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Note on MAR Level 2 DTS, 11 December 2015

The BBA, AFME, ISDA and FIA Europe welcome the European Securities and Markets Authority's (ESMA) extensive work on the Market Abuse Regulation (MAR) draft technical standards (DTS) and, would like to suggest clarifications on four fundamental issues that we believe will bring more proportionality and will facilitate the implementation for investment firms, credit institutions, commodities firms, investors, and other financial markets participants as well as regulators. We believe that this is especially important given the significantly extended scope of the new market abuse rules. We remain available to follow up with more detail and to discuss further the following drafting proposals.

1. Investment Recommendations (Annex XV)

The scope of MAR is broader than the Market Abuse Directive 1 (MAD), and therefore more recommendations are expected to be subject to the disclosure requirements under the DTS. Furthermore, the DTS includes a number of additional disclosures, such as those set out in Article 4. These disclosures appear to be designed to provide recipients of an investment recommendation with additional information to enable them to make a better-informed investment decision. We note that these disclosures have been crafted with traditional, substantive independent research in mind which is based on models and employs a rating system (e.g. a system that provides a recommendation, based on a framework, for issuers or securities using terms such as buy/hold/sell). They are not appropriate for marketing communications falling within the scope of the MAR investment recommendation definition ('in-scope marketing communications'), which are fundamentally different, in that they are sent to existing clients, are not necessarily based on models or valuations and do not include the long, reasoned, in-depth analyses that the DTS seems to presuppose.

It would therefore be disproportionate to treat in-scope marketing communications in the same way as traditional, substantive independent research by applying the full set of disclosures set out in the DTS to the former. In particular, we believe that Articles 3 and 5 of the DTS already constitute an appropriate set of disclosure standards for in-scope marketing communications, especially given the addition of the 0.5% disclosure in Article 6.1.a of the DTS.

'ABC CEO resigns – short opportunity?' is an example of a scenario where a disproportionate level of compliance may be triggered for a brief communication. The requirements of Article 4.1.e of the DTS (to include an explanation of the meaning of the recommendation, the length of time for which the recommendation is valid etc); or of Article 4.1.c (to direct the reader to the details of the valuation methodology used), would not be appropriate given the often sporadic and extemporaneous nature of these marketing communications. Moreover, the next day, the same person could issue another note saying 'ABC hires XY as CEO - long opportunity?' Furthermore, this investment recommendation may differ from the published view of the independent research from the same investment firm or credit institution, both in the direction of the recommendation and the time period to which the recommendation relates. Thus the requirement in Article 4.1.h of the DTS (to list out differing recommendations relating to the same instrument or issuer over the previous 12 months), or Article 4.1.i of the DTS (to list all the recommendations made on the relevant instrument or issuer over the previous 12 months), may actually confuse or mislead recipients. Also, a number of the disclosure requirements included in the DTS (e.g. Articles 4.1.i and 6.3) are not possible to implement for recommendations that are not part of a ratings system. For example a sales person may produce trade ideas which are ad hoc and not based on a model

(e.g. relative value trade ideas such as 'Buy BRITEL $2.350% '19s/ Sell BRITEL €1.125% '19s'). Such disclosures only make sense, and should only be required, where the recommendations are based on a rating system. This is the approach that has been taken by FINRA in the US under Rule 2242. Indeed, and for the same reason, the requirement in Article 6 (3) of the DTS to aggregate and publish on a quarterly basis all the relevant banks' recommendations to buy/sell/hold will be misleading if applied to all MAR investment recommendations.

Applying the same set of DTS disclosure standards to all MAR investment recommendations would additionally create major additional process and cost, particularly in the case of in-scope marketing communications, which might lead businesses to conclude that some types of recommendation should no longer be made available to clients. That would impact the amount of market information received by industry participants, trading volumes, liquidity and ultimately economic growth.

There is, of course, nothing preventing a client from asking for further and better particulars of any MAR investment recommendation should he/she so desire.

The MAR Level 2 disclosure requirements should take into consideration the different types of investment recommendation covered under MAR (including in-scope marketing communications and other investment recommendations which do not employ a rating system). We therefore suggest that the DTS exempt in-scope marketing communications and other non-rating based types of investment recommendation from certain of the disclosure requirements, in accordance with the following drafting:

- Insert in Article 4 of the DTS, Annex XV, a new paragraph 3 as follows:

  3. This Article 4 does not apply to short term investment recommendations originating from inside the sales or trading department of an investment firm or credit institution and which are: (i) addressed to their non-retail clients; and (ii) clearly stated as not intended for the general public.

