AFME Response to Issues Arising from CP 17/5 relating to the Handling and Disclosure of Inside Information and Compliance with Market Abuse Regulation and Connected Analyst Interactions

June 2017

AFME welcomes the opportunity to respond to the aspects of CP 17/5 referred to below. This document is a response to question 10 from CP 17/5.

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. AFME advocates 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.

This response is being submitted in parallel with a general response to CP 17/5 prepared by an Equity Capital Markets focused working group formed by AFME and the British Bankers' Association. This ECM working group agrees with the contents of this response.

Further, this response should be read alongside a document entitled "AFME Research Working Group Response to CP 17/5 – Connected research Analyst Interactions with Issuers, Shareholders and Corporate Finance Advisers", which was prepared by a separate working group to consider the proposed changes to COBS 12.2.21A G.

Introduction

1. AFME agrees with the core principle articulated in §§2.46, 4.16-4.18, 4.20 and 4.23 that, where an issuer and its securities fall within the scope of MAR, it must ensure that any inside information being disclosed to analysts in analyst presentations (and in turn by analysts to the recipients of research):

1.1 is in the normal exercise of employment, profession or duties (Article 10 MAR); and

1.2 has not been publicly disclosed on the basis of a legitimate ground for delay (Article 17(4)-(8) MAR).

Scope of application of MAR (including Article 11)

2. AFME acknowledges that certain statements are made in CP17/5 (in particular at §2.45 and §§4.21-4.22) regarding the scope of application of MAR, and the Article 11 MAR soundings regime in particular. Whilst AFME notes that the views expressed by the FCA were framed as being subject to the views of

ESMA, AFME confirms that its views on this issue remain as previously expressed to the FCA. As a result, AFME does not agree with the views as to the scope of MAR that are set out in the paragraphs referenced above. The FCA has previously received more detailed papers from AFME commenting on this issue and we do not wish to repeat the detail of what was said in those earlier papers here. In line with previous discussions, however, AFME would be happy to provide further information to the FCA to elaborate on the circumstances in which securities transactions would, in AFME's view, fall within the scope of Article 11 of MAR and the reasons why AFME considers its analysis to be consistent with the wording and intent of the Article 11 MAR regime. AFME understands that members are not encountering difficulties in applying the Article 2(1)(d) test when assessing whether a particular IPO transaction is in the scope of Article 11 MAR, and would be happy to discuss particular scenarios or examples with the FCA if this would be helpful.

Circumstances in which inside information will be disclosed to analysts

3. Before examining the controls and processes operated when determining whether inside information may be disclosed to analysts as part of early stage IPO discussions, it is important first to recognise that the circumstances in which this will take place will, in AFME's view, be limited given the scope of application of MAR:

3.1 For debut issuers with no securities admitted to trading, inside information concerning the issuer will, by definition, not be capable of being transmitted until a request for admission to trading is made;

3.2 For issuers that have listed debt or are the subsidiary of a listed parent, MAR will apply in relation to the listed securities.[1] In these circumstances however it is generally the case that public disclosures before the time of the analyst presentation will have the effect that what is disclosed in the presentation is not inside information (for the reasons discussed further below).

4. In situations falling within 3.2 above (or other transactions within the scope of MAR) we agree with the FCA that firms / issuers should take steps to ensure:

4.1 that there is an assessment of whether information that is proposed to be disclosed to analysts comprises inside information and if it does whether it should be announced by the issuer.

4.2 where there is inside information and no proposal to announce it before the analyst presentation, that the proposed disclosure to analysts is reasonable and in the normal exercise of employment, profession or duties (Article 10 MAR) and:

4.2.1 there is a legitimate reason for public disclosure of the inside information being delayed by the issuer to whom the inside information relates (Article 17(4)-(8) MAR); and

[1] Article 11 will, however, apply only where the price or value of the equity shares to be issued and listed depends on or has an effect on the price or value of the existing listed debt / shares of the listed parent, as the case may be.

4.2.2 the information is publicly disclosed prior to the publication of any analyst research based on such information.

5. AFME believes that firms already have processes in place to meet these requirements (and a number of these were described in a paper sent by AFME to the FCA in September 2016), but we agree with the FCA that firms and issuers should ensure that these matters are considered

6. To elaborate on paragraph 5 above:

Assessing whether inside information will be disclosed

6.1 It is invariably the case that an announcement that the issuer / listed parent is considering the possibility of an IPO will have been released, so that this information is no longer inside information. This will often take the form of a public statement that the issuer is considering strategic options including the **possibility of an IPO**. See, for example:

6.1.1 Misys (Website Statement, Sep-16): "Marlin and its major shareholders continue to assess a range of strategic alternatives including a potential IPO".

