European Securities and Markets Authority
201-203 rue de Bercy
75012 Paris

By online submission - www.esma.europa.eu

29 November 2019

ESMA Consultation Paper: MAR Review Report

Dear Sir or Madam,

The Alternative Investment Management Association[1] ("AIMA") and the Managed Funds Association[2] ("MFA") (collectively, the "Associations") welcome the opportunity to respond to the European Securities and Markets Authority ("ESMA") regarding its Consultation Paper "MAR Review Report" ("the CP")[3].

The Associations support the objectives that underlie the Market Abuse Regulation[4] ("MAR") framework and the need for transparency in the financial services sector. We appreciate ESMA's willingness to consider possible enhancements to the existing regulatory framework and are pleased that ESMA is taking this opportunity to go further than the European Commission's mandate with a view to considering a broader range of issues where it might be possible to address and clarify deficiencies in the existing framework.

[1] AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council ("ACC") to help firms focused in the private credit and direct lending space. The ACC currently represents over 100 members that manage $350 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

[2] MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organisation established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organisations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

[3] ESMA70-156-1459. Available online at < https://www.esma.europa.eu/sites/default/files/library/mar_review_-_cp.pdf >.

[4] Regulation 596/2014 of the European Parliament and of the Council. Available online at < http://data.europa.eu/eli/reg/2014/596/oj >.

In this submission we make the following points:

- We do not believe that a change in the scope of MAR would be the most effective way to address potential issues in the foreign exchange spot ("spot FX") market. Given the complexities of potentially including spot FX within the scope of MAR, as ESMA identifies in the CP, we suggest that this topic should be considered separately to the ongoing review of MAR.

- We are concerned that the definition of inside information is, at present, not applied in a consistent manner by all market participants. In our members' experience, issuers and brokers tend to interpret it in a narrow way, particularly in regard to broker pre-hedging and the non-disclosure of inside information. We suggest that ESMA should seek to promote more consistent application of the existing definition through the adoption of Level 3 material, and clarify that the definition, under Article 7(1)(a) of MAR, includes requests for quotes ("RFQs") and non-actionable indications of interest.

- We note the valuable CESR guidance[5] published in 2007 regarding the application of the concept of inside information and would encourage ESMA to re-endorse the CESR position, given the period of time that has elapsed since its publication.

- We would welcome further clarity regarding whether the fact of information being subject to a non-disclosure agreement ("NDA") would likely indicate that the information is sufficiently precise and/or price sensitive for the purposes of meeting the criteria for inside information under MAR. We would also welcome clarification of ESMA's expectations with regards to the treatment by the issuer of such information.

- We recommend that ESMA provides greater clarity as to what constitutes inside information that requires disclosure and iterates that issuers should not attempt to narrowly define such information to avoid having to rely on Article 17 of MAR.

- We support the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling and disclosing inside information. We believe that this would make internal identification and evaluation processes more robust, reducing the risk that disclosable inside information is overlooked and not published to the market. In the interests of consistency between jurisdictions, we suggest that an EU equivalent of the U.S. Electronic Data Gathering, Analysis and Retrieval ("EDGAR")[6] system would be beneficial.

- We agree that parts of Article 11 of MAR should be amended to clarify the obligatory nature of some of its requirements in the context of market soundings.

- We do not find it proportionate for the obligation to draw up and maintain insider lists, per Article 18(1) of MAR, to be explicitly expanded to *all* other persons performing tasks through

[5] CESR/06-562b. Market Abuse Directive: Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market (July 2007). Available online at <http://www.cesr-eu.org/data/document/06_562b.pdf >.
[6] https://www.sec.gov/edgar/aboutedgar.htm

which they have access to inside information, even if they do not act on behalf or on account of the issuer.

- We believe that the proposed use of the concept of "relevant persons" for management companies, as defined under Article 3(3) of Commission Directive 2010/43/EU[7] is too broad and out of line with the concept of Person Discharging Managerial Responsibilities ("PDMR") in the context of non-Collective Investment Undertakings ("CIUs") issuers.

- We welcome the proposed framework for cross-market order book surveillance.

