WHITE & CASE

Capital Markets Blueprints

Ongoing Reporting Obligations for High Yield Bonds

2020

Contents

Foreword

An issuer of high yield bonds is subject to a number of different ongoing reporting obligations, some of which are contractual and some of which are regulatory. As part of the transaction process, issuers should take these obligations into account when negotiating documentation, and have a clear compliance plan in place prior to closing.

The reporting covenants within a high yield indenture include a number of different considerations that the issuer must keep in mind as it continues to run its business. In addition, because the vast majority of European high yield bonds are listed, compliance with exchange rules and market abuse legislation, including the EU Market Abuse Regulation, if applicable, is also important.

This **White & Case Capital Markets Blueprint: Ongoing Reporting Obligations for High Yield Bonds** sets out a summary of common reporting covenant compliance considerations, a roadmap for navigating obligations related to the disclosure of inside information and key considerations when providing guidance as part of the reporting process.

Reporting covenant compliance

High yield issuers are obligated under the covenants within the bond indenture to provide periodic financial information and information regarding material events. The summary below seeks to highlight key ongoing reporting obligations.

Why Do European Issuers Have Reporting Requirements?

Statutory Reporting for Rule 144A Transactions

Reporting covenants contained in the indenture serve as a contractual mechanism to ensure compliance with the information requirements of Rule 144A ("**Rule 144A**") of the Securities Act of 1933, as amended (the "**Securities Act**"). Where an issuer is not otherwise required to report pursuant to the Securities Exchange Act of 1934 (the "**Exchange Act**")(i.e., a foreign company otherwise exempt or a foreign government), Rule 144A (the common resale exemption from US registration used by issuers) requires the issuer to make available, upon request, certain "reasonably current" information. This information includes a description of the business, most recent balance sheet, profit and loss statement, retained earnings statement and the previous two years' financial statements. Notably, this information requirement carries forward for each subsequent resale. Therefore, if an issuer fails to make such "reasonably current" information available to satisfy Rule 144A, investors would no longer be able to sell their notes without registration with the SEC or an alternative exemption. Reporting covenants therefore contractually protect liquidity of restricted securities by preserving investors' ability to make future resales in reliance on Rule 144A.

There are exemptions to the information requirements under Rule 144A, namely where the issuer otherwise reports information to the SEC or foreign securities regulators. More specifically, resale of securities are exempt from the information requirements of Rule 144A if the issuer files reports with the SEC pursuant to the reporting requirements of the Exchange Act or is exempt under Rule 12g3-2(b) of the Exchange Act (this exemption encompasses any foreign private issuer that, among other specific requirements, has listed equity securities outside the US and which complies with local disclosure regulations). Certain listed European high yield issuers may fall into these exemptions, but we believe most do not.

Investor Commercial Expectations for Information

Regulatory requirements aside, investors' baseline expectation is to receive sufficient reports to inform their investment decisions regardless of the formal regulatory requirements. For instance, despite the exemption available to foreign private issuers registered with the SEC from the requirement to file quarterly reports (they are only required to file annual reports on Form 20-F and notify the market of material information on Form 6- K), they do, nevertheless, often provide quarterly reports on Form 6-K. Similarly, market practice has developed such that issuers of European high yield bonds not subject to the information requirements of Rule 144A are nevertheless expected to provide quarterly reports and general information which closely correlates to such requirements. The information requirements of Rule 144A provide a floor for reporting, and investor expectations set a higher bar. These investor expectations manifest in the reporting covenants found in European bond indentures.

Common Reporting Requirements under European High Yield Indentures

The following discussion describes the reporting covenants and requirements contained in the indentures for European high yield issuers, and their most common variations.

Annual and Quarterly Financial Statements

The indenture requires issuers to, within a certain number of days following the end of each year or quarter, provide financial information to investors. Such annual or quarterly information typically satisfies the information requirements of Rule 144A, namely by periodically providing a description of the business, balance sheet, income statement and statement of cash flows, but the indenture typically goes further to address investor expectations. Investors typically demand to see a periodic presentation of EBITDA and industry-specific metrics, and, notably, require the issuer to provide such information on a shorter timeline and without the need for investors to request it.

