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Dear Ms Akhtar

Observations on draft Market Abuse Regulations (the "SI")

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.

As a general observation, while we note that Article 23 of the Market Abuse Regulations (596/2014) ('MAR') does not restrict a national competent authority's ('NCA') assumption of powers to those described in that Article, we consider it highly desirable that the Treasury does not assume additional powers without justifying the reasons for doing so. It is not appropriate for the Treasury to vest the FCA with mandatory enforcement powers of application that extends beyond the implementation of MAR without separately consulting upon them and, in particular, establishing that there is an unmet need for the conferment of such powers.

We particularly welcome the Treasury's commitment, contained in Article 24, periodically to review the operation of the UK market abuse regime in light of the other member states' practices. We consider that

a) The review should have regard not only to implementation (which may be understood as encompassing no more than a consideration of what legal and other instruments have been introduced to bring it into effect) but also its

operation, having regard in particular to the supervisory and enforcement practices of the national competent authorities in other member states.

b) The reports should be published every 12 – 24 months, so as to ensure that UK market participants are not subject for any prolonged period to a regime that is, or is becoming, inconsistent with that of other comparable Member States.

We wish to make the following specific observations in relation to the SI:

1. **Section 122A** – power to obtain information from issuers: the exercise of this power in section 122A (1) (a) should be restricted to where it is necessary for the FCA to fulfil its duties under MAR. Without this qualification, the FCA will have a specific and focused power giving it rights in relation to issuers (and managers/close associates etc) that is not restricted to its functions under MAR and which it does not possess in relation to any other class of person.

2. **Section 122B -** We note that Article 23(2) of MAR is potentially very broad. The use of the phrase "supervisory and investigatory" powers suggests the purpose here is to equip competent authorities with a range of powers some of which are required for market supervision purposes and some of which are required for the purposes of conducting investigations;

   There is a strong argument that on a purposive interpretation, the powers listed in Article 23(2)(a) and (b) are intended to be exercised for the purposes of investigations and should therefore be limited to circumstances where there is a reasonable suspicion of breach and the documents or information are relevant to that investigation (without prejudice of course to the existing power under section 165 of FSMA in respect of regulated firms).

   We recognise that there are contrary arguments (we recognise that other paragraphs in Article 23(2) specify when there needs to be a reasonable suspicion and that those words are absent from (a) and (b)) – but these ignore the overriding purpose of Article 23 which is to require Member States to implement in their national law supervisory and investigation powers that are necessary to enable NCAs to fulfil their duties under MAR (see Article 23(3)), and does not purport to specify the precise grounds on which those powers need to be exercisable in order to meet that requirement.

   MAR must be read down in a way that ensures compliance with the ECHR and is "in accordance with national law" including the Human Rights Act. We see no basis for arguing that a power to require ordinary members of the public to produce documents or information to the authorities in the absence of any investigation/ reasonable suspicion is necessary or proportionate for that purpose (any more than a power to summon them for an interview would be necessary or proportionate outside an investigation).

3. **Sections 122C – F** – powers of enforcement: these draft sections substantially mirror the existing sections 175 – 177 and it would be preferable to amend these sections rather than creating a parallel, and occasionally inconsistent, regime. If it is decided to retain the proposed new sections, we consider that the wording should be maintained in substantially the form of the corresponding existing section; see (for example) the discrepancy between the phrasing of draft section 122C(4) and existing section 175(4) where we do not expect any distinction is intended to be drawn.

4. **Section 122G** – publication of information by issuers: the exercise of this power should be restricted to where it is necessary for the FCA to fulfil its duties under MAR; this is the formulation used in draft section 122B (2). Furthermore, the circumstances when the FCA may exercise this power, described in section

122G(2), do not correspond to the provision in Art 23(2)(m) that it is presumably intended to implement. This provides that the purpose of this power is to ensure that the public are correctly informed, including by correcting false or misleading disclosed information. We consider that both limbs of this Article should be reflected so that, in sum, the FCA may exercise this power:

a) in order to fulfil its duties under MAR, and not otherwise;

b) to ensure that the public are correctly informed; and

c) including by requiring the correction of false and misleading information.

