Quoted Companies Alliance

6 Kinghorn Street
London EC1A 7HW

T +44 (0)20 7600 3745
F +44 (0)20 7600 8288
mail@theqca.com

www.theqca.com

The European Securities and Markets Authority (ESMA)
CS 60747
103 rue de Grenelle
75345 Paris Cedex 07
France

31 March 2016

Dear Sirs,

Draft guidelines 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 paper published by ESMA relating to the draft guidelines (ESMA Guidelines) on the Market Abuse Regulation (MAR).

Achieving flexibility for small and mid-size quoted companies without compromising the integrity of the market is an issue of particular importance to us given that, when MAR comes into force in July 2016, the full weight of the regulation will fall upon companies whose shares are traded on growth markets, such as AIM and ISDX in the UK, the very companies which form a large proportion of our membership. Thus, small and mid-size quoted companies will be looking to the guidance provided by ESMA required to be published under Article 11 (11) and Article 17(11) of MAR. Pending the publication of the ESMA Guidelines, issuers will continue to look at the historic guidance issued by CESR in 2006 (CESR/06/562b) (CESR Guidance).

We would highlight that, as a general comment, our members have a few overarching concerns on the implementation of MAR regarding:

- The provisions relating to dealings by persons discharging managerial responsibilities – These rules could negatively affect all quoted companies significantly. It should be ensured that MAR rules will allow for preliminary announcements to trigger the end of the closed period; and

- The interaction between the application of MAR rules for SME Growth Markets and the entry into force of MiFID II – It should be ensured that issuers on growth markets are able to take advantage of MAR's more proportionate rules regarding insider lists from the date MAR enters into force.

Given the requirements which will apply to national competent authorities (NCAs) following MAR, a number of points below have already been made to the FCA in the UK in our responses to CP15/38 and CP15/35 (February 2016); we will share this submission to the FCA as well.

As an overarching comment regarding this consultation, we urge ESMA to include as much clarity as possible in its Guidelines so to allow NCAs certainty in the supervisory and investigatory approach of MAR. While the ESMA Guidelines will cover most of the issues that need to be addressed, we see a role for the NCAs to clarify the application of the ESMA Guidelines to each Member State's markets and their usual practices, as well as dealing with practical aspects of compliance.

Responses to specific questions

Market soundings

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?

As a matter of compliance protocol, persons receiving the market sounding (MSRs) will have to make their own assessment of whether they are in possession of inside information, and at what point they cease to be in possession of inside information (typically following the making of a cleansing announcement by the disclosing market participant (DMP)). We believe that the proposed guidance merely clarifies what is currently regarded as good market practice.

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

We agree with the proposal regarding discrepancies of opinion between DMP and MSR. However, the requirement to specifically note the discrepancy appears onerous and, to the extent relevant, should be incorporated as a subsidiary matter to be included in the record of the MSR's assessment of whether the information provided to it is, or has ceased to be, inside information.

Q3 Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

Yes, we agree with the proposal regarding internal procedures and staff training; we believe that the guidelines are sufficient to enable effective procedures to be adopted. Nevertheless, as a general remark, we note that not all MSRs will be regulated entities: they may be individuals or companies that are not listed and may not be based in the EU and may receive market soundings very infrequently. The proposed internal procedures and training could be overly burdensome in those cases.

Q4 Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

Yes, we agree with the proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding. Notwithstanding, it would be helpful if ESMA clarified the meaning of "in possession of the information".

Q5 Do you agree with the revised approach regarding the recording of the telephone calls?

Yes, we agree with the revised approach regarding the recording of the telephone calls.

Q6 Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

Yes, we agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP. Although a memorandum annexing the DMP's record and noting the points of difference should suffice.

Q7 Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

We are unable to access the volume of data required to make this assessment.

