

15 October 2014

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

**Re: ESMA Market Abuse Regulation Delegated Acts (ESMA/2014/808)**

CFA Institute appreciates the opportunity to respond to Consultation Paper ESMA/2014/808 following the request of the European Commission to ESMA seeking technical advice regarding the sections of MAR that will be implemented by means of delegated acts.

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) indicators of market manipulation, (b) determination of the competent authority, and (c) managers' transactions.

Please find our detailed responses in the attached reply form.

Yours faithfully,



Sviatoslav Rosov  
Analyst, Capital Markets Policy, EMEA  
CFA Institute

+44 20 7330 9558  
[sviatoslav.rosov@cfainstitute.org](mailto:sviatoslav.rosov@cfainstitute.org)



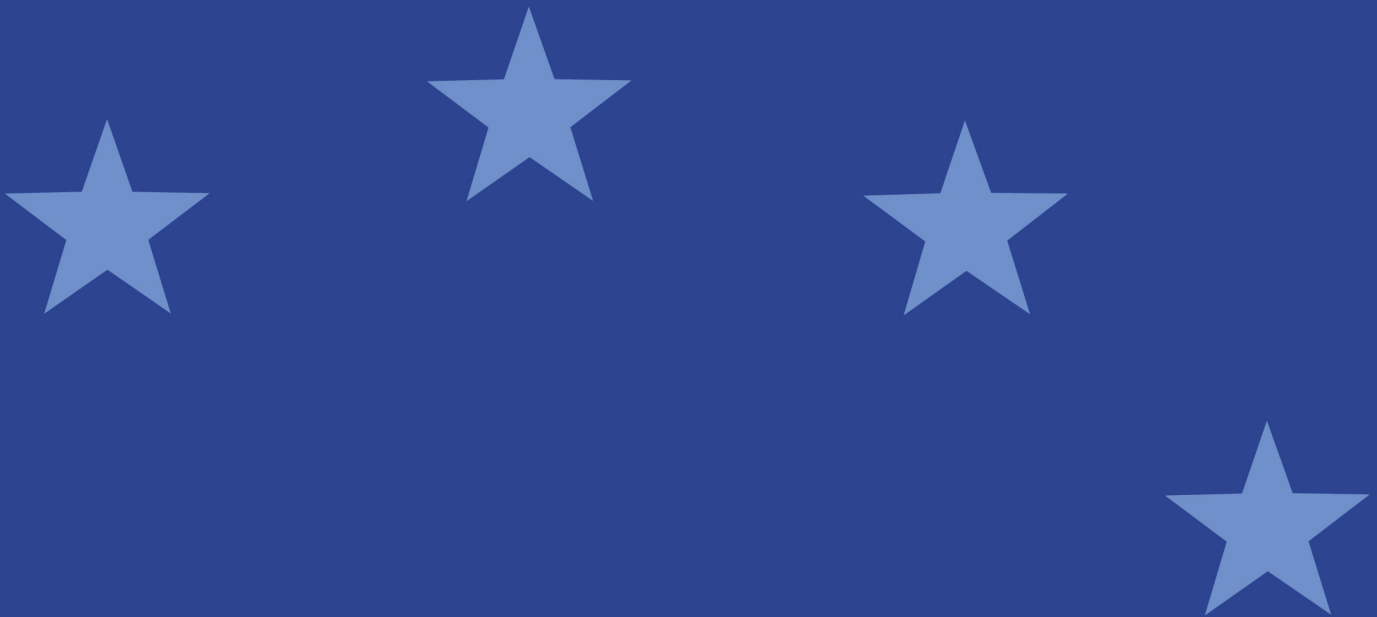
Rhodri Preece, CFA  
Head, Capital Markets Policy, EMEA  
CFA Institute

+44 20 7330 9522  
[rhodri.preece@cfainstitute.org](mailto:rhodri.preece@cfainstitute.org)



European Securities and  
Markets Authority

## **Reply form for the ESMA MAR Technical advice**



20 August 2014



European Securities and  
Markets Authority

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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 advice on possible delegated acts concerning 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\_TA\_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](http://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\_TA\_NAMEOFCOMPANY\_NAMEOFDOCUMENT: e.g.if the respondent were ESMA, the name of the reply form would be ESMA\_MAR\_CP\_TA\_ESMA\_REPLYFORM or ESMA\_MAR\_CP\_TA\_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](http://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/2014/808 following the request of the European Commission to ESMA seeking technical advice regarding the sections of MAR that will be implemented by means of delegated acts.

