

31 March 2016

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

CFA Institute identification number in the EU transparency register: 89854211497-57

Re: ESMA Consultation Paper on Draft Guidelines on the Market Abuse Regulation (ESMA/2016/162)

Dear Sirs,

CFA Institute appreciates the opportunity to respond to ESMA's Consultation Paper on Draft Guidelines on the Market Abuse Regulation (ESMA/2016/162).

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. CFA Institute has more than 136,000 members in 145 countries and territories, including more than 129,000 Chartered Financial Analyst® charterholders, and 147 member societies.

Summary

CFA Institute advocates for fair, transparent and ethical market practices. As elaborated in the responses below, we broadly support ESMA's draft guidelines with respect to market soundings. These guidelines achieve an appropriate balance of limiting the spread of inside information associated with market soundings (for example through internal policies and procedures for persons receiving market soundings) and limiting administrative burdens (for example through specifying the specific cases in which persons receiving market soundings must liaise with disclosing market participants on differences of opinion on inside information).

Regarding the draft guidelines on the delay of disclosure of inside information, we broadly concur with ESMA's approach, but caution that delayed disclosure should only be permitted under very narrow circumstances, and that the legitimate interests of investors are not unduly superseded. We consider that it is always in the best interests of market integrity for material information to be disclosed publicly as soon as practicable. It is conceivable that delaying inside information may engender uncertainty and therefore instability, rather than preserve stability in the face of a crisis.

Our detailed answers to the draft guidelines are presented below. Please do not hesitate to contact us should you wish further elaboration of the points raised.

Yours faithfully,



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Guidelines for persons receiving the market soundings

Q1: Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

CFA Institute agrees with ESMA's proposal for the person receiving the market sounding (MSR) to take into consideration all the information available to them in their assessment of whether they are in receipt of inside information or not (i.e. including information from sources other than the disclosing market participant (DMP)). The proposal for the MSR to keep records of their assessment for a period of five years is reasonable.

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

CFA Institute agrees with the proposal that the MSR should be required to notify the DMP only when the MSR believes it is in receipt of inside information from the DMP but the DMP has a different opinion. In this case, not notifying the DMP could result in the spread of inside information beyond the confines of a market sounding.

In cases where the converse is true or where the discrepancy of opinion arises because of additional (private) information held by the MSR, we agree it should not be necessary to require the MSR to notify the DMP, because the risk of spreading inside information (emanating from the DMP) is reduced. Additionally, it would not be appropriate to require the MSR to disclose private information to the DMP to resolve a difference of opinion.

ESMA's proposal therefore strikes a reasonable balance between minimising the burden of conflict resolution and limiting the spread of inside information. ESMA also notes that nothing will prevent the MSR from liaising with the DMP in order to clarify a difference of opinion; allowing for such resolution but requiring it only under specific circumstances is appropriate. ESMA's proposals on record keeping in respect of differences of opinion also appear reasonable.

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

CFA Institute agrees with ESMA that MSRs have to establish, implement and maintain internal procedures to ensure that the information received in the course of the market sounding is internally communicated only through pre-determined reporting lines and on a need-to-know basis. These requirements are further clarified in Articles 8 and 10 of MAR. We believe that as long as the internal procedures are well documented and the records kept for a pre-determined period (e.g. five years), the guidelines do not need to further specify how the MSRs establish, implement and maintain the internal procedures in practice. Firms should be left to establish their own procedures as suited to their circumstances without further regulatory prescription.

The draft guidelines on staff training are also sufficient.

Q4: Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

CFA Institute agrees with ESMA's proposal that MSRs should draw up a list of the persons working for the MSR that are in possession of the information communicated in the course of market soundings. As ESMA notes, such a list is useful to manage the internal flow of information from market soundings; to allow compliance and enforcement of the prohibition on the use of inside information; and to facilitate possible regulatory investigations around market soundings.

