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| 3 October 2019 |

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| Reply form for the Consultation Paper on MAR review report |
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| Date: 3 October 2019 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the MAR review report published on the ESMA website.

*Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_QUESTION\_CP\_MAR\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

* if they respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

**Naming protocol**

In order to facilitate the handling of stakeholders’ responses please save your document using the following format:

ESMA\_CP\_MAR\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA\_CP\_MAR\_ESMA\_REPLYFORM or

ESMA\_CP\_MAR\_ANNEX1

***Deadline***

Responses must reach us by **29 November 2019.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings ‘Legal notice’ and ‘Data protection’.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | State Street |
| Activity | Investment Services |
| Are you representing an association? |  |
| Country/Region | Europe |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_MAR\_1>

State Street Corporation (‘State Street’) welcomes the opportunity to provide comments on the European Securities and Markets Authority (ESMA) consultation paper on the review of the Market Abuse Regulation (MAR). State Street is one of the world's leading providers of financial services to institutional investors, including investment servicing, investment management and investment research and trading. With $32.90 trillion in assets under custody and administration and $2.95 trillion[[1]](#footnote-2) in assets under management as of 30 September 2019, State Street operates in more than 100 geographic markets worldwide, including in Europe, the US, Canada and Asia.

With regards to the scope of MAR, State Street does not support the proposed extension of the MAR framework to spot FX contracts. We can understand the rationale behind the European Commission’s mandate to ESMA. As noted in the consultation, the reasons put forward in favour include the size of the spot FX market, as well as the interlinkages with other financial instruments. While we welcome ESMA’s approach of presenting both arguments in favour of and against extending the scope of MAR, we do not believe the significance of each argument is sufficiently reflected; more precisely, we believe the arguments against significantly outweigh the potential benefits.

In particular, we would like to highlight the FX Global Code, which we believe has gone a long way to promoting integrity in global FX markets. We note that the FX Global Code has been widely adopted by both market participants and central banks. In so far as regulators have specific outstanding concerns on the spot FX market, we believe these should be raised and addressed through the FX Global Code, which is scheduled to be reviewed in 2020. We believe this would be a more appropriate and proportionate approach in comparison to bringing spot FX contracts within the scope of MAR, or indeed MiFID/R (or establishing a MiFID-like regime).

In addition to the above, State Street is generally supportive of the more detailed comments expressed in the separate response to the ESMA consultation paper submitted by the Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA).

Regarding MAR and collective investment undertakings (CIUs), State Street broadly supports the view that they should be differentiated from other issuers. However we have a number of concerns on the applications of the Persons Discharging Managerial Responsibilities (PDMR) obligations. While we agree with ESMA’s preliminary view that the current definition of PDMR may not sufficiently capture persons that may be relevant in the context of CIUs, we believe ESMA’s proposed approach, namely to incorporate the definition of “relevant person” may result in too broad an application. We would encourage ESMA to revisit this. Similarly, we do not believe that a depositary should be brought within scope of the PDMR obligations, where it has been delegated tasks by a CIU.

In the context of a cross-market order book surveillance framework, we would like to exercise caution and highlight the practical challenges of mandating trading venues to report order book data on a daily basis. By definition, order-book data will capture significantly more information than transaction reporting. This may present a substantive challenge for both industry participants and national competent authorities, who will need to have the systems and infrastructure in place to receive, store and analyse this data. Furthermore we are supportive of efforts to facilitate cooperation and the exchange of information between supervisory and tax authorities. We would encourage ESMA to take into account the implementation of Council Directive (EU) 2018/822, or ‘DAC 6’, in this regard.

We have set out below more detailed responses to the specific questions of the consultation. Should you wish to discuss further any aspect of our response, please do not hesitate to contact State Street.

<ESMA\_COMMENT\_CP\_MAR\_1>

1. Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.

