



## Market abuse rules also apply to (employees of) organisations in the public domain

How to handle inside information

Publication date: June 2016

## The Netherlands 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.

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## Introduction

A sudden rise in the price of a share prior to the approval of a new drug or a favourable ruling by a judicial authority. Such price movements could indicate information inequality in the market. Initially, the careful treatment of inside information would seem to be relevant only listed companies. However, other organisations can also possess inside information about listed companies

The Netherlands Authority for the Financial Markets (AFM) regularly sees organisations, which are not themselves listed on the stock exchange, disseminating information that could significantly affect the price of financial instruments (such as shares or bonds) of listed companies.<sup>1</sup> This information can be classified as inside information. Trading on the bases of inside information and unlawfully disclosing inside information are both forbidden. It is therefore also important for (employees of) organisations in the public domain to handle such information carefully.

In this brochure the AFM provides examples of inside information that organisations (and their employees) in the public domain may possess. These organisations include courts, central banks, supervisory authorities, ministries, competition authorities, trade unions and industry associations. In the rest of this brochure they are referred to as organisations in the public domain. Information that can be classified as inside information concerns, for example, the imposition of a sanction, approval given by competition authorities for a takeover, the granting of a licence, or a court ruling.

This brochure also covers relevant legal provisions<sup>2</sup>, and includes recommendations from the AFM that can help organisations and their employees to handle inside information with care. Each organisation and person must consider for itself which recommendations are appropriate to apply in a given situation.

If you have questions about the subject, please call the AFM on +31 (0)20-797 3777, or send an email to [marketsupervision@afm.nl](mailto:marketsupervision@afm.nl).

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<sup>1</sup> In the rest of this brochure we refer to these listed companies as 'issuers', the same term used in the market abuse legislation.

<sup>2</sup> No rights may be derived from this brochure, and no actions should be based solely on its contents. If the text of the brochure deviates from that of the MAR and the explanation this provides, the MAR will prevail. The actual text of the EU's Market Abuse Regulation (MAR) is available on the EU website.

## 1. AFM creates awareness about handling inside information

The AFM is committed to ensuring fairness and transparency within financial markets and, amongst other things, strives for compliance with legal obligations and prohibitions with regard to inside information<sup>3</sup>. The AFM intends to increase the awareness among organisations in the public domain (and their employees) as regards the handling of inside information. This primarily concerns the following two aspects:

- the confidential handling of inside information by the employees of organisations in the public domain, before the information is publicly disclosed;
- timely notification by an organisation in the public domain to an issuer of its plans with regard to inside information, so that the issuer is able to disclose the information publicly as quickly as possible. In some cases inside information may also be publicly disclosed directly by the organisation in the public domain. In either case<sup>4</sup>, the objective is to prevent information inequality in the market.

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<sup>3</sup> For further information on this and related terms, see also the AFM's brochure entitled 'Public disclosure of inside information', on [www.afm.nl](http://www.afm.nl)

<sup>4</sup> The legal obligation to publicly disclose inside information as soon as possible rests with the issuer. However, the moment an organisation disseminates inside information selectively, this can result in a breach of the legal prohibitions of unlawful disclosure. In this case it might be desirable for the organisation to disclose the information publicly (and as soon as possible).

## 2. Why is knowledge about inside information important for my organisation and my employees?

If your organisation and/or its employees potentially deal with inside information, you need to take the following risks into account:

- Persons who have access inside information may share this *intentionally* with third parties. This constitutes a violation of the legal prohibition of unlawful disclosure of inside information.<sup>5</sup> These third parties may then unlawfully disclose the information further and/or engage in insider dealing.
- The unlawful disclosure of inside information can also arise *unintentionally* as people concerned may not realise that the information is actually inside information and may share this information with third parties. Ultimately, in both situations there is information inequality in the market, from which third parties can gain a financial advantage. This can damage the confidence that investors have in the sound functioning of the (Dutch) capital market.
- Persons who possess inside information can use it to make financial gains by trading in financial instruments to which the information relates. Such gains arise from the counterparties to the transactions not possessing the same information. This is insider dealing, which is prohibited by law.

