The voice of banking
& financial services

European Securities Markets Authority:

103 rue de Grenelle

75345

Paris

France

27 January 2013

Dear Sirs/Madams,

BBA response to the Discussion Paper: 'ESMA's policy orientation on possible implementing measures under the Market Abuse Regulation' Ref. ESMA/2013/1649

The BBA is pleased to respond to this discussion paper and welcomes the opportunity to consider ESMA's future policy orientations on possible implementing measures under the Market Abuse Regulation. We very much hope our comments will assist in ensuring that the final regime developed is proportionate and works effectively. On this basis, we have tried to ensure our comments are as detailed as possible and where possible, we have sought to propose solutions. Furthermore, we have highlighted a number of areas where we would welcome further clarification.

The British Bankers' Association (BBA) represents more than 240 organisations, including more than 170 banks and 70 Associate member firms. Our member banks make up the world's largest international banking cluster and contribute over £50 billion annually to European economic growth. Our members, whilst predominately banks, engage in activities which range widely across the financial spectrum, encompassing services and products as diverse as primary and secondary securities trading, insurance, investment advice and wealth management, custody, as well as conventional and non-conventional forms of banking.

We very much hope to continue our dialogue with ESMA and its members and welcome the opportunity to discuss in more detail the responses provided. As such, please do not hesitate to get in touch with my colleague Victoria Powell (victoria.powell@bba.org.uk) for further information.

Yours sincerely

Sally Scutt

Deputy Chief Executive Officer

Buyback programmes and stabilisation (Article 3 of MAR)

Q1. Do you agree that the mechanism used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?

We agree that the information dissemination and storage mechanism set up in each Member State pursuant to the Transparency Directive requirements are an adequate mechanism for public disclosure. We agree that for shares, only traded outside an RM, a comparable mechanism should be used.

Q2. Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?

We agree that it is important that the information provided to the public should be clear, readable and understandable. We agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures; we also believe that it would be potentially confusing to require a different set of data regarding individual transactions to be disclosed on the issuer's website.

In general in the UK, listed companies have not sought to rely on the current buy back regulation safe harbour because of the cumbersome nature of the disclosure requirements. Instead, UK listed companies typically notify a Regulatory Information Service as soon as possible, and in any event no later than 7:30am on the business day following the calendar day on which the purchase has occurred, providing aggregated data. That aggregated data includes the date of purchase, the number of shares purchased, the purchase price for each of the highest and lowest price paid, the number of shares purchased for cancellation, and the number of shares purchased to be held as treasury shares. Where equity shares are purchased to be held as treasury shares, the total number of treasury shares of each class held by the company, following the purchase and non-cancellation of those shares; and the number of equity shares of each class that the company has in issue, less the total number of treasury shares of each class, held by the company, following the purchase and non-cancellation of such shares, would be notified.

Q3. Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

We consider that the current deadline is appropriate for the provision of data for individual transactions and we note that it is open to participants to notify more promptly.

Q4. Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?

We agree provided that information required to be disclosed to the Competent Authority is the same.

Q5. Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?

We agree that there should be one Competent Authority to whom reporting of buy-back transactions should be made. For Community issuers, we believe this should be the Member State where the issuer has its primary listing, and for third country issuers, the home state of the venue on which the share was first traded subject to a subsequent election by the issuer if the home state was not determined by their choice.

Q6. Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

We consider this would be rather difficult to track due to currency differences for example. We would therefore recommend the place of primary listing rather than the most liquid market. However, whilst recognising the issue of currency differences, there may also be some risk that the last traded price/last current bid on the primary market is well off the market price on the most liquid market; if the most liquid market is trading at a significantly higher price than the primary market, then the issuer may be prevented from using the safe-harbour in buying back, even though the buy-back may take place on the most liquid market.

We would also share the view expressed by AFME that buy-backs should not be restricted to being at a price which is equal to or lower than the last traded price or last current bid on the most liquid market. The best execution rule should apply. The price restriction proposed would be too complicated to apply where a share is traded on multiple venues.

Q7. Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

We think that a restriction is unnecessary. The final auction price is driven by the largest orders. The proposed restriction not to enter any orders to purchase shares during the last third of the regular (fixed) time of an auction would not achieve the designed outcome. In order to have broader global alignment we would be happy for issuers to be prohibited in the auction.

Q8. Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.

The cumulative criteria for extreme low liquidity, is too restrictive in our view. We also note that market capitalisation is not a good indicator of liquidity. At present, we would have a strong preference for using average daily turnover, however we would agree with AFME in the view that that there needs to be a statistical review of prices/volumes of permitted buy-backs. This would lead to a better appreciation of the likely impact of such a regulation. In the meantime, we would suggest that no new rule needs to be imposed.

Q9. Do you think that the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?

We would prefer that ESMA keep the regime as it stands with liquid being 25% and illiquid being 50% (as noted earlier q8, we would not support ‘illiquid’ being defined as restrictively as proposed).

Q10. Do you think that for the calculation of the volume limit the significant volumes on all trading venues should be taken into account and that issuers are best placed to perform calculations?

We would support that volume should be calculated taking into account volume across all venues. However we note that a clear way of calculating volumes across all venues is challenging, and issuers should be entitled to rely on the list that recital 8a of MAR envisages that ESMA should maintain

Q11. Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.

Yes, we would support this proposal.

Stabilisation measures:

Q12. Do you agree with the above mentioned specifications of duration and calculation of the stabilisation period?

Yes, we would support the duration and calculation of the stabilisation period, although we note that stabilisation activities do not generally last for the duration specified in the proposal.

Q13. Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?

We would agree that the disclosure provided in the Prospectus Directive is sufficient for the public disclosure or stabilisation activities

Q14. Do you agree with these above mentioned details which have to be disclosed?

Yes we would agree in principle. The details proposed in the discussion paper appear to be broadly consistent with general practices and we would support formal recognition of these disclosures obligations through regulation. However, we note that paragraph 38 in the discussion paper envisages that for offers that do not fall under the scope of the Prospectus Directive, public disclosure of the fact that stabilisation measures would be undertaken should be made "right before the opening of the offer period". We believe that there may be some uncertainty about when the offer period formally commences. As a matter of general practice, the stabilisation notice is issued either simultaneously with the pricing notice, or immediately following publication of the pricing notice. It would be helpful if ESMA acknowledged that this practice conforms with its expectations.

Regarding the means of disclosure, we note that this is established by the Transparency Directive and should be aligned with this. As such, the 'means' should depend on the issuer's choice.

Q15. Do you agree that there should be an exclusive responsibility with regard to transparency requirements? Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?

We agree with ESMA's view that there should be a clear allocation of responsibilities with respect to transparency obligations. It is important to distinguish here between responsibility for disclosure of proposed stabilisation measures and for disclosure of the measures actually undertaken. For offers that fall under the scope of the PD, the issuer should remain responsible for the contents of the prospectus, including the disclosures required under the implementing Regulation 2004/809. For offers that fall outside the scope of the PD, responsibility for disclosure of proposed stabilisation activity could be assigned either to the issuer or to the stabilisation manager.

In our view, the responsibility for disclosure of stabilisation transactions should rest with the stabilisation manager i.e. the entity/entities which is/are actually undertaking the stabilisation.

In situations, where the stabilisation is managed by a 'Syndicate' (i.e. where there are several investment firms undertaking the stabilisation), we would recommend that the guidelines clearly assign the responsibility of making relevant disclosures to the Co-ordination Stabilisation Manager. Not only would this enable more clarity regarding transparency obligations, it would also give comfort to other stabilisation mangers that the necessary disclosures are being made and obviate the need for each of them to separately ensure that this is being done. However, it is important to recognise that although the Co-ordination Stabilisation Manager may be expected to require as a matter of contract that the other investment firms provide it with the requisite information, the steps it can take to ensure compliance with this contractual obligation are limited, and in circumstances where the Co-ordination Stabilisation Manager has taken reasonable steps in this regards, it should not be held liable for the failure of another investment firm to meet those contractual obligations. We would also encourage ESMA to provide clarity on the format of that disclosure and process of delivery.

