International
Capital
Market
Association

ICMA

European Securities and Markets Authority
103 rue de Grenelle
75007 Paris
France

(Submitted online at www.esma.europa.eu)

27 January 2014

Dear Sirs,

Discussion Paper – ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation (ESMA/2013/1649)

The International Capital Market Association (ICMA) is responding to the above.

Setting standards internationally, ICMA is a unique organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years. See: www.icmagroup.org.

ICMA is responding in relation to its primary market constituency that lead-manages syndicated debt securities issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Committee[1], which gathers the heads and senior members of the syndicate desks of 31 ICMA member banks, and ICMA's Legal and Documentation Committee[2], which gathers the heads and senior members of the legal transaction management teams of 19 ICMA member banks, in each case active in lead-managing syndicated debt securities issues in Europe.

We set out our response in the Annex to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,

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[1] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Primary-Market-Practices-Sub-committee/.
[2] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Legal-and-Documentation-Sub-committee/.

Annex
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Response

General remarks

1. The responses below relate primarily to stabilisation and sounding (with some related comment on public disclosure of inside information and insider lists) and are made from the perspective of new issues of Eurobonds. It has been very helpful that ESMA was able to allow over two months for stakeholders to respond to the discussion paper (DP).

2. It is important to bear in mind that the dynamics of the debt markets differ substantially from those of the equity markets. For example, the majority of Eurobonds involve no retail participation and tend to trade infrequently (with potentially months between trades in the less liquid issues) and in large increments (which can be in the millions). This is in contrast to most shares which tend to trade continuously in small, as well as larger, amounts. Furthermore share investors tend to focus on the profitability and growth prospects of issuers, whilst only issuers' solvency would be relevant to bond investors.

Stabilisation measures

3. **Stabilisation generally** – Generally replicating the current regime, under the Stabilisation Regulation (EC-2273-2003) of the Market Abuse Directive (MAD), has the benefit of preserving market participants' accumulated experience and understanding and so promotes market certainty.

Q12: Do you agree with the above mentioned specifications of duration and calculation of the stabilisation period?

4. **Stabilisation period duration calculation** – In relation to straight bonds, the time period suggested in DP #34 seems to replicate the current regime and is workable.

5. **Stabilisation pre-notice timing** – It would be helpful if the approach taken for defining the beginning of the stabilisation period - "the date of adequate public disclosure of the terms of the offer of the relevant securities (i.e. including the spread to the benchmark, if any, once it has been fixed)" - be extended to also define when prior public notice of stabilisation purchases is to be given. Earlier than this and lead-managers are unlikely to have any clear idea of the likelihood of stabilisation being necessary and so may have to publish pre-stabilisation notices systematically on a defensive basis. So extending would result in the stabilisation period starting on publication of the prior public notice.

6. **Stabilisation notice publication channel** – The current regime requires stabilisation notices to be published in accordance with Articles 102(1) and 103 of Directive 2001/34/EC, which was repealed by the Transparency Directive (TD). CESR's May 2009 third set of guidance on MAD's operation states (in the context of stabilisation) that CESR is "inclined to the view that adequate public disclosure would entail the use of" the TD's publication mechanisms. This is proposed, in DP #239-246, to be formally recognised in Level 2 in the context of the disclosure of inside information. Similar certainty is also needed in the context of the publication of stabilisation notices.

Q13: Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?

7. **Prospectus Directive regime** – The disclosure provided for under the Prospectus Directive (PD) is sufficient. However, it is worth noting that many bond issuances involving a prospectus approved under the PD might only involve PD-exempt offers (the prospectus being approved

under the PD only for admission to regulated market trading) or initially only involve PD-exempt offers (prior to prospectus approval under the PD). Stabilisation lead-managers therefore tend to generally also follow the non-PD transparency requirements as a result.

Q14: Do you agree with these above mentioned details which have to be disclosed?

8. **Information to be disclosed** – The details suggested in DP #38-39 and 41 seem to replicate the current regime and are workable.

9. There seems to be a minor ambiguity in DP #39 – presumably the identity of the stabilisation manager should not be required in the pre-stabilisation notice where such identity is, rather (emphasis added), either "publically known" (i.e. in the public domain) or "privately unknown" (i.e. a stabilisation manager has not yet been appointed and so is unknown to the issuer and the other stabilisation managers).

10. No response is made in relation to greenshoes under DP #40 as this is mainly a feature of share, rather than bond, issuances.

Q15: Do you agree that there should be an exclusive responsibility with regard to transparency requirements? Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?

11. **Responsibility for disclosure/transparency** – An exclusive responsibility would seem simpler from a practical perspective, and in syndicated issues the obligations are indeed centrally managed (see below). However, responsibility does not need to be outlined (and should not be prescribed) in legislation: entities carrying out stabilisation that want to benefit from the safe harbour merely need the relevant transparency obligations to be satisfied (it being irrelevant by whom) – the consequences otherwise (most likely breach of MAR's manipulation prohibition) would, after all, be theirs to bear. Some further relevant considerations are set out below.

