04 February 2016

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Training Conduct & Settlement Policy Team
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London, E14 5HS

AFME-BBA-FIA-ISDA Response to Consultation Paper FCA CP15/35 (Policy Proposals and Handbook Changes Related to the Implementation of the Market Abuse Regulation)

Dear Sir, Madam

The Association for Financial Markets in Europe (AFME), British Bankers Association (BBA), FIA and International Swaps and Derivatives Association (ISDA) welcome the opportunity to comment on the FCA consultation paper entitled Policy Proposals and Handbook Changes Related to the Implementation of the Market Abuse Regulation (2014/596/EU) - CP15/35.

Yours faithfully

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AFME

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Consultation response

Policy Proposals and Handbook Changes Related to the Implementation of the Market Abuse Regulation (2014/596/EU)

04 February 2016

The Association for Financial Markets in Europe (AFME), British Bankers Association (BBA), FIA and International Swaps and Derivatives Association (ISDA) welcome the opportunity to comment on **FCA CP15/35 Policy Proposals and Handbook Changes Related to the Implementation of the Market Abuse Regulation (2014/596/EU), (CP)**.

Information about the associations is included in an annex.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

AFME, BBA, ISDA and FIA appreciate the work that the FCA has carried out in amending the Handbook in light of the Market Abuse Regulation 2014/596/EU (EU MAR). We value the opportunity to respond to the work that has been carried out so far and we see the amendment of the FCA Handbook as a chance to ensure the UK markets continue to have the guidance they need which will assist with their clear, orderly and proper functioning.

We have set out our responses below which we would be grateful if the FCA would consider, as we believe that the suggested changes would assist the UK market in understanding and applying the market abuse regime as set out in EU MAR. We have set out some general comments in the paragraphs below, before turning to answering some of the questions set out in the CP.

Status of Guidance

Many of the changes that we have suggested in this paper are dependent on the status of the provisions all being clearly marked as guidance, rather than being evidential or providing safe harbours as is the case currently for many provisions under the FCA Handbook Market Abuse module ("**MAR**"). We therefore support the use of the icon 'G' for these provisions. It is clear to readers of the FCA Handbook that where there is a 'G', the information given is guidance which is not strictly binding. It does not detract from the requirement on persons to refer to the original legislation and we would suggest that guidance from the FCA is in the spirit of the legislation particularly where there are sections which are implied or clearly noted as being non-exhaustive, for example the indicators of manipulative behaviour.

We feel strongly that it is always better to have more guidance to provide possible clarifications as it results in more legal certainty and effective enforcement as well as less market abuse). However we

would like to underline that we do not have an expectation that guidance would be evidentiary or exhaustive.

EU MAR Signposts

One of the overarching changes we would like to comment on is the replacement of deleted Handbook paragraphs with signposts to the relevant EU MAR articles. We feel that adding EU MAR hyperlinks to the provisions instead of signposts would be helpful as it would make using the Handbook and EU MAR together a seamless experience. We do not believe that using hyperlinks would risk fewer persons making reference to EU MAR. On the contrary, as the Handbook is mainly used as an online tool we believe that the possibility to link directly to the legislation would encourage users to follow through to the original legislation and make the user experience quicker and clearer.

In connection with the use of the signposts, we have also noted places where we feel that links/signposts are missing. One such example is MAR 1.3.7 which has been deleted; we would have expected a reference to be made to Article 9(2)(a)[1] (in fact there is no reference made to EU MAR 9(2)(a) in the CP's Appendix 1). Where text has been replaced with signposts it seems that the markets are missing out on valuable guidance as the previous wording has been removed and there is either no signpost at all, or only a signpost without the previous helpful Handbook wording.

We note the new MAR 1.1.9 and that provisions in EU MAR may be relevant but not signposted in the corresponding sections of the Handbook, but we believe that more signposts will lead to more clarity and will encourage more people to link through to EU MAR.

EU MAR Article 17: Public disclosure of inside information

Q1: Do respondents agree that the issuer/EAMP should provide a written explanation following notification of delayed disclosure to the FCA only upon its request?

Yes we do agree that the issuer/EAMP should only provide a written explanation following notification of delayed disclosure to the FCA if so requested by the FCA, rather than for every delayed announcement. We welcome the pragmatic approach taken in this area.

Q3: Would it be too burdensome to automatically provide the explanation without waiting for a specific FCA request? Please could you provide data regarding the resources required?

We do believe that it would be too burdensome to automatically provide the explanation without a specific FCA request.