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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) indicators of market manipulation, (b) determination of the competent authority, and (c) managers' transactions.

< ESMA\_COMMENT\_MAR\_TA\_1 >

## II. Specification of the indicators of market manipulation

**Q1: Do you agree that the proposed examples of practices and the indicators relating to these practices clarify the indicators of manipulative behaviours listed in Annex I of MAR?**

<ESMA\_QUESTION\_MAR\_TA\_1>

CFA Institute agrees that the proposed examples clarify the indicators of manipulative behaviours.

<ESMA\_QUESTION\_MAR\_TA\_1>

**Q2: Do you think that the non-exhaustive list of indicators of market manipulation proposed in the CP are appropriate considering the extended scope of MAR in terms of instruments covered? If not, could you suggest any specific indicator?**

<ESMA\_QUESTION\_MAR\_TA\_2>

CFA Institute agrees that the list is appropriate.

<ESMA\_QUESTION\_MAR\_TA\_2>

**Q3: Do you consider that the practice known as “Phishing<sup>1</sup>” should be included in the list of examples of practices set out in the draft technical advice?**

<ESMA\_QUESTION\_MAR\_TA\_3>

CFA Institute does not consider Phishing to be an obvious example of market manipulation and is better addressed under anti-fraud laws.

<ESMA\_QUESTION\_MAR\_TA\_3>

**Q4: Do you support the reference to OTC transactions in the context of cross product manipulation (i.e. where the same financial instrument is traded on a trading venue and OTC) and inter-trading venue manipulation (i.e. where a financial instrument traded on a trading venue is related to a different OTC financial instrument)?**

<ESMA\_QUESTION\_MAR\_TA\_4>

CFA Institute supports this reference.

<ESMA\_QUESTION\_MAR\_TA\_4>

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<sup>1</sup> In this context, “phishing” should be understood as the attempt to acquire sensitive information, such as passwords or account details, by masquerading as a trustworthy entity in an electronic communication.



**III. Minimum thresholds for the purpose of the exemption for certain participants in the emission allowance market from the requirement to publicly disclose inside information**

**Q5: If you do not agree with the suggested thresholds, what would you consider to be appropriate thresholds of CO<sub>2</sub> emissions and rated thermal input below which individual information would have no impact on investors' decisions? Please substantiate.**

<ESMA\_QUESTION\_MAR\_TA\_5>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_5>

**Q6: In your opinion, what types of entity-specific, non-public information held by individual market participants are most relevant for price formation or investment decisions in the emission allowance market?**

<ESMA\_QUESTION\_MAR\_TA\_6>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_6>

#### **IV. Determination of the competent authority for notification of delays in public disclosure of inside information**

**Q7: Do you agree with the proposals for determining the competent authority to whom issuers of financial instruments and emission allowances market participants should notify delays in disclosure of inside information?**

<ESMA\_QUESTION\_MAR\_TA\_7>

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. We also believe the determination of the relevant competent authority should be made on the basis of the place of issue of the security and not as a strategic decision of the issuer.

<ESMA\_QUESTION\_MAR\_TA\_7>

**Q8: Under point c) of paragraph 2 of the draft technical advice, in cases in which the issuer's financial instruments were admitted to trading or traded simultaneously in different MSs, which criteria should ESMA take into consideration to determine the relevant competent authority?**

<ESMA\_QUESTION\_MAR\_TA\_8>

CFA Institute considers using the location where the majority of raised capital is issued (or, in the case of financial instruments, location of volume traded or notional amount outstanding) as the determinant of the relevant competent authority. This should avoid the incentives for regulatory arbitrage.

<ESMA\_QUESTION\_MAR\_TA\_8>

**Q9: Do you consider it would be appropriate to determine in a different manner the competent authority for the purpose of Article 17(5) of MAR, where the delay has the scope of preserving the stability of the financial system? If so, should the competent authority be determined according to mechanism set out in Article 19(2) of MAR or in another way?**

<ESMA\_QUESTION\_MAR\_TA\_9>

As a general principle, CFA Institute is concerned with any proposals that seek to facilitate delays in the disclosure of inside information. It is conceivable that delaying inside information may engender uncertainty and therefore instability, rather than preserve stability in the face of a crisis. We therefore disagree that there should be a different determination of the competent authority in any situation, including when the delay is deemed to have the scope of preserving the stability of the financial system.

