SIFMA
European Primary Markets Division

9 January 2009

Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France

Re: **CESR/08-717 Market Abuse Directive Level 3 – Third set of CESR guidance and information on the common operation of the Directive to the market**

I am writing on behalf of the European Primary Markets Division of the Securities Industry and Financial Markets Association with regard to the public consultation by the Committee of European Securities Regulators ("CESR") on the Third Set of Guidance and Information on the Common Operation of the Market Abuse Directive.[1] Generally we thought the proposed CESR guidance would be helpful, particularly having cross-European confirmation that stabilisation and buy-back activity should not be regarded as abusive solely because it occurs outside of the safe harbour. On stabilisation we agree with CESR's view that sell transactions are not within the safe harbour. We also agree that there is a particular area of industry concern about the application of Article 8 of the Market Abuse Directive to "refreshing the geenshoe".

There are a few respects in which we believe the market could benefit from some greater clarity and would recommend CESR consider amending and/or adding to its guidance.

1 Sales of Shares in order to facilitate exercise of the greenshoe

There are circumstances in which sales of shares made for the purpose of facilitating the exercise of a greenshoe may not be abusive and recognition from CESR that this is the case would be helpful.

We would see the conditions for any such trading to be non abusive as including:

- the greenshoe option is drafted on the basis that it is able to be exercised for the purposes of covering overallotments and subsequent short-positions (whether or not they are taken out with a stabilising purpose);
- the issuer (or selling shareholder) as grantor of the option wants to raise the additional proceeds and is consulted in relation to the proposed sales;

[1] The European Primary Markets Division represents the shared interests of major global and regional banks in matters related to the equity capital markets in Europe and in the Middle East. Members include Citi, Credit Suisse, Deutsche Bank, Goldman Sachs, Merrill Lynch, JPMorgan, Morgan Stanley, Nomura, Royal Bank of Scotland, UBS, and UniCredit. SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in London, New York, and Washington D.C.; its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

- selling activity is conducted in a way which minimises its market impact with regard to the prevailing market conditions; and
- sales are limited to the position acquired by the stabilising manager in prior stabilising transactions. (Stabilising managers should not "free ride" by allocating less that the full amount of the overallotment facility and subsequently increasing the size of the short position by sales in the market.)

This is an area in which different banks might seek to adopt different interpretations giving rise to unsatisfactory differences in practice across the market. Additional guidance from CESR would therefore be helpful.

2 Suggested technical changes to the Draft Third set of guidance

In paragraph 14 CESR expresses the view that sales of securities conducted in the stabilising period are not within the safe harbour (which we agree with) and that subsequent purchases are not. We do not as a technical matter see any reason for subsequent purchases being viewed as necessarily outside the safe harbour? If they are trades the purpose of which is solely to close a refreshed short position (where the fresh shorting is not covered by safe harbour) we could see some possible argument that they should not have the protection of the safe harbour. It would seem to us however that if they are made for a stabilising purpose they should be covered. To the extent it is possible to allocate purchases against prior short positions they might after all be treated as made to cover positions that have been held from the outset.

In paragraph 15 we would suggest deleting the reference to an indicator of non abusive refreshing activity which is directed at creating "capacity" to stabilise as being there having been volatility in the relevant share price. Our understanding is that it is rare for any syndicate desk to judge the likelihood of future volatility by reference entirely to what has happened in the past. The factors for judging the likelihood of future volatility tend to be based more on forward-looking sector, market, currency, political and economic matters and sentiment. Typically banks will want to preserve the ability to stabilise in order to protect against volatility throughout the period and will be reluctant and would be ill-advised to commit at any point prior to the expiry of the period that there could be no conceivable need for further stabilisation.

3 Closing positions

Where a stabilising manager has a long or a short position which, for commercial reasons, it has a desire to close it seems to us that closing the position on its face is not motivated by any manipulative purpose and therefore that if it is undertaken in a responsible way should not give rise to market abuse concerns even though it does not fall within the safe harbour. Some guidance to this effect would be helpful. The two principle contexts in which this concern can arise:-

3.1 closing a naked short where the price rises above the offer price and the underwriting bank takes the view that the capacity will not be required in order to support stabilising trades; and

3.2 sale out of a long position acquired from stabilisation transactions which is not off-set by the initial overallocation.

As a commercial matter it should be open to an underwriting bank to look to manage such short or long positions in the same way it would manage any other position without regard to the fact that it may still be within the stabilising period - recognising that while within the stabilising period transactions to close the position should be undertaken in a responsible way having regard to market conditions.

4 Block Trades

Recital 14 of the Buy-back and Stabilisation Regulation provides that block trades are not considered as a significant distribution of relevant securities "as they are strictly private transactions". The Regulation does not however define "block trade" as it is used in the Recital.

Many block trades as we would understand the term are undertaken by the ECM desks of most banks and would seem to us not to be "strictly private transactions". They will be publicly announced and widely marketed to institutional investors before a binding contractual commitment is entered into with investors. The book building techniques adopted for offering and selling an "ECM syndicate desk managed" block trade to institutional investors will be broadly the same as those adopted for an IPO or add-on equity offering with a prospectus.

It would be helpful, therefore, if CESR could clarify that it is a question of fact whether on any particular transaction there is a "significant distribution" such as to allow stabilising and delete the reference to block trades in Recital 14.

We thank you for the opportunity to give our observations on the draft guidance. Please feel free to contact me on +44 20 7743 9304 if you would find it useful to discuss the contents of this letter or any aspect of the consultation.

Best regards,

Lorraine Charlton

Lorraine Charlton
Managing Director

cc: Michael Treip, United Kingdom Financial Services Authority