment.

Any provision in the FCA Handbook (in particular the Disclosure and Transparency Rules (the DTRs), the Listing Rules and the Code of Market Conduct) that has an equivalent provision in MAR will be deleted and replaced with a "signpost" to the appropriate MAR provisions. Where applicable, certain retained provisions in the FCA Handbook, which are currently binding rules, will be recast as guidance.

The London Stock Exchange (the LSE) has proposed changes to the AIM Rules for Companies (the AIM Rules) ahead of MAR's entry into force.

The FCA is the competent authority for MAR in the UK both for Main Market issuers and issuers with shares admitted to AIM.

Next steps for issuers

Issuers should:

- Identify what internal policies, systems and procedures will need to be reviewed and updated in order to comply with MAR (*e.g.*, internal share dealing codes, insider dealing policies, disclosure procedures and wall-crossing procedures), including changes to references to the appropriate legislation.
- Ensure that all staff are provided with training and guidance on any new policies and procedures.

Identification and disclosure of inside information

The definition of inside information under MAR is broadly the same as the definition under the current UK market abuse regime and the DTRs. As under the current rules, issuers will have an obligation to disclose to the public all inside information relating to the issuer as soon as possible. There are, however, certain changes with respect to how inside information is disclosed on an issuer's website.

For AIM issuers, the LSE is proposing to retain AIM Rule 11 as currently drafted, the purpose of which is to maintain a fair and orderly market in securities and to ensure that all users of the market have simultaneous access to the same information in order to make investment decisions. AIM issuers would have to comply with both AIM Rule 11 and the separate disclosure obligations in MAR. Compliance with AIM Rule 11 does not necessarily guarantee compliance with MAR and vice versa.

Next steps for issuers

Issuers should:

- Review how inside information is currently displayed on their website and consider if they are in compliance with the new requirements that the information be in a clearly identifiable section.
- Change any processes that delete inside information from a website after one year as now such information will have to be kept on an issuer's website for five years.

AIM issuers and their nominated advisers should be aware of the dual compliance regime described above.

Delaying disclosure of inside information

Under Article 17 of MAR, as is currently the case under the DTRs, an issuer may delay the disclosure of inside information provided certain conditions are satisfied. However, MAR introduces an obligation on the issuer to notify the FCA, in writing, of any delay once the information in question has been announced. The notification to the FCA will need to include certain specified information, including the date and time of the decision to delay the disclosure of inside information and the identity of all persons with responsibilities for such decision. If requested by the FCA, issuers must also provide a written explanation of how the conditions for delay were met (*e.g.*, how confidentiality was ensured). The European Securities and Markets Authority (ESMA) will publish guidelines setting out non-exhaustive lists of information that will be reasonably expected or required to be disclosed, legitimate reasons for delaying disclosure and situations in which delay is likely to mislead the public.

Next steps for issuers

Issuers should:

- Ensure systems are in place to provide the requisite notification to the FCA of any inside information the disclosure of which has been delayed.
- Ensure that detailed records are kept of when, how and by whom decisions to delay the disclosure of inside information are made so that sufficient information can be provided to the FCA if requested.
- Ensure that where the disclosure of inside information is delayed, internal procedures provide for the ongoing monitoring of the continued satisfaction of the conditions for delayed disclosure.
- Consider preparing template documents / forms that can be used to ensure appropriate contemporaneous records are kept satisfying these requirements.

Notification of PDMR dealings

The rules in DTR 3 on the disclosure of dealings by persons discharging managerial responsibilities (PDMRs) in an issuer's securities will be replaced with a signpost to Article 19 of MAR. Article 19 requires PDMRs and persons "closely associated" with them to notify the issuer and the FCA of all transactions in the issuer's securities on their own account — including any pledging or lending of such securities. MAR applies a de minimis threshold, whereby the notification obligation applies once a total amount of €5,000 has been reached within a calendar year (to be calculated without netting of transactions). The FCA will accept over-notification so issuers are welcome to notify all transactions, regardless of the threshold, in order to ease the burden of monitoring the threshold and avoid inadvertent breach.

