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Via Electronic Submission

European Securities and Markets Authority

103 rue de Grenelle

75345 Paris

France

Re: Green Key Technologies Comments to Consultation Paper;

Draft Guidelines on the Market Abuse Regulation;

ESMA 2016/162; 28 January 2016

Dear Sir or Madam:

Thank you very much for the opportunity to provide comments to the Consultation Paper (the “CP”) that consists of Draft Guidelines on the Market Abuse Regulation (“MAR”). We appreciate that the European Securities and Markets Authority (“ESMA” or the “Authority”) has requested feedback on its important work in the market abuse area, as well as on other topics.

Green Key Technologies (“we” or “GKT”) are the voice-led collaboration platform for teams in financial markets: enhancing compliance and enabling sophisticated data analytics and workflows. We have been in existence since November 2013 and operate across multiple time zones with offices in the following cities: Chicago, New York, London and Singapore.

Since our inception we have created a cloud-based “software turret” that completely replicates the functionality of legacy hardware turrets and lines, but at a fraction of the cost.  Traders and brokers simply download the voice software onto their device, establish connections to counter-parties and “push-to-talk” in real time with an unlimited number of users. Communication is encrypted, recorded and can be transcribed for real-time compliance capabilities.  The Green Key VoIP network now includes over 250 of the world’s largest banks, brokerage firms and trading firms.

**CP – Questions 5-7**

We would like to provide feedback to the Authority on questions 5-7 of the CP. More specifically, our focus is on Section 2.11, “Written minutes or notes and recording of telephone calls,” pp 15-16. As an overview, we believe that ESMA has taken steps in the right direction by requiring recording and retention of telephone conversations. Given our experience with telephony technology, including recording functionality, we submit that the Authority should go even further with some of its requirements, as discussed below.

**Q.5. Do you agree with the revised approach regarding the recording of the telephone calls?**

While GKT supports the recording requirement, we believe that a few changes should be made and the requirements enhanced. Initially, we note that ESMA mandated that each party to a telephone conversation in which a market sounding was conducted to record the conversation. In this current proposal, ESMA has backed away from the dual recording approach and is only requiring that the Disclosing Market Participant (“DMP”) be responsible for the recording and retention of the market sounding. The party receiving the market sounding, or “MSR,” is now exempt.

We disagree with the new approach and submit that both parties – DMP and MSR – be responsible for recording. Our reasons for this recommendation are: first, while recording technology is very reliable, it isn’t perfect. Requiring two parties to record the conversation ensures that at least one recording of the market sounding will exist. It is essentially requiring the creation of a back-up. Second, every party is responsible for its own compliance. MSRs shouldn’t have to rely on DMPs in order to demonstrate compliance as to its behavior in a market sounding. Lastly, if an MSR is being investigated regarding a course of conduct over several market soundings, a regulator will be forced to go to several different DMPs to get the telephone recording of the MSR at issue. In other words, from an efficiency standpoint, if an MSR is required to record the market sounding discussions that it has with a variety of DMPs, then all of those conversations will be in one place.

We would like to add that, in our experience, there is a wide range of recording quality that exists among market participants, MSRs and DMPs. There should be requirements that (a) ***the recording be, at a minimum, clearly audible***; and (b) that all lines that a person could use are recorded. Some of the situations that we have come across include:

* Many separate lines were recorded on one line (so that the listener heard many different conversations at one time rendering the recording useless);
* Audio quality that sounds no better than “white noise”; and,
* A market participant who opens a line that he/she knew would be recorded (line 1) and then proceeds to carry on conversations on other lines within the telephone system that are not recorded (lines 2-20). So, at the end of the day, the recorded line contains only silence.

Aside from requiring both parties on a market sounding to record the conversation, the Authority should also require that the parties must transcribe those conversations (or, at least a percentage of the conversations). Transcription technology exists today and it is reliable and effective. Thus, the approach should be that all conversations must be recorded and clearly audible. From that universe of recordings, a certain percentage of the conversations should be required to be transcribed. The compliance department would then be tasked with auditing/reviewing the transcripts (a certain size of the overall universe) to ensure that the market participant/MSR/DMP is in compliance.

