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ALERT MEMORANDUM

Market Abuse Regulation: Impact on U.S. Public Companies

June 13, 2016

With the July 3, 2016 entry into force of the Market Abuse Regulation ("**MAR**") now only weeks away, U.S. public companies with debt, equity or other securities admitted to trading on EU regulated markets or "multilateral trading facilities," or contemplating such admissions to trading, have limited time to assess and prepare for the new EU-wide market abuse regime. This memorandum supplements our prior memoranda in this area by focusing on MAR's implications for U.S. public companies' ongoing obligations and ordinary course activities and provides updates in an evolving area as implementation approaches.

For most companies, the most relevant MAR requirements for their ongoing obligations and ordinary course activities will be those that relate to ongoing disclosure of "inside information," managers' transactions, insider lists and share repurchases.[1]

The significance of these requirements to U.S. public companies, and the work necessary to comply with them, are likely to differ based on which of the following three categories these companies fall into (which, for purposes of this memorandum, we style as Categories A, B and C, in order of magnitude of expected impact):

- Category A – highest impact – companies whose debt, equity or other securities are *not* currently admitted to trading on an EU regulated market,[2] but are admitted to trading on other EU trading platforms (*i.e.*, MTFs or OTFs)[3] *with* those companies' approval, or that are contemplating any such admission to trading;

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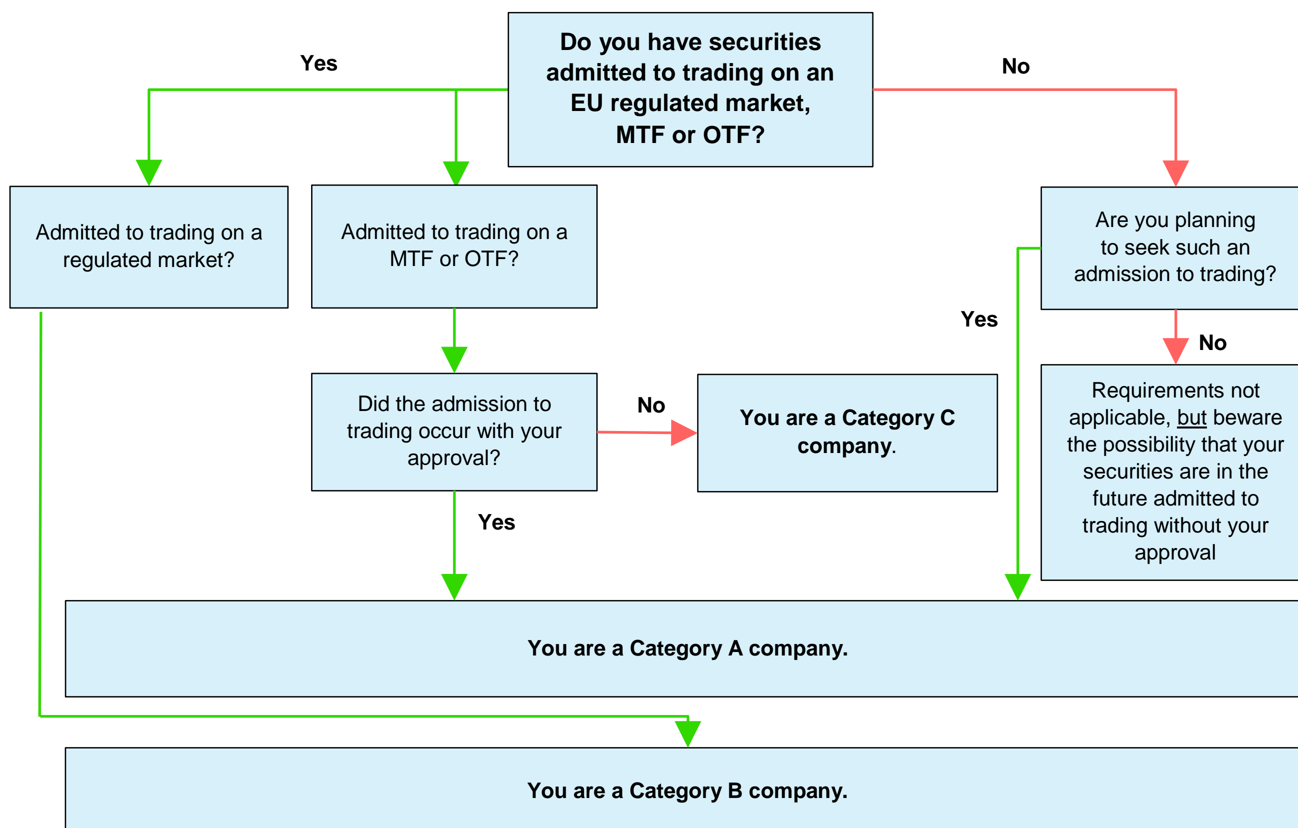
[1] For details on other aspects of MAR, including its market abuse offences and implications for market soundings, stabilization, suspicious transaction and order reports and investment recommendations, please refer to our prior January 14, 2016 and March 15, 2016 memoranda, available here and here.

[2] EU regulated markets, broadly, include the main platforms of the EU stock exchanges.

[3] "Multilateral trading facilities" or "MTFs" are financial trading platforms that are not traditional stock exchanges, including a number of popular trading venues like the Euro MTF in Luxembourg, the Global Exchange Market in Ireland, the Alternative Investment Market in the UK and the Open Market of the Frankfurt Stock Exchange. "Organised trading facilities," or "OTFs," are a new category of trading venue introduced by MiFID II for bonds, structured finance

- Category B – medium but significant impact – companies whose debt, equity or other securities are currently admitted to trading on EU regulated markets; and
- Category C – lowest but potentially significant impact – companies whose debt, equity or other securities are (or in the future become) admitted to trading on MTFs (or OTFs) *without* their approval.



An additional, and potentially overarching, consideration for Category A and B companies assessing the implications of MAR relates to *which* of their securities are admitted to trading in the EU. Article 2 of MAR, its "scope" provision, expressly applies the regulation only to:

- financial instruments admitted to trading on EU regulated markets, MTFs or OTFs (or, in the case of regulated markets or MTFs, for which admission to trading has been requested); and
- financial instruments whose price or value depends or has an effect on the price or value of those EU-traded securities.

Thus, although a U.S. public company with only straight debt (*i.e.*, non-convertible debt) admitted to trading in the EU with its approval will be subject to the full range of MAR requirements, the text of MAR's scope provision supports the view that the requirements should generally only apply to, and be understood only in the context of, those debt securities admitted to trading in the EU (and other securities with a price-value relationship with those debt securities, if any). Conversely, for a U.S. public company with a secondary equity listing in the EU that has no debt admitted to trading in the EU, the text of MAR's scope provision supports the view that MAR requirements generally should *not* apply to its outstanding debt (absent a price-value relationship with the equity).

products, emission allowances and derivatives. OTFs are similar to MTFs, but the execution of orders is carried out by the OTF operator in a discretionary way. MAR will only apply to OTFs from January 3, 2018.

Regulators' views on MAR's scope continue to evolve, however, and we understand that at least one EU competent authority appears to be taking the position that at least some of MAR's requirements apply to *all* of a company's securities if it has *any* securities admitted to trading in the EU, although that view has not been formally expressed. Nevertheless, at this time, it seems reasonable to comply with MAR's requirements as laid out in its scope provision, particularly given the burden of extending MAR's requirements to all of a company's securities, whether or not admitted to trading in the EU. However, U.S. public companies should closely monitor developments in the relevant member state(s) in which their securities are admitted to trading for formal guidance on this issue.

CATEGORY A – HIGHEST IMPACT

Category A companies have not previously been subject to Market Abuse Directive ("**MAD**") requirements and, generally, will not have been subject to any analogous requirements under MTF rules. For these companies, MAR will represent a sudden plunge into the EU market abuse regime and its requirements, superimposing a new layer of regulation on the existing framework to which they are subject under the U.S. Securities Exchange Act of 1934 (the "**Exchange Act**"), the U.S. Sarbanes-Oxley Act of 2002 and the rules of the Securities and Exchange Commission (the "**SEC**") and the U.S. stock exchanges.

In particular, these companies:

- will become subject to a material event reporting regime that is premised on a general obligation to disclose *all* "inside information" (a concept similar to material non-public information under the U.S. federal securities laws, although potentially broader) to the market *as soon as possible*, which may require disclosure of more information, and earlier, than would be required under Form 8-K;
- will, together with directors and certain senior employees (and certain associated persons), become subject to a new transaction reporting regime that in many respects is broader than section 16 of the Exchange Act – extending to a potentially wider range of securities (for example, debt securities, although the securities covered may reasonably be limited to the company's securities that are admitted to trading in the EU and any securities that have a price-value relationship with those securities) and transactions (including pledging and lending) and imposing direct reporting obligations not only on directors and senior employees, but also on associated persons and public companies themselves;
- will have their directors and certain senior employees become subject to new prescribed "closed periods" (30 calendar days before the publication (through prescribed channels, where applicable) of an interim financial report or a year-end report), which may limit the ability to use Rule 10b5-1 plans and potentially restrict trading windows, although the securities covered again may reasonably be limited to the company's securities that are admitted to trading in the EU and any securities that have a price-value relationship with those securities;
- will be required to maintain lists of all persons who have access to inside information in a prescribed, detailed format, which may entail a significant diligence burden;
- may face new restrictions on share repurchase programs; and
- will become subject to EU prohibitions on insider dealing, unlawful disclosure of inside information and market manipulation.

