	AFG RESPONSE TO THE CONSULTATION PAPER BY ESMA ON DRAFT GUIDELINES ON THE MARKET ABUSE REGULATION - March 31st 2016 GD-VB 4527
Introduction	The Association Française de la Gestion financière (AFG) welcomes the opportunity given by the ESMA to express the French asset management's opinion on the draft guidelines on the Market Abuse Regulation and would like to highlight the necessity to find reasonable requirements issued by the new regulation in consideration of the intended purpose. From our point of view, there is a real danger that this new regulation could appear as a new burden meaning that the investment management companies would be placed in a situation to forbid market soundings due to the fact that the new requirements would be too difficult to implement in their own organization. A such situation would be prejudicial to the markets soundings themselves and hence to the financing of European companies. Moreover it does not match with the objective of these new drafted guidelines. The implementation costs will be important regarding the forecasts benefits. For instance, the wish to register each information flow will be time consuming without any clear added value. The principle to assess each information as an insider information or not will be sufficient to manage insider information and market soundings. These new guidelines require organizational changes and to draft more procedures for a weak benefit. It is important to bear in mind that the market soundings are not so frequent in the investment management industry. They concern some investment teams as fixed income or convertibles. But market soundings are nevertheless important and should not be curbed by excessive constraints.
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?	Partially. We do not understand the objectives of the current drafting of Guideline 3 as the current drafting seems to create greater risks for the MSR rather than mitigate them. First, the current text of Guideline 3, particularly when taken with Guideline 4, seems to go beyond the obligations set forth in Article 11, paragraph 7 of the Regulation and ESMA's own position under point 21 of the General Remarks of this consultation and create greater confusion and risk for the market generally and the MSR specifically. The current draft text suggests that the MSR is required to independently evaluate whether the information communicated by the DMP is in itself inside information, in addition to the MSR's obligation to evaluate whether it is in possession of inside information as a result

	of this information combined with information from other sources. Article 11, paragraph 7 of the Regulation should not be read as requiring the MSR to independently evaluate whether the information provided by the DMP is in itself inside information or is inside information in combination with other information that the DMP has provided to the MSR. Rather, Article 11, paragraph 7 should be read as only requiring the MSR to evaluate if, by possessing the information communicated by the DMP, in combination with other information the MSR (its employees – see below) may have in its position from other sources, the MSR is in possession of inside information. It is unrealistic, and indeed risky, to expect that the MSR is in a better position than the DMP, who is acting on behalf of the MSB (Market Sounding Beneficiary), to assess whether the information the DMP discloses to the MSR, is in itself or in combination with other information disclosed by the DMP, inside information. Consequently, we recommend that the text of this guideline be amended so that it is clear that the MSR should not be required to independently assess whether the information disclosed by the DMP is in itself inside information or is inside information in combination with other information disclosed by the DMP, but rather should simply be required to assess if the information that is disclosed by the DMP, regardless of how it is qualified by the DMP, in combination with any other information the MSR may have in its possession, would lead the MSR to be in possession of inside information and document this assessment accordingly. Secondly, we believe that the requirement set forth in Article 11, paragraph 7 and elaborated upon in Guideline 3 should only be limited to an analysis of the information available to the employees of the MSR that receive the information communicated by the DMP (either directly or indirectly via another employee of the MSR). We do not understand the objective of requiring the MSR to evaluate and determine if any of its employees may have information that in combination with the information communicated by the DMP would constitute inside information if such employees do not receive the information communicated by the DMP. We do not believe extending the assessment across the entirety of the MSR's employees mitigates risk of market abuse and in fact, we believe that this creates greater risk and administrative burden for the MSR. Finally, following section 4.2.1, paragraph 67, of ESMA/2015/1455 Final Report on Draft technical standards on the Market Abuse Regulation, which indicates that situations where a DMP questions investors on its own initiative, without being mandated by the MSB should not be considered as market soundings for the purposes of the regulation, it is our view that the MSR can consider that any information communicated by the DMP in such circumstances should not be considered as precise and take this into account in its