Q16. Do you agree that there should be an exclusive responsibility with regard to reporting obligations? Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilisation?

On this point as well, we agree with ESMA's point of view that there should be clear allocation of responsibilities with respect reporting obligations and that this should rest with the investment firm undertaking the stabilisation. As in Q15, with respect to stabilisations involving several investment firms, it is our view that in line with current market practice the Co-ordinating Stabilisation Manager should be responsible for disclosure obligations. The Discussion Paper in para. 43, recommends identification of one of several investment firms participating in the stabilisation as the 'central contact point' for any requests from the Competent Authority of the trading venues. We believe that in addition to placing this responsibility for answering queries related to trading venues, the transparency and reporting obligations should also be placed on the same investment firm in its capacity as Co-ordinating Stabilisation Manager as this will enhance consistency and clarity in the implementation of the proposals.

Q17. Do you think that in the case of bi- or multinational stabilisation measures a centralised reporting regime should be established to exclusively one competent authority? If so, what are your views on the proposed options?

Yes we would agree that a centralised reporting regime would be efficient, as such we have a preference for one competent authority and would propose this be in the place of the primary listing. Alternatively, this could potentially be delegated to a supranational authority (such as ESMA), in the case of dual/multi listings. Whilst such dual or multi listings are currently not a very common occurrence, with the introduction of a far wider group of multilateral trading facilities (MTFs) and OTFs under the new MiFID, this could potentially increase and it would be useful to have a centralised reporting regime.

Q18. Do you agree with these price conditions for shares/other securities equivalent to shares) and for securitised debt convertible or exchangeable of shares/other securities equivalent to share?

Yes we agree.

Q19. Do you consider that there should be price conditions for debt instruments other than securitised debt convertible or exchangeable of shares/other securities equivalent to share?

It is important that the standards reflect and recognise the different characteristics of non-equity instruments and markets. The current stabilisation regulation contains specific price conditions only for those securities or securitised debt convertible or exchanged in shares. We do not agree that the price conditions should be extended to other debt instruments. Such instruments do not lend themselves to the application of pricing conditions – their valuation depends on discounting the expected cash flows to the present using an appropriate discount rate, often determined in practice by reference to similar instruments. The valuation becomes more complex where the debt instrument includes embedded derivatives.

Q20. Do you agree with these conditions for ancillary stabilisation?

Yes, we agree in principle but we note with respect to the requirement that the overallotment facility not covered by the "greenshoe option" must not exceed 5% of the original offer, it is worth noting that in the debt markets, stabilisation operates without a greenshoe. There may be circumstance where it is appropriate to overallot more than 5% of the offer. These circumstances have been recognised by the UK regulator (please see FSA Market Watch, Issue No.14 December 2005). Market participants would benefit from guidance and clarification as to the circumstances permitting over-alloting beyond 5% in order to remain within safe harbour.

Q21. Do you share ESMA's point of view that sell side trading cannot be subject to the exemption provided by Article 3(1) of MAR and that therefore "refreshing the green shoe" does not fall under the safe harbour?

We welcome the statement that the mere act of selling securities will not be deemed abusive solely because it falls outside the scope of the safe harbour.

Where the greenshoe has been refreshed to provide liquidity (provided that the sell-side trading is done in a way that does not compromise market integrity), we believe that further acquisitions which are made exclusively for a stabilising purpose should fall within the safe harbour. By way of example, if purchases were made against prior short positions they should be treated as made to cover positions that have been held from the outset – rather than as trades whose sole purpose is to close a refreshed short position (where the fresh shorting is not covered by the exemption).

Q22. Do you agree that "block-trades" cannot be subject to the exemption provided by Article 3(1) of MAR?

In respect of a primary market led "block-trade", there will be situations where a large shareholder sells a large block of shares to a large number of purchasers involving underwriting or a selling group. Such block sales should be permitted under the stabilisation safe harbour to protect existing shareholders and new purchasers. For this reason, we would not agree with the proposal that "block-trades" cannot be subject to the exemption provided by Article 3 (1) of MAR.

It would be helpful if ESMA could provide more clarity on how they are defining a block. We would suggest that non-risk blocks could be stabilised as no investment bank would benefit.

Market soundings (Article 7c of MAR)

Q23. Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?

We agree overall with the proposed standards that should apply prior to conducting a market sounding. However, we wish to note that the nature of record keeping for non-wall crossed market sounding and wall crossed market sounding will be different to the extent that while the former will clearly specify what factors were considered before concluding the information not to be inside, the latter will only have appropriate wall-crossing related records thereby indicating that the information was presumed to be inside. Any recommendation that requires market participants to document why information was considered to be inside would likely result in superfluous and redundant record keeping.

Furthermore, as market soundings often takes place without a final written agreement having been concluded between a third party acting on behalf of the issuer and the issuer, we agree that it would be helpful to clarify what is meant by the term "acting on behalf of or on the account of" for the purposes of Article 7c(1)(d) of MAR. However, in order to ensure certainty of when the relevant requirements apply and when the third party should engage the issuer along the lines suggested by ESMA, it needs to be clear that this should only cover circumstances where the third party is plainly acting on the instructions of the issuer, whether these are given orally or in writing, so that the third party or the issuer are not put in a situation where they may be required to engage with each other in respect of activities which they do not consider to be market sounding activities conducted "on behalf of or for the account of" the issuer. We note that public side activities should not constitute acting on behalf of or for the account of the issuer before a market sounding takes place. Similarly there may be other teams/divisions at the organisation of the third party who may have discussions with potential investors but who are unaware of any instruction of the issuer to conduct sounding and any discussions with investors undertaken by such teams, unrelated to the instruction, should not be subject to the market sounding procedures.

In respect of the assessment of whether information to be disclosed is inside information, we agree that where the disclosing party forms part of a syndicate it should take reasonable steps to ensure that those members of the syndicate who participate in market soundings agree on whether the information is inside information. It seems sensible for the fall-back position to be that the information should be treated as inside information where the members disagree on the characterisation. However, syndicate members should not be required to agree on the disclosure of information that is not inside information. Further, the term "Syndicate" should be clearly defined to mean only such members who are jointly instructed by the issuer to conduct the sounding at the time of sounding, and who are aware of the joint instruction. An issuer may independently instruct several banks without communicating this to them.

ESMA states that in the event that the issuer takes a different view as to whether the information is inside information or not, the disclosing market participant shall characterise it as inside information. We understand that this would be the case where the disclosing party has classified the information as not amounting to inside information, whilst the issuer disagrees. In addition, we consider that if the disclosing party considers that the information amounts to inside information despite the issuer being of a contrary opinion, the disclosing party should also be entitled to characterise the information as inside information.

Although we agree that disclosing market participants should determine the type and number of investors they intend to question, we would appreciate ESMA's clarification of how this assessment would impact on whether or not the disclosure is improper and therefore in breach of Article [7b] of MAR. It may be helpful to clarify that concerns would not arise where the number of investors is not disproportionate to the goal of gauging the interest of a cross-section of investors and the investors are of a type likely to be interesting in investing in the relevant securities.

We would query the reasons behind the suggestion that members of a syndicate should be consulted to ensure that the same investor is not questioned by several syndicate members. In practice, syndicate members may well share clients, but it is not clear to us why they should be required for the purposes of MAR to ensure that investors are not contacted by more than one syndicate member. We agree that a disclosing party should also inform the issuer of the type of investors to be questioned. We would support the EBF request for further guidance on criteria to determine the type and number of investors the disclosing market participant intends to question (paragraph 74). This clarification is very important as failing to fulfill this requirement will lead to sanction if disclosure is considered inadequate.

Q24. Do you have any view on the above? (as it relates to timing of market soundings)?

We note that we interpret the question to be relating to timing of market soundings.