Such notifications should be made by PDMRs promptly and no later than three business days after the date of the transaction — the current requirement under the DTRs is to notify within four business days. The issuer has an obligation to publicly announce the information promptly and, in any event, no later than three business days after the date of the transaction (rather than after the date of receipt of notification by the issuer). The FCA is considering these reporting requirements further given that the time periods for notification by PDMRs to the issuer and the FCA and public disclosure by the issuer are effectively the same.

Article 19 will also apply to AIM issuers and the LSE is proposing to delete the current requirements in AIM Rule 17 to disclose directors' dealings.

Next steps for issuers

Issuers should:

- Determine whether to require the notification by PDMRs of all dealings in the issuer's securities regardless of the *de minimis* threshold.
- Amend the notification period for PDMRs to three business days in internal share dealing codes and policies — issuers may wish to provide for a shorter period (*e.g.*, one or two business days) to enable them to comply with their own obligations under MAR to announce within three business days of the transaction.
- Review their procedures for monitoring and recording PDMR dealings, so as to know when the *de minimis* threshold has been reached (unless an issuer takes the approach that all dealings by a PDMR are to be notified to the issuer which should be specifically stated in any internal share dealing code or policy).

PDMRs should:

- Keep a detailed record of all transactions in the issuer's securities to be able to identify when the *de minimis* threshold has been exceeded and a notification is required.
- Receive appropriate training and guidance on their obligations under the new MAR regime and any updates to internal share dealing codes and other policies implemented as a result of MAR; in particular, PDMRs will need to be educated on the new timing requirements and the definition of "closely associated persons", which differs somewhat from the existing "connected persons" definition under DTR 3 and the existing definition of "family" under the AIM Rules.

Restrictions on PDMR dealings in a closed period

Article 19 of MAR also provides that a PDMR should not trade in the issuer's securities on their own account during a "closed period", defined as 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public. Under the current Model Code annexed to Chapter 9 of the Listing Rules, periods prior to the publication of a preliminary announcement and quarterly announcement are treated as closed periods and dealings by PDMRs in securities of the issuer are prohibited during this time. However, as preliminary announcements and quarterly reporting are not mandatory, they are not caught by the definition of "closed period" in MAR. In the UK it is customary for issuers to release a preliminary announcement of their annual results some time before publishing their year-end report. As a preliminary announcement is not required by UK law, the MAR closed period would only apply in the 30 days prior to publication of the issuer's year-end report and the closed period would not end on publication of the preliminary announcement as is currently the case under the Model Code. The FCA is currently considering further how to interpret this requirement of MAR in light of preliminary announcements and quarterly reports.

The range of permitted exceptions for dealings during a "closed period" are narrower than under the current Model Code — for example, there is no equivalent to the current exceptions in the Model Code which permit certain dealings connected to a rights issue or a takeover offer or dealings under a trading plan where the PDMR has no influence or discretion. The Model Code requirement that PDMRs seek to prohibit dealings by their connected persons during a closed period is not included in MAR, although issuers may wish to retain such a requirement. In its FCA Policy Statement, the FCA confirmed that the Model Code will be deleted and will not be replaced with new rules and guidance — as previously proposed — to avoid creating an overly onerous two-tier compliance regime for PDMRs. Despite this the FCA welcomed an industry-led development of a share dealing code or best practice.

Article 19 will also apply to AIM issuers and duplicate obligations will be removed from the AIM Rules. The LSE has proposed that AIM Rule 21 will be replaced with a new rule that will require all AIM issuers to have a reasonable and effective dealing policy, the minimum provisions for which will be set out in the AIM Rules, and to require nominated advisers to consider this as part of their responsibilities. This obligation will be separate to an AIM issuer's compliance with Article 19.

