esma European Securities and Markets Authority

Reply form for the ESMA MAR Technical standards

20 August 2014

European Securities and Markets Authority

Date: 20 August 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - Draft technical standards on the Market Abuse Regulation (MAR), published on the ESMA website (here).

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type <ESMA_QUESTION_MAR_TS_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **15 October 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Naming protocol - In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_MAR_CP_TS_NAMEOFCOMPANY_NAMEOFDOCUMENT: e.g.if the respondent were ESMA, the name of the reply form would be ESMA_MAR_CP_TS_ESMA_REPLYFORM or ESMA_MAR_CP_TS_ESMA_ANNEX1

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.

General information about respondent

Are you representing an association?	Yes
Activity:	Banking sector
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1>

We thank ESMA for the opportunity to be involved with the consultation process in relation to the technical standards to the Market Abuse Regulation (596/2014) ("**MAR**").

Please find below the executive summary of our key concerns with respect to the provisions and commentary detailed within the Consultation Paper.

1 Characterisation of the market soundings procedure as a safe harbour.

Based on MAR Level 1, we fundamentally disagree with the view that a market sounding conducted as proposed is not within a safe harbour. We do not understand the rationale for the conclusion that a market sounding is not within a safe harbour, particularly given the wording of Recital 35 MAR, and we strongly encourage this view to be reconsidered.

2 Investment recommendations.

We are strongly of the view that investment recommendations, originating from inside the sales or trading department of an investment firm or credit institution expressed to their clients and which are not likely to become publicly available, should not be considered investment recommendations for the purposes of MAR. Implementing the current proposals without change would have a material impact on investment communications between investment firms and investors with whom they have existing relationships as well as on research firms. Liquidity in some investments would also be impacted. These unintended consequences run contrary to the EU efforts to strengthen SME markets.

3 Content of insider lists.

We are concerned with the vast amount of personal and private information which is required to be held on insider lists. We consider this to be disproportionate to the aims of keeping such a list and further it poses a serious data protection concern.

4 Provision of research free of charge.

We strongly oppose the provisions which require firms to provide their investment research free of charge, where it has been referred to in a non-written recommendation. We consider this to be unfair and contrary to commercial practice in all sectors.

< ESMA_COMMENT_MAR_TA_1>

II. Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

Q1: Do you agree with the approach set out for volume limitations? Do you think that the 50% volume limit in case of extreme low liquidity should be reinstated? If so, please justify.

<ESMA_QUESTION_MAR_TS_1>

We do not consider that the 50% volume limit in cases of extreme low liquidity should be removed merely because it is infrequently used. Where buy-backs are conducted in illiquid instruments a higher threshold is necessary, and we therefore do consider that the 50% volume limit should remain.

In relation to average daily volume calculation, we acknowledge the practical challenges involved in performing an market aggregate calculation. However, we are of the view that further consideration may be required as to the impact of a per-venue volume limit. To limit permitted repurchase to 25% on the venue where the repurchase takes place would deny issuers the opportunity to benefit from market fragmentation by purchasing a higher volume of shares on the venue where they can achieve the best price, in a way that is still consistent with the principles of the safe harbour. We think it should be open for issuers to use an aggregate calculation or a per-venue calculation. For an issuer to have flexibility to determine an aggregate market volume need not oblige all issuers to perform this calculation since applying a per-venue limit will inevitably also be compliant with an aggregate volume limit.

Conversely, some issuers may be limited by company law requirements to make repurchases on certain types of venue. It should be open to them to benefit from a greater aggregate market liquidity within the safe harbour.

With respect to reporting to competent authorities, we do not support ESMA's proposal that in case of multiple listings, buy-back transactions should be reported to several competent authorities across the Union. We are of the view that such multiple reporting is disproportionately burdensome on firms who will be required to send several duplicative reports. We do not consider MAR precludes firms from sending such reports to a single competent authority.

At paragraph 9 of the Consultation Paper, ESMA notes that buy-backs are limited to transactions in shares, and not associated instruments. Given that the wording of MAR is, for all intents and purposes, identical to the current wording under the Market Abuse Directive (EU) (2003/6/EC), we do not believe that there is any rationale to take derivatives out of the scope of the safe harbour. We do not consider the MAR text precludes buy-backs to be undertaken through derivatives (just by virtue of the text being silent on the derivative element). We consider that "trading in own shares" will also cover trading in derivative financial instruments which grant the issuer the right or obligation to purchase their own shares at a future date. In our view, it does not matter how the buy-back is undertaken, so long as there is delivery of the shares and compliance with the volume and price limitation, such transactions should fall under the safe harbour.

We note that ESMA clarifies that only buy-back transactions carried out on a trading venue where the shares are admitted to trading or traded should benefit from the safe harbour. We do not consider that MAR enables ESMA to restrict the scope of the exemption and exclude over-the-counter

("**OTC**") trading. We would argue that it should not matter where the instruments are traded in a buy-back and we ask ESMA to explicitly recognise the use of OTC trading within the safe harbour.

