Insider legislation and market manipulation

Current as of 28 December 2007

In pursuit of the GoC, the compliance officer shall ensure that the statutory provisions regarding market abuse (insider and market manipulation prohibitions) are observed, both by the credit institutions as such and by their individual employees, managing directors and external persons working on behalf of a credit institution.

Section 1: Insider legislation

1. Compliance-related information

The following types of information are considered relevant for compliance:

1.1. Insider information

Insider information is defined as any information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments as an informed investor would probably make use of it by partly basing his investment decisions on it (sec. 48a para 1 no. 1 of the Stock Market Act).

For the purposes of this definition, the public means the section of the public that is interested in stock market trading.

1.2. Other compliance-related information

In addition to insider information, price-sensitive information is included, such as company data in particular that is made available to analysts prior to general publication, for instance. Such information does not include research findings insofar as they result exclusively from a combination of already known items of information and business data. The overall context must be taken into account when assessing the relevance for share prices. The planned secondary listing of an already listed security or the specific timing of already known change in the capital of a company may, for instance, constitute price-relevant information without as such causing any significant price change.
Other information whose publication in all likelihood may affect the price of a financial instrument also include – with regard to the SCC - any information which the issuer is required to disclose to the public under the Austrian Capital Market Act and under the Austrian Stock Exchange Act, as amended.

2. Insider trading

Sections 48a and b of the Stock Market Act provide a statutory definition of the act of insider trading. The purchase/sale or recommendation of or purchase/sale offers for financial instruments to third parties, which use insider information are prohibited if the intention is to achieve financial gain for oneself or for a third party. This also applies to secondary insiders. An insider trade also occurs when a non-insider knowingly uses insider information (as defined in the previous sentence) that was shared or otherwise made known to him in order achieve a financial benefit for himself or for a third party through the sale/purchase of securities or derivates. An insider trade is also committed by anyone, whether an insider or not, who uses insider information in order to make a profit for himself or for a third party, even without fraudulent intent, if he was grossly negligent in failing to recognise that it was insider information.

3. Financial instruments

The Austrian Banking Act of 2007 provides for a distinction between financial instruments and non-complex financial instruments. This distinction is of relevance to execution-only transactions.

3.1. Financial instruments acc. to sec. 1 nos. 4 - 6.

1. Transferable securities: the classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;

2. Money market instruments the classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers, excluding instruments of payment;

3. Shares in domestic or foreign investment funds, in domestic or foreign real estate funds, or in similar schemes combining assets with diversified risks;

4. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash

5. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

6. Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;

7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities pursuant to Art. 38 of Commission Regulation (EC) No. 1287/2006;

8. Derivative instruments for the transfer of credit risk;

9. Financial contracts for differences;

options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts pursuant to Art. 38 of Commission Regulation (EC) No. 1287/2006.

3.2. Non-complex financial instruments acc. to sec. 1 no. 7

a) Shares admitted to trading on a regulated market or in an equivalent third country market, money-market instruments, bonds or other securitised debt (excluding those bonds or securitised debt that embed a derivative), shares in any joint investment organism subject to Directive 85/611/EEC;

b) any other financial instruments listed in sub-para. a that meets the following criteria:

aa) it is not included in sec. 1 no. 4 sub-para. c or no. 6 sub-paras. d through j of the Austrian Banking Act (here sec. 3.1. no. 1 sub-para. c or nos. 4-10)

bb) there are frequent opportunities to sell, repurchase, or otherwise realise the instrument at prices that are publicly available to the parties on the market, where such prices are either market prices or have been determined or confirmed by independent evaluation systems;

cc) it does not involve any existing or potential obligation of the customer exceeding the instrument's acquisition costs; and

dd) reasonable information about the financial instrument's features is in the public domain and is sufficiently comprehensible to enable the average small investor to make an informed decision with regard to any transaction involving the instrument.

