



## Obligation to notify market abuse

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## The Dutch Authority for the Financial Markets

The AFM is committed to promoting fair and transparent financial markets.

As an independent market conduct authority, we contribute to a sustainable financial system and prosperity in the Netherlands.

*The European Securities and Markets Authority (ESMA) regularly publishes Q&As with regard to the Market Abuse Regulation (MAR). Although the AFM processes this information in its brochures on a regular basis, it may occur that certain information in this document no longer applies. Therefore, we advise you to consult the ESMA website for the latest information on this subject. In case of any uncertainties with regard to interpretations set out in this brochure, you should also consult the Q&As of ESMA.*

*Click on the following link for a current overview of the latest Q&As:*

<https://www.esma.europa.eu/questions-and-answers>

In this brochure the ESMA Q&A'S are incorporated up until the version of 29 March 2019.

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## Introduction

In this brochure, the Dutch Authority for the Financial Markets (AFM) explains in more detail the obligation to prevent and detect market abuse and to notify the competent authority. This obligation derives directly from the EU's Market Abuse Regulation (MAR), which is applied since 3 July 2016.

The AFM is committed to promoting fair and transparent financial markets. The obligation to prevent and detect market abuse is important for identifying and tackling it. This obligation is applicable to market operators and investment firms that operate a trading venue, and to any person that professionally arranges or executes transactions in financial instruments. In this brochure<sup>1</sup> the AFM explains in more detail the obligation to detect, prevent and notify market abuse under the MAR. The AFM supervises compliance with the rules for preventing market abuse.

Two prohibitions make up the core of the rules to prevent market abuse:

- the prohibition of insider dealing; and
- the prohibition of market manipulation; including
- engaging or attempting to engage in insider dealing or market manipulation.

In addition, issuers are under the specific obligation to disclose inside information as soon as possible, and to comply with the prohibition of unlawful disclosure of inside information.

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<sup>1</sup> No rights may be derived from this brochure, and hence no action should be based solely on its contents. If the text deviates from the MAR, the wording of the MAR prevails. The actual text of the Market Abuse Regulation is available on the EU's website.

## 1. The obligation to notify market abuse prior to 3 July 2016.

Prior to 3 July 2016, the obligation to notify market abuse was laid down in Sections 5:62 and 5:63 of the Financial Supervision Act (FSA).

Section 5:62 of the FSA stipulates that an investment firm having a reasonable suspicion that the prohibition of insider dealing (Sections 5:56(1) or 5:56(3)) or of market manipulation (Section 5:58(1)) is being contravened has an obligation to report this suspicion without delay to the AFM. The purpose of this obligation is to prevent and detect market abuse.

## 2. Obligation to notify market abuse after 3 July 2016

### *Obligation to detect, prevent and notify market abuse*

The new EU Market Abuse Regulation (MAR) has been applicable since 3 July 2016.

Article 16 of the MAR requires that market operators (such as Euronext) and investment firms that operate a trading venue shall establish and maintain effective arrangements systems and procedures aimed at preventing and detecting insider dealing and market manipulation (i.e. market abuse), as well as attempts to engage in such activities. The Regulation also requires market operators and investment firms to notify, without delay, the competent authority - in the Netherlands this is the AFM - about orders and transactions, as well as cancellations or modifications, that could constitute (attempted) market abuse. In such cases, the notification that must be made is referred to as a Suspicious Transaction and Order Report (STOR).

In addition, every person that professionally arranges or executes transactions in financial instruments must establish and maintain effective rules, systems and procedures to detect and notify suspicious orders and transactions. If such a person has a reasonable suspicion that an order and/or transaction in a financial instrument, whether placed or executed on or outside a trading platform, could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation, the person is obliged to notify the AFM without delay.

The regulation makes it obligatory to notify all suspicious orders, as well as every transaction that might be actual or attempted market abuse. Moreover, it is irrelevant whether such an above-mentioned order has been executed or not (for example, where a broker has refused to place one for a customer). Attempts can be described as situations in which an activity was started but not finished. However, this is not the only possibility. For example, there could be an intervention, technical problem, or non-executed order.

The obligation to submit a STOR also applies to OTC trading in derivatives where the underlying instrument is bought and sold on a regulated market, multilateral trading facility (MTF) or organised trading facility (OTF). The obligation still applies irrespective of the circumstances surrounding the placing of the order or the execution of the transaction (i.e., whether for own account or the account of a client) or the nature of the client concerned (institutional, professional, retail, etc.).