[1] MAR Art.9(2) "For the purposes of Articles 8 and 14, it shall not be deemed from the mere fact that a person is in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal where that person:

(a) for the financial instrument to which that information relates, is a market maker or a person authorised to act as a counterparty, and the acquisition or disposal of financial instruments to which that information relates is made legitimately in the normal course of the exercise of its function as a market maker or as a counterparty for that financial instrument;"

EU MAR Article 19: Manager's transactions

Q4: Do you agree with our proposal to adopt the €5,000 threshold? If not, please specify the market conditions that you consider would justify the decision to increase it to €20,000.

Some members are not supportive of the implementation of a threshold at any level (but appreciate that this is set in the Level 1 text) as a threshold at any level will require an additional level of monitoring of PDMR trades and will introduce potential operational risk, should an aggregate threshold reporting event be missed. From an administrative perspective and to minimise potential risks, some members have indicated that they intend to implement a policy that requires disclosure and notification of all transactions to avoid any errors relating to thresholds. Other members have noted that there is some value, from an administrative perspective, in increasing the threshold to the €20,000 amount as it would significantly reduce the number of notifications, the additional administration required, the amount of information on the newswires of questionable use to investors; and the cost of making announcements.

Members have also expressed that it would be useful to have an understanding of the mechanism for PDMR and closely associated persons to disclosure to the authorities as soon as possible.

Q5: Please provide quantitative data on the number of transactions you would have to notify at a threshold at €5,000 and €20,000 respectively in a calendar year.

One member has provided an example of Director/PDMR share transactions announced in 2015 in respect of Directors' fees being invested in the firm's shares, which happens twice a year. All but one transaction broke the €5k threshold so, under EU MAR, they would have released 12 separate announcements in respect of transactions that are completely foreseeable by the market, as it is the firm's policy to purchase these shares on behalf of Directors. Only one of these transactions would have broken the €20k threshold. Under EU MAR, they would have had to make 25 separate Director / PDMR share announcements if there had been a €5k threshold. That would have been reduced to 13 if the threshold was €20k, saving the market at least 12 unnecessary announcements per year. The €5k threshold would have saved just one.

Another member provided data for 2015 which showed that for the €5k threshold they would have had 236 transactions above the threshold, dropping to 219 for a €20k threshold. The transactions included the allotment of shares under long term incentive plans and any dividend equivalents and/or scrip shares. With no threshold, there would have been 260 transactions to report.

Proposed Changes to the Handbook

Q8: Do you have any comments or suggestions on the proposed amendments to MAR 1.3? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach

MAR 1.3.3 and 1.3.5

We note the decision to delete MAR 1.3.3 and 1.3.5, but we strongly feel that guidance on when a person has not acted on the basis of inside information would be helpful, particularly given the fact that there is a rebuttable presumption regarding the use of inside information under EU MAR, examples are set out in Article 9 of EU MAR. In this case specifically, EU MAR Article 9(3) is relevant to MAR 1.3.3 and EU MAR Article 9(1) is relevant to MAR 1.3.5.

Many of our members are complex firms who need to set up arrangements and procedures the in correct ways to avoid conflicts and offences, and these firms should be able to benefit from guidance from their home regulator that in following the correct procedures they can continue with their legitimate activities without being deemed to be committing an offence.

We recognise that MAR 1.3.3(3) may not be supported in its entirety by EU MAR, we would therefore suggest that amended wording be included for MAR 1.3.3 such as "*~~In the opinion of the FCA, t~~The following non-exhaustive list of factors may~~are to~~ be taken into account in determining whether or not a person's behaviour is ~~"~~on the basis of~~"~~ inside information, and may indicate ~~are each indications~~ that it is not: (1) if the decision to deal or attempt to deal was made before the person possessed the relevant inside information; or (2) if the person concerned is dealing to satisfy a legal or regulatory obligation which came into being before he possessed the relevant inside information~~; or (3) if a person is an organisation, if none of the individuals in possession of the inside information: (a) had any involvement in the decision to deal; or (b) behaved in such a way as to influence, directly or indirectly, the decision to engage in the dealing; or (c) had any contact with those who were involved in the decision to engage in the dealing whereby the information could have been transmitted~~.*" (mark-up against current MAR1.3.3).

We would also suggest the following wording for MAR 1.3.5 "*~~In the opinion of the FCA, if the~~ If an organisation has effective arrangements and procedures and holds inside information ~~is held~~ behind ~~effective Chinese wall~~internal barriers~~, or similarly effective arrangements,~~ from the individuals who are involved in or who influence the decision to deal, and the organisation does not induce, or encourage in any other way, the person who deals ~~in any other way~~ in relation to the inside information, that may indicate~~s~~ that the decision to deal by an organisation is not ~~"~~on the basis of~~"~~ inside information.*" (mark-up against current MAR1.3.5).

