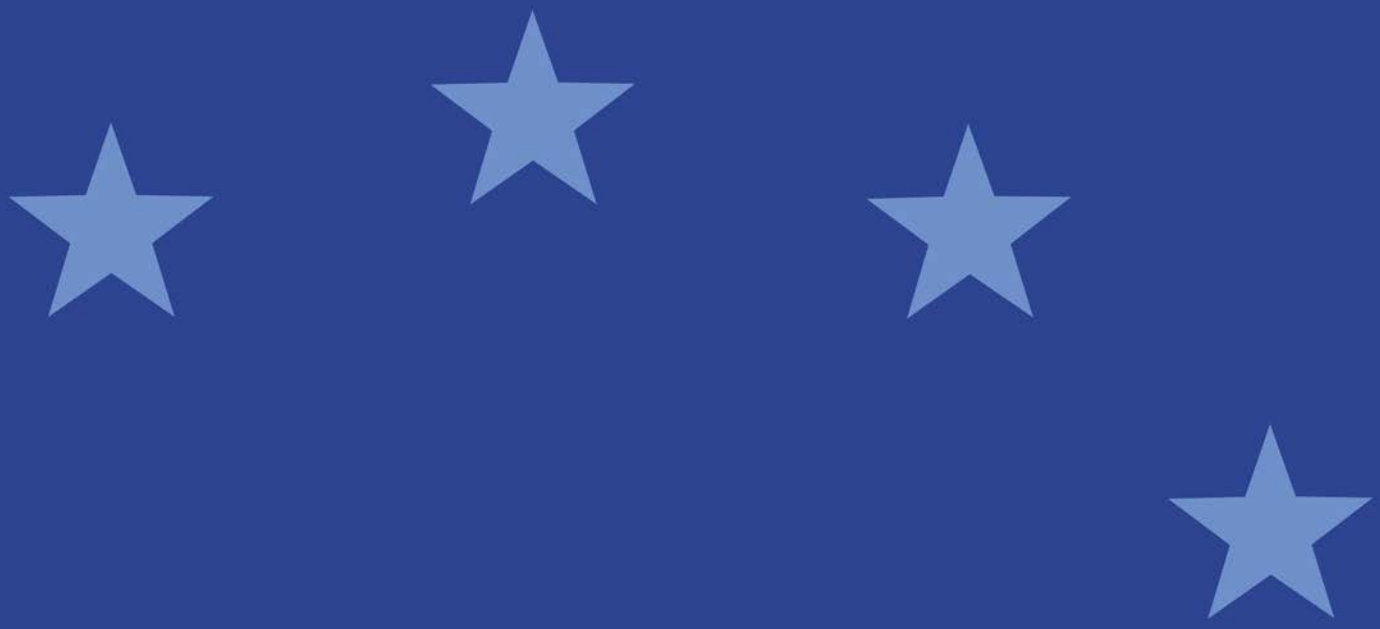
esma European Securities and Markets Authority

Reply form for the Consultation Paper on MAR review report



3 October 2019

European Securities and Markets Authority

Date: 3 October 2019

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the MAR review report published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_MAR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- if they respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

Naming protocol

In order to facilitate the handling of stakeholders' responses please save your document using the following format:

ESMA_CP_MAR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA_CP_MAR_ESMA_REPLYFORM or

ESMA_CP_MAR_ANNEX1

Deadline

Responses must reach us by **29 November 2019.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	Cleary Gottlieb Steen & Hamilton LLP
Activity	Audit/Legal/Individual
Are you representing an association?	☐
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>
TYPE YOUR TEXT HERE
<ESMA_COMMENT_CP_MAR_1>

Q1. **Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.**

<ESMA_QUESTION_CP_MAR_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_1>

Q2. **Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.**

<ESMA_QUESTION_CP_MAR_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_2>

Q3. **Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?**

<ESMA_QUESTION_CP_MAR_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_3>

Q4. **Do you agree that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors?**

<ESMA_QUESTION_CP_MAR_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_4>

Q5. **Do you agree that the Article 23 of MAR "Powers of competent authorities" point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?**

<ESMA_QUESTION_CP_MAR_5>
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<ESMA_QUESTION_CP_MAR_5>

Q6. **Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?**

<ESMA_QUESTION_CP_MAR_6>
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<ESMA_QUESTION_CP_MAR_6>

Q7. Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

<ESMA_QUESTION_CP_MAR_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_7>

Q8. If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

<ESMA_QUESTION_CP_MAR_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_8>

Q9. Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

<ESMA_QUESTION_CP_MAR_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_9>

Q10. Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_10>

Q11. Do you agree with ESMA's preliminary view?