Separately, in respect of trades capable of benefitting from the buy back exemption, we ask ESMA to consider clarifying the scope of eligible trades to make clear that share purchases made on a riskless principal basis, where the corresponding transaction is made on a trading venue, are also within the safe harbour. In respect of trades undertaken on a riskless principal basis, we are strongly of the view the transaction should be viewed as a whole rather than on a trade leg by trade leg basis. AFME have also raised this important clarification, in respect of riskless principal transactions, in our response to the Discussion Paper in respect of MiFID II/MiFIR in relation to the trading obligation detailed at Article 23 MiFIR, where we stated our view that the client leg of a riskless principal transaction should not be caught by the obligation.

<ESMA_QUESTION_MAR_TS_1>

Q2: Do you agree with the approach set out for stabilisation measures? If not, please explain.

<ESMA_QUESTION_MAR_TS_2>

We generally agree with the proposed approach with respect to stabilisation measures for equities transactions. However, we consider that the proposed approach is not adequately clear, particularly in relation to reporting, with respect to debt capital market transactions. We note that a number of stabilisation activities in the debt capital markets take place OTC: the proposed approach does not provide adequate clarity for such transactions which may bring significant practical difficulties for firms.

With respect to block trades, we support ESMA's wording at Recital 9 of the draft RTS (detailed at Annex IV to the Consultation Paper) which states that block trades that are strictly private trades are not significant distributions, and outside of the safe harbour, as supported by the paragraph 58 of the Consultation Paper. However, we note that the wording of paragraph 56 of the Consultation Paper, broadly states that "block-trades are not considered for the purpose of the stabilisation as primary or secondary issuance by the issuer and thus should not be subject to the exemption". We assume that paragraph 56 is meant to read: "such block-trades that are strictly private transactions are not considered for the purpose of the stabilisation as an "offer" under the definition of "significant distribution" and therefore should not be subject to the exemption.

<ESMA_QUESTION_MAR_TS_2>

III. Market soundings

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

<ESMA_QUESTION_MAR_TS_3>

We agree with the aim of a number of the proposals put forward; however, please find our specific comments, in respect of the below listed paragraphs.

- [para.62] We consider it important to clarify that the Article 11 MAR requirements, with respect to market soundings, are limited to persons at the DMP who have access to inside

information relevant to the market sounding in question, rather than applying generally to the DMP. We are of the view that the provisions of Article 11 were not designed to encompass all persons at the DMP, but rather those holding the inside information, and it would be useful for ESMA to clarify this.

- [para.64] We welcome ESMA clarification of the term “acting on behalf of or on the account of” but believe that it would be clearer to replace the words “should include” with are “limited to”. We believe it is important to clarify this point in order to avoid inadvertently capturing, by the definition of the market sounding, any general discussions that syndicate or sale teams at the banks may have with investors regarding their views on the market during which only public information is discussed. We strongly believe that such discussions should be outside the scope of provisions regarding market sounding.

- [para.65] We think it is important to clarify that a third party should only be considered to be acting on behalf of an MSB where there has been a direct contact between the MSB and the third party, with the information regarding potential imminent launch of the deal being provided by MSB to the third party on a confidential basis. For example, where a shareholder is coming out of a lock-up (information of such lock-up being generally available) or where a shareholder has indicated publically its intention to reduce its holding, such information may lead a third party to believe that a deal launch is highly probable but this should not trigger a need to follow market sounding procedures, in the event that a bank wished to test the market in respect of such a potential transaction.

- [para.66] We agree that a market sounding occurs only when the DMP is acting at the request of a MSB. When a DMP consults investors on its own initiative it should not be considered a market sounding for purposes of Article 11 MAR.

- [para.74] We do not understand when a disclosure of inside information would not be useful to an investor since by definition such information is price sensitive, therefore, we suggest removing the provision that DMPs should avoid disclosing inside information which they do not consider useful. This would otherwise introduce an unwelcome uncertainty to the scope of the provisions.

- [para.76] We agree that a DMP should assess, to the extent possible, the expected time table of a proposed transaction. However, we note that often is it not possible for the DMP to know the time period of publication. We therefore suggest that the DMP be obliged to determine the “reasonable expectation of the time period of when the information will cease to be inside information”, provided that the recipient should remain responsible for conducting its own assessment and make its own determination as to whether after such time period the recipient continues to be in possession of inside information (including, in the light of any other information the recipient may have). This is important given that the DMP will not know what other information the recipient may have which may render the information disclosed by the DMP to continue to be inside information to the particular recipient.

- [para.77] We are of the view that the DMP should inform the MSB of the nature or type of inside information to be discussed during the sounding, rather than the content.

- [para.78] Whilst we agree that in all cases the DMP is responsible for characterising information as inside information (or not), we do not consider that the DMP has the "ultimate responsibility" for such characterisation. Each person involved in the sounding process, including the DMP, MSB and potential investor, is responsible for determining their own characterisation of the information; this does not ultimately rest with the DMP. Additionally, in a syndicate scenario, we do not consider it is for any single DMP to characterise the information for all syndicate members, it is up to each member to make its own determination. Further in respect of the record-keeping, we do not consider the use of the words "due diligence" as helpful. This language cannot be found in the Article 11(3) MAR and we consider that the language could be confusing, we therefore ask that ESMA ensure there is a consistency of language used. We also note that Article 12(2) draft RTS (detailed at Annex IV to the Consultation Paper) does not provide further clarification in respect of keeping records of the decision, over and above what is already provided within MAR.

