AIM Notice No 44 – proposed changes to the AIM Rules for companies in relation to the Market Abuse Regulation (MAR)

City of London Law Society and Law Society Company Law Committees Joint Market Abuse Working Party Response

Introduction

The comments set out in this paper have been prepared jointly by the Market Abuse Joint Working Party of the Company Law Committees of and the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**)

The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The Law Society is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

The Market Abuse Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to capital markets.

General introduction on CLLS

We have reviewed the proposed changes to the AIM Rules and the rationale as set out in AIM Notice 44 and the Inside AIM edition of 29 April 2016 and have the following comments.

AIM Rule 11 – disclosure of price sensitive information

We note the Exchange's stated policy reasons for retaining AIM Rule 11. However, we have been unable to think of any case where:

- information that would be required to be disclosed pursuant to AIM Rule 11 would not also be inside information for the purposes of MAR (and so disclosable under MAR, subject to the ability under MAR Article 17 to delay disclosure); or

- an issuer would be entitled to delay the disclosure of inside information under MAR Article 17, but should not also be able to delay disclosure under AIM Rule 11.

It would be very helpful if the FAQ that the Exchange has indicated it will be producing would give one or more examples of the circumstances in which, or explain the circumstances in

which, the Exchange believes that an announcement is required under AIM Rule 11 but not under MAR. In the absence of any assistance for issuers and their Nominated Advisers (and their respective advisers) to understand and identify any gap between the requirements of MAR and of AIM Rule 11, we do not think it appropriate for the Exchange to retain AIM Rule 11 once MAR applies. We appreciate that the Exchange wishes to be able to take its own disciplinary action with respect to Rule 11 breaches, and to ensure the continued interface with Nominated Advisers, but this could be achieved by Rule 11 simply requiring that AIM companies comply with MAR.

AIM Rule 17

It would be helpful if in AIM Rule 17 the Exchange were to signpost the templates in the Level 2 Regulation (2016/523) for PDMR notifications, which PDMRs and their persons closely associated will need to use. We also suggest that the non-exhaustive list of notifiable transactions set out in Article 10 of the Level 2 Regulation (2016/522) should be signposted.

AIM Rule 21

It seems disproportionate to require AIM companies to adopt a dealing code when companies with a premium listing on the Official List will no longer have to do so. It is also unduly onerous on AIM companies that they are expected to update their policies to ensure compliance with the proposed new rule by 3 July 2016. We also query whether the words "reasonable and effective" are necessary or useful. No criteria are set out for what is "reasonable". Effective could be dealt with by providing that an AIM company must have in place from Admission and monitor [and enforce] a dealing policy.

If, as stated in AIM Notice 44, the Exchange's policy is to have a meaningful way to support the new MAR requirements, we suggest that this could be achieved simply by providing in Rule 21 that "an AIM company must ensure that its PDMRs do not deal in any of the AIM shares or debt instruments or derivatives or linked financial instruments during a MAR closed period" and that "MAR closed period" is defined. The Guidance to AIM Rule 21 could then state that an AIM company should consider adopting a dealing policy to ensure compliance by its PDMRs with AIM Rule 21. If the Exchange requires a dealing policy as per its proposed amendment to AIM Rule 21 (which under proposed AR5 of Schedule 3 of the AIM Rules for Nominated Advisers, the Nominated Adviser is required to review) clarification is required as to what the dealing policy should contain. The same point applies if a dealing policy is referred to only in Guidance to AIM Rule 21. The proposed amended Rule 21 states that it must set out "when a director or applicable employee must obtain clearance to deal in the AIM securities of the AIM company". It is not clear whether the Exchange considers that clearance must always be obtained or only during MAR closed periods. Also, given that the scope of the MAR is much wider than AIM Securities (as defined in the AIM Rules), any dealing policy must surely also cover dealings in debt instruments, derivatives and financial instruments linked to AIM securities or debt instruments of the AIM company. There is no guidance given as to when it is appropriate for clearance to deal to be given and no signpost to the MAR Level 2 Regulation. It is very difficult to see how an AIM company can assess this without guidance.

We would also point out that Article 19(11) of the MAR restricts dealings by PDMRs during a MAR closed period and the definition of PDMR is much narrower than that of "applicable employee" under the AIM Rules, leading to a mismatch with companies with a listing on a regulated market in the UK.

Preliminary statement of annual accounts

We note that the Exchange is considering making changes to the AIM Rules once it has been made clear (expected through ESMA guidance) whether or not an issuer is able to end its MAR closed period through the publication of a preliminary statement. Currently the AIM Rules do not provide for preliminary statements although the Exchange has stated in Inside AIM Issue 5 that it is routinely able to agree that a closed period for accounts ends upon the publication of preliminary results. If, as is hoped, ESMA's guidance is that a preliminary statement does end the MAR closed period, it will in any event be necessary to include a provision in the AIM Rules that, should an AIM company choose to publish a preliminary statement of its annual results, it is obliged to make then public as soon as possible. Only then, could the preliminary statement fall under Article 19(11) as an announcement which the issuer is obliged to make public according to the rules of the trading venue where the issuer's shares are admitted trading.

We are suggesting that AIM companies should have the option as to whether or not to make a preliminary statement of their annual results as many AIM companies do not currently do so. They should also be required to make public whether or not they are exercising that option and any change.

Consequential changes to the AIM Rules for nominated advisers

We have commented above on the proposed changes to AIM Rule 21. If our suggested amendment to Rule 21 is adopted, AR5 should be amended to delete the "and review the AIM Company's Rule 21 dealing policy" and replace it by "review compliance with AIM Rule 21".

We are happy to discuss the points made in the paper or the drafting of the amendments to the AIM Rules with the Exchange.

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