### *Notifying a reasonable suspicion without delay*

Once a reasonable suspicion is formed, a STOR must be submitted to the competent authority without delay. This does not mean that the (legal) person reporting to the AFM has an unlimited amount of time to submit this reasonable suspicion. If a prior analysis is necessary, this must be carried out as soon as possible. Sometimes a suspicious transaction or order can only be detected after it took place. In such cases the (legal) person responsible for submitting the STOR must be able to justify the delay. In addition, organisations with an obligation to notify have to submit more than just transactions and orders that they found suspicious at the time they took place. They must also notify transactions and orders that raise suspicions later in the light of subsequent events or information (for example new transactions and/or orders attributable to the same person, or the disclosing of inside information). A further point is that waiting for a sufficient number of suspicious transactions and/or orders to notify to the AFM in one batch does not comply with the obligation to report these without any delay. Even when an organisation has already submitted a STOR, if it comes into the possession of additional information (for example, from an internal investigation it has conducted), the relevant additional information must be provided to the competent authority as soon as possible.

### *Reasonable suspicion: limited information*

The persons making notifications, often compliance officers of organisations, are not always in a position to determine or assess whether transactions and/or orders are suspicious. For example, the submitter is aware that the broker is not the only intermediary the client is using for the transaction. It is therefore not possible in this case for the submitter to have an overview of the complete trading situation. Organisations have to take into account *all* the information available to them, such as other transactions and/or orders. Also, there might be situations where proper reasons or specific indications exist to justify a suspicion of market abuse. However, it is possible that the submitter is not fully certain that it is market abuse. This uncertainty must not be the reason for failing to submit a notification. However, this uncertainty must be clearly stated in the STOR. In a situation where a chain of market parties is involved in the execution of an order and/or transaction, each (legal) person that is subject to the Market Abuse Regulation is obliged to notify suspicions of market abuse. Because one organisation in the chain reports its suspicions does not mean that others do not have to report their own suspicions of market abuse concerning the same or related transactions and/or orders.

### 3. Active detection

#### *Proactive monitoring*

The MAR obliges organisations to establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting suspicious orders and transactions. This requires organisations to analyse and evaluate their own operations constantly (including organizational structure, client base, asset classes and markets) in order to deal with the risks of market abuse.

#### *Monitoring systems*

With regard to detecting market abuse (both actual and attempted), every organisation must have a system in place that can analyse every order and transaction, individually and comparatively, as well as issue alerts stating that further analysis is necessary. Accordingly, in a large majority of cases, a strongly or fully automated system will be necessary. Obviously, once an organisation starts to engage in trading activities – and especially if there is little or no contact with a front office, which can raise alerts about potentially suspicious orders and transactions – it becomes extremely difficult to detect suspicious orders and transactions without having an automated monitoring system.

ESMA (European Securities and Markets Authority) states there is a wide scope of (legal) persons who are subject to the new obligation to notify market abuse. ESMA stresses the importance of the (automated) monitoring system in use being effective in practice and having among its features the possibility to evaluate each order and transaction individually, as well as in relation to other orders and transactions. An organisation complies with Article 16 of the Market Abuse Regulation if the level of control is both effective and appropriate relative to the scale and nature of its operating activities. An organisation will not easily be able to avoid having a monitoring system that is automated to a certain extent.

When determining the degree to which the monitoring system must be automated an organisation has to take into account the type and number of transactions/orders that must be monitored.

In this context, the following should be considered:

- the type of financial instrument traded and the type of markets it is traded on;
- the frequency and volume of the orders and transactions;
- the size, complexity and/or nature of the business activity.

For an organisation with a limited size, it might be enough to use a relatively straightforward automated monitoring system. Complex and advanced organisations, however, need extensive and (customised) automated systems to monitor the flow of orders and transactions effectively.

The scope of the monitoring system, be it automated or not, must cover all the organisation's trading activities. On request, the organisation must be able to explain to the AFM how the system generates alerts and why the selected level of automation is suitable for its organisation. Moreover, there always has to be an appropriate level of human analysis to monitor, detect and identify market abuse. This is a key factor. It is a fact that the most effective form of monitoring combines automated and human analysis.

The systems that market operators and investment firms operating trading venues have in place should include software that is capable of deferred automated reading, replaying and analysis of order book data. In this way, the actions and dynamics of a trade can be thoroughly analysed.

