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European Securities and Markets Authority (ESMA)
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15 October 2014

Dear Sirs,

Consultation Paper – Draft Technical Standards on the Market Abuse Regulation

Introduction

We are the Quoted Companies Alliance, the independent membership organisation that champions the interests of small to mid-size quoted companies. Their individual market capitalisations tend to be below £500m.

The Quoted Companies Alliance is a founder member of European**Issuers**, which represents over 9,000 quoted companies in fourteen European countries.

The Quoted Companies Alliance Legal Expert Group has examined your proposals and advised on this response. A list of members of the Expert Group is at Appendix A.

Response

We welcome the opportunity to respond to this consultation. We have focused our response on the changes regarding market soundings, insider lists and persons discharging managerial responsibilities, as we feel these areas will have the greatest impact on small and mid-size quoted companies.

We are particularly concerned about the proposals on insider lists. We do not support ESMA's proposals on the content of insider lists as outlined in the consultation paper. We believe that the information proposed by ESMA is far too detailed and will be burdensome for issuers to provide. The contents of such lists should be proportionate and take into the account the purpose for which insider lists are required. Furthermore, we believe that there could be data protection issues with the amount of information required to be kept by issuers and their advisors, thus triggering additional reporting requirements under EU and national data protection legislation.

Furthermore, we note that the purpose of creating the template for insider lists in the level I regulation was to decrease administrative burdens on issuers. Paragraph 56 of the Recital of the Market Abuse Regulation (Regulation 596/2014) states that:

> *Insider lists are an important tool for regulators when investigating possible market abuse, but national differences in regard to data to be included in those lists impose unnecessary administrative burdens on issuers. Data fields required for insider lists should therefore be uniform in order to reduce those costs.*

ESMA's proposals for the contents of insider lists are completely in conflict with the spirit of the level I regulation in the area of insider lists, as they would require far more data to be included than is currently required or necessary, and so will increase the costs for issuers.

We would like to note that we support the exemption in the Market Abuse Regulation for companies on 'SME Growth Markets' from the need to produce insider lists on an ongoing basis. We recognise that the current text of MAR requires issuers on SME Growth Markets (if they are to have the benefit of the exemption) to be in a position to provide the Competent Authority on request with an insider list. Therefore, there would, inevitably be a need, in practice (as ESMA recognises) for such issuers to have sufficient systems and procedures in place to produce such an Insider List if requested by the Competent Authority.

We support that ESMA has not mandated the types of sufficient systems and procedures that issuers on SME Growth Markets would need to put in place. Issuers must have the flexibility to develop their own appropriate systems and procedures; otherwise, we would question, whether, in these circumstances, the exemption will actually confer cost savings for issuers on these markets. However, even taking into account this flexibility, we believe that the level I regulation's requirement for issuers to be able to provide an insider list containing the appropriate information may, in fact, translate into issuers having to establish costly internal systems and/or processes, which would increase administrative burdens and effectively negates the exemption in practical terms.

Responses to specific questions

III Market soundings

We believe that it is not appropriate or proportionate for provisions and procedures which a regulated firm is required to have in any event (for example under MiFID) to apply to issuers. Issuers that are not themselves regulated by a competent authority would not have company recorded mobiles and landlines (paragraph 101). The Technical Standard should be rewritten so it is sufficient for the regulated firm that is the disclosing market participant acting for the issuer to keep the records and soundings lists for a market sounding in which the issuer participates.

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

We note that in paragraph 74, the consultation paper states that "Information disclosed by a DMP should enable a potential investor to make a sufficiently informed assessment." We do not think this is correct. An issuer may not be able, for example for confidentiality reasons, to provide full information at an early stage but may still wish to conduct a preliminary market sounding, to be followed (if the potential transaction progresses) by a later market sounding.

Q7: Do you agree with these proposals regarding recorded communications?

No. As mentioned above, we believe that it is not appropriate or proportionate for provisions and procedures which a regulated firm is required to have in any event (for example under MiFID) to apply to issuers. Issuers that are not themselves regulated by a competent authority would not have company recorded mobiles and landlines (paragraph 101). The Technical Standard should be rewritten so it is

sufficient for the regulated firm that is the disclosing market participant acting for the issuer to keep the records and soundings lists for a market sounding in which the issuer participates.

Q8: Do you agree with these proposals regarding DMPs' internal processes and controls?

No. It seems clear from Article 11(4) and the last sentence of Recital (32) of the Market Abuse Regulation that the market sounding regime in Article 11(3) and (5) is a safe harbour and not mandatory and so compliance with the record keeping requirements should not apply where the market sounding does not involve inside information. We would query whether ESMA is going beyond its mandate by prescribing record keeping requirements for all market soundings, regardless of whether they contain inside information or not.