For these companies, the burden of becoming familiar with, assessing the impact of, and implementing policies, procedures and practices to comply with MAR will be particularly keenly felt. Indeed, in light of the additional burden and costs of compliance, some U.S. public companies with securities listed only on an MTF or OTF may wish to consider the possibility of delisting or migrating the listing of those securities.[4]

[4] Delisting, however, may have adverse consequences for some companies. For instance, a U.S. public company may wish to maintain an EU listing for debt securities, for example, to preserve a diverse base of European investors (investment mandates of which frequently require investments in listed instruments), for tax reasons or to retain eligibility for the European Central Bank's asset purchase program (which is being extended to include purchases of

CATEGORY B – MEDIUM BUT SIGNIFICANT IMPACT[5]
Category B companies should already have procedures in place to comply with MAD, as implemented in the relevant member state(s) in which their securities are admitted to trading. For these companies, many aspects of the new regulatory regime will be familiar, and preparation for MAR may primarily be procedural. Even for these companies, however, the possibility that MAR (many aspects of which remain subject to significant interpretive uncertainty) will result in meaningful new substantive restrictions and requirements should not be lightly dismissed. This is particularly true as concerns: • the extent to which inside information must be identified and segregated in announcements and website disclosures; and • the doubtful ability to continue to make use of even fully discretionary Rule 10b5-1 compliant trading plans during new prescribed closed periods and the potential impact of those closed periods on directors' and senior employees' trading windows (although the securities covered may reasonably be limited to the company's securities that are admitted to trading in the EU and any securities that have a price-value relationship with those securities). Category B companies with only listed debt, however, have not previously been subject to MAD's transaction reporting requirements, and, for these companies and their directors and senior employees (and certain associated persons), compliance with the reporting regime may represent more of an incremental burden (although the securities covered again may reasonably be limited to the company's securities that are admitted to trading in the EU and any securities that have a price-value relationship with those securities).

CATEGORY C – LOWEST BUT POTENTIALLY SIGNIFICANT IMPACT[6]
Category C companies, whose securities are admitted to trading on an MTF or OTF without their approval, will generally only be subject to MAR's prohibitions against insider dealing, unlawful disclosure of inside information and market manipulation. Accordingly, MAR's impact on their ongoing obligations and ordinary course activities is likely to be limited. Nevertheless, in view of MAR's potential extraterritorial reach, even Category C companies should familiarize themselves with the safe harbor for share repurchase programs (see IV. "Share repurchases") and update compliance manuals and training programs to incorporate relevant MAR prohibitions.

The remainder of this memorandum analyzes MAR's impact on U.S. public companies in further detail. The sections have been organized thematically and are preceded by flowcharts that summarize the general impact on Category A, B and C companies. The Annex to this memorandum provides an additional tabular summary comparing relevant MAR requirements, their evolution from MAD (as implemented in the UK) and the U.S. regulatory backdrop applicable to U.S. public companies.

Note that while this memorandum addresses the impact of MAR primarily for domestic U.S. public companies, much of the discussion will also be relevant to non-EU "foreign private issuers" that are subject to

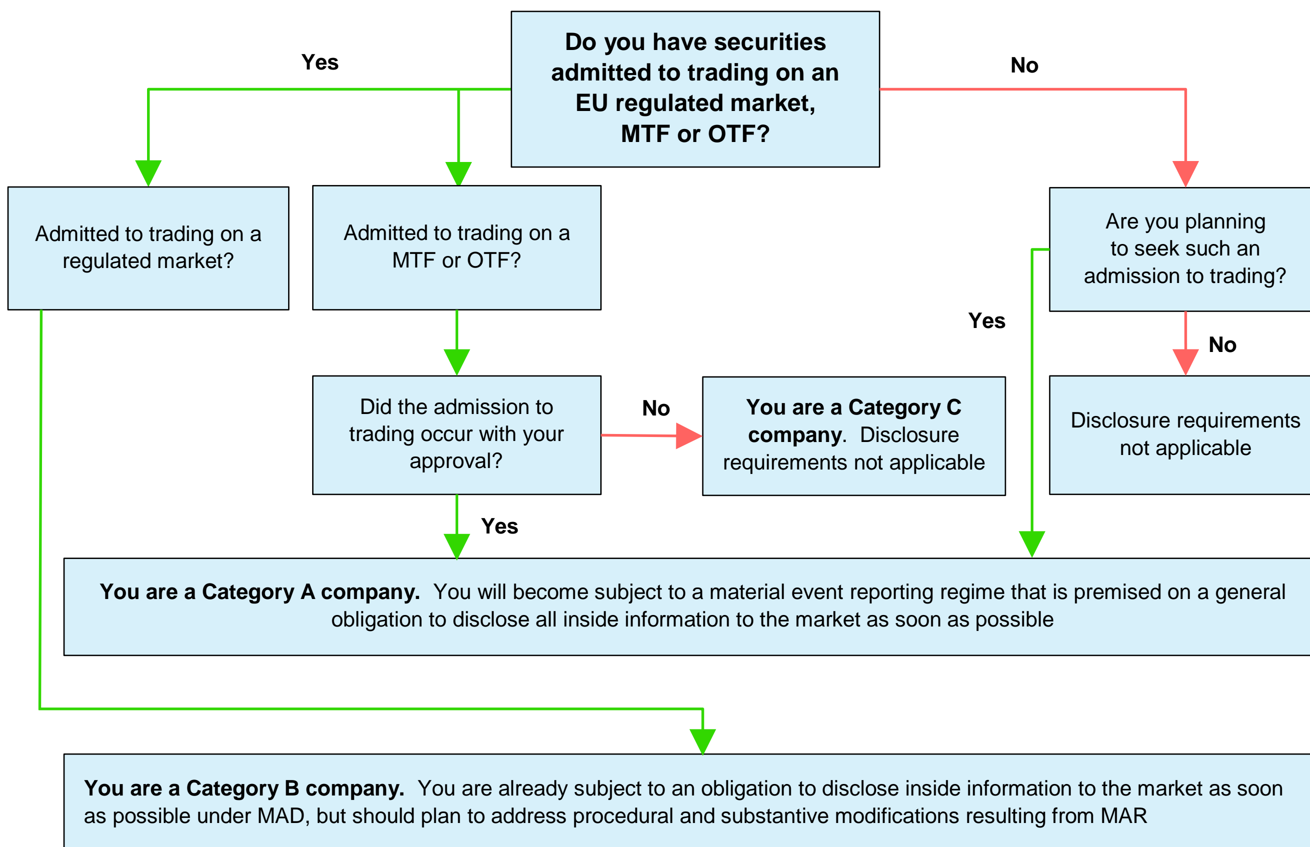
corporate debt). Many companies also maintain EU listings to facilitate employee share incentive plans. We would be pleased to assist U.S. public companies in evaluating the benefits of delisting from EU trading venues.

[5] In contrast to MAD, which was subject to relevant implementing measures in each member state, MAR is a "maximum harmonization" regulation, and EU competent authorities are prevented from retaining rules, evidential provisions or guidance that conflict with it. For Category B companies already subject to MAD, any assessment of MAR's incremental burden will necessarily entail an analysis against MAD as implemented in their relevant member state(s).

[6] U.S. public companies may ask how to determine whether their securities have been admitted to trading on an MTF or OTF without their approval. One preliminary reference point will be the website of the European Securities and Markets Authority ("**ESMA**"), where ESMA currently maintains a register of shares admitted to trading on regulated markets, which will be expanded to cover all securities admitted to trading on regulated markets, MTFs or OTFs.

portions of the broader U.S. regulatory regime and that, because of present or future admissions to trading on EU trading platforms, will also be affected by MAR. We would be pleased to provide more tailored advice to these companies upon request.

I. ONGOING DISCLOSURE OF INSIDE INFORMATION (*Category A and B companies*)



MAR (like MAD, but see the discussion below) requires companies to publicly disclose "inside information" that directly concerns them "as soon as possible." Inside information must be disseminated in a manner that "enables fast access and complete, correct and timely assessment of the information by the public." It must also be posted on the company's website and maintained there for five years. As has been the case under MAD, a company may delay disclosure of inside information to protect its "legitimate interests," provided that the delay is unlikely to mislead the public and confidentiality can be maintained.[7]

Category A companies primarily accustomed to the Form 8-K regime may need to prepare to disclose more information to the market and more rapidly than they otherwise might have, both because "inside information" may extend to types of information that are not reportable events under Form 8-K and because the deadline for disclosure is earlier than the four business day timeframe that Form 8-K generally requires. For these companies, compliance with the basic premise of the EU reporting regime – continuous reporting of *all* inside information *as soon as possible* – may, depending on what securities are admitted to trading in the EU (as discussed further below), require meaningful updates to disclosure controls and procedures and, to some extent, a shift in mindset.

The more notable points for Category B companies (and also key points for Category A companies to consider in assessing differences from their current SEC reporting obligations) are likely the following:

[7] For companies that are financial institutions or credit institutions, MAR adds another basis for delay: delay in order to preserve the stability of the financial system. See page 5 of our March 15, 2016 alert memorandum (available here) for further details.

- *Potentially wider definition of "inside information"*: MAR defines inside information 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*" (emphasis added). It further provides, however, that information that "would be likely to have a significant effect on … pric[e]" means information that a "reasonable investor would be likely to *use* as *part of the basis* of his or her investment decisions."

  This reasonable investor test is potentially very broad. In contrast, under the U.S. federal securities laws, information will not generally be viewed as "material" absent a *substantial likelihood* that a reasonable investor would have considered it *important* in making an investment decision, and that case law formulation is situated against the backdrop of judicial guidance that makes clear that the formulation was intended, among other things, to avoid subjecting investors to "an avalanche of trivial information."[8] Further, under the test in MAR, the relevance of the likely effect of disclosure on price (on which the test in MAD turned) is unclear,[9] whereas in the U.S. context, the impact of disclosure on market price, though not determinative, is clearly recognized as a factor to be taken into account in an assessment of materiality.

  In light of the above, and the practical reality that the adequacy of particular disclosures will be assessed by courts and regulators with the benefit of hindsight, U.S. public companies with equity admitted to trading on EU trading venues (or any other securities with a price-value relationship with equity, like convertible debt) in particular would be well advised to take a conservative approach to their disclosure choices (as they should, in any event, in complying with U.S. law).

  Companies with only straight debt admitted to trading in the EU should, in general, find the EU continuous reporting obligation less burdensome since any determination of whether information comprises inside information in the debt context would appropriately focus on the relevance of the information to a debt investor (including, for example, whether it is information that might affect credit ratings or creditworthiness). Still, in view of the potential breadth of MAR's reasonable investor test and the reality noted above that disclosure choices are often judged in hindsight, even the effectively higher disclosure bar in the debt context may represent a MAR risk that U.S. public companies should take into consideration.

