Securities and Markets Stakeholder Group

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ADVICE TO ESMA

Response to ESMA's Consultation Paper on Draft Technical Standards on the Market Abuse Regulation and on ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation

I. Executive summary

The Market Abuse Regulation (MAR) establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets. To achieve those goals, ESMA has been mandated to draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS). Furthermore the European Commission has requested ESMA for technical advice on implementing acts. To this end ESMA has published a Consultation Paper on Draft Technical Standards on the Market Abuse Regulation and a Consultation Paper on draft technical advice on possible delegated acts concerning the Market Abuse Regulation.

One of the main tasks of the Securities Markets Stakeholder Group (SMSG) is to provide a high level advice to ESMA on the preparation of RTS and ITS and proposals of delegated acts. The SMSG therefore has focused on ESMA's approach building a single rulebook on market abuse. In addition the SMSG has prepared answers for selected questions which are relevant for the aim of the MAR to avoid potential regulatory arbitrage and to provide more legal certainty and less regulatory complexity for market participants.

ESMA has made great efforts in developing a level 2-regime in line with the purpose of the MAR. With respect to the many informational elements of ESMA's proposals, the SMSG recognizes a welcome emphasis on the role transparency plays in mitigating the risk of market abuse but also on the need for related mandatory disclosure to be readable and understandable. Furthermore the SMSG agrees with ESMA's general concern that enforcement be supported.

The SMSG provides advice on nine topics ESMA's Consultation Papers are dealing with. Market soundings, insider lists, investment recommendations and manager transactions are key issues. The SMSG has the following position on these topics:

- *Market soundings are important for the proper functioning of financial markets. The SMSG welcomes that the MAR provides an exemption from the prohibition of market abuse provided that certain conditions are met. ESMA's approach determining appropriate arrangements, procedures and record keeping requirements principally seems flexible and practical. In particular the SMSG strongly supports EMSA's emphasis on the need to protect market soundings as a means of managing relations between the issuer and investors. However some processes proposed by ESMA seem to be too complex. As a result market sounding might be discouraged.*

- *Insider lists are an important tool for competent authorities when investigation market abuse. The SMSG therefore welcomes the harmonisation of insider lists. But the Group is concerned about the extensive information ESMA intends to be provided by insiders.*

- *With respect to investment recommendations, the SMSG observes that the current regime under the Market Abuse Directive and Directive 2003/125/EC principally has worked well. But given the developments in other areas of European capital markets law, it is reasonable tightening some rules. In particular, the SMSG generally agrees with ESMA's approach to provide stricter rules for qualified persons, such as the disclosure of financial interests and conflicts of interest.*

- *Disclosure of manager transactions is an important part of the MAR and plays a great role in practice. However the SMSG is concerned about ESMA's proposal defining the respective obligations in a broad way, which is not in line with the purpose of the law. A further concern relates to ESMA's advice how to interpret the closed period for managers. In fact the closed period is a complementary instrument aimed at preventing the abuse of inside information but it does not follow a transparency purpose. This should be taken into account when defining the circumstances under which a manager can be permitted to trade during a closed period.*

II. Background

1. On 2 July 2014, the EU Regulation on Market Abuse (MAR) entered into force. The MAR empowers ESMA to develop draft regulatory and implementing technical standards to be endorsed by the Commission. Furthermore, the MAR empowers the Commission to adopt implementing acts by means of delegated acts. To this end the Commission has requested ESMA for Technical Advice on Implementing Acts (mandates published on 21 October 2013 and 2 June 2014).

2. On 11 July 2014, ESMA published its Consultation Paper on ESMA's draft technical advice on possible delegated acts concerning the Market Abuse Regulation (ESMA/2014/808 – "CP on Technical Advice") and on 15 July 2014 its Consultation Paper on Draft Technical Standards on the Market Abuse Regulation (ESMA/2014/809 – "CP on draft RTS"). The CPs are the follow-up of ESMA's Discussion Paper on ESMA's policy orientations and initial proposals for MAR implementing measures published on 14 November 2013 ("DP on MAR").

3. On 21 April 2014, the SMSG responded to ESMA's DP on the MAR (ESMA/2014/SMSG011). After having published its CPs, ESMA requested SMSG's opinion on the proposed technical standards (CP on draft RTS). The SMSG herewith gives advice to ESMA and also responds to ESMA's CP on Technical Advice. In addition SMSG provides its opinion on ESMA's approach building a single rulebook on market abuse.

III. Comments

1. General comments on ESMA's approach building a single rulebook on market abuse

4. The MAR constitutes a new era for capital markets regulation in Europe. It establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets. The MAR shall provide uniform rules and clarity of key concepts. In order to ensure uniform conditions, the Commission is empowered to adopt imple-

menting acts and ESMA is required to elaborate standards to be adopted by the Commission. The MAR and the accompanying level 2-measures will build a single rulebook on market abuse in Europe.

5. The change from directives (to be transposed by the Member States into their national laws) to (directly applicable) regulations is probably one of the most important changes the European market abuse regime has undergone. However this implies that market participants are able to understand the law enacted by the European legislature. This is not the case for every provision of the MAR. In some language versions sentences are even incomplete. The SMSG is aware of the fact that a translation of the English version of the MAR into all EU languages is challenging. However it is extremely important to have a comprehensive legal text, especially given the fact that some prohibitions are part of criminal law (the Directive 2014/57/EU on criminal sanctions for market abuse refers in many provisions to the MAR!). The SMSG suggests that the Commission and/or ESMA ask NCAs to analyse the texts and provide them with an error list.

6. The single rulebook on market abuse is a fundamental element of EU capital markets regulation. Therefore ESMA´s proposals for a level 2-regime should be consistent with either, any other legislation in force or, with existing recommendations by ESMA, in particular with MiFID-II/MiFIR and the Transparency Directive (TD). Any inconsistency with other legislation has to be avoided otherwise it would lead to significant implementation difficulties for market participants and affect the reliability of data aggregation and analysis by the competent authority. The SMSG observes that ESMA's draft RTS and draft Technical Advice take into account the developments European capital markets law has went through in the last years. This is particularly the case for ESMA's proposals of disclosure obligations.

