The New EU Market Abuse Regulation: Key Issues for U.S. Issuers

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Executive summary

- A new Market Abuse Regulation will apply across the European Union (EU) from July 3, 2016, replacing the previous market abuse regimes that existed in EU Member States and applied only to instruments traded on EU regulated markets.
- For the first time, issuers of securities on previously unregulated exchanges across the EU will be subject to onerous obligations on information disclosure, insider lists and dealings by senior managers in respect of their securities traded on EU trading venues.
- Where a U.S. issuer has not consented or approved trading in its securities on an EU trading venue (e.g. where a third party has arranged admission to trading on a German trading venue without notifying the issuer), the issuer obligations above should not apply.
- The new regime will also prohibit insider dealing, unlawful disclosure of inside information and market manipulation in respect of a much wider range of securities in the EU.
- U.S. issuers may wish to consider de-listing from EU trading where the new issuer obligations are considered to be too onerous and they wish to be removed from the scope of MAR. U.S. issuers should carefully check the provisions of the securities themselves in order to establish whether noteholders have to be consulted about de-listing, as well as obtain local advice on the procedures for de-listing from the relevant exchange.

Background

The EU has adopted a new **Market Abuse Regulation** (MAR) that will take effect from July 3, 2016 and will differ in certain material respects from U.S. regulation. MAR applies to companies with securities admitted to trading in the EU, and therefore has implications for U.S. issuers that have debt and equity securities admitted to trading in the EU, including Eurobonds that have been admitted to trading on previously unregulated exchanges such as the Dublin and Luxembourg exchanges. The following memorandum explains this regime for U.S. issuers.

After many years where non-U.S. issuers have complained about extra-territorial imposition of rules by U.S. regulators, some U.S. companies will now face a similar situation and will be subject to additional rules imposed by EU regulators despite relatively little nexus to EU securities markets.

An overview of the MAR regime

What is MAR and when will it apply? MAR sets out a new standardized pan-EU regime dealing with market abuse, market manipulation and insider dealing. It prescribes rules relating to, *inter alia*, the disclosure of inside information, the maintenance of insider lists and dealings in securities by persons discharging managerial responsibility (PDMRs) with the aim of enhancing market integrity and investor protection. MAR will have direct application in the EU Member States from July 3, 2016, replacing both the existing Market Abuse Directive (MAD) and related implementing national legislation.

The table below summarizes the key aspects of the MAR regime:

Market Abuse Regulation (MAR) repeals and replaces MAD, directly applicable in EU Member States with effect from July 3, 2016			
Expands **scope of instruments** subject to market abuse regime, for instance to debt securities traded on an MTF in the EU	Covers **offences** of insider dealing, unlawful disclosure and market manipulation	Provides **defenses** for buy-backs and stabilization and market soundings Codifies other defenses to insider dealing	Contains rules on disclosure of inside information, insider lists and dealings by managers

Who and what does MAR apply to? MAR applies to issuers with financial instruments admitted to trading (or for which a request for admission has been made) on an EU **regulated market** such as the London Stock Exchange. For the first time, the EU market abuse regime will also apply to issuers with financial instruments, such as debt securities, admitted to trading (or for which a request for admission has been made) on a **multilateral trading facility** (MTF). Examples of MTFs include Luxembourg's Euro MTF and Ireland's Global Exchange Market (GEM Market), where many U.S. issuers have listed their euro-denominated debt, and which were previously unregulated and not subject to the EU market abuse regime. In addition, MAR will apply to financial instruments traded on an **organized trading facility** (OTF) when that category is introduced as part of the revisions to the Markets in Financial Instruments Directive (MiFID) in 2018[1]. MAR will also apply to derivative instruments whose price or value depends on or has an effect on the price of a financial instrument referred to above.

What is the likely impact for U.S. issuers? All U.S. issuers with securities admitted to trading on an EU trading venue should consider how MAR may affect them.

A U.S. issuer with financial instruments admitted to trading on an EU regulated market is already subject to the existing EU market abuse regime. If such an issuer also has financial instruments admitted to trading on an MTF, these will now fall within the scope of the regime as well. Thus, the requirements under MAR will be incremental to those with which such an issuer currently complies, taking the form of more granular record-keeping and disclosure obligations, which are described below and at Annex II.