- *Need to identify / label inside information as "inside information"*: In a change from MAD, draft implementing technical standards published by ESMA under MAR require that public disclosure of inside information be "clearly identif[ied]" as such. In practice, as discussed in our March 15, 2016 alert memorandum, it is often the case that companies disclose information out of prudence because it *might* be inside information, without definitively concluding that it *is*, and a requirement to draw concrete conclusions at the point of each disclosure, and to label disclosed information accordingly, sets a potentially unhelpful precedent when making future disclosure choices. It may be that in

[8] *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976).

[9] It should be noted that the equating (within MAR itself) of the concept of likely significant effect on price with the concept of whether a reasonable investor would be likely to use the information represents a subtle shift from MAD. Under the MAD regime, although an essentially identical reasonable investor test was set out in an EU implementing directive (and there too was framed as the definition of what constitutes a likely significant effect on price), guidance from the Committee of European Securities Regulators (CESR) made clear that the reasonable investor test was merely intended to "*assis[t]* in determining the type of information to be taken into account" in assessing a likely significant effect on price. Moreover, since MAD itself precluded implementing measures (in this case, one setting forth the reasonable investor test) from modifying the essence of a MAD provision (in this case, the requirement of a likely significant effect on price), interpretations that sought to reconcile the price-sensitivity and reasonable investor tests by deemphasizing the likely effect of disclosure on market price were always questionable. Under MAR, in contrast, there is greater uncertainty as to whether the likely effect of disclosure on market price remains part of the analysis.

certain EU member states, regulators will eventually permit slightly less precise formulations with respect to identification, such as a statement that a given announcement "includes" or "contains" inside information. This may mitigate, to an extent, but not entirely address, the concern.[10]

In light of this concern, it remains to be seen whether market practice will move in the direction of identifying disclosures as inside information except in the clearest cases. Where a definitive conclusion that information constitutes inside information cannot be reached, and disclosure is being provided as a matter of prudence or good practice, an unlabeled announcement, possibly coupled with disclaimers on the relevant section of the website that such portion of the website "includes" or "contains" (or may include or contain) inside information, may be a reasonable middle ground. However, in the absence of EU-wide guidance, it would be prudent for companies to monitor market practice and regulatory guidance in the relevant EU member state(s) in which their securities are admitted to trading.

- *Website segregation requirement:* ESMA's draft implementing technical standards contemplate the inclusion of inside information in an "easily identifiable" section of the website, with clear indication of date and time of disclosure and organization in chronological order. The "easily identifiable" requirement represents a relaxation from an earlier ESMA proposal that would have required posting on a section of the website that "only" contained inside information, and appears to have been intended to permit companies to continue to use customary investor relations websites for these postings. MAR requires, however, that a company's disclosure of inside information must not be combined with "the marketing of its activities," while providing little guidance as to what marketing activities comprise. In the absence of guidance, it would be prudent for companies to review the investor relations sections of their websites and to remove, at a minimum, product advertisements and overly bullish text on the webpage itself, as well as any other posted materials of a sort not routinely included on investor relations websites that may be construed as being of a "marketing" nature.

- *Additional flexibility to delay disclosure, but also heightened scrutiny*: Although the basic criteria to delay disclosure of inside information (discussed above) have not changed under MAR, ESMA has proposed examples of "legitimate interests" that broaden the list of potential legitimate interests from those that have been recognized to date and provided examples of instances where delay would mislead the public.[11]

  The additional flexibility to delay, however, has come with additional procedural burdens. Any decision to delay disclosure under MAR (in contrast to MAD) must be notified to the relevant competent authority at the time the relevant inside information is made public, and each competent authority may require the company to give reasons for the decision to delay disclosure, either as a matter of course or upon request. These new notification requirements will likely also increase regulatory scrutiny of delay decisions. Companies will be obliged to keep proper records about any decision to delay, including when the inside information first arose, when the decision to delay was

[10] For example, we understand that at least one competent authority has noted in informal discussions that it regards a general label of "may contain inside information" as non-compliant with MAR, and is currently considering whether a general label of "contains inside information" is acceptable on an announcement of any length.

[11] The list of legitimate interests includes the following instances: where negotiations are in progress; where the company's financial viability is in grave and imminent danger; where the inside information is subject to the approval of another internal body of the company; where intellectual property rights might be jeopardized; where the inside information involves the buying or selling of major holdings in another entity; and where public authority approval is pending. Examples provided of instances where delay would mislead the public include: information that is materially different from a previous announcement; information that relates to the fact that previously announced financial objectives will not be met; and information that is in contrast to the market's expectations if those expectations are based on signals previously given by the company. See page 6 of our March 15, 2016 alert memorandum (available here) for further details.

taken, evidence of the satisfaction of the MAR requirements for delayed disclosure, the identity of the person(s) responsible for the decision to delay and other details specified in ESMA's draft technical standards.[12] Companies will accordingly need to review their existing policies, procedures and practices to ensure that proper records are maintained.

Key next steps – Category A companies

- Establish internal policies, procedures and practices to, among other things:
  - identify inside information and disclose it as soon as possible through appropriate channels;
  - consider the appropriateness of delaying disclosure;
  - meet recordkeeping / notification obligations in connection with delayed disclosure;
  - label inside information appropriately at the time of announcement; and
  - retain inside information on your website for at least five years
- Review the investor relations section of your website and consider any needed updates to remove "marketing" materials
- Institute necessary training programs for relevant staff

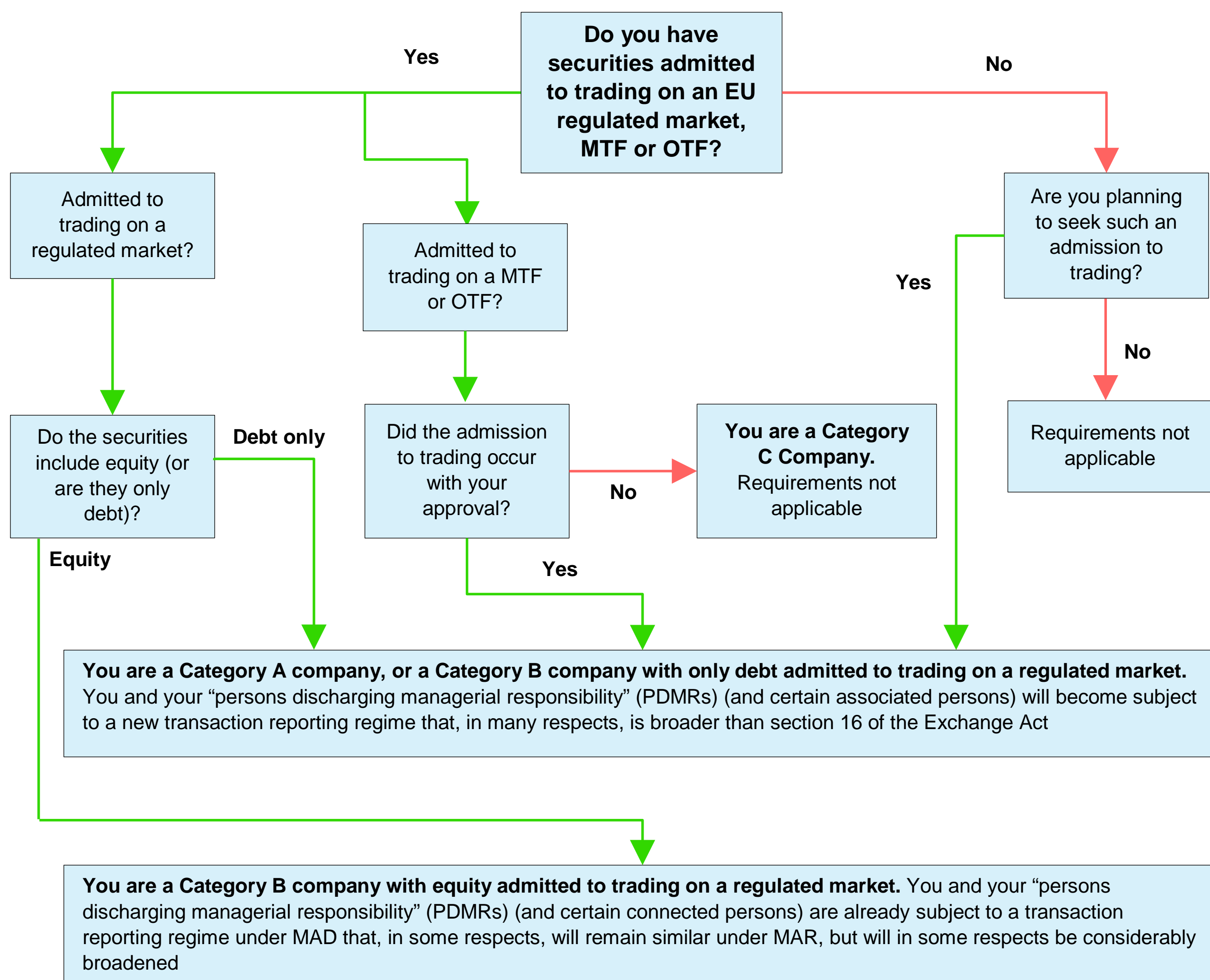
Key next steps – Category B companies

- Update internal policies, procedures and practices to, among other things:
  - reflect a changed definition of "inside information";
  - reflect new flexibility to delay disclosure (bearing in mind potentially heightened scrutiny of decisions to delay);
  - meet new recordkeeping / notification obligations in connection with delayed disclosure;
  - label inside information appropriately at the time of announcement; and
  - retain inside information on your website for at least five years (versus one year under MAD)
- Review the investor relations section of your website and consider any needed updates to remove "marketing" materials
- Institute necessary training programs for relevant staff

[12] See page 7 of our March 15, 2016 alert memorandum (available here) for further details.