7. ESMA has made great efforts in developing a level 2-regime in line with the purpose of the MAR. With respect to the many informational elements of ESMA's proposals, the SMSG recognizes a welcome emphasis on the role transparency plays in mitigating the risk of market abuse but also on the need for related mandatory disclosure to be readable and understandable. Furthermore the SMSG agrees with ESMA's general concern across both the CP on draft RTS and the CP on Technical Advice that enforcement be supported (strong enforcement is essential if the new market abuse regime is to have teeth) and its emphasis on the application by the market of judgment when considering the risk of engaging in market abuse. Finally the SMSG welcomes ESMA's non-prescriptive approach in places, given the risks engaged in adopting highly detailed requirements which may be over-taken by market developments.

2. Market sounding (CP on draft RTS)

8. Market soundings are interactions between a seller of financial instruments and one or more potential investors prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring. The MAR acknowledges that market soundings are important for the proper functioning of financial markets and should not in themselves be regarded as market abuse. Provided that a disclosing market participant (DMP) complies with the requirements laid down in the MAR, disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person's employment, profession or duties (Art. 12 (4) MAR). In order to ensure consistent harmonisation, ESMA shall develop draft RTS to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements laid down in the MAR (Art. 12 IX MAR).

2.1. Principles of the new regime

9. The regime on market sounding is new on the European level. Even the Member States do not have respective rules in place,[1] the only exception being France where the AMF requires investment services providers that poll the market when preparing a corporate financing transaction to comply with the obligations laid down in the regulation of the AMF and with the code of good conduct that sets out the conditions of its implementation and has been approved by the AMF.[2] But market sounding is a common market practice and there is always a risk for market participants of violating prohibition of insider dealing. The SMSG therefore welcomes that the MAR following the example of France provides an exemption for market soundings from the market abuse regime. It agrees with ESMA's approach generally which mainly seems to be flexible and practical. In particular, the Group strongly supports ESMA's emphasis on the need to protect market soundings as a means of managing relations between the issuer and investors (CP on draft RTS para. 72), and to reflect the purpose of the exemption, for example the inclusion of third parties (CP on draft RTS para. 64 and 66 – particularly with respect to the proposed flexibility in relation to more generally assessing market conditions and appetite). However, some processes proposed by ESMA seem to be too complex. As a result, market soundings might be discouraged, as can be observed in France in the last two years.

2.2. Inside information subject do disclosure by a DMP

10. According to Art. 11 (1) MAR, a market sounding comprises the communication of information in order to gauge the interest of potential investors. A DMP shall, prior to conducting a market sounding, specifically consider whether the market sounding will involve the disclosure of inside information (Art. 11 (3) MAR). Provided that a DMP complies with this requirement and the ones laid down in Art. 11 (5) MAR, disclosure of inside information made in the course of a market sounding shall be made in the normal exercise of a person's employment, profession or duties (Art. 11 (4) MAR). The SMSG again highlights that a DMP only has to fulfil the obligations stipulated by Art. 11 (5)-(8) MAR if the respective information has to be considered as an inside information and the issuer did not have to disclose it. This is the case if the issuer had delayed disclosure (cf. Art. 17 (4) MAR) or when the inside information does not directly concern the issuer (cf. Art. 17 (1) MAR).

11. ESMA has dealt extensively with the requirement to specifically consider whether the market sounding will involve the disclosure of inside information (CP on draft RTS para. 73-83). One of its main conclusions is that the information a DMP may disclose would generally relate to the exact characteristics of the possible transaction in relation to which the DMP intends to sound out investors. However, it could also include other information not necessarily directly related to the possible transaction but providing important context to the transaction, such as the financial standing of the issuer (para. 74).

12. The SMSG generally agrees with this interpretation. Art. 11 MAR does not restrict the nature of the inside information disclosed by a DMP. It is therefore in line with the wording of the provisions on market sounding that not only inside information relating to the transaction, but also other inside

[1] But NCAs have already dealt with this issue. In the UK the former FSA has imposed significant fines on investors for insider dealing after they have been sounded by brokers, cf. FSA, David Einhorn/Greenlight Capital, Inc. 25 Jan. 2012, FSA/PN/005/2012; FSA, Darren Morton und Christopher Parry/Dresdner Kleinwort, 7 Oct. 2009, FSA/PN/134/2009. Furthermore the FCA provides guidance in order to facilitate any commercial, financial or investment transaction (cf. FCA Handbook MAR 1.4.5).

[2] Cf. Art. 216-1 RG AMF.

information is disclosed. However the exemption has also to be interpreted in light of the purpose of Art. 11 MAR and the case-law of the ECJ still valid for the MAR. According to the ECJ, any exemption of the prohibition to disclose inside information must be treated restrictively and can only be justified if there is a close link between the disclosure and the exercise of the employment, profession or duties and the disclosure of inside information is strictly necessary for the exercise thereof.[3] The purpose of Art. 11 MAR is to facilitate corporate finance transactions. Therefore a DMP is allowed to provide information to the buy side with regard to "the terms that will make up a transaction" (recital 33 MAR). But it is generally not necessary for gauging the interest of an investor to keep him updated about any other inside information. Thus inside information may not be disclosed by a DMP if it is not necessary for evaluating the respective transaction. Similarly, unless the issuer is obliged to generally disclose such inside information (Art. 17 (1) MAR), it has to ensure the confidentiality of that information (Art. 17 (4) MAR).

13. ESMA's approach on 'transaction' vs 'issuer' information is reflected in Annex IV draft RTS Recital 18, but not in either Annex IV draft RTS Article 13 (1) (v) or Annex V draft ITS Annex I (v), which should be amended to conform and read as following: "v. The information being sounded in accordance with Article 12(1) of the RTS on market sounding".

2.3. Standards for conducting a market sounding

14. With respect to Q3, the standards which apply prior to conducting a market sounding principally seem reasonable and proportionate. In particular the SMSG welcomes the fact that ESMA does not restrict the hours in which market soundings can take place. The time-lag between market sounding and the proposed transaction will vary depending on the circumstances and of course on the complexity of the transaction.