<ESMA\_QUESTION\_MAR\_TA\_9>



## V. Managers' transactions

**Q10: Do you agree with the types of transactions listed in the draft technical advice that trigger the duty to notify?**

<ESMA\_QUESTION\_MAR\_TA\_10>

CFA Institute agrees with the types of transactions that trigger the duty to notify.

<ESMA\_QUESTION\_MAR\_TA\_10>

**Q11: Under paragraph 3 of the draft technical advice, do you consider the use of a “weighting approach” in relation to indices and baskets appropriate or alternatively, should the use of such approach be discarded? Please provide an explanation.**

<ESMA\_QUESTION\_MAR\_TA\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MAR\_TA\_11>

**Q12: Do you support the ESMA approach to circumstances under which trading during a closed period may be permitted by the issuer? If not, please provide an explanation.**

<ESMA\_QUESTION\_MAR\_TA\_12>

CFA Institute has no objections to the proposed approach whereby trading during a closed period is allowed provided that the circumstances for such transactions are exceptional, the issuer has permitted such trading (assessment to be carried out on a case-by-case basis) and the PDMR has been informed.

<ESMA\_QUESTION\_MAR\_TA\_12>

**Q13: Regarding transactions executed by a third party under a (full) discretionary portfolio or asset management mandate, do you foresee any issue with the proposed approach regarding the disclosure of such transactions or the need to ensure that the closed period prohibition is respected?**

<ESMA\_QUESTION\_MAR\_TA\_13>

CFA Institute is concerned that the need to report transactions that are executed on behalf of a PDMR by a third party under a discretionary mandate may effectively preclude a PDMR from holding securities. We believe this requirement to be unnecessarily restrictive and difficult to implement or enforce; further, the EUR 5,000 threshold is very low. This proposal may also encourage PDMRs to move their portfolios to non-discretionary managers only. At the same time, CFA Institute agrees that portfolios managed by third parties cannot be used as a means of side-stepping regulations.

<ESMA\_QUESTION\_MAR\_TA\_13>

**Q14: Do you consider the transactions included in the non-exhaustive list of transactions appropriate to justify the permission for trading during a closed period under Article 19(12)(b)?**

<ESMA\_QUESTION\_MAR\_TA\_14>

CFA Institute agrees that the transactions listed are appropriate.

<ESMA\_QUESTION\_MAR\_TA\_14>

## VI. Reporting of infringements

**Q15: Do you agree with the analyses and the procedures proposed in the draft technical advice? Which best practices from existing national, European or international legislation or guidance could be useful for the protection of the reporting persons under the market abuse regime?**

<ESMA\_QUESTION\_MAR\_TA\_15>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_15>

**Q16: Do you think there are other elements to be developed in relation to specific procedures for the receipt of reports of infringements under MAR and their follow-up, including the establishment of secure communication channels for such reports**

<ESMA\_QUESTION\_MAR\_TA\_16>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_16>

**Q17: Do you see any other provision, measure or procedure currently in place under national laws of Member States that could complement the procedures proposed in the draft technical advice for the reporting of infringements of market abuse to competent authorities in order to increase the protection of personal data, especially in relation to:**

- **compliance with data retention periods and notification requirements for data processing;**
- **protection of the rights related to data processing;**
- **security aspects of the data processing operation; and**
- **conditions for the management of reporting mechanisms (including limitations of cross-border data transferral)?**

<ESMA\_QUESTION\_MAR\_TA\_17>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_17>

**Q18: In the context of “the protection of employees working under contract of employment”, among the following common forms of unfair treatment - namely dismissal, punitive, transfers, harassments, reduction or loss of duties, status, benefits, salary or working hours, withholding of promotions, trainings, and threats of such actions - which are the most important forms of unfair treatment in case of reporting of infringements of market abuse to a competent authority? Which protection mechanisms against such unfair treatments would you consider effective (e.g. mechanisms for fair procedures and remedies including appropriate rights of defence)? Are you aware of any other aspects that could be relevant in this context? Please specify.**

<ESMA\_QUESTION\_MAR\_TA\_18>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MAR\_TA\_18>

**Q19: Are you aware of any particular provision, measure or procedure currently in place under national laws of Member States or best practices that could effectively complement the mechanism of the competent authorities and the waiver of liability for report-**



**ing proposed in the draft technical advice, in order to increase the protection of employees working under a contract of employment? If yes, please provide examples.**

<ESMA\_QUESTION\_MAR\_TA\_19>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MAR\_TA\_19>