II. MANAGERS' DEALINGS (*Category A and B companies*)

A. Disclosure obligations



Under MAR, "persons discharging managerial responsibility" ("**PDMRs**") of Category A and B companies (and also "persons closely associated with them") will have obligations to notify those companies and competent authorities of every "transaction conducted on their own account" in the company's shares or debt instruments, or derivatives or other financial instruments linked to those shares or debt instruments.[13] The

[13] A "person discharging managerial responsibility" is defined in MAR as: "(a) a member of the administrative, management or supervisory body of that entity; or (b) a senior executive who is not a member of the bodies referred to in point (a), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity." See the discussion below contrasting PDMRs with section 16 directors and officers.

"Persons closely associated with [PDMRs]" are defined in MAR as: "(a) a spouse, or a partner considered to be equivalent to a spouse in accordance with national law; (b) a dependent child, in accordance with national law; (c) a relative who has shared the same household for at least one year on the date of the transaction concerned; or (d) a legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities or by a person referred to in point (a), (b) or (c), which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person." Category A companies and Category B companies with equity admitted to trading on a

reporting obligation is subject to a €5,000 per annum *de minimis* amount, which competent authorities may increase to €20,000 at their discretion. (A comparable *de minimis* amount did not exist under MAD.) Notifications must be made promptly and in any event no later than three business days after the date of a transaction. Companies, somewhat impracticably (as discussed below), are required to publicly disclose the relevant transaction within the same three business day timeframe.

The reach of this reporting obligation is broad, both as compared to the analogous MAD requirements, and also, in many respects, the requirements of section 16 of the Exchange Act. Moreover, as compliance with U.S. reporting requirements will not substitute for MAR compliance, PDMRs of Category A and B companies (and persons closely associated with them) will have to submit reports both under MAR and under section 16 of the Exchange Act.

The extraterritorial reach of the PDMR reporting requirements is also somewhat uncertain. As discussed at the outset, the text of MAR's scope provision supports the view that, for U.S. public companies that only have straight debt admitted to trading in the EU, MAR should generally only apply to that debt (and other securities with a price-value relationship with that debt, if any), and the view that for U.S. public companies with secondary equity listings in the EU that have no debt admitted to trading in the EU, MAR requirements generally should not apply to their outstanding debt (absent a price-value relationship with the equity). Regulators' views on MAR's scope continue to evolve, however, and we understand that at least one EU competent authority appears to be taking the position that MAR's PDMR reporting requirements apply to *all* of a company's securities if it has *any* securities admitted to trading in the EU, although that view has not been formally expressed. U.S. public companies should closely monitor developments in the relevant member state(s) in which their securities are admitted to trading for formal guidance on this issue.

A more detailed comparison of the requirements under section 16, MAD and MAR is set forth in the Annex to this memorandum, but the following points bear particular mention:

- *Persons subject to disclosure obligations extend beyond section 16 directors and officers*: While the definition of PDMRs under MAR (which is essentially identical to the definition under MAD) should catch many of the same individuals that are "directors" or "officers" for purposes of section 16, the definitions are not coextensive. In practice, the list of PDMRs for a given company is unlikely to be broader than the list for section 16 purposes (and may even be narrower), but companies will need to make this determination based on their particular corporate governance and organizational structures. More notably, unlike the section 16 regime, which does not generally impose obligations on persons associated with an insider (though their transactions may be reportable by the insider itself),[14] MAR (like MAD) imposes a direct obligation on a PDMR's associated persons to disclose their transactions.

- *Reporting potentially covers all types of securities, not just equity (or equity-linked):* MAR's PDMR reporting obligations extend to both shares and debt instruments, as well as derivatives and other financial instruments linked to shares or debt instruments.[15] In contrast, section 16 applies only to transactions in equity securities registered under section 12 of the Exchange Act (although under a

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regulated market should note that the definition set out in MAR may be wider or narrower than the equivalent definition under MAD as implemented in their relevant member state(s).

[14] An insider is required to report holdings of a company with respect to which the insider has a direct or indirect pecuniary interest. The term "pecuniary interest" means, generally, an economic interest, and may arise from a direct holding of an equity security, from an indirect interest in a security through a corporation, partnership or trust (of which the insider is a trustee, a settlor or a beneficiary), from equity securities held by certain family members or from equity securities held by an investment partnership from which the insider is entitled to a performance-related management fee.

[15] Although, as discussed above, questions remain as to the applicability of MAR's reporting requirements to securities that are not admitted to trading on EU trading venues (absent a price-value relationship with securities that are admitted to trading in the EU).

very broad construct that includes derivative securities and other equity-based contracts, rights or arrangements), and MAD's PDMR reporting obligations apply only to shares and derivatives or any other financial instruments relating to those shares.

- *Disclosable transactions*: MAR and its implementing regulations set out lengthy non-exhaustive lists of transactions that are subject to the PDMR reporting requirement.[16] While types of transactions disclosable for section 16 purposes (including acquisitions, disposals, grants or exercises of options or other rights to receive shares and various other transfers of beneficial ownership) will generally be disclosable under MAR, there are differences between the regimes with which companies will need to familiarize themselves. In particular, companies should note that securities lending and pledging transactions, which generally are not disclosable under section 16, are expressly included in the MAR disclosure obligation.

- *Timing:* Under the current MAD regime, PDMRs (and their associated persons) have four business days after a relevant transaction to notify the company, and the company is then obliged to notify the market by the next business day. Under MAR, as discussed above, PDMR (and associated person) notifications to both companies and competent authorities will be required within three business days after the date of the transaction, and companies will be required to publicly disclose relevant transactions on exactly the same timeframe. This overlapping timing requirement will be problematic if the PDMR (or associated person) only discloses its dealings to the company at the end of the three business day deadline.[17] U.S. public companies should, accordingly, consider requiring their PDMRs (and associated persons) to disclose relevant transactions to them and to competent authorities no later than the second business day after relevant transactions occur, which would be consistent with the timetable for filing Form 4s under section 16.

- *Company obligation to maintain PDMR lists and notify PDMRs of their obligations:* MAR requires companies to maintain a list of their PDMRs and associated persons,[18] and to notify PDMRs and associated persons of their MAR obligations.

For Category A companies, and Category B companies with only straight debt admitted to trading on a regulated market, compliance with the different facets of the PDMR reporting regime in respect of relevant securities may require a substantial investment of time and effort to update existing section 16-oriented policies, procedures and training programs (although less for companies with only straight debt admitted to trading on an EU trading venue, as PDMR transactions in debt securities are typically rare). Category B companies with equity admitted to trading on a regulated market will be familiar with PDMR disclosure obligations under MAD, and preparation for MAR compliance will primarily entail updating existing policies, procedures and training programs to cover the broader list of transactions captured by MAR, the wider list of securities that must potentially be reported (debt securities as well as equity) and new MAR-prescribed methods, formats and deadlines for disclosure.

[16] See Commission Delegated Regulation of December 17, 2015 (available here).

[17] ESMA has recognized the issue but has stated that it has no power to change this as it is in the text of MAR itself.

[18] This obligation is distinct from the obligation to maintain insider lists discussed in III. "Insider lists" below.

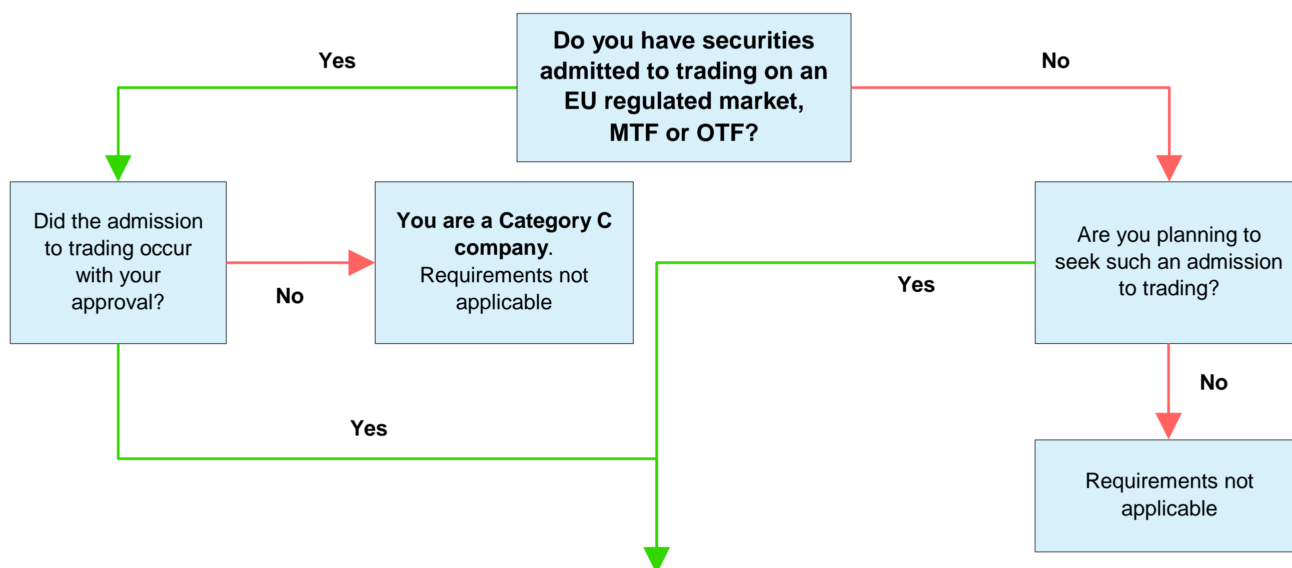
Key next steps – Category A companies, and Category B companies with only debt admitted to trading on a regulated market

- Establish lists of PDMRs and associated persons based on MAR definitions
- Establish policies, procedures and practices to, among other things:
  - require PDMRs (and their associated persons) to report transactions in relevant securities (which may reasonably be limited to the company's securities that are admitted to trading in the EU and any securities that have a price-value relationship with those securities), no later than the second business day after the relevant transactions occur; and
  - meet company obligation to disclose within three business days through appropriate channels
- Institute necessary training programs / notification procedures for PDMRs (and associated persons) and other relevant staff

Key next steps – Category B companies with equity admitted to trading on a regulated market

- Update lists of PDMRs and associated persons / connected persons based on MAR definitions
- Update policies, procedures and practices to:
  - reflect the wider list of potentially relevant securities under MAR (which may reasonably be limited to the company's securities that are admitted to trading in the EU and any securities that have a price-value relationship with those securities), wider list of transactions and new MAR-prescribed methods and formats for disclosure;
  - require PDMRs (and their associated persons) to report relevant transactions no later than the second business day after the relevant transactions occur; and
  - meet company obligation to disclose within three business days through appropriate channels

B. Closed periods



You are a Category A or Category B company. Your "persons discharging managerial responsibility" (PDMRs) will become subject to a new prescribed closed period (30 calendar days before the publication of an interim financial report or a year-end report), which may restrict their ability to use Rule 10b5-1 plans and restrict trading windows in respect of relevant securities

Although quarterly blackout periods designed to prevent directors, officers and certain other employees from trading in a company's securities for a period of time prior to earnings releases (and until a short time thereafter) are common features of many U.S. public companies' insider trading policies, there are no formal

or prescriptive requirements as to timing. Typically, such blackout periods begin on or before the date by which earnings information is sufficiently known that it might be expected to constitute material non-public information and end at a time when markets can be expected to have sufficiently digested earnings announcements. Transactions pursuant to Rule 10b5-1 plans will also typically not be subject to blackout periods. Compliance with MAR may require some key changes in these practices.