15. Art. 11 (5) (a) MAR requires the DMP to obtain the consent of the person receiving the market sounding (buy side) to receive inside information. In order to prevent unwanted wall-crossing, the buy side should be encouraged to inform the sell side of their unwillingness to be wall-crossed in any circumstances. ESMA's DP on MAR has dealt extensively with the requirements related to the issues of obtaining the buy side agreement and has brought up several options for discussion. Option 1 would be simply to require that the DMP prior to wall-crossing seeks the consent of the buy-side to be wall-crossed. Option 2 goes beyond this and requires that the DMP also keeps a list of those clients that have informed it that they would never want to be wall-crossed and does not contact these clients in relation to potential transactions. ESMA's CP on draft RTS (para. 87) notes that, whilst a majority of respondents favoured option 1, a significant minority stated investors should not be "prevented" from expressing their general wishes to the DMPs (the lists of the 'unwilling' proposed to be mandated in option 2 in the DP). The SMSG holds the view that investors should certainly not be prevented from expressing such wishes. However the adoption of option 1 by ESMA would not have prevented them from doing so. Thus ESMA's concern should not be necessarily a valid basis for the proposal to proceed on the basis of option 2. Instead ESMA should pursue option 1 which is more flexible,

16. The MAR requires a DMP to keep a record of its compliance with all the processes and procedures. ESMA is of the opinion that the record keeping requirements should apply in relation to every type of market sounding, irrespective of whether inside information is part of the communication or not

[3] ECJ of 22 Nov. 2005, C-384/02 [2005] ECR I-9939.

(CP on draft RTS para. 90). Principally, procedural provisions where no inside information is involved should be outside of MAR's scope. But the SMSG acknowledges that it might be appropriate to apply record keeping requirements for market soundings where the DMP categorises the information as not inside information (para. 91). This, if effective, may indeed be helpful to DMPs and might perhaps even (as suggested in para. 92) somewhat mitigate the likelihood of DMPs routinely treating information as inside. However it is unclear whether there is a competence for ESMA and Commission to adopt a respective rule under the MAR.

17. With respect to Q4 on the proposal for standard template for scripts, the SMSG draws the attention to the fact that Eurobond syndicates can be very large and only a minority of the syndicate members (usually the most active ones) will be involved in any market soundings. Consequently the statement (CP on draft RTS para. 64) that "each member of the syndicate is considered to be a DMP" seems technically incorrect at first glance. However, Annex IV draft RTS defines "syndicate" at Article 2(k) to only mean those members of a syndicate that are DMPs – so the approach seems workable after all.

18. Where information ceases to be inside information according to the assessment of the DMP, the DMP shall inform the recipient accordingly (Art. 11 (6) MAR). In order to bring as much clarity as possible to the potential investors as to the expected date at which the transaction is likely to become public, ESMA suggests this date should be part of the assessment conducted by the DMP prior to the sounding and also part of the information passed to potential investors in the course of the sounding (CP on draft RTS para. 108). With regard to the content of standard template for scripts, ESMA deals with the situation that the DMP has assessed the information to be inside information. In this case, the script should contain "the anticipated time when information will cease to be inside information" (cf. CP on draft RTS para. 94 (iv) (c) Annex IV draft RTS Article 13 (1) and Annex V draft ITS Annex I (iv) (c)). However it is difficult to assess for a DMP when information will cease to be inside information. A further argument against the proposed rule follows from Art. 11 (10) MAR. ESMA is only empowered to draft ITS to specify the technical means for appropriate communication of the respective information. The SMSG is of the opinion it would be sufficient to require "an explanation on how the market sounding recipient will be informed in case the disclosing market participant communicates further information to the market sounding recipient for the purposes of applying Art. 11 (6) of Regulation 596/2014".

19. The standard template for the scripts should also contain an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid (CP on draft RTS para. 94 (iv.) (c), Annex IV draft RTS Article 13 (1) (iv) (c), Annex V draft ITS Article 5 and Annex V draft ITS Annex I (iv) (c)). However ESMA recognises that it is not always possible to go beyond the disclosure (referred to in para. 13) and to clarify what should happen where effectively that timeline is impacted (CP on draft RTS para. 109). Consequently Annex V draft ITS Article 5 and the latter part of Annex V draft ITS Annex I (iv) (c) should, respectively, be clarified as following, so as not to imply there will be further disclosure to sounding recipients in the cases envisaged in para. 109 that are not strictly within Article 11 (6) of MAR (and a [generally accepted] electronic method of communication should be sufficient): "[...] and an explanation on how the market sounding recipient will be informed in case the disclosing market participant communicates further information to the market sounding recipient for the purposes of applying Article 11(6) of Regulation 596/2014".

20. A further content of the template for the scripts of market sounding should be the "confirmation that the disclosing market participant is speaking with the appropriate person and that person's consent to proceed with the conversation. This seems to be a superfluous additional requirement,

since the market sounding recipient will in any case have to also consent to receiving the sounded information itself.

21. In practice it is challenging for DMPs to correctly evaluate whether an information has to be considered as inside information, especially given the ever wider and less intuitive interpretation certain regulators have been placing on the inside information definition in recent years and the harsh sanctions. Consequently DMPs in practice treat much information as inside, even if they would consider it not so on a sensible interpretation of the inside information definition. This will likely continue to be so, even if some mitigation results from the approach suggested by ESMA in its CP on draft RTS para. 91 to establish at Level 2 procedures to enable a DMP to avail itself of the protection under Article 11 MAR where inside information is disclosed during sounding that has been categorised by the DMP as not being inside. This fact should be reflected in the wording of the sounding scripts in Annex V draft ITS Annex I (iv).

22. With respect to Q5 on the proposals regarding sounding lists, recording details of just the persons actually contacted by the DMP (and not any persons to whom information was subsequently distributed to internally), as proposed in CP draft RTS para. 96, seems sensible.

23. With respect to Q6, the risk of regulatory error relates to over-inclusive and onerous lists (the danger of replicating the 'insider lists' problem): the approach adopted by ESMA, however, seems proportionate and tailored to enforcement needs (CP on draft RTS para. 96-97).

24. DMPs should ensure all market soundings and subsequent discussions or communications are recorded on a durable medium. But there will be no contact details used for the sounding where it is conducted face to face (as acknowledged in CP on draft RTS para. 101), so Annex IV draft RTS Article 14 (1) (c) should be amended accordingly.

