Insider dealing

The Authority for the Financial Markets

The AFM promotes fairness and transparency within financial markets. We are the independent supervisory authority for the savings, lending, investment and insurance markets. The AFM promotes the conscientious provision of financial services to consumers and supervises the honest and efficient operation of the capital markets. Our aim is to improve consumers' and the business sector's confidence in the financial markets, both in the Netherlands and abroad. In performing this task the AFM contributes to the prosperity and economic reputation of the Netherlands.

The AFM operates in two areas:

Financial services

The AFM promotes due care in the provision of financial services to consumers. Businesses and persons who provide financial services must be experts in their field, reliable and ethical. The information provided by financial undertakings and pension providers shall be accurate, clear and not misleading. Companies must act in the interests of their clients; a duty of care rests on them.

Capital markets

The AFM promotes the fair and efficient operation of the capital markets, on which investors can rely. We enforce the rules for participants in the markets for equities and other securities. Market abuse – use of inside information, market manipulation or misrepresentation – is forbidden. Listed companies must publish inside information correctly and in a timely manner. We enforce the rules for the issuance of securities and public takeover bids, for financial reporting and for auditors responsible for auditing this reporting

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1 Introduction

Trading with inside information is a serious offence. It is prohibited for everyone. Trading in financial instruments with inside information undermines the confidence in the proper operation of the financial markets, since those who do so seek to obtain an unfair advantage on the basis of the information they possess. Adequate legislation to prevent the use of inside information has thus been introduced to protect investor confidence.

A person who possesses inside information possesses certain information that is confidential and not in the public domain. Such information, also known as 'inside information', can for instance relate to an imminent takeover or to financial difficulties at an issuer. A person may possess inside information as part of their duties, profession or position at an issuer, for example directors, lawyers or employees. It is also possible that a person may come into possession of inside information without intending to do so; for instance, this may occur because they hear their neighbour or acquaintance who happens to be a director of an issuer talking in the garden, or on the train.

When published, inside information can affect the price of an issuer's financial instruments. The issuer is obliged to publish this information without delay (i.e., as soon as possible), so that all investors are aware of the inside information and all investors have an equal opportunity to realise a good return.

If a person desires to profit from inside information (and therefore from the expected price development of the issuer's shares, for example) and decides to buy or sell these financial instruments before the inside information is published by the issuer, they are trading with inside information. This is forbidden. It is also forbidden to share inside information with a third party or to advise a third party to effect transactions in the financial instruments to which the inside information relates.

The AFM takes its duty as the regulator of the prohibition of trading with inside information extremely seriously. It actively monitors behaviour and transactions by investors in the market. If certain trading actions are in breach of the prohibition, these actions will result in an administrative-law or criminal-law sanction. In other words, the AFM can impose a penalty or refer the case to the Public Prosecution Service (*Openbare Ministerie*, or PPS).

In this brochure, the AFM explains the regulations applying to insider dealing. The regulations are pursuant to the European Market Abuse Directive, and are stated in Section 5:56 of the Dutch Financial Supervision Act [*Wet op het financieel toezicht, or Wft*] and in Section 2 of the Market Abuse (Financial Supervision Act) Decree [*Besluit marktmisbruik Wft*]. This brochure also describes the provisions related to the prohibition of insider dealing, such as the exceptions to the prohibition, the reporting scheme, the regulations for insiders and the insider lists. These provisions are included in Sections 5:59(1), 5:60 and 5:65 Wft and Sections 5 to 8, 10 and 11 of the Market Abuse (Dutch Financial Supervision Act) Decree. The brochure also contains a practical manual describing how notifications must be submitted to the AFM.

The purpose of this brochure is to provide a detailed description of the rules applying to insider dealing and other related provisions. The brochure also refers to relevant (legal) documents and other sources of information. This brochure is intended to provide information. No rights may be derived from it. The AFM advises persons consulting this brochure not take action solely on the basis of this brochure. If the text of the brochure differs from the text of and notes to the above-mentioned Act and Decree, the Act and Decree shall prevail.

The actual text of the European Directive, the Implementation Directives, the Wft and the Market Abuse (Financial Supervision Act) Decree can be found at the AFM's website: *AFM > Legislation > Act on Financial Supervision (Wft) > Wft Market Abuse Directive*.

2 Prohibition of insider dealing

2.1 Legal definition

It is generally prohibited to conduct or effect a transaction in financial instruments with the use of inside information in or from the Netherlands.

What is meant by inside information?

Inside information is “awareness of specific information that relates directly or indirectly to an issuer to which the financial instruments pertain or to the trade in those financial instruments that has not been publicly disclosed and which if disclosed could have a significant influence on the price of the financial instruments or on the price of financial instruments derived therefrom”. (Section 5:53(1) Wft first sentence).

'Specific information'

Specific information is defined as information relating to

- a situation that exists or which may reasonably be expected to exist in future; or
- an event that has occurred or which may reasonably be expected to occur; and

that is specific enough to reach a conclusion regarding the possible effect of the situation or event on the price of financial instruments or financial instruments derived therefrom.