4. Areas of confidentiality

Areas of confidentiality are departments in credit institutions, which must be separated from other departments through organisational measures regarding the exchange of information, as in such departments, insider information may become available permanently or temporarily. Compliance-relevant information may generally not leave the area of confidentiality and should also be treated strictly confidentially vis-à-vis other units in internal dealings. This rule does not apply to such communication of information as is necessary in the ordinary course of business. Compliance-relevant information may be exchanged between two areas of confidentiality only after consultation with the compliance officer.

The credit institution should therefore take measures to ensure confidentiality. As a minimum precaution, the employees of the areas of confidentiality should be required to sign confidentiality agreements prohibiting the disclosure of confidential information (whether within the credit institution or to third parties) beyond the normal internal flow of information. Such measures may – depending on the size of the credit institution, number of employees or scope and complexity of transactions, for instance – range from ensuring controlled processes to the spatial, personal or organisational separation of units.

In the case of complex transactions, it is sometimes necessary to communicate information from one department to the other in order to ensure that the transaction goes smoothly. Such communication of information is allowed only if limited to what is absolutely necessary and if the secrecy of the compliance-relevant information is assured. It is therefore necessary to inform the head of the area of confidentiality and the compliance officer before making such a communication; moreover, the content and source of the information must be documented, as well as the time of receipt and communication of the information. Employees who are permanently or temporarily assigned to another area of confidentiality (for the duration of a project, for instance) must not exploit their confidential knowledge from the old area or disclose it to the new area.

5. Watch list and restricted list

For the purpose of recording and tracing insider-relevant information reported to the compliance officer with regard to listed companies and affected financial instruments and of business transactions as well as for the control and documentation of relevant compliance measures established by him, the compliance officer shall have the following major instruments at his disposal:

- watch list,
- companywide restricted list or
- selective restricted list.

5.1. Reportable information / business transactions

5.1.1. Information
All compliance-relevant information that accrues in an area of confidentiality must be promptly reported to the compliance officer in a transparent manner. The compliance officer shall record the actual security, the name of the reporting person, date, time, reason for reporting and names of persons who might also have knowledge of such information as part of their work.

5.1.2. Big orders and front running
In case of large orders for financial instruments, a trader shall arrange for the order to be reported to the compliance officer without delay. A “big order” is an order (whether originating within the bank or from group companies) whose execution may cause a significant price change. The definition of a big order is based on the number of units, percentages or exchange transactions in trading days during a specific previous period (e.g.: 20 days, 1 or 3 months) or the volatility.

Provided that the compliance officer is able to identify big orders and regularly monitors these using computer systems, such an immediate report by employees may be dispensed with.

Whenever possible, the compliance officer should decide whether or not to include a security in the list, in agreement with the head of department.

It is not permitted before or during the execution of a customer transaction involving these securities, to execute proprietary trades based on one’s knowledge of the order situation in order to make a profit for oneself or for third parties.

5.1.3. Suspected insider dealings

In the event of information or facts suggesting that a transaction constitutes insider dealing, this shall be reported without delay to the compliance officer at the very least stating the reasons why the reporting person has such a suspicion. The reporting persons shall not suffer any disadvantage from

complying with this obligation, in particular they shall not suffer any disadvantage under employment law.

In case of any justified suspicion of insider dealings, the compliance officer shall initiate a report to the Financial Market Authority (FMA).

5.1.4. Mandates

Any mandates with listed companies (such as supervisory or executive board mandates) shall also be reported to the compliance officer. Compliance-relevant information received by an employee of the credit institutions during the exercise of his mandate is not reportable if the recipient of the mandate is bound to secrecy by section 99 in conjunction with section 84 para 1 of the Austrian Stock Corporation Act.