Where a U.S. issuer's financial instruments are only traded in the EU on an MTF rather than a regulated market, there will be a more material increase in the regulatory burden compared with the present position. However, some of the procedures the issuer operates to allow it to comply with its U.S. regulatory requirements may assist the issuer in dealing with that burden effectively, although MAR will impose additional requirements.

[1] Financial instruments traded on an OTF will not be covered until the Markets in Financial Instruments Directive II, the EU directive that creates categories of trading venue and will replace the current Markets in Financial Instruments Directive, becomes effective in early 2018.

Where a U.S. issuer's financial instruments are admitted to trading in the EU only on an MTF and the issuer has not approved or consented to such admission to trading, the offences of insider dealing, unlawful disclosure and market manipulation will apply to those trading in those instruments regardless of whether an issuer approved of its instruments being admitted to trading and/or knew they were traded on an EU trading venue. However, the issuer obligations in MAR (i.e. disclosure of inside information, control of inside information and insider lists and dealings by PDMRs) will apply only to issuers who have approved admission to trading of their securities on at least one EU trading venue.

The circumstances in which U.S. issuers could normally be subject to MAR as well as the nature of the new obligations to which they will be subject are further described at Annex I.

The new issuer obligations. MAR introduces a number of key obligations, further described at Annex II, including:

Disclosure of inside information:

An issuer with securities admitted to trading on an EU regulated market is currently under an obligation to disclose inside information to the market as soon as possible, except where it is in the issuer's legitimate interests for disclosure to be delayed. This obligation is retained under MAR but will now be extended to a wider range of trading venues. The legislation also contains a new requirement for an issuer to inform the national regulator of the trading venue of any such delay and issuers must also retain a record of how they determined that the delay in disclosure was in their legitimate interests. In addition, MAR provides that, once disclosed, inside information must be available to the public on the issuer's website for five years.

Control of inside information and insider lists:

MAR also requires the issuer to maintain insider lists in a prescribed format, and it introduces a new and detailed regime for wall-crossings, known as "market soundings" in MAR. Where sounding-out investors involves disclosure of inside information, the issuer can benefit from a "safe harbor" in relation to the unlawful disclosure offence where it follows a specific market sounding procedure and maintains certain records. In particular, the issuer must, *inter alia*: (i) determine whether information disclosed is inside information and keep written records of that determination; (ii) keep records in relation to the disclosure of the information; (iii) inform the recipient as soon as possible once the information ceases to be inside information; (iv) keep records of the disclosure process for five years; and (v) inform the market participant that, by agreeing to receive the information, he is obliged to keep the information confidential.

Dealings by PDMRs:

MAR requires PDMRs as well as persons closely associated with them to disclose to the issuer and the national regulator certain notifiable transactions in the issuer's financial instruments. The issuer must ensure that any such notification is also disclosed to the market. Although the PDMR notification regime is a feature of the existing MAD regime applicable to regulated markets, MAR introduces significant changes, such as the introduction of a *de minimis* threshold for notification of transactions in an issuer's financial instruments of €5,000 per calendar year (or such higher threshold of up to €20,000 as may be set by a Member State). MAR has also reduced the time limit for notifications to three business days (from four business days under the existing MAD regime). In addition, MAR generally prohibits PDMRs from dealing when in possession of inside information or when in a "closed period," i.e. thirty days before an announcement of interim or annual results. Trading under 10b5-1 programs will be subject to these restrictions in relation to the financial instruments traded on an EU trading venue, but not in relation to those instruments traded only on a U.S. trading venue.

Effect on trading of the instruments. As Annex I makes clear, MAR will **not** apply to the trading of U.S. listed securities by U.S. counterparties where there is no EU nexus, i.e. where the relevant financial instruments of the issuer are not admitted to trading on an EU regulated market, MTF or OTF. However, given the expansion of the regime to cover MTFs and OTFs, it may be difficult for market participants to determine whether or not a particular instrument is in scope (for example, whether a U.S. listed security has also been admitted to trading on an EU trading venue by a third party without the consent of the issuer) and, therefore, whether the offences of insider dealing, unlawful disclosure and market manipulation will apply to those trading in those instruments.

MAR requires the European Securities and Markets Authority (ESMA) to maintain a list of MAR-scope financial instruments based on information received from national regulators, themselves having received the information from market operators. However, the obligation to maintain this list will not apply until January 2018, and this list will not be definitive under MAR and may not be updated frequently enough. Market participants may wish to establish systems to monitor this list and/or create monitoring systems that establish whether certain debt or equity instruments are in scope.