5. **Section 122H** – publication of corrective statements: whereas Condition B in section 122H(3) is restricted to the exercise of functions under MAR, the operation of section 122H(2) is not, and we consider that it should be.

6. **Section 123A** – power to prohibit individuals:

   a) We consider that it would be preferable to express the prohibitions in sections 123A(2)(a) and (3) as the exercise of the power of prohibition under section 56 in additional circumstances so that this power is integrated into the FCA's existing power of prohibition rather than create an inconsistent parallel power.

   b) The Treasury should explain what elements it would expect to see present when seeking to identify whether an individual is responsible for taking decisions about the management of an investment firm as this expression is vague and ambiguous.

   c) The prohibition in section 123A(2)(b) goes further than required by Article 30(2)(g), and the Treasury should explain why it considers this necessary, and also clarify whether this is intended to cover discretionary fund management performed for the prohibited individual by a third person.

   d) As a prohibition is stated to be temporary, the section should provide the maximum duration; we propose that:

      i. The maximum prohibition is six months (or at most 12 months, as in section 123B(4)); and

      ii. The power to extend a temporary prohibition in section 123A(4) should not be exercised so that any two periods of prohibition are concurrent (which could result in an enduring prohibition) unless the FCA is satisfied that there has been a further contravention.

7. **Section 123C –** exercise of administrative sanctions: we urge the Treasury to retain section 124(6), which is currently marked "TBC", as retaining this will provide confirmation that, in exercising sanctions, the FCA will have regard to any contemporary statement of policy. We do not see this as being incompatible with the proper implementation of MAR.

8. **Section 127A** – applications relating to prohibitions under section 123A: we consider that these provisions should additionally extend to section 123B.

9. **Section 129** – we note the removal of the reasonable belief/all reasonable steps defence consequent on the repeal of the existing section 383(3). We consider that, consistent with Article 31(1)(b), it is open to the Treasury to retain a provision in section 384 which confers on the FCA the discretion to refrain from exercising the power if, having considered any representations made to it in response to a warning notice, the FCA has reasonable grounds to be satisfied that the person

concerned took all reasonable precautions and exercised all due diligence to avoid behaving in a way which breached the provision of MAR.

We wish to make the following additional observation in so far as it concerns the enforcement of breaches of the draft RTS/ITS. We note that the proposal is to make breach of any RTS provision actionable. We are mindful that MAR has its own scheme requiring Member States to have the power to take appropriate administrative sanctions and other administrative measures in relation to "at least" the infringements listed in: Article 14; Article 15; Article 16(1) and (2); Article 17(1), (2), (4), (5) and (8); Article 18(1) to (6); Article 19(1), (2), (3), (5), (6), (7), and (11); Article 20(1); and Article 23(2).

In our view, to make not only breach of every provision in MAR, but also of every provision in the RTS and ITS enforceable by the FCA as a form of "market abuse" is to extend the scope of the sanctions well beyond the core sanctions proposed in the MAR (we acknowledge that MAR does not in this respect provide for maximum harmonisation).

In particular, by way of example, we note that:

- there is a requirement made in Article 3 paragraph 4 of the market soundings RTS[1] for non-inside soundings to be made using the requisite template (MAR Article 11(5) does not empower ESMA to make RTS in relation to non-inside soundings); and
- the record-keeping requirements in Article 3(7) of the relevant RTS[2] in respect of the analysis of transactions and orders which following examination were not reported as suspicious.

The proposed implementation of the sanctioning power would enable the FCA to sanction both of these as market abuse breaches which, in our view, is disproportionate, especially given that the FCA could enforce these on a breach of Principle for Business. In our view, enforcement actions based on breach of Principle for RTS breaches is the more appropriate route for non-core contraventions of RTS made under MAR.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours sincerely

Karen Anderson
Chair, CLLS Regulatory Law Committee

[1] COMMISSION DELEGATED REGULATION (EU) No …/.. of XXX […] 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 [https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf#page=244]

[2] COMMISSION DELEGATED REGULATION (EU) No …/.. of XXX […] 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 [https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf#page=282]

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