- [para.80] We agree that it is desirable for members of a syndicate to agree whether a piece of information should be regarded as inside information.

- [para.83] We disagree with the statement made in para. 83 of the Consultation Paper. We would recommend that this statement is redrafted to read: "In case of a syndicate, each DMP who is a member of such syndicate should make reasonable efforts to seek to avoid the same investors being questioned by several members with regards to the same piece of information, which has been concluded by the DMPs to be inside information, provided that it is acknowledged that the DMP cannot be responsible for any act or omission of another DMP". We do not think that the obligation should apply where no inside information is disseminated.

- [para 86]. The statement set out at para. 86 should be rephrased. Article 11(5)(a) MAR requires the DMP to obtain the consent of the potential investor to receive inside information prior to disclosing the information. We believe the statement in Article 11(5) MAR is clear and should not be broadened or rephrased.

  Obtaining consent to be sounded where no inside information is disseminated by the DMP is not in our view necessary and may lead to tipping off the investors that there is an underlying potential transaction or an inside information. Where the DMP concludes that the market sounding does not involve dissemination of inside information, the DMP should not be required to obtain consent from the investors to be sounded (whether to request such consent is necessary should be in the discretion of the DMP).

- [para. 88] We agree with the importance of recording a potential investor's decision to receive inside information. However, we do not support ESMA's decision to require the DMP to keep a list of potential investors that have said they do not wish to be sounded. Such a list as proposed by ESMA, has the risk of becoming very quickly outdated. In addition, such decisions tend to change continuously depending on the specificities of certain transactions and firm strategies, making such a list redundant in many circumstances. We consider that obtaining the potential investor's consent prior to undertaking the market sounding and recording this decision should be sufficient to avoid any inadvertent disclosure.

We attach a mark-up of the draft regulatory technical standards (detailed at Annex IV and Annex V to the Consultation Paper) reflecting our comments for ESMA's consideration.

Following the 8th October 2014 ESMA open hearing we wish to challenge the view communicated that compliance with the requirements for market soundings does not provide a safe harbour from the market abuse offence of the improper disclosure of inside information. We bring ESMA's attention to Recitals 32-36 of MAR, which set out the guiding principles with respect market soundings. Recital 35 states: "*Inside information should be deemed as being disclosed legitimately if it is disclosed in the normal course of the exercise of a person's employment, profession or duties. Where a market sounding involves the disclosure of inside information, the disclosing market participant will be considered to be acting within the normal course of his employment, profession or duties*.." This clearly indicates that compliance with the requirements is a safe harbour from that form of market abuse. The recital continues "[…]*There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information but they should not be able to take advantage of the exemption given to those who have complied with such provisions*." It is AFME's view that this wording of Recital 35 clearly suggests that a market sounding is a safe harbour. We consider the classification of a market sounding as a safe harbour to market abuse as fundamental and we ask ESMA to reconsider its position with respect to the status of market soundings.

<ESMA_QUESTION_MAR_TS_3>

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

<ESMA_QUESTION_MAR_TS_4>

Subject to our comments set out below, we generally agree with the proposed standard templates for market sounding where the DMP has concluded that the information included in the market sounding is inside information. In principle it is helpful to have clarity as to the matters to be covered in a call which amounts to such sounding; however, the scripts should allow for flexibility to deviate from the prescribed form where appropriate in the circumstances.

- The timeframe wording detailed in the draft RTS, Annex I template at para. iv.(c) (detailed in Annex V to the Consultation paper) should be qualified "if timing information is available" and should refer to the fact that the ultimate responsibility for determining whether the inside information has ceased to be inside information remains the recipient's.

- We do not consider it appropriate to require the use of a script in non-wall crossing soundings (i.e. soundings where DMP has concluded that the information included in the market sounding is not inside information). Not only is this unnecessarily prescriptive, we are of the view that the use of a script itself may suggest that there is some underlying inside information which drives the market sounding, which as a result may inadvertently lead to a tipping off risk. For example, the mere fact that the sounding script is used will inevitably lead the recipient to believe that there is an underlying potential transaction with respect to which the recipient is sounded. In certain circumstances it may be better to have a general discussion regarding the recipient's views and interest on the particular stock (or stocks or sector) without the need to use a script. Additionally, the use of a script where there is no inside information may confuse potential investors. Therefore, we consider that in instances where the DMP has concluded that the information included in the market sound-

ing is not inside information, the DMP should have the flexibility to use a script only if it deems it appropriate.

- We are of the view that DMPs should be authorised to email the script to the potential investors in order to make this process more practicable and efficient. On this basis the market sounding may then only go ahead once confirmation from the potential investor has been received by the DMP.