25. With respect to Q8 on the proposals regarding DMPs' internal processes and controls, the SMSG wishes to note that DMPs are internally organised between functions that are treated as 'private-side' (such as DCM/origination and syndicate) and those that are treated as 'public-side' (such as sales). This helps the efficient establishment and internal policing of information barriers. In this respect, it seems workable to limit the number of DMP employees, be they 'private-side' or 'public-side', not responsible for sounding yet having access to the sounded information, to those with a 'need to know'. However "ensuring" that non-sounding 'private-side' staff "are not in possession" of the sounded information (as provided for in Annex IV draft RTS Art. 11 (3) (c)) would disproportionately undermine the value of segregating such 'public' and 'private' sides.

3. Accepted market practices (CP on draft RTS)

26. The prohibition of market manipulation shall not apply, provided that the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction order or behaviour have been carried out for legitimate reasons and conform with an accepted market practice in accordance with Art. 13 MAR. In order to ensure consistent harmonisation, ESMA shall develop draft RTS specifying the criteria, the procedure and the requirements for establishing an accepted market practice (AMP) as well as the requirements for maintaining it, terminating it, or modifying the conditions for its acceptance.

27. The MAR has extended the scope of market abuse. In particular, it includes within its scope transactions that take place outside a trading venue (OTC transactions). The SMSG agrees with ESMA's

view that such transactions should not be excluded from the scope of AMP (Q9 CP on draft RTS). In order to ensure appropriate supervision of the new regulatory perimeter (post MiFID II/MiFIR as well as MAR) it seems functionally necessary to adopt ESMA's proposed approach to including OTC transactions, which approach is also calibrated to the distinct features of OTC trading (the reference to the assessment of transparency). With respect to Q10 (CP on draft RTS), the (advised) limitation of AMP to supervised entities fits well with the MAR theme of supporting strong supervision and enforcement.

28. A competent authority has to take into account several criteria when deciding to establish an AMP. One of these is whether the market practice ensures a high degree of safeguard to the operation of market forces and the proper interplay of the forces of supply and demand (Art. 13 (2) (b) MAR). ESMA is of the opinion that the principle of independence of action of the firm executing the AMP should be recommended by competent authorities. In this respect the issuer or other interested party should not instruct the firm performing the AMP on how to conduct trading (CP on draft RTS para. 140). The SMSG generally agrees with this understanding. But independency can also be ensured in a different way, such as Chinese walls. In particular this would be helpful for a listed credit institution and investment firms belonging to the same group of the issuer. In this case the requirement of independence could be respected through the imposition of effective Chinese walls by the investment firm performing an AMP. This approach would be consistent with other EU regulation, such as the restrictions for buy-back programmes (cf. Art. 6 (2) EC Regulation 2273/2003).

29. With respect to an AMP already in place, the SMSG asks ESMA to clarify that a NCA can extend the AMP to a MTF/OTF upon request of an interested party, depending on the circumstances of the individual case. The SMSG understands that level 1 does not allow extending the AMP automatically but only under the conditions specified in Art. 13 (2) MAR and only under full approval process defined under MAR. The reason for this is that AMPs are fitted to specific market conditions of a given market.

4. Suspicious transaction and order reporting (CP on draft RTS)

30. Market operators and investment firms that operate a trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing and market manipulation (Art. 16 (1) MAR). ESMA shall develop draft RTS to determine the details (Art. 16 (5) MAR). To this end ESMA has dealt with the reporting obligations, level of suspicion required, the arrangements to detect prohibited behaviour, the templates for notification and the requirement to keep a record of submitted information for at least five years (CP on draft RTS para. 177-215). ESMA is of the view that an entity should be required to keep a record of "potentially suspicious transactions – near misses" (para. 214). It is of the opinion that it would not be particularly difficult for an entity to identify at the time those cases where it has considered seriously whether to submit a report but had decided against doing so.

31. The SMSG does not agree with ESMA's approach. Firstly it is not clear what ESMA means with a "near-miss", especially given the fact that ESMA's CP does not provide a clear definition. This will cause many implementation difficulties and will lead to different practices in the Member States. It will, contrary to ESMA's opinion, be complicated for an entity to apply the concept of a "near-miss". The process to determine transactions which have to be reported to the NCAs would have to be organized as a two stage-process. In the first stage some orders or transactions would be marked as requiring further examination. In practice this task is fulfilled by employees who are qualified in processing of client orders but typically not necessarily highly qualified in detecting market abuse.

As a next step, selected orders and transactions would have to be examined more thoroughly by specialised persons who have the knowledge to decide whether a specific order or transaction is "reasonably suspicious" (cf. Art. 16 (2) MAR). As no definition of a "near-miss" exists, market participants could be afraid that this term would be applied to all orders selected in the first stage but rejected in the second stage as not suspicious at all. Ex post it is easy to say that such facts should have been detected as market abuse and declared to the NCA as such. Ex ante it is not that simple. The SMSG therefore finds it possible that there would be a natural tendency to diminish the number of orders and transactions marked in the first stage to further examination to avoid a risk of ex post examination by NCAs. In consequence really suspicious orders or transactions could be lost in the first stage, with a negative effect of lowering the effectiveness of the whole process.

32. Secondly the SMSG does not see any legal basis for a respective rule; Art. 16 (5) MAR does not empower ESMA to draft technical standards in order to deal with "near-misses" but to determine the "arrangements, systems and procedures for persons to comply with the requirement to report orders and transactions" that could constitute "insider dealing or market manipulation". Since a "near-miss" does not seem to be a suspicious transaction there is no need for record-keeping in such cases. The SMSG rejects ESMA's proposal. Instead of introducing the concept of "near-miss", NCAs should focus on the existence and quality of the procedures implemented by persons subject to the requirements under Art. 16 MAR to detect market abuse.

5. Insider list (CP on draft RTS)

33. Issuers or any person acting on their behalf or on their account, shall draw up a list of insiders (Art. 18 (1) MAR). In order to ensure uniform conditions of application, ESMA shall develop draft ITS to determine the precise format of insider lists and the format for updating insider lists (Art. 18 VIII MAR).