12. Issuers do not, for practical reasons, tend to get involved with stabilisation safe harbour procedures. Conversely, it is frequent current practice in syndicated issues for the stabilisation manager that is acting as the central point of inquiry under Article 9.5 of MAD's Stabilisation Regulation to also run, as 'stabilisation coordinator', the safe harbour transparency and reporting procedures under Articles 9.1, 9.2 and 9.3. The coordinator's role in this respect is necessarily limited to (i) information regarding the stabilisation activity of other stabilisation managers to the extent they have accurately communicated such information to the coordinator and (ii) information regarding the coordinator's own stabilisation activity.

13. Whilst it would seem generally possible to allocate exclusive responsibility for transparency obligations to the stabilisation manager or, where there are several stabilisation managers, to the entity acting as stabilisation coordinator (ICMA is developing some market recommendations in this respect), legislation should either (i) leave such responsibility open or (ii) simply add the stabilisation coordinator to the existing (MAD) list.

Q16: Do you agree that there should be an exclusive responsibility with regard to reporting obligations? Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilisation?

14. **Responsibility for reporting** – Similar considerations arise as in relation to Q.15, with any allocation of exclusive responsibility for reporting obligations also possibly attaching to the stabilisation manager or, where there are several stabilisation managers, to the entity agreed to be acting as stabilisation coordinator. However, legislation should also either (i) leave such responsibility open or (ii) simply add the stabilisation coordinator to the existing (MAD) list.

15. Distinctly DP #44 suggests that reporting could perhaps occur within less than 7 daily market sessions "as the details of the transactions are known to the entity which is undertaking the stabilisation already on the day when the transaction has been carried out". The communication to a third party of any information within an entity's knowledge requires resourcing and the calibration of any related obligation should be carefully balanced with a clearly identified

regulatory or other benefit. In any case the timeline has already been fixed in MAR Level1 and so is moot.

Q17 Do you think that in the case of bi- or multinational stabilisation measures a centralised reporting regime should be established to exclusively one competent authority? If so, what are your views on the proposed options?

16. **Centralising reporting** – Centralising reporting to just one competent authority would definitely bring clarity and simplicity for industry.

17. The challenge however lies in deciding which authority should be designated this respect, particularly given the somewhat confusing expansion of scope from MAD to MAR. Under MAD one might have faced at times situations where a security was admitted to trading on at most two, or perhaps a few of a limited number of, well-known regulated markets (RMs). However under MAR such a security might also or instead be traded on many of a far wider group of multilateral trading facilities (MTFs) and organised trading facilities (OTFs) – in the latter case easily unknown to the issuer or stabilisation manager concerned.

18. The three suggestions made in DP #46 seem too subjective or uncertain to be workable:
    (a) the authority for the "most relevant liquid" market under future MiFIR seems subjective (unless there would be some clear public measure in real time), and the draft legislation is still evolving;
    (b) the PD home authority would only work for the narrow range of securities (not just shares) that are within PD scope (many bonds within MAR scope would not be within PD scope);
    (c) the authority for the first trading venue in time would also seems too subjective or uncertain to be workable in terms of tracking over time multiple simultaneously changing trading venues (OTFs particularly).

19. The argument is most obvious for a centralised pan-EU reporting system for all securities within MAR's stabilisation safe harbour, perhaps via ESMA. Incidentally and in parallel, the argument is similarly clear for a European EDGAR regarding the safe harbour's transparency obligations. Pending any legislative pan-EU centralisation of reporting (which is not within ESMA's gift), any ability for national regulators to delegate the reporting due to them to a centralised entity (perhaps ESMA) could be invaluable.

20. At this time, and failing any ability to centralise on a pan-EU basis or delegate reporting as noted above, the only apparent workable alternative, at least for bonds, seems to be to centralise reporting and transparency by reference to (i) the Member State of incorporation, for EEA incorporated issuers, and (ii) the elected reporting Member State under the TD, for non-EEA incorporated issuers. The latter option would presumably require someone (perhaps ESMA) to maintain a public and authoritative list of such non-EEA incorporated issuers' elections. To the extent a non-EEA issuer would have no current election under the TD (e.g. because it has had no securities admitted to an RM), it would presumably have to make and notify such an election to the entity maintaining the list before any reporting could be undertaken pursuant to the stabilisation safe harbour.

21. **Centralising notice publication** – Considerations similar to the above arise in relation to determining which Member State's TD mechanism would be relevant publishing stabilisation notices (this links to the points in paragraph 6 above).

