

Countdown to the new market abuse regime

INTRODUCTION

Starting 3 July 2016, the European Market Abuse Regulation (596/2014)(**the Regulation**) will apply directly in all EU Member States. The articles of the Market Abuse Directive (2003/6/EU) that are currently implemented in the Dutch Financial Supervision Act (**FSA**) will be abolished on 3 July 2016 and replaced by the Regulation. The Regulation is elaborated in secondary EU legislation, guidelines and technical standards, some of which are still in draft form, so subject to changes.

In combination with the Regulation, the European Directive on criminal sanctions for insider dealing and market manipulation (2014/57/EU)(**the Directive**) has to be implemented by the Dutch legislator on 3 July 2016 at the latest. The Directive increases the criminal sanctions for violation of the Regulation. However, because the Dutch criminal sanctions already fulfil these standards, the Directive will not lead to material changes. Nevertheless, the Dutch government has taken this opportunity to diversify and increase the severity of the administrative sanction regime for violation of the Regulation. The Authority for the Financial Markets (**AFM**) will, for example, be able to give a public warning

to disclose the name of the person responsible for the infringement, impose a temporary ban of a person from dealing on own account, and will have the power to impose maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of such infringement. The Dutch implementation of the Directive, as well as secondary EU legislation on market abuse, is still in draft form, so changes may still occur.

In this e-Alert, we inform you about the changes that are introduced by the new market abuse rules that will replace existing Dutch rules in this area. We also provide a checklist with actions for issuers.

GENERAL: BROADER SCOPE

The new market abuse rules have a broader scope.

They will apply to:

- issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State;
- issuers who have approved trading or have requested admission to trading of their financial instruments on a multilateral trading facility (MTF) in a Member State; and
- issuers who have approved trading of their financial instruments on an organised trading facility (OTF) in a Member State. [N.B. The concept of OTFs is introduced by MiFID II. Due to the proposed delay of MiFID II, it is expected that the concept of OTFs will only enter into force on 3 January 2018.]

INSIDER LISTS

Issuers are no longer allowed to use their own form of insider list – new templates will now have to be used. There are templates for deal-specific insider lists. Issuers can also prepare an insider list for permanent insiders.

Insiders have to confirm in writing that they are aware of their legal and regulatory duties and of the sanctions for market abuse.

INSIDER DEALING

The scope of the prohibition of insider dealing will be broader: the use of inside information by the acquiring or disposal of financial instruments will be considered insider dealing, as will the cancelling or amending of an order concerning a financial instrument, where the order was placed before the person concerned possessed such inside information.

IDENTIFYING AND HANDLING INSIDE INFORMATION

Delay in publication

The Regulation imposes the obligation to inform the AFM if disclosure of inside information was delayed. This has to be done immediately after the information is made public. Upon request of the AFM, the issuer will have to provide a written explanation to the AFM showing justification for the delay. Secondary EU legislation will prescribe the information that needs to be included in the written explanation.

The obligation results in a need for a more robust analysis of whether or not to make a public announcement and, as an example, the need to keep a detailed account of the chronology of circumstances surrounding any decision taken.

New requirements for delay in publication for issuers that are financial institutions

In order to preserve the stability of the financial system, issuer that are financial institutions will be able to delay public disclosure of inside information, including that relating to a temporary liquidity problem, if:

- such disclosure would risk undermining the financial stability of the issuer and the financial system;
- it is in the public interest to delay such disclosure;
- the confidentiality of the information can be ensured; and
- the AFM has consented to the delay.

MANAGERS' TRANSACTIONS

Notification

The following changes will occur relating to the notification of transactions by 'persons discharging managerial responsibilities' (PDMRs) and the persons closely associated with them (e.g. spouse, children):

- the scope of transactions that have to be notified is broadened; it now includes debt instruments and related financial instruments;
- the notification has to be made not only to the AFM, but also to the issuer;
- the term for the notification has been shortened from five to three business days;
- new templates are prescribed for making the notifications.