It is important that your organisation and employees manage these risks. This starts with awareness that certain information can be classified as inside information. Clear agreements and procedures on handling inside information also help to manage these risks.

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<sup>5</sup> The prohibitions referred to here are explained below in section 3.b.

### 3. What is inside information?

Inside information is defined as:

- information that is of a precise nature; and
- relates, directly or indirectly, to one or more issuers or to one or more financial instruments and that
- if it were made public;
- could have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments

Information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, means information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.

Inside information can relate *directly* to an issuer. One example is the approval of a drug that is manufactured by an issuer.

However, inside information can also relate *indirectly* to an issuer, for example, because the information concerns several issuers. A specific example is an interest rate change by a Central Bank, of which the issuers were not aware in advance. For some companies, this interest rate change can have such major consequences that the information also qualifies as inside information directly relating to them.

An issuer is obliged to publicly disclose inside information that relates directly to it as soon as possible. However, the issuer can only do so once it is informed about the existence of the inside information. Hence, an issuer might not know about the information until an organisation in the public domain has shared it with the issuer or has published it.

#### *a. Examples of inside information*

Below are some examples of situations from recent years where organisations in the public domain took action that could be considered as inside information relating directly to the issuers concerned:

- The ECB increases the interest rate.
- The Netherlands Bureau for Economic Policy Analysis (CPB) publishes an unexpectedly strong economic growth forecast.
- Environmental Agencies issue sensitive rulings about breaches of environmental legislation by an issuer.
- The AFM or De Nederlandsche Bank (DNB) imposes an administrative penalty on an issuer because of a breach of legislation.

- The European Commission issues its Statement of Objections to an issuer.
  - imposes penalties on participants in a cartel. This can affect the share prices of several issuers.
  - makes statements about preconditions for a planned takeover of an issuer.
- Netherlands Authority for Consumers and Markets (ACM):
  - issues rulings about competition aspects relating to the acquisition of a company listed in the Netherlands. This can result in the planned takeover not proceeding.
  - announces that a telecom provider (which is an issuer) will be granted greater freedom to negotiate with competitors regarding access to its networks.
- A European competition authority announces that it has started investigating a Dutch issuer.
- Publication by the WHO of approval or rejection of a drug manufactured by an issuer.
- The Netherlands Food and Consumer Product Safety Authority (NVWA) announces that glass has been found in jars of baby food manufactured by an issuer.
- A court rules on a major dispute between a company and an issuer.
- The Minister of Finance pronounces on the nationalisation of a bank that is also an issuer.
- Ministries publish decisions on airport landing rights that have been granted, which can affect the price of shares in airlines.
- The Ministry of Infrastructure and the Environment awards a large infrastructure project to a construction company (which is an issuer).
- The Netherlands Financial Services Complaints Tribunal (Klachteninstituut Financiële Dienstverlening, or Kifid) rules on a claim concerning investment-linked insurances. This ruling can set a precedent for similar claims, thus increasing the risk of civil claims for listed insurance companies.
- Labour Unions inform the media about reorganisation plans at an issuer.
- Index: the decision to include a share in a key index (such as the AEX index), or remove a share from one, can affect the trading in the share concerned.
- The International Air Transport Association (IATA) publishes figures showing the lowest monthly growth in airfreight. This can affect the price of shares in listed airlines.

*b. How can organisations in the public domain prevent unlawful disclosure of inside information?*

It is prohibited to disclose inside information unlawfully, or to recommend that another person engage in insider dealing, or to induce another person to engage in insider dealing. This prohibition applies to any person, and a breach of this prohibition is a criminal offence. The administrative penalty, a fine, can be as high as the monetary value of the insider dealing transactions. If inside information is unlawfully disclosed, the AFM or the Public Prosecutor can take action against the person who disclosed the inside information.