Additionally, the transcription must be searchable. Thus, requiring this function may actually save money for market participants in the long run. That is, a compliance department could work with regulators to focus on certain search terms that would likely pick up market abuse activity. We would also recommend that compliance officers read a certain percentage of the transcripts. Nonetheless, the search capacity is a very powerful compliance tool.

On retention issues, we note that ESMA has a 5 year holding period for recordings, but some of the literature suggests that 7 years may be more appropriate. While we do not offer a view on the 5 versus 7 year debate, we do suggest that before the 5/7 year clock begins ticking that the transaction in question should be complete. So, similar to the U.S. requirement regarding swaps – where various components of the transaction must be retained, that is: (i) all of the activity leading up to the swap; (ii) the length of the swap (for example, 10 years for a 10 year swap); and then (iii) a 5 year retention period – we would offer that the same be done for market soundings. Thus, assuming M&A activity is being discussed, then the pre-discussions leading up to the M&A should be retained; the period of time for the M&A to take place should be retained; and, lastly, then the 5/7 year clock should begin at that point (after the M&A fully and finally closes and all of the documents are executed and the transaction occurs).

One point to keep in mind about record retention periods, generally, is to ensure that the parties retaining the telephone conversations, the transcriptions or any record maintain technology that can still read and/or listen to the conversation for the period of retention. For example, as to a swap transaction, if the swap is for a 20 year period and the additional 5 years are added to it, then 25 years from the initiation of the swap, the parties may need to access records related to it, including telephone conversations. It is likely that the technology will be quite different 25 years in the future. As such, it behooves market participants to either maintain such technology and/or work with a third party provider that will ensure that the recordings are audible and that the technology still works. Another solution would be to create transcripts that are retained in paper format.

**Q.6. Do you agree with the proposal regarding MSR’s obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?**

Drafting minutes of important events can be a useful tool for market participants. However, as has been demonstrated in the corporate minute-taking context, minutes are far from perfect. While drafters usually strive for neutral and objective language, minutes can often be “slanted” in a way to bias one party over another. Indeed, there are numerous law firms and trade associations that provide suggestions as to how to “strategically” draft minutes. Minute drafting is an art that, unfortunately, may not fully and accurately reflect the content of a conversation.

For those reasons, we would recommend that recording such face-to-face meetings be mandated. There are numerous companies that provide cost-effective recording solutions to the marketplace, including Green Key.

**Q.7. Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?**

As noted above, many providers of telephony technology provide their services for very reasonable costs. Depending on what functions a client desires, our experience suggests that the services offered range from $50/user/month to $200/user/month. GreenKey’s solution costs far less than traditional telephony, and includes all the recording, retention and transcription capabilities to exceed the requirements proposed.

We note that most market participants, MSRs and DMPs would likely already have compliance departments. Review of additional telephone conversations of market soundings will add to their workload – and may require that additional personnel be retained (or outsourced) – but, again, the technology can assist compliance and make the review very efficient. For example, transcription services, with search functionality, could substantially reduce the amount of time that compliance officers are required to spend on a review of telephone conversations.

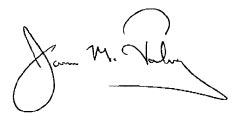
**Conclusion**

Not that many years ago, the Chicago open outcry markets would on occasion result in errors and disagreements between traders on the floor. To deal with these issues, the exchanges introduced video technology so that the traders could go to a room off of the floor and rewind the tape to watch themselves conduct the transaction that resulted in the dispute.

Recording and transcribing telephone conversations today are no different. The technology will help reduce errors, minimize market abuse and substantially reduce, if not eliminate, litigation around market soundings or other transactions. With the suggestions that we offered, above, we submit that the goals of recording will be met – in particular, better compliance. This can all be achieved with existing technology that is readily available for minimal cost.

Once again, we thank you for the opportunity to provide our thoughts and observations to you. Should you have any questions, please do not hesitate to contact us at 312-404-5839.

Best regards,



James M. Falvey

General Counsel