VII Insider lists

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

No, we do not agree with the proposals. We believe that the amount and detail of data required by ESMA is disproportionate to the intended effects of ascertaining someone's identity. Moreover, we are strongly concerned with the burden that will be incurred by small and mid-size issuers to collect, retain and update the sensitive information proposed to be included in insider lists in their systems, which may trigger additional data protection compliance obligations and, in turn, must be adequate and secure and therefore costly. As noted in our introduction, the point of creating a standardised format for insider lists was to decrease administrative burdens on issuers. However, ESMA's proposals will result in the exact opposite situation and burden issuers with having to keep detailed records of a disproportionate amount of information on insiders.

As we noted in our response to the Discussion Paper earlier this year, the contents of such a list should be proportionate and take into account the purpose for which the insider lists are required. Their creation and updating should be manageable and not impose too great a burden on issuers and their advisors (for whom issuers will remain responsible if the creation, maintenance and updating of the insider list has been delegated by the issuer to them).

Against this background, we do not support the detailed identification requirements of insider lists suggested by ESMA. Information regarding place of birth and personal phone and electronic email addresses are not required to be kept by organisations in the UK. Even obtaining home addresses (and keeping them up to date) and recording dates and places of birth and national identification numbers (passport or NI numbers) would, in our view, be administratively and unnecessarily burdensome and disproportionate to the purpose of the insider list, which is to enable a regulator to identify a person and the date and time at which the person obtained inside information. In our view, the proposals go beyond the mandate of article 18 of the MAR which requires simply that the identity of the person having access to insider information is documented.

We have concerns that the large amount of sensitive information required to be collected under ESMA's proposals would result in issuers having additional data protection reporting requirements, as many would find themselves falling into the category of 'data controllers'. The European Union data protection

legislation and policy being developed[1] sets out strict conditions for the collection of data. The EU Data Protection Directive[2]'s rules are applicable to all entities (data controllers) who collect and control the use of the personal data relating to individuals (data subjects). This Directive determines that the processing of data (i.e. carrying out operations such as collection, storage, consultation, disclosure by transmission or dissemination) must comply with a number of principles set out in Article 6, including that the collection of data is "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed". The wide set of personal data being required by the ESMA draft technical standards would be not only irrelevant and excessive, but also burdensome and disproportionate from the viewpoint of the data subjects.

We note that keeping such a wide set of data would trigger disproportionate obligations for small and mid-size quoted companies acting as data controllers, such as retention period obligations and potentially, obligations stemming from the right to be forgotten[3].

We note that the majority of respondents to the Discussion Paper on the Market Abuse Regulation expressed concerns over the amount of proposed information to be included in insider lists. These concerns, noted by ESMA on paragraph 294 of the Consultation Paper, included the extent and scope of information included in the insider list, the lack of need for all the data required to identify persons, the failure to decrease administrative burdens on issuers and that insider lists should not be databases where personal data is duplicated. In our opinion, ESMA has not provided enough explanation as to why each field individually and together is necessary for the purposes of *initially* identifying an insider, as opposed to allowing an issuer to provide some of this information at a later stage in the case of an investigation by a competent authority.

Additionally, the European Data Protection Supervisor, in its opinion regarding the MAR proposal in 2012, stated that an explicit reference to the purpose of the insider list in a substantive provision should be added to the regulation, as "the ***purpose*** is indeed one of the essential elements of any processing according to Article 6 of Directive 95/46/EC". We urge ESMA to re-evaluate the purpose of the lists (ie to identify initially who has access to inside information) and consider a reduced list as covering the intended purpose.

We strongly believe that information is being required in excess of what would be necessary to unequivocally identify someone, and is therefore disproportionate, burdensome and costly. Moreover, in reality, what ESMA is proposing will translate into costs for small and mid-size issuers, having to update and keep the records secure. As ESMA points out in its Preliminary high-level cost-benefit analysis, the compliance costs will include "training costs for staff, systems investment to keep the insider lists in electronic format and appropriately submit them to the competent authorities, and staff time dedicated to maintaining lists". ESMA further identifies two of the main cost drivers as being "the number of data fields required in the list" and the "level of security required for the transmission to the competent authority". It is clear to see this will be extremely burdensome for small and mid-size companies.

[1] See Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regards to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
[3] See European Court of Justice: C-131/12 – Google v Costeja González

Finally, we note that the ESMA Securities and Markets Stakeholder Group in its advice to ESMA (ESMA/2014/SMSG/047, 10 October 2014[4]) echoes our concerns over the amount of information to be included in an insider list (paragraph 36), stating "It is questionable whether the principles of proportionality is respected by ESMA's proposals."