Additionally, we welcome ESMA's statement that the DMP may use a simplified standard script for market soundings where DMP has concluded that the information included in the market sounding is inside information when questioning potential investors with whom it has an on-going relationship and who have previously confirmed to the DMP that they are aware of the consequences of holding inside information. We believe in these instances the DMP should have the flexibility to decide exactly how to communicate with the potential investors so long as they make it very clear that they are being wall-crossed and that the potential investor consents.

<ESMA_QUESTION_MAR_TS_4>

Q5: Do you agree with these proposals regarding sounding lists?

<ESMA_QUESTION_MAR_TS_5>

We generally agree, subject our comments below, and we welcome ESMA's clarification that this requirement applies only to employees who are actually sounded. Whilst we agree with the overall aims of keeping sounding records, we have some concerns in relation to keeping a record of all follow-up calls. It is often the case that there will be numerous follow-up calls and we consider that the burdensome nature of recording every such instance is not proportionate to the overall aims of sounding lists. Therefore we suggest the recording of follow-up communications be limited to 'materially' important communications or discussions only.

With respect to non-wall crossing soundings (i.e. soundings where DMP has concluded that the information included in the market sounding is not inside information), we do not support the proposal that the DMP must retain sounding lists as this is overly burdensome considering no inside information will have been passed to the recipient. As with the use of prescriptive scripts for non-wall crossing soundings (as detailed in our response to Q.4), we consider that the collation of the sounding list by the DMP should be optional where no inside information is communicated in the sounding.

<ESMA_QUESTION_MAR_TS_5>

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

<ESMA_QUESTION_MAR_TS_6>

No. We do not consider it necessary to be obliged to keep such a contact list. We are of the view that, when considering the purpose of the provision is to control the exposure of inside information, the introduction of a contacts list will not materially improve the information exposure management. We consider that management of inside information is adequately performed by other means, such as detailed market sounding scripts, and therefore the maintenance of contact lists is not only burdensome but also unnecessary.

<ESMA_QUESTION_MAR_TS_6>

Q7: Do you agree with these proposals regarding recorded communications?

<ESMA_QUESTION_MAR_TS_7>

No. In principle we agree that it is important to have a record of market soundings where the DMP has concluded that the information included in the market sounding is inside information. We do not agree, however, with the proposals in respect of soundings which take place in face-to-face meetings and are therefore not captured by audio recording. Whilst we agree that it is good practice to ensure that persons record the details of the meeting appropriately, we do not believe that having them agree the content of the note should be mandatory. Parties agreeing the content of the note of a meeting will in many cases inevitably involve time-consuming discussions about diction, content, punctuation and will probably entail review by lawyers of each side which may be extremely costly and time consuming. We therefore urge ESMA to reconsider this and recognise that that it should be sufficient to require each party to draft and keep their own record of the communication.

<ESMA_QUESTION_MAR_TS_7>

Q8: Do you agree with these proposals regarding DMPs' internal processes and controls?

<ESMA_QUESTION_MAR_TS_8>

We generally agree, subject our comments below. We do agree that it is important that all employees are educated and appropriately trained in relation to managing inside information. However, with respect to the training detailed at draft RTS Article 11(3)(b) (detailed at Annex IV to the Consultation Paper), we do not consider it practical for specific training to be given to all employees in respect of assessing whether information to be conveyed in a market sounding is inside information. The assessment of whether information is inside information is a highly fact specific one, which, as a matter of practice, is undertaken by qualified professionals, who have developed appropriate expertise through their participation in the market which is not susceptible to compliance training. We are of the view that such training should be limited to appropriate training for relevant staff as to their regulatory obligations.

<ESMA_QUESTION_MAR_TS_8>

IV. Accepted Market Practices

Q9: Do you agree with ESMA's view on how to deal with OTC transactions?

<ESMA_QUESTION_MAR_TS_9>
We agree.

<ESMA_QUESTION_MAR_TS_9>

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

<ESMA_QUESTION_MAR_TS_10>
We agree that it is appropriate that such assessment is undertaken by supervised persons. However, we ask ESMA to consider expanding this to include persons equivalently supervised in third countries, rather than restrict this to persons supervised in the Member States.

<ESMA_QUESTION_MAR_TS_10>

V. Suspicious transaction and order reporting

Q11: Do you agree with this analysis regarding attempted market abuse and OTC derivatives?

<ESMA_QUESTION_MAR_TS_11>

We understand in principle that orders which are suspected to be market abuse with respect to an underlying of an OTC derivative are within scope of the reporting obligation. However, it would be helpful if ESMA were to acknowledge that, in practice, there may be limited cases where there could be grounds for such a suspicion.

<ESMA_QUESTION_MAR_TS_11>

Q12: Do you agree with ESMA's clarification on the timing of STOR reporting?