Pro Forma Information

Reporting covenants also typically require a *pro forma* income statement and balance sheet in the event there were any acquisitions or dispositions during the period. However, these *pro forma* disclosures need not comply with Regulation S-X under the Exchange Act, instead the typical formulation of the covenant will require explanatory footnotes, which take on greater importance in this context.

While the annual, quarterly and periodic requirements derive from reporting requirements applicable to US public companies the European bond market does not follow them strictly and has developed some distinctive features, which are largely common sense adaptations to the non-registered or European context that have evolved over time.

Business and Operations

In addition to financial information, the quarterly and annual reports are typically required to contain a management's discussion and analysis ("**MD&A**") section which discusses the financial results in greater detail. The MD&A often includes certain key performance indicators for the business, information on environmental and employment matters, a general discussion of the business, including a discussion of material transactions, contracts, risk factors and recent developments related to the company. However, requirements that were historically seen in European high yield indentures to draft these sections "with a similar level of detail to the offering memorandum" have largely fallen away.

Material Events Reporting

Similar to the requirements under Form 6-K, upon the occurrence of a material event, issuers are required to promptly provide a description of the event to bondholders. Examples of material events include a material acquisition, disposition or restructuring, a change in management or key employees, a change in auditors, or other similar events. In addition to contractual material events reporting requirements under the indenture, for bonds that are listed on multilateral trading facility exchange within the EU, the EU Market Abuse Regulation also applies. See "Disclosure of inside information" below.

Flexibility in Reporting Covenants

While most items contained in the reporting covenant are relatively uniform across the market, like other aspects of a high yield bond, there is some degree of flexibility. This is important as the covenant needs to ensure bondholders receive information while also allowing the issuer to grow and adapt.

Reporting Entity – There is often flexibility about which level of the corporate structure should be the consolidating and reporting entity. Most indentures require the issuer to be the consolidating entity, but permit a parent entity to report if at any time the notes are guaranteed by any direct or indirect parent company. In the context of payment-in-kind ("**PIK**") deals, the financial disclosure requirements are often not at the level of the PIK issuer, but rather at an entity lower in the corporate structure. In this context the covenant would require an additional explanation if there is a significant difference in the financials if it had otherwise been reported at the PIK issuer level.

Treatment of Unrestricted Subsidiaries – One common point of flexibility relates to the issuer and its corporate structure. Which entities must report? Sometimes it is only the issuer and its restricted subsidiaries and sometimes it is all subsidiaries. However, where unrestricted subsidiaries are not included in a report, if when they are taken together they would otherwise be a significant subsidiary of the issuer, issuers are often required to have separate disclosure for them containing the same information.

Accounting Standards – Another common concern is which accounting standard is applied and as of what date (i.e., US GAAP or IFRS). The accounting standard is typically "floating" for reporting purposes, meaning it changes over time as the accounting standards change. However, when it comes to the application of the relevant accounting standard when calculating compliance with the covenants most indentures allow for a "freeze" of the standard as of the date of the indenture (or any date prior to such "freeze"). This allows the issuer some certainty as to how it will calculate its compliance. However, sometimes issuers are permitted to change the applicable standard (to incorporate new rules

or interpretations) up to one or two times over the life of the bond. Notably indentures usually do not contain a specific requirement that the issuer report the metrics which it uses to measure compliance with the financial covenants, therefore, without notification from the issuer, a bondholder may not be able to confirm from a report based on "floating" accounting standards whether an issuer is able to take further actions under any incurrence covenants as they may have "frozen" the accounting standards which are applicable.