‘Significant’

This concerns information that is meaningful. In other words, information which a reasonable investor would be likely to use as part of the basis of his investment decisions. The term ‘significant’ here does not therefore refer to its meaning in the context of statistics (as in “statistically significant”). It is defined as “meaningful”.

‘Making use of’

A person conducting or effecting a transaction is making use of inside information if he is aware or should be aware of the fact that there is information not available to the public that could have a significant effect on the price of financial instruments or financial instruments derived from those financial instruments. The basic principle is that the element of ‘making use of’ can be explained by the evidence of ‘awareness’. This does not mean there must be a causal link. It does not have to be shown that the transaction is the result of the inside information concerned.

Commodity derivatives

The definition of inside information in the case of commodity derivatives differs from the common definition described above. With regard to financial instruments for which the value is partly determined by the value of commodities, inside information is defined as: “awareness of non-disclosed specific information that relates directly or indirectly to one or more commodity derivatives, which investors in those commodity derivatives may expect to be publicly disclosed in accordance with market practices that are customary in the regulated market, or the market for financial instruments that is not a regulated market for which the holder is recognised as referred to in Section 5:26(1), in which those commodity derivatives are traded.” (Section 5:53 (1) Wft second sentence). Information which investors may expect to be publicly disclosed shall be involved if this information is of such a nature that it: i) is routinely made available to the investors in those financial instruments; or ii) must be publicly disclosed in accordance with the statutory regulations applicable in the market or in accordance with the market rules, contracts or customary practices in that market. (Section 5:56(4) Wft).

2.2 Scope of the prohibition

According to Section 5:56 Wft, it is forbidden to make use of inside information by conducting or effecting a transaction:

a. in or from the Netherlands or a non-Member State in financial instruments admitted to trading on a regulated market which has been licensed in accordance with Section 5:26(1) or a multilateral trading facility for which the investment firm holds a licence as referred to in Section 2:96, or for which the admission to such trading has been requested;
b. in or from the Netherlands in financial instruments admitted to trading on a regulated market or multilateral trading facility in another Member State or admitted to trading on a system comparable with a regulated market or multilateral trading facility in a non-Member State, or in financial instruments for which the admission to such trading has been requested; or
c. in or from the Netherlands or a non-Member State in financial instruments other than financial instruments as referred to under a) or b), whose value partly depends on the financial instruments referred to under a) or b);
d. in or from another Member State in financial instruments admitted to trading on a multilateral trading facility for which the investment firm holds a licence as referred to in Section 2:96.

It is not important whether the transaction actually takes place via the systems of the market in financial instruments in question. For example, bonds admitted to trading on Euronext Amsterdam also fall under the scope of the prohibition, as does a transaction in these financial instruments conducted over-the-counter (OTC) or via the systems of another platform.

Trading with inside information is therefore forbidden in or from the Netherlands. This also applies if the trading concerns financial instruments that are not admitted to trading on a Dutch regulated market but are traded on a European regulated market or one of the government-approved markets in financial instruments in a non-Member State (for instance, an American financial market).

To qualify as a transaction ***in*** the Netherlands, the person conducting or effecting the transaction may be in the Netherlands or abroad, while the transaction is conducted via the systems of a market in financial instruments in the Netherlands. A transaction also qualifies as a transaction in the Netherlands if the counterparty (in a private transaction) is located in the Netherlands. To qualify as a transaction ***from*** the Netherlands, the person must be in the Netherlands at the time the transaction is conducted or effected. In this case the transaction is effected via the systems of a market in financial instruments located abroad or with a counterparty located abroad (if for instance a transaction arising from a contract is involved). The location of the bank executing the transaction is not relevant, since the prohibition applies to the person effecting the transaction and not the bank.

The scope of the prohibition makes it clear that the prohibition of insider dealing also applies to trading in financial instruments admitted to a multilateral trading facility for which the investment firm holds a licence as referred to in Section 2:96 Wft, such as Alternext Amsterdam or NYSE Arca Europe.

2.3 Who is subject to the prohibition?

The prohibition of insider dealing applies to everyone. The prohibition distinguishes between two categories: primary insiders and secondary insiders. Primary insiders are (briefly) those who are in a special relationship with the issuer, such as managing and supervisory directors of an issuer, or persons who have a qualified holding in the issuer.

Persons who as a result of their profession, business or position have access to inside information also qualify as primary insiders. Persons in possession of inside information as a result of their involvement in criminal offences are also considered to be primary insiders.

Primary insiders are deemed by virtue of their relationship to the issuer to be in possession of non-public, inside information. As such, the question of whether this category of persons knew or reasonably should have known that they possessed inside information is not relevant.

Secondary insiders are all persons other than primary insiders. In the case of secondary insiders it must be proved that they knew or reasonably should have suspected that the information they possess constitutes inside information in the sense of the Act. The reason for this distinction between primary and seconday insiders lies in the fact that secondary insiders are less likely to realise that they are in possession of inside information.

