

The Market newsletter addresses topical matters concerning interpretations, regulation, as well as supervisory findings relating to listed companies' disclosure obligation, financial reporting enforcement, securities trading and insider issues. Articles other than those pertaining to IFRS enforcement will appear mainly in English. The newsletter is published by FIN-FSA's Supervision of Markets and Conduct of Business Department.

In this newsletter, we discuss the following topics:

■ Topical matters at ESMA	1
■ Market Abuse Regulation also applies to the issuer of a listed bond	1
■ Information on regulation relating to MAR and on notification of transactions by entities in which managers exercise influence	3
■ MAR website is now open	4
■ How the new delegated regulation will change the prospectus approval process in practice	5
■ All working capital needs must be considered in issuing the working capital statement in equity prospectuses	6

Topical matters at ESMA

Level 3 regulation relating to the Market Abuse Regulation

ESMA is currently considering comments received on its draft guidelines on market sounding and the delay of public disclosure of inside information. The deadline for comments was 31 March 2016. In addition, ESMA is inviting comments on draft guidelines on the public disclosure of inside information relating to commodity derivatives. Comments should be submitted by 20 May 2016.

Level 2 regulation relating to the PRIIPs Regulation

The ESA Joint Committee has submitted the draft technical standards relating to the Packaged Retail Insurance Investment Products Regulation (so-called PRIIPs Regulation).

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Market Abuse Regulation also applies to the issuer of a listed bond

On the purview of the Market Abuse Regulation (Article 2 of MAR)

The Regulation of the European Parliament and of the Council on market abuse (596/2014, MAR) entered into force on 3 July 2014 and will be applicable as of 3 July 2016. MAR is a directly applicable regulation and therefore several provisions of the Securities Market Act (SMA) are amended or repealed.

Bonds are defined as financial instruments in the Directive on Markets in Financial Instruments (2004/39/EC, MiFID I)¹. MAR applies to financial instruments subject to trading on a regulated market or multilateral trading facility (MTF), or for which a request for admission to trading on such trading venue has been made. MAR also applies to financial instruments whose price or value is determined by reference to the value of one of the abovementioned financial instruments or affects it. Therefore, if a bond is listed, for example, on the Official List of the Helsinki Stock Exchange or the First North list, MAR applies to its issuer.

¹ The definition of a financial instrument in MiFID I covers transferable securities, which include bonds. The Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR) replace MiFID I as of 3 January 2018. The definition of transferable securities in MiFID II is essentially the same.

Municipalities and cities which have issued a bond will also fall within the purview of MAR

Article 6.1 of MAR provides for exemptions from the purview of the Regulation. According to it, the Regulation does not apply to transactions, orders or behaviour, in pursuit of monetary, exchange rate or public debt management policy by a Member State, a member of the ESCB, a ministry, agency or special purpose vehicle of one or several Member States, or by a person acting on its behalf. Article 6.2 of MAR also excludes from the purview the European Union and institutions relating to its activities.

The above exemptions under Article 6 of MAR do not extend to municipalities or cities referred to in the Local Government Act (410/2015). Therefore, the obligations under MAR also apply to municipalities and cities which are issuers of listed bonds.

MAR obligations applicable to the issuer of a listed bond

The issuers of listed bonds and their managers are subject to the following obligations under the MAR as of 3 July 2016.

Public disclosure of inside information and delaying the disclosure (Article 17 of MAR)

An issuer shall inform the public as soon as possible of inside information which directly concerns the issuer. This obligation also applies to the issuer of a listed bond. A similar obligation is also included in the current SMA, section 6:4, whose provisions on the ongoing disclosure obligation will be replaced by provisions of Article 17 of MAR.

Chapter 6, section 2 of the current SMA provides an exemption for municipalities and joint municipal authorities, according to which the provisions of chapter 6 of the SMA do not apply if the issuer is a municipality or a joint municipal authority. The exemption under MAR does not extend to municipalities or joint municipal authorities, and therefore the obligations concerning the public disclosure of inside information and the delay of disclosure will also apply as of 3 July 2016 to such municipalities and joint municipal authorities whose bonds are listed.

