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15 October 2014

European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Re: ESMA Market Abuse Regulation Technical Standards (ESMA/2014/809)

CFA Institute appreciates the opportunity to respond to Consultation Paper ESMA/2014/809 following the request of the European Commission to ESMA seeking technical advice regarding the sections of MAR that will be implemented by means of technical standards (the "consultation").

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behaviour in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 127,000 members in 150 countries and territories, including 120,000 Chartered Financial Analyst® charterholders, and 144 member societies.

By reason of the technical input sought by ESMA, CFA Institute has responded to selected sections of the consultation paper, in relation to the topics of (a) buybacks and stabilization measures, (b) market soundings, (c) accepted market practices, (d) suspicious trade reporting, (e) technical means for disclosure, (f) insider lists, (g) managers' transactions, and (h) investment recommendations.

Please find our detailed responses in the attached reply form.

Yours faithfully,

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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:	Choose an item.
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1>
CFA Institute appreciates the opportunity to respond to Consultation Paper ESMA/2014/809 following the request of the European Commission to ESMA seeking technical advice regarding the sections of MAR that will be implemented by means of technical standards.

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< 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>
Currently, an issuer conducting a buy-back programme must not purchase more than 25% of the average daily volume of the shares traded over a reference period. In cases of extreme low liquidity there is a provision for this limit to be 50% of the average daily volume. ESMA notes that almost no competent authority has reported such a case of extreme low liquidity, and therefore asserts there is no need to maintain such a provision.

CFA Institute agrees with ESMA's position that it is unclear how to define cases of extreme low liquidity. Absent a clear and consistent definition, it is not possible to enforce the provision in a harmonised fashion across venues. Therefore, maintaining the 50% provision for cases of extreme low liquidity could result in circumvention of the rules for buy-back programmes via trading venue arbitrage on the basis of different competent authorities' definitions of extreme low liquidity. We therefore support the removal of the exception for cases of extreme low liquidity.
<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>
CFA Institute has no objections to the approach set out for stabilisation measures. We believe that buy-back and stabilisation programs should be treated separately. We also agree that stabilisation should not be regarded as abusive solely because it occurs outside of the safe harbour.

Further, selling one's own shares during a buy-back program should eliminate the safe harbour for the program. There should not be any exemptions for programs managed by third party administrators.
<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>
CFA Institute broadly agrees with the revised proposals for conducting market soundings. In particular we want to stress the importance of obtaining investor consent prior to the transfer of potentially inside information in the course of conducting a market sounding. We therefore agree that disclosing market participants (DMPs) should keep a record of investors that have previously chosen to opt-out of receiving inside information in the course 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>
CFA Institute has no objections to the proposed standard template for scripts.

<ESMA_QUESTION_MAR_TS_4>

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

<ESMA_QUESTION_MAR_TS_5>
CFA Institute has no objections to the proposals regarding the details and format of sounding lists.
<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>
CFA Institute agrees with the revised requirements for maintaining sounding information by disclosing market participants (DMPs). One consistent point of contact per investor/firm helps to limit the possibilities for dissemination of potential inside information.
<ESMA_QUESTION_MAR_TS_6>

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

<ESMA_QUESTION_MAR_TS_7>
CFA Institute agrees with the need for recording communications between DMPs and potential investors in order to facilitate conflict resolution and provide an audit trail. We note that ESMA mentions the possibility for market soundings to occur out of office hours by mobile phone. It is conceivable that this may be necessary, however ESMA provides no guidance on how to record such communications. We propose that the DMP produce a written summary of the mobile phone conversation the next business day and obtain the signature of the potential investor verifying its accuracy. This document could then be used as evidence of the phone meeting.
<ESMA_QUESTION_MAR_TS_7>