Guidance on how the FCA will handle such situations would be helpful, but in the event that the FCA will not consider the amended wording suggested here, or a variant of this wording, we would be grateful for the inclusion of a signpost to MAR Article 9 (3) (a) and (b) at MAR 1.3.3, and to MAR Article 9 (1) at MAR 1.3.5.

MAR 1.3.7

One of the areas that we feel is particularly difficult is the removal of MAR1.3.7.

Recital 18 of the Directive 2003/6/EC ("**MAD**") made reference to the legitimate business of market makers and counterparties, and this wording has been carried over to EU MAR in Recital 30. Although the wording has been amended slightly to render its meaning more clearly, the intention is the same. Recital 30 in EU MAR goes on to mention "the protection, laid down in this Regulation, of market makers, bodies authorised to act as counterparties or persons authorised to execute orders on behalf of third parties with inside information, does not extend to activities clearly prohibited under this Regulation *including, for example*, the practice commonly known as 'front-running'." This wording in Recital 30 as a whole would imply that companies are not deemed to have used inside information in all circumstances, but the legislation does not list all the circumstances and is therefore not exhaustive. Recital 30 does give one example, front running, as a practice which is not permitted under the legislation. Given this construction, we believe that there would be the possibility for the formulation of guidance or further information on legitimate business which would not be incompatible with the legislation. We note that the MAR 1.3.2 amendment shown at page 41 of the CP specifies that the list of behaviours that may amount to insider dealing is "not an exhaustive list" and retains the previous FCA guidance (including front-running) which is not specifically covered in the EU MAR, so we conclude that there is the possibility to include detail not expressed in EU MAR. Furthermore MAR 1.3.10 has also been retained in an amended format again listing non-exhaustive indicators (of legitimate business).

We therefore feel there is a strong argument for retaining the previous wording on legitimate business in MAR 1.3.7, i.e. there is the possibility to include detail not expressed in EU MAR if an EU MAR specifications are not providing an exhaustive list of cases or examples.

EU MAR has introduced Article 9 in which "the protection" mentioned in Recital 30 is laid down. However, we also wanted to clarify that we do not believe that Article 9 is an exhaustive list of situations where dealing in possession of information does not amount to use of that information. This position is also supported by EU case law under MAD in the Spector Photo Group NV case where it was noted that 'several examples of situations' where holding inside information while entering into transactions 'should not in itself constitute "use of inside information"' were provided in MAD in Recital 18. As set out above, the wording from Recital 18 of MAD appears in EU MAR Recital 30. When therefore looking at the combined effect of case law, Recital and wording of the Article we feel that this is a very strong argument for including guidance on this point i.e. Article 9 does not provide an exhaustive list of relevant situations, based on the comparison with practically the same MAD wording and case law. In addition, the guidance will not be absolute and binding (which we discuss further below), so we believe that there would be the possibility of looking to these sources as grounds for including guidance such as MAR1.3.7.

We note the FCA comment that including MAR 1.3.7 would "narrow the scope of the Regulation" and we assume that this is in relation to the language used in MAR 1.3.7 stating that "…[the behaviour] will not in itself amount to market abuse". Further to our comments above, in the event that the FCA still consider there is a difficulty in including MAR 1.3.7, we would urge the FCA to consider whether there is an amendment that could be made to the wording instead of a complete deletion, for example along the lines of the change made by the FCA to the first sentence of MAR 1.3.2 and MAR1.3.10 and therefore keep this section in as guidance. We propose the following wording "*For market makers and persons that may lawfully deal in ~~qualifying investments or related investments~~financial instruments on their own account, pursuing their legitimate business of such dealing (including entering into an agreement for the underwriting of an issue of financial instruments) ~~will~~ may not in itself amount to insider dealing under the ~~m~~Market ~~a~~Abuse Regulation~~(insider dealing)~~.*" (mark-up against current MAR1.3.7).

Trading information – MAR 1.3.2 and 1.3.8

We also felt that the loss of all references to trading information was particularly serious as these provisions provide~~s~~ clarity on an important area for our members. We understand that the concept of trading information is not referred to in EU MAR, however we believe that the idea of trading information is not incompatible with EU MAR, much as it was not incompatible with MAD although not expressly referred to in the MAD legislation.