3 Exemptions to the prohibition of insider dealing

There are a number of exemptions to the prohibition of insider dealing. Transactions whereby one of the parties may be or is in possession of information but which by nature do not form a threat to the integrity of the capital market or the interests of the parties operating in that market, are not considered to constitute insider dealing. These exemptions are specified in Sections 5:56(5) and (6) Wft, in Section 2 of the Market Abuse (Financial Supervision Act) Decree and the European Commission Regulation 2273/2003 regarding exemption rules for buy-back programmes and stabilisation of financial instruments.

The following transactions are exempt from the prohibition:

Compliance with an enforceable obligation (Section 5:56(5)(a) Wft)

The conducting or effecting of transactions in financial instruments to comply with an enforceable obligation that already existed at the time when the party conducting or effecting the transaction became aware of inside information is exempt.

In the context of monetary policy, foreign-exchange policy or the management of public debt (Section 5:56(5)(b) Wft).

Stabilisation and buy-back of financial instruments (Section 5:56(5)(c) and (d)

Transactions in the context of a buy-back programme or in the context of the stabilisation of financial instruments are exempt, as long as this occurs in accordance with the established measures, including those relating to transparency. Further details are given in the European Commission Regulation 2273/2003, which states the objectives and conditions with which buy-back programmes and the stabilisation of financial instruments must comply in order to qualify for the exemptions. If these objectives and conditions are not complied with, the exemption shall not apply. This EC Regulation is implemented in Section 5:56(5)(c) and (d) Wft and is directly applicable with respect to the objectives and conditions.

Allocation of financial instruments in the context of an employee benefit scheme (Section 2(a) of the Market Abuse (Dutch Financial Supervision Act) Decree

An exemption applies to the allocation of financial instruments to directors, supervisory directors or employees in the context of an employee benefit scheme, if a consistent course of action is followed with regard to the conditions and periodicity of the scheme. For the purpose of this article, an employee benefit scheme is defined as 'a scheme whereby certain financial instruments are offered to directors, supervisory directors or employees'. The issuer or its subsidiary or group company must follow a consistent course of action with regard to the conditions and the periodicity of the scheme. The main issues concerned include the time of allocation, the decision to allocate, the group of beneficiaries to which financial instruments are allocated and the number of financial instruments that are allocated.

These above-stated elements of the allocation must be in accordance with the procedure followed in preceding years. The allocation (this includes the combination of offer and acceptance, in other words, the entire agreement) of options, convertible bonds, warrants and similar rights to shares in an issuer in the context of an employee benefit scheme are exempt from the prohibition of making use of inside information. Share (participation) plans also fall under this exemption, since the definition states "the allocation of financial instruments". These plans are regularly employed as a compensation instrument in order to create a long-term commitment to the institution or subsidiary or group company from its directors, supervisory directors or employees.

It is possible that at the time the agreement is concluded – the allocation – the issuer concerned or the directors, supervisory directors or employees may be in possession of inside information, so that without this exemption they would be acting in breach of the prohibition.

The purpose of using a consistent course of action is to establish a strict framework for the allocation of financial instruments to directors, supervisory directors and employees, so that on the basis of actual circumstances it can be demonstrated that any inside information that was available at the time of allocation could not have played a role in the allocation.

The existence of a consistent course of action must be properly established by the company concerned. For instance, it must be able to demonstrate when the (annual) decision to allocate is made. The issuer is itself responsible for ensuring that if it introduces a new employee benefit scheme or changes the conditions of an existing scheme, that the decision to do so is taken during a period in which no use is made of inside information. It must also be able to demonstrate

that this is the case. A change to a scheme does not have to mean that there is a lack of consistency if it is made with the intention of continuing to apply the change in future years, since a new element of consistency is thus introduced to the scheme.

The timing of the allocation of a financial instrument must be a fixed and objectively determinable date, if possible a fixed date on which allocations are made. This prevents a situation in which the one-off allocation of financial instruments for a particular situation or frequent changes in the beneficiary group, the degree of participation and the conditions used could still be exempt from the prohibition. It is not necessary to inform the AFM of a proposed allocation. The AFM may, in the context of an investigation, request information from the issuer and check the extent to which the issuer can demonstrate the dates upon which decisions to establish an employee benefit scheme were taken and whether the scheme follows a consistent course of action as regards the conditions and periodicity of allocation.

For the sake of clarity, it should be added that financial instruments may be allocated to, for instance, employees entering service, or managing and supervisory directors on their appointment, or to employees or managing or supervisory directors in the event they attain an anniversary or are promoted, subject to the condition that the employee benefit scheme explicitly states that financial instruments can be allocated in these situations. This means that the employee benefit scheme is sufficiently consistent.

If the employee benefit scheme meets the requirement of a consistent course of action, then there is no conflict with the prohibition, despite the possibility that inside information may be available at the time of allocation.

Exercise of rights in the context of an employee benefit scheme (Section 2(b) of the Market Abuse (Financial Supervision Act) Decree)

The exercise of options, exchange of convertible bonds or exercise of warrants or similar rights to shares or depositary receipts for shares granted under an employee benefit scheme on the expiration date or within a period of five business days prior to this date are exempt from the prohibition of the use of inside information. This also applies to the sale of the shares or depositary receipts for shares acquired as a result of the exercise of these rights within this period, subject to the condition that - at least four months prior to the expiration date - the beneficiary notifies the issuer in writing of their intention to sell, or has given the issuer an irrevocable power of attorney to sell.