Public Companies – If an issuer or one of its parent companies does a public equity offering and thereafter is subject to a stock exchange's reporting requirements, the reporting covenants in the indenture may allow for a reporting change. This covenant has come into greater focus in recent years and is very important to companies that may be considering a public equity offering in the near future (for additional information regarding the high yield to IPO process please see our article available at: https://www.whitecase.com/publications/insight/hit-ground-running-high-yield-bond-ipo). Certain reporting covenants provide that if the issuer or a parent entity is listed on a regulated market and the issuer fulfils that exchange's reporting requirements, the issuer is deemed to comply with the obligations under the reporting covenant. Other reporting covenants provide for more minor changes to reporting requirements following a public equity offering, for example, by requiring *pro forma* financial information only to the extent required by the stock exchange rather than pro forma income statement and balance sheet information for any material acquisitions, dispositions or recapitalizations.

It can be important to build in the relevant reporting flexibility into an indenture from the outset where an issuer may become a public company to avoid duplication of reporting requirements. For example, recently Worldpay Group delisted from the London Stock Exchange, the result of which was that Worldpay Group was no longer required to make its reports publicly available other than pursuant to its high yield indenture. Worldpay Group sought bondholder consent to shift their indenture reporting requirement further up their corporate structure to a new indirect parent, Worldpay Inc., which trades on the New York Stock Exchange and publicly files with the SEC. However, there was significant investor discussion around the change to the reporting entity and change of reporting requirements, and given the required reporting flexibility was not included in the indenture, ultimately Worldpay Group had to pay a consent fee to secure the amendment.

Investor Calls – Many indentures require the issuer to hold investor calls for bondholders. However, it is common to allow bondholders to participate in shareholder calls for issuers whose parent company is listed, rather than requiring separate investor calls for bondholders.

Disclosure of inside information

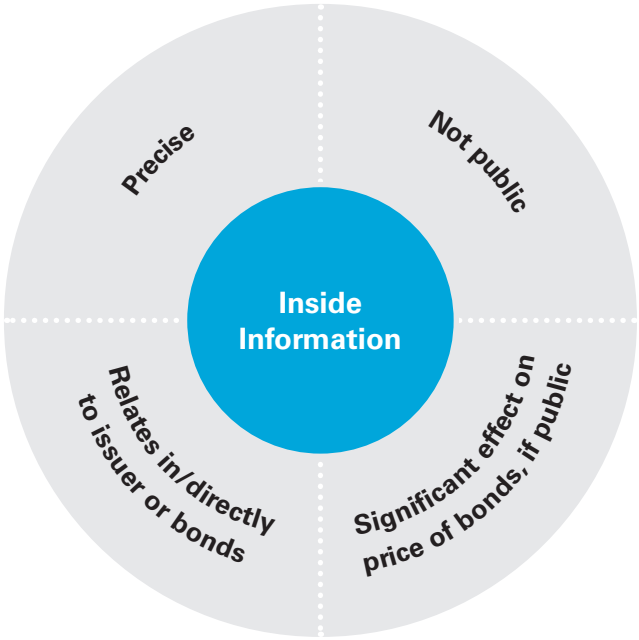
Listed bonds are subject to exchange-specific disclosure requirements and may be subject to market abuse rules. In particular, bonds listed on regulated or multilateral trading facility exchanges within the EU are subject to the EU Market Abuse Regulation (MAR), which details the obligations and procedures regarding the disclosure and control of inside information.

The following highlights the key components of MAR requirements for disclosure and control of inside information, as well as some best practice suggestions.

Identifying inside information

"**Inside information**" is information of a **precise nature**, which has **not been made public**, relating directly or indirectly **to the issuer or the bonds** and which, if it were made public, would be likely to have a **significant effect on the price of the bonds**.

- "**public**": if the information is publicly available, then it is **not** inside information.
- "**precise nature**": the information relates to a set of circumstances or an event which exists or has occurred, or may reasonably be expected to come into existence or occur, which is specific enough to enable a conclusion to be drawn as to the possible effect of the circumstances or event on the price of the bonds. Importantly, the threshold for whether or not information is considered sufficiently precise to enable such conclusion is lower than "more likely than not".
- "**significant effect**" on price: would a reasonable investor be likely to use the information as part of the basis of his or her investment decisions? There is no figure (percentage change or otherwise) that can be set when determining a "significant effect"; this will depend on the company and the securities involved. Information that may be considered relevant for this purpose includes, but is by no means limited to, information relating to the company's assets and liabilities, major new developments in the business of the company, its financial condition or its performance or expectation of the performance. For example, the UK regulator has previously concluded that even a minor shift in the price of bonds (as low as four basis points) is "significant" and could be expected to affect a reasonable investors' decision-making.