MAR will prohibit PDMRs of Category A and B companies (though *not*, in contrast to the PDMR reporting regime discussed above, persons closely associated with them)[19] from conducting any "transactions on [their] own account or for the account of a third party, directly or indirectly" in the company's shares or debt instruments, or derivatives or other financial instruments linked to those shares or debt instruments during "closed periods." This represents a significant change from the MAD regime, which contains no comparable restrictions.[20] Closed periods under MAR will run for 30 calendar days before publication (through prescribed channels, where applicable) of an interim financial report or a year-end report that the company is obliged to make public under "(a) the rules of the trading venue where the issuer's shares are admitted to trading; or (b) national law."[21]

As with other MAR requirements discussed above, it seems reasonable to apply MAR's closed period requirements only to a company's securities that are admitted to trading in the EU (and any securities that have a price-value relationship with those securities), and not to *all* of its securities, whether or not admitted to trading in the EU. This approach may substantially mitigate the concerns discussed below. However, as noted above, U.S. public companies should closely monitor developments in the relevant member state(s) in which their securities are admitted to trading for formal guidance on this issue.

The two most notable consequences of the new closed period requirement for relevant securities are likely the following:

- *Doubt as to ability to rely on Rule 10b5-1 trading plans during closed periods:* At present, there is considerable doubt that transactions effected pursuant to Rule 10b5-1 trading plans will be permissible during MAR closed periods. While the language of MAR is ambiguous as to whether the prohibition extends to discretionary trading activity by a third party investment manager on the PDMR's account, ESMA has indicated in a non-binding consultation paper that it views transactions executed *even* in the context of a fully discretionary asset / portfolio management mandate (*i.e.*, where the PDMR has no possibility whatsoever to influence the asset / portfolio manager) as covered by the prohibition.[22] Various experts and industry bodies have questioned this view, but ESMA has not yet sought to resolve the uncertainty definitively through secondary legislation.

[19] The closed period restriction also does not apply to companies themselves. Companies should, however, be careful not to conduct transactions in their own securities while in possession of inside information, and should note that the MAR safe harbor for share repurchase programs (see IV. "Share repurchases") is not available during closed periods unless, among other things, it is managed by an investment firm or credit institution that makes trading decisions independently of the company.

[20] In certain jurisdictions, however, EU member states may have imposed comparable restrictions in implementing MAD. Under the Model Code in the UK, for example, PDMRs of companies with a premium listing on the London Stock Exchange are generally subject to trading restrictions for 60 days prior to announcements of results and at certain other times.

[21] U.S. public companies will be subject to the new MAR closed period requirement as a result of interim and annual reports required under the U.S. federal securities laws, but, as discussed above, the resulting restrictions on trading may be limited to securities that are admitted to trading in the EU and any securities that have a price-value relationship with those securities.

[22] The consultation paper is available here.

U.S. public companies should closely monitor any developments in this area, and, in the absence of further guidance before MAR's entry into force, give serious consideration to requiring PDMRs to ensure that their Rule 10b5-1 trading plans suspend trading during MAR closed periods.

- *Potential shortening of trading windows:* Many U.S. public companies routinely release earnings announcements days or even weeks prior to required quarterly reports on Form 10-Q or annual reports on Form 10-K. For these companies, there are unanswered questions as to the timing of the 30 calendar day closed period. For example, for a company that releases first quarter earnings on April 21 and files its Form 10-Q on May 10:
  - Should the closed period begin 30 calendar days before the earnings announcement (though that announcement is not strictly required), and continue for *more* than the 30 days through to the formally required report (*i.e.*, March 22 to May 10)?
  - Alternatively, should it begin precisely 30 calendar days before the formally required report, regardless of when earnings are released (*i.e.*, April 10 to May 10)?
  - Alternatively (and likely the most rational outcome as a policy matter), should it end before the formally required report if an earlier earnings announcement contained all material non-public information (*i.e.*, on or shortly after April 21)?

  As many U.S. public companies institute blackout periods a number of days or even weeks before the end of a fiscal quarter to mitigate insider trading concerns, the start date of the MAR-prescribed closed period may be academic for many Category A and B companies. However, an end date only on the filing or publication of a *required* interim financial report or year-end report (which, in most cases, will be the Form 10-Q or Form 10-K), days or weeks after earnings have been publicly released, is likely to be a more significant concern, as this would meaningfully restrict already constrained trading windows.

  Helpfully, for U.S. public companies with securities admitted to trading in the UK (where it is also customary, but not strictly required, to make preliminary earnings announcements), this concern has been substantially alleviated. The UK Financial Conduct Authority (the "**FCA**") has recently announced that, pending further guidance from the European Commission or ESMA, it will treat closed periods as ending on the announcement of preliminary results (provided that the preliminary announcement contains all inside information expected to be included in the relevant later report, which may not always be the case).[23] For U.S. public companies with securities admitted to trading in other EU member states, however, there may be greater uncertainty. Although the FCA's approach is likely to be influential with other competent authorities, companies would be well advised to monitor developments in the relevant member state(s) in which their securities are admitted to trading, and particularly in jurisdictions where there is no practice of preliminary earning releases, consider approaching competent authorities to confirm the acceptability of ending MAR-prescribed closed periods with earnings releases.[24]

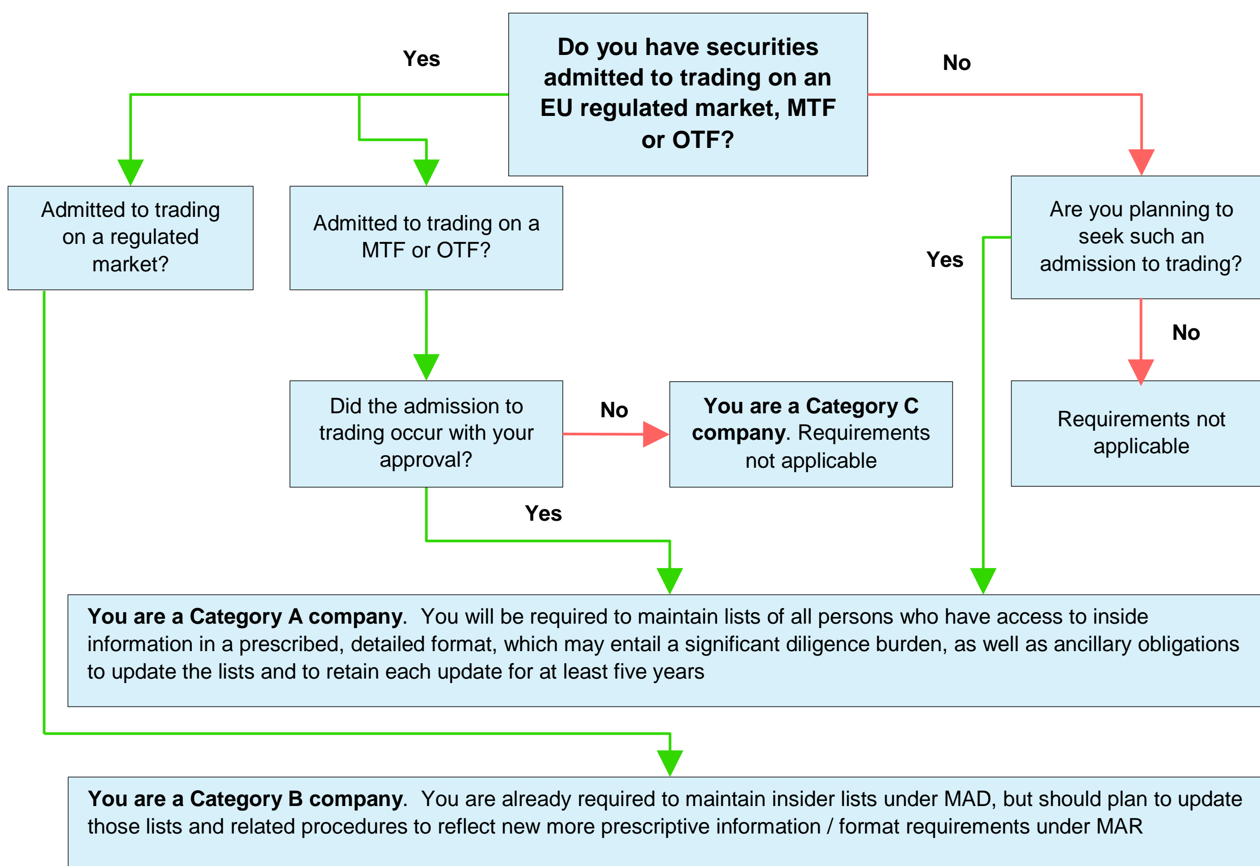
[23] The FCA's announcement is available here.