- We understand concerns surrounding types of market conduct that are inconsistent with regulatory requirements though believe that ESMA should focus its review of MAR on issues directly connected to market abuse. We are concerned that providing national competent authorities ("NCAs") with additional authority beyond market abuse matters raises a number of complicated issues that require further consideration.

- A matter not addressed in the CP is the treatment of positions in index derivatives; we encourage ESMA to consider whether there is scope for further guidance on the application of market abuse rules to trading in such instruments.

We have provided detailed comments on the questions included in the Consultation Paper in the Annex to this letter.

If you would like to discuss any aspect of this submission further, please contact Aniqah Rao (arao@aima.org); Adam Jacobs-Dean (ajacobs-dean@aima.org); Michael Pedroni (mpedroni@managedfunds.org); or Benjamin Allensworth (ballensworth@managedfunds.org).

Yours truly,

/s/ Adam Jacobs-Dean	/s/ Michael Pedroni
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[7] Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company. Available online at < http://data.europa.eu/eli/dir/2010/43/oj >.

ANNEX

1. **Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.**

The Associations do not consider it necessary to extend the scope of MAR to spot FX contracts.

We recognise the potential for abuse in the spot FX market and acknowledge that voluntary codes, such as the Global FX Code, have limitations in terms of their potential impact. We also agree with ESMA's assessment that misconduct in the spot FX market has the potential to contribute to abusive behaviour or disorderly trading in other related markets.

However, we do not believe that a change in the scope of MAR would be the most effective way to address potential issues in the spot FX market. In this regard, we agree with ESMA's analysis that the spot FX market exhibits different structural characteristics to markets on which transferable securities are traded, with pricing determined on the relationship and creditworthiness of the counterparties rather than the interaction of supply and demand. Conceptually, many of the components of MAR would not be meaningful if applied in the context of spot FX, such that a mechanical extension would be largely impossible.

We would also caution against any broader approach that entails an amendment to the scope of the Markets in Financial Instruments and amending Regulation ("MiFIR")[8] transaction reporting requirements, given the level of operational cost and complexity this would imply. Likewise, we note that additional features required by the Markets in Financial Instruments Directive II ("MiFID II")[9] regarding systems and controls, transparency and conduct requirements would need to be developed before MAR could be applied.

Given the complexities of potentially including spot FX within the scope of MAR that ESMA identifies in the CP, we suggest that this topic should be considered separately to the ongoing review of MAR.

2. **Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.**

We agree with ESMA that many structural changes would be required to apply MAR to spot FX contracts. As noted above, any move to extend MiFIR transaction reporting obligations to spot FX instruments would entail significant one-off and on-going compliance costs for the industry as a whole.

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[8] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.
Available online at < http://data.europa.eu/eli/reg/2014/600/oj >.

[9] Directive 2014/65/EU of the European Parliament and of the Council f 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.
Available online at < http://data.europa.eu/eli/dir/2014/65/oj >.

4. **Do you agree that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors?**

We agree and find it logical that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors, as this concept has now been defined in EU law through the European Benchmarks Regulation ("BMR")[10].

5. **Do you agree that the Article 23 of MAR "Powers of competent authorities" point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?**

The Associations agree that, in line with BMR, the Article 23 of MAR "Powers of competent authorities" would be more effective if reference were made to administrators of benchmarks and supervised contributors.

6. **Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?**

We agree that, following the introduction of the concepts of "submitter" and "assessor" through BMR, Article 30 of MAR should also refer to submitters within supervised contributors and assessors within administrators of commodity benchmarks.

14. **Do market participants consider that the definition of inside information is sufficient for combatting market abuse?**

The Associations would welcome further clarity regarding the definition of inside information.

We are concerned that the definition is, at present, not applied in a consistent manner by all market participants. In our members' experience, issuers and brokers tend to interpret it in a narrow way, particularly in regard to broker pre-hedging and the non-disclosure of inside information, as discussed further in our response to Questions 20, 22, and 23 of the CP.