The definition of inside information under EU MAR could in certain cases include trading information, particularly given EU MAR Article 7(1)(d)[2], so it can be considered as a sub-set of inside information. As EU MAR Article 9 permits persons in possession of inside information to carry out certain activities under certain circumstances, this would include persons in possession of trading information. The inclusion of this as guidance only, would be an example of practical information which would help market participants. For example, MAR 1.3.8 could be retained if MAR 1.3.7 were to be reinstated in an amended format we suggested above "*For market makers and persons that may lawfully deal in ~~qualifying investments or related investments~~financial instruments on their own account, pursuing their legitimate*

[2] EU MAR Art 7(1) For the purposes of this Regulation, inside information shall comprise the following types of information:

(d) for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client's pending orders in financial instruments, which is of a precise nature, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.

business of such dealing (including entering into an agreement for the underwriting of an issue of financial instruments) ~~will~~ may not in itself amount to insider dealing under the ~~m~~Market ~~a~~Abuse Regulation~~(insider dealing)~~.". As EU MAR Article 9(2)(a) states that a person will not be deemed to have used inside information where they are a market maker acting legitimately in the normal course of business, MAR 1.3.8 could be used as guidance to specify that MAR 1.3.7 would still apply if the person was in possession of a sub-set of inside information such as trading information. This would be particularly useful guidance for persons such as market makers given the relevance of this type of inside information to the public side. For these reasons, we believe that the idea of trading information is not irreconcilable with EU MAR.

We also believe that MAR 1.3.2(1) could be retained. Repealing this provision without any replacement would be borne ultimately by the issuer clients in the form on an increased cost of hedging, which may have impacts on liquidity. The list at MAR 1.3.2 is now specified as being non-exhaustive, so we believe that this is the appropriate place to include another example of what kind of information inside information can cover. This is particularly important as trading information is likely to be something firms come across on a regular basis and understanding how it fits into the landscape could be crucial.

As mentioned above, trading information can fall within the definition of inside information, for example looking at EU MAR 7(1) (d), however this will not always be the case and by including the MAR 1.3.2(1) users of the Handbook will have guidance that there is not a clear assumption that can be made as to whether trading information will be inside information or not.

In brief, the inclusion of the guidance (by retaining and modifying appropriately MAR 1. 3.7, 1.3.8 and 1.3.2 (1) as suggested above) that trading information *may* be (as opposed to *is*) a subset of inside information would very helpfully clarify that those being in a possession of trading information may potentially qualify to be in the market making situation described in EU MAR Article 9(2)(a).

MAR 1.3.16

Retaining MAR 1.3.16 as guidance would also be possible from a reading of EU MAR Recital 30. Both Recital 18 in MAD and Recital 30 in EU MAR make reference to the persons authorised to execute orders on behalf of third parties with inside information confining themselves to carrying out, cancelling or amending an order dutifully. Although the term "dutifully" is not then used in the EU MAD Article 9 which sets out legitimate behaviour, the recital retains the same reference to the term dutiful and we feel that it would not be incompatible to retain MAR 1.3.16 purely as guidance.

MAR 1.3.17-1.3.19

We note that MAR1.3.18 refers to "inside information" whereas MAR1.3.17 refers only to "information". Using these two different terms is confusing for users of the Handbook. We note that Article 9(4) does at one point make reference to only "information" (rather than "inside information") in the second line, and if this is the reason for the use of the two different terms we would point out that Article 9(4) goes on to state "where such person has obtained that inside information in the conduct of a public takeover or merger with a company and uses that inside information solely for the purpose of proceeding with that merger or public takeover", which we think demonstrates that from a complete reading of the Article it is clearly a reference to inside information which can be reflected in MAR1.3.17.

We would also like to request that MAR 1.3.19(2) be reinstated as we feel that it is important that transactions with the sole purpose of gaining control or effecting a merger be recognised within the guidance as an indicator of a person's behaviour being for the purpose of proceeding with a merger or

with a takeover. We believe that it is not incompatible with MAR to set out the intent in relation to this provision, and we are not clear why 1.3.19(2) was deleted. If there is to be a departure from the current wording of MAR 1.3.19, it would be important for the FCA to give further details to the market on this change.

Q10: Do you have any comments or suggestions on the proposed amendments to MAR 1.6? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

MAR 1.6.4(2)

We understand the rationale given for deleting large sections of MAR 1.6. However, in deleting MAR 1.6.4, we felt that helpful guidance was lost which is not contrary to EU MAR. In MAR 1.6.4(2) the FCA clarified that certain trades which are permitted on venue will not be manipulating transactions. As EU MAR Annex 1 and the Delegated Acts give non-exhaustive indicators which could amount to market abuse, we believe that there is the possibility for national competent authorities ("NCAs") to give guidance on further indicators, particularly as the NCAs are responsible for enforcement of market abuse.