<ESMA_QUESTION_CP_MAR_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_11>

Q12. Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.

<ESMA_QUESTION_CP_MAR_12>
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<ESMA_QUESTION_CP_MAR_12>

Q13. Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?

<ESMA_QUESTION_CP_MAR_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_13>

Q14. Do market participants consider that the definition of inside information is sufficient for combatting market abuse?

<ESMA_QUESTION_CP_MAR_14>
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<ESMA_QUESTION_CP_MAR_14>

Q15. In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

<ESMA_QUESTION_CP_MAR_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_15>

Q16. Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

<ESMA_QUESTION_CP_MAR_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_16>

Q17. What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?

<ESMA_QUESTION_CP_MAR_17>
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<ESMA_QUESTION_CP_MAR_17>

Q18. As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.

<ESMA_QUESTION_CP_MAR_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_18>

Q19. **Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?**

<ESMA_QUESTION_CP_MAR_19>
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Q20. **What changes could be made to include other cases of front running?**

<ESMA_QUESTION_CP_MAR_20>
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<ESMA_QUESTION_CP_MAR_20>

Q21. **Do you consider that specific conditions should be added in MAR to cover front-running on financial instruments which have an illiquid market?**

<ESMA_QUESTION_CP_MAR_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_21>

Q22. **What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?**

<ESMA_QUESTION_CP_MAR_22>
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Q23. **What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?**

<ESMA_QUESTION_CP_MAR_23>
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<ESMA_QUESTION_CP_MAR_23>

Q24. **What financial instruments are subject to pre-hedging behaviours and why?**

<ESMA_QUESTION_CP_MAR_24>
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Q25. **Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.**

<ESMA_QUESTION_CP_MAR_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_25>

Q26. **Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.**

<ESMA_QUESTION_CP_MAR_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_26>

Q27. **Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?**

<ESMA_QUESTION_CP_MAR_27>
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Q28. **Please provide examples of cases in which the identification of when an information became "inside information" was problematic.**

<ESMA_QUESTION_CP_MAR_28>
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<ESMA_QUESTION_CP_MAR_28>

Q29. **Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.**

<ESMA_QUESTION_CP_MAR_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_29>

Q30. **Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.**

<ESMA_QUESTION_CP_MAR_30>
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<ESMA_QUESTION_CP_MAR_30>

Q31. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.

<ESMA_QUESTION_CP_MAR_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_31>

Q32. Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

<ESMA_QUESTION_CP_MAR_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_32>

Q33. Do you agree with the proposed amendments to Article 11 of MAR?

<ESMA_QUESTION_CP_MAR_33>
We do not agree with the proposed amendments to Article 11 MAR. We believe that it is abundantly clear from the language and the internal logic of MAR that the market soundings regime is, and was intended to be, an optional safe harbor against the prohibition of unlawful disclosure of inside information under Article 10(1) MAR and not as a standalone set of mandatory rules:

1. With respect to disclosure of inside information, the centerpiece of MAR is, of course, Article 10(1), which prohibits such disclosure except where made "*in the normal exercise of an employment, a profession or duties*".

2. The key principle of Article 11 MAR is Article 11(4), which provides that *"For the purposes of Article 10(1), disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise (…) where the disclosing market participant complies with paragraphs 3 and 5 of this Article*" (emphasis added). It is thus clear from the language of MAR that (a) the market soundings regime is a particular application of the general regime of Article 10(1) MAR, and not a standalone set of rules, and (b) establishes a presumption of compliance with Article 10(1) MAR if the formal requirements of the market soundings regime are complied with.

3. Recital 35 MAR makes it perfectly clear that parties may benefit from that presumption ("*(…) take advantage of the exemption (…)*") if they elect to follow the formal requirements of the market soundings regime, but will not, conversely, be deemed to act in breach of Article 10(1) MAR if they do not: "*There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information (…)"*

4. The misconception that the market soundings regime is a prescriptive set of rules rather than an optional safe harbor seems to derive from the fact that certain other provisions of Article 11 MAR are expressed in prescriptive terms. This, in our view, does not affect the foregoing conclusion: Article 11(5) MAR, which contains the main procedural requirements that apply to disclosing market participants (DMPs), is expressly introduced by the words "*for purposes of* [Article 11(4)]", *i.e.*, of the presumption.