In our view, the head of inside information under Article 7(1)(d) of MAR covering information relating to a client's pending orders gives room for misinterpretation by sell-side participants. We observe that Article 7(1)(d) covers only information conveyed by a *client* and relating to a client's pending *orders* in financial instruments. This is problematic as buy-side participants in bond markets are not generally "clients". They are instead treated as arm's length counterparties to which no fiduciary or investor protection duties are owed**.** Likewise, communications of buying or selling interest from the buy-side are in the form of RFQs and not formal "orders", as referred to in subparagraph (d). Misinterpretation of the application of Article 7(1)(d) to dealing counterparties and RFQs creates concerns about front running by certain sell-side participants. As such, we recommend that Article 7(1)(d) be amended to reference "…information conveyed by a

[10] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014. Available online at < http://data.europa.eu/eli/reg/2016/1011/oj >.

client *or dealing counterparty* and relating to the client's pending orders *or dealing counterparty's requests for quotes* in financial instruments…".

Additionally, we find that some public issuers inappropriately categorise non-public information as non-inside information. Issuers, particularly those with only listed bonds, have been narrowly construing the definition of inside information so that fundamental documents needed for the accurate evaluation of listed financial instruments are not disclosed. For example, members have had experience of documents material to the credit structure of an issuer being withheld from the public since they are deemed to not have any inside information, despite including highly material information such as restructured liabilities and payout waterfalls. We have been made aware of practices where the existence and title of documents, such as bond transaction documents, have been published without any disclosure as to the importance of the information within them. Issuers have then shared these documents to existing bondholders and subjected them to strict NDAs. We find this to be contradictory as information that requires strict confidentiality agreements is likely to also be sufficiently precise and price sensitive to constitute inside information.

For the delay of disclosure regime to work correctly, the definition of inside information must be robustly applied, so that all information that is non-public, precise and price sensitive is categorised as such by issuers. We therefore believe that MAR could be amended to clarify the definition of inside information. However, we would suggest that the initial focus by ESMA should be on whether the existing definition could be better elaborated through the adoption of Level 3 material. Level 3 guidance could, for example, clarify an expectation that all relevant inside information should be disclosed by in-scope issuers as soon as possible, and that non-public documents which are distributed to existing security holders subject to signing an NDA are likely to contain confidential information that is both precise and price sensitive.

We also note the valuable CESR guidance published in 2007 regarding the application of the concept of inside information. We would encourage ESMA to re-endorse the CESR position, given the period of time that has elapsed since its publication.

Additionally, we note that access to data rooms in the course of debt security issuances is generally subject to signing an NDA. It may be helpful for ESMA to clarify its views regarding whether the fact of information being subject to an NDA would likely indicate that the information is sufficiently precise and/or price sensitive for the purposes of meeting the criteria for inside information under MAR and, correspondingly, for ESMA to clarify its expectations with regards to the treatment by the issuer of such information. Where information is broadly available to interested investors (beyond existing noteholders), we suggest that ESMA clarifies that such information should not be viewed as inside information.

15. In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

The Associations agree with ESMA, at paragraph 101 of the CP, that RFQs often constitute inside information, as currently defined. RFQs are non-public and will often be precise and price sensitive, as the fact that there is a party requesting a quote for a particular volume of financial instruments can itself be price sensitive. Given inconsistent application by market participants, we

suggest that ESMA provides Level 3 clarification that the definition of inside information, under Article 7(1)(a) of MAR, includes RFQs and non-actionable indications of interest.

20. What changes could be made to include other cases of front running?

As discussed further in our response to Question 22 of the CP, broker pre-hedging practices can often constitute front running and have a significant risk of both *de facto* and *de jure* market abuse.

We believe that, as a matter of priority, Level 3 clarification of this is required.

22. What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?

We thank ESMA for addressing this issue and agree that ESMA should further scrutinise broker pre-hedging practices.

We find that pre-hedging has the potential to create clear market abuse risks. As noted in our response to Question 15 of the CP, buy-side RFQ information is often inside information. Trading based upon it can constitute insider dealing.

There are also clear conduct risks that arise from pre-hedging. Pre-hedging essentially places the proprietary interest of the broker ahead of the *de facto* client. In the context of bond trading markets, when brokers explicitly refuse to transact with buy-side participants on an agency basis they avoid application of the conduct rules in MIFID II. As such, brokers may avoid committing to any obligation to act in the client's best interest associated with a broker/client relationship. Further to this, there are investor protection risks for the underlying clients of buy-side firms to whom the buy-side owe best execution obligations.