Q18: Do you agree with these price conditions for shares/other securities equivalent to shares) and for securitised debt convertible or exchangeable of shares/other securities equivalent to share?

22. **Equity price conditions** – No response is made to this question concerning DP #47-48 as it does not relate to straight bond issuance.

Q19: Do you consider that there should be price conditions for debt instruments other than securitised debt convertible or exchangeable of shares/other securities equivalent to share?

23. **Debt price conditions** – Stabilisation is currently defined under the Stabilisation Regulation *inter alia* as being purchases (or offers to purchase) "exclusively for supporting the market price [...] due to a selling pressure". This already makes clear that safe harbour stabilisation occurs by reference to the price at which the securities were initially issued to the market – in the case of bonds being their yield relative to the rest of the market.

24. No arguments for any additional conditions are known at this time.

Q20: Do you agree with these conditions for ancillary stabilisation?

25. **Ancillary stabilisation** – The Stabilisation Regulation requires ancillary stabilisation (overallotment to facilitate subsequent stabilisation purchases) be "undertaken in accordance with" (i) the general transparency and reporting obligations, as well as (ii) specific additional obligations.

26. There may be some ambiguity arising out of (i) above, similar perhaps to saying that factory workers when building cars on the assembly chain inside factories must comply with road driving rules. This ambiguity could best be cured by specifically articulating how the individual transparency and reporting obligations applicable to stabilisation purchases would apply to overallotment acts. Alternatively, it might be clarified that all purchases made to fill the short position resulting from the overallotment must comply with the transparency and reporting obligations applicable to stabilisation purchases – even where such purchases are not in fact made "exclusively for supporting the market price [...] due to a selling pressure" (which may be the case if the potential 'selling pressure' envisaged at the time of the overallotment fails to materialise in practice). However there might seem to be some inconsistency in mandating reporting and transparency of trades, as 'stabilisation', that were not in fact so.

27. Capping the ancillary stabilisation safe harbour at an overallotment of 5% limits the firepower stabilisation managers are able to bring to bear where substantial selling pressure materialises – particularly given banks' more restricted balance sheets further to recently tightened capital requirement and other rules. One regulator at least has recognised[3] circumstances where it may be appropriate to overallot more than 5%. Changing that threshold to, say, 10% would be particularly helpful in this respect.

28. No response is made in relation to greenshoes under DP #49/50 as this is mainly a feature of share, rather than bond, issuances.

Q21: Do you share ESMA's point of view that sell side trading cannot be subject to the exemption provided by Article 3(1) of MAR and that therefore "refreshing the green shoe" does not fall under the safe harbour?

29. **Refreshing the greenshoe** – No response is made to this question under DP #51-52 as greenshoes are mainly a feature of share, rather than bond, issuance.

Q22: Do you agree that "block-trades" cannot be subject to the exemption provided by Article 3(1) of MAR?

30. **Stabilisation for block-trades** – No response is made to this question under DP #53 as it does not relate to the new issuance of bonds.

[3] See "Overallotment in Debt Markets", FSA Market Watch No.14 of December 2005 (http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter14.pdf).

Market soundings

31. **Soundings generally** – The insider rules under both MAD and MAR are 'breach'-driven: certain things are prohibited and subject to sanction, with the rest of the regime then building exceptions and detail around that fundamental premise.

32. In the context of soundings, it is the prohibition on "improper" disclosure of inside information - outside "the normal course of the exercise of an employment, profession or duties" - that is relevant. Satisfying the definition of sounding (*inter alia* by/for an issuer), together with the certain procedural conditions, effectively 'deems' (non-rebuttably) the disclosure concerned not to breach the improper disclosure prohibition – a classic safe harbour concept. Disclosure of inside information that is otherwise in "the normal course of the exercise of an employment, profession or duties" would also not breach the prohibition.

Q23: Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?

33. **Acting at issuer request** – The suggestion in DP #59, that (i) the "acting on behalf of or on the account of" the issuer requirement where there is no written agreement includes acting at the issuer's request and (ii) this includes taking part in the issuance transaction under the issuer's instructions, seems workable. The acknowledgment that issuer communication may be oral is indeed correct. Issuers frequently request their lead-manager banks to input on likely market appetite for potential new issuance, without necessarily specifying the specific methods (including sounding) that the banks should use to do so. Most issuers are not experts in financial market practices and many do not wish to get involved in the detail of their bond issues any more than they absolutely have to – this is after all one of the reasons they hire banks as lead-managers in the first place.

34. **Soundings for block-trades** – No response is made in relation to block trades as these do not relate to the new issuance of bonds.

35. **Inhibiting relations between issuers and investors** – DP #62 states that the MAR soundings regime "is not intended to inhibit relations between the issuer and its investors". The main consideration in this respect is not really to do with the soundings regime, but rather the definition of inside information (which underpins the improper disclosure prohibition to which the soundings safe harbour relates) and notably regulators' interpretation of that definition when conducting enforcement actions.