An important part of the issuer's process for identifying inside information is consultation with financial advisors, who are best placed to advise on whether the information is likely to have a significant effect on the price of the bonds.

Examples of inside information relating to the issuer	Examples of inside information relating to the bonds
A significant change in the issuer's financial situation that either increases or reduces the issuer's risk of default, which could include: □ a material increase in debt or an increase in capital □ additional off-balance sheet arrangements □ material impairments	Circumstances that may impact the issuer's ability to meet its obligations under bonds, such as: □ any default in payment of interest □ any default in payment of principal amount
Any significant changes in corporate governance, such as: □ changes in key management or directors □ material amendments to corporate documents	Any change of ratings of the bonds
Any business combinations and demergers or material acquisitions or divestments by the issuer	Any change of the paying agent
The entering into or termination of any material agreement	Any redemption of the bonds
Any payment default or decisions relating to bankruptcy, insolvency or cessation of payments	
Any new material litigation or updates to material legal or tax proceedings	

Duty to disclose

Once information has been identified as inside information, the issuer must disclose the information to the public as soon as possible. As set out below, an issuer may delay disclosure of inside information if certain conditions are met.

Delay in disclosure

The issuer is permitted to delay the public disclosure of inside information where the following three conditions are met:

- immediate disclosure is likely to prejudice the legitimate interests of the issuer;
- delay of disclosure is not likely to mislead the public; and
- the issuer is able to ensure the confidentiality of that information.

When a decision to delay disclosure of inside information is made, it is important that a holding announcement is prepared (and kept up-to-date) so that the issuer can respond promptly to any inadvertent leaks or if the conditions for delay are no longer satisfied. Note that delay will not be justified in order to offset any negative news with positive news.

Dos and Don'ts for announcing inside information

Dos	Don'ts
Disclose as soon as possible	Combine announcement with marketing activities
Provide fast access	Delay announcement to convene full board meeting
Ensure announcement allows for complete, correct and timely assessment of information	Delay announcement to give full briefings
Maintain on issuer website for five years and provide a copy to the bond trustee as required by the indenture	Delay announcement in order to offset with good news
Provide free of charge	Delay announcement to coincide with scheduled periodic announcement
Publish announcement through a regulated newswire	Publish on social media or website only
Provide on a non-discriminatory basis	Release to media under embargo

If the disclosure of inside information is delayed, MAR requires a written explanation of how the three conditions set out above were met. This written explanation must set out the date and time when the information became inside information and when the inside information is likely to be disclosed, as well as record the decision and rationale for the delay including the individuals involved in making the decision and the ongoing monitoring of the conditions of delay. The written explanation must also set out the information barriers in place to prevent access to inside information by persons other than those who require it for the normal exercise of their employment, profession or duties within the issuer and with regard to third parties and the arrangements in place where confidentiality is no longer ensured. Where a decision to delay the announcement is made, a holding announcement must be prepared.

Conditions to delay disclosure

Immediate disclosure is likely to prejudice issuers' legitimate interests	Delay of disclosure is not likely to mislead the public	The issuer is able to ensure the confidentiality of that information
□ immediate public disclosure would jeopardise any ongoing negotiations; □ immediate public disclosure of the development of an invention would likely jeopardise intellectual property rights; □ immediate public disclosure would seriously jeopardise negotiations intending to promote the issuer's financial recovery; □ immediate public disclosure would jeopardise the purchase or sale of a major holding in another entity; □ where a transaction is subject to the approval of a public authority and such approval is conditional on additional requirements; or □ where the management body of an issuer requires the approval of another body within the issuer before entering into certain contracts or making certain decisions.	□ information is materially different from a previous public announcement on the matter; or □ information relates to the fact the issuer may not meet previously announced financial objectives.	□ existence of binding confidentiality agreements; and □ all entities and persons receiving the information included in insiders lists.