Insider lists (Article 18 of MAR)

The obligation to maintain insider lists also applies to the issuer of a listed bond. A similar obligation is also included in chapter 13, section 6 of the current SMA.

In accordance with Article 18 of MAR, issuers or persons acting on their behalf shall draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information (deal-specific register). In addition, the issuer or persons acting on its behalf may maintain a list of permanent insiders.

Managers' transactions (Article 19 of MAR)

Article 19 of MAR provides for the notification and public disclosure of transactions by an issuer's managers and persons closely associated with them. This obligation also applies to the issuer of a listed bond. This is a new obligation for the issuers of bonds.

Issuers' managers and persons closely associated with them must notify the issuer and FIN-FSA of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto no later than three (3) business days after the date of the transaction. In addition, Article 19.3 of MAR requires that the issuer publicly discloses the information notified to it in a stock exchange release.

Reporting of infringements (so-called whistleblowing) (Article 32 of MAR)

Article 32 of MAR provides for a so-called whistleblowing procedure. According to the provision, Member States shall require employers who carry out activities that are regulated by financial services regulation to have in place appropriate procedures for their employees to report infringements of MAR.

The government proposal to Parliament on amending the Securities Markets Act and on certain related Acts (65/2016) proposes that issuers need to have a procedure that can be used by their employees to report through an independent channel within the issuer of any suspected infringements of any provisions and rules concerning the financial markets. According to the proposal, the reporting

procedure shall include appropriate and sufficient measures to arrange appropriate processing of reports and to ensure the protection of the personal data of the person submitting a report and the person concerned, in accordance with the Personal Data Act (523/1999).

The whistleblowing procedure is applicable to issuers of listed bonds.

FIN-FSA has addressed questions relating to MAR in the following Market newsletters:

[Market newsletter 1/2016](#) Procedures relating to the notification of managers' transactions

[Market newsletter 3/2015](#) Procedures relating to application of the Market Abuse Regulation

[Market newsletter 2/2015](#) The definition of persons closely associated with persons discharging managerial responsibilities

[Market newsletter 1/2015](#) Key changes in the Market Abuse Regulation

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Information on regulation relating to MAR and on notification of transactions by entities in which managers exercise influence

Level 2 regulation issued by the Commission

Under the Market Abuse Regulation (596/2014, MAR), several implementing and regulatory technical standards will be provided as Commission regulations. These Commission regulations also constitute directly applicable regulations in the Member States.

By the publication date of this newsletter, the Commission has provided implementing regulations covering, among other things, the formats and models of the notification and disclosure of managers' transactions¹ as well as the format of insider lists and updating insider lists². In addition, the Commission has provided a delegated regulation³ addressing, among other things, the types of notifiable managers' transactions and permission for trading during closed period.

The Commission will provide further regulations relating to MAR concerning, among other things, technical means for delaying the public disclosure of inside information and market soundings.

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On the notification of transactions by entities in which managers exercise influence

[Market newsletters 2/2015](#) and [1/2016](#), published in November 2015 and March 2016, discussed the definition of entities in which managers exercise influence which is based on Article 3.1, section 26 d) of the MAR. There was found to be ambiguity between the different language ver-

1 Commission Implementing Regulation (EU) 2016/523. Link to the Regulation: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0523&qid=1459931761067&from=EN>

2 Commission Implementing Regulation (EU) 2016/347. Link to the Regulation: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0347&qid=1459927202284&from=EN>

3 Commission Delegated Regulation (EU) 2016/522. Link to the Regulation: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0522&qid=1%20460541632621&from=EN>



sions of the MAR. The main issue was whether closely associated persons include all companies in which a manager discharges managerial responsibilities or whether ownership or another type of financial connection is also required.

Due to the ambiguity of the different language versions, the European Securities and Markets Authority (ESMA) has brought the matter to the Commission for the consideration of possible measures. To date, the Commission has not adopted a position concerning the ambiguity of the language versions. Based on previous discussions on the matter, FIN-FSA is under the impression that the intent of the regulation would be that merely serving in a managerial position would give grounds to the notification and public disclosure obligation of the transactions.