It is important to recognise that although parties will seek to minimise any time lag between a market sounding and a transaction, the timing may be influenced by a number of factors outside their control, which may include information gained as part of the market sounding. Changes may be required to the structure or conditions of the transaction, which will require additional time to be implemented, or it may be determined that the timing is not right for the transaction. Many lists of buy-side firms which do not wish to be wall-crossed would very quickly become obsolete as firms change views, strategies, procedures and personnel.

We agree that due to the reasons outlined by ESMA, it would not be appropriate to restrict the hours during which market soundings can take place.

Q25. Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

We firmly believe that Option 1 is the most appropriate and Options 2 and 3 are simply not workable in practice. Option 1 enables the buy-side firm to evaluate whether or not to consent to be wall-crossed on a case-by-case basis. Continuing this approach is both simple and practical.

In respect of Option 2, where buy-side firms do not want to be wall-crossed under any circumstances, then they may wish to inform the sell-side of this and it should also be up to the buy-side to inform the sell-side if this position changes.

However, if Option 2 is used, the sell-side should also be able to confirm this position with the buy-side on a regular basis to ensure that its list is up to date, although we do not think this should be a requirement. Having a list of buy-side firms who do not want to be wall-crossed may be a problem for banks who could be criticised for not informing their client of a deal on the basis of an out-dated request not to receive inside information. It may also unnecessarily heighten execution risk as banks will be unable to contact investors who may actually want to be contacted despite a previous request. Many lists of buy-side firms which do not wish to be wall-crossed would very quickly become obsolete as firms change views, strategies, procedures and personnel.

Although a residual risk of inadvertent disclosure remains, we believe this will be adequately addressed by the new procedures suggested by ESMA, which will reduce this risk. In this context, we consider that Option 3 is unworkable and will impose a burden on sell-side firms that is disproportionate to the benefits that may be achieved by implementing this option.

Q26. Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

We agree that the use of scripts will ensure a more unified approach to market soundings, whilst also reducing the risk of inside information being disclosed inadvertently. Nevertheless, we believe the contents proposed by ESMA will need further consideration. Specifically, the following proposals for the standards scripts may be helpful to review:

84.b.i: In respect of the statement explaining the reasons why the disclosing party considers the information to be inside information, it is possible that this may include further information of a confidential nature, which the disclosing party should not be required to provide. In general we are of the view that market-sounding scripts should contain only the bare minimum that is essential for the buy-side to make a decision on agreeing to be wall-crossed or otherwise. Including any additional information with respect to the reasons why information may be inside prior to the investor agreeing to be wall-crossed may significantly increase the risk of inadvertent disclosure or ‘tipping off’. However, the disclosing party may be able to provide an explanation of a more generic nature. Any discussion about the nature of the inside information or why it is inside information should only be had after the investor has agreed to be wall crossed.

84.a.ii: Any non-wall crossed market sounding goes through a chain of review and controls in order to determine that the information being disclosed is indeed not inside. Including such a statement in the script will not only undermine the assessment process and controls, it will also unduly burden the buy-side and may discourage investors to be sounded out on a non wall-crossed basis. In general, we do not believe that the use of scripts for non-wall crossing is necessary. Using a script for non-wall-crossed soundings, and informing the buy-side that they are being "sounded" may lead to confusion on the buy-side whether they have actually been wall-crossed and may also tip-off the investors that they are being sounded in the context of a potential transaction. To the extent that ESMA determines that the scripts for non-wall-crossed soundings are required, we would recommend that any such scripts are adopted as an industry standard in an annual notification to investors rather than for each sounding. Furthermore, we would suggest, the script should include a simple statement that the buy-side will have to consider for itself whether any info conveyed is 'inside information'.

We therefore do not agree that the above two points must be included as part of the standard scripts.

Generally, it may also be helpful to add a specific point in the wall-crossed sounding script on seeking the investor's consent to being wall-crossed.

In respect of the cleansing strategy, it should be recognised that it may be difficult to ascertain a definite cleansing strategy up front, although this will depend on the particular circumstances of the transaction. In particular, the characteristics or timing of the transaction may change as a result of the market sounding, which could impact on the cleansing strategy and its timing.

We agree with the use of a simplified script in respect of investors who are aware of the consequences of holding inside information.

Q27. Do you agree with these proposals regarding sounding lists?

Yes, we agree that sounding lists should be kept by the disclosing party, as this is current practice. Clarity will be needed as to the period of time these records should be retained.

Q28. Do you agree with the requirement for disclosing market participants set out in paragraph 89?

Where a buy-side firm specifically provides such details, then we agree that the disclosing party would keep a record of these. However, we question the need for this requirement and it may be that such a process should be left as commercial to market participants. Such details will be out of date quickly and the disclosing party should not be under an obligation to keep records up to date or to seek such details if none have been provided, as this could be disproportionately burdensome. Additionally, disclosing parties should not be prevented from contacting other persons with the buy side firm where they believe the details previously provided to be out of date.

Furthermore, buy side firms have different arrangements, with some channelling information through a designated person and others do not have a designated person. We therefore do not consider it necessary to prescribe the arrangement so long as the buy side firms communicate with sell side firms about their arrangements.

Q29. Do you agree with these proposals regarding recorded lines?

Yes, we agree that where appropriate, market sounding conversations should be conducted on recorded lines or in a meeting that is recorded, but that an alternative durable medium should be used to record the content of a meeting where recorded facilities are not available; we also recommend that the requirement take account of the evolving IT market and ensure that there is some scope built-in to include newly developed forms of durable medium. We understand that record retention requirements should only apply to conversations taking place over a recorded line. Nevertheless, we are concerned about the record retention requirements on the recorded tapes. It is unclear from paragraph 90 whether record retention requirements for 5 years are applied to recorded telephone conversations as well as other record such as documents and emails. If that was the case keeping records of tapes for a period of at least 5 years would go way beyond the current requirements under Directive 2004/39/EC (where retention rules should be in conformity with national law). The current UK requirement under COBS 11.8.10R is to retain tape-recorded conversations for 6 months. It may be necessary to perform a cost-benefit analysis.

Q30. Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

Whereas obtaining a written confirmation from the wall-crossed investor of their agreement to be wall-crossed may be considered too onerous, we agree that a one-way notice provided to the investor which records the fact that the investor has agreed to be wall-crossed would be workable. This is on the basis that it does not need to be issued to the investor prior to inside information being provided, which we think would be impractical in fast moving markets. This would be combined with a confirmation (generally verbal) from the investor that they agree to be wall crossed prior to being wall crossed.

Q31. Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

The recording of the oral consent should amount to sufficient confirmation of the agreement to be wall-crossed. The sell-side should be able to rely on this oral consent. If a subsequent written confirmation is required from the buy-side, this could leave the sell-side in a difficult position if the buy-side does not provide it.

Q32. Do you agree with these proposals regarding disclosing market participants' internal processes and controls?

Banks that conduct sounding's currently maintain Chinese walls between their 'public' and 'private' sides (partly because of MiFID) where inside information is only shared within the private side on a need-to-know basis, the establishment of full Chinese walls, as seemingly suggested in para 98, between private side individuals, would be a logistically disproportionate burden.

It should also be recognised that the timing of the market soundings is not always within the control of the disclosing party, e.g. an issuer may make last minute changes to a proposed transaction or cancel or delay the market sounding.

Q33. Do you have any views on the proposals in paragraphs 102 to 104 above?

We support the proposals and in particular the point made in paragraph 104, which underlines the buy-side's independent duty to form their own view whether any supplied information is inside information.

Where the buy-side firm gives notice that it does not wish to be wall-crossed, it will still have the obligation to determine whether it has been given inside information during any sounding.

Q34. Do you agree with this proposal regarding discrepancies of opinion?