*c. When can inside information be disclosed legitimately?*

The main rule is that inside information that an organisation in the public domain possesses, or creates, must remain strictly confidential until it is publicly disclosed. Therefore, until then, it is prohibited to disclose the information internally or externally, other than in the situations outlined below.

Exception: inside information should be deemed as being disclosed legitimately if it is disclosed in the normal course of the exercise of a person's employment, profession or duties. Ask yourself whether you have to share the information. Does the recipient need to know this information? The argument that sharing simplifies the work process is not sufficient.

In the next section, we give recommendations for preventing you or your employees from breaching the aforementioned legal provisions. Although organisations in the public domain, such as a court, are not subject to a legal obligation to publicly disclose inside information directly relating to an issuer as soon as possible, organisations in the public domain (and their employees) that have inside information must handle it with due care.

## 4. Recommendations for organisations in the public sector on handling inside information

Based on our experience as a supervisory authority of the financial markets and discussions with market participants, we have formulated a number of recommendations that can help organisations in the public domain and their employees handle inside information carefully.

### *a. Create awareness*

- Classify information in your organisation so it is clear to everyone which information is potentially inside information and which is not.
- Create internal awareness that certain statements and publications can be deemed to be inside information. One advice is to organise periodic workshops during which commonly occurring examples of inside information in the organisation are mentioned and provide guidelines on how to handle them.
- Also be aware that inside information not only relates to companies that have issued shares, but also to those that have issued other types of financial instruments, such as bonds.
- Emphasise to anyone who may come into possession of inside information (regularly or occasionally) that they have a responsibility and duty of care as regards handling this information. Do not leave documents on a printer or a desk, keep diaries out of sight, and do not share the information at team meetings, social occasions or the coffee machine, in the train or elsewhere in the private sphere. Make sure it is clear to everyone what the consequences are of breaching the prohibition of unlawful disclosure of inside information and insider dealing.

### *b. Provide non-disclosure agreements and insider lists*

- Use non-disclosure agreements for all employees that (may) come into contact with inside information.
- On a case-by-case basis, draw up a list of persons with whom the inside information has been or may be shared (insider list).
- Place every person, from support staff to policy-makers, who has anything to do with inside information on the appropriate list, including details about when persons were added to the list. People who are given information early on a one-off basis about a planned acquisition should also be added to the list
- Check whether people on the insider list have a conflict of interest.
- Keep the group of persons who possess inside information as small as possible. The larger the group of persons the greater the risk of leaks.
- Assess whether persons need inside information for the normal course of the exercise of their employment, profession or duties, and if so, whether they need all the information? It is not necessary to share everything with everyone.

- Consider having Chinese walls between departments as a way of preventing conflicts of interest. An example is the separation of the supervisory department from the trading department of a central bank.
- Designate one employee (plus backup) to be responsible for keeping the insider list up to date and for access to the protected digital file. This could be a member of your compliance staff.
- Send an updated insider list to the group of insiders each time one or more persons are added to the list. By following this procedure, the insiders know with whom they can discuss inside information.

### *c. Pay attention to system configurations*

#### Authorisation

- Secure the IT systems/communication internally in such a way that the inside information can only be accessed by authorised insiders, for example by creating a restricted digital environment.
- Embed safeguards. Only grant employees access to the digital file and the ability to spend time on the relevant project after they have been added to the insider list.
- Ensure the access to sensitive emails and electronic invitations to meetings is secure and restricted: pay attention to the reading rights for supporting staff. As soon as these persons have access to emails intended for insiders, they must also be added to the insider list.

