

# KIRKLAND ALERT

4 July 2016

## On Your MARks: New EU Market Abuse Regime Now in Force

### Overview

From 3 July 2016, the EU Market Abuse Regulation (MAR) has direct effect across the EU, replacing the EU Market Abuse Directive (MAD). Pending the UK's exit from the EU (and depending on the negotiated terms of that exit), MAR will, for some years at least, have direct effect in the UK and will impact issuers with securities listed on UK exchanges, as in other EU jurisdictions.

### Practical Application

Although MAR bears many similarities to the UK's pre-3 July 2016 civil market abuse regime, it introduces a number of changes which will impact financial sponsors when they are dealing with EU issuer counterparties in an M&A context. It will also have implications for those fund managers (or their portfolio groups) who already hold or trade in, or who subsequently acquire, securities traded on a relevant EU exchange or trading platform — for example, on a take private or PIPE transaction, in relation to a stakebuilding strategy or post-IPO lock-up — or who otherwise handle inside information.

Notably, MAR will significantly increase compliance burdens for issuers of bonds admitted to trading on previously unregulated EU trading platforms. This will include portfolio group companies (and other issuers) with high yield or quoted Eurobonds admitted to trading on EU exchanges, for example Ireland's GEM and the Luxembourg EuroMTF, which will become subject to the same treatment under MAR as companies with publicly listed equity.

Fund managers (and relevant issuers, respectively) may need to update (or adopt new) compliance policies and securities trading manuals, to reflect these changes.

### 10 'Takeaway' Messages

1. MAR has expanded scope. While MAD only applied to financial instruments admitted to trading on EU regulated markets (and derivatives based on those instruments), MAR will also apply to high yield bonds and quoted Eurobonds (and derivatives based on those instruments) admitted to trading on EU multilateral trading facilities (such as the LSE's AIM, the Global Exchange Market of the Irish Stock Exchange (GEM) or the EuroMTF of the Luxembourg Stock Exchange). Relevant issuers will now be subject to additional regulatory and administrative burdens, regardless of where they are based or whether they already comply with more stringent continuing obligations on exchanges outside the EU — for example, in the United States. Issuers of such instruments may consider undertaking future listings on non-EU exchanges, such as those in the Channel Islands or Cayman Islands.

**MAR introduces a number of changes which will impact financial sponsors when they are dealing with companies with EU publicly traded securities, either in an M&A context or who hold, or subsequently acquire, those securities.**

2. MAR covers behaviour both within and outside the EU, in relation to financial instruments admitted to trading on a relevant EU exchange.
3. The existing civil law market abuse offences (insider dealing, unlawful disclosure of inside information and market manipulation) and the existing criminal offences of insider dealing and market manipulation are substantively unchanged under MAR.
4. The definition of inside information is also substantively unchanged and we expect that existing guidance and principles of interpretation will therefore continue to inform this assessment. MAR underscores the need for continued focus on whether confidential information in relation to an issuer is 'inside information'. It will be important for relevant fund managers and portfolio group companies to implement procedures for identifying and managing the flow of information.
5. Relevant issuers will be required (subsequently) to inform their competent authority if they have delayed the announcement of inside information and will (in the UK, only if requested to do so by the FCA) need to explain the rationale for that decision. This means that they will need to implement a process for managing and disclosing inside information and for recording permitted instances of delayed disclosure.
6. A new 'safe harbour' from the offence of unlawful disclosure of inside information has been introduced for issuers and their advisers conducting 'market soundings' (the scope of which may be broader than a traditional pre-marketing, wall crossing or pilot fishing exercise). Procedures will be tightened up both for disclosing market participants and recipients of market soundings and there will be more prescriptive record-keeping obligations and compliance processes on both sides.
7. The market abuse safe harbour from insider dealing in relation to a takeover offer has been narrowed; in light of pre-existing market practice, urgent clarification is being sought from the FCA on the extent to which a bidder's own knowledge of its impending bid will fall within the safe harbour, going forward.
8. MAR introduces a new 30-day 'closed period' prohibition on dealings by persons discharging managerial responsibility (and their closely associated persons) and also modifies pre-existing disclosure requirements under the Model Code in the Listing Rules, which set out the pre-3 July 2016 restrictions and authorisation requirements for directors and senior managers dealing in their company's securities. Issuers will need to implement procedures for tracking and recording relevant transactions and adopt MAR-compliant dealing policies. Investor directors who stay on post-IPO of a portfolio company will need to comply with these new rules.
9. There are more prescriptive (and expanded content) requirements for insider lists and an increased number of issuers will now be subject to these requirements.

**MAR will increase compliance burdens for issuers of bonds admitted to trading on previously unregulated EU trading platforms, for example, in Ireland or Luxembourg.**

10. In the UK, all of the above has necessitated significant amendments to the FCA Handbook, the Disclosure and Transparency Rules, the Code of Market Conduct and FSMA 2000. The Model Code will be removed. Compliance documentation should be reviewed and updated, in order to reflect these changes.

**Fund managers will need to review their policies and procedures to ensure that they remain compliant with the introduction of MAR.**

## Next Steps

MAR introduces a number of changes of relevance for fund managers and issuers of bonds admitted to trading on previously unregulated EU exchanges or trading platforms. We would be delighted to assist you with any aspect of MAR's implementation.

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