Where can the new rules be found? Relevant documents relating to the new MAR regime can be found on the **European Commission** and **ESMA** websites. It is possible that ESMA will provide informal (and non-binding) guidance on MAR and how the rules should apply to a U.S. issuer with a secondary listing or listing of debt securities on an EU regulated market. The current draft of the **Q&A document** contains only one question, but this document will be extended over time.

What action do you need to take?

Issuers that were not previously subject to the EU market abuse regime will need to adopt internal policies, procedures and controls to meet the requirements of MAR as they apply to that issuer's affected securities, i.e. those securities that are traded on an EU trading venue. These issuers must also ensure that their boards, PDMRs and other relevant staff receive training on the regime and their obligations, which will apply in respect of securities admitted to trading on an EU trading venue. In addition, they must prepare insider lists in accordance with the relevant ESMA format, as well as a list of PDMRs and their closely associated persons.

Issuers with financial instruments admitted to trading on an MTF that are already subject to the EU market abuse regime as a result of also having financial instruments admitted to trading on an EU regulated market will need to review and revise their internal policies, procedures and controls to meet the requirements of MAR described above and extend them to cover securities admitted to trading on an MTF.

The table in Annex II below summarizes the key points for issuers and includes references to those supplementary rules that have been published in final draft form or have already entered into force. Issuers will need to continue to review the supplementary rules and guidance as they come into force over the coming weeks and months.

Issuers may wish to consider de-listing from exchanges where the increased compliance burden has become too onerous and they wish to be removed from the scope of MAR. Issuers should carefully check the provisions of the securities themselves in order to establish whether noteholders have to be consulted about de-listing. There may also be a provision in the original underwriting agreement obliging them to consult with the lead managers or seek an alternative listing.

The rules of the relevant exchange will have to be taken into account when de-listing and each individual MTF will have its own requirements.

The Irish **GEM Market** has a relatively straightforward de-listing process. An announcement must be released on the Irish Stock Exchange giving notice that the issuer has applied for the securities to be delisted. Once the announcement is released the Irish Stock Exchange will de-list the securities. In **Luxembourg**, a request specifying the reasons for the request must be addressed to the Luxembourg Stock Exchange. In reviewing the request, the Luxembourg Stock Exchange is required to take into account the interests of the stock market, the investors and, if applicable, the issuer. The Luxembourg Stock Exchange will then fix the date on which the de-listing of the securities will take effect. Other exchanges may take different approaches. As a result of the variation in practice, it is recommended that, where issuers are considering de-listing their securities, they take specific local advice at the earliest possible opportunity.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers in our London office listed below or your regular Davis Polk contact.

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Annex I

Application of MAR to U.S. issuers

Type of U.S. issuer	Previously subject to MAD regime	MAR behaviors apply to securities	Issuer obligations – disclosure of inside information, insider lists and PDMR dealings	Points to note
U.S. issuer with U.S. listing with equity or debt securities also admitted to trading on a regulated market in the EU	Yes	Yes – insider dealing, unlawful disclosure and market manipulation can occur in relation to the securities admitted to trading on the EU regulated market, or derivative instruments related to those securities, but **not** in relation to securities traded only on a U.S. market	Yes – in relation to the securities admitted to trading on the EU regulated market, not in relation to securities traded only on a U.S. market	By January 2018, it is expected that ESMA will have in place a consolidated list of all instruments subject to MAR
U.S. issuer with equity or debt securities admitted to trading in the EU only on an MTF	No[2]	Yes – insider dealing, unlawful disclosure and market manipulation can occur in relation to the securities admitted to trading on an MTF or derivative instruments related to those securities	Yes – in relation to the securities admitted to trading on an MTF	By January 2018, it is expected that ESMA will have in place a consolidated list of all instruments subject to MAR
U.S. issuer with equity or debt securities admitted to trading on a regulated market in the EU and equity or debt securities admitted to trading on an MTF in the EU	Yes – but only in respect of the equity or debt securities admitted to trading on an EU regulated market	Yes – insider dealing, unlawful disclosure and market manipulation can occur in relation to the securities admitted to trading on a regulated market and the securities admitted to trading on an MTF or derivative instruments related to those securities	Yes – in relation to the securities admitted to trading on a regulated market and the securities admitted to trading on an MTF	By January 2018, it is expected that ESMA will have in place a consolidated list of all instruments subject to MAR
U.S. issuer with equity or debt securities admitted to trading in the EU only on an MTF where the issuer has not approved or consented to such admission to trading	No	Yes – insider dealing, unlawful disclosure and market manipulation can occur in relation to the securities admitted to trading on an MTF or derivative instruments related to those securities	No – Articles 17(1), 18(7) and 19(4) of MAR appear to restrict the application of the obligations on issuers to circumstances where an issuer has approved trading of their financial instruments on an MTF or has requested admission to trading of their financial instruments on an MTF	It is possible that ESMA may provide guidance on this topic in the next few months