The requirements of Article 11(5) MAR are thus intended solely for the purposes of the presumption and not as a standalone requirement. Other provisions of Article 11 MAR (such as paragraphs (6), (7) and (8)) do not contain these introductory words, but are all, by their nature, ancillary to paragraph (5), and it stands to reason that if the principal provision (paragraph (5)) is part of a presumption rather than an absolute set of obligations, then so are the provisions ancillary thereto.

5. Finally, the intention of the authors of MAR's level 1 text not to make the market soundings regime mandatory is further evidenced by the fact that a "breach" of Article 11 MAR would not be subject to any sanctions: Member States are not required to provide for sanctions (under Article 30 MAR or under CSMAD) for non-compliance with the procedural requirements of Article 11 MAR.

We recognize that there has been significant uncertainty, and occasional confusion, around the market soundings regime, because of some of the ambiguity created by the language of certain paragraphs of Article 11 MAR and of the technical standards of Commission Delegated Regulation (EU) 2016/960. But we believe that this ambiguity should be resolved in a way that is consistent with the clear intent of the authors of MAR, *i.e.*, by confirming its optional nature, rather than by riding roughshod over that intention and turning the principle on its head.

Further, setting aside the language and intent of MAR, making the market soundings regime mandatory strikes us as undesirable as a matter of policy: first this would make the regime sit awkwardly next to the general principle of Article 10(1) MAR, in that a DMP that conducts a market sounding as part of her profession would be able to rely on the exemption set forth in Article 10(1) MAR but could nonetheless be in breach of Article 11 MAR if she does not comply with the technical requirements. Second, the detailed technical requirements are not suitable for all instances, and the inability to comply with (some of) these requirements should not automatically lead to a technical violation of MAR.
<ESMA_QUESTION_CP_MAR_33>

Q34. Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

<ESMA_QUESTION_CP_MAR_34>
Leaving aside the question of the mandatory or optional nature of the market soundings regime, we recommend clarifying that the regime would in any event only apply in case "inside information" is shared. The reference in Article 11(1) MAR to "information" (and not just "inside information") has led to the development of requirements applicable even where no inside information is disclosed (see Article 3(4) of Commission Delegated Regulation (EU) 2016/960) which seems wholly unnecessary. Given that only the disclosure of "inside information" could be considered unlawful disclosure pursuant to Article 10 MAR, it seems logical that the market soundings regime should only apply to the sharing of such information. We note, however, that if it is specifically acknowledged that the market soundings regime is a purely optional safe harbor, this limitation would be less essential.

In addition, we believe that public M&A transactions should be entirely excluded from the scope of application of the market soundings regime, and that Article 11(2) MAR should be deleted. The nature of public M&A transactions is such that these involve ongoing discussions and negotiations (physical meetings, calls, *etc*.) over an extended period of time between a prospective bidder and one or more (controlling / important) shareholders of the listed target. Requiring a systematic application of the requirements of the market soundings regime would be highly impractical and imply serious difficulties in practice. The extension of the market soundings regime to the M&A context is unnecessary as a matter of policy, in that transaction participants operate under the general principles of Articles 10(1) and 17(8) MAR, and have developed transaction execution standards that adequately reflect those.
<ESMA_QUESTION_CP_MAR_34>

Q35. **What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?**

<ESMA_QUESTION_CP_MAR_35>
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Q36. **Do you think that the reference to "prior to the announcement of a transaction" in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?**

<ESMA_QUESTION_CP_MAR_36>
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<ESMA_QUESTION_CP_MAR_36>

Q37. **Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?**

<ESMA_QUESTION_CP_MAR_37>
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<ESMA_QUESTION_CP_MAR_37>

Q38. **Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?**

<ESMA_QUESTION_CP_MAR_38>
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<ESMA_QUESTION_CP_MAR_38>

Q39. **Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.**

<ESMA_QUESTION_CP_MAR_39>
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<ESMA_QUESTION_CP_MAR_39>

Q40. **Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.**

<ESMA_QUESTION_CP_MAR_40>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_MAR_40>

Q41. What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

<ESMA_QUESTION_CP_MAR_41>
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<ESMA_QUESTION_CP_MAR_41>