We would, therefore, again suggest that the identification requirements be limited to name, position within the issuer (or advisor or third party), work address and work email address. This would serve the purpose of identifying insiders, while ensuring that small and mid-size quoted companies do not become overburdened with handling detailed personal data. This would still facilitate the work of the competent authority, which, when required due to investigation or suspicion of violation, could approach the issuer requesting more information.

In terms of issuers on SME Growth Markets, we do not believe that Article 18(6)(b) of the Market Abuse Regulation requires these issuers to provide an insider list in the format and containing all the information of an insider list required to be kept under Article 18(1) of MAR. We note that the ESMA Securities and Markets Stakeholder Group agrees with this analysis stating in its response (paragraph 39):

> *The SMSG observes that Art. 18 (6) MAR does not require a specific content of such an insider list and therefore asks ESMA to impose lower requirements for SME Growth market issuers.*

We do not understand how ESMA is able to conclude in its Preliminary High Level Cost Benefits analysis (Annex III) that this "should allow to achieve the objective of reducing their administrative burden and operational costs …"

As mentioned in our introduction, the value of the exemption in Article 18(6)(b) of MAR will be negated if SME Growth Market issuers are required to provide an insider list with all the information specified in Annex 1 and submit in accordance with the format for notification specified in Article 10(1) and (3). Therefore, in addition to reducing the number of required fields for all issuers, we believe that ESMA should not mandate the content and/format of insider lists for SME Growth Markets, as this would be going beyond what is mandated in the level I regulation.

Q23: Do you agree with the two approaches regarding the format of insider lists?

We welcome that ESMA has taken into consideration the need for flexibility for the company responsible for the insider lists. However, we do not consider the templates and the proposed "appropriate format" for each of the lists to be adequate.

We understand that ESMA does not consider Template 1 to replicate what is known to some issuers as a 'permanent' or 'general' insider list. In practice, many issuers keep two types of insider lists – one which is a general list for those employees within the issuer that regularly have access to inside information (e.g. CEO or Finance Director) and another which is a deal specific list (e.g. in relation to specific transaction such as an acquisition). The reason for keeping the two lists is that it can be less of administrative burden on issuers than repeating the employees who regularly have access to inside information on deal specific lists.

[4] Available at: http://www.esma.europa.eu/system/files/2014-smsg-047.pdf

We note that, as outlined in Template 1, it will be very burdensome for an issuer to have to list every project/transaction that a permanent insider, such as the CEO, will be involved in. It will result in adding numerous additional columns to the insider list for what we see as very little added value to the competent authority, as it should be accepted that certain senior-level employees in an issuer will always have access to inside information.

Therefore, we suggest that Template 1 has the project columns removed and that Article 8.1 is redrafted to say:

> *Pursuant to Article 18(1) of Regulation (EU) No 596/2014… shall create and update an insider list. The insider list may take the form of:*
>
> *a) A general list including persons having access to any inside information containing the information set out in Template 1 of Annex I of this Regulation; and/or*
>
> *b) One or more deal-specific or event based lists that include the persons having access to relevant deal-specific or event-based inside information containing the information set out in Template 2 of Annex I of this Regulation*
>
> *Provided that when an issuer creates both a general list and a deal-specific or event-based list or lists, the general list may include only persons who because of their position have general access to inside information.*

The general list should not require all persons having access to inside information to be included. If it does, this essentially makes the two approaches very similar and negates any flexibility offered by having two approaches for producing an insider list.

We agree that ESMA should not prescribe technical details on the provision of information in order to provide flexibility and decrease the burden on small and mid-size issuers. However, we do have concerns on the level of security of the system used to store and share the information, as it is very detailed personal data. As mentioned in our response to Question 22, data protection requirements will need to be in place and complied with as the issuer will inevitably become a data controller according to EU Data Protection Law. This will lead to increased costs to issuers, which we will believe are disproportionate and should be taken into account when reviewing the fields necessary to be included in an insider list.

If you would like to discuss any of our response in more detail, we would be happy to attend a meeting.

Yours faithfully,

Tim Ward
Chief Executive

APPENDIX A

Quoted Companies Alliance Legal Expert Group

Gary Thorpe (Chairman)	Clyde & Co LLP
Maegen Morrison (Deputy Chairman)	Hogan Lovells International LLP
David Davies	Bates Wells & Braithwaite LLP
Martin Kay	Blake Morgan
Richard Beavan	Boodle Hatfield LLP
David Fuller	CLS Holdings PLC
Mark Taylor	Dorsey & Whitney
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Stephen Hamilton	Mills & Reeve LLP
Ross Bryson	Mishcon De Reya
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