Harvard Law School Forum on Corporate Governance and Financial Regulation

SUPPORTED BY: pwc

The New EU Market Abuse Regulation: Impact on US Issuers

Posted by Michael E. Hatchard, Skadden, Arps, Slate, Meagher & Flom LLP, on Sunday, November 6, 2016

Editor's note: Michael E. Hatchard is partner and head of the English law practice at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on a Skadden publication by Mr. Hatchard, Pranav Trivedi, Danny Tricot, James A. McDonald, Scott C. Hopkins, and Patrick Brandt.

The EU Market Abuse Regulation, which replaced the previous Market Abuse Directive regime, has been in effect since 3 July 2016. Although there is much in the new regime that is familiar, U.S. issuers that have applied to have securities admitted to trading on European Union Regulated Markets will still need to address a number of detailed differences. U.S. issuers that fell outside the scope of the previous Market Abuse Directive regime because they had applied to have their securities admitted to trading on certain EU multilateral trading facilities face a greater compliance burden. This post outlines the new regime's implications for affected U.S. issuers, some issues that have emerged since the implementation and methods of dealing with them.

What has happened?

Since the EU Market Abuse Regulation (EU/596/2014) (MAR) replaced the now-repealed Market Abuse Directive regime on 3 July 2016, it has, amongst other changes, extended the application of inside information disclosure, inside information control, senior managers' share dealings and share repurchase requirements to all issuers—including U.S. issuers—that *have applied* to have their securities traded on EU multilateral trading facilities (MTFs)[1] or *have approved* such trading.[2]

MAR's territorial scope has also been formally extended to cover trading in relevant securities and derivatives in non-EU countries where, broadly speaking, the relevant investments are traded on an EU Regulated Market or MTF.

What are the new rules meant to achieve?

[1] EU financial services regulation divides regulated securities and derivatives trading venues among Regulated Markets (*i.e.*, pre-November 2007 official EU national markets), MTFs (*i.e.*, post-November 2007 EU markets that were not official national markets) and, from January 2018, Organised Trading Facilities (OTFs) (*i.e.*, non-equity trading facilities such as interdealer brokers) that have not so far been regulated as trading venues. MAR's requirements are expected to apply to financial instruments traded on OTFs starting on 3 January 2018, when the recast Markets in Financial Instruments Directive is expected to come into force. MAR's impact on those instruments is therefore not covered in this post.

[2] We refer in this note to trading in these instances to be at the issuer's "consent."

MAR, which is supplemented by Delegated Acts (the EU form of secondary legislation), is designed to improve confidence in the integrity of European securities and derivatives markets, increase investor protection and encourage greater cross-border co-operation between regulators. MAR's direct application into EU member states' laws (without the need for national transposition) is designed to ensure a harmonised EU approach to EU capital market supervision.

To which issuers and securities does MAR apply?

MAR applies to issuers of financial instruments (broadly, securities and derivatives) admitted to trading (or for which a request for admission to trading has been made) on: i) EU Regulated Markets—for example, the London Stock Exchange's Main Market; and ii) other EU exchanges such as MTFs—for example, the Luxembourg Euro MTF, Ireland's Global Exchange Market, the U.K.'s Alternative Investment Market and the Frankfurt Stock Exchange's Open Market.

MAR also applies to financial instruments whose price or value depends on, or has an effect on, the price or value of a financial instrument traded on a Regulated Market or MTF (called related investments). Although related investments include derivatives, other securities can also be related investments. This can cause uncertainty, for example, where an issuer intends to issue bonds that will be traded on a non-EU trading venue where its other bonds are traded in the EU even without that issuer's consent.

What does this mean for U.S. issuers?

MAR extends the scope of the EU's market abuse regime to U.S. issuers that applied to have their securities admitted to trading only on an EU MTF (new U.S. issuers). U.S. issuers with financial instruments admitted to trading with their consent on an EU Regulated Market (existing U.S. issuers) had been subject to the previous Market Abuse Directive regime and, therefore, should already be familiar with the types of requirements that MAR imposes on issuers.