Q42. What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

<ESMA_QUESTION_CP_MAR_42>
1. We believe, put simply, that the scope of the insider list obligations should be limited to parties acting for or on behalf of the issuer, and not to other third parties. We note that the examples provided by ESMA *(e.g.*, auditors and notaries) are under the current rules usually already considered to be acting on behalf or on the account of the issuer. We therefore do not believe that there is a need to extend the scope of Article 18(1) MAR to "*persons performing tasks*". A broadening of the language of Article 18(1) MAR could lead to undesirable consequences such as requiring governmental agencies (NCAs, antitrust agencies, *etc*.) to establish insider lists. It would also be a disproportionate and unduly intrusive outcome, if such a change were to result in an obligation by any party to discussions relating to a transaction involving inside information, to disclose at all times to the issuer (*i.e.*, its counterparty) the names of all persons within its organization and its group of advisors involved in the proposed transaction.

2. We further recommend clarifying in Article 18 MAR that persons acting on behalf or on the account of the issuer (such as advisors) are only required to establish an insider list if and when the issuer determined that a specific set of circumstances qualifies as inside information, the disclosure of which it decides to defer in accordance with Article 17(4) MAR.

Indeed, the issuer is the "owner" of the inside information and only it can decide if and when such information arises. Persons acting on behalf or on the account of the issuer should not be required, or allowed, to second-guess the issuer's own assessment in this respect. Taking a different approach may lead to the awkward situation where an advisor, based on an imperfect assessment of the price-sensitive or precise nature of the information, decides to create an insider list at a point in time when the issuer has not yet determined that it possesses inside information, thus possibly casting unwarranted doubt, in an *ex post* review by an NCA with the benefit of hindsight, as to whether the issuer complied in due time with its obligations under Article 17 MAR.

3. Finally, it would not be practical, or indeed realistic, to expect issuers to maintain the detailed insider lists employed by third party advisors acting on its behalf or on its account, as these lists can be very extensive and change frequently. Practice has developed such that issuers often include in their own list only the name of the third party legal entities acting on their behalf or on their account (name entity and contact person), without listing each and every person within such legal entity who has access to the inside information. The insider list of the third party advisor operates as a "satellite" list maintained and kept up to date by the advisor and not by the issuer. This ensures that all insiders are identified by the person who is best placed to make such identification. We believe that practice is consistent with the spirit and the letter of MAR and should be acknowledged.
<ESMA_QUESTION_CP_MAR_42>

Q43. Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

<ESMA_QUESTION_CP_MAR_43>
We suggest not maintaining the permanent insider concept in light of (i) its ambiguous nature (by expanding the scope of Article 18(1) MAR to persons who are "deemed" to have access to inside information, it creates and inherent conflict with the concept of insider) and (ii) its limited use in practice.
<ESMA_QUESTION_CP_MAR_43>

Q44. Do you agree with ESMA's preliminary view?

<ESMA_QUESTION_CP_MAR_44>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_44>

Q45. Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

<ESMA_QUESTION_CP_MAR_45>
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<ESMA_QUESTION_CP_MAR_45>

Q46. Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

<ESMA_QUESTION_CP_MAR_46>
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Q47. Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

<ESMA_QUESTION_CP_MAR_47>
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Q48. Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.

<ESMA_QUESTION_CP_MAR_48>
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<ESMA_QUESTION_CP_MAR_48>

Q49. On the application of this provision for EAMPs: have issues or difficulties been experienced?

<ESMA_QUESTION_CP_MAR_49>
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<ESMA_QUESTION_CP_MAR_49>

Q50. Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.

<ESMA_QUESTION_CP_MAR_50>
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<ESMA_QUESTION_CP_MAR_50>

Q51. Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.

<ESMA_QUESTION_CP_MAR_51>
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<ESMA_QUESTION_CP_MAR_51>

Q52. Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

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<ESMA_QUESTION_CP_MAR_52>

Q53. Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?

<ESMA_QUESTION_CP_MAR_53>
We believe that Article 19(11) MAR should clarify that trades made under discretionary trading mandates during a closed period are not captured by the prohibition (contra ESMA/2014/808, §114).