We would therefore suggest that the following wording be retained at MAR 1.6.4(2) *"(2) Tt~~t~~ransactions where both buy and sell orders are entered at, or nearly at, the same time, with the same price and quantity by the same party, or different but colluding parties, ~~other than~~ for legitimate reasons , ~~unless the transactions~~ are legitimate trades carried out in accordance with the rules of the relevant trading platform (such as crossing trades) and entering into such transactions does not of itself indicate behaviour described in Annex IA of the Market Abuse Regulation and Commission-adopted delegated acts made pursuant to article 12(5) of the Market Abuse Regulation.~~;*" (mark up against original MAR 1.6.4(2)).

Q11: As discussed in paragraph 4.49 above and also discussed in paragraphs 4.52, 4.55 and 4.86, we propose to delete some potential indicators of behaviour such as those included in MAR 1 and Sup 15.10 Annex 5 from the Handbook and, instead, direct the industry to the list of indicators provided under the delegated acts under Article 12(5). If you disagree with this approach, please suggest an alternative approach with rationale and indicate, if relevant, whether there are particular indicators proposed for deletion which should be preserved and why.

We believe that some of the indicators of behaviour could remain in MAR 1 and would be complementary to EU MAR. We note that paragraphs 4.49 and 4.55 of the CP state that MAR 1.6.15 and MAR 1.8.6 have been removed due to overlap with the indicators of market abuse set out in Annex 1 of EU MAR and the related Delegated Acts. We would first note that the indicators are described in EU MAR as being non-exhaustive, so we do not think it would be incompatible with EU MAR to provide further examples of indicators. We also believe that it would not be confusing to maintain these provisions in MAR 1 as they provide illustrative examples of the abusive behaviour. MAR 1.3.20 has been retained as an example of behaviour that could be market abuse, and we feel that MAR1.6.15 and 1.8.6 are in the same vein and should be retained. MAR 1.6.15 provides descriptive examples of abusive behaviours which would be valuable guidance that could even be incorporated into training as case study examples, while MAR 1.8.6 provides descriptive examples of methods dissemination. These provisions place the abusive behaviours in a "real life" context that gives more colour which can only assist persons in understanding EU MAR.

[By contrast, we agree that provisions such as MAR 1.6.9, 1.7.2 and 1.7.3 are no longer required as there is significant overlap with the wording in MAR Annex 1 and Annex II of the MAR Delegated Acts. We would note however that by deleting all of MAR 1.7.2, we lose the clarification in MAR1.7.2(2) that although series of transactions concealing ownership can be market abuse, this would not include nominee holdings. We would be grateful if the FCA could retain wording on this clarification, for example

we suggest amending MAR1.7.2(2) to read "~~*a transaction or series of transactions that are designed to conceal the ownership of a qualifying investment, so that disclosure requirements are circumvented by the holding of the qualifying investment in the name of a colluding party, such that disclosures are misleading in respect of the true underlying holding. These transactions are often structured so that market risk remains with the seller. This does not include n*~~*Nominee holdings are not included in the behaviour described in Annex IA(c) and Commission-adopted delegated acts made pursuant to article 12(5) of the Market Abuse Regulation*" (mark up against original MAR 1.7.2(2)).

We agree with the proposed deletion of the provisions in SUP 15 Annex 5 set out in paragraph 4.86 of the CP.

Q16: Do you have any comments or suggestions on the proposed amendments to MAR 1 Annex 1? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

We note the decision to delete MAR 1 Annex 1 and replace it with a reference to the relevant Technical Standards under Article 5 of MAR but feel that guidance on a number of requirements of the technical standards as currently included in MAR 1 Annex 1 would be helpful.

In particular, we would like to retain (with amendments to reflect the website requirements) the guidance at 1.1.18G that clarifies that disclosure through a regulatory information service constitutes adequate public disclosure.

We also consider that it would be helpful for the FCA to provide some guidance around how issuers can fulfil the new requirement to report transactions to the competent authority of each trading venue on which the shares are admitted to trading or are traded. This could result in issuers being required to report to numerous competent authorities with no clear mechanism to make these reports.

We also feel that guidance from the FCA around the application of Article 3(1)(a) to purchases made on a riskless principal basis would be of considerable value to UK based issuers.

Q18: Do you have any comments or suggestions with the changes proposed to MAR 2? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

We wanted to raise a point in relation to stabilisation and how it will apply in certain circumstances. By doing so we hope to highlight to the FCA that is it very important for our members that the relief contained in MAR 2.2.1(2) coupled with MAR 4, as well as the relief contained in MAR 2.5 be maintained as far as possible.