This exemption from the prohibition of the use of inside information is included because it is possible that some managing directors, supervisory directors or employees may regularly be in possession of inside information, so that it would actually be impossible for them to exercise the options, convertible bonds, warrants or similar rights granted to them under an employee benefit scheme. These persons would in that case have to let their rights expire unused, which would negate the purpose of granting them in the first place. The term of five business days is included in order to make the exemption from the statutory prohibition as brief as possible while giving sufficient opportunity for the actual exercise of the rights concerned.

The exemption from the prohibition also applies to the sale of shares and depositary receipts for shares arising from the exercise, if the sale takes place on the expiration date of the right concerned or during the preceding five business days. The person concerned must have notified the issuer in writing - at least four months before the expiration date - of their intention to sell the shares acquired immediately after the rights were exercised. This period of four months is intended to prevent a situation in which persons in possession of inside information at the time the rights are exercised can then decide whether to dispose of the shares immediately or not.

If this notification has been made, the person concerned is obliged to actually dispose of the shares they acquire. If they do not meet this obligation, the prohibition fully applies to the sale. As often happens in practice, it is possible for the beneficiary to establish their final decision by granting an irrevocable power of attorney to the issuer. Since the beneficiary can no longer change their mind, there is no possibility for them to make use of inside information.

Meeting delivery obligations (Section 2(c) of the Market Abuse (Financial Supervision Act) Decree)

Transactions conducted or effected in order to be able to meet an obligation to deliver shares or depositary receipts for shares are exempt from the prohibition of the use of inside information. For instance, this concerns the fulfilment of an obligation to deliver shares arising from the exercise of options or warrants under an employee benefit scheme.

This exemption also applies to obligations arising from the exchange of convertible bonds or similar rights to shares. There may, however, also be transactions that are necessary in order to meet delivery obligations arising for other reasons. In these cases the transaction conducted in order to meet the sale obligation or conversion obligation is exempt from the prohibition, but the preceding purchase transaction that is necessary in some cases is *not* exempt.

For the application of this exemption, it is not important whether the transaction takes place at the same time as, immediately after, or some considerable time after, the allocation of the option rights or the issuance of convertible bonds. Since these transactions are only exempt from the prohibition to the extent that they are necessary in unchanged circumstances in order to fulfil the obligation in question, the issuer must be able to demonstrate this necessity. It must demonstrate that the number of financial instruments that the legal entity possesses (either at that time, or in due course) does not exceed the total (potential) supply in order to meet the delivery obligation. In the case of interim disposal of financial instruments that are held in portfolio for a future obligation, the premature sale must be evaluated in the light of the prohibition of the use of inside information.

Commitment by a shareholder in the context of a public offer (Section 2(d) of the Market Abuse (Financial Supervision Act) Decree)

The following act is exempt from the prohibition of the use of inside information: entering into an agreement whereby a party entitled to financial instruments irrevocably makes a commitment to an offeror, in the context of a public offer that is (to be) proposed or is in preparation, to offer financial instruments related to that public offer, to the offeror. The party entitled must in this case establish the number of financial instruments to which the agreement relates in a written statement to the offeror.

A party who is intending to make a public offer for financial instruments, and who is therefore seeking the opinion of (major) shareholders as to whether they are prepared to offer their financial instruments if such an offer is made, is acting in accordance with the normal conduct of their duties, profession or position. For such a party, it is important to be able to establish whether a proposed public offer has a chance of success. The (major) shareholder approached by the offeror with regard to the offer is thus in possession of inside information. The testing of opinion by the offeror will be to no purpose if the (major) shareholder is not able to indicate to the offeror whether it will support the offer or not. Since the definition of the term ‘transaction’ in Section 5:56(1) Wft is rather broad in practice, it could be assumed that a commitment by a (major) shareholder constitutes the beginning of a transaction, and is therefore prohibited.

To clearly establish that a (major) shareholder is allowed to make a commitment to the offeror, the making of a commitment in this context is exempt from the prohibition of trading with inside information, subject to the condition that the (major) shareholder specifies to the offeror, in writing, the number of financial instruments it will offer. The offeror can moreover demonstrate with this written statement that the testing of opinion was necessary.

For the sake of clarity, it should be noted that the commitment to support the offer to the offeror is also made in the case that the opinion of the (major) shareholder is tested by the target company (the company that is the subject of the potential offer). This may or may not be as a result of the intermediation of the target company.

The commitment to support the offer is made to the offeror and the ultimate transaction will be concluded with the offeror. The exemption in this context therefore also applies to the commitment to the offeror.

The offeror may come into possession of inside information as a result of sounding out the opinion of (major) shareholders. By stating which (major) shareholders have already indicated that they will accept the offer with respect to their financial instruments in the offer announcement, the inside information is made public, and after publication of the offer announcement the offeror is no longer subject to the transaction prohibition. The same applies to the target company that sounds out the opinion of (major) shareholders.

