

CAPITAL MARKETS | June 23, 2016

EU Market Abuse Regulation—Implications for Non-EU Issuers with Securities Traded on an EU Market

The EU's revamped market abuse rules—the Market Abuse Regulation (“MAR”)—come into direct effect in all EU Member States on July 3, 2016. MAR expands the scope of certain EU rules to EU markets that were previously not subject to the EU market abuse rules, including the exchange-regulated segments of the Irish Stock Exchange and the Luxembourg Stock Exchange. These exchanges have historically been popular with non-EU issuers in the United States, in Latin America and elsewhere for listing their cross border debt offerings. For those issuers, MAR imposes new substantive disclosure and compliance requirements. Issuers will need to consider whether they will need to adopt new, or adapt existing, policies and procedures in order to comply with MAR. This briefing provides some guidance to issuers about these new requirements, the issues they raise and options that may be available to issuers in dealing with them, especially for issuers who are not otherwise tied to European markets as trading and capital-raising venues for their equity.

The Annex to this briefing contains a checklist of key actions that issuers may want to consider taking in preparing for MAR's application to their EU-traded securities.

What is Changing on July 3, 2016 and Why This Will Matter For Some Non-EU Issuers

MAR expands the application of the EU market abuse rules to EU markets that were previously exempt. These are EU multilateral trading facilities (MTFs) (and, from January 2018, “organized trading facilities”). EU MTFs include the Irish Stock Exchange Global Exchange Market (GEM), the Luxembourg Stock Exchange Euro MTF market and the London Stock Exchange's AIM market. Under the existing Market Abuse Directive, the rules only apply to securities traded on EU regulated markets, though a number of significant MTFs—e.g. the Irish GEM, AIM and all German MTFs—either chose to apply some parts of the EU rules to their markets or were required by national law to do so. Many non-EU issuers have historically chosen to list their debt securities on an EU MTF, rather than an EU regulated market, because of the MTF's more limited regulatory and reporting obligations. These markets will now become subject to the EU market abuse rules, as described in detail below.

MAR also extends procedural requirements for securities listed on EU regulated markets. In addition, for issuers with securities listed or traded on EU markets that were already subject to the EU market abuse rules, MAR extends the record keeping requirements and other procedures required to be followed to comply with those rules. It imposes more onerous requirements for issuers and, in the case of directors'/senior officers' dealings in EU-traded securities, for those directors/senior officers.

Issuers affected by the revamped rules will want to take the following actions:

- **Assess impact.** Non-EU issuers with securities traded on an EU market will need to assess how onerous adapting to the new requirements will be and what changes will be required to their internal policies and procedures (and the related costs).
- **Consider listing alternatives.** Depending on the impact assessment, issuers may consider delisting from their existing EU MTF and possibly seeking a listing or trading on a non-EU market. There are a number of market (including investor requirements) and legal considerations involved in any such assessment that will need to be taken into account.

What are the Key Requirements of MAR?

MAR contains two sets of provisions:

- restrictions/prohibitions on (a) dealing in EU-traded securities when in possession of inside information (defined under MAR as summarized in the Annex, “*Disclosure Requirements—Inside Information*” below—essentially this is material non-public price sensitive information), and (b) market manipulation in relation to EU-traded securities, and
- requirements with regards to: (i) the prompt disclosure of inside information in relation to EU-traded securities, (ii) the maintenance of lists of insiders within issuers (and their advisers) and (iii) reporting of dealings, as well as restrictions on dealings, by directors and certain senior officers.

Rules prohibiting insider dealing/market manipulation

MAR’s insider dealing and market manipulation rules also apply to conduct taking place outside of the EU and off the relevant trading venue and regardless of any intention to benefit the insider personally. Market manipulation generally requires false or misleading behavior in some shape or form.

MAR provides certain safe harbors from the relevant prohibitions if detailed disclosure, record keeping and other requirements are followed:

- share buybacks (safe harbor limited to share buybacks, but good practice would suggest that bond buybacks also follow the share buyback requirements as appropriate) (see the Annex, “*Buybacks/Stabilization*” below);
- stabilization—(available for equity and debt) (see the Annex, as above);
- market soundings (i.e. wall-crossing—pre-transactional discussions with potential investors where inside information is being shared) (see the Annex, “*Market Soundings*” below); and
- certain AMPs (accepted market practices).

