

MEMO# 30226

September 9, 2016

EU Market Abuse Regulation - ESMA Q&A and Guidelines

[30226]

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TO: ICI GLOBAL REGULATED FUNDS COMMITTEE No. 61-16
ICI GLOBAL EXCHANGE TRADED FUNDS COMMITTEE No. 6-16
ICI GLOBAL TRADING & MARKETS COMMITTEE No. 40-16
EQUITY MARKETS ADVISORY COMMITTEE No. 33-16
FIXED-INCOME ADVISORY COMMITTEE No. 28-16 RE: EU MARKET ABUSE REGULATION -
ESMA Q&A AND GUIDELINES

The EU Market Abuse Regulation (MAR) [\[1\]](#) came into effect on 3 July 2016. [\[2\]](#) MAR repealed the Market Abuse Directive (MAD) and has changed many aspects of the EU's market abuse regime, as briefly described below. Recently, ESMA provided additional guidance on the MAR framework, including guidelines and Q&As. This memo provides background on MAR and summarises the recent guidance supporting MAR that are of relevance to regulated funds and asset managers.

Background

With the adoption of MAR Legislation, there are two main types of changes to the EU's market abuse regime compared to the previous regime under MAD. First, a broadening of the scope of financial instruments [\[3\]](#) and trading venues [\[4\]](#) that are covered by the regime. Second, changes to the behaviours (with some exceptions [\[5\]](#)) that are deemed to be market abuse, namely: insider dealing, unlawful disclosure of inside information and market manipulation.

MAR mandated the European Securities Markets Authority (ESMA) to develop draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) in the following areas of relevance to regulated funds and asset managers: [\[6\]](#)

- Publication of a list of financial instruments covered by MAR [\[7\]](#) – RTS [\[8\]](#) and ITS [\[9\]](#) concerning the notification process for trading venues and the subsequent publication of covered financial instruments by ESMA;
- Exemptions for buy-back programmes and stabilisation measures [\[10\]](#) – RTS [\[11\]](#) specifying the conditions applicable for certain exemptions from the insider dealing, unlawful disclosure of inside information and market manipulation rules;

- Market soundings [\[12\]](#) – RTS [\[13\]](#) and ITS [\[14\]](#) specifying the arrangements, systems procedures, record keeping and notification requirements for market soundings (supplemented by ESMA guidelines as discussed below);
- Accepted Market Practice (AMP) [\[15\]](#) – RTS [\[16\]](#) specifying the criteria, procedure and requirements for accepted market practice, to which the prohibition on market manipulation does not apply;
- Prevention and detection of market abuse [\[17\]](#) – RTS [\[18\]](#) determining appropriate arrangements, systems, procedures and notification requirements aimed at preventing and detecting actual and attempted insider dealing and market manipulation;
- Disclosure requirements [\[19\]](#) – RTS [\[20\]](#) and ITS [\[21\]](#) concerning the public disclosure of inside information and managers' transactions, presentation of investment recommendations and the dissemination of statistics and the development of insider lists.

Recent ESMA Q&As and Guidelines

ESMA Q&A

ESMA has been developing questions and answers (Q&A) under MAR to promote common supervisory approaches and practices. The most recent update to the Q&A on 13 July 2016 [\[22\]](#) contained questions, of relevance to funds and asset managers, concerning the scope of the detection and reporting obligations for market abuse and managers' transactions. [\[23\]](#)

ESMA Guidelines

ESMA has published (or is developing) guidelines and Q&As relating to several aspects of MAR, as described below.

Market Soundings

On 13 July 2016, ESMA published guidelines for persons receiving market soundings. [\[24\]](#) The guidelines cover the following six areas:

- Internal procedures and staff training;
- Communicating the wish not to receive market soundings;
- Market Sounding Recipient's (i.e. a person receiving market soundings) assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information;
- Assessment of related financial instruments;
- Drawing up written minutes or notes of unrecorded meetings or unrecorded telephone conversations; and
- Record keeping of internal procedures, notifications, assessments and employee records.

Delay disclosure of inside information

On 13 July 2016, ESMA published guidelines on legitimate interest to delay disclosure of inside information and situations in which the delay of disclosures is likely to misled the public. The guidelines mainly apply to issuers.

The guidelines specify cases where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests, include circumstances where: (i) the issuer is conducting negotiations; (ii) the financial viability of the issuer is in grave and imminent danger; and (iii) the immediate public disclosure of that information before a definitive decision [25] is taken by the issuer would jeopardise the correct assessment of the information by the public.

The guidelines also specify situations in which delay of disclosure of inside information is likely to mislead the public, including circumstances where the information: (i) is materially different from the previous public announcement of the issuer on the matter to which the inside information refers; (ii) is regarding the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or (iii) is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously sent to the market.