Buy-side firms cannot put in place additional systems and controls to address the above market abuse and conduct risks beyond avoiding submitting RFQs to multiple brokers and concealing potential trading intentions by asking for two-way prices. However, this does not promote confidence.

As such, as mentioned in our response to Question 20 of the CP, the Associations believe that Level 3 guidance should be adopted to explicitly address for RFQ markets and combat abusive pre-hedging by counterparties. This would enable buy-side counterparties to be confident in obtaining quotes from multiple brokers for a trade without moving the market whilst meeting the objectives of the MiFID II best execution regime. Further to this, we also seek clearer guidance on the limits of acceptable pre-hedging behaviour.

23. What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?

Whilst we acknowledge the importance of brokers being able to manage risk when acting in a market making capacity, our view is that pre-hedging more frequently operates to the detriment of buy-side participants. We note that the market maker provisions also extend to other principal traders and in some cases the distinction between the two is blurred.

We observe that pre-hedging facilitates the sell-side trading ahead of other market participants to which no duty or obligation to act in their best interests is owed, and that the benefits are taken by brokers. Several brokers have refused to pre-hedge due to recognition that the practice is detrimental to their counterparties and damaging for ongoing relationships.

The Associations also find that broker pre-hedging can damage the functioning of the fixed income market.

We believe that pre-hedging can lead to the market moving against bona fide traders before they trade. Some market participants may consider that pre-hedging could also narrow spreads. Whilst this may appear positive for buy-side participants, narrower spreads are not relevant when then the entire market has moved to a more disadvantageous price point. Pre-hedging creates a cost to the buy-side which could be incorporated in the spread of a single broker with whom they are trading, as opposed to being added cumulatively to the market price by each broker that the buy-side participant submits an RFQ to.

As ESMA notes in paragraph 104 of the CP, pre-hedging risks a cumulative negative impact of the RFQs to different brokers, thereby distorting the functioning of the market and creating best execution conflicts. The act of obtaining multiple prices for the purposes of comparison moves the market against the firm, preventing them from obtaining best execution. This could disincentivise firms from seeking one-way market pricing and two-way requests.

Additionally, we do not believe that pre-hedging necessarily has a substantial link to brokers attempting to provide competitive market prices. Brokers will often pre-hedge regardless of whether they have sufficient inventory to undertake the trade. Therefore, pre-hedging frequently does not improve liquidity for buy-side participants.

24. What financial instruments are subject to pre-hedging behaviours and why?

Pre-hedging tends to be limited to fixed income instruments traded on RFQ markets, such as bonds. Pre-hedging is enabled here as brokers owe no duty to act in the best interests of the client, unlike equity and traditional order book markets that are subject to MiFID II client order handling rules and Article 7(1)(d) of MAR.

25. Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

We find that whilst the delay of disclosure regime, under Article 17 of MAR, is an appropriate means for issuers to delay the publication of inside information, in some situations, they are not categorising inside information as inside information, thereby avoiding the regime entirely. Passing information that is potentially incorrectly classified as not being inside information to a closed group of bondholders creates risks of inadvertent insider dealing by bondholders who may then trade with non-bondholders who are not in possession of the information.

Therefore, we recommend that ESMA provides greater clarity as to what constitutes inside information that requires disclosure and that ESMA iterates that issuers should not attempt to narrowly define such information to avoid having to rely on Article 17 of MAR.

Level 3 guidance could, for example, clarify the expectation that all relevant inside information should be disclosed by in-scope issuers as soon as possible, and that non-public documents which are distributed to existing security holders under an NDA are likely to contain confidential information that is both precise and price sensitive. Our members would also value clarification that publication of a document itself is required, as opposed to only extracting what the issuer deems to be inside information within a high-level and selective summary.

27. Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

The Associations support the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling and disclosing inside information.

We believe that this would make internal identification and evaluation processes more robust, reducing the risk that disclosable inside information is overlooked and not published to the market. The requirement could also introduce specific books and records obligations to ensure that the rationale for particular decisions is recorded, thereby enabling an ex post review of decisions as to what is and is not inside information.