5.2. Actions to be taken if required

5.2.1. Watch list

5.2.1.1. Function
The watch list is a strictly confidential, purely internal list of financial instruments, on which the bank possesses not yet publicly accessible, compliance-relevant information. The watch list, which is updated on an ongoing basis, is known in its entirety only to the compliance officer and allows the credit institution to continually monitor particularly proprietary transactions and those of its employees as well as fund and asset management transactions in order to ensure that the areas of confidentiality are respected and to monitor whether employees are making unfair use of information that has not yet been made publicly available. The compliance officer will decide about whether to include a financial instrument in such list or not.

5.2.1.2. Commercial consequences

- General

Entering a security in the list initially has no legal consequences; in particular, there are no restrictions on trading or advising with respect to such securities. However, the monitoring of transactions with financial instruments included in the watch list must be ensured.

- Employee transactions

The credit institution reserves the right to restrict transactions by employees or to cancel them after the fact. The compliance officer may also prohibit the execution of transactions that have come to his attention. Trading with securities on the watch list is therefore generally allowed but may be prohibited and/or cancelled in certain cases.

5.2.1.3. Agendas of the compliance officer

- Inclusion in/deletion from the watch list

Upon consideration of available information, the compliance officer shall decide on the inclusion of a financial instrument in the watch list without delay.
A financial instrument may be deleted from the watch list only after the information that has resulted in its inclusion in the list has either caused its transfer to the restricted list (companywide or selective) or if it has been made public or shown to be irrelevant. The reporting person shall also report that such compliance-relevant information no longer applies as soon as this has become known. Publication of the originally compliance-relevant information is not subject to a reporting obligation. (Sec. I. 5.2.1.3. and sec. 5.2.2.5.). The subsequent decision with regard to deletion of the financial instrument from the watch list shall be the sole responsibility of the compliance officer.

- Transfer to the restricted list

If information accrues about companies whose securities are on the watch list or if the credit institution receives new information suggesting that substantial immediate price changes are to be expected,

these securities must be put on the selective or the companywide restricted list: (with regard to the commercial consequences or to the publication procedure, see sec. 5.2.2.2.)

5.2.2. Restricted list

5.2.2.1. Function

The restricted list is an internal bank list of securities that are subject to restrictions under this Standard Compliance Code with respect to proprietary trading, customer advising or employee trading. First of all, the purpose of the restricted list is to avoid giving the impression that investment- or price-relevant information that has not yet been publicly disclosed is being used illicitly by the credit institution to its own advantage or that of a customer. Secondly, the restricted list protects employers (especially traders and advisors) from inadvertently doing the following with compliance-relevant information that is not yet publicly available:

- from performing any insider dealings or other transactions frowned upon by the law (in particular transactions acc. to sec. 34 (2) Austrian Banking Act of 2007 or sec. 48b Austrian Stock Exchange Act), or
- giving bad advice or
- arousing as much as a suspicion of having committed such actions.

The restricted list thus has a general preventive effect.

5.2.2.2. Forms and commercial consequences

- selective restricted list
Inclusion of a financial instrument in a restricted list by the responsible compliance officer in precisely defined organisational units and/or persons plus relevant trading and advisory limitations for the group of affected persons to ensure own protection or the protection of the bank against accusations of insider dealing. Here, sections 6.1. through 6.4. - “Trading and consulting limitations upon inclusion in the restricted list” - apply accordingly, restricted to all persons affected. The publication of analyses (including analysis updates) is prohibited if the insider-relevant information is available to the analyst or if the compliance officer has issued such prohibition.

- companywide restricted list
Inclusion in the restricted list applicable to all organisational units/employees of a bank by the competent compliance officer plus major trading and consulting limitations for proprietary, customer or employee transactions. (For details see sec. 6. below). The publication of analyses (including analysis updates) is prohibited until deletion from the restricted list.

