MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

March 31, 2016

By upload to ESMA website

European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Re: ESMA consultation paper draft guidelines on the Market Abuse Regulation ("MAR") (28 January 2016)[1]

Dear Sir / Madam:

Managed Funds Association ("**MFA**")[2] welcomes the opportunity to provide comments on ESMA's consultation paper, "Draft guidelines on the Market Abuse Regulation" (the "**Consultation Paper**"). MFA supports the policy goals underlying MAR and the Consultation Paper; however, we believe that certain of the proposed requirements set out in the Consultation Paper would create unnecessary compliance burdens on many buy-side firms without furthering those policy goals.

We have set out in the Appendix to this letter our responses to the specific questions raised in the Consultation Paper. We have provided responses only to the *Guidelines for persons receiving market soundings*; we have no comments on the *Guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public.*

Many MFA members, being hedge fund managers, would be MSRs for purposes of the draft Guidelines on market soundings; we hope that ESMA will find MFA's views helpful in developing and finalising the Guidelines.

We would be very happy to discuss our comments or any of the issues raised in the Consultation Paper. If ESMA has any comments or questions, please do not hesitate to contact Benjamin Allensworth or the undersigned at +1 (202) 730-2600.

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[1] https://www.esma.europa.eu/press-news/esma-news/esma-consults-mar-guidelines-regarding-market-soundings-and-delayed-disclosure.

[2] MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent and fair capital markets. MFA, based in Washington, DC, is an advocacy, education and communications organisation established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organisations, qualified individuals and other institutional investors to diversify their investments, manage risk and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and other regions where MFA members are market participants.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell

Executive Vice President & Managing Director, General Counsel

APPENDIX

MFA comments on ESMA consultation paper on draft guidelines on the Market Abuse Regulation (28 January 2016)

Q1 Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

No comment.

Q2 Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

MFA urges ESMA to reconsider its proposal and remove the requirement for MSRs to inform DMPs of discrepancies of opinion.

Under the proposed Guidelines, MSRs would need to study carefully eight scenarios in order to determine whether they must take any action to inform DMPs of a discrepancy of opinion:

1. Where the DMP informs the MSR that inside information has been provided to the MSR during the market sounding:

    a. and the MSR agrees with the DMP's opinion, there is no need to inform the DMP of such agreement.

    b. and the MSR disagrees with the DMP's opinion for any reason, there is no need[3] to inform the DMP of such discrepancy of opinion.

2. Where the DMP informs the MSR that inside information that was provided to the MSR during the market sounding has ceased to be inside information:

    a. and the MSR agrees with the DMP's opinion, there is no need to inform the DMP of such agreement.

    b. and the MSR disagrees with the DMP's opinion solely on the basis of the information provided by the DMP, the MSR should inform[4] the DMP of such discrepancy of opinion.

    c. and the MSR disagrees with the DMP's opinion on the basis of information other than that provided by the DMP, the MSR should refrain from informing the DMP of such discrepancy of opinion.

3. Where the DMP informs the MSR that inside information has not been provided to the MSR during the market sounding:

[3] ESMA is of the view that there is no need to inform the DMP of such discrepancy of opinion as "there should be limited risk of spreading inside information to other MSRs without flagging it as such." (Paragraph 31 of the Consultation Paper).

[4] ESMA is of the view that "the proposed approach should ensure that, where a DMP has wrongly considered the information passed in the course of the market sounding as non-inside information, then the fact that the MSR should inform them of such a circumstance may force the DMP to reassess the nature of the information and prevent it from inadvertently spreading inside information to other MSRs without flagging it as such." (Paragraph 30 of the Consultation Paper).

a. and the MSR agrees with the DMP's opinion, there is no need to inform the DMP of such agreement.

b. and the MSR disagrees with the DMP's opinion solely on the basis of the information provided by the DMP, the MSR should inform[5] the DMP of such discrepancy of opinion.

c. and the MSR disagrees with the DMP's opinion on the basis of information other than that provided by the DMP, the MSR should refrain from informing the DMP of such discrepancy of opinion.

MFA's concern is that the approach proposed in the Consultation Paper is – as the above eight scenarios demonstrate – extremely convoluted for MSRs to implement in practice, given the possible outcomes involved. As there is no obligation for DMPs and MSRs to reach an agreement on their independent assessments, we believe that requiring MSRs to notify DMPs of discrepancies of opinion would serve little purpose and, as ESMA notes in the Consultation Paper, an MSR's assessment would in any event remain open to scrutiny by the MSR's national regulator.

DMPs and MSRs already have independent obligations under Articles 3 and 7 of MAR to assess whether the information at hand is inside information. Indeed, MSRs currently carry out assessments as to whether they have received inside information, regardless of the circumstances in which that information might be received. The Consultation Paper suggests that, by notifying the DMP of discrepancies of opinion, the MSR "may force the DMP to reassess the nature of the information and prevent it from inadvertently spreading inside information to other MSRs without flagging it as such." However, in our view, MAR does not impose such an obligation on MSRs; the DMP is under an obligation to make its own independent assessment of information.

MFA respectfully submits that it would be inappropriate – and administratively burdensome and impractical – to require MSRs to inform DMPs of discrepancies of opinion in the manner contemplated in the draft Guidelines.

Q3 Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

No comment.

Q4 Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

MFA urges ESMA to remove the requirement for MSRs to draw up a list of staff possessing information passed during a market sounding. MFA is concerned that such a requirement would be unduly burdensome for MSRs to implement in practice and, for the reasons discussed below, would not provide a corresponding policy benefit from the perspective of an MSR's obligation not to trade on inside information.

