European Securities and Markets Authority
Submitted online at: www.esma.europa.eu

15 October 2014

Dear Sir/Madam,

GC100 Response to the European Securities and Markets Authority (ESMA) Consultation Paper - 'Draft technical standards on the Market Abuse Regulation (MAR)

Our responses to the questions asked are set out below:

Market soundings

Question 3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

No. At present the CP and draft Regulations do not contemplate a situation where more than one Disclosing Market Participant, for example an issuer and its financial adviser, jointly conduct market soundings. On the basis of the current draft, both the issuer and its financial adviser would be required to keep records and lists. This is unnecessary duplication. Unlike brokers, issuers are typically unregulated entities who are not otherwise required to have in place, for example, recorded telephone lines.

In circumstances where an issuer conducts a market sounding in the absence of a broker, filenotes and scripts would provide sufficient records of the discussions and avoid imposing a disproportionate burden on the issuer.

We remain concerned that where a Disclosing Market Participant is about to carry out market soundings and the issuer takes a different view to the market participant as to whether the information is inside information, the disclosing market participant "shall characterise it as inside information". We appreciate the desire on the part of ESMA for there to be uniformity of views as to whether or not information is "inside information". However, the issuer (with assistance from its professional advisers (as required)) is best placed to make this assessment.

If after making an appropriate assessment, the issuer has satisfied itself that no inside information will be disclosed during the market sounding, it would seem to create uncertainty for the Disclosing Market Participant to be required to indicate that the assessment may be incorrect. It is

also not clear to us how this requirement would benefit the market.

Furthermore, Paragraph 74 of the CP suggests that information disclosed as part of a market sounding should "enable a potential investor to make a sufficiently informed assessment". We suggest this section should be deleted. Although the wording is not entirely clear, any suggestion that a preliminary market sounding should contain sufficient information on a proposed transaction for an investor to make an investment decision is unhelpful. Market soundings are typically undertaken at an early stage in a transaction when full information is likely not to be available for disclosure. Any requirement that pushes back the time at which market soundings can be undertaken is undesirable.

As Article 11(4) and Recital (32) of MAR make clear that the market sounding regime in Article 11(3) and (5) provides a safe harbour but is not mandatory, compliance with the record keeping requirements should not apply where no inside information is involved. We note that Article 11(5) applies in the context of disclosure of inside information, and query whether ESMA's proposed extension of record keeping obligations to market soundings not involving inside information may be beyond the intended scope.

Question 4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

No. As noted above in relation to Q3, in our view the draft Regulations do not contemplate a situation where an issuer participates in a market sounding jointly with its financial adviser. The CP and draft Regulations suggest that in the context of such joint market soundings both the issuer and its financial adviser would be required to follow the script requirements. This would arguably require the script to be read out multiple times on a single call, so that each participating DMP could fulfil its individual requirements. This seems a perverse result. One possible pragmatic solution that ESMA may wish to consider is for the draft Regulations to provide that where an issuer participates in a market sounding jointly with its financial adviser only the financial adviser, in its capacity as DMP, should be required to comply with the script requirements in order for the market sounding as a whole to fall within the safe harbour. We understand ESMA's concerns in this area but think that this approach is a more proportionate, but equally acceptable, way of dealing with this issue.

Question 5: Do you agree with these proposals regarding sounding lists?

No. As noted above in relation to Q3, in our view the draft Regulations do not contemplate a situation where an issuer participates in a market sounding jointly with its financial adviser. The CP and draft Regulations suggest that in the context of such joint market soundings both the issuer and its financial adviser would be required to maintain sounding lists. One possible pragmatic solution that ESMA may wish to consider is for the draft Regulations to provide that where an issuer participates in a market sounding jointly with its financial adviser only the financial adviser, in its capacity as DMP, should be required to maintain sounding lists in order for the market sounding as a whole to fall within the safe harbour. We understand ESMA's concerns in this area but think that this approach is a more proportionate, but equally acceptable, way of dealing with

this issue.

Question 6: 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?

No. As noted above in relation to Q3, in our view the draft Regulations do not contemplate a situation where an issuer participates in a market sounding jointly with its financial adviser. The CP and draft Regulations suggest that in the context of such joint market soundings both the issuer and its financial adviser would be required to maintain sounding information about the point of contact. One possible pragmatic solution that ESMA may wish to consider is for the draft Regulations to provide that where an issuer participates in a market sounding jointly with its financial adviser only the financial adviser, in its capacity as DMP, should be required to maintain sounding information about the point of contact in order for the market sounding as a whole to fall within the safe harbour. We understand ESMA's concerns in this area but think that this approach is a more proportionate, but equally acceptable, way of dealing with this issue.