5.2.2.3. Non-disclosure

The restricted list is to be kept strictly confidential as a trade secret. Otherwise, the restricted list is subject to banking secrecy as defined by section 38 of the Austrian Banking Act. Without prejudice to any statutory requirements, the fact that a security has been placed on the restricted list of the credit institutions must not be disclosed to any parties outside the bank. In case of a selective restricted list, such fact shall be communicated only to the affected organisational units or (groups of) persons and therefore - in addition to professional secrecy vis-à-vis persons outside the bank - may also not be disclosed internally to other employees of the bank.

5.2.2.4. Term

To keep trading and advisory limitations to a minimum, “inclusions in companywide restricted lists” should usually be of a short duration.
”Inclusions in selective restricted lists” on a case-by-case basis may also be made for preventive purposes by the compliance officer for a longer period of time.

5.2.2.5. Agendas of the compliance officer

If information accrues about companies whose securities are on the watch list or if the credit institution receives new information suggesting that substantial immediate price changes are to be expected,

these securities must be deleted immediately from the official recommendation list (purchase/sale) of the credit institution and put on the selective or the companywide restricted list.

- Inclusion to the "selective restricted list"
In this form of the restricted list, all organisational units or (groups of) persons affected by yet undisclosed or price-relevant information shall be precisely defined by the compliance officer to bring their attention to any limitations on trading or advice that need to be taken into account by them. Inclusion in the restricted list shall exclusively be communicated to the group of persons involved by the compliance officer upon consideration of the adequacy of such measure.

- Inclusion to the "companywide restricted list"
To bring the trading and consulting restrictions that are to be observed to the attention of affected employees, the restricted list shall be communicated companywide. The reason for inclusion in the restricted list is not disclosed.

- Deletion from the restricted list
A financial instrument may be deleted from the restricted list only if the reasons for its inclusion in the list have ceased to exist. The reporting person shall also report that such compliance-relevant information no longer applies as soon as this has become known. Publication of the originally compliance-relevant information is not subject to a reporting obligation. The subsequent decision with regard to deletion of the financial instrument from the watch list shall be the sole responsibility of the compliance officer.

6. Limitations on trading and advice in case of inclusion in the restricted list

The following provisions apply without limitation to companywide restricted lists and to selective restricted lists depending on the affected company unit/person (cf. sec. 5.2.2.2.).

6.1. Proprietary trading

It is prohibited to execute proprietary trading transactions involving securities included on the restricted list in excess of the average amount that is customary for the relevant credit institution and for the relevant security (e.g., in the context of Market Making, see section 6.2 below). In such cases, the "Safe-Harbour Regulations" defined by section 48e para 6 of the Austrian Stock Exchange Act shall apply. Before executing such orders or transactions, it is necessary to submit them to the compliance officer for examination, who may grant his approval in certain cases.

6.2. Market making

Market making in financial instruments on restricted lists shall be permitted only to the extent provided for under agreements or – in the absence of any agreements – to the usual extent. Market making must not be resumed, however, as long as the security is on the restricted list.

6.3. Asset management transactions

In principle, transactions in financial instruments included in the restricted list are prohibited as part of asset management. Justified exceptions shall be coordinated with the compliance officer.

6.4. Employee trading

As set forth in the provisions of the "Guidelines for Transactions by Employees in Credit Institutions", the trading in securities that are on the restricted list by employees is prohibited if the restricted list has been communicated to these employees or they have otherwise gained knowledge thereof. The compliance officer must have the possibility of monitoring all employee trading.

6.5. Advice and recommendations

It is prohibited to actively advise a customer about securities included in the restricted list or recommend such securities to him. If the customer expressly asks for advice, however, such advice is permissible but must always be written up by the advisor and forwarded to the compliance officer. In any case, it is forbidden to communicate compliance-relevant information. In case of doubt, it is necessary to obtain approval from the compliance officer.

Publication of analyses (updates) of financial instruments / issuers included in the restricted list shall be prohibited until cancellation of the restricted list. Queries regarding specific securities may be answered, however, but they must be written up at the close of the transaction and notified to the compliance officer.

