20 May 2016

To: European Securities and Markets Authority ("ESMA")

For online submission at www.esma.europa.eu

Re: Consultation Response to ESMA's Consultation Paper on its guidelines on information expected or required to be disclosed on commodity derivatives markets or related spot markets under MAR

Dear Sir:

FIA and the International Swaps and Derivatives Association ("ISDA"), collectively "the Associations", are pleased to provide comments on ESMA's Consultation Paper on its guidelines on information expected or required to be disclosed on commodity derivatives markets or related spot markets under MAR (the "Consultation Paper"). We appreciate ESMA's desire to engage with third parties from within the commodity derivatives markets in order to compose these guidelines.

Summary of key issues:

- We urge ESMA to look at the criteria for defining inside information in the round. If a piece of information is reasonably expected to be disclosed, or required to be disclosed, but it is never likely to have a significant price effect if it were disclosed, then it should not feature in these guidelines, e.g. the illustrative examples in relation to freight markets in paragraph 35 and 36 of the CP.
- This is an area, which may well develop over time, with education through experience, of what the market may reasonably expect, with various regional or national permutations. The amount of information legally required to be disclosed will increase with the throughput of regulation. We call for as much clarity as possible so that the industry can conduct its businesses in an appropriate manner, as per the FCA's Senior Management regime, from Day 1.
- Where the information depends on MiFID II, we would recommend ESMA give clarity on the application date of the guidelines.

We understand that emission allowances are excluded from this consultation. We call on ESMA to clarify where clean dark and clean spark spreads fit, as it is not clear whether these fall under emission allowances or commodity derivatives.

We remain at your disposal to discuss this response in more detail.

Yours sincerely

FIA

International Swaps and Derivatives Association

FIA

FIA is the leading global trade organisation for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's member firms play a critical role in the reduction of systemic risk in global financial markets. For more information, visit www.fia.org

ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org

Appendix I: Response to Questions within the Consultation Paper

Note: While answers are provided to certain questions within the Consultation Paper based on the importance to the membership of the Associations, the fact that a question is ***not*** answered should not be interpreted as agreement with the position outlined in the Consultation Paper ("CP").

General comments

We would like to express our support for ESMA's reiteration of the key point (set out in para 6 (p.8) of the CP and in point 2 of the draft guidelines (p.21)) that the fact that a particular type of information appears on the list does not mean that it will automatically be inside information if the other criteria set out in Article 7(1)(b) of MAR are not met. We encourage ESMA to repeat this statement clearly in the final version of the guidelines, when published.

Further to, and in support of this key issue, our members are concerned that the inclusion of examples of information on the non-exhaustive list which could not fulfil the other criteria set out in Article 7(1)(b) of MAR to being "inside information" with respect to commodity derivatives (e.g., because they could never have a significant effect on price or because they have been made public) is misleading. This could potentially lead to an over-cautious approach being taken to the giving and receiving of such information given the uncertainty surrounding a case-by case analysis of the factual circumstances in which such information is given and the fear of judgement in hindsight of market conditions. It is entirely possible that this could lead some Compliance functions within the market to an effective presumption that any information that is on the non-exhaustive list is at risk of being "inside information" when, in fact, for some examples this cannot be the case. There is a real danger that this non-exhaustive list, if not properly drawn, could create uncertainty .

We argue that this too-wide drafting of the non-exhaustive list goes against the reasoning for drawing up the list in the first place. It also has the potential to seriously impair market development and responsiveness and to create a climate of fear of breaching insider dealing prohibitions where, in fact, no such risk exists. We strongly urge ESMA to restrict examples strictly to information that could potentially have a significant price impact and to exclude those that could not. Alternatively, and to avoid "false positives" which could unnecessarily impair orderly market function, we believe it would be helpful for ESMA to provide distinguishing examples that (while falling within the non-exhaustive list of information expected or required to be disclosed) definitely would not be inside information because they could never satisfy the other limbs of the inside information test (e.g. because they could not have a significant effect on price or because they have been made public).

We would like to emphasise that the scope of ESMA's mandate in respect of this CP is to issue guidelines to establish a non-exhaustive indicative list of information expected or required to be disclosed in accordance with legal or regulatory provisions at EU or national level, market rules, contract, practice or custom, of the relevant commodity derivatives markets or spot markets. In circumstances where there is no legal or regulatory requirement to disclose and whether to disclose information (or not) is entirely at the discretion of private entities that are not subject to any organised market rules requiring such disclosure, we argue that there can be no expectation of disclosure, or of continued disclosure and that it is outside of ESMA's mandate to create one where none currently exists.