The definition of entities in which managers exercise influence has an impact on the extent of the reporting obligation and the technical solutions to be adopted by the reporting entities. For as long as the issue of the language versions, and consequently the uniform interpretation of the provision within the EU, remains unresolved, FIN-FSA will not require Finnish operators to implement systems solutions, for example. However, FIN-FSA recommends that all Finnish operators at least prepare for an enlargement of the notification obligation, at least as a plan.

FIN-FSA will communicate on the matter as soon as it is resolved.

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MAR website is now open

FIN-FSA has published the [MAR website](#) in April 2016. The website provides information on the application of the MAR and practical operating guidance. However, there may be changes in the FIN-FSA interpretations and practical guidance due to the implementing regulations provided by the Commission as well as any interpretations and practical application guidelines that may be provided by ESMA.

The content of the website will be published gradually in spring and summer 2016. Currently, the website contains information on the purview of MAR, regulation, the public disclosure of inside information, and managers' transactions. FIN-FSA will also provide on the website information on insider lists, buy-back programmes, market soundings and the prevention and detection of market abuse by summer 2016.

FIN-FSA has published a test form in English on the website for notifying the managers' transactions. The submission of a notification to FIN-FSA may be tested before the application of the MAR starts by sending the test form by encrypted email to johdonkaupat_testi@finanssivalvonta.fi. Feedback on the usability of the form may be sent to FIN-FSA at markkinat@finanssivalvonta.fi.

For further information, please contact:

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How the new delegated regulation will change the prospectus approval process in practice

The European Commission has issued a new delegated regulation 2016/301¹, consisting of new technical provisions on the approval, publication and marketing of a prospectus, and old provisions concerning same topics which have been transferred from the Prospectus Regulation². The delegated regulation entered into force on 24 March 2016 and it constitutes directly applicable legislation within the EU.

The new delegated regulation does not include such new requirements which would significantly impact on the preparation, approval and publication of a prospectus or dissemination of advertisements. Below is a description of details involving changes compared with the Finnish prospectus practices.

Application for the approval of a prospectus

According to the new regulation, applications for the approval of a prospectus must always be made in an electronic format, which means the submission of the application and related documents to FIN-FSA e.g. by email or on a memory stick. The documents must be in searchable format. In practice, this mainly prevents the scanning of draft prospectuses as pictures, because then the search functions of a computer will not recognise the words of the prospectus; and the encryption of the document into an unsearchable format.

In submitting a prospectus application, the applicant must indicate a contact point, typically an email address, to which FIN-FSA may send its comments and questions regarding the application. In turn, upon receiving a prospectus application, FIN-FSA must provide the applicant with a reference number, i.e. the future journal number of the prospectus, and the person(s) and their contact information to which inquiries regarding the prospectus may be addressed.

Any documents incorporated into the prospectus by reference must be attached to the prospectus application submitted to FIN-FSA. As a change from previous practice, the applicant no longer needs to resend such documents incorporated by reference that it has submitted previously, for example in the context of a previous prospectus application.

Review, commenting and revision of a draft prospectus

The current prospectus review process is already based on a practice where FIN-FSA sends its comments and questions primarily in writing, and the applicant sends its responses and a revised version of the prospectus to FIN-FSA by email in both a mark-up version and a so-called clean version. The new regulation requires this practice, which is already used in Finland, and therefore in this respect the regulation does not bring changes to prospectus review process. The only entirely new detail is the specific requirement to confirm in writing to FIN-FSA before the approval of the prospectus that no changes have been made after the version in respect of which FIN-FSA stated it had no further comments or questions.

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¹ The delegated regulation was issued on 30 November 2015 and different language versions were published in the Official Journal on 4 March 2016.

² Commission Regulation (EC) No 809/2014 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (as amended).