Under EU MAR Article 5, stabilisation will apply to securities which are listed, or have submitted an application to be listed, on a "trading venue" which is defined with reference to directive 2014/65/EU ("MiFID II") as including Regulated Markets, MTFs or OTFs ("EU MAR in-scope instruments"). In the paragraphs below however, we consider instead a domestic UK stabilisation regime only which will not apply to EU MAR in-scope instruments.

Rather, the instruments which would be covered by a domestic regime would include (1) securities on the markets listed in MAR 2 Annex 1, and (2) securities which are not listed on any market and traded OTC (traded under the rules of ISMA/ICMA as set out in MAR 2.2.1). If a firm engages in stabilisation in respect of such instruments, it will not be subject to the new market abuse regime set out in EU MAR,

but it would potentially be subject to the criminal provisions in the section 90 of the Financial Services Act 2012 ("FSA 2012") on misleading impressions.

Currently, firms can rely on MAR 2.2.1 and MAR 2.4 as protection for stabilisation transactions where the instruments are not listed on a Regulated Market in the event of any attack under section 90 (1)3 FSA 2012, and it is this protection which our members would ask to preserve. Examples of such stabilisation include where stabilisation is carried out in the UK (see section 90 (10) FSA 2012) by a firm (whether in the UK or abroad) which is part of an underwriting syndicate and in respect of securities listed on a market listed in MAR 2 Annex 1, or in respect of securities which are not listed anywhere. The firm is currently protected by the existing provisions of MAR 2.4 provided that the stabilisation is carried out in accordance with certain limited requirements (more limited than those that are set out either in MAD for Regulated Markets or those that will apply under EU MAR for trading venues).

We would also like to highlight the specific example of a primary debt offering in the UK. With a significant proportion of primary debt offerings today, the intention (as stated in the prospectus-type document) is often to seek a listing on a Regulated Market in the near future (say three to six months) however the securities are allocated, priced and traded in the market before any request has been made for their admission to trading on an EEA market. The securities are therefore traded OTC and stabilisation will occur during this period using the protection under MAR2.4, which covers securities that "are or may be traded under the rules of ISMA (ICMA)." We are concerned that that removal of the MAR 2.4 wording gives rise to a problem for stabilising in this circumstance as the MAR protection for securities for which a request for admission to trading has not yet been made would disappear post 3 July 16.

We note that MAR 2.5 will be retained which permits stabilisation and provides protection from section 90 (1) FSA 2012, however it is limited in its use. MAR 2.5.1 requires the stabilisation to take place outside the United Kingdom, in conformity with specified rules in one of three countries, the USA, Hong Kong or Japan, in relation to an offer which is governed by the law of one of those countries. MAR 2.5 would therefore permit a US bank to make stabilising purchase from UK investors in relation to the underwriting of a listing solely on the NYSE.

MAR 2.5 therefore does not protect firms that will need to carry out stabilisation in third countries outside of those listed in MAR 2.5, nor firms that will be carrying out stabilisation OTC under the new regime.

As stated above this is a particular problem for firms which currently rely on the protection of MAR 2.4 as protection in the event of any attack under section 90 (1) FSA 2012. Section 90 (9)(b) FSA 2012 provides a defence if the stabilisation is carried out in accordance with the "price stabilising rules". Price stabilising rules have the same meaning in FSA 2012 as set out in section 137Q of the Financial Services and Markets Act 2000 ("FSMA"), which currently includes all FCA rules on stabilisations and permits the

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[3] **Misleading Impressions** s90 FSA 2012

(1) A person ("P") who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments commits an offence if— (a) P intends to create the impression, and (b) the case falls within subsection (2) or (3) (or both).

(2) The case falls within this subsection if P intends, by creating the impression, to induce another person to acquire, dispose of, subscribe for or underwrite the investments or to refrain from doing so or to exercise or refrain from exercising any rights conferred by the investments.

(3)The case falls within this subsection if— (a) P knows that the impression is false or misleading or is reckless as to whether it is, and (b) P intends by creating the impression to produce any of the results in subsection (4) or is aware that creating the impression is likely to produce any of the results in that subsection.

...

(9) In proceedings brought against any person ("D") for an offence under subsection (1) it is a defence for D to show— ...(b) that D acted or engaged in the conduct— (i) for the purpose of stabilising the price of investments, and (ii) in conformity with price stabilising rules.

FCA a relatively wide remit to draft stabilisation rules. The latest HM Treasury statutory instrument draft however, makes several changes to both the FSA 2012 and 137Q FSMA which will be problematic for this protection.