<ESMA\_QUESTION\_CP\_MAR\_1>

We neither support nor deem it necessary to extend the scope of the MAR to spot FX contracts. We welcome ESMA’s approach in the consultation paper of comparing the arguments in favour of extending the scope to the arguments against. In our view, the arguments against extending the scope significantly outweigh any potential benefits.

With regards to promoting market integrity, we believe this is being addressed in wholesale FX markets by the establishment, and subsequent widespread adoption, of the FX Global Code. We note that more than 40 central banks and more than 200 market participants, including State Street, are signatories to the FX Global Code. Should European policymakers consider there to be any outstanding concerns, we believe this should be addressed through the review of the FX Global Code, which is scheduled to take place in 2020.

While the FX Global Code remains voluntary, we have observed that it is becoming more prominent in regulator’s thinking in regards to FX markets. For example, the FCA previously established a framework for formally recognising industry codes; recognition of a code is not intended to mandate but rather encourage the use of a particular code. The FCA clarified that it will only recognise codes where they fulfil certain criteria. The recognition criteria takes into account the operational objectives of the FCA, one of which is “protecting and enhancing the integrity of the UK financial system”. In addition, adherence to recognised industry codes will be considered by the FCA under the Senior Managers and Certification Regime (SM&CR) and, in particular, the obligation to observe “proper standards of market of conduct”. The FCA announced its recognition of the FX Global Code on 26 June 2019.

We appreciate that other jurisdictions do not have an equivalent framework as the UK SM&CR. Nevertheless, adopting a similar approach as the FCA with regards to recognition may help to clarify the expectations of regulators and be a more proportionate approach to addressing outstanding concerns.

We note that ESMA also makes reference to the UK’s Fair and Effective Markets Review (FEMR) and, in particular, recommendation 3.b regarding the establishment of a “[…]*new statutory civil and criminal market abuse regime for spot foreign exchange*[…]”. In the most recent progress report, submitted to the UK Chancellor of the Exchequer in May 2018, there is extensive reference made to the FX Global Code. However, we note the progress report did not renew calls for the implementation of recommendation 3b.

We would also question the suggestion that national competent authorities (NCAs) may not have the necessary tools to supervise or sanction market abuse in spot FX markets, as illustrated by the more-than USD 10bn of fines imposed by NCAs in relation to market manipulation. Furthermore, as ESMA notes, these fines were imposed by NCAs in various jurisdictions. It is our understanding that none of these jurisdictions have, or are indeed considering, extending their respective market abuse regimes to spot FX markets. Given the inherently global nature of these markets, the EU taking an approach that is inconsistent with other major jurisdictions could present a significant challenge and cause unnecessary market disruption.

<ESMA\_QUESTION\_CP\_MAR\_1>

1. Do you agree with ESMA’s preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.

<ESMA\_QUESTION\_CP\_MAR\_2>

We broadly agree with ESMA’s preliminary view regarding the structural changes necessary to extend the scope of MAR to spot FX contracts, and the challenges these present. This is highlighted by the size of the global FX market and the range of market participants involved. In particular we would emphasise the significant cost implications for both NCAs and market participants, as referenced by ESMA in paragraph 22 of the consultation paper.

We support ESMA’s comment in paragraph 17 that it may be advisable to wait until the FX Global Code is further embedded and any outcomes of the review process have been sufficiently considered.

<ESMA\_QUESTION\_CP\_MAR\_2>

1. Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

<ESMA\_QUESTION\_CP\_MAR\_3>

We would agree with ESMA’s analysis that the MAR and the BMR are largely complementary pieces of legislation. Regarding the definition of a benchmark under the two regulations, we would agree that these are largely consistent and do not believe the slight differences noted by ESMA could increase the likelihood that potential market abuse risks materialise.

<ESMA\_QUESTION\_CP\_MAR\_3>

1. Do you agree that the Article 30 of MAR “Administrative sanctions and other administrative measures” should also make reference to administrators of benchmarks and supervised contributors?

