

EU Market Abuse Regulation – New Requirements for Issuers of Debt Securities Admitted to Trading in Europe

Skadden

07/21/16

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

40 Bank Street
Canary Wharf
London, E14 5DS
44.20.7519.7000

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Introduction

On 3 July 2016, Regulation 596/2014 of the European Parliament and of the Council of the European Union (the Market Abuse Regulation) repealed and replaced Directive 2003/6/EC on Market Abuse (the Market Abuse Directive).

The Market Abuse Regulation has direct effect in all EU member states and expands the scope of the Market Abuse Directive to impose additional disclosure and compliance obligations on issuers that have requested or approved the admission of their debt securities to trading on EU multi-lateral trading facilities (MTFs). MTFs are electronic exchanges that are distinguished from more official EU exchanges called EU regulated markets.

Bonds issued in the European market are typically listed and admitted to trading on an MTF, so these new requirements will be relevant for any company with bonds listed and admitted to trading on an MTF.

EU Market Abuse Regulation

Scope

Before 3 July 2016, Market Abuse Directive requirements only extended to issuers with securities admitted to trading on EU regulated markets, such as the Main Market of the London Stock Exchange, the Main Securities Market of the Irish Stock Exchange and the Bourse de Luxembourg. The Market Abuse Regulation expands the scope of the Market Abuse Directive to cover issuers of securities admitted to trading on MTF markets and, when the EU's Markets in Financial Instruments Directive (MiFID II) comes into effect on 1 January 2018, other organised trading facilities.

Exchange regulated MTF markets such as the Professional Securities Market on the London Stock Exchange, the Euro-MTF market on the Luxembourg Stock Exchange, the Global Exchange Market on the Irish Stock Exchange and the Open Market of the Frankfurt Stock Exchange are popular venues for issuers of debt securities because they are outside the scope of the EU Prospectus and Transparency Directives and require less onerous initial listing and disclosure obligations and post-listing ongoing obligations.

All issuers who have requested or approved the admission of their debt securities to trading on MTF markets must therefore ensure that they are familiar with applicable Market Abuse Regulation requirements. This applies whether or not the issuer is headquartered in the EU.

Requirements

Key obligations imposed by the Market Abuse Regulation on issuers of debt securities admitted to trading on MTF markets include:

- the disclosure of inside information;
- the maintenance of insider lists; and
- the disclosure of managers' transactions.

Disclosure of Inside Information

Obligation to Disclose

Article 17 of the Market Abuse Regulation requires issuers to disclose inside information as soon as possible.

EU Market Abuse Regulation – New Requirements for Issuers of Debt Securities Admitted to Trading in Europe

“Inside information” is defined in Article 7 of the Market Abuse Regulation as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

- **Precise Nature.** Information is sufficiently precise if it indicates a set of circumstances or events which exists or which may reasonably be expected to come into existence, or which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or events on the prices of the financial instruments or of any related derivative financial instruments.
- **Significant Effect.** Information would be regarded to have a “significant effect” on the price of financial instruments only if a reasonable investor would likely use such information as part of the basis for his or her investment decision.

What constitutes inside information is therefore extensive and must be carefully determined on a case-by-case basis by the issuer. In the context of a debt security, any circumstances, events, agreements or transactions that may, for example, impact:

- an issuer’s ability to repay interest under, or the principal amounts of, the relevant debt securities; or
- an issuer’s credit rating or credit worthiness,

would be relevant to an investor of debt securities and would likely constitute inside information that must be disclosed as soon as possible.

An issuer will need to make such disclosure of inside information as soon as possible through an officially appointed mechanism (OAM) on the exchange where the bonds are admitted to trading. Such OAMs include the Regulatory News Service of the London Stock Exchange, the Regulatory News Service of the Irish Stock Exchange and the Financial News Service of the Luxembourg Stock Exchange.

Delaying Disclosure

Under Article 17(4) of the Market Abuse Regulation, an issuer may only delay the disclosure of inside information if:

- it has legitimate interests which would be prejudiced by immediate disclosure (for example, if the issuer is conducting negotiations, the outcome of which would likely be jeopardised by immediate public disclosure of the information);

- the delay will not likely mislead the public; and
- it is able to ensure the confidentiality of the information.

The reasons for any delay need to be properly documented, and the relevant national regulator of an EU member state has the power to request information from the issuer explaining how an issuer has determined to delay the disclosure of inside information.¹

Insider Lists

Article 18 of the Market Abuse Regulation also requires issuers to:

- maintain a list of all persons who have access to inside information;²
- promptly update the list whenever there is a change; and
- provide the list to a national regulator upon request — where the issuer has no other debt or equity securities listed in Europe, the relevant national regulator will be the regulator of the jurisdiction where the bonds are admitted to trading.