[5] See footnote 4.

MFA notes that listed issuers are required to compile insider lists because, in the ordinary course of their business, they will frequently be in possession of inside information and so need to have in place policies and procedures to control the handling and flow of inside information. On the other hand, although many MSRs on the buyside may receive inside information from time to time, possessing and distributing inside information does not form part of their day-to-day activities and so, in our view, it would be inappropriate to impose an obligation on MSRs to compile insider lists in a similar manner to the requirement applicable to listed issuers.

Furthermore, while DMPs such as large banks acting for issuers, will have internal compliance procedures to control the distribution of inside information within the firm, many MSRs that are smaller and less complex in nature (including most hedge fund managers) typically do not implement those types of procedures and instead simply place the relevant issuer that is the subject of inside information on a restricted list. In effect, under this compliance approach, all staff in the MSR would be deemed to be in possession of inside information. Hedge fund managers and other regulated MSRs are already required to have detailed compliance policies and procedures as to the handling of inside information; such firms have policies that are tailored for their individual business models to manage the receipt of inside information and to prevent insider dealing and the improper disclosure of inside information. MFA encourages ESMA to allow such MSRs to continue to utilise such policies, which have not been found to be defective. In MFA's view, requiring MSRs in these circumstances to identify specific individuals for purposes of inclusion on an insider list and requiring the MSR to continually monitor such a list, would be unduly burdensome to implement in practice, without a corresponding policy benefit.

Q5 Do you agree with the revised approach regarding the recording of the telephone calls?

MFA welcomes ESMA's decision not to require MSRs to record follow-up conversations with DMPs following a market sounding that did not result in wall-crossing. Under MAR, it is DMPs and not MSRs who are required to make and maintain a record of information given during market soundings. In our view, a requirement for MSRs to record follow-up telephone calls would have been disproportionately onerous given the absence of an obligation under MAR.

Q6 Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

MFA is concerned that the proposed approach would be unduly burdensome for MSRs. Under MAR, it is the DMP and not the MSR who is required to keep a record of information passed during a market sounding. In our view, the Guidelines should not extend this obligation to MSRs by requiring them to engage with DMPs where their internal records conflict with minutes drawn up by the DMP; it should be sufficient for MSRs to maintain their own internal record.

Further, as there is no requirement under MAR or the proposed Guidelines for the DMP and MSR to reach an agreement where their minutes conflict, having two sets of conflicting minutes would serve little purpose to DMPs and MSRs. As mentioned in our comments on Question 2, above, DMPs and MSRs are already subject to independent obligations under MAR to carry out their own assessments as to whether inside information has been passed / received in the course of

market soundings,[6] and an MSR's assessment would remain open to scrutiny by the relevant national regulator regardless of any sharing of information and/or agreement between the MSR and the DMP. MFA respectfully submits that this requirement should be removed from the Guidelines.

Q7 Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

The requirements proposed in the Consultation Paper would impose significant new administrative burdens for MSRs and, therefore, would require the allocation of additional compliance staff and resources. In addition to requiring additional compliance staff and resources, we are concerned that the Consultation Paper would require compliance staff at MSRs to focus on creating insider lists, drafting minutes of conversations with DMPs and compiling lists of financial instruments related to the inside information, whereas, in our view, these resources would be better allocated to monitoring trading activity and handling the receipt of inside information. In particular, the proposed requirement addressed in Question 6, above, for MSRs to share their own version of minutes where they disagree with the DMPs' minutes, would require MSRs to spend considerable time and internal staff resources as well as incur significant additional costs to engage external legal counsel in order to obtain comfort that their position is correct and thereby seek to avoid liability. Therefore, in our view, the requirements proposed are unnecessarily prescriptive and would necessitate unduly onerous time and budget allocations for MSRs.

Additional Comments on Other Sections of the Consultation Paper

2.7 MSRs' obligation to report to competent authorities

MFA welcomes ESMA's decision to remove the requirement for MSRs to report suspected improper disclosures of inside information to competent authorities. MFA agrees that the approach proposed in the DP[7] might have made DMPs overly cautious in classifying market soundings as concerning inside information, which might have forced MSRs to frequently challenge the DMP's assessment.

2.10 Assessment of related financial instruments

Draft Guideline 7 provides:

> "Where the MSR has assessed they are in possession of inside information as a result of a market sounding, the MSR should identify all the issuers and financial instruments to which that inside information relates."

MFA urges ESMA to reconsider and delete the above draft Guideline. MSRs are already subject to the requirements under Articles 8 and 10 of MAR not to deal on the basis of, or to disclose, inside information. Currently, hedge fund managers who receive inside information will add the relevant issuer to their internal restricted list and, if any of their staff attempts to trade financial instruments issued by, or referencing, that issuer, the transaction would be blocked. This

[6] Articles 11(3) and 11(7) of MAR.

[7] ESMA Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation (14 November 2013).

achieves the desired result of preventing insider dealing without the need for hedge fund managers to compile a list of all possible financial instruments.

Furthermore, it would not be possible for MSRs to ensure that any such list of instruments they create is exhaustive. For example, it would be possible for third parties to create an OTC financial instrument related to an issuer about which an MSR possesses inside information, without the MSR's knowledge. MFA believes that a requirement to maintain such a list would be a significant burden for hedge fund managers and unlikely to be capable of being comprehensive, and so would not assist in relation to the MSR's compliance with Articles 8 and 10 of MAR.