[2] Except where the securities were listed on an MTF which was effectively brought within the scope of the MAD regime by a particular EU Member State, e.g. the Alternative Investment Market (AIM) in the UK.

Annex II

Key points for issuers with securities admitted to trading on an EU regulated market, MTF or OTF

Topic and sources	Key points to note	Key action points
Disclosure of inside information MAR Articles 7 and 17 Draft ESMA Guidelines on MAR	▪ Obligation to disclose "inside information" (that a reasonable investor would use when making investment decisions in relation to the securities traded on an EU trading venue) to the market as soon as possible ▪ The following are examples of events or circumstances that may constitute inside information in relation to an issuer with securities traded on an EU trading venue: o Any circumstance that affects the issuer's ability to comply with its obligations under the relevant securities (e.g. the payment of interest for debt securities) o A change in the issuer's financial situation (e.g. a capital injection that reduces the issuer's risk of default in respect of debt securities) o A refinancing measure that affects the ranking of debt securities o A legal dispute ▪ Delay in disclosure is permitted where in the company's "legitimate interests" (*guidance set out in Draft ESMA Guidelines*) and information can be kept confidential and market not misled ▪ If disclosure of information is delayed, on eventual announcement must notify the regulator of time/date of decision to delay and who took it; a Member State regulator can require an explanation of the delayed disclosure to be given with the notification or (as will be the case in the UK) upon request ▪ Once disclosed, inside information must be available to the public for 5 years on a corporate website	▪ Prepare and/or review policies and procedures on identifying and disclosing/delaying disclosure of inside information ▪ Set up log of inside information, template for recording delayed disclosure and notice to regulator of delayed disclosure
Control of inside information and insider lists MAR Articles 11 and 18 Commission Implementing Regulation (EU) 2016/347	▪ Insider dealing and improper disclosure of inside information are offences ▪ Sounding-out investors can involve disclosure of inside information; therefore, issuer must follow specific market sounding procedure and keep records to benefit from the safe-harbor, as described below: o Determine whether information disclosed is inside information and keep written records of that determination o Keep records in relation to disclosure of information o Inform recipient as soon as possible once information ceases to be inside information o Keep records of disclosure process for five years o Inform market participant that, by agreeing to receive information, he is obliged to keep information confidential ▪ Must keep insider lists in prescribed format: no deviation from format, extensive information must be included (*forms set out in annex to Implementing Regulation*)	▪ Brief board and managers on offences and safe-harbors ▪ Consider if permanent insider list required in addition to lists for specific situations ▪ Set up insider lists in prescribed format and process for market soundings
Dealings by managers MAR Article 19 Commission Delegated Regulation (EU) 2016/522 Commission Implementing Regulation (EU) 2016/523	▪ Regime applies to PDMRs and "closely associated persons" ▪ PDMRs cannot deal when in possession of inside information or when in "closed period" (30 days before announcement of half year or annual results) (*exemptions in Arts 7 to 9 Delegated Regulation, e.g. for some employee share scheme dealings*) ▪ PDMRs and closely associated persons must disclose "notifiable transactions" (*list set out in Art 10 Delegated Regulation*) in the company's securities ▪ De minimis threshold for notification of transactions of €5,000 per calendar year (as will be the case in the UK) (or such higher threshold of up to €20,000 as may be set by a Member State) ▪ Disclosure made to the company and the regulator (*form set out in annex to Implementing Regulation*): the company must notify the regulator of notifications received within 3 business days	▪ Prepare list of PDMRs and closely associated persons ▪ Prepare and/or review internal share dealing code and review impact on share schemes ▪ Consider voluntary disclosure of all dealings (regardless of de minimis threshold) ▪ Establish process for notifying regulator