We do not agree that an investor will necessarily avoid trading restrictions if it disagrees that information is inside information as characterised by the sounder. Where the sounder does not agree that the information is public after reviewing the documentation/arguments asserted by the investor, the investor may still be bound by its agreement to keep confidential and not trade on the information provided whether it is inside information or sensitive, confidential information(but not inside information). At issue here is the nature of the undertaking given by the investor in accepting a sounding. If an investor takes the view that specified information is not inside or confidential information, it will have liability if its judgement is determined to be erroneous.

Q35. Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the

disclosing market participant but the disclosing market participant has not indicated that it is inside information?

Whilst, in principle it would be helpful to all parties to have an open dialogue regarding the nature and assessment of the information that has been disclosed, we note the risk that in communicating a difference of opinion the buy-side should be mindful of not providing the sell-side with any further non-public information. This may be because it is based on additional information that the buy-side has at that point.

Q36 – 38: No response.

Q39. What are your views on these options?

Whether the parties involved in a market sounding are willing or able to agree to a cleansing strategy up front will depend on the particular circumstances of the transaction. Although we recognise that clarity on this point would be helpful at an early stage, that may not always be possible. In particular, the characteristics or timing of the transaction may change as a result of the market sounding, which could impact on the cleansing strategy and its timing. Moreover, agreeing a detailed cleansing strategy prior to wall crossing also carries the inherent risk of tipping off. For example indicating the expected timeline for the deal or its expected imminence could provide further inside information. Furthermore, in cases where several investors are approached, there is a high risk that different buy-side contacts will prefer different strategies, making it almost impossible to combine and implement.

As such, although an early discussion around a cleansing strategy may be helpful, we consider that a requirement for an agreement on this issue is unlikely to be workable in practice.

More generally, we would note that information may cease to be inside information other than as a result of cleansing or public announcement and this too should be reflected in ESMA's technical advice.

Specification of the indicators of market manipulation laid down in Annex I of MAR

In responding to this section, we would like to make some general points.

Annex I of the Regulation sets out the a "non-exhaustive" list of indicators "which should not necessarily be deemed in themselves to constitute market manipulation" but should be taken into account when transactions or orders to trade are examined by market participants and competent authorities.

The Annex is deliberately framed in this way as it is often difficult to be prescriptive as to the types of conduct that will or will not constitute market manipulation. ESMA and the Commission should therefore exercise caution when seeking to clarify these indicators contained in Annex I of the regulation to ensure that delegated acts are not adopted that are overly prescriptive.

With this in mind, we are concerned that Annex III of the ESMA paper lists examples of certain types of practices that "would constitute market manipulation". Given the necessary lack of precision in the descriptions of misconduct we consider that there is a significant risk that these descriptions may become overly prescriptive and have the effect of appearing to prohibit practices that may be considered legitimate in certain circumstances. Further, we are concerned that seeking to define examples of conduct that would constitute market manipulation would exceed the mandate given to the Commission in Art 8 para 5 because in clarifying the elements of the "indicators" in Annex I of the Regulation (which indicators are expressly stated not to be determinative of whether the conduct in question constitutes market manipulation) the Commission is not empowered to proscribe or prohibit certain defined conduct.

That said, the provision of non-exhaustive examples of conduct that is likely to amount to market manipulation under Art 8 MAR, can provide helpful guidance in interpreting the provisions. However, we are not convinced that it appropriate to enshrine such examples in a delegated act of the Commission.

We therefore suggest that the specification of the indicators in Annex I of the Regulation should focus on providing non-exhaustive and more detailed guidance as to the practical application of the indicators set out in Annex I – setting out examples of factors to be taken into account in determining whether or not conduct amounts to market manipulation under Art 8. Separate, additional guidance may then be appropriate giving specific examples of market manipulation but these should be provided as guidelines to accompany the delegated acts, as anticipated in the Commission's request to ESMA of 8 October 2013.

Types of practices of market manipulation

Annex III of ESMA's paper provides a non-exhaustive list of the types of practices that, in the view of ESMA, "would constitute market manipulation under MAR". The list is helpful as a non-exhaustive and indicative list of types of manipulation but, for the reasons given above, is not appropriate for inclusion in a delegated act of the Commission under Art 8 para 5 MAR.

As is acknowledged in the introductory paragraphs to Annex III, even within the examples provided there remains considerable uncertainty as to the extent to which manipulative intent is required to prove market manipulation and the list includes examples of practices that may, in certain circumstances prove legitimate.

Such degree of legal uncertainty in relation to the types of conduct that constitute market manipulation is potentially detrimental to the efficient functioning of financial markets and presents serious concerns in relation to the rule of law. It is objectionable for the offence of market manipulation, which rightly carries such moral opprobrium and is the subject of punitive sanctions, to be so unpredictable in its application. While Annex III incorporates previous guidance provided by CESR, ESMA should give serious consideration to recasting the examples in a way that seeks to clarify how legitimate conduct is to be distinguished from illegitimate conduct in the examples given.

The following examples illustrate the point:

Example a. Annex III refers to the example of "wash trades" that are described as sales or purchases "where there is no change in beneficial interests or market risk or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion". However, that definition potential captures not only "wash trades" but also legitimate transactions such as intra-group transfers of securities, trading by market participants that involves hedging market positions in order to eliminate or minimise market risk for legitimate commercial purposes. It is very difficult to distinguish a "wash trade" from such legitimate trading other than by reference to the purpose and effect of the trading and this should be explicitly recognised in the guidelines: If the purpose and effect of the trading is to give a false or misleading signal as to supply of, or demand for, a financial instrument or a related spot commodity contract, then this will constitute market manipulation. However, the mere fact that transactions involve no change in beneficial ownership or no assumption of market risk can only be one factor to be taken into account – it is not itself determinative of whether the transactions are manipulative "wash trades".

Example b. – "painting the tape": the phrase "to give the impression of activity or price movement" suggests that this must be the purpose of the behaviour in order for it to amount to market manipulation. However, the introductory paragraphs of Annex III throw that into doubt by stating "Where an example seems to require that conduct is characterized by a manipulative intent, this does not imply that, in the absence of that intentthat conduct might not fall within the scope of the definition of market manipulation”. Without any manipulative intent, the “painting the tape” example would simply involve “engaging in transactions which are shown on a public display facility [which] give the impression of activity or price movement in a financial instrument” This clearly does not, of itself constitute manipulation. At the very least the impression created must be a false one in order for such conduct to amount to manipulation and this should be made clear.

Many of the other examples in Annex III suffer from similar definitional problems and therefore provide little practical guidance as to how to distinguish legitimate conduct from market manipulation. The examples would benefit from being recast to indicate much more transparently and consistently (a) what conduct is involved in the example, (b) what the effect or likely effect on the market is (including for example the nature of the false or misleading signal or impression given by the conduct and/or the impact on price), and (c) the extent to which the example requires that there be a manipulative intent or purpose, recklessness or mere negligence in order for it to be considered market manipulation.

Q40. Which practices do you think are more related to manipulation of benchmarks?

MAR defines the manipulation of benchmarks in Art 8 para 1(d) as “transmitting false or misleading information or providing false or misleading inputs where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark”

The first part of the definition in relation to false or misleading information or inputs is relatively clear and does not require further clarification. The key question is what “other behaviour” may constitute manipulation of a benchmark. Other than the direct provision of false information or inputs, the route by which a benchmark may be manipulated is through behaviour falling within para 1(a), (b) or (c) of Article 8 MAR which has the effect of manipulating the market in a financial instrument or related spot commodity contract that also affects the setting of a benchmark.

Q41. Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?

No.

Q42. In your view, what other ways exist to measure order cancellations?

A high level of order cancellations is a possible indicator of manipulation but is not determinative and will only ever amount to circumstantial evidence. There may be legitimate reasons for cancellations but the higher the ratio the more likely this is to suggest that the orders were not genuine offers to buy or sell but were for the purpose of giving misleading signals to the market. It is unlikely to be helpful for the Commission to seek further to specify the level of cancellations that are likely to be indicative of market manipulation or the methods by which they level of cancellations should be measured as such matters will necessarily have to be sensitive to the specific circumstances of each case. Specifying the way in which cancellations can be measured may give rise to perverse incentives for market participants to game the way in which regulators are likely to scrutinise their trading patterns.