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

<ESMA_QUESTION_MAR_TS_8>
CFA Institute broadly agrees with the proposals regarding internal processes and controls.
<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>
CFA Institute agrees with the need to incorporate OTC transactions into the accepted market practices (AMP) framework. However, we believe devolving the decision of whether a transaction meets the "substantial transparency" criterion under the concept of an AMP to national competent authorities runs the risk of regulatory divergence. To avoid the possibility of regulatory inconsistencies across jurisdictions in the field of OTC accepted market practices, we suggest that ESMA provides more specific guidance for the substantial transparency criterion.
<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>
CFA Institute agrees that the person performing the AMP should have the status of supervised person and that this should be an essential criterion of any assessment conducted by the competent authority.
<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>
The question refers to the obligation, under MAR, to submit suspicious transaction and order reports (STORs) in the OTC space, which some respondents to a previous Discussion Paper considered problematic. CFA Institute agrees that OTC transactions should be included in the requirement to submit STORs.
<ESMA_QUESTION_MAR_TS_11>

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

<ESMA_QUESTION_MAR_TS_12>
The clarification that STORs must generally be submitted within two weeks of reasonable suspicion being formed is clear and helpful. CFA Institute agrees with ESMA's conclusion that by the time reasonable suspicion is formed, preliminary analysis will have likely been conducted on the suspicious trade to form the suspicion in the first place. With this in mind, the two week timeframe appears reasonable, particularly if the STOR template is easy to use and understand. We note that the longer the submission is delayed, the more scope there is for the suspicious activity (and its consequence) to persist.
<ESMA_QUESTION_MAR_TS_12>

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

<ESMA_QUESTION_MAR_TS_13>
CFA Institute agrees with ESMA that automated surveillance technology is necessary and it need not be unduly burdensome for small firms to acquire and operate off-the-shelf systems. We are particularly supportive of plans for trading venues to allow ex-post reading and analysis of the order book. This would not only make it easier to forensically analyse suspicious activity ex-post but also allow regulators to better understand and shed light on market practices ex-ante. We would like ESMA to clarify whether it intends for this order book data to be made available only for regulators or also for the public.
<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>
CFA Institute has no additional comments.
<ESMA_QUESTION_MAR_TS_14>

Q15: Do you have any additional views on templates?

<ESMA_QUESTION_MAR_TS_15>
CFA Institute wishes to strongly endorse ESMA's view that a single harmonised reporting form template should be used across the EU. We believe standardised reporting practices greatly aid comparability and transparency in the EU and simplify the process for market participants.
<ESMA_QUESTION_MAR_TS_15>

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

<ESMA_QUESTION_MAR_TS_16>
CFA Institute broadly agrees that having a comprehensive audit trail of firm decisions regarding suspicious trades and submissions of STORs would be extremely helpful to facilitate forensic analysis subsequent to any investigation into suspicious trading. However, we are concerned that there is no guidance as

to how ‘near misses’ will be treated retrospectively if, for example, an investigation were to show ex-post the incorrect classification of trades as near misses’ rather than STORs. Further, there is insufficient guidance as to what should be classified as a ‘near miss’. The combination of these two uncertainties may cause over-reporting or low-quality reporting of STORs.
<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>
CFA Institute agrees with ESMA's proposition that dissemination of insider information should involve the active distribution of information with a view to reaching investors. We agree that it is not acceptable to simply make the information available but difficult to find such as burying it on a website. However, we believe that the focus on achieving useful disclosure to investors means that simply reporting this information to the home competent authority website is insufficient and possibly fragmentary. We propose that ESMA investigate the possibility of creating a central repository that aggregates information from national competent authorities and is publicly available.
<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>
We believe that the MAR standards are preferable to the non-binding ACER guidance in this instance, in particular because of their emphasis in achieving effective dissemination of information. In general, CFA Institute believes that where two sets of standards or regulations apply, participants should abide by the stricter of the two standards.
<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>
TYPE YOUR TEXT HERE
<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>
CFA Institute agrees that ESMA's proposals for the content of the notification are acceptable. However, we would like to stress the importance of creating a common template rather than allowing discretion. We believe that standardised reporting practices will ultimately benefit market transparency and be a lesser burden for businesses.
<ESMA_QUESTION_MAR_TS_20>