[N.B. The existing uncertainty over who is in scope as PDMR remains under the Regulation.]

Closed periods

The new closed periods under the Regulation will be 30 calendar days before the announcement of an interim financial report, or a year-end report, which the issuer is obliged to make public. During a closed period a PDMR may not conduct any transactions on its own account or for the account of a third party relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them. It is possible to seek clearance from an issuer in certain limited circumstances, such as transactions made under or relating to an employee share plan or saving scheme that fulfils certain requirements.

Issuers will have to amend their insider trading codes to reflect the above. As from 3 July 2016, the 30 calendar day period will apply even if the code is not yet amended.

MARKET SOUNDINGS

Issuers must amend their IR policy to reflect the new rules on market soundings. The Regulation sets out more detailed rules for sounding out large shareholders in advance of general meetings of shareholders. Issuers may only approach shareholders whose co-operation is reasonably necessary, e.g. because of the size of their shareholdings. In the course of such a market sounding inside information may be disclosed if the issuer has first:

- (a) obtained the consent of the investor to receive inside information;
- (b) informed the investor that he cannot trade in, nor cancel or amend an existing order for the relevant financial instruments;
- (c) informed the investor that by agreeing to receive the information he is obliged to keep the information confidential; and
- (d) kept a record of his considerations whether inside information is to be disclosed, and the reasons therefore.

The record-keeping obligation applies to each disclosure of information throughout the course of a market-sounding process, therefore the written records may have to be updated after each disclosure.

A number of templates have been prepared that need to be used in connection with the process of market soundings.

Actions for issuers

PUBLIC DISCLOSURE OF INSIDE INFORMATION

- Update procedures for identifying and delaying the disclosure of inside information¹ (robust record-keeping and use of new templates required), and check the indicative list of legitimate interests of issuers to delay the disclosure of inside information². Record-keeping must, among other things, enable the provision of a written explanation that contains the justification for the delay of public disclosure, because the AFM can request such an explanation.
- Update procedures to inform the AFM, immediately after the information is publicly disclosed, that such disclosure of information was delayed.

INSIDER LISTS

- Consider how to obtain the comprehensive data needed to populate the new-style insider list(s)³ and processes required to ensure data is updated and protected.
- Consider what amended documentation and systems are needed because, for example, all insiders have to acknowledge awareness of their duties and of the sanctions for market abuse in writing.
- Decide whether to keep a permanent insider list.

MARKET ABUSE POLICIES

- Update the Insider Trading Policy, manual, training material, etc., for example, to reflect the new closed periods, to refer to the MAR for the material market abuse provisions and to incorporate the broader scope of the insider dealing prohibition and the new sanctions regime.
- Update procedures to comply with the extensive and stricter notification obligation of PDMRs and the persons closely associated with them (e.g. spouse, children). Also consider whether to impose tighter deadlines internally, because the AFM must be notified within three business days.
- Make use of the new templates⁴ that are required to be used for the notification of PDMR transactions.
- Hold internal training on the new rules for the board and other employees.

MARKET SOUNDINGS

- Amend existing IR policies for contacts with large shareholders, to ensure discussions benefit from the new market soundings' safe harbour (pre-disclosure requirements and record-keeping).⁵

¹ Link to draft regulation for record-keeping regarding delaying disclosure of inside information (draft document): https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf (page 294-299).

² Link to draft regulation for legitimate interests regarding delaying disclosure of inside information (draft document): <https://www.esma.europa.eu/sites/default/files/library/2016-162.pdf> (page 29-30).

³ Link to final version of insider list templates (final document): <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0347&from=EN> (page 5-6).

⁴ Link to final version of notification templates (final document): <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0523&from=EN> (page 3-4).

⁵ Link to draft regulation for record-keeping (draft document): <http://data.consilium.europa.eu/doc/document/ST-9030-2016-INIT/en/pdf>.