[24] In the absence of confirmation from relevant competent authorities, companies would appear to face an unpalatable choice between abiding by only the spirit of the MAR requirement and instituting a closed period that ends with earnings releases (or a short time thereafter), and complying with the letter of the MAR requirement and opening trading windows only after their Form 10-Q or Form 10-K filings.

Key next steps – Category A and B companies

- Consider implications of, and decide on approach to, new closed period requirement with respect to Rule 10b5-1 plans and trading windows and implement necessary modifications to policies, procedures and practices
- Institute necessary training programs / notification procedures for PDMRs and other relevant staff

III. INSIDER LISTS (*Category A and B companies*)



Companies are required under MAR to maintain lists of all persons who have access to inside information, whether working for them under a contract of employment or otherwise. In a clarification of MAD, this requirement will expressly extend to advisers, accountants and credit rating agencies. The requirement also applies to individuals and information both within and outside the EU.

Moreover, in a change from MAD, MAR requires insider lists to be prepared using a prescriptive EU-wide template, which, under final technical standards implemented by the European Commission, requires a considerable amount of detail on each insider (including, *e.g.*, function, surname at birth, national identification number, personal telephone numbers and personal addresses), as well as reasons why the person is an insider and details on when the person obtained and ceased to possess inside information.

Insider lists must be updated promptly if the reason for an insider's inclusion on the list changes, a new person gains access to inside information or a person ceases to have access to inside information. Each update must be retained for at least five years.

For Category A companies that are unused to comparable requirements under MAD (and that do not maintain comparable insider lists as a matter of practice), these requirements may impose a significant diligence

burden. Category B companies, currently subject to the MAD regime, should find updating their existing insider lists and record keeping policies less burdensome, but, in view of the amount and nature of the new information required, may also need to invest considerable effort into the task.

Key next steps – Category A companies

Establish policies, procedures and practices to, among other things:

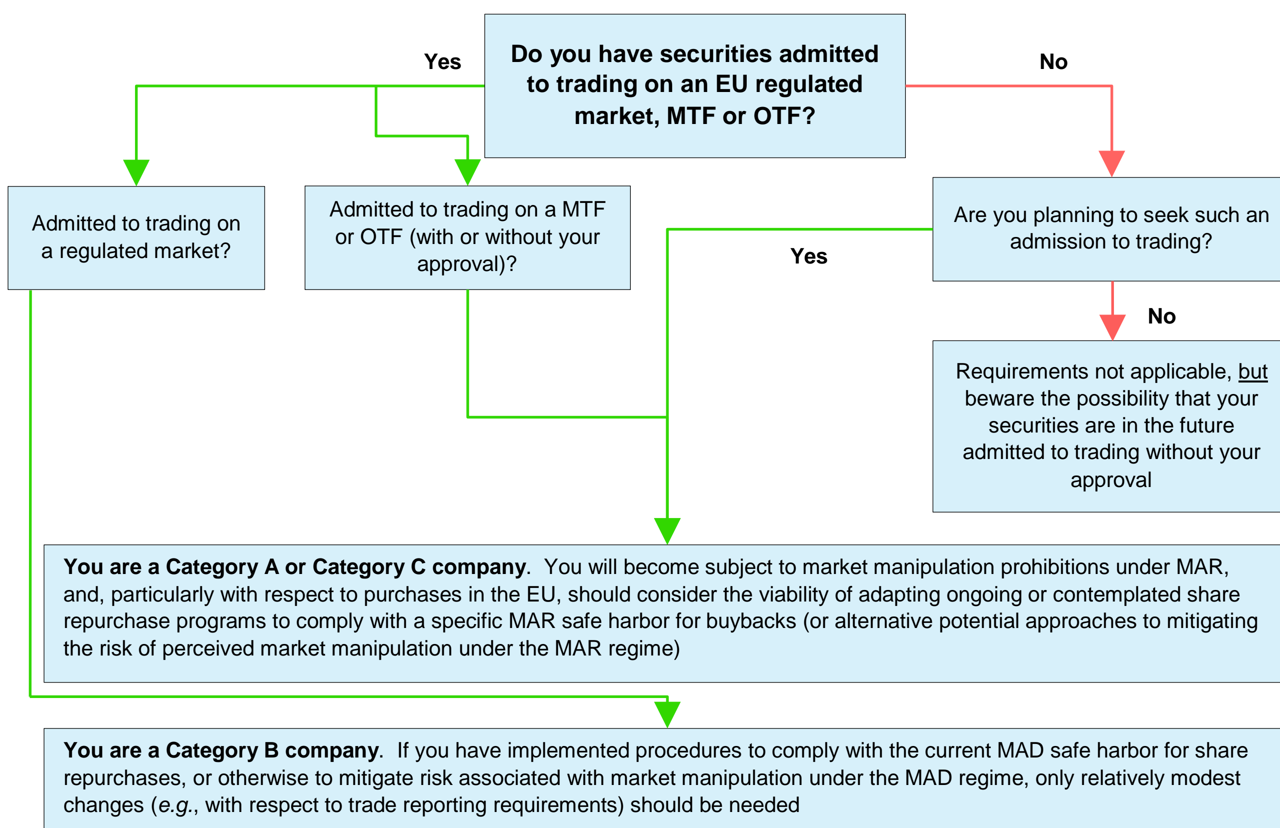
- identify all persons who have access to inside information (including advisers, accountants and credit rating agencies); and
- prepare insider lists that reflect prescribed content requirements, and update those lists as and when required going forward

Key next steps – Category B companies

Update policies, procedures and practices to, among other things:

- extend insider lists to advisers, accountants and credit rating agencies (if not already included); and
- update insider lists to reflect new prescribed content requirements, and update those lists as and when required going forward

IV. SHARE REPURCHASES (*Category A, B and C companies*)



There is an explicit safe harbor from MAR's market manipulation provisions for share repurchase programs that meet specified criteria outlined in MAR and its implementing measures. Accessing the safe harbor requires, among other things, the following:

- *Objective:* A repurchase program that has, as its sole purpose, a reduction in the capital of the company, meeting obligations under convertible debt (and certain other financial instruments exchangeable into equity), or meeting obligations under certain equity incentive programs.

- *Advance disclosure:* The full details of the repurchase program, including the objective of the program, the maximum consideration allocated to it, the maximum number of shares to be acquired and the program's duration, must be disclosed prior to any trades.

- *Trade reporting:* All trades under the program must be recorded and reported to *all* the competent authorities of the trading venues where the shares are admitted to trading (and disseminated through other prescribed channels, including postings on the company's website) no later than seven trading days after the relevant trades. Trade reporting must be made on both a detailed transaction-by-transaction basis (including the titles and amounts of the securities purchased, dates and times, prices, trading venue and means of identifying any investment firms concerned) and in an aggregated form (indicating aggregated volume and the weighted average price per day and per trading venue).

- *Trading venue:* Trades must be effected through on-market purchases on trading venues.[25]

- *Price limit:* Purchases may not occur at a price higher than the highest price of the last independent trade or the highest current independent bid.[26]

- *Volume limit:* Purchases on any trading day may not exceed 25% of the average daily volume of the shares on the trading venue on which the shares are purchased.[27]

- *Trading restrictions:* The company may not sell treasury shares "during the life" of the program. It also may not effect any purchases (including outside the program) during a MAR-prescribed closed period or when it has delayed public disclosure of inside information, unless (i) the dates and volumes of shares to be purchased are set out in the initial public disclosure of the share repurchase program or (ii) the repurchase program is managed by an investment firm or credit institution that "makes its trading decisions concerning the timing of the purchases of the issuer's shares independently of the issuer."[28] For U.S. public companies that implement repurchase programs through Rule 10b5-1 plans, the typical approach of granting full discretion to an investment firm or credit institution within broad price, volume and timing parameters set by the company (*e.g.*, to purchase a certain volume of shares per week or month under particular price parameters) should be sufficient to satisfy the latter exception, provided that the parameters themselves were not set during a closed period (or when the company was otherwise in possession of insider information, as also required under Rule 10b5-1).

U.S. public companies considering the implications of the points set out above (including Category C companies, which, as noted above, are subject to the prohibition on market manipulation) should note that the requirements of the MAR safe harbor are somewhat different from those for the safe harbor contained in Rule 10b-18 under the Exchange Act. Although the MAR safe harbor is unlikely to be available for purchases off

[25] For markets that have continuous trading and auctions during the trading day, the safe harbor will not apply to trades conducted during auctions. Shares that are solely traded through auctions will benefit from the safe harbor so long as market participants have sufficient time to react to orders relating to the repurchase program.

[26] When shares are multi-listed on different trading venues, the final technical standards require that this price limitation be applied separately to each trading venue on which the shares are purchased.

[27] The average daily volume will either be the average daily volume traded in the month preceding the month of the initial disclosure of the share repurchase program (provided disclosure of that volume is included in that initial disclosure), or in the 20 trading days preceding the date of purchase (where it is not).

[28] These limitations will not apply to companies that are themselves investment firms or credit institutions if they have set up effective information barriers.

EU trading venues, different approaches could be considered to mitigate MAR-related market abuse concerns in relation to a multi-jurisdictional repurchase program. Particularly for U.S. public companies with a secondary equity listing in the EU, the most conservative approach would likely be to comply with both Rule 10b-18 and any stricter MAR requirements in respect of the U.S. portion of the program,[29] and with the MAR safe harbor and any stricter Rule 10b-18 requirements in respect of the EU portion. However, since behavior outside the MAR safe harbor does not automatically constitute market abuse in the EU, a number of alternatives based on the MAR safe harbor's and/or Rule 10b-18's requirements may also be reasonable from a risk mitigation perspective. For U.S. public companies with only straight debt admitted to trading in the EU, all of whose share repurchases would occur in the United States, compliance with Rule 10b-18 by itself is likely to be sufficient.