<ESMA\_QUESTION\_CP\_MAR\_4>

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<ESMA\_QUESTION\_CP\_MAR\_4>

1. Do you agree that the Article 23 of MAR “Powers of competent authorities” point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?

<ESMA\_QUESTION\_CP\_MAR\_5>

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<ESMA\_QUESTION\_CP\_MAR\_5>

1. Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?

<ESMA\_QUESTION\_CP\_MAR\_6>

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<ESMA\_QUESTION\_CP\_MAR\_6>

1. Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

<ESMA\_QUESTION\_CP\_MAR\_7>

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<ESMA\_QUESTION\_CP\_MAR\_7>

1. If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

<ESMA\_QUESTION\_CP\_MAR\_8>

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<ESMA\_QUESTION\_CP\_MAR\_8>

1. Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

<ESMA\_QUESTION\_CP\_MAR\_9>

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<ESMA\_QUESTION\_CP\_MAR\_9>

1. Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_10>

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<ESMA\_QUESTION\_CP\_MAR\_10>

1. Do you agree with ESMA’s preliminary view?

<ESMA\_QUESTION\_CP\_MAR\_11>

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<ESMA\_QUESTION\_CP\_MAR\_11>

1. Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_12>

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<ESMA\_QUESTION\_CP\_MAR\_12>

1. Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?

<ESMA\_QUESTION\_CP\_MAR\_13>

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<ESMA\_QUESTION\_CP\_MAR\_13>

1. Do market participants consider that the definition of inside information is sufficient for combatting market abuse?

<ESMA\_QUESTION\_CP\_MAR\_14>

State Street is of the view that the current definition of inside information is indeed sufficient for the purposes of identifying and combating market abuse, and do not believe there to be any obvious shortcomings. Furthermore, the additional guidance issued by ESMA in this area has been helpful.

<ESMA\_QUESTION\_CP\_MAR\_14>

1. In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

<ESMA\_QUESTION\_CP\_MAR\_15>

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<ESMA\_QUESTION\_CP\_MAR\_15>

1. Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

<ESMA\_QUESTION\_CP\_MAR\_16>

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<ESMA\_QUESTION\_CP\_MAR\_16>

1. What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?

<ESMA\_QUESTION\_CP\_MAR\_17>

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<ESMA\_QUESTION\_CP\_MAR\_17>

1. As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.

<ESMA\_QUESTION\_CP\_MAR\_18>

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<ESMA\_QUESTION\_CP\_MAR\_18>

1. Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?

<ESMA\_QUESTION\_CP\_MAR\_19>

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<ESMA\_QUESTION\_CP\_MAR\_19>

1. What changes could be made to include other cases of front running?

<ESMA\_QUESTION\_CP\_MAR\_20>

In the consultation paper, ESMA indicates that front-running is relevant beyond persons charged with the execution of orders who have knowledge relating to a client order. We believe this is sensible and it is something that State Street already implements in practice. Nevertheless, we would welcome such a clarification in the legislative framework.

State Street believes that the expanded scope should be applicable to all persons involved in the pre-trade lifecycle. This would include research analysts and persons involved in various internal committees where investment strategies may be discussed and investment activities reasonably anticipated. In addition, this broadened scope should cover all persons with access to aggregated information, such as advisors and brokers, as well as persons in support functions (e.g. IT, compliance), where they have access to pre-trade information.

Furthermore, we believe this clarification would result in greater international consistency, as other jurisdictions currently view front-running through a broader lens than the EU.

<ESMA\_QUESTION\_CP\_MAR\_20>

1. Do you consider that specific conditions should be added in MAR to cover front-running on financial instruments which have an illiquid market?

<ESMA\_QUESTION\_CP\_MAR\_21>

Notwithstanding our response to Question 20, we do not see the need for additional specific conditions for illiquid instruments.