1. Trading in company securities by an independent third party on behalf of a company insider (such as on the basis of a discretionary trading mandate entered into outside the closed period) falls outside the scope of the general insider dealing prohibition, on a combination of two (conceptually related) legal grounds:

- first, the express exemption under Article 9(3) MAR for transactions conducted in the discharge of an obligation that "*results from (…) an agreement concluded before the person concerned possessed inside information*", and

- second, the possibility to rebut the presumption (established by the Spector decision of the ECJ (C-45/08)) that where an insider trades in the affected securities he or she is deemed to have made use of the inside information: where (a) a trade is effected on the basis of a trading mandate granted before the principal became aware of the information and (b) the broker executing the trade is neither aware of inside information that the principal may subsequently possess nor otherwise influenced by the principal, then the trade is not unlawful insider dealing.

Since the Article 19(11) MAR closed period prohibition is a precautionary measure to avoid insider dealing, there is no reason why actions which would under the general insider dealing prohibition be legitimate, would be prohibited under Article 19(11) MAR. Accordingly, trades under discretionary mandates should not be captured by the Article 19(11) MAR closed period prohibition, provided that (a) the mandate is granted in *tempore non suspecto* (*cf*. Article 9(3) MAR), and (b) there is no interference by the principal with the broker's execution of the mandate (*cf*. Spector (C-45/08)). One could perhaps design a safe harbor (similar to that applicable to share buybacks) subject to certain conditions, such as a cooling-off period of, say, 30 days between the date of granting of the mandate and the date when independent trades may start pursuant to the mandate, in order to further secure the presumption of absence of market abuse.

2. Prohibiting trades under discretionary trading mandates further is inconsistent with the share buyback safe harbor. While, in principle, the safe harbor is not available during closed periods, Article 4(2) of Delegation Regulation 2016/1052 provides for an exemption for (i) time-scheduled buyback programs and (ii) buyback programs managed by a financial institution which takes the buyback decisions independently from the issuer.

Accordingly, an issuer may continue to conduct share buybacks during a closed period when the trades are made by a broker, acting independently from the issuer, and without interference from the issuer. This is line with the general principles set out under point 1 above. The same logic should apply to trades made on behalf of a PDMR under a discretionary trading mandate.
<ESMA_QUESTION_CP_MAR_53>

Q54. Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.

<ESMA_QUESTION_CP_MAR_54>
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Q55. Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

<ESMA_QUESTION_CP_MAR_55>
We do not agree with the extension of the requirement of Article 19(11) MAR to issuers.

1. The general insider dealing and market manipulation prohibitions sufficiently ensure market integrity. Article 19(11) MAR should leave some flexibility for issuers, acting under their own responsibility, to

issue or sell securities even during closed periods. This could be useful in specific cases, including rescue rights issues and other types of situations involving urgent funding needs, where the issuer is in a closed period but there is in fact no inside information.

2. We recommend to maintain in any event the safe harbor for (i) time-scheduled buyback programs and (ii) for buyback programs managed by a financial institution which takes the buyback decisions independently from the issuer (Article 4(2) of Delegation Regulation 2016/1052).

We also do not agree with the extension of the requirement of Article 19(11) MAR to CAPs.

1. The rationale of Article 19(11) is to avoid insider dealing and therefore prohibit certain transactions by insiders during a period where sensitive information may be present within the company. This rationale does not apply in the same way to CAPs. Indeed, unlike PDMRs, CAPs do not have access to such sensitive information during the preparation of the announcement of financial results.

2. If the PDMR would have disclosed certain inside information to his or her CAPs, this will, irrespective of the PDMR's fiduciary duties, already constitute an offence of unlawful disclosure of inside information and any trades by the CAP would then be insider dealing. MAR thus already adequately covers this scenario.
<ESMA_QUESTION_CP_MAR_55>

Q56. Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.

<ESMA_QUESTION_CP_MAR_56>
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<ESMA_QUESTION_CP_MAR_56>

Q57. Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.

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Q58. Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.

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Q59. Do you agree with ESMA's preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs.

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Q60. Do you agree with ESMA's preliminary view? If not, please elaborate.

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Q61. What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of "relevant persons" would be adequate for CIUs other than UCITs and AIFs.

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Q62. ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.

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Q63. Do you agree with ESMA's conclusion? If not, please elaborate.

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Q64. Do you agree with ESMA preliminary view? Please elaborate.

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Q65. Do you agree with ESMA's preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?

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Q66. Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

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Q67. Please provide your views on the impact and cost linked to the establishment of a regular reporting mechanism of order book data.

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Q68. In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

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Q69. What are your views regarding those proposed amendments to MAR?

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Q70. Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.

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Q71. Please share your views on the elements described above.

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