



European Securities and
Markets Authority

Reply form for the ESMA MAR Technical standards



20 August 2014



European Securities and
Markets Authority

Date: 20 August 2014



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - Draft technical standards on the Market Abuse Regulation (MAR), published on the ESMA website ([here](#)).

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type <ESMA_QUESTION_MAR_TS_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Responses must reach us by **15 October 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input/Consultations’.

Naming protocol - In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_MAR_CP_TS_NAMEOFCOMPANY_NAMEOFDOCUMENT: e.g. if the respondent were ESMA, the name of the reply form would be ESMA_MAR_CP_TS_ESMA_REPLYFORM or ESMA_MAR_CP_TS_ESMA_ANNEX1

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading ‘Disclaimer’.



General information about respondent

Are you representing an association?	Yes
Activity:	Other Financial service providers
Country/Region	Europe



Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MAR_TA_1 >

FIA EPTA is an association of European principal traders formed in June 2011 under the auspices of the Futures Industry Association (FIA). FIA EPTA represents 25 principal trading firms that, on a combined basis, provide significant amounts of liquidity to European regulated markets and multilateral trading facilities (MTFs).

FIA EPTA Members are generally the electronic versions of the floor-based jobbers, market makers or specialists in equity and/or derivatives markets. They are authorised under MiFID for undertaking the investment activity 'dealing on own account' or as "local" firms. Members exclusively trade their own capital and do not act as deposit takers in any form. They engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

< ESMA_COMMENT_MAR_TA_1 >



II. Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

Q1: Do you agree with the approach set out for volume limitations? Do you think that the 50% volume limit in case of extreme low liquidity should be reinstated? If so, please justify.

<ESMA_QUESTION_MAR_TS_1>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_1>

Q2: Do you agree with the approach set out for stabilisation measures? If not, please explain.

<ESMA_QUESTION_MAR_TS_2>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_2>

III. Market soundings

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

<ESMA_QUESTION_MAR_TS_3>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_3>

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

<ESMA_QUESTION_MAR_TS_4>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_4>

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

<ESMA_QUESTION_MAR_TS_5>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_5>

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

<ESMA_QUESTION_MAR_TS_6>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_6>

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

<ESMA_QUESTION_MAR_TS_7>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_7>



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

<ESMA_QUESTION_MAR_TS_8>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MAR_TS_8>



IV. Accepted Market Practices

Q9: Do you agree with ESMA's view on how to deal with OTC transactions?

<ESMA_QUESTION_MAR_TS_9>

FIA EPTA agrees with ESMA's approach to include practices performed outside a trading venue given the equal footing afforded to it through the extended scope of the Market Abuse Regulation (MAR) (Articles 2(3) MAR). We agree with ESMA's analysis that the application of Accepted Market Practices ("AMPs") to the OTC market, while in line with the scope of MAR, would require a careful examination of the criteria for establishing an AMP that is set out in Article 13(2) MAR. However, we would foresee some difficulties in applying this criterion to the OTC market due to its specificity and structure.

<ESMA_QUESTION_MAR_TS_9>

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

<ESMA_QUESTION_MAR_TS_10>

FIA EPTA does not believe the status of supervised person of the person performing the AMP is an essential criterion as, while not highly objectionable, it seems to be inconsistent with the Level 1 text and does not necessarily contribute to enhanced market integrity.

As indicated by ESMA in the Consultation Paper (par. 124), there is no explicit legal base in the MAR Level 1 text to make a distinction between supervised and unsupervised firms; Article 13(1) of MAR states that a person entering into a transaction for (a) a legitimate reason and (b) in conformity with an AMP is shielded from the prohibition on market manipulation laid down in Article 15 of MAR. A 'person' is defined in Article 3(1)(13) of MAR as any natural or legal person. The MAR Level 1 text does not deem it relevant whether a person is supervised or not to be able to perform an AMP in conformity with Article 13(1) of MAR and does not provide for such a distinction.

FIA EPTA's concern is that firms acting as proprietary traders do not fall within the scope of MiFID I and thus may not fall within the definition of 'supervised persons' suggested by ESMA with the consequence that they may not perform AMPs. These firms, despite the fact that they are not as heavily regulated as investment firms under MiFID I, have nevertheless successfully performed AMPs in line with the Market Abuse Directive¹ (MAD I) and have had to comply with this legislation as thoroughly as their regulated counterparts. While we appreciate that under MiFID II, the scope of authorisation requirements for investment firms will expand significantly, such that many more firms will be subject to supervision than under the current regime, there will still be at least a one year gap between the effective implementation date of MAR (July 2016) and MiFID II (January 2017) during which period this criterion may undermine the level playing field. Moreover FIA EPTA does not believe that requiring persons performing AMPs to be supervised would significantly contribute to enhanced market integrity.

