

5 July 2019

## Circular on the Market Abuse Regulation (EU) 596/2014 (‘MAR’ or the ‘Regulation’) - List of Insiders

This Circular is being addressed to all issuers of financial instruments, admitted to trading on a trading venue or for which a request for admission to trading has been made, and to any persons acting on their behalf or on their account in terms of Article 18 of MAR.

As you are aware, Article 18 of MAR requires, issuers or any persons acting on their behalf or on their account to draw up, and promptly update, a list of all persons who have access to inside information and who are working for them under a contract of employment or otherwise performing tasks through which they gain access to inside information.

### 1.0 Purpose of Lists of Insiders

The Authority holds List of Insiders (‘LOI’) in high regard, particularly given the LOI’s importance towards strengthening market integrity. The main purposes of drawing up and keeping updated LOIs are, on the one hand, to assist the Authority to monitor insider trading and, on the other hand, to assist issuers in controlling the flow of inside information, in order to prevent persons with access to inside information from using it for their own gain or for the gain of others. Therefore, LOIs help issuers manage their confidentiality duties, since including persons on the LOI, makes those individuals aware that they are in possession of information, which the issuer considers as inside information.

### 2.0 Who is required to draw up the List of Insiders and when?

An issuer who has requested the admissibility to trading or has the approval for the admissibility to trading of its financial instruments on a trading venue<sup>1</sup> in Malta, or for which a request for admission to such a facility has been submitted, or persons acting on behalf or for the account of the issuer, must draw up and update a list of all persons that have access to inside information.

The obligation to draw up an LOI arises as soon as there is inside information. MAR defines inside information as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of

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<sup>1</sup> As defined under Article 4(1)(24) of Directive 2014/65/EU

those financial instruments. Therefore, inside information is information that reasonable investors would likely use as part of the basis of their investment decisions.

Article 18 of MAR states that the obligation of drawing up and keeping updated a list of insiders applies to issuers or any person acting on their behalf or on their account. Therefore, the obligation to keep an insider list also applies to all those who are working for the issuer under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as for instance, advisors, consultants and accountants/auditors. Such persons shall draw up, update and, upon request, submit their insider list to the MFSA.

The above has been clarified by ESMA in its [Questions and Answers](#) on the Market Abuse Regulation ('ESMA Q&As'). Answer 10.1 thereof states that, *"the legislative aim of the insider list regime under MAR is to cover any person that, by virtue of its action on behalf or account of the issuer, has access to inside information. Therefore, not only the issuer but also all the persons acting on behalf or account of the issuer that have access to inside information relating to the issuer (e.g. advisors and consultants) are subject to the obligation to draw up, update and provide to the NCA upon request their respective insider list under Article 18 of MAR."*

The list of insiders of issuers who have persons acting on their behalf or on their account ('Service Providers'), shall reflect that such persons have been engaged and are privy to inside information. Where the Service Provider is not a natural person, it shall be sufficient to provide the identity of a contact person within the Service Provider. All of the information prescribed by Annex I of Commission Implementing Regulation (EU) 2016/347 (the 'Implementing Regulation') must be provided for such contact person in the insider list of the issuer. The Service Provider is then obliged to draw up and keep updated an LOI delineating employees which are privy to inside information relating to issuer(s) whose securities are admitted to trading on a trading venue or which have requested admission to trading.

## 2.1 Exemption

MAR allows a more flexible regime for SME growth market issuers. According to Article 18(6) of MAR, issuers whose financial instruments are admitted to trading on an SME growth market shall be exempt from drawing up an insider list, provided that the following conditions are met:

- a. the issuer takes all reasonable steps to ensure that any person with access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information; and
- b. the issuer is able to provide an insider list to the MFSA, upon request.

The Authority would like to clarify that, as at the date of publication of this circular, there were no SME growth markets issuers in Malta.

### 3.0 Who is responsible for the List of Insiders?

Please note that the person who is obliged to keep an insider list is always fully responsible for ensuring that the applicable provisions of MAR are complied with, even when they delegate the task of drawing up and updating the insiders list to a third party.

There is a difference between the obligation of the issuer or any person acting on their behalf or on their account to keep an insider list, and the option provided under Article 18(2) of MAR allowing the party obliged to keep an insiders list to delegate its duties to a third party. In the latter case, the party obliged to keep an insider list shall remain responsible for maintaining the list (even if it entrusts a third party with the task of drawing up the insiders list).