<ESMA\_QUESTION\_CP\_MAR\_21>

1. What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?

<ESMA\_QUESTION\_CP\_MAR\_22>

We can appreciate ESMA’s concern in this area and in particular, the potential for a conflict of interest where brokers benefit at the expense of their clients. We agree with the underlying premise that while it is sensible for brokers to engage in such activity, from a general risk management perspective, the broker should not actively profit from this and it should certainly not be to the detriment of clients. However, this is not something that we have observed in practice.

With regards to additional transparency, we understand that a number of brokers already disclose their use of pre-hedging arrangements to clients. We would be supportive of further efforts to improve transparency.

<ESMA\_QUESTION\_CP\_MAR\_22>

1. What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?

<ESMA\_QUESTION\_CP\_MAR\_23>

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<ESMA\_QUESTION\_CP\_MAR\_23>

1. What financial instruments are subject to pre-hedging behaviours and why?

<ESMA\_QUESTION\_CP\_MAR\_24>

We do not believe that pre-hedging is specific to a subset of financial instruments. However, should policymakers have particular outstanding concerns on pre-hedging in relation to wholesale FX markets, we believe these should be addressed through the upcoming review of the FX Global Code, rather than revisions to MAR.

<ESMA\_QUESTION\_CP\_MAR\_24>

1. Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

<ESMA\_QUESTION\_CP\_MAR\_25>

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<ESMA\_QUESTION\_CP\_MAR\_25>

1. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.

<ESMA\_QUESTION\_CP\_MAR\_26>

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<ESMA\_QUESTION\_CP\_MAR\_26>

1. Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

<ESMA\_QUESTION\_CP\_MAR\_27>

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<ESMA\_QUESTION\_CP\_MAR\_27>

1. Please provide examples of cases in which the identification of when an information became “inside information” was problematic.

<ESMA\_QUESTION\_CP\_MAR\_28>

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<ESMA\_QUESTION\_CP\_MAR\_28>

1. Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

<ESMA\_QUESTION\_CP\_MAR\_29>

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<ESMA\_QUESTION\_CP\_MAR\_29>

1. Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.

<ESMA\_QUESTION\_CP\_MAR\_30>

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<ESMA\_QUESTION\_CP\_MAR\_30>

1. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.

<ESMA\_QUESTION\_CP\_MAR\_31>

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<ESMA\_QUESTION\_CP\_MAR\_31>

1. Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

<ESMA\_QUESTION\_CP\_MAR\_32>

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<ESMA\_QUESTION\_CP\_MAR\_32>

1. Do you agree with the proposed amendments to Article 11 of MAR?

<ESMA\_QUESTION\_CP\_MAR\_33>

We agree with the proposed amendments to Article 11 put forward by ESMA. We are aware that some market participants have interpreted Article 11 as optional. In order to promote consistent application, we would welcome further clarification in MAR that it is in fact an obligatory provision.

<ESMA\_QUESTION\_CP\_MAR\_33>

1. Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

<ESMA\_QUESTION\_CP\_MAR\_34>

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<ESMA\_QUESTION\_CP\_MAR\_34>

1. What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?

<ESMA\_QUESTION\_CP\_MAR\_35>

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<ESMA\_QUESTION\_CP\_MAR\_35>

1. Do you think that the reference to “prior to the announcement of a transaction” in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?

<ESMA\_QUESTION\_CP\_MAR\_36>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_36>

1. Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

<ESMA\_QUESTION\_CP\_MAR\_37>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_37>

1. Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?

<ESMA\_QUESTION\_CP\_MAR\_38>

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<ESMA\_QUESTION\_CP\_MAR\_38>

1. Do you agree with ESMA’s preliminary view on the usefulness of insider list? If not, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_39>

State Street agrees with ESMA’s view on the usefulness of insider lists. We believe that insider lists can assist in actively informing an organisation of potential new risks and contribute to the overall soundness of its risk management.

<ESMA\_QUESTION\_CP\_MAR\_39>

1. Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_40>

We would be supportive of amendments to the insider list regime, which limit its scope to persons with actual access to inside information, rather than persons who may potentially have access to inside information. Again, we believe this will support a firm’s overall approach to risk management.