In addition, ESMA has indicated that NCAs should be able to require that only persons who are members of a trading venue may perform AMPs. FIA EPTA disagrees with ESMA on this approach, again because the MAR Level 1 text does not provide a legal basis, but also because the possibility for NCAs to require market membership may lead to an uneven level playing field to the extent obtaining market membership on a remote basis as required under MiFID is still not possible on all markets within the EU (as is currently the case, for example, in Spain).

¹ Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation.



In the event ESMA feels it is essential to limit the performance of AMP only to supervised entities, FIA EPTA asks ESMA to clarify the definition of ‘supervised persons’ contained in Article 2(l) of the draft RTS as follows by inserting the words marked in **RED**.

Article 2
Definitions

l) “supervised persons” means persons who are subject to supervisory duties from regulators, **including entities registered under local regulatory regimes**, authorised persons under MiFID, or persons subject to prudential supervision in a Member State;

<ESMA_QUESTION_MAR_TS_10>



V. Suspicious transaction and order reporting

Q11: Do you agree with this analysis regarding attempted market abuse and OTC derivatives?

<ESMA_QUESTION_MAR_TS_11>

FIA EPTA agrees with ESMA's analysis that the reporting of suspicious orders and transactions pursuant to Article 16(2) of MAR covers also orders and transactions done in the OTC market.

<ESMA_QUESTION_MAR_TS_11>

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

<ESMA_QUESTION_MAR_TS_12>

FIA EPTA agrees with ESMA's approach that any obligation to report suspicious orders and transactions 'without delay' pursuant to Article 16(2) of MAR should only be triggered once the reporting entity has a 'reasonable suspicion' that the order or transaction is contrary to MAR.

FIA EPTA agrees with ESMA's approach that, in the event the reporting of a suspicious order or transaction exceeds two weeks beyond the point at which the entity has 'reasonable suspicion', the entity should nevertheless be able to provide evidence as to why the extended delay was necessary.

<ESMA_QUESTION_MAR_TS_12>

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

<ESMA_QUESTION_MAR_TS_13>

FIA EPTA supports ESMA's approach on automated surveillance being a best practice approach to detecting suspicious orders and transactions. However, we would like to caution that automation itself should not be considered a determining factor of effectiveness. A poorly calibrated automated system can be less effective than a well calibrated manual approach giving a greater role to human monitoring. Therefore, we welcome ESMA's view that an ideal system of surveillance should combine automated systems with human monitoring and should depend on the scope, size and activities of a firm.

With regard to off-the-shelf automated systems, FIA EPTA wishes to emphasise that most of the existing off-the-shelf systems are equity focused and do not offer an efficient solution for the monitoring of non-equity products. Therefore, most existing off-the-shelf systems are not suited to a firm trading in multiple asset-classes.

<ESMA_QUESTION_MAR_TS_13>

Q14: Do you have any additional views on the proposed information to be included in, and the overall layout of the STORs?

<ESMA_QUESTION_MAR_TS_14>

FIA EPTA believes that the process for submission of STORs should enable firms to make timely and clear submissions. In particular, given the requirement to submit STORs without delay once the entity has 'reasonable suspicion', the form to be used should be as concise as possible, and firms should not be expected nor required to complete every field where these may not be applicable or where completion may unduly delay submission of the report.

Furthermore, FIA EPTA believes that the prescribed provision of commercially sensitive or personal data in each and every STOR is not always necessary and gives rise to confidentiality concerns. We believe such information should not be included in STOR reports, but be formally requested by the relevant competent authority if after an initial investigation of the STOR report by the NCA there is a reasonable presumption that a violation of the Market Abuse Regulation has occurred. Therefore FIA EPTA suggest that the template contained in Annex I of the draft RTS on STOR (Annex VI of the Consultation Paper) should clarify that the information to be included in Section 3 is optional at the discretion of the reporting firm.



<ESMA_QUESTION_MAR_TS_14>

Q15: Do you have any additional views on templates?

<ESMA_QUESTION_MAR_TS_15>

FIA EPTA welcomes ESMA's view that one harmonized STOR template should be used throughout the EU. Furthermore, we agree that where possible the STOR form should be provided and submitted in electronic format and be subject to appropriate levels of security, as assured by the national competent authority to whom the STOR report has been submitted.

<ESMA_QUESTION_MAR_TS_15>

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

<ESMA_QUESTION_MAR_TS_16>

FIA EPTA agrees with ESMA that recordkeeping requirements should apply in those instances where a firm has seriously considered making a STOR and has chosen not to do so. We therefore welcome ESMA's clarification on the definition of 'near misses'.