Further, we argue that a publication or expectation of disclosure can exist in one market, but it should not necessarily follow that the existence of a disclosure expectation in that market should automatically create an expectation of disclosure in another. If this were the case, this could be construed as ESMA effectively imposing an expectation to disclose on a similar/ new market, if one

were to be established, which would arguably restrict a new exchange or other market's ability to set its own disclosure rules and which, arguably, would be beyond the scope of ESMA's mandate.

ESMA does not provide any real guidance as to the meaning of the phrase 'reasonably expected to be disclosed' as criteria relevant to determining "inside information" pursuant to Art. 7.1(b) MAR in order to define further, what could be relevant disclosable information. As a result, the examples provided by ESMA are somewhat random and are very broad in scope. Therefore, we propose incorporating further guidance on assessing whether or not information is reasonably expected to be disclosed and would suggest the following clarifications:

(i) it is widely disclosed (i.e. information to the public and not only to a limited number of recipients, for example, to members of an association or an exchange or in return for payment of a subscription or fee);

(ii) it is an "official" communication of the disclosing person and not an opinion or the result of analysis of a third person or merely a rumour or speculation;

(iii) it is information which is regularly published rather than information which is published on an irregular basis or rarely as it is not possible for the market to "reasonably expect" such information to be published.

Furthermore, we urge ESMA to consider the overlap between MAR and REMIT. In particular, it would be helpful if ESMA could clarify in its final guidelines that market participants in possession of inside information with regard to wholesale energy products pursuant to REMIT are permitted to disclose such information pursuant to Art. 4 of REMIT without concern that such disclosure is deemed to be unlawful disclosure under Art. 10 of MAR. Once such information is disclosed pursuant to REMIT, it should no longer be considered to be inside information pursuant to REMIT or MAR.

Meaning of "spot market":

There is a lack of clarity around the meaning of a "spot market" as the term is used in this CP. Is this intended to refer to a specific market place (such as an exchange) where spot contracts are traded or to a more generalised concept of a market of habitual buying and selling interests for an underlying commodity on a spot basis, even in circumstances where there may not be a single spot commodity price? ESMA's use of the words "more or less organised (para 19, p.10) is also unclear. We believe the market would benefit from clarification of ESMA's meaning here.

We also argue that in respect of information on spot market transactions, certain types of information may be reasonably expected to be disclosed where there is an organised and centralised market for a spot commodity, but if ESMA intends to infer the more general sense of a "spot market", i.e., a series of disparate bilateral trades outside of a trading venue, suggesting that there is an expectation of publication is not accurate and does not reflect market practice.

In addition, the definitions of a "spot market" and a "spot commodity contract" refer to commodities (i.e. goods of a fungible nature that are capable of being delivered), whereas the definition of "commodity derivatives" is wider and includes C(10) instruments without a related spot commodity market, which includes freight derivatives. There is, however, a spot freight market. Does this mean (in accordance with para 24/25 (p.12 and 13)) that freight is regarded as not having an underlying spot market for the purposes of these guidelines, given that the spot market in question does not relate to commodities?

Status of clean/dark and clean/spark spreads[1]:

With regard to para 27/28 (p.13), it is not clear whether clean-dark and clean-spark spreads are intended to be within scope of the guidelines or not, as the guidelines expressly exclude emission allowances and derivatives thereof.

We believe that the market would benefit from more clarity as to whether such spreads would be classified as derivatives on emission allowances (and so be outside scope of these guidelines) or commodity derivatives (and so within scope).

This is important for the purposes of working out which definition of "inside information" applies to them and whether any information related to emissions allowances potentially could be relevant for the purposes of this non-exhaustive list.