In the consultation paper, ESMA makes reference to provisions included in the proposed SME growth regulation. We do not believe ESMA needs to further clarify the insider list with regards to persons with regular access and persons with only situational (or *ad hoc*) access.

<ESMA\_QUESTION\_CP\_MAR\_40>

1. What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

<ESMA\_QUESTION\_CP\_MAR\_41>

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<ESMA\_QUESTION\_CP\_MAR\_41>

1. What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

<ESMA\_QUESTION\_CP\_MAR\_42>

We believe that expanding the requirement of insider lists to include all persons with access to inside information, including those not acting on behalf of an issuer, would seem logical and provide clarity with respect to applicable regulatory requirements.

<ESMA\_QUESTION\_CP\_MAR\_42>

1. Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

<ESMA\_QUESTION\_CP\_MAR\_43>

State Street does not make use of the option of using a permanent insider section as part of our insider lists. Nevertheless, we recognise the concerns flagged by ESMA in the consultation paper. If the permanent insider section is to be maintained, we believe that further guidance that facilitates its appropriate use may be helpful.

<ESMA\_QUESTION\_CP\_MAR\_43>

1. Do you agree with ESMA’s preliminary view?

<ESMA\_QUESTION\_CP\_MAR\_44>

We support ESMA’s preliminary view that the issuer should only include one contact person per external provider and that each external provider should maintain its own insider list to effectively manage their own internal risk. It may be helpful if ESMA provides further clarity on its expectation, for example, with regards to responsibilities and when the information is to be made available to NCAs.

<ESMA\_QUESTION\_CP\_MAR\_44>

1. Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

<ESMA\_QUESTION\_CP\_MAR\_45>

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<ESMA\_QUESTION\_CP\_MAR\_45>

1. Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

<ESMA\_QUESTION\_CP\_MAR\_46>

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<ESMA\_QUESTION\_CP\_MAR\_46>

1. Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

<ESMA\_QUESTION\_CP\_MAR\_47>

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<ESMA\_QUESTION\_CP\_MAR\_47>

1. Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.

<ESMA\_QUESTION\_CP\_MAR\_48>

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<ESMA\_QUESTION\_CP\_MAR\_48>

1. On the application of this provision for EAMPs: have issues or difficulties been experienced?

<ESMA\_QUESTION\_CP\_MAR\_49>

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<ESMA\_QUESTION\_CP\_MAR\_49>

1. Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.

<ESMA\_QUESTION\_CP\_MAR\_50>

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<ESMA\_QUESTION\_CP\_MAR\_50>

1. Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.

<ESMA\_QUESTION\_CP\_MAR\_51>

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<ESMA\_QUESTION\_CP\_MAR\_51>

1. Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

<ESMA\_QUESTION\_CP\_MAR\_52>

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<ESMA\_QUESTION\_CP\_MAR\_52>

1. Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?

<ESMA\_QUESTION\_CP\_MAR\_53>

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<ESMA\_QUESTION\_CP\_MAR\_53>

1. Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.

<ESMA\_QUESTION\_CP\_MAR\_54>

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<ESMA\_QUESTION\_CP\_MAR\_54>

1. Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

<ESMA\_QUESTION\_CP\_MAR\_55>

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<ESMA\_QUESTION\_CP\_MAR\_55>

1. Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.

<ESMA\_QUESTION\_CP\_MAR\_56>

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<ESMA\_QUESTION\_CP\_MAR\_56>

1. Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.

<ESMA\_QUESTION\_CP\_MAR\_57>

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<ESMA\_QUESTION\_CP\_MAR\_57>

1. Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.

<ESMA\_QUESTION\_CP\_MAR\_58>

State Street agrees that the features of CIUs mean they should be differentiated relative to other issuers for the purposes of MAR.