Insider information

Q8 Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

We note that the proposed guidelines go beyond the approach taken by the existing CESR Guidance, which, rather than acknowledging that "legitimate interest circumstances" may exist which are additional to those set out in Article 3(1) of Market Abuse Directive (MAD) (now set out in Recital 50 of MAR), sought instead to present examples as sub-sets of those two situations – and consequently delivered some confusing outcomes (for example, "product development, patents and inventions" were categorised as a sub-set of "negotiations in course").

However, in spite of this more progressive approach, we believe that the proposed guidelines remain overly restrictive and we would make the following observations:

- We consider that the removal of "impending developments that could be jeopardised by premature disclosure" from the list of illustrative examples is unhelpful to issuers. The rationale given by ESMA for the deletion is that the provision is too generic. However, we believe that it is helpful, at the very least, as a statement of principle. Indeed, specifically removing it from the existing guidance could cause issuers to assume that impending developments are incapable of constituting a legitimate interest justifying delayed disclosure;

- We welcome the commentary at paragraph 73 of the consultation paper to the effect that M&A transactions will generally fall within the category of negotiations, which would likely be jeopardised by immediate public disclosure. We recommend that this is actually repeated within the proposed guidelines, albeit on a suitably qualified basis. It certainly represents the generally accepted view within the market;

- We also note the commentary at paragraph 61(a) which references the current CESR Guidance for contracts being negotiated in competitive situations where early disclosure would jeopardise the outcome. We agree that this is effectively a sub-set of the proposed guideline 1a. However, it

represents a helpful example of a situation which falls within that guideline. For this reason, we would recommend the retention of this particular guideline; and

- The existing CESR Guidance contains a statement (at paragraph 2.7) that, "Issuers should consider the particular circumstances of their case when deciding whether they can delay disclosure". We believe that this guideline is helpful in that it emphasises the need to avoid a "one size fits all" approach. Its deletion would appear to discourage issuers and their advisers from making informed judgment calls on a case by case basis.

As a general comment, we urge ESMA to carefully review the wording of the proposed guidelines and ensure that the terms used are consistent. As an example, the words "likely to be jeopardised", "would jeopardise" and "jeopardising" used in 1 a-e could lead to different interpretations and thus be misleading.

Q9 Do you agree with the proposal regarding situations where the delayed disclosure is likely to mislead the public?

We believe that the inclusion of guidance relating to situations in which the delay of inside information is likely to mislead the public, is likely to help promote a properly functioning disclosure regime and (taken with the other points made in this response) serve to clarify and emphasise that there has not been a relaxation of the current regime.

Nevertheless, we urge ESMA to include as much clarity as possible on this subject; for example, ESMA should clarify as to how the term "materially different" (to previous announcements) is to be interpreted (as used in 2a.) and as to the meaning of "signals" (that the issuer has previously set), in 2c. With regard to the latter, we are concerned that "signals" is too vague a term and we consider that to fall outside the parameters for delayed disclosure the inside information should be contrary to a "specific contradictory statement" made by the issuer.

Q10 Do you see other elements to be considered for assessing market's expectations?

We favour a narrow view of the term market expectations. They should be expectations which have resulted from statements issued or confirmed by the company itself as opposed to statements made by third parties such as the financial or trade press.

If you would like to discuss 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
Paul Arathoon Andrew Collins David Hicks Tom Shaw	Charles Russell Speechlys LLP
David Fuller	CLS Holdings PLC
Mark Taylor	Dorsey & Whitney
June Paddock	Fasken Martineau LLP
Ian Binnie	Hamlins LLP
Donald Stewart	Kepstorn
Karish Andrews	Lewis Silkin
Tara Hogg Jane Mayfield	LexisNexis
Stephen Hamilton	Mills & Reeve LLP
Ross Bryson Nicholas McVeigh	Mishcon De Reya
Philippa Chatterton	Nabarro LLP
Jo Chattle Simon Cox Julie Keefe	Norton Rose Fulbright LLP
Naomi Bellingham Sarah Hassan Hilary Owens Gray	Practical Law Company Limited
Ben Warth	PricewaterhouseCoopers LLP