In the interests of consistency between jurisdictions, we suggest that an EU equivalent of the U.S. EDGAR system would be beneficial. EDGAR is used at the U.S. Securities and Exchange Commission (SEC) as the primary system for submissions by companies and other bodies that are legally required to file information with the SEC. Access to EDGAR's public database is free and allows buy-side firms to research, for example, a public company's financial information and operations through reviewing its filings with the SEC. We believe that such a system implemented in the EU would enhance the efficiency, transparency, and fairness of the EU securities markets.

28. Please provide examples of cases in which the identification of when an information became "inside information" was problematic.

When seeking to evaluate a company with no listed equity, a member firm was denied access to important documents about the company's credit restructuring and payouts from a particular debtor. Documents included a Deed of Amendment relating to available revenue funds under the transaction documents, a Settlement Account Agreement and a Supplemental Agreement, as well as master definitions and a Framework Deed regarding floating rate bond notes. On the relevant newswire service, only high-level information regarding the documents' existence, that they had been agreed by the noteholders and that they were only available to the noteholders, was posted.

After challenging the issuer, the issuer stated that the information was not inside information but that it was subject to an NDA and therefore could not be disclosed without unanimous agreement of the noteholders. The information was not public as it was unavailable unless a participant purchased a bond. However, the firm deemed the information to be material as it were both precise and would have had a significant effect on price if made public.

Such circumstances are problematic as buy-side participants in this position have no ability to question the issuer's evaluation of the potential inside information. Their only avenue to access withheld documents is to purchase a bond. We believe that this is an unreasonable expectation for buy-side participants and would risk restricting the trading of the bond to, at least, non-current bondholders if the non-public information were subsequently found to be material. All relevant information should be available for assessment ahead of purchase.

33. Do you agree with the proposed amendments to Article 11 of MAR?

We agree with ESMA's proposal to amend part of Article 11 of MAR to clarify which of its requirements are obligatory in the context of market soundings. In particular, we note that

paragraphs 4 and 5 are not obligatory and are only triggered for firms that wish to avail themselves of the safe harbour. We believe that it would be disproportionate to require all firms to implement processes to comply with these provisions (even those firms for whom these provisions would rarely be relevant and for whom simpler processes would ensure no misuse of information).

Whilst we believe it is important to clarify the obligations, we caution that a balance is needed to not burden and stifle sell-side participants. We also believe it would be reasonable to have a carve-out in respect of issuers whose securities are admitted to trading on a trading venue without their having sought this.

Similarly, we encourage ESMA to clarify that the obligation only applies to listed instruments and no other transactions, such as private loans. We are aware that there is some confusion in the market regarding this point.

40. Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

We would welcome clarification from ESMA that the scope of the obligations relating to insider lists is targeted towards issuers and their advisers. In light of this, we have no specific comments on how the requirements under the regime may be made most effective.

In the context of investment managers, we note that firms that are wall crossed also manage the consequent risk of market abuse by producing internal systems to detect and register employees with access to inside information, typically through the construction of their own insider lists. We believe that investment managers should have the discretion to approach the construction of insider lists flexibly and in a way that best reflects their operating structures.

In particular, we do not consider it is practical for insider lists to include only those persons who actually accessed information. This would require a constant screening of those personnel to whom (for good reason) access is available but may not be utilised, such as appropriate IT or compliance personnel. We believe that it should be sufficient if firms' facilities enable them, on request, to identify which of such personnel actually accessed information. The current UK practice of categorising insiders as super insiders, core insiders and peripheral insiders could be a way to address this issue.

Thus, we would encourage ESMA to clarify that the requirements imposed on issuers with respect to the structure of insider lists should not restrict the approach taken by investment managers when voluntarily constructing insider lists.

42. What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

Although the Associations understand and appreciate the general sentiment of this section of the CP, it would be helpful for ESMA to clarify that the reference to “any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer” should not extend to market participants that deal in the financial instruments of the issuer.

