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Re: Draft guidelines on the Market Abuse Regulation

The Investment Association welcomes the opportunity to respond to ESMA's consultation paper.

The Investment Association represents the UK asset management industry. Our members manage over £5 trillion in the UK of assets on behalf of UK, European and international clients, both retail and institutional. Collectively, our members make up the second-largest asset management industry in the world.

We note the two areas of most significance to our members:

- The Guidelines seem to go significantly beyond the scope of the Level 1 Regulation in imposing record keeping requirements on MSRs.
- The cumulative weight of requirements imposed on MSRs by the proposed guideline may result in many of them reconsidering their participation in the market sounding process in future.

In response to issues raised in the consultation paper on which no questions were asked:

2.4 The current wording of Guideline point 2 imposes an obligation on the MSR to indicate to the DMP, every time it is addressed, whether it wants to receive future market soundings. Instead, the MSR should be encouraged, but not obliged, to indicate to any DMP or potential DMP whether or not it wishes to receive specific market soundings or market soundings in general. It is in the MSR's interest to communicate to the DMP whether it wants to receive future market soundings.

2.7 We agree with ESMA's proposed approach, that no specific requirement should be included in the MSR Guidelines. We also note that under Article 32(3) all regulated firms should have appropriate internal procedures for employees to report infringements of MAR.

2.10 We note that the obligation in Guideline point 7 would only apply when a market sounding included inside information.

MSRs would find their being obliged, on receiving a market sounding, to identify *all* the issuers and financial instruments to which the inside information relates extremely onerous in theory and very difficult to comply with in practice. Even applying a blanket ban across all instrument types issued by related issuers would not necessarily be sufficient to capture all related issuers in some circumstances.

While recognising the logic to this requirement, we would argue that it needs to be softened slightly to avoid firms inadvertently breaching it, despite taking reasonable steps to identify all related securities and issuers.

We note that Recital 23 states that the 'essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information'. If a firm identifies all those financial instruments to which it believes the inside information relates, then it does not believe that the inside information would relate to other financial instruments, and they could not, therefore *make use of* the inside information in their dealings in those financial instruments (as they don't believe they are related), so they could not thereby gain an unfair advantage.

To resolve this issue we would suggest that Item 7 of the proposed guidelines be amended to state 'the MSR should identify all the issuers and financial instruments to which *they believe* that inside information relates'.

Below, we have provided our responses to the questions raised in your paper.

Yours

Adrian Hood
Regulatory and Financial Crime Expert

Consultation Paper – Draft guidelines on the Market Abuse Regulation

Section 2: Guidelines for persons receiving market soundings

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

While recognising that MSRs have an obligation to impose controls over any inside information they have, there should be nothing in the guidelines to stop them from relying on the assessment of a DMP that they are receiving inside information.

MSRs should independently assess those market soundings where they are informed that they have not received inside information, because in those circumstances they may have additional information that, when put together with the newly disclosed information, constitutes inside information.

MSRs should only be required to make a formal record of their decisions when they differ from that of the DMP.

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

This seems reasonable, as long as the obligation on the MSR is merely to notify the DMP that their interpretation differs, with no further legal analysis or explanation required.

Any requirement for further discussion between DMP and MSR on the question of whether disclosed information qualifies as inside information could increase the risk that inside information is disclosed. Such disclosure of inside information would increase the compliance requirements, and risk of breach, for both parties, unnecessarily.

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

We consider that the wording of Guideline point 5.1.b. should better target 'proper training' on those who assess whether the MSR possesses inside information, rather than the whole function or body in which they are located.

While all firms will, as a matter of course, have internal procedures on the treatment of inside information received from DMPs, it does not seem necessary to require that these extend to cover non-inside information received from DMPs. If the information received from the DMP in the market sounding is not inside information, and the MSR is not, thereby made an insider, then there should be no new requirements imposed on the MSR.

If our point, in the first paragraph above is accepted, then the internal procedures within sections **5**.1)a.) and **5**.1)c.) seem to be very similar, if not identical. Both require the firm to control the flow of inside information arising from the market sounding. They could, without loss of clarity, be combined.

Should not the reference in 5.1)c. to 'Articles 8 and 10 of MAR' actually be to Article 14 of MAR? Articles 8 and 10 set out what amounts to Insider Dealing and Unlawful Disclosure, it is Article 14 which states that firms should not engage in such activities.