36. A key aspect here is regulator interpretational clarity that inside information must, *inter alia*, continue to "be likely to have a significant effect on [...] prices". Insider regimes were created as corollaries to issuer transparency requirements – the social compact being that, in return for approaching the 'public' for funding, issuers must publish all price-forming information or (if delaying for 'allowed' reasons) keep it confidential. The reason insider regimes need to focus on enforcing this confidentiality is to prevent the enrichment of insiders at the expense of others. Price sensitivity is the key measure here, which is recognised in Recitals 11-14 of MAR Level 1. Information "a reasonable investor would be likely to use as part of the basis of his investment decisions" is potentially a much wider set than information "likely to have a significant effect on [...] prices" – potentially encompassing pretty much all non-public knowledge of an issuer's senior management. By way of analogy, the vast majority of the voluminous information required to be disclosed in prospectuses under the PD's (sensible) Article 5.1 materiality test (and its distinct minimum disclosure requirements) would not be likely to be significantly price sensitive. In terms of substantive law, the ECJ's Geltl v Daimler judgment (at paragraphs 48-55) helpfully seems to indicate that, for the purposes of MAD (and so presumably MAR), information investors would use for their investment decisions would be information that is price sensitive. Nonetheless, regulatory enforcement (which can stray from substantive law unless appealed) of cases that do not involve the likelihood of significant price sensitivity risks substantially inhibiting relations between issuer and others, including investors.

37. **Determining the type and number of investors** – The suggestion in DP #74 that sounders determine the type and number of investors to be sounded is a matter of practical common sense.

Sounders will necessarily select the potential soundees they consider to be the most able to provide the sufficient and appropriate feedback for the transaction in question. Nonetheless, feedback to initial soundings (or attempts to sound) may unexpectedly indicate that further soundees should be approached (e.g. because all/many of the initial soundees refused to be wallcrossed) – or even further types of soundees (e.g. because initial feedback indicates the transaction might also be of interest to another, unexpected, type of investor). Consequently any determination of type or number of soundees should not be legislated as a fixed limit.

38. **Syndicate deliberations** – DP #66/69/70 suggest that syndicate members agree (i) the information to be disclosed and, effectively, (ii) if the information is not to be characterised as inside. Furthermore, DP #75 suggests that syndicate members be consulted to "ensure" there is no duplicative sounding by different syndicate members. Syndicates for new bond issues, for various reasons, can involve up to a dozen or more members, most of whom (usually those referred to as 'co-managers') will often have limited practical participation, their role being potentially limited to just the legal underwriting of a small fraction of the bonds being issued with no other involvement in the actual running of the transaction. Consequently, any legislative obligation for syndicate agreement/consultation should apply to the syndicate 'core' only, which may be most simply articulated by referring to those syndicate members who will be participating in any soundings (e.g. as set out in ICMA Recommendation 1.30 reproduced in the box below). It is unclear in any case whether syndicate agreement/consultation needs to be enshrined in legislation, rather than in market guidance such as ICMA Recommendation 1.30. If it is to be legislatively enshrined, then existing industry guidance will likely need to be revised in consequence – at least to the extent the (expanded) MAR scope applies. It is worth noting also that an issuer might independently instruct different banks to conduct soundings prior to a formal syndicate being formed, without informing the individual banks that other banks are involved – bank coordination would be impossible in such circumstances.

ICMA PRIMARY MARKET HANDBOOK (IPMA HANDBOOK)

DEBT INSTRUMENTS

RECOMMENDATION 1.30

PRE-SOUNDING OF TRANSACTIONS

For the purpose of this Recommendation, "pre-sounding" means discussions, prior to any public announcement, with selected third parties to gauge market appetite for a potential structure, transaction and/or pricing. This may involve disclosure, to such third parties, of non-public price-sensitive information.

Those syndicate members (e.g. Bookrunners and Lead Managers) intending to conduct pre-sounding should, prior to conducting such pre-sounding, discuss together:

- what information is proposed to be disclosed in the course of such pre-sounding;
- whether such information is to be treated as 'inside information' under applicable market abuse rules; and
- what procedures such syndicate members will apply, in managing the disclosure of such information (including as to potential subsequent 'cleansing' of 'stale' information), to ensure compliance with such rules.