34. The SMSG notes that the obligation to create an insider list only arises when an issuer delays disclosure of inside information (cf. Art. 17 (4) MAR) or when the inside information does not directly concern the issuer (cf. Art. 17 (1) MAR).

35. ESMA emphasizes that insider lists are an important tool for NCAs when investigating possible market abuse (CP on draft RTS para. 291). The SMSG agrees and welcomes the harmonisation of insider lists. It can be observed in practice that the content of insider lists differs to a large extent. This is not only a problem of NCAs but also for employees.

36. The SMSG however is concerned about the extensive information that EMSA intends to be provided by insiders. Some of SMSGs' members support the inclusion of private addresses, private email accounts and private telephone numbers but have doubts whether this is in line with Member States' personal data laws. In particular it is questionable whether the principle of proportionality is respected by ESMA's proposals. Protection of personal data is part of the fundamental right to respect private life under Article 7 and 8 Charter of Fundamental Rights. In accordance with settled jurisdiction of the ECJ, intervention is strictly limited. Some of SMSGs' members hold the opinion that an intervention cannot be justified with the integrity of the market and the detection of insider trading. The minimal content of the list should be the name and another identification data of the insider.

37. ESMA proposes to require the inclusion of a number of categories of persons into the insiders list, as long as they have access to inside information, such as members of the management and/or super-

visory board, executive officers, etc. (para. 298 and Q22). The list of categories is intended to be indicative and non-exhaustive (recital 8 Annex II draft ITS). The SMSG fully supports ESMA's approach. The specification will be helpful for issuers and persons acting on their behalf to comply with the legal obligation to establish an insider list.

38. A further proposal of ESMA relates to the obligation of Art. 18 (1) (c) MAR that an issuer or any person acting on the behalf of the issuer shall provide the insider list to the competent authority. In case of a third party, ESMA proposes a flexible way to comply with the obligation. The issuer could consider whether to provide to the NCA a single consolidated insider list, fully and solely maintained by the issuer, or separate insider lists (para. 302). However, the SMSG is concerned whether this is in line with the level 1-text. The MAR requires the person acting on behalf of the issuer to submit its insider list to the NCA by itself.

39. Issuers whose financial instruments are admitted to trading on an SME growth market shall be exempt from drawing up an insider list, provided that certain conditions are met (cf. Art. 18 (6) MAR). In addition ESMA wants issuers on SME Growth Market to be able to provide an insider list containing the information specified in Table 2 of Annex 1 (para. 316 CP on draft RTS and Annex VII Art. 11 draft ITS). The SMSG observes that Art. 18 (6) MAR does not require a specific content of such an insider list and therefore asks ESMA to impose lower requirements for SME Growth market issuers.

6. Investment recommendation (CP on draft RTS)

40. Persons who produce or disseminate investment recommendations shall take reasonable care to ensure that such information is objectively presented, and to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates (Art. 20 (1) MAR). ESMA shall develop draft RTS to determine the technical arrangements for these persons for objective presentation of investment recommendations and for disclosure of particular interests or indications of conflicts of interest.

6.1. Privilege for journalists

41. Journalists are exempt from the obligations provided that they are subject to equivalent appropriate regulation in a Member State, including equivalent appropriate self-regulation. Member States shall notify the text of that equivalent appropriate regulation to the Commission (Art. 20 (3) MAR). This privilege, already in place under the current Market Abuse Directive (MAD), is justified by the freedom of the press and the freedom of expression in other media. The SMSG acknowledges that journalists are not subject to supervision by ESMA. However, the SMSG would like to draw attention to the fact that investment recommendations and other information recommending an investment strategy are often published by journalists. In particular, stock market information services have to be considered as journalists, irrespective of whether they disseminate the information in print or via electronic media. It is therefore important that self-regulation for journalists is equivalent to the rules laid down in the MAR. The SMSG encourages the Commission to ask ESMA to monitor respective instruments of self-regulation accepted by NCAs and to compare the content of the codes of conduct with the requirements laid down in the MAR and the accompanying level 2-regulations, especially given the fact that qualified persons will be subject to specific disclosure requirements.

6.2. Principles of the future level 2-regime

42. With regard to the future level 2-regime, ESMA holds the view that the current Level 2 measures set out by Directive 2003/125/EC may constitute a sound benchmark for responding to its mandate developing draft RTS (CP on draft RTS para. 347). The SMSG observes that the investment recommendations regime has not experienced reform since it was adopted and contrasts accordingly with the rating agency regime in relation to which very extensive disclosures are now required. But the original regime seems to have worked well and there seems to be little evidence of detriment and/or enforcement action relating to poor/inadequate disclosures on investment recommendations. But this is a key area, not least given the well-documented dependence of retail investors on investment recommendations, and their attachment to headline 'buy'/'sell' etc. recommendations. ESMA's decision to base its advice on the original regime seems sensible, given overall experience but also in light of the need not to impose undue cost burdens on this sector: this is particularly the case given that investment research is typically subsidized within the investment firm and the independent research house is not common in the EU. As is well known, SME issuers can accordingly struggle to ensure coverage. In order to ensure alignment with the other measures designed to support SMEs (i.e. under MiFID II), efforts should be made not to impose undue costs on the provision of research. But allowing for this, a widely drawn approach (within which the rules are reasonable) seems appropriate given the sensitivity of investment recommendations and the vulnerability of investors to online dissemination in particular.

43. ESMA suggests a "twofold" approach based on a general set of requirements applying to any person, and on applying a set of additional requirements to any person mentioned in Art. 3 (1)(34)(i) MAR and also to other persons that are considered "experts", both together called by ESMA and hereinafter as qualified persons (CP on draft RTS para. 354). The SMSG agrees with the approach and in particular the reliance on the "experts" device (Q26 CP on draft RTS). With respect to the qualifications on the "expert" classification, it seems useful to add the "regular basis" qualification to the others. It is difficult to suggest the appropriate frequency – leaving it open may be more effective; otherwise perhaps "at least quarterly" given the recurrence of quarterly in other elements of EU regulation (Q27 CP on draft RTS). This seems an area where some degree of regulatory flexibility is needed which allows a regulator to take a risk-based approach, although some minimum degree of legal certainty is also required.