All working capital needs must be considered in issuing the working capital statement in equity prospectuses

Companies must consider all of their working capital needs over the following 12 months in preparing the working capital statement for a prospectus. Unless the working capital of the company is sufficient for its present requirements, the company may not provide a clean working capital statement in a prospectus. Many recent prospectuses have contained a qualified working capital statement. This does not, however, necessarily indicate payment difficulties in the company; but is normal, for example, in a context where a share issue is carried out to finance a large investment or acquisition.

This article is based on ESMA's recommendation on prospectuses¹ and observations made by FIN-FSA in the context of prospectus review.

Working capital statement must be included in equity prospectuses

Equity prospectuses must contain a statement regarding the sufficiency of working capital. This requirement is based on the minimum content requirements for prospectuses².

“Statement by the issuer that, in its opinion, the *working capital* is sufficient for the issuer's *present requirements* or, if not, how it proposes to provide the additional working capital needed.”

Working capital should be considered as an issuer's ability to access cash and other available liquid resources in order to meet its liabilities as they fall due.

Present requirements should be considered to be a minimum of 12 months from the date of the prospectus.

A clean working capital statement is an advance confirmation by the company that it has sufficient cash flow over the next 12 months, taking into account any relevant variables and their alternative outcomes.

The company must ensure that the statement is understandable. The working capital statement should be clear and unambiguous leaving no doubt in the investors mind

1 ESMA update of the CESR recommendations for the consistent implementation of Commission Regulation No 809/2004 implementing the Prospectus Directive (ESMA/2013/319, issued on 20 March 2013).
2 Commission Prospectus Regulation (EC) No 809/2004, Annex III (Share Securities Note), paragraph 3.1 and Annex XXIV (Share Securities Note for Rights Issues).

as to whether, in the issuer's opinion, there is, or is not, sufficient working capital.

Clean working capital statement may not include reservations

In a clean working capital statement, the company states that *the working capital is sufficient for the company's needs during the following 12 months*. FIN-FSA considers that the working capital statement should be issued in the prospectus under a separate heading. In connection with the statement, risk factors or other parts of the prospectus may not contain factors that would restrict the significance of the statement. The matters on which the clean statement is based must be explained elsewhere in the prospectus, primarily in the section Capital Resources³.

A clean statement may not contain the expressions “will have/may have” but must specifically state that the working capital is sufficient. Neither may the statement make reference to assumptions, various future outcomes, risk factors or limitations.

Any statements on the sufficiency of working capital must be based on justified assumptions. Describing the underlying assumptions made by the company in connection with the working capital statement is not, however, acceptable, since it is considered to transfer the responsibility for making the final assessment on the sufficiency of working capital to the investor, which could hinder and complicate understanding the statement.

As part of the prospectus review process, FIN-FSA usually requests the company to submit the justifications for a clean working capital statement.

If the company is aware of any difficulties relating to the sufficiency of working capital after the 12-month period, it must assess whether further information should be provided thereon in the prospectus.

All known uses of funds must be considered in preparing the statement

FIN-FSA considers that in assessing the sufficiency of working capital, the company must consider all uses of funds

3 Commission Prospectus Regulation, Annex I (Share Registration Document), paragraph 10.



budgeted or otherwise known to materialise in the period, including all commitments maturing during the next 12 months, such as debt repayments and investments.

On the other hand, anticipated cash flows and existing funding agreements may be taken into account as capital resources. Arrangements being negotiated may not, however, be taken into account.

Irrevocable subscription undertakings may be taken into account as existing funding

FIN-FSA considers that the subscription and underwriting undertakings in a share issue may be taken into account as existing funding in the context of assessing the sufficiency of working capital, if the undertakings are irrevocable and based on customary terms and conditions. The principal terms and conditions of the undertakings must be described in a sufficient manner in the prospectus. A share issue or part thereof whose materialisation has not been ensured by subscription or underwriting undertakings may not be taken into account in assessing the sufficiency of working capital.

Principles for preparing working capital statements

Companies should ensure that there is very little risk that the basis of the statement may be subsequently called into question. The procedures adopted by issuers in making a statement are expected to be very similar to those adopted by issuers in concluding that the annual accounts should be drawn up on a going concern basis.