<ESMA_QUESTION_MAR_TS_12>

No. We do not agree with ESMA's indicative two week timeline "of the actual suspected breach" for submission of the STOR. Whilst we appreciate that STORs should be submitted as soon as practicable, we have serious concerns that this could, in some cases, be too short a timeframe. Therefore, we ask ESMA to remove the reference to the two week timeframe from the recitals of the draft RTS. We consider the wording of "without delay" once reasonable suspicion of actual or attempted market abuse is formed within the Articles of the draft RTS adequately conveys the required sense of urgency and is sufficient to articulate the timely nature in which STORs should be reported. Further we would suggest that the standard should be "without delay and as soon as reasonably practicable". We would also request that ESMA make it clear that this timing is measured from the time when a reasonable suspicion of market abuse is formed rather than from the date or time of the suspected breach (we would therefore suggest Recital 3 of the draft RTS (detailed at Annex VI to the Consultation Paper) be redrafted). It may often be the case that a reasonable suspicion of market abuse will only arise as a result of events that happen subsequently to a particular act that, following review and analysis, constitutes market abuse. It is only when this act is viewed in the light of subsequent events that a reasonable suspicion of market abuse arises (e.g. the announcement of a capital raising subsequent to a specific client transaction) and it is from the latter point that any timeline for a STOR should be measured.

<ESMA_QUESTION_MAR_TS_12>

Q13: Do you agree with ESMA's position on automated surveillance?

<ESMA_QUESTION_MAR_TS_13>

No. We do not consider that automated surveillance is appropriate in respect of all instruments and in all circumstances.

We ask ESMA to consider specifying within the draft RTS that firms should establish and maintain appropriate automated surveillance systems 'where it is necessary, appropriate and proportionate to the size, scale and nature of the business' to conduct effective monitoring of orders and transactions. Further, we consider it would be useful for ESMA to clarify and acknowledge in the draft RTS that automated surveillance is not always appropriate, necessary or indeed possible. Each firm should be able to consider what type of surveillance is both necessary and proportionate to the products in question and to the level of trading and the market to which such instruments are

traded. Additionally, where automated surveillance is appropriate, in respect of bespoke systems, we consider that the requirement should be qualified as "may be necessary".

<ESMA_QUESTION_MAR_TS_13>

Q14: Do you have any additional views on the proposed information to be included in, and the overall layout of the STORs?

<ESMA_QUESTION_MAR_TS_14>

We generally agree, subject our comments below.

We consider that it is important that the STOR template give firms flexibility to ensure they are able to provide all information they consider necessary in the context of the transaction in question in a timely manner. We note that fact patterns vary from transaction to transaction and that firms need to be able to provide all relevant known information. We therefore raise this not only in respect of appropriate report fields but also in respect of the formatting of reporting fields.

Additionally, we note that suspicion may not be raised from a single transaction. It may be the case that it is only over the course of dealing that it is deemed that a STOR is required to be submitted. Again, the STOR template needs to be able to have necessary flexibility to ensure the course of dealing can be adequately described in an useful way.

Please find our specific comments on the STOR template detailed at Annex 1 of the draft RTS (detailed at Annex VI of the Consultation Paper) below:

Section 1:

- Type of breach suspected: we would suggest rewording this to 'nature of suspicion' as we consider that firms should be responsible for explaining the suspicious or unusual activity rather than the exact type of market abuse.

Section 3:

- We would welcome clarification as to the meaning of 'account numbers'.
- We do not consider that national ID numbers should be necessary with respect to STORs.

Section 5:

- We consider it onerous to require firms to include KYC or AML documentation in STORs. We believe this is very granular information which should only be provided on request once the regulators have received and consider the STOR in question.

<ESMA_QUESTION_MAR_TS_14>

Q15: Do you have any additional views on templates?

<ESMA_QUESTION_MAR_TS_15>

No.

<ESMA_QUESTION_MAR_TS_15>

Q16: Do you have any views on ESMA's clarification regarding "near misses"?

<ESMA_QUESTION_MAR_TS_16>

We agree with the aim of recording circumstances where there have been “near misses”; however, this should not create additional obligations on firms. We are of the view that, as firms will already have an audit trail in respect of such considerations, it is burdensome for firms to then have to record a summary of their considerations, duplicating information already recorded.

With regards to the definition of ‘near misses’, we welcome ESMA’s statement in paragraph 214 of the Consultation Paper that near-misses should include cases where it has been considered seriously whether to submit a report or not. We would therefore ask ESMA to amend Article 10(2)(b) of the ESMA draft RTS to clearly reflect this and to only include transaction/orders which were ‘seriously considered to be suspicious’ but following examination were not submitted.

<ESMA_QUESTION_MAR_TS_16>

VI. Technical means for public disclosure of inside information and delays

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

<ESMA_QUESTION_MAR_TS_17>
Yes.

<ESMA_QUESTION_MAR_TS_17>

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

<ESMA_QUESTION_MAR_TS_18>
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<ESMA_QUESTION_MAR_TS_18>

Q19: What would be the practical implications for the energy market participants under REMIT who would also be EAMPs under MAR to use disclosure channels meeting the MAR requirements for actively disseminating information that would be inside information under both REMIT and MAR?

<ESMA_QUESTION_MAR_TS_19>
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<ESMA_QUESTION_MAR_TS_19>

Q20: Do you agree with ESMA's proposals regarding the format and content of the notification?