Category B companies should also note that, though the MAR safe harbor is similar to that under MAD, there are differences (*e.g.*, with respect to the trade reporting requirements). Accordingly, companies that have implemented procedures to comply with the MAD safe harbor, or otherwise mitigate risk associated with market manipulation, will need to review those procedures and make any appropriate updates.

Key next steps – Category A and B companies

Assess ongoing or contemplated share repurchase programs (within and outside the EU), and related policies and procedures for recording and reporting trades, for compliance with the new MAR safe harbor and/or adequacy of risk mitigation

V. OTHER CONSIDERATIONS (*Category A, B and C companies*)

MAR preserves the MAD prohibitions on the following general behaviors:

- *Insider dealing*: Insider dealing involves behavior where a person possesses inside information and uses that information by acquiring or disposing, for the person's own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. In contrast to insider trading under Rule 10b-5, there is no requirement that the behavior be in breach of a fiduciary duty or constitute a misappropriation of the information. MAR also expands the MAD prohibition to cover attempts to commit insider dealing and also to the cancellation of orders on the basis of inside information (a restriction beyond what U.S. public companies will be accustomed to under Rule 10b-5, which only applies to purchases and sales of securities). As under MAD, there is a

[29] The principal overlays of such a program over one designed to comply solely with Rule 10b-18 would likely be the following:

- purchases would be limited to the limited purposes permitted by MAR;
- advance disclosure would be required of the objective of the program, the maximum consideration, the maximum number of shares to be acquired and the duration of the period for which authorization for the program has been given;
- treasury shares could not be resold;
- restrictions on privately negotiated repurchases would need to be considered (since, in contrast to Rule 10b-18, where SEC staff guidance makes clear that that privately negotiated repurchases in parallel should not jeopardize the availability of the safe harbor for open market repurchases, similar certainty does not exist vis-à-vis the MAR safe harbor);
- a stricter 25% ADTV volume restriction would need to be complied with (without Rule 10b-18's flexibility for block purchases); and
- public disclosure of trades under the program would be required within 7 days (versus in the next Form 10-Q (or for fourth quarter repurchases, Form 10-K)).

rebuttable presumption that someone who is in possession of inside information has traded on the basis of it.

- *Unlawful disclosure of inside information*: Inside information is unlawfully disclosed if it is disclosed by a person other than in the normal exercise of their employment, profession or duties.

- *Market manipulation*: A person engages in market manipulation if the person engages in one of a range of behaviors (including entering into transactions or disseminating information) that gives false or misleading signals as to the supply for, demand of or price of a financial instrument. MAR extends the MAD prohibition to cover manipulative high frequency and algorithmic trading and the manipulation of financial benchmarks and spot commodity prices.

It will accordingly be important, particularly in view of MAR's potential extraterritorial reach, that U.S. public companies with securities admitted to trading on an EU trading venue (with or without their approval), or that are contemplating such admissions to trading, familiarize themselves with these market abuse offences (as well as differences with analogous U.S. restrictions, which, in some instances – like insider dealing – are notable), update compliance manuals, policies, procedures and practices accordingly, and provide training to relevant staff.

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ANNEX

MAD TO MAR: CHANGES FOR UK-LISTED COMPANIES

The summary of MAD in this Annex is specific to the UK.[30] For Category B companies already subject to MAD, any assessment of MAR's incremental burden will necessarily entail an analysis against MAD as implemented in the relevant member state(s) in which their securities are admitted to trading. We would be pleased to provide a tailored analysis of how the new regime will impact companies with admissions to trading in other member states upon request.

I. Ongoing disclosure of inside information

U.S. context
U.S. public companies must file or furnish current reports on Form 8-K to the SEC upon the occurrence of one or more of a specific list of events, generally within four business days after occurrence. They are not, however, subject to a *general obligation* to disclose material non-public information analogous to the MAD / MAR requirement, unless transacting in the market or otherwise communicating to investors on a related topic.

	MAD as implemented in the UK	MAR (*from July 3, 2016*)
Definition of inside information:	Information of a precise nature which (a) is not generally available, (b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and (c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments "Reasonable investor" test used to *assist* in determining the type of information to be taken into account in assessing a likely significant effect on price	Basic definition identical to the MAD definition; however, the "reasonable investor" test has now been made the very *definition* of likely significant impact on price in MAR itself. Continued relevance of price sensitivity in the analysis accordingly unclear
Timing of required disclosure:	As soon as possible	As soon as possible
Method of disclosure:	Disclosure to a prescribed regulatory information service ("**RIS**") Website publication simultaneously or following the RIS announcement (but no later than the end of the business day following the RIS announcement) Information to be maintained on website for at least one year	Disclosure to a RIS Website publication is required, although deadlines for posting are not yet clear Information to be maintained on the company's website for at least five years
Identification / segregation	No specific requirements	Communications must clearly identify that the information communicated is inside

[30] In giving effect to the provisions of MAD, the UK has in some cases gone further than the text of the directive strictly required. As MAR is a "maximum harmonization" regulation, the FCA will be prevented from doing the same with MAR.

	MAD as implemented in the UK	MAR (*from July 3, 2016*)
requirements:		information, among other things The website must "allow users to locate the inside information in an easily identifiable section of the website" and "ensure the disclosed inside information clearly indicates date and time of disclosure and is organised in chronological order." Relevant section of website must be kept separate from "marketing materials"
Delaying disclosure:	Permitted where: (i) the delay is to protect the company's legitimate interests; (ii) the delay is unlikely to mislead the public; and (iii) confidentiality can be maintained	As under MAD, but new ESMA guidance effectively expands the scope of "legitimate interests"[31]
Notification of delay:	No notification obligation	Company will need to notify the competent authority of a decision to delay when the information is ultimately publicly disclosed. In the UK, the FCA has indicated that reasons for delay will only be required on its specific request Companies will need to record details about any decision to delay disclosure, including when the information first arose, when the decision to delay was taken, when the information is likely to be disclosed, who is responsible for the decision to delay and evidence of the initial fulfillment of the conditions permitting delay (see "Delaying Disclosure" above)

II. Managers' dealings

A. Disclosure obligations

U.S. context
Section 16(a) of the Exchange Act requires insiders of U.S. public companies with a class of equity security registered under section 12 of the Exchange Act to file an initial report of their holdings on becoming insiders (within 10 business days) and report subsequent transactions in the company's equity securities (generally within two business days). U.S. public companies are also generally required to disclose share ownership information, including of directors and executive officers, in their annual reporting. These requirements share similar goals with the PDMR reporting regime under MAD / MAR, but, as further outlined below, are not identical.

[31] Additionally, for a company that is a financial institution or credit institution, delay permitted with prior approval of competent authority to preserve the stability of the financial system.

	Section 16	MAD as implemented in the UK	MAR (*from July 3, 2016*)
Persons subject to disclosure obligations:	Officers and directors[32] of a company and persons who are "beneficial owners" of more than 10% of a registered class of equity securities of a company[33]	PDMRs and their "connected persons"[34]	PDMRs and "persons closely associated with them"[35]
Relevant securities:	Equity securities registered under section 12, including, for this purpose, derivative securities as well as other contracts, rights or arrangements the value of which is based on the value of equity securities	Shares and derivatives or other financial instruments relating to those shares	Shares or debt instruments of the company, or derivatives or other financial instruments linked to those shares or debt instruments. Uncertainty remains on whether rules apply to securities not admitted to trading in the EU (without a price-value relationship with securities that are admitted to trading in the EU)
Disclosable transactions:	Applicable persons must disclose (i) their initial holding, at the time of acquisition or, if later, the registration of the class of securities under section 12 (on Form 3); (ii) changes in beneficial ownership (on Form 4); and (iii) an annual	Transactions conducted on their own account Brief non-exhaustive list (acquisitions, disposal, accepting awards, accepting gifts, exercising options and placing spread bets) is set out by the FCA in technical	Transactions conducted on their own account[36] Lengthy non-exhaustive lists of examples are set out in MAR and implementing regulations,[37] and includes pledging or lending the securities and transactions

[32] "Officer" includes the president of a company, its principal financial and accounting officer(s) or controller, any other individual who is a vice president in charge of a principal business unit, division or function and any other individual who performs a policy-making function. A person may be an officer for these purposes without regard to that person's title or formal position. A "director" is, in general, any director of a company, although a corporate shareholder of a company may be deemed to be a director of the company if the shareholder designates one of its representatives to be a director.

[33] An insider's beneficial interest in securities may arise from a direct holding of an equity security, from an indirect interest in a security through a corporation, partnership or trust (of which the insider is a trustee, a settlor or a beneficiary), from equity securities held by certain family members or from equity securities held by an investment partnership from which the insider is entitled to a performance related management fee. Accordingly, although there is no direct obligation on associated persons to report under section 16, as in the MAD / MAR regimes, holdings of an associated person may be deemed to be holdings of the insider and therefore reportable.

[34] The definition of "person discharging managerial responsibility" in MAD is consistent with that in MAR. "Connected persons" under MAD as implemented in the UK includes all persons included in the definition of "persons closely associated with [PDMRs]" in MAR, but also includes (i) companies in which the PDMR and connected persons hold 20% of the shares/voting interests; (ii) trusts where the trustee may exercise a power of the trust for the benefit of the PDMR; (iii) persons who are partners (under partnership law) of the PDMR or a connected person of the PDMR; and (iv) a firm in which a PDMR (or one of his connected persons) is a partner. In this respect, MAR has narrowed the field of associates of PDMRs who are caught by the regime.

[35] See footnote 13 for the definition of "persons closely associated" under MAR.

[36] Note that this does not include transactions "for the account of a third party" or "directly or indirectly", unlike the prohibition on transactions during closed periods – see Part II.B below.

[37] See the list set out in Commission Delegated Regulation of December 17, 2015 (available here).