The HM Treasury draft removes the definition of price stabilising rules from section 93 FSA 2012 and does not include any replacement so there is now a lack of certainty as to how a person can rely on the defence in section 90 (9)(b) FSA 2012. Furthermore, the HM Treasury draft also proposes amending section 137Q FSMA so that the FCA has powers to make stabilisation rules if they conform with EU MAR stabilisation provisions and with the provisions made by a body or authority outside the EEA. It would appear therefore that there is a gap in the defence from actions under section 90 (1) FSA 2012.

We believe it cannot be the intention that legitimate stabilisation business should be stopped. This would damage firms located in the UK and their international profile. We would therefore need a solution for this issue which has arisen purely in relation to domestic legislation.

In paragraph 4.63 of the CP, it is stated that MAR 2.4 will be deleted as being contrary to Article 5 of EU MAR. We agree that MAR 2.4 will in due course be superseded by Article 5 but only in respect of instruments traded on an MTF or an OTF. Therefore one solution may be to retain a modified MAR 2.4 which does not apply to EU MAR in-scope instruments so that it is in complete conformity with EU MAR and also permits stabilisation on venues which are not OTF, MTF or Regulated Markets for the purposes of EU MAR and MIFID II. The modified MAR 2.4 would therefore ensure that firms continue to have protection in the UK for an issue which relates to UK legislation.

We mentioned above that MAR 2.4 is currently available if the stabilisation is carried out in accordance with certain requirements (for example requirements on timing, on disclosure etc) and that these requirements are less detailed than those that apply under the current MAD regime or that will apply under the future EU MAR regime. The less detailed requirements are those that were contained in the FSA Handbook under the domestic regime that applied between N2 and the advent of MAD. We are asking that, in reinstating MAR 2.4, the FCA retains unchanged the current MAR 2.4 requirements as they are at present.

We also note that the amended MAR 2.5.1 in CP15/35 currently makes reference to "section 89(3)(a) and section 90(9)(b) of the Financial Services Act" on page 75 of Appendix 1 to the CP. In the version of the draft statutory instrument we have been referring to, section 89 FSA 2012 no longer makes reference to the price stabilising rules, and the section 90 reference is now section 90 (9) (d). We understand that the HM Treasury has been issuing various drafts of the statutory instrument, so our only concern here is to ensure that the final version of the Handbook will reflect the final position of the statutory instrument.

Q21: Do you have any comments or suggestions on the proposed amendments to COBS 12.4? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

In relation to the definition of "non-independent research", we appreciate this is not in COBS 12.4, but in relation to COBS 12.3 and other provisions which refer to non-independent research. We note that the definition of "non-independent research" has now been expanded (page 8 of Appendix 1 of the CP) to include the full range of EU MAR investment recommendations. As has been raised previously, the definition of 'investment recommendation' under EU MAR is potentially very wide, and this raises the possibility that communications such as very brief sales notes would be described as non-independent research. We feel that the use of the term 'research' implies that a greater level of analysis and detail would be included, we would therefore suggest that an alternative description could be used such as "non-independent investment recommendation".

Q35: Do you have any comments or suggestions on our proposed changes to DTR 2.8? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

In relation to the requirement set out in EU MAR Article 18 (2) that agreements in writing need to be obtained from each insider, we would appreciate confirmation from the FCA that both paper format or electronic means would be acceptable, including via click through acceptance on an email. This would be an important area to provide clarity on for users of the Handbook given the responsibilities that remain with the issuers in relation to insider lists. To ensure a single approach to this issue across the EU, we believe that guidance should also be provided at ESMA level in a timely manner which is sufficiently in advance of the July effective date.

In connection with insider lists, we also note that the introduction of EU MAR changes the concessionary treatment at NCA level (which is offered by the FCA & BaFin) limiting the number of employees that needed to be included in insider lists. The concerns and previous findings regarding the number of employees that could be included on insider lists do not change with the introduction of MAR, and we would therefore request that the FCA continue this treatment of insider lists consistent with the previous practice under MAD.

Q37: Do you agree with the proposal to delete the provisions of the Model Code and replace it with rules and guidance on systems and procedures for companies to have clearance procedures regarding PDMR dealing?

We note paragraph 4.140 in the CP and would like to take the opportunity to include our observations on the points raised in the paragraph as requested by the FCA in 4.140.

This concerns the Model Code, in particular paragraphs 8(b) and 20, which forbid dealing on "considerations of a short term nature". Paragraph 4.140 acknowledges that it is difficult to maintain such provisions in the face of EU MAR, but asks for comments from readers. These provisions were introduced at a time when the term 'inside information' was less clearly defined and less clearly understood than it is today. At that time the dissemination of inside information was often made selectively by a company to its appointed broker who then leaked the information into the market. From the date of publication of the PSI Guide by the London Stock Exchange in 1993, attempts were made to regularise the distribution of inside information.