March 2009

39. **Issuer involvement** – As noted in paragraph 33 above (and implicitly acknowledged in DP #59), most issuers (particularly less frequent issuers) do not wish to get involved in the detail of their bond issues any more than they absolutely have to. Consequently a systematic legislative obligation at MAR Level 2 for issuers (i) to be informed as to whether information to be disclosed is inside and as to proposed sounded types and (ii) to consent to the sounding, all as suggested in DP #68/71-73/76, would seem excessive. Issuers unfamiliar with MAR's sounding regime, being cautious and suddenly faced with the obligation to make a consent decision relevant to the potential success of their transaction, may well either incur substantive expense seeking independent legal advice (if time allows), simply refuse consent (with potential prejudice to their issuance success in terms of volume or pricing) or, at an extreme, even postpone or cancel their issuance plans. Those issuers wishing to be involved in the sounding process will be so in any case pursuant to their general client relationship with their lead-manager banks (whether or not required under existing conduct of business rules).

40. The ability to deduce the issuers' name (as noted in DP #71) does not seem a relevant criteria in terms of issuer involvement – issuers should be entitled to get involved in soundings carried out in relation to their new bond issue transactions regardless of whether their identity might be deducible. More generally however, an inability to deduce the issuer's name in a sounding might well result in the information concerned not being inside information at all, with its disclosure therefore not being regulated by the MAR regime (and see further paragraphs 50, 55 and 57 below in this respect).

41. **Other aspects** – Subject to the nuances above, the aspects raised in DP #54-76 seem workable.

Q24: Do you have any view on the above?

42. **Time lapse after soundings** – DP #77 suggests the time lapse, between soundings and transactions going public, is subject to external pressures, though sounders aim to minimise it. This is correct. It is hard to envisage how such aspects (involving extraneous elements and best efforts) would be the subject of a legislative text.

43. **No sounding outside trading hours** – DP #78 suggests that it is recommended in "some" jurisdictions that soundings should not be conducted in trading hours. Generally, as noted in DP #79 and as in other spheres of human business, investor and bank activity occurs primarily during working hours, which overlap substantially with trading hours. That is when market parties, including potential soundees, are indeed generally at their desks and likely to be most easily contactable. This indeed also increases the likelihood sounding calls will be made on recorded lines (and c.f. DP #90/91 discussed at paragraph 57 below in this respect). In a globalised market, with multiple time zones, someone determined to misuse inside information would be unlikely to be hampered by being sounded outside his local trading hours (and in any case the information involve might well continue to be inside into the following day's local trading hours). It is not possible to comment further without an indication of the jurisdictions ESMA has in mind and more detail on the relevant rationale.

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

44. **Wallcrossing refusal options** – It does not seem plausible that only seeking buyside consent on a case by case basis (suggested Option 1 in DP #82) will substantially impact the incidence of accidental wallcrossing. Sounders not only carefully establish the underlying information to be sounded (currently *inter alia* under ICMA Recommendation 1.30), but also the initial approach to potential soundees and so should not be drawn beyond that in initial discussion (*inter alia* given the aspects discussed in paragraph 47 below regarding DP #84).

45. Whilst many banks already also keep lists of investors indicating they are unwilling to ever be wallcrossed, either in any circumstances or only in the context of, e.g., certain industry segments, (suggested Option 2) - this merely serves the logistical purpose of avoiding wasted time and related personal aggravation (which does not in itself warrant legislative compulsion). It seems implausible that investors who would declare themselves unwilling to be ever wallcrossed would suddenly seek further information if approached to decide whether they would actually agree to be wallcrossed in a particular case. Distinctly, such 'lists of the unwilling' may indeed become out of date over time as investors' individual dynamics, internal structures and policies change – unless the positions are proactively refreshed by the investors concerned or through some coincidental exchange (e.g. during the course of general relationship meetings or even in the context of otherwise wholly unrelated discussions). To the extent such lists are to the mutual advantage of buyside and sellside firms, mandating them in legislation seems superfluous.

46. An obligation to proactively systematically record, and then continuously or periodically update, the wallcrossing wishes of all investors (suggested Option 3) is wholly unrealistic, even if limited to just the investors on a bank's existing list of eligible/vetted counterparties (usually arising from past and present transactions). At the very least, the obligation would need to be limited to those investors that could be compelled to cooperate further to a mirror obligation under MAR Level 2. Even then, the potential justification of mitigating the risk of accidental wallcrossing is tenuous (as

noted in relation to Option 2 above) and so the obligation would be massively disproportionate given the burden involved.

Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

47. **Wallcrossing scripts** – Wallcrossing scripts are in systematic use, though they vary (partly in relation to the degree of significant price sensitivity involved). Warnings aside, their sufficiency in terms of content to enable a decision by the potential soundee to agree to be wallcrossed is quite simple – either the initial lead-in communication includes sufficient information (including as to any 'cleansing' as noted in DP #118/119) to enable consent to wallcrossing or it does not (in which case wallcrossing is refused and the related sounding does not proceed). As noted in DP #84.a.i, clearly indeed the lead-in information must not disclose inside information or allow it to be guessed. Presumably, DP #84.a.ii (on no inside information being intended to be disclosed) would be inapplicable for a wallcrossing script. Separately, it is very difficult to see how one might, as suggested in DP #84.b.i, comprehensibly explain the rationale for the specific inside information being inside prior to disclosing it – unless one would be merely stating that the as yet undisclosed information is non-public, significantly price sensitive etc. (which seems to lend no value). Stating that agreement will result in information the sounder considers inside being received and that this results in restrictions (as suggested in DP #84.b.ii and iv) seems workable. Loosening the latter requirement for potential soundees who have previously acknowledged the consequences of being insiders (as suggested in DP #85) seems marginal.