Examples of the issuer's "**legitimate interests**" include:

- the issuer is conducting negotiations, where the outcome or the normal pattern of those negotiations would likely be jeopardised by immediate public disclosure of that information.
- the issuer's financial viability is in imminent danger and the immediate public disclosure of information would seriously jeopardise the interests of existing and potential shareholders by undermining the success of specific negotiations intending to promote the issuer's financial recovery;
- the issuer has developed a product or invention and the immediate public disclosure of that information is likely to jeopardise its intellectual property rights. However, if the issuer relies on this heading to delay disclosure, it should seek to protect its rights as soon as possible so that disclosure can then be made (for example, obtaining a patent);
- the issuer is planning to buy or sell a major holding in another entity but negotiations are yet to begin, and the disclosure of that information would jeopardise the conclusion of the transaction;
- the management body of an issuer is taking decisions and/or entering into contracts in relation to a transaction which require the approval of another body within the issuer (excluding the shareholders) to become effective, provided that (i) immediate public disclosure of the information prior to the approval being obtained would jeopardise the correct judgement of the information by the public and (ii) the relevant approval is sought to be obtained as soon as possible; and
- an announced transaction is subject to a public authority's approval and this approval is conditional on additional requirements where immediate disclosure of those requirements will likely affect the ability of the issuer to meet them and therefore prevent the success of the transaction.

In order for the issuer to delay disclosure of inside information, it must be sure that any delay will not mislead the public, this will not be the case if the delay relates to information which:

- is materially different from a previous public announcement of the issuer on the matter to which the information refers;
- concerns the fact that the issuer's financial objectives are likely not to be met, where such objectives were publicly announced; or
- is in contrast with market expectations, where these expectations are based on signals the company has set (e.g. in announcements, press releases or interviews). For example, the company should be careful with public messaging around M&A strategy – if the issuer tells the market that no M&A activity will happen, it might not be able to rely on the legitimate interests exemption.

These are examples of where immediate disclosure will always be necessary. However, this list is not exhaustive and other situations may arise whereby delaying disclosure is likely to mislead the public.