It is our view that it would not be proportionate for the obligation to draw up and maintain insider lists to be explicitly expanded to *all* other persons performing tasks through which they have access to inside information, even if they do not act on behalf or on account of the issuer. Taking as an example buy-side firms (who would not be acting on behalf of or on account of the issuer), the trading intentions of such a firm (where pertaining to instruments within MAR's scope) are capable of constituting inside information (albeit, the firm is nonetheless permitted under MAR to trade on the basis of its own trading intentions without this constituting insider dealing). Expansion of the requirement to maintain an insider list in this manner would result in the firm having to maintain a list of all persons who possess knowledge of the firm's trading intentions. Depending on the frequency of trading, instances where the firm forms a trading intention could be highly frequent and potential "insiders" could be numerous (including also the firm's brokers). Accordingly, maintenance by a buy-side firm of an insider list conforming with the detailed fields prescribed by MAR for each trading intention formed would be disproportionate.

As a further comment, where buy-side firms obtain access to confidential information (which could potentially include inside information) directly from the issuer, such access is generally subject to the entering in to of an NDA. The terms of the NDA generally require the recipient firm to impose controls on the handling or access of such information and, on this basis, buy-side firms do already generally prepare a list of persons with access to confidential information.

46. **Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?**

We would welcome an increase in the minimum reporting threshold from EUR 5,000, as this would reduce the administrative burden for issuers and ease compliance.

We find that, in practice, firms do not use the current threshold, as it is easy to surpass. We note that firms tend to notify all transactions, even if below the threshold, in order not to monitor when the threshold is exceeded.

51. **Do you consider that the 20% threshold included in Article 19(1)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.**

The Associations find the 20% threshold included in Article 19(1)(a) and (b) of MAR to be appropriate.

61. **What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of "relevant persons" would be adequate for CIUs other than UCITs and AIFs.**

It is the Associations' view that the proposed use of the concept of "relevant persons" for management companies, as defined under Article 3(3) of Commission Directive 2010/43/EU is too broad.

This is because the definition includes personnel who are "involved" in collective portfolio management or who provide services to a third-party delegate of the management company "for the purpose of" the provision of collective portfolio management. The concept of collective

portfolio management (CPM) is broadly defined and includes many purely administrative functions, as well as more substantive investment activity. When added to the fact that to be "involved in" CPM and/or to provide services "for the purpose of" CPM are broad and ill-defined concepts, the potential constituents of "relevant persons" are also very broad and out of line with the concept of PDMR in the context of non-CIU issuers.

An alternative approach would be to look to the personnel who take part in the investment decisions of the CIU.

66. Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.

Our members welcome ESMA's proposals for a cross-market framework for order book surveillance concerning market abuse cases. We agree that there is a need to harmonise the format in which trading venues transmit their order book data to NCAs and believe that mandatory reporting of order book data may enhance the surveillance framework. We also believe that trading venues should record and report order book data in an electronic and machine-readable format, use a common template, and that both standards and templates harmonisation and order book quality should be ensured.

69. What are your views regarding those proposed amendments to MAR?

The Associations understand the concerns surrounding any type of market conduct that is inconsistent with regulatory requirements and represents a threat to the integrity of the financial markets. However, we believe that ESMA should focus its review of MAR on issues directly connected to market abuse. We are concerned that providing NCAs with additional authority beyond market abuse issues raises a number of complicated issues that require further consideration.

For example, giving NCAs investigatory and sanctioning powers based upon a broad concept could risk undermining existing concepts within MAR itself. If a new offence is created pertaining to unfair behaviour posing a threat to the financial market as a whole (which, presumably, must be the case if the NCAs would be granted sanctioning powers in this regard), this could create uncertainty as to whether actions which do not meet the existing criteria of insider dealing or market manipulation under MAR could nevertheless still be offences under this new heading.

Furthermore, giving NCAs investigatory and sanctioning powers based upon a broad concept could risk unintended consequences in other areas of EU legislation. Given the large body of existing tax legislation within the EU, we consider it prudent for ESMA to consider to what extent such changes could relate to or have an effect on other areas of EU law as a whole, so as to avoid any unintended consequences. For example, whilst the CP raises the potential significance of such proposals in the context of withholding taxes, there may be other areas of tax (as well as non-tax areas) where such proposals could have an impact. Such situations and implications should be considered fully.