Disclosure, insider lists and trade reporting

- **Prompt disclosure of inside information.** Inside information in relation to the relevant EU-traded securities must be disclosed as soon as possible and in the prescribed way. There are strict conditions under which this disclosure can be delayed—see the Annex, “*Disclosure Requirements—Understanding the Circumstances Where Disclosure May Be Delayed*” below. Issuers will need to familiarize themselves with the MAR definitions and standards, implement relevant policies and procedures for the prompt disclosure of inside information relating to the EU-traded securities and obtain appropriate advice in cases of any doubt.
- **Maintenance of insider lists.** If an issuer is in possession of inside information, it will be required to maintain an insider list which records the names and certain other information of individuals with access to that inside

information. The requirement also applies to any person acting on behalf of the issuer, e.g. professional advisors. These insider lists must be maintained and updated in the prescribed form and, where required, made available to the national regulator—see the Annex, “*Insider Lists*” below.

- **Trade reporting.** Trades by the issuer’s directors/senior officers in the EU-traded security must be reported by the individual to the national regulator and issuer. The issuer must then notify these to the market. “Transactions” for these purposes are defined very broadly. This is required whether or not the officer concerned has any inside information.

MAR prescribes a 30-day “closed period” before announcements of interim financials or year-end reports by the issuer. During this closed period, neither directors nor senior officers may deal in the EU-traded security. There are only very limited and tightly controlled and prescribed “exceptional circumstances” when an issuer may allow such dealings.

These rules only apply to EU-traded securities. Information that is price-sensitive for non-EU traded equity but not for EU-traded debt does not have to be disclosed. Dealings in non-EU traded equity will not need to be disclosed under MAR simply because the issuer has debt traded on an EU MTF.

Are the Issues the Same For All Non-EU Issuers? No.

Issuers that have only debt traded on an EU MTF. These issuers will have fewer issues to consider. Director/senior officer dealings in equity not traded in Europe will not require disclosure under MAR.

Issuers already traded on an EU-regulated market. These issuers are already subject to the existing rules and so are likely to have policies and procedures in place to deal with a large part of what MAR will require.

Issuers with securities admitted to trading on an EU MTF without their consent. Issuers who have their securities admitted to trading on an MTF (and no other EU market) without their consent will not be subject to the disclosure, insider lists and directors’/senior officers’ transactions rules under MAR. They will, however, be subject to the prohibitions on insider dealing and the market manipulation rules under MAR as will any other person dealing in the securities. Most of the record keeping and notification requirements under MAR concern the disclosure and related rules, rather than the insider dealing and other prohibitions and so MAR should be less of a concern for those issuers. These issuers may, however, need to satisfy themselves that any “own dealings” in those EU-traded securities (e.g. buybacks) will not be caught by the insider dealing prohibitions (e.g. by ensuring they are not conducted when in possession of any inside information).

Sovereign issuers. Certain public bodies and central banks of third (non-EU) countries (as well as certain EU-bodies) have been exempted from MAR in relation to transactions, orders or behavior in pursuit of monetary, exchange rate or public debt management policies. These are designated bodies in the United States, Australia, Brazil, Canada, China, HK SAR, India, Japan, Mexico, Singapore, South Korea, Switzerland and Turkey.

“Private company” issuers. Issuers with no other public trading of securities other than their EU MTF traded debt may not have had to implement the internal policies to support compliance with existing EU rules and regulations, but will now be required to do this under MAR if their debt remains traded on the EU MTF. These companies may face the biggest challenge in preparing their internal systems to adapt to MAR.

Key Behavioral and Other Changes That Issuers May Need to Consider Adopting

Compliance with home-country requirements is no substitute for compliance with MAR. On the one hand, as noted above, some issuers will be familiar with the general principles underlying the MAR requirements. For example, NYSE and Nasdaq both have “prompt release” policies that generally require issuers to disclose material information to the market promptly. Many Latin American countries have similar requirements for publicly traded companies. Trading by insiders, except during specified trading windows, is often prohibited, as is market manipulation.

On the other hand, MAR may still differ from applicable home-country rules in how these general principles are implemented.