48. **Cleansing assurances** – In practice, 'cleansing strategies' are usually very limited. Sounders at most are able to state the current intention that a transaction is intended to proceed at or by a certain point – however the status of the information where the transaction does not proceed within that timeframe requires evaluation, against Level 1 MAR's definition of insider information, by each of the holders of that information that wishes to act free of insider restrictions. Further sounder communication, e.g. that the transaction has been postponed or cancelled, is not obviously a 'cleansing' solution, as it could in some cases constitute additional inside information in its own right and so further wallcross the investor concerned instead of cleansing him (as acknowledged in DP #92). Sounders do not continuously review the status of each item of inside information sounded, though if they do and if they conclude the information has ceased to be inside, MAR Level 1 Article 7c requires the conclusion (though interestingly not the rationale) to be shared with the soundees concerned. This seems pointless since the article also prevents investors from relying on that conclusion, by requiring, rightly, that each person take responsibility for their own acts. This is partly acknowledged in DP #127 – though only in relation to investors "automatically" relying on the sellside, which seems odd. A soundee may indeed remain an insider, where the sounder considers the information no longer to be inside, because the investor possesses additional information unknown to the sounder. However, even where this is not so, the soundee still cannot rely on the sounder view.

49. Issuers have historically been reticent to make public statements that transactions have been planned, but abandoned or postponed, for fear of the markets wrongly drawing adverse conclusions as to such issuers' ability to fund themselves in the markets. Often issuers may change issuance plans simply as a result of general market turbulence closing issuance windows or of initial market feedback making alternative funding options (different currencies, tenors, markets thus involving other investors) seem more appealing. If issuers feel compelled to make a public announcement every time a potential transaction has not launched on the initially anticipated timeline (so as to guarantee a cleansing of any wallcrossed soundees), they may consider sounding to be impossible. In this respect, DP #117 acknowledges cleansing strategies are not obligatory under MAR Level 1 but queries at DP #124 whether to compel cleansing agreements at Level 2. Issuers might have to launch transactions without sounding that are then more expensive for them, in order to ensure success (to the detriment of their shareholders and of their contribution to economic growth). They might thus consider the European bond markets to be less attractive and instead fund in other markets (to the detriment of European bond investors) or reduce their funding levels (to the detriment of European bond investors and again of such issuers' contribution to economic growth). Further aspects relating to cleansing are discussed in paragraph 71 below.

50. **Non-wallcrossing scripts** – The suggestion for non-wallcrossing scripts at DP #84.a is strange, as there is no legislative basis for it in MAR Level 1. As noted in paragraphs 31-32 above, MAR's sounding rules are relevant as a safe harbour from MAR's prohibition on improper disclosure of inside information. Non-wallcrossed soundings do not involve disclosure of inside information, so the improper disclosure prohibition is irrelevant, together with the related soundings safe harbour and so DP #84.a's suggestion of non-wallcrossing scripts.

51. Some might argue that imposing procedural requirements here is necessary just in case the sounding unwittingly involves inside information, but that would seem to be nonsensical. Firstly, the sounder would still be in breach of MAR and the soundee(s) would still be restricted if inside information is passed. Secondly, if there is a regulator desire in this respect to mandate the compilation of potential evidence, such a concept could stretch, for example in the context of MAR Level 1 Article 12, to issuers having to notify regulators of the rationale for the non-publication of all private information, regardless of their assessment of the (non) inside status of such information and even beyond. Finally, 'public side' employees at investment banks with no access to inside information (such as sales staff), who (as part of their function) have regular discussions with investors *inter alia* to continuously gauge market demand for potential transactions (providing one-way feedback to the banks' 'private side' employees), would be subject to a huge and pointless administrative burden. This may be particularly so the extent many such discussions may well occur outside formal office confines (such as business social events). If a public side employee is required for a wallcrossed sounding, then the employee will himself be subject to prior wallcrossing. See further on Chinese walls in paragraph 62 below.

52. **Sounding confidentiality outside MAR** – Sounding confidentiality may derive from needs or requirements unrelated to MAR, potentially even where the information concerned would not be 'inside' under MAR. This may be so, for example, pursuant to national banking secrecy laws. It is therefore worth bearing in mind that sounding procedures may be subject to other drivers in addition to, or instead of, MAR.