6.6. Customer orders

Performance of orders for financial instruments included in the restricted list which have been issued by the customer without prior advice in acc. to sections 45 and 46 of the Austrian Securities Supervision Act of 2007 are permitted. In case of orders by customers with prior advice, sec. 6.5 shall be observed.

Section 2: Market manipulation

1. Prohibited behaviour

In particular, the following practices are incompatible with the prohibitions of market manipulation under stock exchange law (sec. 48a (1) no. 2 Austrian Stock Exchange Act):

1.1. Orders/transactions contrary to permitted market practice

1.1.1. The above includes transactions or orders to buy or sell, which

- give or might give wrong or misleading signals for the offer of financial instruments, the demand for the above or their price, or
- which affect the price of one or of several financial instruments by one person or by several colluding persons in such a way that an abnormal or artificial level is reached,

unless the person concluding the transactions or issuing the orders had legitimate reasons to do so and that such transactions or orders are not in violation of permitted market practice on the relevant regulated market.

1.1.2. Under said conditions, the following is therefore not permitted:

a) Transactions or orders to buy or sell that are liable to be misleading regarding offer of or demand for a financial instrument when determining a specific stock exchange or market price used as reference price for a financial instrument or other products, e.g.

- if, through the purchase or sale of financial instruments on the close of trading, investors issuing orders based on the closing price are misled about the real economic situation ("*marking the close"*);
- if demand for a financial instrument is increased in order to drive up the price by creating the impression of dynamics or by pretending that the price hike has been caused by buoyant sales ("*advancing the bid"*);

b) if transactions or orders to buy or sell financial instruments are issued by different colluding parties mainly for the same number of units and the same prices. These include:

- transactions not associated with a real change of ownership of a financial instrument ("*wash sales*");
- transactions where simultaneous orders to buy and to sell at the same price and in the same scope is issued by different colluding parties ("*improper matched orders*");
- performance of a series of transactions appearing on a public notice board to create the impression of lively sales or price movements of a financial instrument ("*painting the tape*");
- activities of one person or of several colluding persons with the objective of driving up the price and of subsequently offloading their own financial instruments in large numbers ("*pumping and dumping*");

The above shall not apply if such transactions have been announced in due time in compliance with the respective market terms.

1.1.3. The assessment whether or not a transaction constitutes "a permitted market practice" shall take into account the regulations enacted by the FMA (cf. Market Practice Ordinance, Federal Law Gazette II 2005/1 regarding compensation transactions in bonds).

1.2. Orders/transactions with other fraudulent contents

1.2.1. Market manipulation also includes transactions or orders to buy or sell upon fraudulent misrepresentation or by way of other deceptive action.

1.2.2. The above shall include securing, i.e. not merely temporarily obtaining a monopolistic position in respect of the offer of a financial instrument or demand for such financial instrument by one or several colluding persons with the result of a direct or indirect determination of the purchase or selling price or other unfair trading terms:

In case of a derivative or base value, the manipulator takes control of demand, placing him at a controlling position, which he can use to manipulate the price of the derivative or base value ("*cornering*" or "*market corner*", "*abusive squeezes*").

1.2.3. Any resort to a legitimate "market practice" (cf. sec. 1.1.1. above) is ruled out.

1.3. Dissemination of incorrect/misleading information

1.3.1. The above shall include the dissemination of information using the media, including the internet or any other means, which give or could give incorrect or misleading signals in respect of financial instruments, through the dissemination of rumours and incorrect or misleading news, for instance, if the person disseminating this information knew or should have known that such information was incorrect or misleading.

1.3.2. The above shall include the use of occasional or regular access to traditional or electronic media by issuing a statement or spreading a rumour regarding a financial instrument or its issuer, once the positions for such financial instrument have been closed without adequately and effectively disclosing this conflict of interest at the same time (e.g. purchase of a financial instrument for own account, before recommending it to another person and subsequent disposal for profit at an increased price as a result of such recommendation ["scalping"]).