<ESMA_QUESTION_MAR_TS_20>
We generally agree, subject as below. However, for clarity we are of the view that, in respect of content of the notification detailed at para.261(f) (Article 5(2)(f) draft ITS (detailed at Annex VII to the Consultation Paper)), the notification should include the names of those making the decision, as opposed to those participating in the decision.

<ESMA_QUESTION_MAR_TS_20>

Q21: Do you agree with the proposed records to be kept?

<ESMA_QUESTION_MAR_TS_21>
We generally agree, subject as below. In respect of keeping records of ongoing monitoring of delay conditions, we consider that such records only be necessary where there is a change in the conditions, such as publication of rumours or where there are unanticipated spikes in pricing which are reviewed and no action taken. If action is taken i.e. disclosure is made, then the corresponding report including an explanation of delay would be filed.

We strongly agree that firms should have flexibility in making sure that their staff are informed of relevant policies.

<ESMA_QUESTION_MAR_TS_21>

VII. Insider list

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

<ESMA_QUESTION_MAR_TS_22>

No. We strongly disagree with the extent of the information proposed to be included on the insider list, which in our view, is disproportionate and unduly invasive. We do not understand the rationale for the inclusion of such a wide selection of private personal data. We also question if potential investors would cease consenting to be sounded due to being aware that they will be obliged to provide such a vast amount of personal data. This could have a real impact on market sounding practice. To the extent such information is required during an investigation, this should be sought at the relevant time. We note that at the ESMA open hearing on the 8th October 2014, it was discussed that ESMA had not completed its efforts to consider these proposals in light of data protection and privacy requirements. We trust that this will result in a reconsideration of the proposals to ensure they are less invasive.

Further, we reiterate the data protection concerns in relation to provision of such personal data. Holding a such personal data on insider lists will limit a firm's ability to comply with requests for the insider list, such as from foreign regulators, due to a firm's data protection obligations. Further, holding such data not only provides a greater risk of personal data fraud, but also creates an additional burden on issuers with respect to system changes.

Additionally, we have concerns relating to ensuring the broad range of information required is kept up to date.

Finally, with respect to persons who are recipients of inside information by virtue of being party to a market sounding, we assume that the DMP may rely on Article 14(1) draft RTS (detailed at Annex IV to the Consultation Paper) with respect to the information of the persons sounded that the DMP is required to record and maintain, and, specifically, that the more burdensome record keeping requirements for insider lists in Article 7 of the draft ITS (detailed at Annex VII to the Consultation Paper) would not apply with respect to persons who are recipients of inside information by virtue of a market sounding.

<ESMA_QUESTION_MAR_TS_22>

Q23: Do you agree with the two approaches regarding the format of insider lists?

<ESMA_QUESTION_MAR_TS_23>

Yes.

<ESMA_QUESTION_MAR_TS_23>

VIII. Managers' transactions format and template for notification and disclosure

Q24: Do you have any views on the proposed method of aggregation?

<ESMA_QUESTION_MAR_TS_24>
No.

<ESMA_QUESTION_MAR_TS_24>

Q25: Do you agree with the content to be required in the notification?

<ESMA_QUESTION_MAR_TS_25>
No, we disagree. The proposed templates for the notification, which require full address, personal contact details and national ID numbers are, not only intrusive and pose data protection risks, but also unnecessary as the issuer would have full records of the PDMRs.

AFME is strongly supportive of the use of a Legal Entity Identifier (LEI) which has been adopted in EMIR by ESMA and also by EBA, whilst it is under consideration by EIOPA in respect of Solvency II. Universal use of global standardised LEIs will enable organisations to more effectively measure and manage risk, while providing substantial operational efficiencies and customer service improvements to the industry. Under the LEI initiative, over 300,000 LEIs have been issued by 14 different Local Operating Units (LOUs), and OTC Derivative and EBA bank reporting require LEIs. and the requirement by ESMA for use of LEI in reporting under the Market Abuse Regulation would be fully supported by AFME.

Currently, 14 LOUs are operational and are issuing codes. A number of other LOUs have been sponsored by their regulatory authorities and are consequently authorised to issue LEIs. The LEI Regulatory Oversight Committee (ROC) recently retired the term "pre-LEI" and henceforth they will be called "Legal Entity Identifiers" or "LEIs." LEIs are now "official" and fully accepted for all regulatory reporting. These codes are now fully accepted for all forms of regulatory reporting. AFME notes that the Global Legal Entity Identifier Foundation (GLEIF or Foundation) will begin to take full operational management of the Global LEI System, under the oversight of the ROC. Therefore legal entities in Europe have ample choice to whom they may apply for an LEI and confirmation that the Global LEI System is a stable environment.

Therefore, we agree with the use of LEI as described in para 341 in respect of Legal Entities. However, to persuade legal entities who do not yet have an LEI, we would encourage ESMA to strengthen their requirement for the identifier by deleting the words "if available". AFME also recommends that competent authorities require entities regulated under their supervision to obtain an LEI and also that the LEI be used to identify all counterparties in the reporting requirements where counterparty information is required.

