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Steven A. Meyerowitz

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Market Abuse Regulation: Impact on U.S. Public Companies—Part II

Raj S. Panasar, Aseet Vasudev Dalvi, Jackson Martin, Leslie N. Silverman and Sandra L. Flow[*]

This multi-part article focuses on the Market Abuse Regulation's implications for U.S. public companies' ongoing obligations and other ordinary course activities if they have debt, equity or other securities admitted to trading on EU trading venues, or are contemplating such admissions to trading. The first part of the article, which appeared in the January 2017 issue of The Banking Law Journal, *gave an overview of the changes made to the previous regime by the Market Abuse Regulation, with particular focus on the ongoing obligation to disclose inside information. This second part of the article focuses on restrictions on managers' dealings. The final part of the article, which will appear in an upcoming issue of* The Banking Law Journal, *will explore the obligation to maintain insider lists and impacts on share repurchase programs, as well as certain other considerations. Capitalized terms used in this part of the article but not defined have the meanings set out in the first part of this article.*

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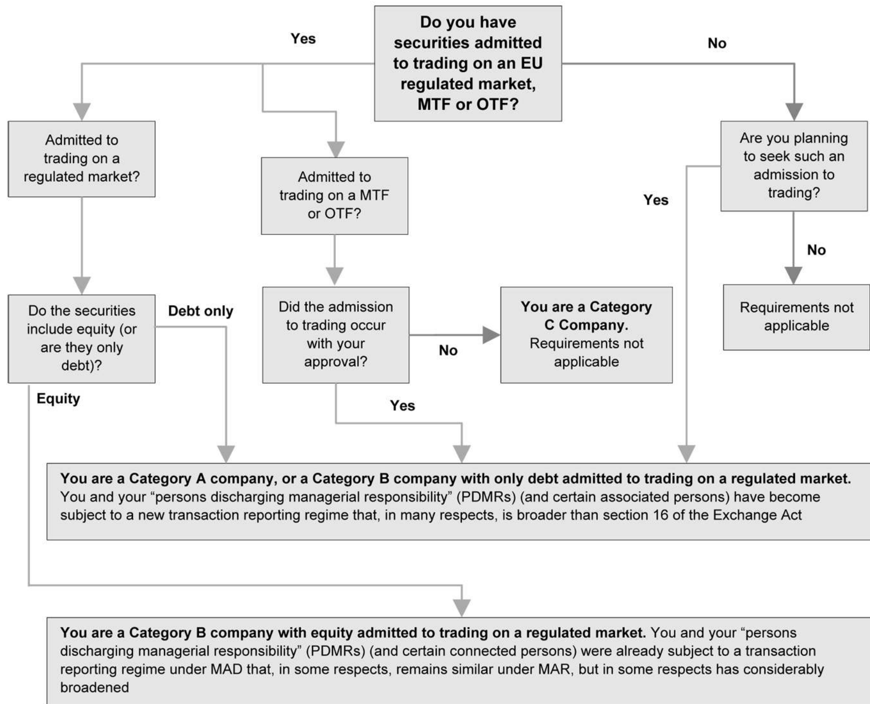
Managers' Dealings (*Category A and B Companies*)
Disclosure Obligations



Under MAR, "persons discharging managerial responsibility" ("PDMRs") of Category A and B companies (and also "persons closely associated with them") are obligated 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.[1] The reporting obligation is subject to a €5,000 per

[1] 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 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

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) 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 in the first part of this article, 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 article, but the following points bear particular mention:

- *Persons subject to disclosure obligations extend beyond section 16 directors*

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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 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).

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 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),[2] 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.[3] In contrast, Section 16 applies only to transactions in equity securities registered under Section 12 of the Exchange Act (although under a 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.[4] 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

[2] 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.

[3] Although, as previously discussed, 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).

[4] *See* Commission Delegated Regulation of December 17, 2015, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0522&qid=1459932714328&from=EN.

transfers of beneficial ownership) are generally disclosable under MAR, there are differences between the regimes with which companies 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 MAD regime, PDMRs (and their associated persons) had four business days after a relevant transaction to notify the company, and the company was 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 are required within three business days after the date of the transaction, and companies are 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.[5] 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,[6] 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 MAR compliance

[5] 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.

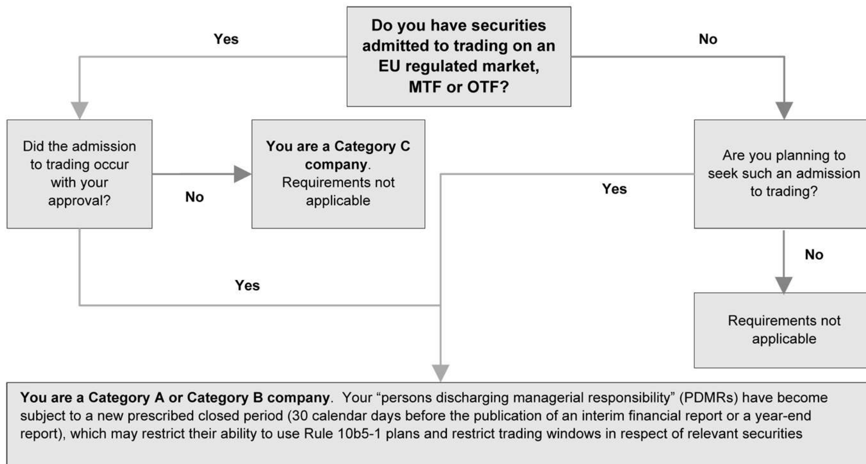
[6] This obligation is distinct from the obligation to maintain insider lists, as will be discussed in Part III of this article, "Insider Lists."

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.

Key Next Steps—Category A Companies, and Category B Companies with Only Debt Admitted to Trading on a Regulated Market
To the extent not already implemented: • 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
To the extent not already implemented: • 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 • Institute necessary training programs / notification procedures for PDMRs (and associated persons) and other relevant staff

Closed Periods



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 prohibits PDMRs of Category A and B companies (though *not*, in contrast to the PDMR reporting regime discussed above, persons closely associated with them)[7] 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 contained no

[7] 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* "Share Repurchases" in the final part of this article) 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.

comparable restrictions.[8] Closed periods under MAR 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."[9]

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 hereinafter. 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.[10] Various experts and industry bodies have questioned this view, but ESMA has not yet sought to resolve the uncertainty definitively through secondary legislation.

  U.S. public companies should closely monitor any developments in

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[8] 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 were generally subject to trading restrictions for 60 days prior to announcements of results and at certain other times.

[9] 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 previously discussed, 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.

[10] The consultation paper is *available at* https://www.esma.europa.eu/sites/default/files/library/2015/11/esma_2014-808_consultation_paper_u_on_mar_draft_technical_advice_0.pdf.

this area, and, in the absence of further guidance, 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 may be 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).[11] 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.[12]

Key Next Steps—Category A and B Companies
To the extent not already implemented: • 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; and • Institute necessary training programs / notification procedures for PDMRs and other relevant staff.

The final part of this article (including the Annex) will appear in an upcoming issue of *The Banking Law Journal*.

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[11] The FCA's announcement is available at http://www.fca.org.uk/firms/markets/market-abuse/mar/closed-periods-preliminary-results.

[12] 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.