An issuer must take all reasonable steps to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information.

An insider list must include, *inter alia*:

- the identity of any person with access to inside information;
- the reason for including that person on the insider list;
- the date and time of day that person obtained access to inside information; and
- the date the insider list was prepared.

Managers’ Transactions

Article 19 of the Market Abuse Regulation also requires issuers to:

- ensure that transactions in the issuer’s securities by persons discharging managerial responsibilities (PDMR, such as directors and senior executives with access to inside information) and persons closely related to them (such as family members) are publicly disclosed no later than three business days after the transaction. This obligation only applies once the PDMR’s

¹ For more, see the [European Securities and Markets Authority Guidelines No. 1130/2016](#), published on 13 July 2016, which provide guidance on legitimate interests of issuers to delay the disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public.

² [Commission Implementing Regulation \(EU\) 2016/347](#) of 10 March 2016 provides the precise format of insider lists and guidance for updating insider lists in accordance with the Market Abuse Regulation.

EU Market Abuse Regulation – New Requirements for Issuers of Debt Securities Admitted to Trading in Europe

transactions have reached a cumulative value of €5,000 (or its equivalent in other currencies) within a calendar year;³ and

- ensure that a PDMR conducts no transactions in an issuer's securities for its own or a third party's account during a 'closed period' of 30 calendar days before the publication of the issuer's annual report and accounts.

An issuer is required to notify PDMRs of their obligations in writing and draw up a list of all PDMRs and persons closely associated with them. PDMRs are also required to notify the persons closely associated with them of their obligations in writing and keep a copy of this notification.

A notification of transactions conducted by PDMRs and persons closely associated with them is made online through an electronic notification system established by each national regulator.⁴

An issuer will also need to publish such PDMR notification (in the same form as provided by the PDMR) on its website and an OAM no later than three business days after the date of the transaction.

Admission to Trading Without Issuer's Consent; Insider Dealing and Market Manipulation

In certain jurisdictions such as Germany, it may be possible for brokers to admit certain securities to trading on an MTF market (such as the Open Market on the Frankfurt Stock Exchange) without the consent or approval of the issuer. In such cases, the issuer should not be subject to the requirements under Articles 17, 18 or 19 of the Market Abuse Regulation, since these articles only apply where an issuer has requested or approved admission of its securities to trading.

³ Commission Implementing Regulation (EU) 2016/523 of 10 March 2016 provides the format and template for notification and public disclosure of managers' transactions in accordance with the Market Abuse Regulation.

⁴ The U.K. electronic submission platform and guide can be found [here](#) and [here](#).

However, certain aspects of the Market Abuse Regulation, such as the prohibitions on insider dealing and market manipulation, extend to financial instruments admitted to trading even where the admission to trading was not requested or approved by the issuer. In practice, these prohibitions will be more relevant to persons such as brokers, who deal and transact in financial instruments, rather than the issuer of the financial instrument. Nonetheless, issuers will need to be cautious in the event of any proposed issuance of securities, tender or exchange offers, buy-backs or liability management exercises to ensure that they do not inadvertently breach such prohibitions.

Conclusion

In practice, issuers that have equity securities listed and admitted to trading on regulated markets in the EU or other international stock exchanges, which have similar requirements for the disclosure of inside information or material price sensitive information, will simply continue to ensure the consistent and uniform disclosure of inside information across all markets where its securities are listed and admitted to trading. Such issuers will, however, have to familiarise themselves with the timing, electronic forms and submission processes that each EU regulator will require for documenting any delay in the disclosure of inside information and the reporting of PDMR transactions, which may be more onerous than their existing practices.

Issuers that have only requested or approved the admission of their debt securities to trading on MTF markets in the EU will face the more challenging task of familiarising themselves with the new requirements and assessing what constitutes inside information that is relevant to holders of their debt securities. They will also need to become familiar with the relevant forms that each EU regulator will require for documenting any delay in the disclosure of inside information and reporting PDMR transactions.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Danny Tricot

London
44.20.7519.7071
danny.tricot@skadden.com

James A. McDonald

London
44.20.7519.7183
james.mcdonald@skadden.com

Patrick Brandt

London
44.20.7519.7155
patrick.brandt@skadden.com

Richard Ho

London
44.20.7519.7126
richard.ho@skadden.com