6.3. Standards for objective presentation

44. The proposed standards for objective presentation (Q28 CP on draft RTS) are based on the tested 2003 regime and seem reasonable and proportionate, particularly with respect to non-qualified persons and non-experts. With respect to access to the information about the methodology and underlying assumptions used, ESMA proposes a stricter approach than the current regime (cf. para 382). The SMSG strongly supports this. In particular it seems appropriate to require qualified persons to indicate and summarise any changes in the valuation, methodology or underlying assumptions (Q29 CP on draft RTS). The disclosure rules will enhance industry discipline.

6.4. Financial interests and conflicts of interest

45. In order to ensure the objectivity and reliability of investment recommendations produced by qualified persons, ESMA proposes to establish stricter disclosure of significant financial interests and conflicts of interest compared to the 2003 regime. Currently, the recipient of a recommendation must be informed about major shareholdings between the relevant person on the one hand and the

issuer on the other hand. This encompasses all cases in which the relevant person holds more than 5 % of the total issued share capital of the issuer or vice versa. The SMSG acknowledges that conflict of interest disclosure is of fundamental importance and the current 5 % threshold appears high, particularly by comparison with the conflict disclosure rule which applies to CRAs. But it is not clear what the 0.5% threshold (cf. Art. 5 (3) (c) (i) draft RTS) is based on – is it an average of the approach adopted by NCAs (cf. Q31 CP on draft RTS)? More detail on why this threshold has been chosen is necessary to support ESMA's position.

46. In addition, the disclosure of any actual holding in financial instruments to which a recommendation relates (cf. Art. 5 (3) (a) draft RTS), is a strict approach. Nevertheless the SMSG considers this rule for qualified persons to be reasonable. ESMA further aims at improving disclosure by introducing a disclosure requirement for net short positions, while no thresholds are considered for positions in debt instruments such as bonds, structured finance products and related derivatives contracts. Principally this approach seems appropriate, but again it is not clear what the 0.5% threshold (cf. Art. 5 (3) (c) (ii) draft RTS) is based on. The SMSG interprets the instances laid down in Art. 5 (3) (c) (i)-(iii) draft RTS as alternatives; this should be made clear (by replacing "and" with "or").

47. Another point are the interdependencies between the specific obligations for qualified persons (Art. 5 (3) draft RTS) and the general rules for non-qualified persons (Art. 5 (1) draft RTS). It is also not fully clear whether non-qualified persons have to disclose the actual holding in the financial instruments to which their recommendations relates. Do major shareholdings held by non-qualified persons constitute a conflict of interest that a non-qualified person has to disclose? The SMSG understands that ESMA does not want to provide specific instances of financial interests and conflicts of interest subject to disclosure by all other persons but in order to achieve a single rulebook on market abuse it will be helpful to explain at least in the recitals of the respective RTS that the general disclosure obligations should be interpreted in the light of the special provisions for qualified persons.

48. Finally the SMSG would like to draw attention to the fact that recommendations do not always provide clear information about inducements and conflicts of interest; sometimes the information is hidden or can be found somewhere in related documents. This should be prevented in the future. ESMA should develop a common standard with regards to how financial interests and conflicts of interest are disclosed to the market. The information that has to be disclosed should also be regulated in a consistent manner: Does a person subject to disclosure have to make public the amount of shares he holds or indicate the shareholdings in percentage? The SMSG pleads for the latter approach.

7. Manager Transactions (CP on draft RTS and CP on Technical Advice)

49. Persons discharging managerial responsibilities ("PDMR") have to notify the issuer and the competent authority of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives linked thereto (Art. 19 (1) MAR). The same applies to persons closely associated with them. Furthermore a PDMR shall not conduct any transactions on its own account or for the account of a third party during a closed period of 30 days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public (Art. 19 (11) MAR). Under certain circumstances an issuer may allow a PDMR to trade during a closed period (Art. 11 (12) MAR). This rule is new on the European level.

7.1. Principles of the regime

50. The disclosure requirement is a preventive measure against market abuse, particularly insider dealing. The publication of those transactions can also be a highly valuable source of information to investors and constitutes an additional means for competent authorities to supervise markets (cf. recitals 58 and 59 MAR). Empirical studies on capital markets in Europe have confirmed the legislature's reasons for the disclosure obligations. The SMSG believes that whilst the closed period will weaken the disclosure approach, it will also contribute to the purpose of the prohibition on insider dealing ensuring equal information of investors. Compared to the disclosure obligations, the scope of application of the rules on a closed period is smaller: Only PDMRs are prohibited from trading during a closed period whilst persons closely associated with them, such as a spouse, partner, child, relative or a legal person controlled by a PDMR, are not subject to the closed period. There are good reasons for this. The most important one is that the regulatory approach of entitling an issuer to allow a PDMR to trade during a closed period fits very well for a PDMR but not for a closely associated person who does not have any contractual relationships with the issuer. But the SMSG is concerned about a potential circumvention of the provisions on a closed period and encourages ESMA and NCAs to examine potential cases in the future. These results should be taken into account by the Commission when reporting to the European Parliament and the Council on the application of MAR by 3 July 2019 (cf. Art. 38 MAR).

7.2. Transactions subject to disclosure

51. ESMA is mandated to provide technical advice to the Commission for specifying the types of transactions which trigger the duty to notify. Art. 19 (1) MAR states that "every transaction conducted on their own account" has to be notified. ESMA intends to define these terms in a broad way. First, any transaction irrespective of where it was conducted, i.e. on a regulated market, on an MTF, on an OTF or OTC, should be notified. Second, the term acquisition shall also include transactions where the PDMR or the closely associated person does not play an active role in the investment decision, such as gifts, inheritances and donations received by a PDMR or a closely associated person (para. 94 and 95 draft Technical Advice).