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

<ESMA_QUESTION_MAR_TS_21>

CFA Institute agrees with the proposed records to be kept regarding the decision to delay disclosure. These records should evidence the process for assessing and deciding on the period for which information disclosure is delayed and the means of preventing non-required persons from accessing the inside information during the period of the delay.
<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>
CFA Institute broadly agrees with the feedback to the Discussion Paper that raised concerns about the scope of the data to be collected. We agree with ESMA's proposal that the date and place of birth is included as an alternative to the national identification number where the latter does not exist. However, we propose that this alternative is made available in all Member States. Further, we do not believe it is necessary for the unequivocal identification of the insider to collect the home address, home telephone numbers, personal mobile phone numbers and personal e-mail addresses. We believe the name of the insider, along with identifying information such as date and place of birth, as well as their work address and work contact details are sufficient for this task.
<ESMA_QUESTION_MAR_TS_22>

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

<ESMA_QUESTION_MAR_TS_23>
CFA Institute agrees with ESMA's proposed approaches regarding insider lists. Having a single generic insider list of all persons potentially privy to inside information may generate significant irrelevant information for an investor in a specific issue. The use of issue-specific insider lists is a welcome proposal that should improve transparency via the provision of more specific, usable information. We also want to stress the importance of using widely adopted software and formats such as Microsoft Excel for the preparation of these lists in order to reduce the burden of generating and interpreting these lists for investors.
<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>
CFA Institute approves of the general principle of aggregating (but not netting) managers' transactions in order to not overwhelm investors with irrelevant information. ESMA's proposed method is satisfactory with the reporting of daily totals of buys and sells aggregated across issue and trading venue (including OTC) as well as the highest and lowest prices and the weighted average price.
<ESMA_QUESTION_MAR_TS_24>

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

<ESMA_QUESTION_MAR_TS_25>
CFA Institute agrees with the respondents to the Discussion Paper that the personal address and telephone number of the person discharging managerial responsibility (PDMR) is not necessary for disclosure to the public. We do not believe this information is necessary for ESMA to get in contact with the PDMR in a timely manner.
<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>
Currently, a qualified person is defined in the MAR as an independent analyst, investment firm, credit institution or any other person whose main business is to produce investment recommendations. A non-qualified person is one that does not fall under the qualified classification but who directly proposes a particular investment decision. ESMA considers the second category as being too broad and therefore suggests that a sub-group within non-qualified persons be deemed 'experts' and face the same requirements as qualified persons.

CFA Institute agrees with the approach of a general set of requirements applying to qualified and non-qualified persons and an additional set of requirements applying to qualified persons and non-qualified persons that are considered experts. However, we believe ESMA should provide more guidance as to what would classify a non-qualified person an expert.
<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>
CFA Institute agrees that the frequency of issued recommendations should be a factor that is taken into account. The regulation should focus on the source of the recommendations, on the degree of influence and outreach to the general public they actually have. To this extent, we consider journalists that publish recommendations frequently in effect provide a similar service as analysts and thus should be held to the same standards as analysts giving investment advice.
<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>
The standards proposed by ESMA for fair presentation of investment recommendations include that: a) facts are clearly distinguished from interpretations, estimates or opinions; b) all sources are reliable or, where there is any doubt as to whether a source is reliable, this is clearly indicated; c) all projections, forecasts and price targets are clearly labelled as such and that the material assumptions made in producing or using them are indicated.