#### Continuity

- Use code names and ensure their consistent use.
- Always classify 'confidential' appointments as 'private' in diaries.
- Be careful when working at other locations (public or not); ensure that employees do not allow other people the opportunity to read or hear inside information. If this is not possible, make employees aware of the risk they are taking, and of the consequences it can have for them and their jobs.
- Make sure employees do not transmit confidential information via their private email accounts.

#### Security

- Do not store confidential information in personal systems, in public clouds, or on unprotected digital storage devices.
- Be aware that an open Wi-Fi network is generally not secure<sup>6</sup>.

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<sup>6</sup> [veiliginternetten.nl/themes/draadloos-internet](http://veiliginternetten.nl/themes/draadloos-internet)

#### *d. Provide internal rules*

- Provide internal rules for:
  - private transactions,<sup>7</sup>
  - handling confidential information,
  - conflicts of interest; and verify compliance with these rules.
- Report potential conflicts of interest to a Compliance Officer or management.
- As an employer, make employees explicitly responsible for their family members or housemates in the event that a family member or housemate becomes aware of inside information.
- When starting employment with an organisation in the public domain, inform the members of your household that, as an insider, you might in the future possess inside information that you cannot talk about.

#### *e. Pay attention to communication*

- It is important to keep confidential information to yourself for as long as possible before it is publicly disclosed. If you do share inside information, discuss several scenarios if possible in order to prevent the recipient from gaining a strong suspicion about the true nature of the inside information.
- Confirm non-disclosure agreements in writing.
- You can consider sharing confidential information, subject to the recipient having committed to implement measures (or additional ones) to guarantee the information is kept confidential. As a minimum, non-disclosure agreements have to be signed by receiving internal and external parties. In addition, a receiving external party's attention should be drawn to taking responsibility as well. For example, consider whether this party has insider regulations.
- If possible, conclude covenants with parties with whom you regularly share confidential information. In these covenants you can make specific agreements about how confidential information is to be handled.<sup>8</sup>
- Make timely agreements with the issuer about handling inside information and the moment of public disclosure.
- Important: if possible, publicly disclose information which can be classified as inside information by issuers, outside stock market hours. This means before 9 a.m. or after 5:40 p.m. for a listing in Europe, or after 10 p.m. if the information is also important for companies whose shares are traded on the US market.
- If in doubt, always contact the AFM.

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<sup>7</sup> See for example the AFM Compliance Regulations: [afm.nl/over-afm/organisatie/interne-regelingen;wetten.overheid.nl/BWBR0020756](https://afm.nl/over-afm/organisatie/interne-regelingen;wetten.overheid.nl/BWBR0020756)

<sup>8</sup> See, for example, the covenant between AFM and DNB: <https://zoek.officielebekendmakingen.nl/stcrt-2013-9966.html> or the collaboration protocol between ACM and AFM: <https://zoek.officielebekendmakingen.nl/stcrt-2014-14473.html>

## 5. Public disclosure obligation for the issuer

Even if an organisation in the public domain discloses the inside information publicly, for example in a court ruling, the issuer concerned could still be under a disclosure obligation. This is the case with a press release from an issuer in which it publicly discloses the consequences of a ruling issued by a specific organisation or whereby it informs about subsequent steps to be taken by the issuer (such as whether or not an objection or appeal will be lodged).

## 6. Questions

If you have any questions about this brochure, please contact the AFM on +31 (0)20-797 3777, or by email at [marketsupervision@afm.nl](mailto:marketsupervision@afm.nl).

The AFM would like to be notified if you suspect that inside information is not being handled with due care. By receiving notifications about possible misconduct, the AFM is able to exercise supervision where it is needed.

For answers to FAQs concerning inside information, rumours, insider lists, etc., please see the [information about market abuse, on the website \(www.afm.nl\)](http://www.afm.nl). Brochures are available there on inside information, insider dealing, and the prohibition of unlawful disclosure of inside information.

In addition, the AFM can give a presentation about these topics. Please email your request to [marketsupervision@afm.nl](mailto:marketsupervision@afm.nl).

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