1.4. Recommendations for price regulation purposes

It is prohibited to make recommendations for the purpose of leading prices in a certain direction for the credit institution's own transactions or transactions of one of its affiliated undertakings.

2. Safe harbours

2.1. Trading in own shares as part of buyback programs and actions to stabilise the price of financial instruments in accordance with sec. 48e (6) Austrian Stock Exchange Act in conjunction with Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC shall in no event constitute a violation of the prohibition of market manipulation.

2.2. The credit institution's relevant departments shall notify the compliance officer about the credit institution's involvement in such transactions at the earliest possible point in time. Issues regarding the differentiation between "safe harbour" transactions and transactions that may constitute market manipulation under the Austrian Stock Exchange Act shall be reported to the compliance officer; performance of transactions in accordance with sec. 2.1. shall be permitted only upon consultation with the compliance officer.

2.3. Particularly within the scope of stock exchange regulations, market making shall be considered a form of price stabilisation or price management.

3. Reporting duty

3.1. The credit institution's departments and employees shall be required to notify the compliance officer without delay of any obvious suspicion of market manipulation, regardless of whether or not it concerns an own position of the credit institution, transactions for third account or employee transactions. The reporting persons shall not suffer any disadvantage from complying with this obligation, in particular they shall not suffer any disadvantage under employment law.

3.2. In case of any justified suspicion of insider dealings, the compliance officer shall initiate a report to the Financial Market Authority (FMA).

3.3. If and to what extent transactions for third account giving rise to suspected market manipulation will be permitted shall be decided by the compliance officer.

4. Employee trading

The credit institution reserves the right to restrict transactions by employees or to cancel them after the fact. The compliance officer may also prohibit the execution of transactions that have come to his attention.

Section 3: Reporting duties in a nutshell

1. Internal reports

1.1. Reports in connection with big orders and front running (sec. I. *5.1.2.)*

In case of large orders for financial instruments, a trader shall arrange for the order to be reported to the compliance officer without delay. A “big order” is an order (whether originating within the bank or from group companies) whose execution may cause a significant price change. The definition of a big order is based on unit numbers, percentages or exchange transactions in trading days during a specific previous period (e.g.: 20 days, 1 or 3 months) or volatility.

Provided that the compliance officer is able to identify big orders and regularly monitors these using computer systems, such an immediate report by employees may be dispensed with.

1.2. Reporting compliance-relevant information (sec. I. 5.1.3.)

All compliance-relevant information that accrues in an area of confidentiality must be promptly reported to the compliance officer in a transparent manner.

The person arranging for the report of compliance-relevant information shall also report that such compliance-relevant information no longer applies as soon as this has become known. Publication of the originally compliance-relevant information is not subject to a reporting obligation. (Sec. I. 5.2.1.3. and sec. 5.2.2.5.).

1.3. Report in connection with mandates (sec. I. 5.1.4.)

Any mandates with listed companies (such as supervisory or executive board mandates) shall also be reported to the compliance officer. Compliance-relevant information received by an employee of the credit institutions during the exercise of his mandate is not reportable if the recipient of the mandate is bound to secrecy by section 99 in conjunction with section 84 para 1 of the Austrian Stock Corporation Act.

1.4. Reports in connection with market manipulation (sec. II. *3.*)

The credit institution’s departments and employees shall be required to notify the compliance officer without delay of any obvious suspicion of market manipulation, regardless of whether or not it concerns an own position of the credit institution, transactions for third account or employee transactions.

2. Reports to the FMA

2.1. Section 1 reports: Insider legislation

In case of any justified suspicion of insider dealings, the compliance officer shall initiate a report to the Financial Market Authority (FMA).

2.2. Section 2 reports: Market manipulation

In case of any justified suspicion of insider dealings, the compliance officer shall initiate a report to the Financial Market Authority (FMA).