Q27: Do you agree with these proposals regarding sounding lists?

53. **Wallcrossed sounding lists** – The detail suggested in DP #86 as to what wallcrossed sounding lists should include seems consistent with the requirements of MAR Level 1.

54. **Advantages of keeping records generally** – Requiring industry to create and maintain ever more records in case of potential regulator information requests will be unlikely to hamper an enforcement regulation. However, the suggestion in DP #88 that keeping ever more records is valuable to firms as well, on the basis that they would "need to spend less time reviewing their systems, procedures and previous transactions and be ready to provide information upon regulators' request", is wishful thinking. It is likely easier for firms to compile just the information requested when needed, rather than compiling all information at great effort when the vast majority of it will never be requested. To the extent keeping such records is indeed valuable to firms, then presumably it does not need to be compelled in legislation.

55. **Non-wallcrossed sounding lists** – Similarly to what is noted in paragraph 50 above, there is no legislative basis in MAR Level 1 for an obligation, as suggested in DP #87, that lists of soundees be kept where no inside information in involved. It is unclear what basis there is for the assertion that the "highest risks of market abuse happening are during the conversations taking place before a formal wall-crossing has occurred" – further particulars in this respect would be helpful.

Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?

56. **Soundee gatekeepers lists** – The suggestion in DP #89 that banks keep lists of any buyside firm preferred initial points of contact for soundings seems workable – to the extent such points of contact are communicated to them by the buyside firms concerned. This suggestion raises similar considerations to those stemming from Option 2 in DP #82 and discussed in paragraph 45 above.

Q29: Do you agree with these proposals regarding recorded lines?

57. **Sounding on recorded lines** – The suggestion in DP #90 that all soundings occur on recorded lines seems workable, to the extent inside information is being passed. However requiring this for non-wallcrossed soundings where no inside information is passed, as noted paragraphs 50 and 55 above, would have no legislative basis in MAR Level 1. The intent to pass inside information would indeed seem irrelevant, at least to the extent of civil, rather than criminal, enforcement of MAR's prohibition on improper disclosure. The logistical burden is indeed, as suggested in DP #91, likely to be limited for European firms or branches that are already subject to MiFID. It may however be high for firms outside Europe, given MAR's wide scope.

58. **'Cleansing' on recorded lines** – It is unclear what 'cleansing' is involved here. As apparent from paragraphs 48-49 above, sounders cannot unilaterally cleanse a wallcrossed soundee. Either the information becomes public or the soundee concludes it is otherwise no longer significantly price sensitive. A statement by the sounder pursuant to MAR Level 1 Article 7c that the sounder has concluded the information is no longer inside is neither of these and so the purpose of having such a statement on a recorded line is unclear. Of course where a 'cleansing' actually involves further transmission of inside information then the initial point made in paragraph 57 above stands (and query how it could be termed a 'cleansing' in any case).

Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

59. **Ex-post confirmation procedure** – Mandating a procedure, ex-ante to sounding, to confirm the wallcross agreement and implications, would be incompatible with the timelines of the vast majority of transactions being sounded (as acknowledged in DP #96). An ex-post obligation as suggested in DP #94 could remind the soundee of the agreement and implications. The content suggested in DP #95 seems workable.

Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

60. **Soundee prior agreement to wallcrossing** – The suggestion in DP #96 that investors confirm their agreement to being wallcrossed prior to being wallcrossed is fundamental (and required in MAR Level 1 Article 7c.6). Maintaining a record of all non-wallcrossed soundings might perhaps be seen by a few as 'prudent' (though it is unclear for what purpose) and/or good record keeping practice, but similar considerations arise as those relating to DP #87-88 and discussed in paragraphs 54-55 above.

Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?

61. **Sounder operational procedures** – Sounders already maintain and review procedures on sounding as suggested in DP #97. Such procedures will be updated in due course to reflect MAR. It is not yet clear whether such procedures should address every aspect raised in MAR Level 1 Article 7c(4) to (8), as some of these provisions may be sufficiently detailed not to require further provisions in firms' procedures.

62. **Sounder Chinese walls** – Banks that conduct sounding currently maintain Chinese walls between their 'public' and 'private' sides (partly because of MiFID). Whilst inside information is only shared within the private side on a need-to-know basis, the establishment of full Chinese walls, as seemingly suggested in DP #98, between private side individuals would be a logistically disproportionate burden. See also the discussion in paragraph 51 above.

63. **Limiting sounder staff involved** – As suggested in DP #99, banks already limit the number of employees involved in sounding (not least for budgetary/profitability reasons), as well as the time lapse between staff gaining information knowledge and a sounding occurring (not least because of tight transaction timelines) – particularly in relation to public side staff, such as sales.