	Section 16	MAD as implemented in the UK	MAR (*from July 3, 2016*)
	statement of beneficial ownership (on Form 5) Transactions that must be reported include acquisitions, disposals, grant of options/other rights to receive shares, exercise of options/other rights to receive shares and various other transfers of beneficial ownership. Does not generally include stock lending or pledging	notes. MAD text does not explicitly include pledging shares, but the FCA has issued a statement confirming that in the UK, share pledges must be disclosed	undertaken by a third party asset manager on behalf of the PDMR/person closely associated
Disclosure made to:	The SEC (through EDGAR)	Company	Competent authority and company
***De minimis*:**	Certain *de minimis* transactions (less than $10,000 in market value) may be reported annually on Form 5 (although often voluntarily reported on Form 4)	None	€5,000 per year
Contents of disclosure:	Information required by Form 4 is broadly the same as under MAR (although does not include the location of the transaction)	Name of PDMR, reason for notification, name of company, description of financial instrument, nature of the dealing, date and place of the transaction and price and volume of the transaction	As under MAD
Format of disclosure:	SEC-prescribed forms (Forms 3, 4 and 5)	An optional form is available on the FCA website (available here)	Prescribed format set out by ESMA and the EU Commission[38]
Timing of disclosure:	Form 3: within 10 days of becoming an insider Form 4: by the end of the second business day following the transaction Form 5: within 45 days of the end of the company's fiscal year	PDMR to disclose within four business days of the relevant transaction; to then be made public by the company as soon as possible, and in any case no later than the business day following notification by the PDMR	PDMR to disclose within three business days of the relevant transaction; to then be made public by the company as soon as possible, and in any case within (the same) three business days of the relevant transaction

[38] See Commission Implementing Regulation (EU) 2016/523 of March 10, 2016, available here.

B. Closed periods[39]

U.S. context
Although quarterly blackout periods designed to prevent directors, officers and certain other employees from trading in a company's securities for a period of time prior to earnings releases (and until a short time thereafter) are common features of many U.S. public companies' insider trading policies, there are no formal or prescriptive requirements as to timing. Transactions pursuant to Rule 10b5-1 plans will also typically not be subject to blackout periods. Compliance with MAR requirements may thus require significant changes in practices.

	Model Code (*current regime for UK premium-listed companies*)	MAR (*from July 3, 2016*)
Persons prohibited:	PDMRs (but PDMRs must seek to prohibit transactions by their connected persons and investment managers)	PDMRs
Prohibited transactions:	Acquisition, disposal, contracts linked to a security's price, actions relating to options, stock lending, granting a charge over a security, any transfer of beneficial ownership	Transactions on their own account or for the account of a third party, directly or indirectly· We understand that it is possible that the list of prohibited transactions is likely to be regarded as the same as the list of transactions that must be disclosed under the PDMR disclosure obligation
Relevant securities:	Publicly traded or quoted securities of the company or any member of its group or any securities that are convertible into the same	Shares or debt instruments of the company, or derivatives or other financial instruments linked to those shares or debt instruments. Uncertainty remains on whether rules apply to securities not admitted to trading in the EU (without a price-value relationship with securities that are admitted to trading in the EU)
Clearance to deal:	All transactions by a PDMR require advance clearance from a designated director of the company	No general requirement for clearance. The FCA has indicated that it will replace the Model Code obligation for PDMRs to seek clearance with a requirement that companies have effective systems and controls in place to ensure that PDMRs seek clearance
Period during which transactions are prohibited:	"Close periods": 60 days prior to a preliminary announcement of annual results; 60 days prior to an annual financial report; if a company reports half-yearly, the time from the end of the half year to the publication of the half-yearly report; if the company reports quarterly, 30 days prior to the announcement of the quarterly	MAR-prescribed "closed periods": 30 days before the announcement of an interim financial report or a year-end report that the company is obliged to make public under national law or rules of the rules of the trading venue where the company's shares are admitted to trading The FCA has announced that, until further

[39] Although there is no MAD requirement analogous to the closed period under MAR, PDMRs of companies with premium listings on the London Stock Exchange are prohibited from dealing during certain "prohibited periods" set forth in the UK Model Code. This Part II.B accordingly summarizes the implications of the Model Code prohibition (which will also be replaced by MAR).

	Model Code (*current regime for UK premium-listed companies*)	MAR (*from July 3, 2016*)
	results In addition, any time there is undisclosed inside information relating to the company	guidance is received from the European Commission or ESMA, it will consider that a closed period ends on the announcement of preliminary results (where the preliminary announcement contains all inside information expected to be included in the relevant later report). The announcement is available here
Exceptions to prohibition on transactions:	(i) If not in possession of inside information, a PDMR in severe financial difficulty may sell securities; (ii) various exceptions for acquiring securities under employee share plan where there is no discretion on PDMR's part; and (iii) under a trading plan executed by a third party under pre-agreed written instructions	Exceptions analogous to (i) and (ii) under MAD will continue to exist Doubtful that trading that could have taken place under exception (iii) (pre-agreed trading plans) will be permitted under MAR
Other company obligations:	None	A company must (i) maintain a list of its PDMRs and closely associated persons; and (ii) notify PDMRs of their obligations under MAR

IV. Insider lists

U.S. context
No analogous requirements, although many companies maintain details of persons with access to material non-public information as a matter of good practice.

	MAD as implemented in the UK	MAR (*from July 3, 2016*)
Insider lists:	Obligation to maintain a list of all persons who have access to inside information	As under MAD
Details to include:	Insider's identity, reason for inclusion on the list and the date on which the list was created and updated	More extensive details of relevant insiders than was required under MAD, including phone numbers, email addresses, home address and national identification numbers
Form of insider list:	No specified form	EU-wide prescribed template must be used (available here)
Record keeping:	Insider list to be kept for five years from the last update	As under MAD

V. Share repurchase programs

U.S. context
Share repurchase programs are subject to the general prohibitions against insider trading contained in the U.S. federal securities laws and can also raise concerns as to market manipulation. For these reasons, U.S. public companies should not engage in share repurchases while in possession of material, non-public information (except under a Rule 10b5-1 trading plan) and generally seek to structure their share repurchases to meet the safe harbor provided by Rule 10b-18 under the Exchange Act.

	Rule 10b-18	MAD as implemented in the UK	MAR (*from July 3, 2016*)
Objective:	No restriction	Sole purpose to reduce the capital of the company or meet obligations to deliver shares under convertible bonds or employee incentive schemes	As under MAD
Advance disclosure:	No specific obligation to provide detailed disclosure in advance; companies will generally make public disclosure of general intent to engage in repurchase activity before commencing a repurchase plan	Prior disclosure required of: the objective of the program, the maximum consideration, the maximum number of shares to be acquired and the duration of the period for which authorization for the program has been given	As under MAD
Trade reporting:	Disclosure on a monthly basis for the most recently completed quarter in Form 10-K and 10-Qs of: total number of shares or units purchased (with additional footnote disclosure in respect of purchases other than pursuant to publicly announced plans or programs) and average price paid; as well as the total number of shares purchased under publicly announced plans or programs and the maximum number (or approximate dollar value) that may yet be purchased under such plans or programs	The titles and amounts of the instruments bought or sold, the dates and times of the transactions, the transaction prices and means of identifying the investment firms concerned must be publicly disclosed no later than seven market sessions following the date of the transactions	As under MAD, but trades will be required to be disclosed on a transaction by transaction basis and on an aggregated basis, as well as broken down for each trading venue Disclosure to be included on the company's website and maintained for five years
Trading venue:	U.S. markets (safe harbor does not extend to purchases made outside the U.S.) Also does not extend to off market trades	Regulated markets MAD is silent on off market trades	Regulated markets, MTFs and OTFs Safe harbor does not extend to off market trades

	Rule 10b-18	MAD as implemented in the UK	MAR (*from July 3, 2016*)
Buying restrictions:	A purchase by the company may not be the first trade of the day reported on the consolidated quotation system, nor in the last 10 minutes (for securities with ADTV of $1 million or more or public float of $150 million or more) or 30 minutes (otherwise) of the primary trading session. (Purchases following the close of the primary trading session permitted only subject to certain restrictions) All purchases and bids on each single day must (with limited exceptions) be made through one broker or dealer	No restriction	The safe harbor will not apply to auctions where the relevant market allows continuous trading. Where the shares are traded in auctions then the safe harbor will apply if participants have sufficient time to react to orders relating to the buyback program
Price limit:	Shares cannot be bought at a price higher than the highest independent bid or last independent transaction price, whichever is higher	Shares cannot be bought at a price higher than the higher of the price of the last independent trade and the highest current independent bid on the trading venue where the purchase is carried out	As under MAD
Volume limit:	25% of the average daily trading volume of the shares in the previous four weeks In the case of a market-wide trading suspension, the 25% limit is increased to 100% Alternatively, the company may make one block purchase per calendar week and not be subject to the 25% limit, subject to certain conditions	25% of the average daily volume of the shares in any one day on the regulated market on which the purchase is carried out. Average daily volume determined based on volumes in the month preceding the month of the initial disclosure of the share repurchase program (provided disclosure of that volume is included in that initial disclosure), or in the 20 trading days preceding the date of purchase (where it is not) In cases of extremely low liquidity, the 25% limit may be exceeded if the company provides information and explanations to the competent authority in advance, as well as disclosing this adequately to	As under MAD, but no exception for low liquidity

	Rule 10b-18	MAD as implemented in the UK	MAR (*from July 3, 2016*)
		the public and remaining within an overall cap of 50% of average daily volume	
Trading restrictions:	Not a requirement of Rule 10b-18 as such, but companies should not repurchase when in possession of material non-public information (except under a Rule 10b5-1 trading plan) The Rule 10b-18 safe harbor is not available: (i) during a Regulation M "restricted period" (when the company is engaged in a distribution of the same class of securities); or (ii) during the period from the time of the public announcement of any merger, acquisition or similar transaction until the closing of the transaction (subject to certain exceptions)	During the period of the program, the company may not (i) sell shares, or (ii) trade during a period which is a closed period or when the company has delayed disclosure of inside information Exceptions: (i) the company is an investment firm or credit institution with information barriers in place, (ii) the dates and volumes of shares to be purchased are set out in the initial public disclosure of the share repurchase program, or (iii) the buy-back program is undertaken by a third party investment firm or credit institution that "makes its trading decisions concerning the timing of the purchases of the issuer's shares independently of the issuer"	As under MAD