It is the practice to list high-yield bonds sold in Europe on a stock exchange, and virtually all high-yield bonds issued in Europe are listed on an EU trading venue, typically the Euro MTF markets of the Luxembourg Stock Exchange or the Irish Stock Exchange. Such issuers (new U.S. issuers) are now subject to MAR. We understand that some bond issuers are choosing to list bonds on stock exchanges not subject to MAR *(e.g.* the Channel Islands Securities Exchange) to avoid MAR application. New U.S. issuers that maintain procedures to comply with U.S. regulatory requirements should be able to adapt those procedures to comply with their MAR obligations, but MAR requirements go beyond disclosure requirements applicable to U.S. companies under SEC regulations in some respects (as MAR requires immediate disclosure of inside information unless delay can be justified, whereas SEC disclosure requirements are based on periodic and specific event-based reporting requirements). In addition, new U.S. issuers will still need to adopt and implement policies and procedures, for example in relation to the creation of insider lists, to comply with MAR requirements.

What are the key areas of impact for existing and new U.S. issuers?

See the table in the appendix of the complete publication, available here.

What about U.S. issuers whose securities are traded on EU trading venues without their consent?

In certain EU jurisdictions it is possible for brokers to facilitate the trading of securities on an EU trading venue *(e.g.* the Open Market on the Frankfurt Stock Exchange) without the issuer's consent. In such cases, the issuer should not be subject to MAR requirements to disclose and control inside information or restrict senior managers' dealings because these only apply where an issuer has requested admission of its securities to trading on the relevant EU trading venue, or has approved trading where no request for admission was made. Nevertheless, MAR prohibitions on insider dealing, improper disclosure of inside information and market manipulation still extend to securities traded on EU trading venues even where the issuer has not consented to that trading. In practice, those prohibitions will be more relevant to intermediaries who deal and transact in financial instruments, rather than issuers. Nevertheless, U.S. issuers who have not consented to the trading of their securities that takes place on EU trading venues still will need to ensure, in consultation with their advisers, that proposed new issuances, tender or exchange offers, buy-backs or liability management exercises do not inadvertently breach such prohibitions.

What are the sanctions for a breach?

The civil sanctions for market abuse include fines, public censure, injunctions and compensation.

Fines	**Issuers**	**Individuals**
Failure to: • maintain adequate systems and controls to prevent market abuse; or • disclose inside information	€2.5 million, or 15% of annual turnover in the preceding business year	€1 million
Failure to comply with rules relating to insider lists and manager transactions	€1 million	€100,000

The Criminal Sanctions for Market Abuse Directive (2014/57/ EU) (CSMAD), which all EU member states with the exception of the U.K. and Denmark have opted into, requires the criminalisation of serious cases of MAR's insider dealing, improper disclosure and market manipulation offences. However, CSMAD does not require EU member states to criminalise an issuer's failure to disclose inside information, maintain adequate controls over the flow of inside information or comply with MAR's senior manager dealings requirements, although they are free to do so should they wish.

Where are the rules and guidance?

MAR can be found on the European Commission website. The European Securities and Markets Authority (ESMA) on 13 July 2016 provided non-binding guidance on the delayed disclosure of inside information under MAR and guidance for persons receiving market soundings (see guidelines on MAR).

ESMA also updated its Questions and Answers on the implementation of MAR, including on managers' transactions.

The City of London Law Society and the Law Society's Company Law Committees' Joint Working Parties on Market Abuse, Share Plans and Takeovers Code published a Q&A on M.A.R, which identifies, and suggests methods of resolving, areas of uncertainty in relation to managers' transactions, share repurchases, disclosure of inside information and insider lists.

What should U.S. issuers do now?

New U.S. Issuers[3] Should:	**Existing U.S. Issuers[4]:**
Familiarise themselves with MAR's requirements in order to adopt and implement the necessary policies and compliance procedures.	Review existing policies and procedures to identify any required extensions or amendments resulting from MAR.
Ensure that their directors, senior managers and other affected employees are trained on MAR and its requirements, especially in relation to the disclosure of inside information, senior managers' share dealings and wall-crossings.	Train affected employees on the differences from the previous market abuse regime. Ensure that senior managers comply with the new rules on share dealings.
Compile and maintain insider lists in the prescribed format.	Comply with the new requirements on insider lists.
For new and existing issuers: Assess the increased compliance burden. If too onerous in a particular jurisdiction, consider whether to de-list from the exchange(s) in that jurisdiction and migrate the listing of those securities to an exchange that is more lightly regulated. Issuers should check the terms of the relevant securities to determine if they require noteholders' consent to de-list.	

The complete publication, including Appendix, is available here.

[3] Those issuers with financial instruments traded on an EU MTF that were not previously subject to the EU Market Abuse Directive.
[4] Those issuers with financial instruments already admitted to trading on an EU Regulated Market.
Those issuers with financial instruments already admitted to trading on an EU Regulated Market.