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Market Abuse Mandates – Second Call for Evidence

A response by the London Investment Banking Association

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The London Investment Banking Association represents the major European and international investment banks and securities houses which base their European operations in London. A list of our members is attached and is available on our website: www.liba.org.uk. We welcome the opportunity to respond to the Market Abuse Mandates – Second Call for Evidence.

1. LIBA's approach to the consultation

We understand the pressures resulting in the short time period available to consider the call for evidence. We do urge CESR to devote the maximum possible available time for consultation on its proposals given the possible effect of certain of the measures suggested. We believe that it is essential that market practitioners are fully involved in the formulation of these implementing measures and we will be very happy to assist in any way possible to achieve this.

2. Specific comment on the issues raised in the second mandate

2.1 Implementing measures relating to the definition of "accepted market practices"

We support the principle that there should be a defence to any charge of market abuse where a firm has acted in accordance with accepted market practices. As a practical point we believe that this defence should apply equally to transactions undertaken on or off market and that this should be clarified in CESR's advice.

We do not believe that CESR's approach to these implementing measures should take the form of a list of acceptable market practices. We suggest that CESR should develop guidelines for competent authorities in terms of a methodology of determining acceptable market practice and that any such determination should be undertaken with suitable input from market practitioners.

2.2 Implementing measures relating to the definition of "inside information for derivatives"

We consider that additional time should be allowed for consideration of this point as commodity derivatives will only come within the scope of the market abuse directive when the Investment Services Directive is implemented. However it should be made clear that the concept of price sensitivity applies generally as well as in relation to derivatives on commodities and sufficient time should be made available to give this issue due consideration bearing in mind the differences between such markets and, for example traditional equity markets.

As derivatives on commodities have no underlying issuer as a source of inside information the definition should be limited to price sensitive information which is announced to the market users by a regulated market either through that market's rules, requirements or custom. Similar price sensitive information may be released by government bodies and this should be included in the definition. However, information which becomes public through sources unrelated to the regulated market on which the commodity derivative is traded or which is unlikely to have a significant effect on the price of the commodity derivative traded on that regulated market should not be covered.

2.3 Implementing measures concerning the conditions under which issuers, or entities acting on their behalf, are to draw up and update lists of persons working for them and having access to inside information

We think it is very important that any such implementing measures should be workable in practice. This is not only because any measure should take account of the burden imposed but also because if the requirement is too extensive the information made available will not be as valuable. We strongly suggest that this list should be limited to those individuals who would be expected routinely to have inside information as a result of their position within the issuer (in the UK this is likely to be the Board of directors and possibly a limited number of other senior individuals). We suggest that the reference to "persons working for them under a contract of employment or otherwise" should be limited to persons who, while not under a contract of employment, discharge the function of an employee or executive and should not encompass advisers. If necessary the main point of contact at the issuer's main advisers could be added to this standing list.

We are concerned that the reference to "issuers, or entities acting on their behalf" could be interpreted so widely as to make this requirement unworkable in practice and the cost/benefit balance should be taken account of here. Detailed lists of insiders may be drawn up by the issuer, for example in the course of an investigation by the competent authority. While issuers and their advisers should certainly have systems which allow such lists to be drawn up when requested in specific circumstances, the cost of drawing them up on a regular ongoing basis would be a very heavy administrative burden which would provide no additional benefit. In addition, if the definition is assumed to include all advisers, the range of information potentially available would lead to numerous, extensive lists with little practical purpose. For example all members of an investment bank's corporate finance department might be assumed to be capable of receiving inside information on all of the bank's clients, even if their involvement in a particular matter is very small. With an extension to banks with a global presence it is easy to see how this provision could be entirely unworkable.

As long as any list is very limited in scope then regular updating (we would suggest six monthly or when individuals join or leave the issuer) should not be a problem. However as the major use of such lists is in the course of regulatory investigations we suggest that lists should only be required to be updated at the request of the competent authority in response to a specific incident.

We understand that certain other European jurisdictions which require lists of insiders to be drawn up (for example Denmark and Sweden), limit the requirement to those persons within the issuer who are subject to disclosure requirements on their dealings by virtue of them being assumed to have access to inside information. We support this approach.

2.4 Implementing measures concerning the categories of persons subject to a duty of disclosure of transactions on their own account and characteristics of a transaction which triggers that duty

We suggest that measures along the lines of the existing UK model be adopted whereby directors of the issuer, and their associates, are required to disclose their dealings publicly. In the case of issuers with separate executive and supervisory boards we suggest that both boards are subject to these disclosure requirements.

The definition of associates should include the director's immediate family (members of the director's household and those for whom he is the primary economic support). It should also include companies or partnerships over which the director has control.

We consider that some level of de minimis threshold would be an advantage.

There should be an obligation on the persons subject to these requirements to notify the issuer without delay and a further obligation on the issuer to make that information public, also without delay. In this context we would suggest that without delay is taken to mean by within two business days following the dealing or following receipt of the information by the issuer respectively.

2.5 Implementing measures concerning technical arrangements governing notification of suspicious transactions to the competent authority

We support the notification of suspicious transactions to the competent authority but it is essential that such a notification requirement be accompanied by immunity from regulatory action resulting from such notification and from any action by a third party who may allege that the reporting person owed them a duty of confidentiality which would prevent the notification.

3. General comment

We note that a number of provisions may be introduced directly by regulation rather than through individual country legislation. While we understand the potential benefits to the timetable for implementation in this manner we believe that it may be more appropriate for individual competent authorities to implement the Directive. The benefits of clarity and uniformity imposed by regulation can be outweighed by a lack of flexibility if overly detailed rules are imposed. As you are aware, we have concerns over whether the short timetable which has been imposed is consistent with an ability to conduct effective consultation. If measures are to be imposed by regulation then full effective consultation is absolutely essential.