52. The SMSG only partly agrees with ESMA's proposal (Q10 CP on draft Technical Advice). It is satisfied with ESMA's interpretation that the disclosure obligation should not depend on the question of where the transaction has been carried out. But in contrast to ESMA's CP on draft Technical Advice, the type of transactions should be interpreted in line with the purpose of the law, as the SMSG has already pointed out in its response to ESMA's DP on MAR (cf. ESMA/2014/SMSG011). The disclosure obligations laid down in Art. 19 (1) MAR are intended as a preventive measure against market abuse. A promptly notification prevents the suspicion of the PDMR taking advantage of his insider knowledge. Furthermore, the disclosure of managers' transactions provides a better informational basis for investment decisions (signal effect). However, a donor does not give relevant signals to the market when he makes a gift/donation to a third party. Furthermore there are no grounds for fearing that he will take advantage of insider knowledge. This applies all the more so in the situation of an inheritance. For these reasons gifts, inheritance and donations are currently not considered as transactions triggering the duty to disclose in some Member States such as Germany and Italy. The SMSG recommends interpreting the MAR in the same way: Transactions by gifts or inheritance should not be subject to notification requirements under Art. 19 (1) MAR.

53. A further observation refers to the disclosure obligations of persons closely associated with a PDMR. The MAR requires the issuer to make public any transaction of such a person relating to the shares

or debt instruments of the issuer. However, the issuer has no information as to whether the respective person falls under the category of persons closely associated with a PDMR. This is because a PDMR is not obliged to disclose such information to the issuer. Thus it is in particular the task of competent authorities to ensure that information is given to the markets only by those who are obliged to do so.

7.3. Closed period

54. ESMA is also mandated to provide technical advice to the Commission for the specification of the circumstances under which trading during a closed period may be permitted by the issuer. The SMSG has already pointed out in its response to ESMA's DP on MAR (cf. ESMA/2014/SMSG011) that the closed period is a new rule on the European level. But provisions on closed periods can be found in some Member States, in by-laws of exchanges and in Codes established by listed companies on a voluntary basis. For example it is stated in the UK LR 9.2.8 FCA Handbook that a listed company must require every PDMR to comply with the Model Code which prohibits transactions within a closed period without obtaining clearance to deal in advance by the chairman of the board.

55. It will be of utmost importance to ensure a uniform application of the rules on a closed period (single rulebook on market abuse). The SMSG welcomes ESMA's efforts to interpret the closed period in a way that takes into account the purpose of the law and ensures legal certainty for market participants (Q12 CP on draft Technical Advice). However, the SMSG does not agree with ESMA's position that the closed period would follow a transparency purpose (cf. CP on draft RTS para. 114). The closed period is a complementary instrument aimed at preventing the abuse of inside information. But it even goes further and restricts the possibility for PDMRs to profit from any other information which is not price relevant as defined by Art. 7 (4) MAR.

56. The SMSG has already asked ESMA to clarify the temporal scope of the closed period (cf. ESMA/2014/SMSG011). The Group agrees with ESMA's interpretation that any interim report (e.g. quarterly and half yearly financial report) will trigger the closed period (cf. para. 109 draft Technical Advice); this should be laid down in the recitals of the respective delegated act by the Commission.

57. ESMA of course concentrates on the circumstances under which a PDMR can be permitted to trade during a closed period by the issuer. SMSG agrees with ESMA's interpretation that the permission on a case by case basis (cf. Art. 19 (12) (a) MAR) is only possible for the sale of shares and that any situation in which trading is permitted should be exceptional (para. 121 and Q12 CP on draft Technical Advice). In fact, the crucial question is how the term "exceptional circumstances" should be interpreted. The UK law follows a strict approach: "A person may be in severe financial difficulty if he has a pressing financial commitment that cannot be satisfied otherwise than by selling their relevant securities of the company. A liability of such a person to pay tax would not normally constitute severe financial difficulty unless the person has no other means of satisfying the liability. A circumstance will be considered exceptional if the person in question is required by a court order to transfer or sell the securities of the company or there is some other overriding legal requirement for him to do so." The same is true for the ASX Listing Rules in Australia. These rules do not prescribe what types of exceptional circumstances an issuer may specify in this regard. It is the responsibility of each issuer to determine what circumstances are sufficiently exceptional to warrant giving a PDMR approval to trade during a prohibited period.

58. Interestingly, the wording of Art. 19 (12) (a) MAR ("exceptional circumstances") corresponds one-to-one to the rules of the Model Code in the UK. This is not a compelling argument for adopting the

same approach. But a strict interpretation of the exemption is in line with the wording ("exceptional circumstances which require the immediate sale") and purpose of Art. 19 (12) (a) MAR and does not impose a disproportionate burden on PDMRs given the fact that trading will be prohibited under Art. 19 (11) MAR only up to 120 calendar days/year. Thus the SMSG agrees with ESMA's position that a PDMR has to present situations which are extremely urgent, unforeseen, compelling and beyond his control (cf. draft Technical Advice 8 CP on page 47 and Q12). Of course, it has to be determined in every single case whether these requirements are fulfilled. The SMSG can very well imagine that other examples for a permission to trade might be a disposal of securities arising from the acceptance of a takeover or scheme of arrangement (see Rule 2 UK-Model Code and ASX Listing Rules Guidance Note 27: commonly excluded from the operation of a trading policy).

59. Regarding transactions executed by a third party under a (full) discretionary portfolio or asset management mandate (Q13 CP on draft Technical Advice), ESMA is of the opinion that they would be covered by the prohibition of trading during a closed period (para. 114). At first sight this interpretation seems to be in line with the wording of Art. 19 (11) MAR. According to this provision a PDMR shall not conduct any transactions "on its own account or for the account of a third party, directly or indirectly". The term "indirectly" may also cover portfolios managed by portfolio/asset managers at their own discretion. But from a teleological point of view, this is not at all convincing: How can a PDMR abuse information when he does not have any influence on the respective transaction? The SMSG again wishes to highlight that the closed period is not based on a transparency purpose but intends to prevent the abuse of inside information (see para. 55 of this Advice). ESMA should take this into account when providing technical advice to the Commission.

60. According to Art. 19 (12) (b) MAR, an issuer may allow a PDMR to trade (i) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, or (ii) where the beneficial interest in the relevant security does not change. As to the second category, ESMA suggests that the request should be motivated and should only relate to a transfer of the concerned instruments between accounts of the PDMR. Such a transfer should not entail a change in the price of the instruments transferred. The SMSG does not agree with this strict interpretation. Neither the wording nor the purpose of Art. 14 (4a) MAR require to interpret the exemption in such a narrow way. For example, the "beneficial interest in the relevant security does not change" when a PDMR transfers securities to a trust. The same is true for transactions by a PDMR within his group of companies. Example: A (= PDMR) holds 1000 shares and sells them to A-plc wholly owned by him. Again, such a transaction should not be forbidden during a closed period, provided that the shares remain within A's group of consolidated companies.