Next steps for issuers

Issuers should:

- Update internal share dealing codes and policies to track the requirements of Article 19 of MAR. AIM issuers will also be required to comply with the proposed changes to the AIM Rules summarised above.
- Keep an eye out for the final FCA policy on closed periods leading up to the release of preliminary announcements and quarterly results and ensure that internal share dealing codes are updated to reflect the final position. The LSE has also indicated that it will consider making changes to the AIM Rules or issuing further guidance once the application of MAR with respect to preliminary results statements is clarified.
- Provide briefings to PDMRs and work with PDMRs to identify any current arrangements (*e.g.*, personal trading policies or "10b5-1 plans") that may be problematic under the new regime.

Clearance to deal for PDMRs

There is no clearance procedure for or restrictions on PDMR dealings outside closed periods under Article 19 of MAR. As such, issuers are free to develop their own clearance procedures and policies governing dealings outside closed periods.

Next steps for issuers

Issuers should consider what form of clearance to deal procedures, if any, they wish to implement or retain (to the extent such procedures have already been implemented).

Insider lists

The requirement in DTR 2.8 for an issuer to maintain an insider list will be deleted and replaced with a signpost to Article 18 of MAR.

The requirement to maintain an insider list will remain broadly the same. However the content and format requirements for insider lists will be more prescriptive under MAR. The precise format and information required will be contained in templates to be produced by ESMA will produce which require details including the insider's name, business telephone number, date of birth and full business address.

In addition, issuers will be required to take all reasonable steps to ensure that persons added to an insider list acknowledge in writing the legal and regulatory duties entailed and the sanctions applicable to insider dealing and the unlawful disclosure of inside information. Furthermore, the issuer will be required to notify an employee in writing that they have been added to an insider list.

Next steps for issuers

Issuers should:

- Review and update insider list templates and consider how information gathering requirements for MAR insider lists can best be integrated into existing systems and procedures.
- Review and update processes for obtaining confirmations of acknowledgement from insiders and notifying employees that they have been placed on an insider list.

- Seek appropriate confirmations from advisers that they will comply with the MAR requirements with respect to insider lists.
- Consider what consents or other steps may be required in order to store personal contact information in accordance with local data protection and labour laws.

AIM issuers will need to introduce new systems and controls in order to comply with the requirement to maintain insider lists (previously only applicable to issuers on the Main Market).

Market soundings – the wall-crossing process

MAR is introducing a new regime for the disclosure of inside information to potential investors during "market soundings" (also known as wall-crossings) which comprise the communication of information to one or more potential investors prior to announcement of a transaction in order to gauge their interest in a possible transaction and the conditions relating to it, such as its potential size or pricing. MAR provides for a safe harbour to the offence of unlawfully disclosing inside information for market soundings carried out in accordance with the requirements as to disclosure and record-keeping. Amongst other obligations, MAR will require any issuer or person acting on an issuer's behalf (*e.g.*, brokers or investment banks), prior to conducting a market sounding, to consider whether the sounding will involve the disclosure of inside information and to keep a written record of its conclusions and reasoning. Even where information is deemed not to be inside information, a written record will still need to be kept.

Next steps for issuers

Issuers wishing to conduct market soundings from 3 July 2016 should ensure that their policies and procedures are consistent with the new rules under MAR and ESMA guidance and that employees who conduct market soundings are properly trained.

Buy-backs

The FCA will delete the restrictions in the Listing Rules on an issuer undertaking share buybacks, transferring treasury shares or dealing in its securities in prohibited periods. It is likely that issuers will continue to conduct closed period buybacks via a pre-arranged programme operated independently by a broker to guard against any suggestion of market abuse. Critically, issuers will need to consider possible market abuse implications before transferring treasury shares or undertaking any other dealings in their securities if they are in possession of inside information.

MAR contains a safe harbour under the market abuse regime for share buyback programmes which is expected to operate in a manner substantially similar to the safe harbour under the existing market abuse regime.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Claire Keast-Butler
claire.keast-butler@lw.com
+44.20.7710.3014
London

Richard Brown
richard.brown@lw.com
+44.20.7710.1169
London

Ariel White-Tsimikalis
ariel.white-tsimikalis@lw.com
+44.20.7710.1819
London

You Might Also Be Interested In

Market Abuse Regulation

FCA Policy Statement

LSE Guidance on MAR for AIM issuers / AIM Notice 44