- Add in Article 5 of the DTS, Annex XV, a new paragraph 4 as follows (please note we have replicated the helpful drafting included in Article 6.4 for the sake of consistency):

  4. Where the disclosure of the information referred to in paragraphs 1, 2 and 3 is disproportionate in relation to the length or form of the recommendation, including in the case of a non-written recommendation that is made using modalities such as meetings, roadshows, or audio or video conferences as well as radio, TV or website interviews, the person who produces recommendations shall state in the recommendation where the required information can be directly and easily accessed by the persons receiving the recommendation free of charge.

- Insert in Article 6 of the DTS, Annex XV, a new paragraph 5 as follows:

  5. The requirements of paragraphs 1 (b) and (c), 2 and 3 shall not apply to short term investment recommendations originating from inside the sales or trading departments of an investment firm or credit institution and which are: (i) addressed to their non-retail clients; and (ii) clearly stated as not intended for the general public.

2. Suspicious transactions and order reports (Annex XI)

We note that ESMA has expanded the definition of 'orders' in Article 1.d of the DTS Annex XI beyond its ordinary natural meaning to include 'each and every quote'. This addition is disproportionate as it would require a very large amount of additional systems development by impacted firms, because (a) existing systems tend only to capture orders, and (b) the number of quotes given by an investment firm in any given period far exceeds the number of orders placed. Combined, this will greatly increase the risk of firms not being compliant on 3 July 2016.

The text of Article 16.2 of MAR refers only to 'orders and transactions'. Consequently we feel that the addition of quotes in the DTS goes beyond the scope of Article 16.2 of MAR and is therefore outside ESMA's Level 2 remit set out in Article 16.5 of MAR. This remit empowers ESMA to develop draft regulatory technical standards to determine appropriate arrangements, systems and procedures to comply with Articles 16.1 and 16.2, which are requirements for, respectively, 'market operators and investment firms that operate a trading venue' and 'any person professionally arranging and executing transactions.'

In our view, the definition of 'order' in Article 1.d of the DTS Annex XI should be amended as follows so that it is clear that orders do not include quotes.

> *(d) "order" means each and every order, including ~~each and every quote, irrespective of whether its purpose is initial submission~~ any~~,~~ modification, update or cancellation of an order~~, and irrespective of type.~~ but excluding any quotes or request for quotes.*

Further, we note that the DTS commentary, at section 6.4, paragraph 149 (page 36), is inconsistent with the DTS Annex XI, Recital (1).

In order to remedy this we propose the deletion of the second, third and fourth sentences of paragraph 149, and their replacement with the following sentence: '*The whole process is likely to require some level of automation*' which appears at the end of Recital (1) of the DTS Annex XI.

3. Insider Lists (Annex XIII)

The obligation to maintain sensitive personal data (full names, addresses, phone numbers, national ID numbers) of an individual not employed within the group of an investment firm or credit institution, i.e. employed by third parties such as lawyers, accountants, printers and the like, should rest on that individual's employers and not on the relevant firm/institution, provided that when the regulator requests the information it can be provided quickly to the firm/institution and on to the regulator and without tipping off. We anticipate significant data protection issues otherwise.

Similarly, we suggest that the requirement to maintain this personal data up to date be on a 'best efforts' basis. Investment firms and credit institutions must be entitled to rely on their employees and their contractors to supply this personal data to them and to accurately maintain it.

We would also like to clarify our understanding that within an investment firm or a credit institution it will be acceptable to maintain the data either in one place (typically, HR) or in different places (e.g. some in investment banking, some in HR) so long as it can be contained in a protected environment and provided quickly to the regulator on request. We understand that data held in one place does not need to be duplicated in another.

There is, finally, the question of individuals' personal data being transmitted electronically across national borders (both within the EEA and to and from third countries). Regulators will have to become involved in making legally enforceable demands for such data, in the situation where local data protection or employment law would otherwise conflict with the proposed insider list requirements. We feel this may potentially place industry in a legally dangerous position by virtue of having to decide between breaching EU law relating to insider lists or national law relating to data protection or employment.