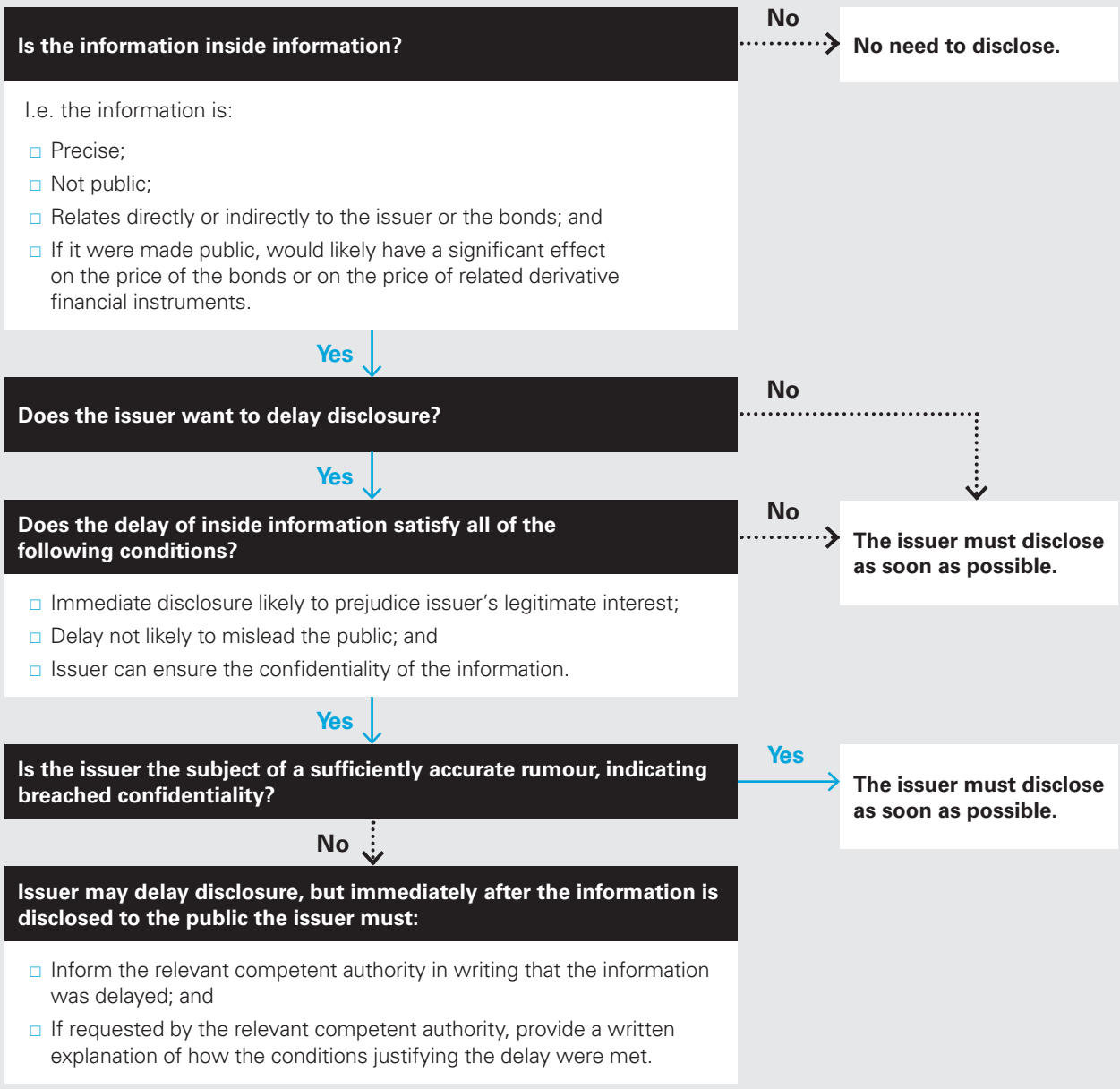
In all situations, confidentiality must be maintained and specific actions to ensure confidentiality must be put in place. In instances where an issuer is relying on another party's duty of confidentiality, it may wish to ensure such duty is documented in order to demonstrate compliance with MAR. If the confidentiality obligation is not in writing, an issuer should consider recording the terms and nature of the obligation.

Selective disclosure

Where the issuer delays public disclosure of inside information as set out above, it may selectively disclose that information to certain persons if the receipt of the inside information is in the normal course of the exercise of that person's employment, profession or duties and that person owes a duty of confidentiality to the issuer, whether based on law, regulation, articles of association (or equivalent constitutional document) or contract. Selective disclosure can also be made by a seller of financial instruments to potential investors, prior to an announcement, in order to gauge the interest of such potential investors.

No selective disclosure can be made unless the proposed recipients have agreed to treat the information as confidential. Selective disclosure cannot be made to any person simply because they owe the company a duty of confidentiality. Before making a selective disclosure, a holding announcement should be prepared so the issuer may promptly respond to any future inadvertent leaks.

Inside information decision tree



Insider dealing and black-out periods

Any person or entity who is in possession of inside information is prohibited from using such information to purchase or dispose of, directly or indirectly, the issuer's bonds.

Such prohibition applies to both the issuer itself and any Person Discharging Managerial Responsibilities ("**PDMR**"). PDMRs are the directors and senior executives of the issuer who have regular access to inside information and power to make managerial decisions affecting future development and business prospects. PDMRs and persons closely associated with them ("**PCAs**") must disclose transactions on their own account in the issuer's bonds.

The issuer cannot proceed with a tender offer, exchange or repurchase of its bonds, and PDMRs must avoid the purchase or disposal of the issuer's bonds (i) anytime it is in possession of inside information, or (ii) as a best practice, during the 30 days preceding the announcement of any annual financial statements, semi-annual or quarterly financial statements (the "**Blackout Period**").