In this respect, reference is made to Answer 10.2 of the ESMA Q&As which states that, ***“the issuer remains fully responsible under the second subparagraph of Article 18(2) of MAR only where a service provider “assumes the task of drawing up and updating the insider list” of the issuer, on the basis of a specific delegation to that purpose. The issuer is not responsible for the fulfilment of the insider list requirements of the persons acting on its behalf or account mentioned in Article 18(1) of MAR and first subparagraph of Article 18(2) (e.g. advisors and consultants) who are personally responsible for the obligation to draw up, update and provide to the NCA upon request their own insider list. Where the person that “assumes the task of drawing up and updating the insider list” of the issuer under the second subparagraph of Article 18(2) of MAR is also a person acting on behalf or account of the issuer under Article 18(1) of MAR (e.g. advisors and consultants), that person will be responsible for the obligation to draw up, update and provide to the NCA upon request its own insider list. The issuer will remain responsible for complying with the insider list requirements in relation to its own insider list, the drawing up and updating of which has been delegated to the same person as part of a separate agreement.”***

### 4.0 Who should be included in the List of Insiders?

Whereas issuers are expected to make their own assessment as to who should be included in their LOIs, by way of guidance, the LOI should include all company employees<sup>2</sup> or otherwise, that have access to inside information. The LOI may include, but is not limited to;

- Team members/employees who are in possession of inside information;
- Administrative staff with access to emails or other records containing inside information;
- Compliance staff with access to inside information;
- IT employees who obtain access to inside information due to a specific project; and
- Senior management with access to inside information.

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<sup>2</sup> Persons who gain knowledge of inside information by chance, or unlawfully would not be expected to be included in the insider list, unless the party obliged to keep the insider list has become aware that these persons have gained knowledge of inside information.

As aforementioned, when an issuer has engaged a service provider which is not a natural person, the issuer shall include in its list of insiders, the identity of at least one contact person.

## 5.0 Temporary and Permanent Lists of Insiders

Within an entity, multiple pieces of information may exist at the same time. Therefore, in terms of the Implementing Regulation, the list of insiders should identify the particular pieces of inside information to which persons working for issuers have or have had access to. Consequently, the list of insiders should be divided into separate sections for each piece of inside information. Therefore, lists of insiders should be drawn up by issuers on a deal-specific, project-specific or event-specific basis whereby each section lists all the persons with access to **the same specific piece of inside information (hereinafter referred to as the 'Temporary LOI')**.

Furthermore, a company may have individuals who, due to their role, function or position within the issuer, would always have access to all inside information of the issuer. Thus, an issuer may decide to draw up a supplementary LOI in order to avoid multiple entries of the same individuals in different section of the insider lists. The supplementary LOI is also often **referred to as the Permanent List of Insiders ('Permanent LOI')**.

This being said, the Authority would like to clarify that whereas it is mandatory for an issuer to prepare and keep up to date at all times, the Temporary LOI, the Implementing Regulation gives discretion to the Issuer as to whether to draw up a Permanent LOI or otherwise. Although **drawing up a Permanent LOI is at the issuer's discretion, the MFSA strongly recommends that** issuers hold such Permanent LOI, as it would avoid the same individuals being included under different sections of the Temporary LOI.

### 5.1 Information to be included in the Insider Lists

In accordance with Article 18(3) of MAR the list of insiders should include at least:

- (a) the identity of any person having access to inside information;
- (b) the reason for including that person in the insider list;
- (c) the date and time at which that person obtained access to inside information; and
- (d) the date on which the insider list was drawn up.

The MFSA however requests that all of the information prescribed by Annex I of Commission Implementing Regulation (EU) 2016/347 is provided in the list of insiders.

The Authority has prepared templates for both Temporary LOI and Permanent LOI which issuers and persons submitting lists of insiders to the MFSA are required to use. Such templates ensure that lists of insiders are drawn up in accordance with the requirements contained in the

Implementing Regulation and provide harmonisation in the submission of information, hence facilitating data processing by the Authority. The templates are available on the MFSA website through the following links:

- [Permanent LOI](#)
- [Temporary LOI](#)

## 6.0 Updating the Insiders List

In terms of Article 18(4) of MAR, issuers or any person acting on their behalf or on their account, shall update the insider list promptly, including the date of the update, in the following circumstances:

- a. where there is a change in the reason for including a person already on the insider list;
- b. where there is a new person who has access to inside information and needs, therefore, to be added to the insider list; and
- c. where a person ceases to have access to inside information.

Each update shall specify the date and time when the change triggering the update occurred.

With respect point (c) above, one of the most probable instances when an individual ceases to have access to inside information is when the inside information becomes public information. A person listed on the temporary LOI of an issuer, who is no longer privy to inside information has to remain on the list, but the issuer is required to provide the date and time when such person ceased to have access to inside information. On the other hand, a person listed on the permanent LOI of an issuer, who is no longer privy to inside information, is expected to be completely deleted from the list. Additionally, issuers are also expected to adhere to their record keeping requirements, as outlined below.