The proposed standards for objective presentation of investment recommendations do not conflict with the CFA Institute Code of Ethics and Standards of Professional Conduct. Standard V requires CFA Institute members to exercise diligence and have a reasonable basis for investment analysis, recommendations, and actions. Specifically, Standard V.B. requires members to "1. Disclose to clients and prospective clients the basic format and general principles of the investment processes they use to analyze investments, select securities, and construct portfolios and must promptly disclose any changes that might materially affect those processes. 2. Disclose to clients and prospective clients significant limitations and risks associated with the investment process. 3. Use reasonable judgment in identifying which factors are important to their investment analyses, recommendations, or actions and include those factors in communications with clients and prospective clients. 4. Distinguish between fact and opinion in the presentation of investment analysis and recommendations." Members must also develop and maintain appropriate records to support their investment analyses, recommendations, actions, and other investment-related communications with clients and prospective clients.

We believe these standards are suitable for all asset classes.
<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>
The proposed standards for objective presentation of investment recommendations are consistent with the CFA Institute Code of Ethics and Standards for Professional Conduct. We believe the standards are suitable for application to the different categories of persons in the scope.
<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>
CFA Institute agrees with the proposal to detail the conflicts of interests for qualified persons and non-qualified experts. Specifically, the proportion of recommendations that are buy, hold or sell as well as the proportion of issuers corresponding to each of these categories to which the investment firm has supplied material investment banking services.

We also agree with ESMA's contention that generic disclaimers relating to potential conflicts of interest are insufficient and specific positions held should be listed. If these are likely to change then this should be made clear in the disclaimer but is not a valid reason for the omission of specific positions.
<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>
CFA Institute supports the Consultation's objective to improve market transparency with regard to the reporting of conflicts of interest. We agree with the proposal to lower the disclosure threshold applicable to major shareholdings from 5% of total issued share capital to 0.5% of total issued share capital, and to introduce the same 0.5% threshold for short positions.
<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>
CFA Institute's Code of Ethics and Standards of Professional Conduct requires investment analysts to exercise due diligence and only issue investment recommendations that are independent and have a reasonable and adequate basis. For this reason, CFA Institute believes it is not necessary to aggregate the positions of the producer of the investment recommendation with those of related person(s) in order to assess whether there are conflicts of interest since these will be due to the producer's position in the asset. The investment recommendation should already be free of any conflicts of interest other than those of the investment analyst producing the report, which should be duly disclosed.
<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>
CFA Institute believes that this requirement is redundant and could contribute to an excess of disclosure that may be largely ignored by investors. We believe that implicit in the investment recommendation is the possibility that trading in the security will be generated as a result of the recommendation so it is unnecessary to explicitly document this possibility. Moreover, trading fees may not be conditional on the direction of the recommendation (e.g. buy or sell) thus negating the likelihood that the recommendation would be conflicted. Further, such documentation, if produced, is likely to be in the form of boilerplate at the back of a report, which is not likely to convey decision-useful information to investors.
<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>
CFA Institute's Code of Ethics and Standards of Professional Conduct require investment analysts to not knowingly make any misrepresentations relating to investment analysis or recommendations. This encompasses the issues that ESMA is raising in relation to the dissemination of recommendations produced by third parties. We therefore agree that any alterations to the third party report or recommendation should be clearly indicated and justified, including that of changes to the target price. Further, the dissemination of a summary of a recommendation produced by a third party should be clear, accurate and not misleading. References to the original source should be provided.
<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>
CFA Institute's Code of Ethics and Standards of Professional Conduct require investment analysts to not knowingly make any misrepresentations relating to investment analysis or recommendations. Therefore, while publication of extracts by news disseminators such as research magazines, newspapers or data providers may be acceptable, these must be done in a way that accurately reflects the meaning of the original recommendation and not take any individual aspect of the original document out of context to further a viewpoint other than the one presented in the original document.

The onus should be on the author of the extract to verify that the recommendation is not reproduced in a substantially altered way from the original. To avoid potentially misleading disclosures, a short comment should accompany extracts saying that the full context is not given. If permissible, the extract should be accompanied by a link to the original content.
<ESMA_QUESTION_MAR_TS_35>