Question 7: Do you agree with these proposals regarding recorded communications?

No. As noted above in relation to Q3, in our view the draft Regulations do not contemplate a situation where an issuer participates in a market sounding jointly with its financial adviser. The CP and draft Regulations suggest that in the context of such joint market soundings both the issuer and its financial adviser would be required to maintain records and lists. This unnecessary duplication would impose a disproportionate burden on issuers, which are typically unregulated entities not otherwise required to have in place, for example, recorded telephone lines. Putting in place recorded land and telephone lines at all listed companies would involve potential costs of many millions of pounds, a significant burden for issuers that is not justified by the remote risk that the records of one Disclosing Market Participant will be insufficient for enforcement purposes or may have been lost (we think that it is unlikely that a record would have been lost in this situation).

Recital (65) of MAR sets out the purpose of requiring recorded communication as follows "Telephone and data traffic records may establish the identity of a person responsible for the dissemination of false or misleading information or that persons have been in contact at a certain time, and that a relationship exists between two or more people." One possible pragmatic solution that ESMA may wish to consider to meet this requirement without imposing a disproportionate burden on issuers is for the draft Regulations to provide that where an issuer participates in a market sounding jointly with its financial adviser only the financial adviser, in its capacity as DMP, should be required to keep the required records in order for the market sounding as a whole to fall within the safe harbour. We understand ESMA's concerns in this area but think that this approach is a more proportionate, but equally acceptable, way of dealing with this issue. We note that paragraph 72 of the CP confirms that the market soundings regime "is not intended to inhibit relations between the issuer and its investors". In our view without this change the ability of issuers to participate in market soundings with their investors would be greatly impaired.

In circumstances where an issuer conducts a market sounding in the absence of a broker, file notes and scripts would provide sufficient records of the discussions and avoid imposing a disproportionate burden the issuer.

Question 8: Do you agree with these proposals regarding DMPs' internal processes and controls?

No. As noted above in relation to Q3, in our view the draft Regulations do not contemplate a situation where an issuer participates in a market sounding. Article 11 of the draft Commission Delegated Regulation proceeds on the basis that the only reason for employees within a DMP having access to inside information is in connection with the market sounding. This will not always be the case. In particular, within an issuer, a number of different employees will need access to the information for operational reasons, for example to negotiate the transaction that is the subject of the market sounding. These employees should be clearly excluded.

Technical means for public disclosure of inside information and delays

Question 17: Do you agree with the proposal regarding the channel for disclosure of inside information?

No. We agree that applying the requirements set out in the Transparency Directive for the dissemination of information to all issuers of RM/MTF/OTF financial instruments is the most straightforward approach. However, the suggestion in Article 4(1)(b) of the draft Commission Implementing Regulation that inside information should be disclosed separately on an issuer's website is unhelpful. While we agree that inside information should be easily located and distinct from marketing materials, we believe that this is adequately achieved through the current standard practice of an "investor relations" section that includes all regulatory announcements. Any obligation to duplicate announcements with inside information would impose an administrative burden on issuers without improving access for investors.

Question 20: Do you agree with ESMA's proposals regarding the format and content of the notification?

No. We continue to be of the view that the level of detail required is greater than is necessary to satisfy MAR requirements in certain respects. We understand ESMA's concerns about the information required if enforcement action is taken, but would suggest that requiring this level of information in relation to each notification is disproportionate. The current draft would result in issuers incurring additional costs not justified by the remote risk of enforcement action.

The requirements in Article 5(2)(e) and (f) of the draft Commission Implementing Regulation to include the date and time of the decision to delay the disclosure of inside information and the identity of the persons having taken part in that decision making process would impose a disproportionate compliance burden on issuers. The decision to delay disclosure of inside information may involve multiple discussions between a number of parties, potentially both individuals internal to the issuer and its external advisers, which may occur across different time zones. The decision to delay may be refreshed multiple times in a short period. Article 7(1)(b) of the draft Commission Implementing Regulation states that a new internal record is only required if there has been a change in the original conditions. The same approach is taken in paragraph 266 of the CP, where the explanation of the decision to delay need only be updated where there is a change in how the conditions are met. We believe it would be helpful, therefore, to clarify in Article 5(2)(e) and (f) of the draft Commission Implementing Regulation that the notification need only include details of the initial decision to delay and any subsequent decision necessitated by a change in conditions. This would make clear that a simple reaffirmation of an earlier decision would not require an entry. Further, given ESMA's view in paragraph 269 that responsible person(s) should be appointed within an issuer to take any decision to delay disclosure, we would suggest it is appropriate in Article 5(2)(f) of the draft Commission Implementing Regulation to clarify that only the person or persons responsible for taking the decision to delay need be named. This would make clear that issuers do not need to include details of every person with whom that decision-maker may have discussed their decision before or after it was made.