On a related point, in the draft guidelines (point 10 on page 9), ESMA states that *“as a good practice MSRs should keep evidence of their decision to designate a specific person or a contact point to receive the market sounding and the way that information is made available to the disclosing market participant (DMP)”*. CFA Institute would be in favour of making mandatory the requirement to keep record of the MSR's decision to designate a specific contact point to receive the market sounding and the way that information is made available to the DMPs. In that manner the delegation of the responsibility would always be transparent and well documented.

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?

We agree with ESMA's approach. As long as the disclosing market participants (DMPs) are required to record the telephone calls, the person receiving the market sounding (MSR) should not be required to do so as well. In circumstances where the market sounding takes place during unrecorded meetings or unrecorded telephone conversations, we agree with the requirement for the DMP to draft written minutes or notes of the conversation and to have the MSR sign-off on the written notes. We also agree that the MSR should provide its own version of the notes to the DMP within 5 business days when there is disagreement.

Q6: Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

CFA Institute agrees with ESMA's proposal. Please see our response to question 5.

Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

We are not able to opine on firms' compliance costs.

Guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public

Q8: Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

Article 17(1) of MAR maintains that issuers are required to inform the public of inside information *“as soon as possible”*. As noted in our response to the ESMA MAR technical advice consultation paper (ESMA/2014/809) in October 2014, CFA Institute is concerned with any proposals that facilitate the delay in public disclosure of inside information.

We consider that it is always in the best interests of market integrity for material information to be disclosed publicly as soon as practicable. It is conceivable that delaying inside information may engender uncertainty and therefore instability, rather than preserve stability in the face of a crisis.

In this vein, we disagree with the comments of the SMSG set out in paragraph 65 of the consultation, in which it states *“An issuer should be allowed to keep the information secret if disclosure of the information may be detrimental to him. A mere probability that such detriment may occur should suffice for the right to delay disclosure to become applicable.”* This paragraph implies that the interests of the issuer come before the legitimate interests of all other stakeholders, including investors and the public. Further, it suggests a wide interpretation of the provision to delay disclosure and seems to disregard the other conditions set out under Article 17(4) of MAR, all of which have to be met for delayed disclosure to be permissible. We strongly believe that the interests of investors and the general public should take precedence, that delayed disclosure should only be permitted under very limited circumstances, and for a limited time window. Otherwise, investors could be misled or could make inappropriate investment decisions given the disclosure black-out.

We firmly agree with ESMA (paragraph 66 of the consultation) that for delayed disclosure to be permissible, *all* the conditions of Article 17(4) of MAR must be met. Further, as ESMA states in paragraph 69 of the consultation, the possibility to delay disclosure should represent the exception to the general rule of disclosure to be made as soon as possible, and therefore should be narrowly interpreted. We agree with this assessment.

We suggest that the list of examples of legitimate interests of the issuer for delaying disclosure of inside information, set out in section 3.4 of the consultation, should be considered exhaustive. This would ensure a narrow and confined interpretation of the applicable rules and ensure certainty for market participants as to the situations in which disclosure may be delayed. The suggestion that the list is non-exhaustive may allow for too wide an interpretation of the rules and investor interests being superseded.

Q9: Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

CFA Institute agrees with ESMA’s proposal regarding situations where the delayed disclosure is likely to mislead the public (as detailed in point 99 on page 27 and in section 3.4(2)). We also agree with ESMA’s assessment (point 102 on page 28) that there may be other situations where the delay in the disclosure is likely to mislead the public. Accordingly, the three examples provided in the draft guidelines – where delayed disclosure would mislead the public and thus where immediate disclosure is always necessary and mandatory – should be considered non-exhaustive.

Q10: Do you see other elements to be considered for assessing market’s expectations?

We agree with the inclusion of point c) in the list of situations in which delayed disclosure is likely to mislead the public, namely where the inside information is in contrast with market expectations. ESMA further provides that these expectations should take into account market sentiment such as the consensus of financial analysts, as well as information conveyed by management of the issuer in a previous road show or CEO interview (for example). Consensus analyst forecasts on financial statement measures such as earnings or revenues typically impound all available information and thus are a good indicator of market expectations.