<ESMA_QUESTION_MAR_TS_25>

IX. Investment recommendations

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called "qualified persons" and "experts"?

<ESMA_QUESTION_MAR_TS_26>

No. We welcome ESMA's clarification in paragraph 363 of the Consultation Paper that investment recommendations under MAR will not include personal recommendations involving the provision of the investment service of investment advice. Whilst the final sentence of Recital 5 of the draft RTS (detailed at Annex VIII to the Consultation Paper) attempts to reflect this statement, we think that the inclusion of the words "in itself" may cast doubt on ESMA's intentions in this regard and would therefore ask ESMA to delete them.

We note that the general category will potentially capture a broad range of people and we propose that it should be limited to those for whom the requirements would be proportionate. For example, the general category should exclude those, such as certain specialist sales personnel, who may propose investments to clients, but do so in reliance upon research providers, who provide the analysis and true expertise. The definition therefore should exclude those who rely upon the expertise of others. Further, persons who produce short term trade ideas, rather than investment ideas, should be excluded from the scope. We do not consider the requirements appropriate or necessary for such persons.

<ESMA_QUESTION_MAR_TS_26>

Q27: Should the issuance of recommendations "on a regular basis" (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an "expert"? Can you suggest other objective characteristics that could be included in the "expert" definition?

<ESMA_QUESTION_MAR_TS_27>

No. We do not agree that frequency of issuance of recommendations is a credible characteristic. We consider the key characteristic of an expert to be that they undertake fundamental analysis of new and existing facts in producing recommendations. This is an important characteristic of an expert. We would also suggest that persons who are paid, or seek payment, for disseminating investment recommendations should be another characteristic to be considered.

<ESMA_QUESTION_MAR_TS_27>

Q28: Are the suggested standards for objective presentation of investment recommendation suitable to all asset classes? If not, please explain why.

<ESMA_QUESTION_MAR_TS_28>

No.

We are pleased that ESMA intends to preserve the current position, as described in Recital 3 of implementing Directive 2003/125/EC, confirming that "short term investment recommendations originating from inside the sales or trading department of an investment firm or credit institution expressed to their clients, and which are not likely to become publicly available should not be con-

sidered recommendations" and would suggest that such a statement should, for clarity, be added to the recitals of the draft RTS (detailed at Annex VIII to the Consultation Paper).

It is difficult however to reconcile this statement with draft Recital 6 of that Annex, which currently states "investment recommendations can take various forms, such as a short note to clients commenting and updating previous investment recommendations in the light of external events often labelled as morning notes or sales notes…". We agree with the sentiment that content of a communication, rather than its label, should determine whether or not it is subject to the regulation at Annex VIII, so we would suggest deleting the reference to morning notes or sales notes, and simply say "investment recommendations can take various forms and their qualification will depend as much on the substance of their content as on how that information is disseminated. Consequently, the investment recommendations which are the subject of this regulation are not necessarily limited to those recommendations that are held out as being objective or independent".

Further, whilst we agree that it is possible to recommend an investment strategy without using the words "buy", "sell" or "hold", we disagree with the current wording of Recital 3 in the draft RTS, because it is so broad as to potentially include tools that merely enable their users to look at existing information through a different lens. Thus, we suggest that current Recital 3 of the Annex should read "Recommending or suggesting an investment strategy is either done explicitly (such as "buy", "hold" or "sell" recommendations) or implicitly. However, the mere presentation of facts already known to the market will not qualify as a recommendation." This would be consistent with the position under Recital 3 of Market Abuse Investment Recommendations Directive (2003/125/EC), which is quoted approvingly in the ESMA paper. We do not believe that such notes should be seen as intended for distribution channels or the public when in practice such note are sent to a small number of particular clients, based on the firms knowledge of that client, including its MiFID classification.

Finally, as indicated during the 8th October 2014 ESMA open hearing, we are very concerned that the normal investment communications between investment firms and investors with whom they have existing relationships will be materially impeded, if they are required to send the full panoply of information for objectivity and conflicts purposes every time they approach an existing client to determine that client's interest in an investment. This amounts to a material obstacle to the flow of investment information which is likely to impact liquidity in some investments, particularly in SME shares. We ask ESMA to reconsider these proposals.

<ESMA_QUESTION_MAR_TS_28>

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

<ESMA_QUESTION_MAR_TS_29>

We broadly agree with the proposed standards, but consider it may be useful to provide further guidance in relation to best practice in respect of objectivity.

We agree that it is crucial for investment recommendations to indicate where more detailed information can be easily accessed; however, we do not consider it necessary to require a summary of the key factors of the proprietary models and their impact on the results to be indicated in the research. We are concerned that this information may be lengthy and disproportionate, we consider

that it is sufficient to state the use of the model and indicate the location where detailed information can be directly and easily accessible, as is described in paragraph 381 of the Consultation Paper. This paragraph is reflected in Article 4(2)(c) draft RTS (detailed at Annex VIII to the Consultation Paper) and should also be reflected in Article 4(2)(d).