In the earlier climate directors were banned from short term dealing as it could take place in circumstances where information might be partly distributed but not distributed to the entire market place. The fact that the dealing was short term might indicate that directors were taking advantage of the imperfect dissemination mechanisms then in place.

We believe that the control represented by this ban has no place in a world where Inside Information must be identified and distributed immediately and where insiders must be recorded on insider lists.

Typographical error

We have one final minor point, we noted what may be a typo on page 32 of Appendix 1 in MAR 1.1. There is a reference in the proposed text to MAR 1.6.6 which we believe should be to MAR 1.1.6.

Conclusion and Availability of Guidance

The importance of solid guidance for the market provides certainty which in turn adds to the orderly functioning. We are concerned that where there is a real or perceived lack of guidance this can lead to negative practices. The Fair and Effective Markets Review noted that in some cases market uncertainties reflect gaps in understanding of existing regulatory rules. We would hope that the FCA could work with industry and help by retaining as much guidance from the Handbook as possible which is consistent with regulatory requirements. Having more information rather than less will make it harder for participants to argue that they believed what they were doing was correct and prevents industry from falling into bad practices. Guidance complementary to the legislation would act as a further line of defence and protection against market abuse. We would add that, in the general enforcement history for areas where there has been guidance (i.e. market manipulation and insider dealing) we do not observe the same risk of misconduct as in areas without such dedicated resources. We therefore think it would be desirable for the FCA to retain as much information as possible on this topic in order to mitigate future market abuse risks and provide continuity.

The proposal by the FCA to keep Handbook sections such as MAR 1 is gratefully received and the industry recognises that the FCA has worked to ensure that as much guidance as possible can be retained. We hope that this paper assists the FCA in finding arguments for keeping further provisions in the Handbook, to ensure their continued assistance to regulated persons operating in the United Kingdom in relation to the market abuse rules to which they are subject.

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Annex 1

Questions Answered in this Response

Q1: Do respondents agree that the issuer/EAMP should provide a written explanation following notification of delayed disclosure to the FCA only upon its request?

Q3: Would it be too burdensome to automatically provide the explanation without waiting for a specific FCA request? Please could you provide data regarding the resources required?

Q4: Do you agree with our proposal to adopt the €5,000 threshold? If not, please specify the market conditions that you consider would justify the decision to increase it to €20,000.

Q5: Please provide quantitative data on the number of transactions you would have to notify at a threshold at €5,000 and €20,000 respectively in a calendar year.

Q8: Do you have any comments or suggestions on the proposed amendments to MAR 1.3? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

Q10: Do you have any comments or suggestions on the proposed amendments to MAR 1.6? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

Q11: As discussed in paragraph 4.49 above and also discussed in paragraphs 4.52, 4.55 and 4.86, we propose to delete some potential indicators of behaviour such as those included in MAR 1 and Sup 15.10 Annex 5 from the Handbook and, instead, direct the industry to the list of indicators provided under the delegated acts under Article 12(5). If you disagree with this approach, please suggest an alternative approach with rationale and indicate, if relevant, whether there are particular indicators proposed for deletion which should be preserved and why.

Q16: Do you have any comments or suggestions on the proposed amendments to MAR 1 Annex 1? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

Q18: Do you have any comments or suggestions with the changes proposed to MAR 2? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

Q21: Do you have any comments or suggestions on the proposed amendments to COBS 12.4? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

Q35: Do you have any comments or suggestions on our proposed changes to DTR 2.8? If yes, please provide your rationale, ideally on a per-provision basis, suggesting a different approach.

Q37: Do you agree with the proposal to delete the provisions of the Model Code and replace it with rules and guidance on systems and procedures for companies to have clearance procedures regarding PDMR dealing?

Annex 2

Information about the Associations

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.
AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

The **BBA** is the leading association for UK banking and financial services representing members on the full range of UK and international banking issues. It represents over 200 banking members active in the UK, which are headquartered in 50 countries and have operations in 180 countries worldwide. Eighty per cent of global systemically important banks are members of the BBA.
As the representative of the world's largest international banking cluster the BBA is the voice of UK banking. The BBA is registered on the EU Transparency Register, registration number 5897733662-75.

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's member firms play a critical role in the reduction of systemic risk in global financial markets.
For more information, visit FIA.org.

Since 1985, International Swaps and Derivatives Association (**ISDA**) has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org