Inside information disclosure relating to commodity derivatives markets and spot markets

ESMA has a mandate to issue guidelines to establish a non-exhaustive indicative list of information that is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on relevant commodity derivatives markets or spot markets. ESMA consulted on its draft guidelines in March 2016 [26] and plans to publish its final guidelines in late Q3 2016.

Accepted Market Practices (AMPs)

The market manipulation prohibition does not apply if a transaction is legitimate and in accordance with market practices accepted by the competent authority (so called "Accepted Market Practices" or "AMPs"). MAR describes the non-exhaustive factors that a national competent authority (i.e. a Member State regulator) should take into account before deciding whether or not to accept a market practice. National competent authorities provide notifications of AMPs to ESMA, which within two months following the receipt of the notification will publish an opinion assessing the compatibility of the AMP with MAR and whether it would threaten market confidence. As is the case under MAD, a list of accepted AMPs will be published by ESMA. [27]

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endnotes

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0596>

[2] Certain provisions, as specified in Article 39(2) applied from 2 July 2014.

[3] Financial instruments subject to MAR include transferable securities (e.g., shares and bonds), money-market instruments, units in collective investment undertakings, and derivative contracts.

[4] MAR does not limit its scope of application to financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made. MAR covers financial instruments admitted to trading or traded on Multilateral Trading Facilities (MTF), financial instruments traded on Organised Trading Facility (OTF) and emission allowances.

[5] The prohibition of insider dealing and market manipulation does not apply to trading in own shares in buy-back programs or trading in securities for the stabilization of securities when some conditions laid down in MAR are met.

[6] http://ec.europa.eu/finance/securities/docs/abuse/its-rts-overview-table_en.pdf

[7] Article 4, MAR

[8] Commission Delegated Regulation (EU) 2016/909 of 1 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the content of notifications to be submitted to competent authorities and the compilation, publication and maintenance of the list of notifications, available from

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466512326294&uri=CELEX:32016R0909>

[9] Commission Implementing Regulation (EU) 2016/378 of 11 March 2016 laying down implementing technical standards with regard to the timing, format and template of the submission of notifications to competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council, available from

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1460552299416&uri=CELEX:32016R0378>

[10] Article 5

[11] Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures, available from

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1467648813733&uri=CELEX:32016R1052>

[12] Article 11, MAR

[13] Commission Delegated Regulation (EU) 2016/960 of 17 May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings, available from

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466512382704&uri=CELEX:32016R0960>

[14] Commission Implementing Regulation (EU) 2016/959 of 17 May 2016 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council, available from

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466512382704&uri=CELEX:32016R0959>

[15] Article 13, MAR

[16] Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance, available from <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466512451106&uri=CELEX:32016R0908>

[17] Article 16, MAR

[18] Commission Delegated Regulation (EU) 2016/957 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions, available from <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466512490605&uri=CELEX:32016R0957>

[19] Article 17, 18, 19 and 20, MAR

[20] Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest, available from <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466512545673&uri=CELEX:32016R0958>

[21] Commission Implementing Regulation (EU) 2016/1055 of 29 June 2016 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council, available from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.173.01.0047.01.ENG&toc=OJ:L:2016:173:TOC, Commission Implementing Regulation (EU) 2016/347 of 10 March 2016 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council, available from <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1460552299416&uri=CELEX:32016R0347>, Commission Implementing Regulation (EU) 2016/523 of 10 March 2016 laying down implementing technical standards with regard to the format and template for notification and public disclosure of managers' transactions in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council, available from <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1460552299416&uri=CELEX:32016R0523>

[22] Last update on 13 July 2016

https://www.esma.europa.eu/sites/default/files/library/2016-1129_mar_qa.pdf

[23] The first Q&A to be published was noted in Memo 29948, Re: EU Regulators Issue First Set of Questions and Answers under Market Abuse Regulation, 1 June 2016, available from <https://www.iciglobal.org/portal/site/ICI/menuitem.9ad35c6866c5fcca09ce3110b52001ca/?vgnextoid=48865edd233f4510VgnVCM100000650210acRCRD&vgnextchannel=2a3db7b54e26b310VgnVCM1000005a0210acRCRD&vgnextfmt=global>

[24] Final Report, Guidelines on the Market Abuse Regulation -market soundings and delay of disclosure of inside information, 13 July 2016, available from https://www.esma.europa.eu/sites/default/files/library/2016-1130_final_report_on_mar_guidelines.pdf

[25] ESMA defines this as “decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer’s bylaws, the approval of another body of the issuer, other than the shareholders’ general assembly, in order to become effective”

[26] Consultation Paper, ESMA’s Guidelines on information expected or required to be disclosed on commodity derivatives markets or related spot markets under MAR, 30 March 2016, available from https://www.esma.europa.eu/sites/default/files/library/2016-444_cp_on_mar_gl_on_information_on_commodities.pdf

[27] A list of AMPs currently accepted by a national authority under MAD are available from <https://www.esma.europa.eu/databases-library/esma-library/%2522Accepted%2520Market%2520practices%2522>