	evaluation of whether the information qualifies as inside information. Consequently, in consideration of the above concerns, we propose the following modifications to Guideline 3: **Guideline 3:** ***Add the following new language***: "When contacted by a DMP about a sounding, if the DMP has not otherwise disclosed to the MSR whether it is mandated by the MSB, the MSR should request that the DMP confirm if it is mandated by the MSB. If the DMP is not mandated by the MSB, then as already indicated in the RTS, this sounding is not to be considered as a market sounding under the Regulation. Furthermore, given that the DMP is not mandated by the MSB and it is conducting this sounding on its own initiative, the MSR can consider that any information communicated to it by the DMP regarding terms of a potential transaction are not precise. The MSR should take this into account when conducting its assessment of whether it is in possession of inside information taking into account other information available to it. As outlined in the RTS, if the MSB eventually does mandate the DMP to conduct further soundings, the DMP will be required to follow the procedures outlined in the Regulation and the RTS, including informing the MSR of this relationship, seeking the MSR's approval to receive market sounding information, and providing an assessment of whether the information to be communicated or communicated constitutes inside information." ***Replace the existing text:*** 1) While taking into account the DMP's assessment, MSRs should independently assess whether they are in possession of inside information as a result of the market sounding taking into consideration as a relevant factor all the information available to them, including the information obtained from sources other than the DMP. 2) While taking into account the DMP's notification that the information disclosed in the course of the market sounding is no longer inside information, MSRs should independently assess whether they are still in possession of inside information taking into consideration all the information available to them, including the information obtained from other sources than the DMP. ***with the following text:*** 1) Upon receiving a DMP's assessment about whether the information to be disclosed or already disclosed by the DMP in the market sounding itself or in combination with other information communicated by the DMP constitutes inside

	information, the MSR is not required to conduct an independent assessment of the DMP's assessment. However, the MSR should independently assess whether its employees who have received or are susceptible to receive the information communicated by the DMP are in possession of inside information as a result of the information received in the market sounding in combination with the other information available to the these employees, including the information obtained from sources other than the DMP. 2) Upon receiving a DMP's notification that the information disclosed in the course of the market sounding is no longer inside information, MSRs should independently assess whether they are still in possession of inside information taking into consideration all the information available to them, including the information obtained from other sources than the DMP. **Additional Comments** We further propose the following modifications of the guidelines: **<u>Guideline 1</u>** Replace the text: « …the MSR <u>should ensure that that information is made</u> available to the disclosing market participants (DMP). » with the text: «… the MSR <u>should make the contact information available</u> to the disclosing market participants» *Reason:* The use of the word "ensure" suggests that the MSR has an obligation to confirm access by or receipt of the information. **<u>Guideline 2</u>** Replace the text: "After being addressed by a DMP, the MSR should notify it whether they wish not to receive future market soundings in relation to either all potential transactions or particular types of potential transactions" with the following text: "Upon being contacted by the DMP about a specific market sounding, a person authorized to receive such contact by the MSR should communicate to the DMP if the

	person agrees to receive the market sounding. The MSR can, upon such contact or at any other time, also communicate to the DMP that it does not wish to receive market soundings in relation to either all potential transactions or particular types of potential transactions." *Reasons:* The existing text is written to suggest that each and every time that the MSR is contacted, it should notify/re-notify the DMP as to whether it wishes to receive future market soundings and also does not allow for the possibility that the MSR should have the option to communicate at any time outside of a market sounding that it does not wish to receive market soundings. Furthermore, only a person authorized to be contacted by DMPs in relation to MSRs and authorized to act on behalf of the company in such matters should have the right to accept or reject future market soundings.
Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?	AFG considers that the proposed guideline would generate risk for the MSR in situations where it is already subject to rules governing insider information and is in compliance therewith. Where discrepancies arise in their respective assessments, the proposed guideline describes the terms upon which a DMP and MSR are required to exchange their views and share information. Inconclusive debates may arise and generate risk. Moreover if the DMP reverses its assessment it is not required to notify all the cross walled MSRs of such change. At the end of the day, the AFG believes that the only reasonable outcome should be for each MSR to make its own assessment independently in accordance with its internal procedures.
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?	AFG agrees that staff exposed to market soundings should be properly trained as regards market abuse as well as the internal procedures to follow to comply with Article 11 on market soundings. However, the proposed language of "function or body" suggests the obligation to create a dedicated body or appoint a specific function within the MSR to deal with market soundings. AFG considers that such requirement goes beyond level 1 and is not flexible enough to accommodate for other types of organizational set-up that are as appropriate to deal with this matter, such as an internal committee or designated staff members from different departments who collaborate on an ad-hoc basis, depending on the case at hand (for e.g. different persons can be involved depending on the type of products