- **Systems and procedures.** Issuers will need to have in place arrangements and systems to disclose inside information, not only as soon as possible, but also in the prescribed way. Announcements to the relevant EU market must be:
 - made via approved regulatory information service providers;
 - relayed simultaneously and free of charge with basic prescribed content; and
 - made available on websites in a non-discriminatory manner, free of charge, for at least five years and organized in a chronological order.
- **Delayed disclosures.** If an issuer wants to take advantage of the MAR rules allowing delayed disclosure—for example, where the prompt disclosure would prejudice its legitimate interests in negotiating a deal—it must: (i) make sure that it satisfies the substantive conditions for delaying; and (ii) have in place the systems and procedures that will ensure it can comply with:
 - the record keeping requirements where it does delay disclosure;
 - the requirement to announce to the market and, where the regulator requires this, the obligation to provide the regulator with details of those records (including its justification for the delay), once the inside information is finally released to the market; and
 - the maintenance and updating of insider lists.
- **Maintenance (and updating) of insider lists.** Insider lists will need to be created and maintained on prescribed MAR templates. These must be ready for delivery, on request, to the relevant EU national regulator.
- **Reporting of trades by directors/senior officers.** If the issuer is unlikely to have directors/senior officers dealing in its EU-traded securities and expressly prohibits this, the likelihood of it needing to set up detailed procedures for dealing with such transactions will be reduced. Issuers will need to revise their policies to comply with MAR, including restricting dealings in the relevant securities by directors/senior officers during the 30-day closed periods, except as allowed by the MAR rules.
- **Market soundings or wall crossings.** If these take place in relation to EU-traded securities, even outside of the EU, they should be conducted in accordance with the requirements (including record-keeping under MAR) to ensure that the safe harbor applies. Otherwise, issuers will need to satisfy themselves that the manner in which the wall-crossing has occurred could not otherwise be regarded as market abuse, and they would need to feel very confident about the immateriality of the transaction as to price or the confidentiality of

any disclosures being maintained and not abused. Issuers (and their advisers) will need to familiarize themselves with the MAR requirements and, where necessary, ensure that systems and procedures are in place to ensure compliance with the MAR rules.

- ***Own dealings in EU-traded securities.*** The need to avoid any “own dealings” (e.g. buybacks) that could be regarded as market abuse by the issuer may not involve significant change for some issuers already accustomed to the listing and trading regulations applicable to their securities outside of Europe. However, this may be much more difficult for “private company” issuers that have not previously had to consider whether and how their own actions could amount to market abuse in relation to their own securities.

In certain circumstances, an issuer’s securities might be admitted to trading by an application from a third party on an EU MTF without the issuer’s consent or even knowledge. Issuers in this situation with any concerns about buybacks being caught by the MAR market abuse rules (see “Are the issues the same for all foreign issuers? No.” above) may need to check, before engaging in a buyback, whether their securities are included on the publicly available list of all securities admitted to trading on EU markets. The European Securities and Markets Authority (“ESMA”) will be required to maintain such list beginning 2018. This list will not, however, necessarily be exhaustive or complete if ESMA is not given accurate and complete information.

Final Thoughts

The significance and problems of the changes brought about by MAR for sophisticated issuers should not be overstated. We expect that, for many public companies that have their equity listed or traded on a non-EU market, the primary impact will be in relation to record-keeping and compliance. The required training and monitoring, however, could be significant in order to implement and document compliance on an ongoing basis. For issuers that are not currently subject to any form of market abuse regulation in their home market, becoming subject to MAR could represent a big change and require significant modifications to existing internal policies and procedures. Where issuers determine that MAR causes the incremental burden of an EU trading to outweigh its benefits, they may want to carefully consider delisting and the use of alternative listing or trading venues for future issuances.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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ANNEX A
KEY ACTIONS CHECKLIST

Insider Lists	
Identifying Insiders	<ul style="list-style-type: none"> ○ Identify a list of individuals who currently have access to any existing inside information that will likely not be disclosed prior to July 3, 2016. ○ Be prepared to make the insider lists available on demand to the relevant national regulator. ○ Ensure professional advisers agree to maintain their own lists and are held to professional or contractual confidentiality obligations. ○ Ensure non-professional advisers are bound by contract to comply with confidentiality obligations. ○ Ensure the Issuer has all the necessary information with respect to each of these persons, including: <ul style="list-style-type: none"> ▪ first name, surname, birth surname (if different from surname); ▪ company name and address; ▪ work direct line and work mobile telephone numbers; ▪ function and reason for being an insider; ▪ date and time at which the person obtained inside information; ▪ date and time at which the person ceased to have access to inside information; ▪ date of birth; ▪ “National Identification Number” (where applicable in the concerned Member State); ▪ personal home and personal mobile telephone numbers; and ▪ personal full address: street name; street number; city; post/zip code; country. ○ Different lists must be maintained for each separate piece of inside information. ○ Receive written acknowledgment that these persons are aware of their legal and regulatory duties and are aware of the sanctions applicable to insider trading and unlawful disclosure of inside information. ○ Set up written procedures to ensure that the same steps are taken with respect to any new inside information going forward. ○ Note that the gathering and storing of personal information may require consent under data protection or similar rules in the relevant jurisdiction(s).
Permanent Insiders	<p>Determine whether Issuer should maintain a list of permanent insiders, e.g. individuals who are deemed to be in permanent contact with inside information.</p>