However, we request ESMA to clarify that the recordkeeping requirement should not be extended to every alert routinely generated by a surveillance system (exception reports). Some alerts generated by the surveillance system may, after a quick investigation, turn out to be a legitimate transaction. FIA EPTA believes firms should not be required to store or share records relating to these transactions.

On a side note, FIA EPTA would like to alert ESMA to the fact that if firms are required to calibrate their automated surveillance systems to monitor the related indicators of market manipulation included in the draft Technical Advice to the European Commission², the number of 'near misses' and thus the recordkeeping requirement may increase exponentially. We have outlined this in our answer to Q1 of the Consultation Paper on Technical Advice.

FIA EPTA advocates the inclusion of a separate recital in the draft RTS addressing recordkeeping, which would reference "appropriate" information on near misses. FIA EPTA also advocates amendments to Article 10(2) of the draft RTS, deleting the second clause of sub-paragraph (a) and adding the word "relevant" at the beginning of sub-paragraph (b).

We have inserted for your convenience the text of Article 10 below with our suggested changes marked in RED.

*Article 10
Record keeping*

1. The records kept pursuant to point (d) of Article 3 of this Regulation shall be retained by the persons referred to in Article 16(1) and 16((2) of Regulation (EU) 596/2014 for at least 5 years. They shall be made available to the relevant competent authority upon request.
2. The records referred to in paragraph 1 shall include in particular:
 - a. every STOR submitted, ~~including the relevant elements on the basis of which the STOR was prepared and reported to the competent authority,~~ and
 - b. relevant details of transactions and orders which were identified as potentially suspicious but following examination were subsequently not submitted, including a summary of the reasons for not submitting a STOR;
 - c. the effective arrangements, systems and procedures put in place and any changes implemented to them.
3. Without prejudice to the competent authorities' rights and powers under Regulation (EU) 596/2014 and this Regulation to access these records, the arrangements, systems and procedures to be established and maintained under this Regulation shall ensure that these records are kept confidential.

² ESMA Consultation Paper on technical advice under MAR, ESMA/2014/808, p. 19 – 21.



<ESMA_QUESTION_MAR_TS_16>



VI. Technical means for public disclosure of inside information and delays

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

<ESMA_QUESTION_MAR_TS_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_17>

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

<ESMA_QUESTION_MAR_TS_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_18>

Q19: What would be the practical implications for the energy market participants under REMIT who would also be EAMPs under MAR to use disclosure channels meeting the MAR requirements for actively disseminating information that would be inside information under both REMIT and MAR?

<ESMA_QUESTION_MAR_TS_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_19>

Q20: Do you agree with ESMA's proposals regarding the format and content of the notification?

<ESMA_QUESTION_MAR_TS_20>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_20>

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

<ESMA_QUESTION_MAR_TS_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_21>



VII. Insider list

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

<ESMA_QUESTION_MAR_TS_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_22>

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

<ESMA_QUESTION_MAR_TS_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_23>



VIII. Managers' transactions format and template for notification and disclosure

Q24: Do you have any views on the proposed method of aggregation?

<ESMA_QUESTION_MAR_TS_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_24>

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

<ESMA_QUESTION_MAR_TS_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_25>



IX. Investment recommendations

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called “qualified persons” and “experts”?

<ESMA_QUESTION_MAR_TS_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_26>

Q27: Should the issuance of recommendations “on a regular basis” (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an “expert”? Can you suggest other objective characteristics that could be included in the “expert” definition?

<ESMA_QUESTION_MAR_TS_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_27>

Q28: Are the suggested standards for objective presentation of investment recommendation suitable to all asset classes? If not, please explain why.

<ESMA_QUESTION_MAR_TS_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_28>

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

<ESMA_QUESTION_MAR_TS_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_29>

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

<ESMA_QUESTION_MAR_TS_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_30>

Q31: Do you consider the proposed level of thresholds for conflict of interest appropriate for increasing the transparency of investment recommendation?

<ESMA_QUESTION_MAR_TS_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_31>

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?



<ESMA_QUESTION_MAR_TS_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_32>

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

<ESMA_QUESTION_MAR_TS_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_33>

Q34: Do you agree with the proposed standards relating to the dissemination of recommendation produced by third parties? If not, please specify.

<ESMA_QUESTION_MAR_TS_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_34>

Q35: Do you consider that publication of extracts rather than the whole recommendation by news disseminators is a substantial alteration of the investment recommendation produced by a third party?

<ESMA_QUESTION_MAR_TS_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MAR_TS_35>