	concerned). AFG therefore suggests amending the wording of bullet point b) as follows: “b) ensure that the employees ~~function or body~~ entrusted to assess whether the MSR is in possession of inside information as a result of the market sounding are clearly identified and ~~composed of staff~~ properly trained to that purpose;”
Q4: Do you agree with this proposal regarding a list of MSR’s staff that is in possession of the information communicated in the course of the market sounding?	**Assessment of related financial instruments** AFG opposes the concept of issuers being caught under the scope of an assessment of inside information regarding another issuer. Management companies do not have an exhaustive knowledge of issuers in order to assess the risk of contagion of inside information between such issuers. Articles 8, 10 and 11 of EU Regulation 596/2014 do not refer to the notion of "issuer". The assessment of possible links of contagion between issuers requires an expertise in financial analysis, for instance, regarding the business, which is not always available within management companies. This competence does not exist for a large number of management companies. Quite often, the MSR (Management Company) sets a pre-trade blocking rule on an issuer in its Order Management System/Portfolio Management System, which allows it (the MSR) to block all instruments related to that issuer (equity, debt and derivative instruments). Management Companies relies on the portfolio managers in order to have an overview of the group of related financial instruments which could be impacted by the information obtained from market soundings. **List of MSR’s staff that are in possession of the information communicated in the course of the market sounding** AFG does not agree with this proposal for the following reasons. Firstly, there is already a requirement under article 11 (4) of Regulation UE 596/2014 for the DMPs to keep lists of all people to whom they communicated market sounding information, including details of the communications and dates/times and to provide these records to the competent authority upon request. This already meets ESMA's objectives mentioned in § 44 of the CP to “(iii) foster the competent authorities’ ability to reconstruct the information flow in the course of a possible investigation” and would therefore be redundant, useless and overly burdensome if also required from the MSRs. Such a

	measure would also be inconsistent with the Commission's objective to reduce unnecessary administrative burdens created by the Union's laws and regulations. Secondly, this requirement would go beyond the level 1 text which deals with inside information, as it would extend the lists to non-insiders, i.e. people who, although they have received information in the course of a market sounding, are not in possession of inside information when the market sounding did not entail communicating such information. From a data protection point of view, the maintenance of such lists that embed personal information, needs to be justified by a clear legal obligation, which is absent from level 1 and cannot be considered met by guidelines, which do not form part of EU legislation. Finally, as MSRs need to characterize the information as inside or not, they are under the obligation under MAR, when the information is inside information, to ensure that their staff members do not communicate it improperly or use it, which will require the implementation of internal procedures, which amounts to meeting the objectives set forth in § 44 of the DP: "(i) (..) the internal management of the flow of information resulting from market soundings, (ii) allow MSRs to demonstrate compliance with the inside information prohibition". The content of such procedures should be left to each MSR's decision, depending on its nature, size and organization.
Q5: Do you agree with the revised approach regarding the recording of the telephone calls?	Partially: The recording of telephone calls is a necessity between market professionals, who are subject to telephone recording obligations. Under the AMF regulation, the management company shall take the necessary measures to put in place suitable electronic systems, allowing quick and correct recording of information on each portfolio transaction. While we agree with removing the obligation on the MSR to communicate only on recorded telephone lines, any communications with the DMP should be made to a telephone line that is subject to recording by the DMP, and that the DMP should make this telephone number available to the MSR. On the other hand, we find difficult to set up the operational process relating to the obligation for the MSR to sign the minutes or notes drawn up by the DMP.

	In this situation, a better solution could be to replace the obligation of signing the minutes by an obligation to obtain an agreement in a durable medium between the DMP and the MSR.
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?	We are reluctant to accept this proposal. It does not protect each side (DMP & MSR) on their own usual rules regarding inside information circulation. Each side is already submit to qualify the nature of the information given/received, according current regulation framework. This proposal only depicts how to handle the case of discrepancy of opinion: according to us this may introduce endless debate without improving MSR/DMP protection, and without improving already existent regulation concerning inside information circulation. If such a guideline would be kept in the final version of the ESMA guidelines, it would be very important not to limit to 5 working days the communication of the final minutes by the MSR. As usually used by ESMA, we would suggest to refer to a delay qualified "as soon as practical" which is more adaptable to each situation. We also noticed that the delay of MIFID implementation introduces a gap between some provisions that are common to the 2 directives (MIFID 2 and MAR). We suggest to adapt a transitory period regarding the criteria of 5 years record till the MIFID 2 implementation.
Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?	At this stage it is impossible to assess accurately the cost of complying with the proposed regulations for the MSRs. However we anticipate significant additional compliance costs in the following areas : – the scope of recorded conversations together with the retention periods are significantly extended (from 6 months to 5 years) – specific training requirements shall impact a wider population and are required in addition to general MAR training – Regulations require that the MSRs implement specific internal procedures for market soundings and expand compliance monitoring programs, not only for market abuse.