When giving a working capital statement, companies are expected to have undertaken appropriate procedures to support the statement that is being made. The companies are expected to have:

- prepared financial forecasts of cash flows, P&L and balance sheet information based on consistent assumptions
- analysed the cash flows of the business
- assessed the terms and conditions as well as costs of external financing
- assessed the strategy and plans of the business and the related implementation risks together with checks against external evidence and opinion
- assessed whether there is sufficient margin or headroom to cover a reasonable worst case scenario.

Qualified working capital statement

Where a company is unable to give a clean working capital statement, it must state clearly that *the working capital does not meet the company's requirements over the following 12 months*.

The company may not state that it is unable to provide an assessment of the sufficiency of working capital.

Following a qualified working capital statement, there are a number of matters the company needs to disclose in order to ensure that investors are fully informed of the company's working capital position. The prospectus should cover the following matters:

1. Timing – how urgent is the problem?

How long is working capital estimated to last?

2. Shortfall

How much additional funding does the company need?

3. Action plan

How does the company plan to rectify the current shortfall?

The actions proposed should be specified, for example:

- refinancing
- renegotiation of or new credit terms/facilities
- decrease in discretionary capital expenditure
- revised strategy or business plan
- revised acquisition program
- asset sales.

4. The probability of resorting to these actions

How likely does the company consider the proposed actions?

5. Schedule of implementation of the actions

What is the schedule in which the actions will be taken?

6. Implications

Where relevant, the implications of any of the proposed actions being unsuccessful should be disclosed. For example whether an issuer is likely to enter into administration or receivership and if so, when.

Working capital statement and other parts of the prospectus should be consistent

The information contained in a prospectus must be consistent. If a company gives a qualified working capital statement in a prospectus, this affects numerous sections of the prospectus. The matters discussed below are examples of observations made by FIN-FSA in the context of prospectus review.

Insufficiency of working capital must always be shown in risks

A qualified working capital statement must be mentioned in the risks concerning the company. Due to the importance of the matter, a separate risk description should be prepared, indicating clearly the risks and potential implications of the insufficiency of the working capital of the company. The financial position of the company and particularly the impact of the insufficiency of working capital on other risks, for example the availability of funding and risks related to the ability to distribute dividend, must be taken into account.

Use of proceeds raised in the share issue must be explained

The prospectus must state the reasons for the offering and the use of proceeds⁴. An estimate of the net proceeds received by the company must be stated and the primary uses of the proceeds shown in order of priority (for example repayments of maturing debt or investments). If the company is aware that the anticipated proceeds will not be sufficient to fund all the proposed uses, the amount and sources of other funding needed must be stated.

A detailed account of the use of proceeds must be given with regard to the use of the proceeds, in particular when they are being used to acquire assets, other than in the ordinary course of business, to finance announced acquisitions of other business, or to discharge, reduce or retire indebtedness.

Strategy and investment plans must be in line with the financial position of the company

The company's strategy and business plan, particularly its investment plans, must be consistent with the company's financial information. In particular, the amount and schedule of investments should reflect the financial position of the company and the availability of financing.

⁴ Commission Prospectus Regulation, Annex III (Share Securities Note), paragraph 3.4.

Financial information must be consistent with the working capital statement

The description of the company's liquidity in the prospectus and particularly the need for debt financing and capital resources must be consistent with the working capital statement.

Existing financing arrangements (including undrawn debt) and all interest and instalments maturing within 12 months of the date of the prospectus are taken into account in assessing the working capital position. In addition, the possibility of early recall of the debt must be considered if it is likely that covenants will be breached. If there is no binding agreement on a financing arrangement or one is only being negotiated, such an arrangement may not be taken into account.

Any matters affecting the company's liquidity and any financing arrangements and their primary terms and conditions considered in preparing the working capital statement must be described in the prospectus in an up-to-date manner as at the date of the prospectus.

Lock-up

Any restrictions imposed by a lock-up commitment by the company must be taken into account, if the prospectus indicates the company is planning a new share issue in the near future.

Further information

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