We agree that it is important to detail the identity of the producer of the recommendation, however, we would welcome ESMA's clarification on how firms should detail the identity of persons who are not employees of the firm responsible for the recommendation. It is often the case that individuals are contractors or consultants or are employees of a service company or sister entity to that of the firm producing the recommendation. As currently drafted at Article 3(1) draft RTS, it is not clear how such employment relationships are to be detailed.

<ESMA_QUESTION_MAR_TS_29>

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

<ESMA_QUESTION_MAR_TS_30>

We are strongly of the view that there should be consistency across regulation with respect to such disclosures. To this end we propose that an exemption be introduced from the disclosure requirement where the person specified in Article 3(1)(34)(i) MAR is a market maker as defined in the Short Selling Regulation (EU) (236/2012). Regarding the proposal to disclose net short positions and lower thresholds in relation to financial instruments as defined in MAR, in order to ensure uniform disclosure with Regulation (EU) (236/2012), we would propose the disclosures be consistent with the jurisdictional requirement for method of calculation for short selling and large shareholder reporting.

<ESMA_QUESTION_MAR_TS_30>

Q31: Do you consider the proposed level of thresholds for conflict of interest appropriate for increasing the transparency of investment recommendation?

<ESMA_QUESTION_MAR_TS_31>

No. Whilst we agree with and acknowledge the overall aim of transparency, with respect to long positions, we are concerned that that this low threshold would mean that in the vast majority of cases positions would be required to be disclosed. This would result in the potential investor being provided with large amounts of information which may in reality decrease transparency by virtue of the volume of information being provided. As ESMA identifies in paragraph 394 of the Consultation Paper, Member States have taken different approaches as to the threshold; however, we note that no Member State has a level as low as 0.5%. We propose that, with respect to long positions, ESMA keep the threshold aligned with that under the Transparency Directive (EU) (2004/109/EC), or otherwise introduce a meaningful threshold level which we believe to be substantially higher than 0.5%.

We refer to paragraph 396 of the Consultation Paper, where ESMA details its consideration of introducing a dual approach to calculating disclosure thresholds. We would welcome further information from ESMA on its considerations. We consider this dual approach, as currently worded, as unclear and, potentially, a redundant mechanism. In our experience, recommendations will refer to financial instruments and not only to issuers, as potential investors wish to know the financial in-

struments to invest in. Therefore the distinction made in point (a) of the dual approach (recommendations on an issuer without reference to any of the issuer's financial instruments and recommendations on specific issuer's financial instruments) does not exist in reality. We would ask ESMA to consider a simplified approach in this respect.

Furthermore, disclosure of actual positions, as opposed to disclosure of the existence of the conflict, will cause firms to significantly amend their existing processes to ensure accurate and timely disclosure. We believe that the cost of adopting technology to meet these new requirements will outweigh any potential benefit to the cause of investor protection.

<ESMA_QUESTION_MAR_TS_31>

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?

<ESMA_QUESTION_MAR_TS_32>

We consider that, in practice, this would be a difficult calculation to undertake given the breadth of the definition of who amounts to a related person. We are also of the view that any amount of investment in a recommended security by the individual responsible for producing recommendation amounts to a potential conflict of interest and requires disclosure. Requiring disclosure of actual holdings does not, in our view, add meaningfully to disclosure of conflicts.

<ESMA_QUESTION_MAR_TS_32>

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

<ESMA_QUESTION_MAR_TS_33>

Yes, however, only where the remuneration is specifically tied to the subject of the particular recommendation, as opposed to the sector in which the recommendation is.

<ESMA_QUESTION_MAR_TS_33>

Q34: Do you agree with the proposed standards relating to the dissemination of recommendation produced by third parties? If not, please specify.

<ESMA_QUESTION_MAR_TS_34>

No. We strongly encourage ESMA to provide a carve-out for unaffiliated third-parties where those who disseminate do so as part of their distribution agreement with the provider and have no input into the content or selection of recommendations.

<ESMA_QUESTION_MAR_TS_34>

Q35: Do you consider that publication of extracts rather than the whole recommendation by news disseminators is a substantial alteration of the investment recommendation produced by a third party?

<ESMA_QUESTION_MAR_TS_35>

We do not agree with ESMA's proposal under Article 5(7) of the draft RTS (detailed at Annex VIII to the Consultation Paper) which states that a non-written recommendation may not be subject to the requirements under Article 5 of the draft RTS when, amongst others, the written recommenda-

tion (on which the non-written recommendation is based) is available free of charge to the public. Whilst we agree that it should be indicated where the relevant written recommendation is available, we do not consider that the availability of Article 5(7) should be dependant on this recommendation being available free of charge. It should be open to firms to refer to the location where the disclosures relating to the written recommendation (but not the recommendation itself) are available free of charge. In this way the disclosure objective would be achieved without compelling the firm that seeks to rely on written disclosures to give away free of charge its commercial product.

Furthermore, where the extracts are published citing the original source, we are of the view that it does not in itself amount to a substantial alteration. In such circumstances, potential investors are on notice that the material has been extracted and reproduced from another source, and they can refer to the original source material for further information.

<ESMA_QUESTION_MAR_TS_35>