8. Specification of indicators of market manipulation (CP on Technical Advice)

61. The MAR prohibits market manipulation in general terms (Art. 12 (1) and (2) MAR) and defines non-exhaustive indicators of manipulative behaviour (Annex I MAR). The Commission is empowered to adopt delegated acts specifying the indicators, in order to clarify their elements and to take into account technical developments on financial markets (Art. 12 (5) MAR). It has invited ESMA to provide technical advice on whether any elements listed in the Annex I of the MAR need to be further clarified and whether additional indictors should be clarified.

8.1. Principles of the regime

62. The SMSG observes that ESMA has dealt carefully with the Commissions' request for technical advice and agrees that the proposed examples of practices and the indicators relating to these practices

clarify the indicators of manipulative behaviours listed in Annex I of the MAR (Q1 CP on Technical Advice). It would therefore just like to suggest some minor modifications of ESMA's draft technical advice (p. 12-21).

8.2. Indicators

63. ESMA's draft advice clarifies indicators of manipulative behaviours by providing non-exhaustive examples of practices. Some examples are specified as "transactions or orders to trade carried out in such a way that obstacles are created to the financial instrument [...] prices falling below a certain level, mainly in order to avoid negative consequences to the financial instrument [...] – usually known as creation of a floor in the price pattern" (cf. draft technical advice 4(2) on p. 13, 8(1) on p. 15, 9(4) on p. 16 and 10(3) on p. 17). The SMSG fully agrees that this is a good example of a possible manipulation. However this is a one-sided case and it may result in a false impression that only forcing a high price (and not a low price) may constitute price manipulation. There are cases known where a manipulator is interested in keeping a low price, either in direct manipulation or in a cross-product manipulation. Therefore this example should be supported with a symmetrical example of a possible price manipulation where "obstacles are created to prices *rising over* a certain level.

64. In addition, a small but important correction is necessary with regard to the technical advice 6(1) on p. 14, which is about wash trades "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". SMSG's concern is about the term "only" as it often happens that some small outside orders may be caught in such a manipulation accidentally, with a main part of the transaction being between colluding parties. Using the word "only" could exclude such a case. The SMSG is concerned that market participants could take advantage from the wording and argue that beneficial interest or market risk was not transferred "only" between parties who were acting in concert or collusion but also between other market participants. In criminal procedures courts would be bound by the wording of the prohibition. The SMSG therefore proposes to remove "only" and to reformulate the sentence as follows: "where beneficial interest or market risk is transferred between parties (...)".

8.3. Phishing

65. ESMA asks whether the practice known as "Phishing" should be included in the list of examples of practices set out in the draft technical advice (Q3). This depends on how "Phishing" has to be understood. The CP explains: "In this context, 'phishing' should be understood as the attempt to acquire sensitive information, such as passwords or account details, by masquerading as a trustworthy entity in an electronic communication". The SMSG does not support the inclusion of "phishing" under this premise. After acquiring such information an account may be used for market manipulation, but it may be acquired also by a "traditional" robbery. There would be no reason why a robbery should be treated as market manipulation and not as robbery. Phishing would be much more similar to robbery than to market manipulation, as it is a tool that can be used for several and very different criminal sanctions, out of which market manipulation would be rather in minority cases, so it should be treated accordingly.

66. However phishing is also a methodology used by High Frequency Traders to uncover orders of other market participants and take advantage of them, in particular through ping orders. In this case it is clearly a subject for MAR and NCAs should be able to prosecute such unacceptable behaviour as market manipulation.

8.4. OTC-transactions

67. Finally the SMSG agrees with the inclusion of OTC transactions (Q4) given the risks of cross-market abuse, and the related theme of the MAR to catch cross-asset, cross-venue manipulation.

9. Determination of the competent authority for notification of delays in public disclosure of inside information (CP on Technical Advice)

68. Issuers of financial instruments have to publicly disclose inside information as soon as possible. However, they may, under their own responsibility, delay the public disclosure of inside information provided that certain conditions are fulfilled (Art. 17 (4) MAR). Where an issuer has delayed the disclosure of inside information, it shall inform the competent authority that disclosure was delayed and shall provide a written explanation. The Commission is empowered to adopt delegated acts specifying the competent authority for the notification (Art. 17 (3) MAR). It has asked ESMA to provide technical advice on this issue.

69. The problem behind the determination of the competent authority is that issuers may have their financial instruments traded on venues in different Member States, but the MAR requires the notification to only one competent authority (cf. para. 59 and 61 CP on Technical Advice).

70. ESMA has identified different options to determine the authority for the purpose of notification. It suggests a three-fold approach which principally refers to the competent authority of the Member State where the issuer's registered office is located. The proposed approach seems efficient and supportive of market monitoring.

10. Reporting of infringements (CP on Technical Advice)

71. Member States shall ensure that NCAs establish effective mechanisms to enable reporting of actual or potential infringements of the MAR to competent authorities, such as specific procedures for the receipt of reports of infringements, appropriate protections for persons who report infringements and protection of personal data (Art. 32 MAR). The Commission shall adopt implementing acts to specify the procedures and protection measures. To this end, it has invited ESMA to provide technical advice. ESMA has developed many procedures for protection of the reporting and of the reported persons (para. 12-22 CP on draft Technical Advice on p. 54-55).

72. The SMSG strongly supports EMSA's approach. But it would however also like to highlight that protection of employees should become a matter of practice. Employees should be aware of the respective rules and policies and to this end they should receive the necessary training. Furthermore technical conditions (proper IT systems) should be available for them in order to identify suspicious transactions or any other activities. In particular training could be handled more efficiently in practice. Employees should be confronted with real-life examples and not only with a paper-based test. They should have the chance to ask questions in order to understand how market abuse takes place. Some of the members of SMSG also hold the position that the persons responsible for the reporting and for the identification of suspicious transactions should have unlimited access to all information within the company.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

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