Q43. What indicators are the most pertinent to detect cross-venue or cross-product manipulation and which would cover the greatest number of situations?

The key indicator of cross-venue or cross-product manipulation is where a person (or persons colluding with each other) engage in activity on one venue or one product that-

(a) has a one or a number of the indicators set out in Annex I to the Regulation;
(b) has an effect on the price of other financial instruments or related spot commodity contracts or on prices on another trading venue;
(c) and benefits a position held by that person (or those persons who are colluding) in those other instruments/contracts or on that other trading venue.

Q44. Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?

For the reasons given above, the list in Annex IV should be recast to follow the structure of and expand on the indicators provided in Annex I of the Regulation. It should provide a guide to market participants and competent authorities as to the practical application of the indicators set out in Annex I of the Regulation. See appendix one for a suggested format and content.

Q45. Which of the indicators of manipulative behaviour manipulation in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.

It is unclear what the relevance of this question is in terms of detection. The prior question one might ask is ‘how should the indicators of market manipulation in Annex I of the Regulation, be applied in the context of an automated trading environment?

The key additional indicators of manipulation specific to an automated trading environment are-

(a) The extent to which it can be shown that algorithms used in algorithmic trading have been devised for the purpose, or have the effect of, enabling a market participant to benefit from movements in market prices that have themselves been generated by the algorithmic trading strategy.

(b) The extent to which it can be shown that the automated trading has been used to secure movements in market prices through trading in very high volumes during a limited period of time in order to subsequently reverse those positions and extract a profit due to other market participants’ inability to react with sufficient speed to changes in market prices.

Q46. From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?

In our view, this is impossible and potentially unhelpful to specify. It will depend on the circumstances of each individual case. For example, this could be driven by a combination of factors including the structure of the platform, the market, the type of market participant and whether the trading is manual or automated.

Q47. What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?

See answer to Q45 above.

We would suggest focusing on trend/pattern analysis as opposed to aiming to generate individual exceptions for surveillance of an automated trading environment. The guidance of ESMA (2012/122) we believe is sufficient but we would not be in favour of it being fixed in technical or regulatory standards.

Accepted Market Practices (Article 8a(5) of MAR)

We note that as the legitimate purpose exemption in Article 8 (1) (a) also requires conformity with Accepted Market Practices, the procedural requirements for establishing such AMPs should not be set at an unnecessarily burdensome level.

Q48. – Q59. No specific comments, please see above for a general comment.

Suspicious Transaction and Order Reports (Article 11 of MAR)

Q60. Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

We agree.

Q61. Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?

We agree with the existing approach that STR should be submitted 'as soon as practicable' however, we do not see a need to set a timeframe of within two weeks of the suspected breach. We agree that a two week deadline is a good benchmark to aspire to but nevertheless, we would be hesitant to put this as an absolute deadline because this is an area where it is important for firms to apply judgement. In many cases, a further investigation by the firm is necessary to ensure the quality of STR submissions remains high and in other cases, a pattern may only become evident over time. We would like to note that any timeline should be framed in terms of being from when a suspicion is identified not the suspected breach itself.

Q62. Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?

We agree.

Q63. - Q65. No comment.

Q66. Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?

We do not believe this would be appropriate for Level 2 legislation. This should be proportionate to individual's roles and responsibilities rather than a one size fits all. In general terms, a reminder on an annual basis seems reasonable.

Q67. Do you agree with the proposed information to be included in, and the overall layout of the STRs?

We mostly agree. We note that an STR is a voluntary submission and we would rather avoid firms being mandated to provide too much detail as this may deter firms from submitting suspicions. We also note that sensitive personal data should be avoided as being mandatory, for example, the form should focus on the entity doing the transactions rather than naming individuals. This further data can be formally requested by regulators if required. We would also ask that the template be sufficiently flexible.

Q68. Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?

In practice harmonisation is good but we are concerned that a resulting template may become unwieldy. It would therefore be critical to consult heavily at the drafting stage.

Q69. No comment

Public disclosure of inside information and delays (Article 12 of MAR)

Q70. Do you agree with this general approach? If not, please provide an explanation.

Yes we agree with the general approach.

Q71. Do you agree that, in order to ensure an appropriate dissemination of inside information to the public (i.e. enabling a fast access and a complete, correct and timely assessment of the information), applying similar requirements to those set out in the TD for the dissemination of information to all issuers of RM/MTF/OTF financial instruments would be adequate? If not, please explain and, if possible, provide alternative approaches to consider in due respect of article 12 paragraph 1 of MAR.

This seems reasonable.

Q72. Do you agree to include the requirement to disclose as soon as possible significant changes in already published inside information? If not, please explain.

Yes we agree.

Q73. No comment.

Q74. What are your views on the options for determining the competent authority for the purpose of notifying delays in disclosure of inside information by issuers of financial instruments?

Article 12 (3) indicates that Member States may take a different approach and we would be concerned if ESMA were to remove the discretion for national authorities to require such information only on request. We favour the Transparency Directive-based approach.

Q75. - Q76 No comment.

Q77. Do you agree with the approach to require issuers to have minimum procedures and arrangement in place to ensure a sound and proper management of delays in disclosure of inside information? If not, please explain.

We agree generally with ESMA but support the comments made by AFME and ISDA. We would note that record-keeping during the delay period should not be onerous where there has been no change in the conditions of delay.

Q78. Do you agree with the proposed content of the notification that will be sent to the competent authority to inform and explain a delay in disclosure of inside information? If not, please explain.

There is a degree of “preciseness” to the “date and time” of determining that an issuer has inside information and the determination to delay that is often not present in real life – often Inside Information doesn’t suddenly “appear” e.g. in an M&A situation. It may therefore be difficult to pin-point the exact time a decision was made.

Q79. Would you consider additional content for these notifications? Please explain.

No.

Q80. Do you consider necessary that common template for notifications of delays be designed?

Yes we think it would help both the issuer and competent authority to process.

Q81. Do you agree with the approach suggested in relation to the notification of intent to delay disclosure to preserve financial stability?

This seems sensible. We note however that in the event of a capital raising, ESMA should clarify if a delay is warranted.

Q82. Do you agree with the approach followed by ESMA with respect to legitimate interests for delaying disclosure of inside information? Do you consider that CESR examples are still appropriate? If not, please explain and provide circumstances and/or examples of what other legitimate interests could be considered.

The CESR examples are still appropriate but it would still be unhelpful to mention M&A in the course of negotiation (see question 78). We assume this will be addressed subsequently as guidance.

Q83. Do you agree with the main categories of situations identified? Should there be other to consider?

We also note that in para 307, ESMA suggests that disclosure will always be required where the undisclosed inside information contradicts the market's current expectations. We believe this is too blunt a statement – although the example given may provide an obvious case for disclosure, one could conceive of a situation where the market's current expectations are incorrect due to a failure on the part of the market properly to take account of macro-economic factors (which are publicly available). A failure by the market to take publicly available macro-economic factors into account should not of itself render a delay (for legitimate reasons) in the disclosure of a specific potentially price sensitive development within the issuer misleading if it would not be misleading.

<u>Insider lists (Article 13 of MAR)</u>

We note that from the perspective of a regulated firm working on instructions of an issuer, there is a distinction to be made between the creation and maintenance of deal-specific 'internal' insider lists, and the content/presentation/delivery of an insider list to a Competent Authority following a formal request. This is because formal insider lists for a Competent Authority's consumption are created ad hoc, following a formal request from a Competent Authority (either directly from the Competent Authority or via the issuer that the specific transaction pertains to). It is for this reason, Competent Authorities give regulated firms a period of time to collate and present the relevant information required by an insider list (two weeks in the case of the UK). It would be inefficient for regulated firms to include all information (required in formal delivery of an insider list to a Competent Authority) in an internal insider list, particularly when for the large majority of transactions, firms will not be required to submit the relevant insider list to a Competent Authority. Notwithstanding this, firms must of course be in a position to deliver this information following a formal request from a Competent Authority.