Q33: Do you have any views on the proposals in paragraphs 102 to 104 above?

64. **ESMA buyside guidelines** – As this response is not being made on behalf of investors, no formal answer is made to this question on the points raised in DP #100-104 as they have no direct sellside relevance, though they generally seem relatively straightforward. The points in DP #102 (notifying sellside of general wallcrossing unwillingness) and 103 (designating gatekeepers) relate, respectively, to the discussions in paragraphs 45 and 56 above.

Q34: Do you agree with this proposal regarding discrepancies of opinion?

65. **Soundees disagree information is inside** – There would seem to be no harm in soundees informing sounders of any perceived discrepancy that 'wallcrossed' information is not inside and evidencing this (as suggested in DP #105/106), though ultimately each party must take responsibility for its own decisions and actions (as acknowledged in DP #109). It is unclear what in meant by the last sentence in DP #106 – certainly there can be no suggestion that soundees can unilaterally absolve themselves of insider restrictions under MAR simply because they happen to disagree with sounder's assessment that the information is inside?

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

66. **Soundees disagree information is not inside** – Similar considerations arise in respect to the points in DP #107-108 as arise from the points in DP #105-106 and discussed in paragraph 65 above. Both sounders and soundees should be able to act as reasonable market parties in terms of being able to share disagreement. Characterising inside information can be challenging in practice and at times may result in disagreement between reasonable people. Ultimately again, each party must take responsibility for its own decisions and actions (as acknowledged in DP #109).

Q36: Do you agree with the proposal for the buy side to report to the competent authorities when they suspect improper disclosure of inside information, particularly to capture situations where such an obligation does not already otherwise arise under the Market Abuse Regulation?

67. **Soundees reporting improper disclosure** – All parties should be free to report any matter to the relevant regulator, subject to any applicable legal restrictions.

Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?

68. **Buyside audit trail for related securities and cleansing** – As this response is not being made on behalf of investors, no formal answer is made to this question on the points raised in DP #113-114 that are internal to the buyside. However internal records would seem to be a question of relative self-interest – ultimately every market participant will likely seek to do maximise its ability to evidence, if and when needed and at the least possible cost, compliance with all regulatory obligations.

69. **Buyside recorded lines for non-wallcrossed sounding** – The sellside perspective on this is addressed at paragraph 57 above.

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

70. **Buyside guidelines / other** – As this response is not being made on behalf of investors, no formal answer is made to this question.

Q39: What are your views on these options?

71. **Cleansing agreements** – Initial considerations on cleansing are already set out in paragraphs 48-49 above (including why cleansing 'agreements' are not realistic). "Recommending/requiring" that investors merely "engage" on cleansing agreements (Option 1 in DP #121) seems devoid of

any real substance. If investors want such agreements, they do not need to be pushed to try to ask for them. Updating cleansing agreements (as referred to in DP #123) would seem to be a relatively moot point, given the general absence of such agreements. Compelling a cleansing strategy (Options 2 as suggested in DP #124) is likely to be counterproductive as highlighted in paragraph 49 above.

Public disclosure of inside information and delays

72. **Relevance to wallcrossed soundings generally** – To the extent soundings involve inside information, MAR will require issuers to *ex post* to explain to regulators the concomitant delay to the publication of the inside information concerned.

Q77: Do you agree with the approach to require issuers to have minimum procedures and arrangement in place to ensure a sound and proper management of delays in disclosure of inside information? If not, please explain.

73. **Issuer delegation of responsibilities** – Requiring the direct involvement of issuer staff in the detailed technicalities of managing the delayed publication of the inside information concerned (as suggested in DP #271-277) might seem straightforward in the context of, say, a once-in-a-decade and protracted takeover transaction. However, wallcrossed sounding periods in the context of new bond issues can be as short as a few hours or even minutes; some issuers may undertake several new bond issues each week; and any inside information involved would relate to issuance plans rather than to issuers' corporate or business status. Consequently issuers should be able to delegate the relevant tasks relating to the management of the delayed publication – to the extent they wish to do so of course (bearing in mind that responsibility is ultimately theirs under MAR Level 1).

74. **Interpretation of the definition of inside information** – The considerations set out at paragraph 36 above are also relevant in terms of the issuers' public disclosure obligations.

Insider lists

75. **Insider list relevance to wallcrossed soundings** – To the extent soundings involve inside information, it seems likely that the persons conducting the sounding for the issuer will figure in its insider records.

Q84: Do you agree with the information about the relevant person in the insider list?

76. **Personal details in insider lists** – The purpose of insider lists is to prima facie evidence who the insiders are. To the extent a subsequent regulatory investigation is needed, the relevant persons' names alone should suffice – such persons are, after all, known to those keeping the lists. Requiring such lists to include reams of information beyond this, as is suggested in DP #318, is highly disproportionate.