Commitment in the context of an issue (Section 2(e) of the Market Abuse (Financial Supervision Act) Decree)

It is important to know whether a proposed issue or re-issue has a chance of success. Entering into an agreement whereby a party entitled to financial instruments or potentially entitled to financial instruments irrevocably commits itself to the purchase of one or more of these financial instruments prior to an issue or re-issue of these financial instruments by the issuer, is therefore exempt from the prohibition against the use of inside information.
This exemption is subject to the condition that the party entitled or potentially entitled has established the number of financial instruments or the financial sum to which the agreement relates in a written statement to the issuer.

Since in the context of a proposed issue or re-issue the opinions of future (major) shareholders are sometimes sounded out as are existing (major) shareholders, the exemption also applies to the sounding out of the opinions of potential (major) shareholders. The sounding out of opinions must be necessary, and the commitment must be specifically established in a written statement to the issuer. If the commitment is not established, the conditions attached to the

exemption have not been met and the prohibition of making use of inside information applies to both (major) shareholders and potential (major) shareholders.

Dividend distribution (Section 2(f) of the Market Abuse (Financial Supervision Act) Decree)

The acquisition of shares or depositary receipts for shares issued due to distribution of a dividend or dividend distribution other than in the form of a dividend with stock option is exempt from the prohibition of the use of inside information.

Although those entitled to the dividend or the issuer may possess inside information at the time the dividend is distributed, it does not make sense to make this distribution subject to the prohibition. The amount of the dividend and the manner of its distribution will have already been approved by resolution of the general meeting of shareholders and apart from the possibility of a stock option, are more or less completely separate from the influence of individuals entitled to the dividend.

The exemption for the acquisition of shares or depositary receipts for shares is not intended for the acquisition of shares or depositary receipts for shares as a result of the decision to take a dividend in the form of shares or depositary receipts for shares by the person entitled to dividend in the event of a stock option. Only the acquisition of shares or depositary receipts for shares in the form of optional dividend is not permitted, however the issuance thereof is permitted.

Intermediaries (Section 2(g) of the Market Abuse (Financial Supervision Act) Decree)

An intermediary acting in accordance with the rules of good faith in the service of his clients and thereby coming into possession of inside information is exempt from the prohibition of the use of inside information. This concerns persons (brokers) acting on the instructions of and for the account of third parties. Trading by such persons for their own account is not exempt from the prohibition.

Given the scope of Section 5:56 Wft, the exemption also applies to intermediaries trading in financial instruments not admitted for trading in a regulated market but traded in another market for financial instruments. Intermediaries are also not committing an offence when executing orders for clients as part of their professional trading activities.

Chinese walls (Section 2(h) of the Market Abuse (Financial Supervision Act) Decree)

The conduct or effecting of a transaction by employees of a legal entity that is in possession of inside information is exempt from the prohibition of the use of inside information if these employees are only in possession of information regarding trading. Situations can arise in which persons working for an issuer that is trading (and therefore the issuer itself) are in possession of inside information regarding the issuer to which the financial instruments being traded relate; however those who are actually involved in the conduct or effecting of the transaction are not aware of this information.

There can be several variations of this situation. For example, the lending department of a lending institution (and therefore the lending institution itself) is usually in possession of inside information regarding its clients. If the securities department of this lender were to trade in financial instruments relating to one of its clients, the lending institution would be acting in breach of Section 5:56 Wft even if the securities department was not in possession of the information in question.

There is also the situation in which, for instance, senior managers or managing directors of a lending institution listed on a market for financial instruments are in possession of inside information relating to their own company while the securities department of this lending institution is not. In this situation as well, under Section 5:56 Wft the persons concerned in the securities department are not permitted to trade in financial instruments relating to their own company, even though this is part of the normal activities of this department.
These situations do not qualify for the exemption for intermediaries in the context of professional trading (Section 2(g) of the Market Abuse (Financial Supervision Act) Decree). In these situations the inside information that the intermediary (the lending institution) possesses does not exclusively relate to trading, it also concerns the legal entity to which the financial instruments relate.

Since it is not the intention to make such transactions impossible (since this concerns a normal conduct of business), an exemption applies here. For the record, it should be noted that an appeal to this exemption cannot be made simply on the basis of a reference to the existence of so-called ‘Chinese walls’. It must be demonstrated in the specific case that these ‘Chinese walls’ had also been effective in preventing the leakage of the information.

Stabilisation and buy-back of financial instruments (Section 2(i) of the Market Abuse (Financial Supervision Act) Decree)
The exemption rules for buy-back programmes and for the stabilisation of financial instruments (included in EC Regulation 2273/2003) also apply as an exemption from the prohibition of trading with inside information. This is also the case if these instruments are traded in a market for financial instruments that is not a regulated market for which the holder is licensed as stated in Section 5:26(1) Wft. For instruments traded in a regulated market, this is arranged in Section 5:56(5)(c) and (d) Wft.