Q84. Do you agree with the information about the relevant person in the insider list?

We do not agree that this level of information is required to effectively enforce the Market Abuse Regime. For the reasons set out below, we consider that information gathering on individuals in the context of insider lists should be subject to reasonable limits.

Presently firms include the first name, surname, home address, work address, home, work and mobile telephone numbers and the work e-mail address of the individuals listed as insiders as well as when individuals first received inside information and when they ceased to have inside information. It is important that ESMA recognises the role insider lists play in any investigation of potential market abuse. As was noted in the CESR consultation on the third set of CESR guidance on the common operation of the Market Abuse Directive (CESR / 08-274), "there is a common understanding amongst CESR members that insiders' lists are used by the competent authorities as a first instance tool in a market abuse enquiry or investigation". If the information on an insider list was not sufficient for a Competent Authority, further details of individuals on the insider list could be gathered at a later stage, should a regulator submit a request.

We would question why it is necessary to provide the further information outlined in paragraph 318 of the ESMA discussion paper, specifically date and place of birth, birth surname, personal email address and national identification number. The information poses security risks for Issuers and fraud risks to individuals increase with the level of personal data required to be shared. Collectively, the level of information proposed to be captured for example could be used to pass the security checks of many service providers. We think it is incumbent on ESMA to balance the EU's policy agenda on privacy with its financial crime agenda.

We also note that many lists will be international in character. Given third country jurisdictions are developing or have developed their own data protection laws, this may result with an impossibility to comply with both sets of requirements. Reducing the list to the essential minimum may not eliminate this risk entirely, but would reduce it.

Given the above points, we believe more generally that the list should be practical and help identify the insider in the firm and we do not believe this additional information is necessary to achieve this end and furthermore as explained, runs various risks

Q85. Do you agree on the proposed harmonised format in Annex V?

We think that a general harmonised format for the delivery of information to a Competent Authority is a good idea. However, we do not agree with the current format outlined in Annex V. There is a distinction to be made between those insider lists created and maintained by issuers, and those insider lists created by regulated firms working on the instruction of an issuer. ESMA's proposed format of a single, integrated insider list per firm (Paragraphs 324 and 325) is perhaps suitable for an issuer. However, it is unlikely to be suitable for regulated firms working on the instructions of many different issuers, and on many different transactions over the course of time. It is for this reason that regulated firms are more likely to keep deal-specific insider lists, as opposed to a single integrated list. Furthermore, when a Competent Authority requests to see the insider list of a regulated firm, the request is likely to relate to a specific issuer / transaction (check accuracy of final statement).

For the reasons stated above we do not believe that it is necessary to provide all the information listed in Annex V when delivering information to a Competent Authority.

Generally, the employment dates for individuals (e.g. their start and end dates if applicable) which is a column in the template in Annex V, are not included on insider lists currently maintained. This information should be easy to access through HR systems for most firms and it would be possible to include, but is of limited utility in our view, particularly in context of insider lists produced by regulated firms working on the instruction of an issuer.

Q86. Do you agree on the proposal on the language of the insider list?

We agree.

Q87. Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

We do not have any major objections to the proposals set out in paragraphs 327 and 328 to send insider lists in electronic format via an encrypted email or other secured channel. Our view is that most firms, as well as issuers already have the technological set-up to meet this proposal (e.g. sending documentation as either MS Excel or PDF files). Nevertheless, we note that excel files do not allow versioning and this may make it less effective.

Q88. Should ESMA provide a technical format for the insider list including the necessary technical details about the information to be provided (e.g. standards to use, length of the information fields…)?

As mentioned above in response to question 85, we agree in principle with harmonised insider lists although we do not agree with the current format proposed in the discussion paper.

Q89. Do you agree on the procedure for updating insider lists?

Yes. In response to paragraph 329, our experience is that most firms' internal policies covering general record-keeping (to include insider lists) state that all insider lists must be kept for a minimum period of five years from the date of the last update and should be kept in the relevant electronic deal file. We believe this should be consistent with most firms' internal policies taking into account MiFID, where there is also a requirement to retain all records for a period of at least five years, except recorded tapes of telephone conversations (were we believe a 6-month record keeping requirement may be more appropriate),

Q90. Do you agree on the proposal to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement, or do you see other possibilities to fulfil the obligation?

Some further analysis on this question with issuers who have instruments traded on SME Growth Markets may be beneficial.

Managers' transactions (Article 14 of MAR)

In addition to our response below we would be grateful if ESMA could consider the following issues during the course of the Level 2 process:

(a) We think that ESMA should clarify whether an "investment recommendation" under Article 15 of MAR is to be read as denoting independent analysis for all purposes (as is suggested by the use of the words "objectively presented" in Article 15(1)). We note that this interpretation would differ from that currently applied to an investment recommendation under MAD (which is clearly capable of including both independent and non-independent research) and wonder if the intention was to exclude non-independent research from the scope of Article 15 of MAR.

(b) We would urge ESMA to give further thought to the potential interaction between the definition of an investment recommendation under MAR and the current/future definitions of investment research and investment advice under MiFID. In this regard, we note the matters mentioned in Recital (3) of Commission Directive 2003/125/EC of 22 December 2003, including the fact that informal short-term investment recommendations expressed to clients from inside the sales or trading departments of investment firms/credit institutions will not be investment recommendations under MAD in circumstances in which they are not likely to become publicly available.

    Furthermore, as indicated by AFME, we note that it is necessary for the RTS to distinguish between an "investment recommendation or other information recommending or suggesting an investment strategy "and other types of communications which are subject to a modified set of standards (fair, not misleading, accurate) without the requirements to disclose the interests of the publisher in the issuer and its financial instruments or indicate conflicts of interests of the publisher. The guidance should make clear that in practice there are circulars and other communications sent by investment banks on a ad hoc basis which on their face, are not investment recommendations or expressions of new critical research or fundamental analysis by a research specialist independently. Rather they are ad hoc expressions of observations or thoughts which might be interesting to certain groups of professional clients e.g. institutional buy-side.

Typically, the communication includes a disclosure that it is not a research report and is not investment advice which means there is not a danger that a reader will think it is investment research. It may or may not reference a previously issued research report but would not include an amendment to an existing research report of the firm. It might be viewing the status of the market in terms of a previously issue research report. These types of communications are not investment advice because they are not tailored to any particular client's investment preferences/needs. They are clearly not recommendations because they do not contain a new investment strategy and are not prepared by a research professional.

Q97. Do you have suggestions on how to determine when an investment recommendation is "intended for distribution channels or for the public"?

We believe that the distribution intention by the producer of the investment should be decisive. Whilst we are in broad agreement with ESMA's views set out in paragraph 388 of the Discussion Paper (bearing in mind our general comments above), we do think it is very important that ESMA pays close attention to the potential interaction between the investment recommendation definition under MAR and the current/future definition of investment advice under MiFID. The investment recommendation is broadly disseminated and not a personal recommendation.

We would also support AFME and ISDA's view that it is necessary for the RTS to distinguish between an "investment recommendation" that is intended or likely to be subsequently disseminated to clients of the firm or to the public", from non-independent research and sales notes which should not be captured by this definition. The investment recommendation is broadly disseminated and not a personal recommendation. The guidance should make clear that in practice, there are circulars and other communications sent by investment banks on an ad hoc basis which on their face are not investment recommendations or fundamental analysis by a research specialist independently. Rather they are ad hoc expressions of observations or thoughts which might be interesting to certain groups of professional clients e.g. institutional buy-side. Typically, the communication includes a disclosure that it is not a research report and is not investment advice which means there is not a danger that a reader will think it is investment research. As such, these types of communications are not investment advice because they are not tailored to any particular client's investment preferences/needs.