We assume that the requirement in Article 5(3)(c) of the draft Commission Implementing Regulation to describe how the confidentiality of information is ensured requires only a general description of the policies and procedures at the issuer, which is helpful. Any requirement to provide a detailed description of how that policy has been implemented in relation to each piece of inside information would be unduly burdensome on the issuer, contrary to the proportionality requirement in Article 4 of the Treaty on European Union as referred to in Recital 86 of MAR, without providing useful extra information for the competent authority.

Question 21: Do you agree with the proposed records to be kept?

No. In our view the prescribed record keeping requirements should be kept at a high level, focused on justification for delay, without detailed granular requirements that may not be appropriate to all issuers in relation to all categories of inside information. It would be undesirable for regulatory action to focus on breach of detailed record keeping requirements rather than on the substance of disclosures made or withheld. In many cases issuers already have in place record keeping policies that are proportionate and reasonable to their individual circumstances. Issuers, in conjunction with their professional advisers, are best placed to identify the records they require to ensure they can cooperate fully with any potential enforcement action by their competent authority. Overlaying prescriptive and detailed requirements on existing practices that are working well is unhelpful and more than is necessary to achieve MAR's objectives as set out in the Recitals.

In particular Article 7(1)(a)(i) of the draft Commission Implementing Regulation requires a record to be kept of the date the inside information "came into existence" rather than a record of the date the issuer "becomes aware" of the inside information. Although in many cases this will of course be the same point in time, where inside information relates to matters outside an issuer's control the issuer may not be aware of the date it came into existence. A possible solution that ESMA may wish to consider is to amend this provision to an awareness obligation, which would meet the same regulatory need without imposing an impossible burden on issuers. This would be a pragmatic way to deal with this issue while achieving the aims of ESMA and the MAR. We also note that the requirement in Article 7(1)(a)(iii) of the draft Commission Implementing Regulation is for a record of the date when the issuer is "likely to publish" the inside information. This again may not be possible where the inside information relates to matters outside the issuer's control. As such a possible solution ESMA may wish to consider is to amend this to an obligation to indicate the circumstances in which it is likely the issuer will either disclose the information (or conclude there is no inside information to disclose).

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Insider list

Question 22 - Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

No. We understand the need to include for identification purposes details of an insider's name, address and employer. However we question the additional elements included in the current draft. The draft template suggests that around 20 pieces of information are needed to identify an individual, which would impose a disproportionate and unnecessary compliance burden on issuers, contrary to the proportionality requirement in Article 4 of the Treaty on European Union as referred to in Recital 86 of MAR. In our view the significant costs to issuers are not justified by the remote risk of enforcement action.

In our view requiring an individual's name, address and employer is sensible and proportionate and is sufficient to enable identification as required by MAR. This level of information would allow a competent authority to obtain greater detail in the event of an investigation of suspicious trades, without imposing a significant administrative burden on every insider list entry. Details of an individual's date of birth should only be required to aid identification if there is already someone with an identical name on the particular insider list. Further, it is unclear how e-mail and telephone contact details assist in identification, and we would suggest that requiring this information from issuers is outside the scope of MAR. We therefore think that the additional requirements included in the current template should be removed.

Requiring issuers to maintain a database with personal information that is arguably unnecessary under MAR would seem to be out of step with the Commission's Data Protection legislation, in particular the requirement that information only be processed if a purpose could not be fulfilled without the use of personal data. Contrary to the expectation expressed in paragraph 304 of the CP, we do not anticipate that use of the template will "decrease the administrative burden" for issuers.

Question 23: Do you agree with the two approaches regarding the format of insider lists?

No. While we agree both approaches should be available, issuers should be allowed flexibility to maintain one or more lists as is appropriate for their needs. For example an issuer may find it less burdensome to maintain both a general insider list, for those employees whose role (in senior management or the preparation of financial information, for example) means they regularly have access to inside information, and separate event based lists for employees in possession of inside information relating to a particular matter. We would also note that the reference in the templates to a "comprehensive" description of function would seem to go beyond ESMA's intentions in paragraph 297. We would suggest this be deleted to avoid confusion that could lead to the inclusion of onerous detail.

Managers' transactions format and template for notification and disclosure

Question 25: Do you agree with the content to be required in the notification?

No. While we agree with the content, it would be helpful if the "Description" column set out clearly the information required for each field, rather than using cross-references to other legislation.

Yours faithfully,

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