Insider dealing FAQs

What dealings are covered?	Any acquisitions and disposals of issuer's listed bonds by the PDMRs and PCAs once a total amount of EUR 5,000 or EUR 20,000 (depending on the listing venue) has been reached in any calendar year.
When is trading by PDMRs prohibited?	A PDMR cannot trade (i) at anytime if it is in possession of inside information; and (ii) during the period of 30 days prior to the announcement of any annual financial statements, semi-annual or quarterly financial statements.
What about PCAs?	A PDMR must seek to prohibit any dealings in the issuer's bonds during a Blackout Period by or on behalf of persons closely associated with him or her (Note: this is not a requirement under MAR, although is considered best practice).
How to disclose dealings of PDMRs and PCAs?	PDMRs and PCAs must disclose their transactions **no later than three business days after the date of the transaction** to the relevant regulatory authority and to the issuer. Once the notice is received by the issuer, the issuer has to disclose such dealings **no later than three business days after the date of the transaction** (i) using the methods provided by the listing venue and/or through an adequate number of press agencies; and (ii) if published on the issuer's website (not a requirement), the use of filters should be avoided.

Best practices

Disclosure controls and procedures

The issuer should set up adequate disclosure controls and procedures in order to (i) gather and analyze all the information collected, (ii) transfer information to the issuer's disclosure committee, which will assess whether the information is "inside information" and (iii) properly disclose any inside information. Overall identification, control and dissemination of inside information is the responsibility of the board.

Purpose

- The disclosure controls and procedures ensure that inside information flows to the appropriate collection and disclosure points (mainly, management and the disclosure committee) on a timely basis.

Main characteristics

- The disclosure controls and procedures must be consistent with the issuer's business and internal management practices and must:
  - ensure timely collection and evaluation of information potentially subject to disclosure;
  - ensure that (i) potential inside information flows upstream to management and the disclosure committee; and (ii) inside information is checked by employees directly involved on the matter;
  - include policies relating to market rumors, handling leaks and accidental disclosure, meeting the media and dealing with analysts;
  - consider whether disclosure can be delayed or selectively disclosed to third parties;
  - ensure segregation of inside information on the basis of adequate insider lists; and be capable of producing reports on inside information that are timely, accurate and reliable.

Periodic review

- The disclosure controls and procedures should be subject to periodic review and assessment by the disclosure committee which should recommend changes or improvements to the board of directors.

Disclosure

- The disclosure controls and procedures must be made available to all employees.

Disclosure Committee

The issuer should also consider establishing a disclosure committee in order to oversee the identification of inside information and review the disclosure controls and procedures.

Disclosure committee

Purpose

- The disclosure committee assists the issuer's officers and directors in fulfilling the issuer's and their responsibilities regarding (i) the identification and disclosure of inside information about the issuer, and (ii) the accuracy, completeness and timeliness of the issuer's disclosure.

Main responsibilities

- It designs and periodically reviews the disclosure controls and procedure on reporting inside information.
- It reviews all material information provided by the various internal functions to recommend to the board of directors and management team what might need to be disclosed.
- It reviews and supervises the preparation of the issuer's (i) financial (annual and intermediate) reports, (ii) price sensitive press releases, (iii) correspondence disseminated to shareholders, and (iv) presentations to investors and/or rating agencies.

Composition and powers

- Composition of a disclosure committee will vary from one issuer to another and depends on the business and size of the issuer. It is usually made up of representatives of the finance, legal and communications teams. CEOs are usually members in small and medium enterprises.
- Powers of the disclosure committee are conferred by the board of directors.

Insider Lists

The issuer should monitor access to inside information by maintaining insider lists of persons (employees and third parties, including lawyers, investment banks, accountants and credit rating agencies) who have access to such information. Issuers must ensure that the persons on their insider lists acknowledge in writing their duties relating to the inside information and the potential sanctions resulting from any breach of such duties.

