The BBA, AFME, and ISDA have engaged with their respective members in relation to the market abuse regulation (MAR) draft technical standards (DTS). Members have four remaining fundamental issues they wish to raise which we have collectively set out below. We would be happy to follow up with more detail should you wish to discuss further.

1. **Investment Recommendations**

MAR seeks to ensure transparency, requiring persons producing or disseminating investment recommendations to ensure information is objectively presented, and to disclose any conflicts of interest. To this end MAR DTS article 6.1.a requires the producer of a recommendation to state whether it holds more than 0.5% of the issued share capital of the issuer to which the recommendation directly or indirectly relates. This seems appropriate.

The scope of MAR is broader than MAD, and therefore more recommendations are expected to be subject to the disclosure requirements applied to investment recommendations 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 constitute an appropriate set of disclosure standards for in-scope marketing communications, with the addition of the 0.5% disclosure in article 6.1.a of the DTS, mentioned above.

It is worth mentioning by way of explanation that some in-scope marketing communications will be very short comments, along the lines of "ABC CEO resigns – short opportunity?", so that, for example, 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 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 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.

Recommendation: The MAR Level 2 disclosure requirements should take into consideration the different types of investment recommendations under MAR (including in-scope marketing communications and other investment recommendations which do not employ a rating system as against traditional substantive independent research using 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 disclosure requirements, as set out above.

2. **Suspicious transactions and order reports**

This part of MAR requires market operators and investment firms that operate a trading venue to establish and maintain effective arrangements, systems and procedures for preventing and detecting market abuse and attempted market abuse.

An entity will be compliant with the obligation in paragraphs 1 and 2 of article 16 of the DTS if the level of monitoring is effective and appropriate for the size and nature of the business the entity conducts.

We welcome the confirmation within a recital of the DTS that surveillance and monitoring systems do not always have to be automated.

However, we are concerned about the suggestion that firms may still be required to have systems that produce automated analysis and alerts of every transaction and order. The requirement for the system to produce alerts, in our opinion, indirectly imposes an obligation on the systems to be automated, directly contradicting the statement in the recital of the DTS. Crucially, we feel industry can deliver a full and effective surveillance programme without having a fully automated system analysing each trade and order by virtue of using other complementary methods, such as human surveillance.

In addition, ESMA has defined ‘orders’ in the DTS in a very broad way, including every type of order and each and every quote (including modifications, updates, cancellations etc.). As a result, this would cover quotes on every trading system, including voice trading. This one-size fits all model for trading activities may not be the most efficient surveillance approach. For example, in the case of voice trading, human analysis (which would be assigned via a risk-based approach) would be, in this instance, more effective than a fully automated system given that under the human approach, nuances such as tone, expression and more subtle suggestions may be picked up rather than conspicuous 'red flag' words or phrases that an automated system might be programmed to identify. We think that automated surveillance systems have a big role to play, but the DTS requirements should reflect the different types of trading systems and allow firms to adopt a risk-based approach without imposing automated systems in all instances by default.

Recommendation: We believe that DTS should not require firms to put in place systems that create alerts for the full range of trading activities. We would suggest that the DTS be amended in order to allow firms to adopt a risk-based approach for certain types of trading systems. We do agree that surveillance and monitoring must be capable of analysing every transaction. The word "capable" appears in the ESMA report (at para 6.4.2.149) but not in the DTS text – we suggest that "capable" is also used in the context of suspicious transactions and order reports in the DTS.

3. **Insider Lists**

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 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.

Recommendation: We would suggest that banks, national competent authorities and professional organisations work together to arrive at the most effective means of implementing the new regime for insider lists with a view to achieving the common aim of making it easier to identify potential market abuse.

4. Buy backs

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.

Recommendation: We suggest, therefore, that it is recognised (in the RTS or ESMA Q&A) that if an issuer purchases shares from a broker on a riskless principal basis and the corresponding market purchase by the broker was on a trading venue, that will be considered to satisfy the requirement under the RTS on buy backs (Art 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.

END 15 October 2015