### *Outsourcing*

The Market Abuse Regulation offers organisations that are part of the same group the right to delegate the monitoring, detection and identification of suspicious orders and transactions to another organisation that is part of the same the group. In all cases the delegating organisations remain fully responsible for the obligation to notify. The delegating organisation remains fully responsible for fulfilling its obligation to submit the STORs to the competent authority (i.e. the AFM).

In addition to the above-mentioned delegating possibility, persons who professionally arrange or execute transactions in financial instruments may delegate the performance of data analyse. This includes the analysis of orders and transaction data, as well as the generation of alerts necessary to conduct monitoring, detection and identifying suspicious transactions and orders. As with the delegating option, the outsourcing organisation remains fully responsible for fulfilling its obligations under the Regulation.

The following conditions need to be fulfilled:

- retention of the expertise and resources necessary for evaluating the quality of the services provided, as well as the organisational adequacy of the providers. This is to ensure effective supervision of the outsourced services and effective management of the risks associated with outsourcing on a permanent basis;
- having direct access to the relevant information regarding the data analysis and the generation of alerts;
- specification of the rights and obligations of the outsourcing organisation and those of the provider in a written contract. Persons who professionally arrange or execute transactions must have the right to terminate the outsourcing contract.

### *Constant documenting, retention and maintenance*

The monitoring systems and procedures must be documented, frequently evaluated and the analyses of the orders and transactions retained. The same applies to analyses of suspicious transactions or orders where the conclusion is that there were no solid grounds for notifying a reasonable suspicion of market abuse. This internal procedure will help the organisations concerned (i.e. trading platforms and persons that professionally arrange or execute transactions) in the future with the analyses of orders and/or transactions that might be suspicious. In addition, organisations need to keep a record of the considerations that resulted in the decision to (not)submit a STOR to the AFM. The analyses, as well as the records of the considerations, must be retained for five years and made available to the AFM on request. Furthermore, confidentiality needs to be guaranteed and preserved with regard to the documents in question. Organisations are not obliged to document every single alert. Only alerts that have been analysed and concluded to be potentially suspicious have to be documented. This includes alerts that do not seem to be suspicious at a later stage and therefore not notified to the AFM.

### *Confidentiality (versus tipping-off)*

It is forbidden to inform the persons that the STOR relates to, or anybody who does not need to know about it, that a STOR will be submitted. This also applies to requests for information on the persons that the STOR relates to, in order to fill in certain fields. Assuring the above, requires procedures to be implemented. The purpose of confidentiality is to prevent the integrity of an investigation being compromised.

### *Adequate training*

Effective supervision is more than just a good monitoring system and procedures. It also includes extensive training focussed on the supervision, detection and reporting of suspicions about actual or attempted market abuse. Well-trained, skilled staff are indispensable for detecting signals of market abuse, as well as for improving the quality of the STORs.

It has become apparent that the best STORs often originate from the front-office staff that are in close contact with customers. Organisations (and their compliance officers) have to ensure that all relevant staff receive effective training in the detection of market abuse.

Given that market abuse attempts are forbidden, training programmes have to ensure that the staff, especially those in front-office positions, are aware of behaviours that can represent attempted market abuse. It is therefore important that the training is sufficiently intensive for the participating staff to acquire thorough knowledge of all possible types of market abuse. They will then be able to recognise and hence detect suspicious orders and transactions. Also, in this context, the training must be tailored to the activities of the organisation. The training has to relate to the scale, structure and systems within the framework of the organisation's activities, but they must not be limited to this framework.

## 4. To notify, the content of STORs

### *What to notify?*

A STOR has to be clearly presented and must contain accurate information that is sufficient for the AFM to evaluate the suspicion quickly and if necessary set up an investigation. The template fields must therefore be filled in as correctly and completely as possible.

In all cases, a STOR has to contain at least the following information:

- personal details of the person submitting the STOR (including his/her function);
- a description of the orders or transactions, including their types, and where the trading activity occurred;
- the price and volume of the orders or transactions;
- a clear description of why the orders or transactions raise a suspicion of actual or attempted market abuse;
- details concerning the identification of each person involved in the suspicious orders or transactions, including the person who placed or executed them, and/or the person on whose behalf this was done; and
- other information and supporting documents that could be relevant for the AFM's market abuse regulation supervision.

The AFM would like to receive all other relevant information (such as written reports, if any, and/or recordings of conversations between the customer and the organisation relating to the suspicious orders and/or transactions). Such information is valuable for an investigation the AFM might conduct. The notification should also be accompanied by relevant press releases, information in the public domain, and/or portfolio details.