4 Notification regulations

4.1 Introduction

The regulations established in Sections 5:60 and 5:61 Wft and Sections 5 to 8 of the Market Abuse (Financial Supervision Act) Decree contain – briefly put – the obligation for persons working at an issuer or persons closely connected to them to report transactions conducted or effected for their own account in financial instruments relating to the issuer in question (hereinafter: "the notification regulations"). They must notify the AFM of transactions for their own account in shares issued by the institution for which they work, or in financial instruments whose value is partly determined by the value of these shares. This provides transparency regarding transactions conducted by persons with policy-making responsibilities at issuers and, if applicable, by persons closely connected to them. This is a preventive measure against market abuse. Notification of these transactions is a valuable source of information for investors.

4.2 Who is subject to the notification requirement?

The obligation to report transactions in shares (or financial instruments whose value is partly determined by the value of these shares) of their own issuer applies to persons designated as insiders:

1 of an issuer with domicile in the Netherlands or an issuing institution with domicile in a state that is not a Member State that has issued or proposes to issue financial instruments as referred to in Section 5:56 (1)(a) Wft;
2 of an issuer with domicile in the Netherlands that has issued or proposes to issue financial instruments as referred to in Section 5:56 (1)(b) Wft, or
3 of an issuer with domicile in another Member State that has issued or proposes to issue financial instruments as referred to in Section 5:56 (1)(d) Wft,

or to any person on whose proposal a purchase agreement regarding a financial instrument as referred to in the subsection concerned other than a security is drawn up or who proposes to draw up a purchase agreement regarding a financial instrument other than a security as referred to in the subsection concerned.

Transactions that are exempt from the prohibition of the use of inside information must also be reported to the AFM.

The obligation to notify applies to all persons involved with an issuer as stated above, who:

1 determine or co-determine the day-to-day policy of an issuer (for example, the directors);
2 supervise the policy and the general affairs of an issuer and the related enterprise (the supervisory directors);

3 hold a management position and have the power for that reason to take decisions affecting future developments and business prospects and who may regularly have knowledge of inside information;
4 persons closely associated with the persons described in subsections 1, 2 or 3, namely:
   I spouses, registered partners or life companions, or other persons cohabiting with the persons described as if in a marriage or registered partnership;
   II children under their authority or placed in guardianship and for whom these persons have been appointed as guardian;
   III other relations by blood or affinity who on the date of the transaction concerned have maintained a joint household with these persons for at least one year; and
   IV legal persons, trusts or partnerships
      - where the executive responsibility rests with a person as described in subsections 1 to 4 III;
      - that are under the control of a person as described in subsections 1 to 4 III;
      - that were established for the benefit of a person as described in subsections 1 to 4 III; or
      - whose economic interests are essentially equivalent to those of a person as described in subsections 1 to 4 III.

The category of persons with a management position described in subsection 3 also includes persons working directly or indirectly under the management board and who share responsibility for the future developments and business prospects of the issuer as a whole.

4.3 What has to be notified?

The AFM must be notified of personal account transactions in shares issued by the institution to which the person subject to the notification obligation is affiliated, or in financial instruments whose value is partly determined by the value of these shares.

A notification must include the following information:
a the name of the party with a duty to notify;
b the address of the party with a duty to notify;
c the name of the issuer involved;
d the reason for the notification;
e a description of the financial instruments involved in the transaction concerned
f the nature of the transaction;
g the date and place of execution of the transaction;
h the price and size of the transaction.

By ‘the nature of the transaction’ under item ‘f’, reference is made for instance to purchase or sale.
Section 1:107(3)(c)(3°) Wft explicitly states that the addresses of persons with a duty to notify shall not be included in the register of the AFM.
The address of the person with a duty to notify will not be made public and will not be made available to third parties. The term ‘address’ of course also means the place of residence.

4.4 When should notification take place?

Persons with a duty to notify must report transactions conducted or effected for their own account not later than the fifth business day after the transaction date.

If the notification concerns an issuer domiciled in the Netherlands or in another Member State, notification must be made to the AFM. If the transaction concerns an issuer domiciled in a non-Member State, the notification must be made to the regulator in the Member State to which the issuer has to provide the annual information relating to the shares (Section 10 of the Prospectus Directive).

Notification can be delayed until such time as the value of the transactions conducted for one’s personal account together with the value of the transactions conducted for the personal account of related persons reaches EUR 5,000 in the calendar year in question (Section 5:60(2) Wft). This means that notification is not compulsory if this amount is not reached in a calendar year. The sum of EUR 5,000 has to be calculated on the basis of the price of the financial instruments, in other words the purchase or sale price paid or received for the acquisition or sale of the financial instruments. In the case of financial instruments acquired for no consideration, this transaction does not need to be reported until the limit of EUR 5,000 is reached. As soon as the limit of EUR 5,000 is reached due to other transactions, the transactions for no consideration must be reported with the other transactions.

4.5 How should notification take place?

Notifications must be submitted to the AFM using the notification form established for this purpose. This means that the administrative costs for those with a duty to notify as kept as limited as possible, and that the flow of information is channelled as efficiently as possible for the AFM.