<ESMA\_QUESTION\_CP\_MAR\_58>

1. Do you agree with ESMA’s preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs.

<ESMA\_QUESTION\_CP\_MAR\_59>

While we generally believe that the provisions contained in sectoral legislation are adequate, based on the analysis undertaken by ESMA, we recognise there may be grounds to extend the PDMR obligations to CIUs and their management companies. However, we would flag the potential challenges from applying certain requirements of Article 19 of MAR to CIUs, including those highlighted in paragraph 224 of the consultation paper.

<ESMA\_QUESTION\_CP\_MAR\_59>

1. Do you agree with ESMA’s preliminary view? If not, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_60>

While we reaffirm our views on current sectoral legislation as expressed in the response to question 59, we agree that a literal reading of the current definition of PDMR under MAR may not be sufficient to capture persons that may be relevant in the context of CIUs.

<ESMA\_QUESTION\_CP\_MAR\_60>

1. What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of “relevant persons” would be adequate for CIUs other than UCITs and AIFs.

<ESMA\_QUESTION\_CP\_MAR\_61>

Notwithstanding our response to question 60, we believe that extending the PDMR obligations to individuals captured under the “relevant persons” definition under the UCITS Implementing Directive would result in too broad a scope of application.

When considering the definition of PDMR, there appear to be two key elements. Firstly, the individual is of sufficient seniority to make or influence managerial decisions. Secondly, the individual should have regular access to inside information; this is implied in Article 3.1(25)(a) and outlined more explicitly in 3.1(25)(b). However, both of these elements would not be reflected if PDMR obligations applied to “relevant persons”.

When considering the definition of relevant persons, while it would appear to capture senior management and portfolio managers, as per the intentions of ESMA, it could also bring into scope a wide range of employees with neither managerial decision-making responsibilities nor regular access to inside information. We believe this would be disproportionate, inappropriate and unnecessarily burdensome.

<ESMA\_QUESTION\_CP\_MAR\_61>

1. ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.

<ESMA\_QUESTION\_CP\_MAR\_62>

In the context of exchange-traded funds (ETFs), ESMA may want to consider the appropriateness of applying the PDMR obligations to authorised participants (APs) and relevant employees at market-makers (often referred to as official liquidity providers or OLPs).

With regards to depositaries, we see little rationale for such entities to be brought within scope of the PDMR regime. When considering the definition of PDMR in Article 3.1(25) of MAR, we note it is limited to:

*“…a person within an issuer, an emission allowance market participant or another entity referred to in Article 19(10)…”*

It is clear that a depositary would not fall within the definition of such entities on its own. Similarly, while we can appreciate ESMA’s consideration of applying PDMR obligations to entities to which a CIU has delegated certain tasks (implying that such entities can indirectly be considered an issuer), we believe ESMA should recognise the nature of the tasks performed. In relation to CIUs, a depositary may undertake the safekeeping of assets, the monitoring of net cash flows and oversight of the activities of the manager. We do not believe such activities can, or should, be equated to the performance of delegated portfolio management (and related) services by the management company.

In addition, a depositary will generally be subject to stringent personal account dealing policies and procedures, particularly where they are part of a larger banking group, including in relation to the CIUs to which they provide their services. As such, we would not support the extension of the PDMR regime to depositaries.

<ESMA\_QUESTION\_CP\_MAR\_62>

1. Do you agree with ESMA’s conclusion? If not, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_63>

In line with our previous response relating to the consistent regulatory treatment across CIUs, we agree with ESMA’s conclusion.

<ESMA\_QUESTION\_CP\_MAR\_63>

1. Do you agree with ESMA preliminary view? Please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_64>

We broadly agree with ESMA’s preliminary view, although we note that CIUs and/or their management companies are already subject to stringent disclosure obligations.

<ESMA\_QUESTION\_CP\_MAR\_64>

1. Do you agree with ESMA’s preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?

<ESMA\_QUESTION\_CP\_MAR\_65>

We agree with ESMA’s preliminary view and do not believe that further clarifications from ESMA are necessary.