Our recommendation, therefore, is to insert new paragraphs at the end of Article 2:

> 6. *The obligation to maintain sensitive personal data (such as full names, addresses, phone numbers, national ID numbers etc.) of an individual not employed within the group of persons referred to in paragraph 1 rests on that individual's employers and not on the relevant person referred to in paragraph 1, provided that, once a competent authority makes a request for an insider list, the firm uses its best efforts to ensure that the data is provided by contractors and other third parties.*
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> *7. Persons referred to in paragraph 1 may, absent manifest error or evidence of fraud, rely on their employees to supply their own personal data to them and to accurately maintain it.*
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> *8. Persons referred to in paragraph 1 may maintain the data in different parts of their group so long as it can be contained in a secure and confidential environment and provided to the competent authority on request and without delay.*
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> *9. If a person referred to in paragraph 1 cannot obtain data required by a competent authority without the risk of breaching the national law of a member state or of a third country it shall discharge its obligations hereunder by notifying the competent authority where and by whom the data is held and using its best efforts to assist the competent authority in obtaining it.*

4. Buy-backs (Annex VII)

Trading in own shares as part of an equity buy-back programme is not considered to be market abuse under MAR Article 5 (1) (safe harbour) if certain conditions are met.

The DTS suggests that in order to benefit from this safe harbour, transactions have to take place on a trading venue (therefore excluding OTC transactions from the safe harbour). This will cause a problem in the (not unusual) scenario in which the broker-client leg of the transaction is traded OTC (i.e. the broker buys shares on a trading venue and then sells to the client bilaterally i.e. OTC).

This appears to be at odds with the objectives of the Capital Markets Union (to remove barriers to capital markets access), and the recent non-binding resolution of the EU Parliament, which encourages a wider range of investment choices and risk mitigation tools.

We suggest that it is explicitly recognised that if an issuer purchases shares from a broker on a riskless principal basis and the corresponding market purchase by the broker was made on a trading venue, that will be considered to satisfy the requirement under the DTS on buy-backs (Article 3.1.a), i.e. that the shares shall be purchased by the issuer in a trading venue where the shares are admitted to trading or traded, provided that all the conditions referred to in Regulation (EU) No 596/2014 and the other conditions of the RTS on buy backs are met.

The following revised drafting could be considered for the DTS, Annex VII Recital (4):

> *(4) In order to prevent market abuse, it is appropriate to set conditions regarding the purchase price and permitted daily volume of trading in own shares in buy-back programmes. To avoid circumvention of such conditions, the buy-back transactions should be carried out on a trading venue where the shares of the issuer are admitted to trading or traded. However, if the issuer is not a member of a trading venue, a buy-back transaction could benefit from the exemption where the issuer carries out the transaction with a broker outside of a trading venue and the broker enters into a matching transaction on a trading venue. Riskless principal trading legs of a buy-back transaction could be used for the purpose of a buy-back programme and should benefit from the exemption, provided that all the conditions referred to in Regulation (EU) No 596/2014 and this Regulation are met. ~~However~~ In addition, negotiated transactions that do not contribute to price formation could be also used for the purpose of a buy-back programme and benefit from the exemption, provided that all the conditions referred to in Regulation (EU) No 596/2014 and this Regulation are met.*

Annex 1: About the associations

The Association for Financial Markets in Europe (**AFME**) represents a broad array of European and global participants in the wholesale financial markets, and its members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association through GFMA (Global Financial Markets Association) to communicate the industry standpoint on issues affecting the international, European and UK capital markets.

The British Bankers' Association (**BBA**) is the leading trade association for the UK banking sector with more than 200 member banks headquartered in over 50 countries with operations in 180 jurisdictions worldwide. Eighty per cent of global systemically important banks are members of the BBA. As the representative of the world's largest international banking cluster the BBA is the voice of UK banking enabling us to represent our members domestically, in Europe and on the global stage. Our network also includes over 80 of the world's leading financial and professional services organisations. Our members manage more than £7 trillion in UK banking assets, employ nearly half a million individuals nationally, contribute over £60 billion to the UK economy each year and lend over £150 billion to UK businesses.

FIA Europe, formerly the Futures and Options Association, represents some 170 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPS, vendors, law firms and consultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe is affiliated with FIA under FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

Since 1985, International Swaps and Derivatives Association (**ISDA**) has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org