Q98. Do you think that there should be a threshold for what constitute "large number of persons" for the purpose of determining that an investment recommendation is intended for the public?

We do not believe it would be helpful for ESMA to set a specific threshold as to what constitutes a 'large number of persons'. This reflects the fact that the level of this threshold will naturally vary by reference to the underlying circumstances (which will include, for example, the nature of the underlying product or market and the nature of the clients who receive such information, for example a mass distribution to retail, should be viewed very different to a limited distribution to professional clients). We would therefore strongly urge ESMA to avoid a 'one size fits all' approach in this instance and instead leave it to individual firms to determine the level of this threshold in light of the underlying circumstances. In addition format of distribution should not be a defining factor in determining whether something is or is not intended for the public. Emails/faxes or a reserved space for selected clients on a website for example should not be considered a method of broad dissemination or making a recommendation publicly available.

Q99. Do you agree that the existing requirements on the identity of producers of recommendations should be maintained?

Yes, we agree.

Q100. Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules, with respect to objective presentation of investment recommendations?

Yes, we agree.

Q101. Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?

We have reservations with the suggested approach. We are not aware of any market failure having occurred, although we accept that there have been some inadequate discussions of methodologies in research reports. We are not convinced that a new requirement is necessary. It is likely that competent authorities are able to give direct guidance to producers of research where that may be required.

We note that research is often not based on a specific methodology such as quantitative analysis. Fundamental research often differs from technical research. It is often based on market experience and judgement based on that experience which may refer to statistics or may not. Research reports typically refer readers to their investment advisors for assistance in understanding or applying the information presented

The BBA would also ask that the reference in paragraph 399 to 'methodologies' be amended in any proposed draft RTS to make it clear that such 'details' are intended to reflect the basis upon which a recommendation is made (as opposed to a numerical calibration).

Q102. Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?

Yes, we agree.

Q103. Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?

We believe that the current threshold of 5% is appropriate. Disclosure of any holdings would lead to monitoring difficulties with little policy benefit unless a general disclosure would suffice that the legal person responsible for the production of the recommendation may hold shares in the respective issuer.

Q104. Do you agree on the introduction of a disclosure duty for net short positions? If yes, what threshold do you consider would be appropriate and why?

No, we do not agree. We do not believe a case has been made that a need exists for change.

Q105. Do you agree on the introduction of a disclosure duty for positions in debt instruments? If yes, what threshold do you consider would be appropriate and why?

We do not consider there is evidence of any market failure that would be addressed by such a change.

Q106. Do you think that additional specific thresholds should be specified with respect to other 'non-equities' financial instruments?

It would be helpful to have further clarification here of what ESMA means. We would not agree to impose bright-line thresholds. For example, in the UK the current regime indicates where ‘significant holdings’ the non-equity FIs are disclosed (‘significant’ being determined in relation to the size of the company holding).

Q107. Do you think that further disclosure on previous recommendations should be given?

We do not see the need for further disclosure although this could be produced on request.

Q108. If so, do you think that an analysis of the gap between market price and price target should also be required in this additional disclosure on previous recommendations?

See above.

Q109. Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?

We do not see any disadvantage in a general disclaimer in addition to the specific disclosure that is legally required. We would highlight the difference between disclosures and disclaimers. Disclosures already provide clear, precise and comprehensive information. Disclaimers, by their nature, must be generic, but that does not make them “ineffective”.

Q110. Do you think a case-by-case assessment for non-written recommendations is appropriate or that specific rules should be developed?

We do not consider that this is helpful or necessary. Rigorous requirements already apply to documents in detail recommendations made to private clients. There is no effective way to mandate additional requirements for institutional clients where conversations are regular/ongoing and “recommendations” may be covered in a short conversation.

Q111. Do you think that the rules on recommendations produced by third parties set forth in implementing Directive 2003/125/EC should be updated?

We believe that the rules on recommendations produced by third parties should be tightened in some circumstances. In particular, we note that research magazines often obtain broker reports and extract information from them and reproduce the investment advice without providing the full justification that they were based on. We believe that they should have to reproduce the full justification or take responsibility for the extracted advice that they circulate.

Reporting of violations (Article 29 of MAR)

We broadly agree with the ESMA proposals in relation to the reporting of violations. In particular, we consider that they correctly acknowledge the need to balance encouraging individuals to make reports with the maintenance of sufficiently detailed and robust procedures to enable competent authorities to pursue meaningful follow up and to ensure that the subjects of reports are not subjected to unfair prejudice.

However, we consider that further clarification is required in a number of areas in relation to its expectations of competent authorities, regulated entities and persons making reports.

Before answering the particular questions posed in Section X of the discussion paper, we make several general comments in response to the introductory remarks set out at paragraphs 416 to 423.

As an overarching comment, although we note that the Market Abuse Regulation incorporates requirements in relation to whistle-blowing in the European market abuse framework for the first time (as acknowledged at paragraphs 422 and 423 of the discussion paper), many of the measures proposed are already in place in the UK market abuse and wider financial services regulatory frameworks. Depending upon their regulatory status and the particular context, firms are subject to obligations to put in place mechanisms by which employees may, and in some circumstances must, report concerns without undue adverse consequences. Chapter 15 of the Supervision section of the FCA's Handbook ("SUP") (and in particular the provisions of SUP 15.10 and SUP 15 Annex 5 which deal with the reporting of transactions suspected to amount to market abuse) sets out firms' notification obligations. These obligations are supplemented by the provisions of other legislation applicable to all firms and individuals (i.e. not only regulated firms), including, for example, the Public Interest Disclosure Act 1998, the Proceeds of Crime Act 2002 and some provisions of the Bribery Act 2010.

In response to the indication given at paragraph 418, we agree that competent authorities should retain the flexibility to receive information anonymously and discretion as to how to act upon such information. However, we add that we consider that, given the availability of protections for genuine whistle-blowers under current and proposed arrangements, cases where competent authorities will be justified in relying on evidence, circumstantial or otherwise, provided anonymously, without taking steps to ascertain the identity of the provider will be rare.

In response to the indications given at paragraphs 420 and 421, we note that, in contrast to the arrangements in place in some other jurisdictions, neither the applicable sections of the FCA's Handbook nor the wider criminal or civil laws applicable in the UK permit the Financial Conduct Authority as the competent authority to offer financial incentives to persons who offer salient information about potential market abuse.

In response to paragraph 421, we agree with ESMA's apparent position that competent authorities should be allowed flexibility in relation to the measures which should be put in place to protect whistle-blowers. However, we consider that the proposal would be more useful if it provided a more definite indication of ESMA's position as to whether persons involved in market abuse or attempted market abuse may take advantage of the benefits outlined in Article 27(1)(e) of MAR. The current indication that they can "probably" do so is, in our view, unnecessarily ambiguous.

Q112. Do you agree on the proposed approach and the suggested procedures for the receipt of reports of breaches and their follow-up? Do you see other topics to be addressed?

We agree with the proposals set out at paragraphs 424 to 432 of the discussion paper.

However, greater detail will be required in the draft technical standards to be prepared by ESMA in a number of areas.

In particular, we note that the proposals do not make explicit provision for the types of steps to be taken by competent authorities to determine whether a person making a report should be afforded whistle-blower status and the timescales within which they are expected to do so. This is particularly relevant given ESMA's indication that it does not consider that persons involved in market abuse or attempted market abuse are precluded from taking advantage of the benefits outlined in Article 27(1)(e) of MAR. The absence of indications from ESMA as to the factors it considers competent authorities should take into account when considering whether to afford an individual whistle-blower status and the processes which they should adopt when doing so may lead to inconsistencies in the approaches taken by competent authorities in different jurisdictions, reticence on the part of potential whistle-blowers and/or prejudice to individuals.