<ESMA\_QUESTION\_CP\_MAR\_65>

1. Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

<ESMA\_QUESTION\_CP\_MAR\_66>

Notwithstanding our comments below, and consistent with the European Commission’s mandate to take into account current transaction reporting obligations, we believe that the ISO 20022 seems a sensible and appropriate methodology. We would also support the use of XML templates.

<ESMA\_QUESTION\_CP\_MAR\_66>

1. Please provide your views on the impact and cost linked to the establishment of a regular reporting mechanism of order book data.

<ESMA\_QUESTION\_CP\_MAR\_67>

We have significant concerns with regards to any proposed mandatory obligation on the reporting of order book data, particularly if this were to be required on a daily basis. As noted in paragraph 266 of the consultation paper, previously issued guidelines by ESMA have clarified that “orders” in relation to Article 25(2) of MiFIR includes:

*“…active, inactive, suspended, implicit and rerouted as well as order modifications, cancellations and rejections, firm and indicative quotes.”*

This generates significant reporting obligations and resulting amounts of data. We can understand the rationale of ESMA and certain national competent authorities in wanting to have this data available. However, we believe that imposing an additional industry-wide requirement to transmit this data on a daily basis would present significant operational challenges and costs, for the industry as well as national competent authorities, which will need to have the systems in place to receive and analyse this data.

Furthermore, ESMA notes in the consultation that a number of NCAs are already making use of the current framework. While the approach taken may differ amongst NCAs, it is not clear whether there are outstanding concerns or limitations of the current framework that need to be addressed. In so far as this is the case, we do not believe there is a need to change the existing framework and would prefer a continuation of the current ad-hoc approach.

<ESMA\_QUESTION\_CP\_MAR\_67>

1. In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.

<ESMA\_QUESTION\_CP\_MAR\_68>

While it is difficult to provide a more granular approximation of the likely costs at this stage, we do believe that the instruments in-scope may have a bearing. For example, given the idiosyncrasies of FX, which ESMA considers in the earlier part of the consultation, the costs are likely to be higher than for fixed-income or equity instruments.

<ESMA\_QUESTION\_CP\_MAR\_68>

1. What are your views regarding those proposed amendments to MAR?

<ESMA\_QUESTION\_CP\_MAR\_69>

The proposed amendments put forward by ESMA seek to address potential regulatory gaps and facilitate exchange of information between supervisory and tax authorities; as such we are supportive of these proposals, particularly where they may help avoid further obligations on market participants.

In addition to the transaction reporting regime under MiFID II, ESMA may wish to take into account the implementation of Council Directive (EU) 2018/822, also referred to as ‘DAC 6’. We believe the provisions enshrined in Level 1 of the DAC 6 may, to a certain degree, help to address the considerations set out in paragraph 317 of the consultation paper. However, we understand that in ongoing technical discussions, the reporting regime under the EU Securities Financing Transaction Regulation (SFTR) has been proposed as a possible option to fulfil the reporting obligations under the DAC 6. We would like to highlight the unsuitability of the SFTR regime in this regard, given the absence of important data fields and because such reports are not accessible to tax authorities. If policymakers continue with this proposal, it may necessitate amendments to the SFTR regime, which we believe would be an undesirable outcome.

<ESMA\_QUESTION\_CP\_MAR\_69>

1. Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.

<ESMA\_QUESTION\_CP\_MAR\_70>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_70>

1. Please share your views on the elements described above.

<ESMA\_QUESTION\_CP\_MAR\_71>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MAR\_71>

1. Assets under management include the assets of the SPDR® Gold ETF and the SPDR® Long Dollar Gold Trust ETF (approximately $44 billion as of September 30, 2019), for which State Street Global Advisors Funds Distributors, LLC (SSGA FD) serves as marketing agent; SSGA FD and State Street Global Advisors are affiliated. [↑](#footnote-ref-2)