The notification form can be downloaded from the AFM’s website (under ‘forms’). You can send the completed form to the AFM, if applicable preceded by a fax message to +31(0)20-797 3822.

4.6 Exemptions

In addition to the possibility of delaying notification until the value of the transactions conducted in a particular calendar year reaches EUR 5,000, the Wft contains a number of other exemptions to the notification requirement.

Rules for the notification of control and capital holdings in issuers

The notification requirement pursuant to Section 5:60(1) Wft is met if the AFM has been previously notified on the basis of Section 5:38(1) or (2) or Section 5:48(6) Wft, or Section 7 of the Market Abuse (Financial Supervision Act) Decree. The notification requirement is, however, not met if a parent company reports transactions conducted or effected by subsidiary companies. This case does not actually involve a double notification requirement for the (legal) person conducting or effecting the transaction. See the explanatory brochure titled 'Managing and Supervisory Directors at Issuers' for more information.

Discretionary management mandates

Section 8 of the Market Abuse (Financial Supervision Act) Decree states that Section 5:60(1) Wft does not apply to transactions conducted on the basis of a discretionary management mandate. These transactions do not therefore have to be reported to the AFM.

In practice, directors of issuers regularly make use of discretionary management mandates for transactions in financial instruments relating to their own company. This kind of mandate involves a contractual relationship between the person entitled to the financial instruments (the principal) and an asset manager (the authorised representative). The discretionary management of the securities portfolio is transferred to the authorised representative on this basis. Naturally, when concluding the agreement the parties are permitted to agree on specific provisions, such as a description of the type of financial instruments or products in which transactions may be conducted, the objective, and the strategy to be pursued. The authorised representative must, however, perform all his management activities arising from the mandate without influence or consultation with the principal, and must invest or reinvest the assets according to his own view, while taking account of the limitations in the agreement.

Changes to the basic principles and objectives in asset management mandate are permitted. These may involve matters such as the investment policy, the risk profile and the reinvestment of released funds. However this is only permitted at an abstract level so that no influence is exercised over the actual individual

transactions conducted or effected by the authorised representative, and otherwise only in periods in which there is no question of inside information (as indicated in the issuer's regulations, known as 'open periods').

Since these transactions are not effected by the insider with the duty to notify, they are exempt from the notification requirement on the basis of Section 5:60(1) Wft. Obviously, the authorised representative does not have to report the transaction, as he does not belong to the group of insiders with a duty to notify.

For the sake of completeness, it should be noted that a single irrevocable buy or sell order whereby the authorised representative intends to buy or sell financial instruments of the issuer concerned during a certain period established in advance cannot be equated with a discretionary management mandate. As part of a discretionary management mandate the authorised representative has freedom of choice regarding investment and reinvestment, and is moreover authorised to replace the existing securities (funds, financial instruments, etc.) with others.

It should be noted that transactions pursuant to a discretionary management mandate, to the extent applicable, have to be reported to the AFM pursuant to Section 5:38(1) or (2), or 5:48(6) of the Wft.

4.7 The AFM register

With the exception of the address of the party with a duty to notify, the information notified is included in the public register on the website of the AFM..

5 Regulations for insiders

5.1 The obligation

An issuer domiciled in the Netherlands that has issued or intends to issue financial instruments as described in Section 5:56(1)(a) or (b) Wft or an issuer domiciled in another Member State that has issued or intends to issue financial instruments as described in Section 5:56 (1)(d) Wft or an issuer domiciled in a non-Member State that has issued or intends to issue financial instruments as described in Section 5:56(1)(a) Wft shall prepare regulations relating to the ownership of, and transactions in, its shares or in financial instruments whose value is partly determined by the value of these shares by its employees, directors and supervisory directors (the 'insider regulations') (Section 5:65 Wft).

The regulations comply with rules established by an order in council (Section 11 of the Market Abuse (Financial Supervision Act) Decree). An issuer that has issued or will issue financial instruments in the context of monetary policy, foreign-exchange policy or the management of public debt is exempt.

5.2 Content of the regulations

A model version of insider regulations is available for download from the website of the AFM. The insider regulations contain rules for:

a the duties and authorisations of the person designated by the issuer to provide notifications under the notification regulations, if the issuer has designated such a person (usually the Compliance Officer). If an issuer has designated a Compliance Officer, rules must be established for his duties and authorisations. The persons with a duty to notify on the basis of the notification regulations however remain personally responsible for the accuracy and promptness of the notification to the AFM. The appointment of a Compliance Officer does not affect this responsibility.

b the obligations of employees, directors and supervisory directors in relation to the ownership of, and transactions in, financial instruments relating to the issuer;

c if applicable: the period in which a person with a duty to notify may not conduct or effect transactions in financial instruments relating to the issuer. Additionally, 'closed periods' (periods in which certain persons within an issuer are prohibited from conducting transactions) must also be included in the regulations

The ‘closed period’ refers to the period in which inside information will regularly be available, such as the period in which the annual figures are prepared or a period in which a takeover is being discussed.
In practice the insiders with a duty to notify are normally not permitted to conduct or effect transactions in financial instruments of the issuer during this period. It is also possible that an issuer indicates the periods in which these persons are permitted to conduct or effect transactions in financial instruments of the issuer (known as ‘open periods’). This also means that the objective of the regulations is achieved, namely that no trading takes place in periods when these persons have or could have access to inside information.