We note the indication at paragraph 424 that procedures put in place by competent authorities should "allow for any person to report". Further detail will be required as to ESMA's expectations of competent authorities and firms in relation to the promotion of these reporting avenues and in relation to the steps it considers should be taken to ensure that all persons who may have "reasonable suspicions" in relation to market abuse are aware of the channels through which they may report the same and of the levels of detail expected of them.

We also note that neither the discussion paper nor MAR provide for whether a person, once afforded whistle-blower status, may lose that status and, if so, how the information they have provided may be used against them in regulatory or other proceedings.

Q113. Do you agree on the proposed approach to the protection of the reporting and reported persons? Do you see other topics to be considered?

We agree with the proposals set out at paragraphs 433 to 441 of the discussion paper.

However, again, we consider that there are a number of areas where greater detail will be required as the proposals are developed. We set out details of these below.

Paragraph 437 acknowledges the potential need for information to be passed between units of the same competent authority. However, it does not address situations where competent authorities may have powers or obligations to transfer information to other regulatory or criminal enforcement authorities. The proposals do not set out ESMA's expectations as to whether the protections afforded to individuals treated as whistle-blowers survive such transfers of information.

Paragraph 440 states that whistle-blowers may be required to "clarify" information provided to the competent authority concerned. However, the proposals are silent as to whether the protections afforded to whistle-blowers by competent authorities may or should be made conditional upon continuing co-operation and as to whether whistle-blowers have any on-going obligations following disclosure of concerns.

Appendix I SUGGESTED TEXT FOR COMMISSION SPECIFICATION AND CLARIFICATION OF INDICATORS OF MARKET MANIPULATION LAID DOWN IN ANNEX 1 OF THE MARKET ABUSE REGULATION

A. Indicators of manipulative behaviour related to false or misleading signals and to price securing

For the purposes of applying point (a) of paragraph 1 of Article 8 of this Regulation, and without prejudice to the forms of behaviour set out in paragraph 3 thereof, the following non-exhaustive indicators, which should not necessarily be deemed in themselves to constitute market manipulation, shall be taken into account when transactions or orders to trade are examined by market participants and competent authorities:

(a) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant financial instrument, related spot commodity contract, or auctioned product based on emission allowances, in particular when these activities lead to a significant change in their prices;

Suggested specification/clarification:

The mere fact that a market participant places order in large volumes that lead to a significant change in prices is not determinative of manipulation: Markets operate on the basis that market participants may trade in volumes and at prices determined by them and, provided such trading has a legitimate commercial rationale, the fact that significant changes in market prices result may be regarded as the proper operation of the price formation process, based on legitimate forces of supply and demand. However, trading in such volumes that one market participant (or market participants who are colluding) is able to drive a significant change in the market price may provide circumstantial evidence that the purpose of the trading was to manipulate the price. Trades that have as their purpose securing an increase or decrease in market prices are likely to amount to market manipulation under Art 8 para 1 of the Regulation.

(b) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument, a related spot commodity contract, or a auctioned product based on emission allowances, lead to significant changes in the price of that financial instrument, related spot commodity contract, or auctioned product based on emission allowances;

Suggested specification/clarification:

(see above)

(c) whether transactions undertaken lead to no change in beneficial ownership of a financial instrument, a related spot commodity contract, or a auctioned product based on emission allowances;

Suggested specification/clarification:

Transactions that lead to no change in beneficial ownership (or transfer of beneficial ownership between persons who are acting in colluding) are likely to give misleading signals that trading volumes and therefore supply/demand are greater than in fact they are ("wash trades") . Where such signals result in movements in market prices which are likely to benefit the person or persons entering the transactions this is likely to amount to market manipulation, particularly where there is no commercial rationale for the transactions and/or successive transactions are entered in the same quantities and at the same prices and/or there is no assumption of market risk by the market participants involved. It is recognised however that certain transactions that may have some of these characteristics have a legitimate purpose. For example, transactions involving the transfer of instruments between group companies for legitimate purposes, transactions entered into for the purposes of hedging market risk, stock lending and "repo" transactions, "crossing" trades or similar transactions carried out in accordance with the rules of the relevant trading platform may all be entered into for legitimate commercial purposes and should not, of themselves, be regarded as manipulative.

(d) the extent to which orders to trade given or transactions undertaken or orders cancelled include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant financial instrument, a related spot commodity contract, or a auctioned product based on emission allowances, and might be associated with significant changes in the price of a financial instrument, a related spot commodity contract, or a auctioned product based on emission allowances;

Suggested specification/clarification:

The reversal of positions that represent a significant proportion of the daily volume of transactions in the relevant instrument in a short period, and which are associated with significant price movements may be indicative of manipulative trading strategy the purpose of which is to give a misleading impression of supply or demand and thereby effect significant price movements.

(e) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;

Suggested specification/clarification:

See (d) above. The fact that trading results in or contributes to price movements or volatility does not, of itself, amount to market manipulation. However, if such trading is undertaken with the purpose of effecting a price change, has no legitimate commercial rationale and results in a profit or avoidance of a loss attributable to the price change, this is likely to indicate possible manipulation.

(f) the extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument, a related spot commodity contract, or a auctioned product based on emission allowances, or more generally the representation of the order book available to market participants, and are removed before they are executed;

Suggested specification/clarification:

Legitimate orders to trade may properly change the representation of the best bid or offer prices where those orders are based on a genuine willingness on the part of the buyer/seller to trade at the volume and price indicated. However, orders to trade that are placed with no intention of execution for the purpose of impacting the best bid or offer prices visible to other market participants are likely to constitute market manipulation. The removal of such orders before they are executed may be circumstantial evidence indicating such a purpose, although it should be noted that the removal of unexecuted orders may be for legitimate reasons in some circumstances.

(g) the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations.

Suggested specification/clarification:

Trading during a period when reference prices, settlement prices or valuations are calculated us likely to constitute market manipulation where the purpose of the trading is effect changes in such prices and valuations. This is particularly likely to be the case where it is evident that the person trading (or others acting in collusion with the person trading) stands to make a financial gain (or avoid a loss) on a pre-existing trading position as a result of the change in the reference prices, settlement prices or valuations that results from the trading

B. Indicators of manipulative behaviours related to the employment of fictitious devices or any other form of deception or contrivance

For the purposes of applying point (b) of paragraph 1 of Article 8 of this Regulation, and without prejudice to the forms of behaviour set out in the second paragraph of point 3 thereof, the following non-exhaustive indicators, which should not necessarily be deemed in themselves to constitute market manipulation, shall be taken into account when transactions or orders to trade are examined by market participants and competent authorities:

(a) whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of false or misleading information by the same persons or persons linked to them;

Suggested specification/clarification:

Knowingly or recklessly disseminating false or misleading information that is likely to be considered significant by market participants in relation to trading in a financial instrument, a related spot commodity contract, or an auctioned product is likely to amount to market manipulation.

If the individuals responsible for the dissemination of information within an organisation could only know the information was false or misleading if they had access to other information that was being held behind an information barrier or similarly effective arrangement then those individuals could not reasonably be expected to know that the information was false or misleading and this would be unlikely to amount to market manipulation

(b) whether orders to trade are given or transactions are undertaken by persons before or after the same persons or persons linked to them produce or disseminate investment recommendations which are erroneous or biased or demonstrably influenced by material interest.

Suggested specification/clarification:

Where such circumstances indicate that the purpose of the orders to trade or the transactions was to obtain a profit or avoid a loss resulting from price movements that were likely to be caused the production or dissemination of the investment recommendations in question then this is likely to amount to manipulation. However, such a purpose will not be evident unless it can be shown that the person or persons giving the orders to trade or undertaking the transactions were aware of (or were directed or influenced by others who were aware of) the fact that the investment recommendations in question were to be or had been produced or disseminated. Where it can be shown that information concerning the investment recommendations in question was held behind and information barrier or similarly effective arrangement such that the information did not influence the orders to trade or the transactions then this will not constitute market manipulation.