Although the company is expected to promptly update the list of insiders, it must ensure that all versions of the insider list at different points in time are recorded for auditing purposes. In the eventuality that the Authority requests information in relation to which individuals had access to inside information concerning a particular deal or event, what the information was and when they had access to it, the issuer needs to be in a position to promptly respond to such request.

## 7.0 Record Keeping: How long, where and how should an Insider List be kept

Issuers or any person acting on their behalf or on their account shall draw up and keep the insider list up to date in an electronic format in accordance with Template 1 of Annex I of the Implementing Regulation. Every LOI shall be kept for a minimum period of 5 years from the

date when it was drawn up, or if it has been updated, from the date of last update. The LOI must be drawn up in electronic format which ensures:

- a. the confidentiality of the information included by ensuring that access to the insider list is restricted to clearly identified persons from within the issuer or any person acting on their behalf or on their account that need that access due to the nature of their function or position;
- b. the accuracy of the information contained in the insider list;
- c. the access to and the retrieval of previous versions of the insider list.

Therefore, when an insider list is updated, updates should be made in a new version of the LOI, in a way which ensures that the outdated information is not lost. This also helps maintain an effective audit trail whereby all versions of the insiders list can be retrieved during the stipulated five-year period.

## 8.0 **Company's Obligations with respect to Employees listed on the List of Insiders**

### 8.1 **Insiders' Acknowledgements**

Issuers and or persons acting on their behalf or on their account, are obliged to take all necessary steps to make sure that each individual with access to inside information acknowledges in writing the legal and regulatory duties entailed in having access to inside information as well as being made aware of the penalties applicable to insider dealing and unlawful disclosure of inside information, in accordance with Article 18(2) of MAR. For clarification purposes, in the case where issuers have persons acting on their behalf or on their account, such Service Providers are required to inform their employees of their duties under MAR.

An employee acknowledgement is required only the first time the individual is added to the list of insiders. Thereafter, the individual may be added to other sections within the Temporary LOI without the need to obtain an acknowledgment, although some companies may prefer sending an acknowledgement every time the individual is added to different sections of the insiders list.

As soon as an individual ceases to be on any section of the list of insiders, another acknowledgement should be sent if the individual is added back to any section of the insider list.

### 8.2 Training

The Authority recommends that, companies ensure that appropriate communication and training programmes are implemented, such that existing and future employees who have

access to inside information are made aware and can understand their obligations as insiders in terms of MAR.

### 8.3 Staff Dealing

The Authority would like to clarify that the Regulation does not explicitly prohibit company employees from entering into transactions relating to the financial instruments of the company. MAR however prohibits dealing on the basis of inside information. Accordingly, in terms of Article 8 of MAR, company employees who are privy to inside information cannot trade where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. Nevertheless, kindly note that it shall not be deemed from the mere fact that a person is or has been in possession of inside information, that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal. In this respect, Article 9 of MAR sets out a number of circumstances where it shall not be deemed, solely based on those circumstances, that insider dealing has occurred.

The Authority understands that issuers or any person acting on their behalf or on their account should ensure that it has effective internal arrangements and procedures to regulate and monitor employee dealing and share schemes in place.

### 8.4 Access and Control of Inside Information

The company needs to ensure that the access to the insider list is restricted, that is, only a **selected number of individuals can access it. Therefore, a “need to know” policy may be applied.** In addition, IT systems are vital in order to control access to inside information. The company can consider password protection to restrict access to inside information as well as secure access databases and/or encryption software for the inside information to be stored and protected.

Kindly note that the Authority considers the obligations contained in Article 18 of MAR as an essential and critical element for ensuring transparency and investor protection in European financial markets. Consequently, the MFSA seeks to ensure that issuers or persons acting on their behalf or on their account are fully compliant with the requirements of Article 18 of the Regulation. Issuers or persons acting on their behalf or on their account are expected to draw up and keep updated at all times, a list of insiders in accordance with the provisions of MAR, and to provide the MFSA with such list immediately upon request.

The Authority appreciates if issuers or persons acting on their behalf or on their account, immediately submit updated lists of insiders every time a change is affected thereto, outlining the updates being made.

**Kindly note that failures to accede to the MFSA’s request to provide updated lists of insiders by the stipulated deadline, could result in a possible breach of Article 18 of MAR.**

**Where the MFSA is satisfied that a person's conduct amounts** to a breach of, *inter alia*, Article 18 of MAR, the Authority may impose an administrative penalty in accordance with Article 22 of the Prevention of Financial Markets Act, Chapter 476 of the Laws of Malta.

#### Contact Points

Lists of Insiders and queries relating to the same should be submitted to the Authority on [pfma@mfsa.com.mt](mailto:pfma@mfsa.com.mt)