### *Where and how to notify?*

If a reasonable suspicion exists that an order or transaction represents actual or attempted insider dealing or market manipulation, the order or transaction concerned will be notified to the AFM by the persons who professionally arrange or execute transactions and who are registered in the Netherlands, or whose head office or branch office is in the Netherlands.

If the suspicion of market abuse arises from an order and/or transaction executed through a Dutch company's branch office in another EU Member State, the company will report the suspicion to the competent authority of the Member State in which the branch office is located.

ESMA has developed a template that must be used for submitting a STOR. This STOR template is integrated in the AFM online portal on <https://portal.afm.nl>. To make use of the portal, you will need to create an account first. Instructions on how to create an account can be found on the Obligation to notify market abuse page of the AFM:

<https://www.afm.nl/en/professionals/onderwerpen/marktmisbruik/meldingsplicht>

Via the AFM portal you can submit STORs to the AFM via a secure connection. Users will get access to an overview page, listing all their submitted STORs, as well as the STORs that are still in concept. STOR notifications can be altered and saved during the creation of the STOR, to be finalised at a later stage.

## 5. Frequently asked questions

### *How does the AFM treat a notification?*

Notifications of suspicion of actual or attempted market abuse can result in an investigation of the orders and/or transactions by the AFM. It is important that the quality of the notification is high enough so that the AFM can quickly form a sound, clear-cut opinion about it, without needing to ask for additional information.

The AFM can also take action if it finds out that a person under a reporting obligation has failed to notify the AFM about a suspicious order and/or transaction. *Failure* to meet this obligation could result in a measure being taken by the AFM.

After receipt the notification is registered by the AFM and is handed over to a supervision officer for further analysis. The supervision officer reviews the notification based on both quantitative and qualitative criteria. The supervision officer can get in contact with the submitter of the notification during this process in case there are questions about the content of the notification, or if additional information is required to conclude the review. The conclusions of the review will in turn be registered, after which a decision is made whether further action should be taken, such as an investigation. An investigation can eventually lead to an enforcement action of the AFM or a report to the Dutch public prosecutor. It is also possible that the notification is closed after review without any further action.

### Legal obligation of confidentiality

The AFM is under an obligation of confidentiality that is laid down in the FSA. The FSA stipulates that all confidential data and information that the AFM receives in relation to its supervision, remains confidential.

Hence, the AFM treats every STOR as strictly confidential. However, there are a few exceptions to the obligation of confidentiality. These exceptions allow the confidential information on which the investigation is based on, such as a notification about a suspicious order and/or transaction, to be shared with other government bodies. In some cases, this sharing is even mandatory. When and which information must or can be shared by the AFM with, for example, De Nederlandsche Bank (the Dutch central bank)<sup>2</sup> or the Public Prosecution Service<sup>3</sup>, is laid down in covenants based on the FSA.

*Regarding information relating to an ongoing investigation, is the AFM allowed to share any of this information with the notifying organisation? If so, what information may be shared?*

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<sup>2</sup> <https://zoek.officielebekendmakingen.nl/stcrt-2016-1863-n1.html>

<sup>3</sup> <https://zoek.officielebekendmakingen.nl/stcrt-2009-665.html>

From discussions with different market parties, a recurring theme is the need for feedback with regard to the processing of notifications made to the AFM. An organisation might wonder how to continue dealing with a customer who is possibly guilty of market abuse. Unfortunately, the statutory obligation of confidentiality applying to the AFM prevents it from saying anything about an ongoing investigation or the processing of a notification. Once the AFM has decided to take steps (such as imposing a fine), the decision is usually made public pursuant to the FSA.

If the AFM proceeds to report the case to the public prosecutor, the details of the decision will not be published by the AFM, as publication is not in the interest of a possible criminal investigation. In the case of a conviction for certain offences under the FSA, the Public Prosecution Service has an obligation to make the matter public. If necessary, the AFM will do its best to inform the notifying organisation about publication by the Public Prosecution Service, the moment this takes place.

## 6. Contact

For questions, please contact the STOR desk by phone on +31 (0)20 797 3716, or by email via [STORdesk@afm.nl](mailto:STORdesk@afm.nl).

The AFM wants to receive your notification if you suspect that market abuse took place or is taking place.

The answers to the frequently asked questions about market abuse, such as insider dealing and market manipulation, can be consulted on the AFM's website ([www.afm.nl](http://www.afm.nl)). The site has more brochures covering the various types of market abuse.

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