Disclosure Requirements	
Inside Information	<p>“Inside information” is information that:</p> <ul style="list-style-type: none"> ○ is precise—i.e. has reached the stage of being specific enough to enable a conclusion to be drawn as to its possible effect on the prices of the securities; ○ not public; ○ relates directly or indirectly to an Issuer or to particular securities; and ○ if made public would be likely to have a significant effect on the prices of those securities—i.e. is information that a “reasonable investor” would be likely to use as part of the basis for his investment decisions.
Identifying Inside Information	<p>The Issuer should establish procedures for identifying inside information and escalating it to senior management and ultimately the Board for consideration. These procedures should include:</p> <ul style="list-style-type: none"> ○ training key individuals in the Issuer’s various departments and divisions globally to understand the MAR requirements and how to identify what information could be deemed “inside information;” ○ designating one or more persons in the Issuer’s various departments and divisions globally who will be responsible for identifying inside information and escalating it internally; ○ requiring the designated persons to escalate inside information to senior management (and ultimately the Board) as soon as possible; and ○ providing for a decision-making process by which the consideration and disclosure of inside information will be made promptly (or delayed for valid reasons) by the Board or designated persons. See “—<i>Responsibility for Disclosure</i>” below.
Understanding the Circumstances Where Disclosure May Be Delayed	<ul style="list-style-type: none"> ○ Note that disclosure of inside information may be delayed only if: <ul style="list-style-type: none"> ▪ the disclosure is likely to harm the Issuer’s legitimate interests; ▪ the delay would not mislead the public; and ▪ Issuer can ensure the confidentiality of the information. ○ The Issuer may have a legitimate interest to delay disclosure where: <ul style="list-style-type: none"> ▪ a deal is in the course of negotiation which would be jeopardised by immediate disclosure; ▪ the Issuer is in financial distress; ▪ the inside information relates to contracts entered into by the management body of an Issuer pending further corporate approvals to become effective; or ▪ it is in the public interest to delay the inside information in order to preserve the stability of the financial system. ○ Ensure that the conditions for the delay are constantly fulfilled, particularly the requirement to maintain the confidentiality of the delayed inside information. ○ Make an assessment to put an end to the delay and ensure that the inside information is then publicly disclosed in an appropriate manner. When the delayed disclosure is published, Issuer will need to be able to provide a written explanation for the delay to the relevant competent authority. At the discretion of each EU Member State, such an

	<p>explanation may not be required to be provided unless requested by the relevant competent authority.</p> <ul style="list-style-type: none"> ○ The Issuer must record the dates and times when inside information first existed within the Issuer, when the decision was taken to delay disclosure.
Responsibility for Disclosure	<p>The Board should designate one or more persons who will have authority to take decisions regarding disclosure of inside information, particularly with respect to the delay of disclosure. Ensure that these persons are clearly identified within the company. The Board should consider whether this responsibility should rest with a formal committee.</p>
Record Keeping	<p>Decisions in relation to inside information (particularly decisions to delay disclosure) should be recorded in writing.</p>
Listing Exchange Relationship	<p>Designate one or more persons who will be responsible for the Issuer's relationship and communications with the stock exchange on which the securities are listed or traded.</p>
Website	<ul style="list-style-type: none"> ○ Post and maintain on the Issuer's public website for at least five years all inside information that it is required to disclose publicly. ○ Ensure that the disclosure of inside information is not combined with marketing information of the Issuer. ○ Label the published information as "inside information."
Directors'/Senior Officers' Transactions and Notifications	
Identifying the Directors and Relevant Senior Officers and Their Closely Associated Persons	<ul style="list-style-type: none"> ○ Identify the persons in the Issuer that should be considered "persons discharging managerial responsibilities" (PDMRs). ○ Ask PDMRs to identify the persons closely associated with them.
Transactions to Be Notified	<ul style="list-style-type: none"> ○ Transactions in the Issuer's shares or related financial instruments, GDRs, debt instruments, derivatives or other financial instruments linked to them traded on an EEA market. ○ The pledging or lending of financial instruments by or on behalf of a PDMR (and associates of such PDMR). ○ Transactions undertaken by a PDMR or by another person on behalf of a PDMR (and associates of such PDMR), including where discretion is exercised. ○ Transactions made under a life insurance policy, defined in accordance with Directive 2009/138/EC of the European Parliament and of the Council, where the policyholder is a PDMR (and associates of such PDMR), the investment risk is borne by the policyholder, and the policyholder has the power or discretion to make investment decisions regarding specific instruments in that life insurance policy or to execute transactions regarding specific instruments for that life insurance policy.
Ongoing Obligations	<ul style="list-style-type: none"> ○ Educate PDMRs on the requirements of the MAR, including the obligation to disclose any transactions in the Issuer's EU-traded securities by each PDMR (and its closely associated persons) exceeding in the aggregate €5,000 per calendar year, within <u>three business days</u>. The Member States may elect to increase the aggregate threshold to €20,000.