Each insider list must be retained for five years after it is drawn up or updated.

Insider lists

When should insiders be included?	Features of Insiders Lists	Information to be included in the Insiders lists
□ permanent insiders (e.g. CEO, CFO, members of the "Disclosure Committee", if any, and other key managers having regular access to all price sensitive information) are always in the list □ occasional insiders (other employees, advisors, rating agencies) to be included as soon as such persons receive the inside information	□ one occasional insider list for each piece of inside information □ insider lists must be maintained electronically ensuring confidentiality, accuracy and retrievability of previous inside information □ insider lists must be updated when: – there is a change in the reason for someone appearing on the list – additional people gain access to inside information – a person ceases to have inside information	□ insiders' names (personal residential contact details must be kept on the list) □ reason they are insiders and why they have issuers to the inside information □ date and time which they became insiders □ date and time on which the insider list was created and/or modified

Enforcement and Penalties

EU regulatory authorities have the power to impose a financial penalty of any amount they consider appropriate for market abuse and have certain other powers such as the right to issue a public censure. In addition, EU regulatory authorities also have the right to apply to the court for certain other remedies, have wide investigatory powers, and have administrative powers such as requiring an issuer to publish specific information and requiring persons to make corrective statements. EU regulatory authorities may also suspend trading in financial instruments where it is considered necessary.

The International Stock Exchange

The International Stock Exchange ("**TISE**") located in the Channel Islands has become an increasingly popular listing venue for high yield bonds. Although TISE has its own set of less onerous guidelines, it is not subject to MAR. Under TISE continuing obligations rules an issuer must notify TISE (and publish an announcement on the TISE website) within 10 business days of certain specific material events, as well as any information relating to the issuer:

□ that is necessary to avoid the establishment of a false market in its securities; and

□ that might reasonably be expected to materially affect market activity in, or the price of, its securities.

Guidance

High yield bond issuers are not required by regulation or the terms of the indenture to provide guidance, however issuers, particularly those with listed equity, sometimes choose to provide (or have already provided) guidance in order to better manage investor expectations. The following are key practical considerations to keep in mind when providing guidance.

Scope of Disclosure

In considering what guidance to provide, an issuer should consider both investor expectations, as well as what metrics the issuer considers most relevant and upon which it would like investors to use in their analysis on a long term basis. In identifying potential metrics, issuers should consider those used regularly in management reporting, or key performance indicators provided in recent offerings. Issuers should also evaluate whether information may be competitively sensitive prior to disclosing. Guidance should be kept to a minimum of what is required to meet investor expectations and accomplish the issuer's investor relations goals. Where possible, any guidance should be presented in ranges that are broad enough to accommodate any potential changes.

Supportability of Statements

There should to be a reasonable basis for any guidance provided, which should be carefully diligenced. As part of this process, it may be advisable for the issuer's independent accountants to review assumptions and calculations. In determining whether guidance is reasonable, the level of certainty that the guidance will materialize should be considered. All assumptions and risk factors related to the guidance should be clearly disclosed. In addition, a special due diligence exercise should be undertaken with management to review in detail the basis for the guidance.

Disclaimers

Whenever guidance is provided, it is important to include appropriate disclaimers. Such disclaimers should identify the guidance as forward looking statements, and should include cautionary statements identifying factors that could cause actual results to differ from the forward looking statement. In addition, it should be clear that statements are only accurate to the best of the issuer's belief as of the date they are made, and that the issuer undertakes no obligation to update forward looking statements.

Securities Offerings

If the issuer will potentially conduct a securities offering within six months of when the guidance is provided that will require an offering document, special consideration should be given to the scope and form of the guidance. Any guidance provided in close proximity to a securities offering will likely be considered material and therefore will need to be included in any offering document. This will subject the information to an additional level of scrutiny by investment banks and legal counsel, and there may be presentational and other restrictions on the form and scope of what can be disclosed in the context of a securities offering. In order to avoid any issues, the guidance should be reviewed carefully with these issues in mind at the time of release.

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