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ESMA
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29 March 2016

Dear Sirs

ESMA Consultation Paper ESMA/2016/162: Draft Guidelines on the Market Abuse Regime

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the **"Committee"**). The Regulatory Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

The Committee welcomes the opportunity of responding to ESMA's consultation paper on the Market Abuse Regulation proposed Level 3 Guidelines for receiving market soundings and delay of inside information. Our comments on some of the proposals contained in the consultation paper are set out below.

Q1: Do you agree with this proposal regarding MSR's 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?

In section 2.2 of the Consultation Paper, paragraph 5 lays out details on the common practice of advisors conducting market soundings for both clients and brokers, who in turn have their own client base. The comment is made that such brokers, and any third parties who are not acting on behalf of an issuer would not be captured by the market sounding regime and would not be afforded the protection against an allegation of unlawful disclosure of inside information when speaking to their clients.

We find this comment unhelpful as it potentially exposes brokers to risk of being regarded as having committed market abuse when carrying out their legitimate business. ESMA appears to take the view that brokers should not be regarded as acting on behalf of the issuer in sounding out investors as to their interest in a possible transaction.

It is important to note that behaviour which falls outside of a "safe harbour" is not necessarily to be regarded as market abuse. This is a principle which has been well established, for example, with respect to the repurchase of shares. It should equally apply in the case of market soundings. ESMA's statement is therefore unhelpful in simply ruling out the availability of a safe harbour and calling into question the legitimacy of the behaviour, without further giving any indication that it may not in fact be a disclosure made outside the normal exercise of an employment profession or duties. This introduces unnecessary legal uncertainty.

We therefore consider that, having chosen to comment on this scenario, it would be of assistance for ESMA to consider adding to this a confirmation that even if parties cannot take advantage of the safe harbour for market soundings, they will not automatically commit market abuse where a disclosure of inside information is made in the normal exercise of their profession, and that in the case of broker MSRs who seek to gauge the interest of their own client base in order to provide an informed response to the original market sounding, this is likely to be the case if they adopt similar procedures and safeguards (as to record keeping, etc.) as those required for market soundings regime.

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

We believe that the requirements to inform DMPs (where an MSR may not agree with the categorisation of the information in question) retain the burden of the previous proposals, but in attempting to mitigate this burden, have introduced a level of complexity which is unworkable in practice. While this ought to be relatively straightforward in cases where there has been a clear mistake in categorisation of inside information, we believe that in reality such cases will be few in number. Differences of opinion are more likely and the MSR will be put to considerable trouble not only to form its own evaluation of the information (as is to be expected) but also to determine what was the basis of that evaluation, whether it is one which requires a separate notice to the DMP, and whether records are to be kept.

In this regard, we also wish to raise a comment on scope, which cuts across the questions in the Consultation Paper.

Jurisdictional scope

We believe that ESMA should set out the jurisdictional scope of the application of the Guidelines, and whether the expectation is that where market soundings are conducted with third country MSRs, the market sounding regime will apply globally, such that those MSRs would submit to and comply with the Guidelines. We would not expect a competent authority in a member state to require or enforce compliance with the Guidelines by a third country entity in these circumstances, but the uncertainty in this regard may lead to a reluctance of these parties to receive market soundings. This may in turn impact on the ability of issuers to raise capital efficiently, on the basis that market soundings are regarded as an important part of this process, and third country investors may be an important source of capital.

In view of this, we believe that a proportional approach to the market soundings regime should be adopted when dealing with third country firms.

Yours sincerely

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

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