6.1.2 ConvaTec (Website Press Release, Jun-16): "ConvaTec is in the early stages of considering options for potentially raising equity, including in the public markets".

6.1.3 Sophos (Website Statement, Mar-15): "Further to market speculation, Sophos confirms that it continues to explore strategic options to enhance shareholder value, including a potential IPO".

6.1.4 Center Parcs (Statement to Bondholders, Mar-15): "Center Parcs confirms that it is considering its strategic and financing options, which may include private or public equity or debt capital markets".

6.1.5 Hastings (Statement in FY2014 Results, Mar-15): "We continue to assess all strategic options available to us, including a potential initial public offering, in order to fully exploit our business' growth potential".

6.2 Generally, it is the fact of the IPO (rather than the **precise timetable, offer structure, pricing model or other information regarding the details of the transaction**) which may be inside information in relation to the listed debt or shares of the listed parent. There may, of course, be exceptions to this. For example:

6.2.1 Where the transaction may be inside information to the shares of the listed parent, there tends to be greater public disclosure as to the proposed transaction prior to any analyst presentations. This will primarily be driven by the parent's continuing obligations as a listed company and will very typically have the effect that no inside information is disclosed during the analyst meetings;

6.2.2 Where the planned use of proceeds of the IPO transaction may be inside information to existing listed debt (e.g. because the proceeds will be used to repay existing debt). Given the contemplation of a possible IPO will already have been announced, this scenario will generally not arise until such time as there is a sufficiently realistic prospect of the IPO itself and the related use of proceeds proceeding as to make the information precise for the purposes of the test for inside information. Generally, the information will not reach this level of precision until after the analyst presentations, as these will usually take place in advance of firm decision-making by the issuer about whether to proceed with the IPO and on what terms, taking account of views of analysts and investors.

6.3 Further, information that is **inside information** in relation to the issuer or its listed parent and **which does not relate to the potential transaction itself** (e.g. operational, financial, strategic and forward-looking information regarding the issuer / listed parent) will generally already have to have been disclosed by the issuer or listed parent, on the basis that there is unlikely to have been a legitimate reason for delaying such disclosure.

6.4 Materials to be provided to analysts are in AFME members' experience reviewed by the issuer and its advisers with an eye to whether they contain inside information and issuers actively consider their announcement obligations under the terms of existing listings.

6.5 As such, AFME considers it will be rare for inside information to be disclosed to an analyst at such meetings. As noted above, however, issuers and firms operate processes in place to assess whether inside information will be disclosed and whether some form of public disclosure is required. We agree with the FCA that this is an area that requires continued focus and that issuers and firms should not make assumptions that inside information will never arise in IPO transactions of the type identified above.

Basis on which inside information is disclosed

6.6 In those cases where inside information is to be disclosed:

6.6.1 AFME members recognise that steps need to be taken by issuers and firms to ensure that there is a legitimate reason for the information being disclosed to the analyst. Generally, the reason for disclosing the expected terms and timing of the IPO, and its impact on the capital structure, strategies and prospects of the listed company, to an analyst are to enable the analyst to model the transaction and its impact for the purposes of preparing the research and providing feedback to the issuer, which is used by the issuer and the advisers to make decisions about the feasibility and terms of the proposed transaction, including whether or not to proceed with the transaction. Disclosures need to be limited to what is reasonably necessary for the purposes of progressing the transaction, and therefore that the disclosures by the issuer and its advisers will be in the normal exercise of their employment, profession or duties. We believe that this is consistent with the requirements of Article 10 MAR.

6.6.2 Analysts are generally wall-crossed and made subject to strict written confidentiality agreements prior to being briefed, irrespective of whether inside information is being disclosed, to safeguard the confidentiality of the information being disclosed. Where inside information is being disclosed, analysts will be notified of their obligations in relation to the inside information (e.g. that they may not use or disclose the information). Irrespective of whether inside information is being disclosed, therefore, analysts will be prohibited from sharing the information with third parties, including through the publication of research prior to the intention to float announcement.

6.7 Additionally, any inside information disclosed to the analyst will be publicly disclosed prior to the analysts publishing any research and/or speaking with investors – e.g. through an ITF or equivalent announcement. This ensures that any inside information has been publicly announced. Analysts will be told when this has happened, so that they can proceed to publish research based on the (now publicly available) information and discuss it with potential investors.

6.8 We anticipate that the same analysis as set out above will also pertain in relation to the reformed IPO process contemplated by CP17/5.

AFME and its members would be happy to meet with the FCA to discuss or elaborate upon these procedures in further detail if that would be helpful.

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