

20 May 2016

FCA
Law and Policy
Enforcement and Market Oversight Division
25 The North Colonnade
Canary Wharf
London, E14 5HS

AFME-BBA response to FCA Consultation Paper CP16/13

Dear Sir / Madam

The Association for Financial Markets in Europe (AFME) and the British Bankers Association (BBA) welcome the opportunity to comment on the FCA consultation paper entitled Changes to the Decision Procedure and Penalties Manual and the Enforcement Guide for the Implementation of the Market Abuse Regulation (2014/596/EU).

Please do not hesitate to contact us if you would like further information on any of the points raised in this response.

Yours faithfully

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Consultation response

Changes to the Decision Procedure and Penalties Manual and the Enforcement Guide for the Implementation of the Market Abuse Regulation (2014/596/EU)

20 May 2016

1 The Association for Financial Markets in Europe (AFME) and the British Bankers Association (BBA) welcome the opportunity to comment on FCA consultation paper CP16/13 “Changes to the Decision Procedure and Penalties Manual and the Enforcement Guide for the Implementation of the Market Abuse Regulation (2014/596/EU)”.

1.2 In this submission we use the same definitions as in the consultation paper.

2 We understand and accept that many of the changes proposed are imposed as a matter of EU law and that the FCA and HM Treasury have little discretion in some areas. That said, there are certain areas of concern which we set out below.

2.1 The deletion of the reasonableness defence currently encapsulated in section 123(2) of FSMA, which deletion has been incorporated into DEPP 6.3.

2.1.1 We have stated in the past (most recently in our submission to the Fair and Effective Markets Review) that in the interests of stamping out deliberate market abuse (which is in everyone’s interests) regulators should always seek to take criminal proceedings where they suspect deliberate market abuse. In the context of CP 16/13 that means that deliberate breaches of articles 14 and 15 of EU MAR (the so-called “market abuse” provisions of MAR, covering insider dealing and market manipulation) should normally be treated as breaches of criminal law and should be pursued through the criminal courts. We think that the deterrent effect of a policy of this nature is very strong. The FCA has had considerable success on insider trading cases in recent years and is to be commended for this.

2.1.2 Conversely we believe that innocent breaches of EU MAR (including articles 14 and 15), whether carried out by individuals or firms, should not generally be enforced against and that negligent breaches should be subject to supervisory measures and not, except in the worst cases of systemic breach, to enforcement action.

2.1.3 We believe very strongly that FCA should be required by law to take into account in its supervision and enforcement procedures situations where the individual believed on reasonable grounds that his behaviour did not amount to market abuse (or ancillary matters) or took all reasonable precautions and exercised all due diligence to avoid engaging in market abuse (or ancillary matters).

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2.1.4 In such circumstances it should be appropriate to exercise enforcement action in a proportionate and reasonable manner such that in these circumstances no enforcement action is actually pursued. The FCA has on many occasions stated that it does not seek to enforce against each and every breach of its rules, and the above would seem to us to be exactly the right sort of case where no enforcement action is necessary.

2.2 The speed of the process. At the time of writing we still do not have the final RTS for EU MAR and we do not have the statutory instruments due to be made under section 2(2) of the European Communities Act 1972. EU MAR is still due to take effect on 3 July and the process of its introduction has been unnecessarily rushed across the EU. We believe it to be inappropriate in general to introduce new enforcement measures in a hurry and particularly when the statutory instrument upon which they depend for legislative effect has not been laid before Parliament. Indeed, if on 23 June 2016 the UK were to vote for Brexit, then HMT and the FCA will want to consider (alongside all other EU legislation) whether or not it wants to implement EU MAR at all, in whole or in part. We assume that the FCA will raise any potential further changes with industry via a consultation process, should any further changes be required to the Handbook, whether in DEPP or other sections, or to the EG, as a result of changes to the final RTS or the statutory instrument.

2.3 The cost-benefit analysis is omitted. It is of course the case that the cost for the industry of implementing the provisions of EU MAR enormous. EU MAR, contrary to what the FCA has been saying, is a major change in law requiring huge investment in systems and process changes. Because of the delay in finalising the legislation – as stated, at the time of writing it is still incomplete - the industry is in general far from ready to implement the investment recommendations disclosures regime and the STORs monitoring regime. The likelihood of breaches of the non-market abuse parts of EU MAR during the first 24 months is therefore very high (in spite of the fact that firms are working hard with the information and time available to them to be compliant and putting in place plans to demonstrate the steps to compliance with EU MAR) and so we propose that the FCA take this into account when considering any enforcement action during this period on non-market abuse breaches of the market abuse regulation (i.e. breaches of articles other than 14 (insider dealing) and 15 (market manipulation). Any such enforcement action during such period should be carefully considered and only embarked upon if the regulator believes that the firm or individual has wilfully failed to use best efforts to comply.

3 We have the following specific points of detail:

3.1 As mentioned in paragraph 2.2 above, we do not yet have the final version of the statutory instrument which sets out the changes being referenced in CP16/13. We therefore want to raise a query, which is based on an earlier version of the statutory instrument, in relation to paragraph 2.17 of CP16/13. In the statutory instrument, s.123A(2) refers to the FCA power to impose “a temporary prohibition on the individual acquiring or disposing of, on his or her own account **or the account of a third party, directly or indirectly**, financial instruments” (emphasis added). Paragraph 2.17 of the CP16/13 does not make reference to the third party

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account, and we would therefore be grateful if you could confirm whether this reference will be included in the statutory instrument and the FCA powers.

3.2 We note the removal of the current s.123(2) FSMA from the statutory instrument, which permits persons a defence on the grounds that they believed their actions to be reasonable, and the change that this requires to DEPP 6.3. However, we would suggest that some of the spirit of this section (mentioned at paragraph 2.1 above) could be included within DEPP section 6.2, as DEPP 6.2 is a list of factors which is not exhaustive, and therefore there is scope for the FCA to amend it. Furthermore, DEPP 6.2 is also clearly marked as guidance, and therefore the FCA will not be bound to consider all such factors in all cases. Although the statutory instrument removes the right to this defence, the FCA continues to have the power to assess which factors it will take into consideration if taking action against a person, and we believe that the current wording in DEPP 6.3.1(1) and (2)¹ is aligned with considerations as to the nature of the behaviour, its seriousness and impact set out in DEPP 6.2.1(1). Indeed, there is already crossover between 6.2 and 6.3 as both look at whether the behaviour is in line with any guidance or other materials (in 6.2.1(4) and 6.3.2(2)). For these reasons, we would suggest that DEPP 6.3.1(1) and (2) could be inserted into DEPP 6.2.1(1).

4 Overall the proposal by the FCA to minimise changes to DEPP and EG and ensure consistency in the drafting is gratefully received. We hope that the FCA will consider the points we have raised above in order to ensure their continued assistance to regulated persons in the United Kingdom in relation to the market abuse rules to which they are subject. We remain as ever ready and willing to assist HMT and FCA.

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¹ 6.3.1 Section 123(2) of the Act states that the FCA may not impose a penalty on a person if there are reasonable grounds to be satisfied that:

- (1) the person concerned believed, on reasonable grounds, that his behaviour did not amount to market abuse or requiring or encouraging; or
- (2) the person concerned took all reasonable precautions and exercised all due diligence to avoid engaging in market abuse or requiring or encouraging.

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About the Associations:

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

The **BBA** is the leading association for UK banking and financial services representing members on the full range of UK and international banking issues. It represents over 200 banking members active in the UK, which are headquartered in 50 countries and have operations in 180 countries 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. The BBA is registered on the EU Transparency Register, registration number 5897733662-75.

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