If either open or closed periods are used, the exact dates of the periods must be established on an annual basis so that the periods are clearly defined.

5.3 Submission to the AFM?

The insider regulations do not have to be submitted to the AFM. This of course does not mean that the preparation of such regulations is voluntary. The AFM supervises the compliance with the prohibition of the use of inside information. If the AFM wishes to review the regulations during an investigation into the use of inside information, it will request the issuer to provide a copy.

6 Insider lists

6.1 The obligation

An issuer domiciled in the Netherlands, an issuer domiciled in another Member State or in a non-EU Member State (with financial instruments admitted to trading in the Netherlands) and any party acting for or on behalf of the issuer must maintain a list of its employees who regularly or occasionally can have access to inside information (the 'insider list'). This includes the persons directly employed by the issuer, but also lawyers, auditors and other contractors (Section 5:59(1) Wft and Section 10 of the Market Abuse (Financial Supervision Act) Decree). The issuer shall inform these persons of the relevant prohibitions and the level of the sanctions entailed by their violation.

The maintenance of the insider list is designed to protect the integrity of the market. The lists can be useful to issuers to keep track of the information that qualifies as inside and thereby comply with their statutory obligations. The lists can moreover be a useful resource for the regulator in the conduct of its supervision.

6.2 Content and updating of the list

The insider list shall contain the following information:

a the names of all persons who regularly or occasionally may have knowledge of inside information;
b the reasons why these persons appear on the list;
c the dates on which the list was compiled and updated. The list must be updated as quickly as possible if:
    a the reason why a person who appears on the list has changed;
    b a person needs to be added to the list;
    c a person appearing on the list no longer has access to inside information.

The list must be archived (in electronic form, accessible and secured) for at least five years after it is compiled or updated. The outdated information must also be archived.

The 'reason why a person appears on the list' could for instance be a statement of the transaction or project in which the person concerned is involved. The knowledge that people have access to changes, and it is not practically feasible for example within a particular project to update the details of who had access to what inside information and when this was the case.

Choice of lists

The reasons why people may appear on an insider list falls generally into two categories: those who regularly may have knowledge of inside information, and those who occasionally may have knowledge of inside information.

An issuer or any party acting for or on its behalf may decide to use a list of all the employees that are or could be involved in a project or transaction whereby they could become aware of inside information, or to use separate lists (for example one list of employees and another list of projects) instead of one integrated list.

It is expressly not the intention that all the employees of the issuer or all the employees of the party acting for or on its behalf should be included on the list without further qualification. This does not benefit either the issuer or the AFM.

6.3 Submission to the AFM?

The insider list does not have to be submitted to the AFM. This of course does not mean that the preparation of such lists is voluntary. The AFM supervises the compliance with the prohibition of the use of inside information. If the AFM wishes to review the list during an investigation into the use of inside information, it will request the issuer to provide a copy.

7 Enforcement by the AFM

Trading with inside information is a serious offence. It is prohibited for everyone.

As stated in the introduction, the AFM proactively monitors the behaviour of and transactions by investors in the market. If it has reason to do so, it will conduct an investigation into compliance with the prohibition of the use of inside information. The AFM's proactive supervision of the compliance by issuers with their obligations - such as the publication of inside information without delay - functions as an important source of signals of potential offences.

Observed developments in price or volume prior to the publication of inside information can, after all, be an indication of trading with inside information. Furthermore, professional market participants and private investors can report suspicions of trading with inside information to the AFM.

In the context of its supervision of compliance with the regulations, the AFM has the power to obtain information from any party that may reasonably be assumed to possess information that is relevant to that supervision. If transactions or other actions are effected in conflict with the regulations relating to the use of inside information, administrative-law or criminal-law sanctions may be imposed. In other words, the AFM can impose an administrative penalty or refer the case to the Public Prosecution Service (PPS).

With regard to the supervision of compliance with the notification regulations, the insider regulations and the compilation and updating of insider lists, the AFM has a wide variety of supervisory measures at its disposal, such as the issuance of an instruction. It may also impose an order subject to a penalty for non-compliance or impose a penalty, or refer the case to the PPS. The measure taken depends on the specific circumstances of the case concerned.

8 Questions

Further information on the prohibition of trading with inside information is available at *www.afm.nl*.

The Securities Markets and Financial Infrastructure Supervision Division [afdeling Toezicht Effectenmarkten en Financiële Infrastructuur, or TEFI] of the AFM is the contact point for questions relating to inside information. For questions and advice, you can send an e-mail to marketsupervision@afm.nl or contact the TEFI Department by telephone on +31 (0) 20 797 3777.

Please note that telephone conversations with the TEFI Department may be recorded for supervisory purposes.

The Authority for the Financial Markets
T 020 797 2000 | F 020 797 3800
Postbus 11723 | 1001 GS AMSTERDAM

www.afm.nl

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