	<ul style="list-style-type: none"> ○ Ensure that PDMRs (and their closely associated persons) do not enter into transactions in relevant securities during a <u>closed period of 30 days</u> before the announcement of interim or annual financial results. ○ Ensure PDMRs and their closely associated persons maintain a written record of each transaction in the Issuer's securities. ○ Ensure that any transactions by PDMRs in the company's EU-traded shares or related derivatives, company's EU-traded debt securities, global depositary receipts, emission allowances and related derivatives and securities loans and pledges over relevant securities are reported to the competent authorities and publish an announcement within three business days. ○ A notification of the transaction to be reported should include certain information such as: <ul style="list-style-type: none"> - the name of the person; - the reason for the notification; - the name of the relevant issuer or emission allowance market participant; - a description and the identifier of the security; - the nature of the transaction, indicating whether it is linked to the exercise of share-option programs or to pledging or lending of securities; - the date and place of the transaction; and - the price and volume of the transaction. ○ Engage PDMRs to continue to actively think of any problem areas relating to existing or future transactions that may entail an obligation to disclose or require further review and analysis and to report these to the people responsible for disclosure internally. See "<i>Disclosure Requirements—Responsibility for Disclosure</i>" above. ○ Ensure PDMRs continue to update the list of closely associated persons as needed.
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Market Soundings	
Wall-crossing	<ul style="list-style-type: none"> ○ Assess in advance whether the market sounding in relation to pre-sale/transaction discussions with potential investors will involve the disclosure of inside information. ○ Keep a written record of the Issuer's conclusion and reasons. ○ Obtain the consent of the recipient of the market sounding to receive inside information and identify the information that is inside information. ○ Inform the recipient of the restrictions on the use of the inside information for: <ul style="list-style-type: none"> ▪ acquiring or disposing of, for the recipient's own account or for the account of a third party, directly or indirectly, the securities relating to that information; or ▪ cancelling or amending an order which has already been placed concerning securities to which the information relates. ○ If the market sounding is conducted by phone, recorded lines should be used where possible. The Issuer should make a statement that the conversation is being recorded and obtain consent to record the conversation. ○ Verify that the individual is the person entrusted by the recipient institution to receive the market sounding. <p>Inform the recipient of its obligation to keep the information confidential.</p>
Cleansing	<ul style="list-style-type: none"> ○ Give the recipients an estimate of when the information will cease to be inside information and monitor the status of information disclosed to the recipients. ○ If the information has ceased to be inside information, the disclosing market participant should provide the recipients with the following information: <ul style="list-style-type: none"> ▪ the identity of the disclosing market participant; ▪ the date and time of the market sounding; ▪ the identification of the transaction subject to the market sounding; ▪ that the disclosed information has ceased to be inside information; and ▪ the date on which the information ceased to be inside information.
Record Keeping	<ul style="list-style-type: none"> ○ Keep a detailed record for at least five years of all required information applicable to the market soundings, including to whom the information is disclosed and what information was disclosed. ○ If conversations are not recorded, then minutes are required, drawn up by the disclosing market participant in accordance with an ESMA template which includes the date/time, identity of the parties, information and materials disclosed and the consents obtained. If minutes are not agreed within five business days after the market sounding, then records of both the disclosing market participant's and recipient's versions of the minutes must be retained.

Buybacks/Stabilization	
	Buybacks/stabilization that satisfy all the requirements for the applicable safe harbor are not subject to prohibitions on insider dealing, unlawful disclosure of inside information and market manipulation.
Buybacks	Buy-back programs can be undertaken for the sole purpose of reducing the capital of the Issuer and can only cover shares.
Stabilization	<p>Stabilization measures can be undertaken for bonds and other securitized debts.</p> <ul style="list-style-type: none"> ○ Ensure that: <ul style="list-style-type: none"> - the undertaking of the stabilisation is for a limited period; - relevant information is disclosed to the competent authority; - disclosure is made in the offering documents; and - the undertaking is in compliance with adequate limits with regard to price. ○ The Issuer must disclose prior to the stabilisation where the stabilisation measure may occur (whether it be on or outside a trading venue). ○ The Issuer must disclose after the stabilisation the trading venue on which the stabilisation transactions were carried out.