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

While it is noted that there is nothing in either MAR Level 1 nor Level 2 text that would require MSRs to record such details, we recognise that doing so would ease any investigations by competent authorities into breaches of Article 8 or 10 of MAR.

We would suggest, to more tightly target the requirement to its objectives, that the list should comprise only staff who are in possession of ***inside*** information communicated in the course of the market soundings.

There is no specific requirement in either MAR Level 1 nor the Level 2 text that would require MSRs to record details of those who are made insiders as a result of DMPs market sounding them. The proposed ESMA Guidelines are going beyond the scope of their mandate, which only relates to the steps they are to take, and records they are to keep, in order to demonstrate compliance with Articles 8 and 10.

The records to be kept would be necessary where some natural persons have access to the inside information, while others don't: for instance where a firm operates an effective 'Chinese Wall'. The records would not seem necessary where a firm acts as though all natural persons working for it are deemed to be insiders, and a general 'stop' is put on any trading in related securities.

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

We strongly endorse the approach taken by ESMA: that the requirement to record telephone call falls solely on the DMP. Many MSRs would not be under any other obligation to record telephone lines, so to impose such an obligation for this one purpose would impose disproportionate costs on firms. This, in turn, would discourage them from taking part in market soundings, to the detriment of the market and their investors.

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

This requirement seems to go beyond anything required in the Level 1 Regulation. The proposed Level 2 text is based on Article 11(8) of MAR, which imposes record keeping requirements only on the DMP. There is no justification for extrapolating from this to impose record keeping obligations on the MSR.

While it is noted that the review, by the MSR, of the DMP minutes of any non-recorded meeting, and the signing of the minutes, or written challenge to them,

would constitute a robust defence, should there subsequently be any dispute between the parties, or allegation of market abuse, this activity should be voluntary on behalf of the MSR. It is unlikely that there would, normally, be any dispute between the versions of events, so imposing such a review requirement on the MSR is disproportionate.

Where there is any disagreement between the parties, this will normally be apparent at the time of the meeting, so triggering the extra precautions by the MSR. However, the vast majority of such meetings are non-contentious and imposing this review regime on the MSR will achieve little, other than to discourage them from taking part in the market sounding process, to the detriment of market functioning.

An extra option should be added to Item 8 of the guidelines:

c. passively accept the version of the meeting as recorded by the DMP, by not responding to the minutes or note that they provide, within five working days.

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

Asset management firms do not directly benefit from taking part in the market sounding process. While it is recognised that the market, as a whole, benefits from the process occurring, firms incur costs, both direct and in terms of time spent, and risk being seen to breach the many regulatory or legal obligations that arise. The cost / benefit equation is already causing many asset management firms to seriously consider ceasing to accept market soundings.

We are concerned that despite the background to, and aims of, each guideline making theoretical sense, when they are combined, and put into practice, the additional requirements around assessments, evidencing, notification and record-keeping may well lead to the process of market soundings becoming excessively burdensome to MSRs.

The initial and ongoing costs of training staff on the market soundings procedure required due to the proposed Guidelines (including assessment and subsequent record keeping requirements) and the time spent by front office staff completing this training and carrying out the assessment and subsequent recording are the main costs foreseen. Whilst the costs associated with these activities would not be highly significant, they would be noticeable and add to those already faced by asset management firms taking market soundings.

The time spent by portfolio and fund managers away from managing their funds to complete what could be perceived, in some cases as tasks that add minimal value, could have a negative impact on the performance of their funds and thus their clients' investments.

Firms may well determine that, as a result of the increased burden, they will cease participating in market soundings, which would have a negative impact on the market as a whole.

Section 3: Guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public

Q8. Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

We believe that the guidance provided is sensible, as long as firms are compelled to justify to the competent authority, on every occasion, how they think these examples of legitimate interests apply to them, so that this guidance is not abused to allow inappropriate delay of disclosure of inside information.

As inside information always contradicts market expectations, this exception to the general rule of disclosing inside information should, as with all exceptions, be read narrowly.

Q9. Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

We agree with the proposed list of situations.

As we agree that inside information always contradicts market expectations, we re-emphasise that this exception to the general rule to disclose should, as with all exceptions, be read narrowly.

Q10. Do you see other elements to be considered for assessing market's expectations?

No comment