3.3 ***Information considered in the Guidelines***

Q1: Do you agree with the examples provided? If not, please explain.

a) Position limits:

Concerning the statement in para 30, p.13/14 of the CP, we believe it would be helpful to clarify in addition to the fact that the disclosing entity in respect of such information is the exchange or other trading venue operator, that aggregated positions by category of person are anonymised, and that individual position holder positions should not be required, or expected, to disclose their own positions. Market participants should be able to hold information on their own physical positions, and expected changes to these positions, and be able to place orders in the market with this knowledge in mind. If the opposite were true, this would require firms to disclose their positions and trading/investment intentions to the market prior to trading, putting them at a disadvantage to their peers. We believe the result would be reduced market activity and liquidity to the detriment of all market participants. Therefore, the guidelines would benefit from a positive statement by ESMA that the non-exhaustive list includes information "reasonably expected to be disclosed", but should not in itself be deemed to change these disclosure expectations.

b) Changes to standardised commodity derivatives (paragraph 31 of the CP):

We agree that information listed in paragraph 31 (a) and (b) of the CP, such as circumstances that change the fundamental characteristics of a commodity contract (e.g. a change in the underlying commodity specifications) or changes to tick sizes, strike prices or delivery points, could theoretically amount to inside information. However, our members point out that in practice, trading venues are managing this type of information so that it is very unlikely that the other criteria of Art 7 (1) (b) MAR, in particular a significant effect on the price, are met. Trading venues implement such changes: a) by creating a new contract rather than modifying current specifications when there is open interest; b) by only applying the change to those deferred delivery/expiry months of the current contract in which there is no open interest; or c) applying the change to all contract months whilst applying offsetting payments or making other adjustments (e.g. to settlement reference prices) to neutralise any windfall profits and losses. As such, and in order to avoid confusion among market participants, the guidelines should contain wording that, in practice, such information would not amount to inside information in circumstances where the trading venue takes steps or has a process to prevent or neutralise the financial impact of such changes on open interest holders, as set out above.

[1] The **spark spread** is the difference between the price received by a generator for electricity produced and the cost of the natural gas needed to produce that electricity. It is typically calculated using daily spot prices for natural gas and power at various regional trading points. A **clean spark spread** is the spread equal to the regular (or 'dirty') spark spread minus the CO2 emissions cost for gas-fired power plants. This spread then represents the net revenue on power sales after gas costs and emissions allowance costs. An analogous spread for coal-fired generation plants is typically referred to as a **clean dark spread**.

Additionally, even in circumstances where there is open interest in existing commodity derivative products, we would argue strongly that references in the list to a change in the underlying commodity specifications should be qualified to refer to a "material" change. By way of example, a change to a single delivery point in a product with only one specified delivery point in the contract specifications would be material, whereas a change to a delivery point by adding an additional optional delivery port to a contract where the contract specified only NW Europe delivery, giving several port options, would not have a significant price effect, so would fail the Article 7(1)(b) test. Our members are strongly of the view that it would be helpful to market participants and trading venue operators to clearly differentiate in the list between material and non-material contractual specification and microstructural changes and not to do so could potentially impair orderly market function and constrain the types of communications between trading venue operators and market participants that are vital to maintaining that orderly functioning in evolving markets.

Further, with regard to para 31 (a) of the CP, we believe that any communications with the market, prior to a formal consultation on proposed new products or new indices (even where these are lookalikes to existing products on other venues or to bilateral OTC products) or any trading venue rule changes in connection with the same could never have a significant price impact on an existing commodity derivative. For this reason, these should be explicitly excluded from the non-exhaustive list.

In relation to other types of changes in connection with existing products we do not believe that the periodic reshuffle of an index basket, where it is based on a disclosed methodology, can be considered as "exceptional circumstances". We would, however, expect the methodology and basket changes to be disclosed.

With regard to para 31 (b) i., our members feel ESMA's reference to strike prices is unclear. If the term refers to "strike price intervals", then changes to those should not be regarded as price sensitive, and thus inside information. If, however, ESMA refers to the "value of existing strike prices", then theoretically, these could be price sensitive. However, trading venues would manage this price impact as outlined in this paragraph b) of our response.

With regard to para 31 (b) ii. and iii., we believe that great care needs to be taken in the guidance relating to market makers. The development of any market-making scheme must necessarily involve interaction with existing and potential market makers. If their ongoing market activity during any such discussions potentially could be considered to be based on information that could be regarded as inside, this could limit their trading activity, which would have a significant negative impact on market liquidity. This would be particularly problematic in the case of potential new market makers, who may not be able to use any market-making safe-harbour to give them comfort that they could continue to trade in possession of such information. Further, we argue that changes to requirements that market makers on commodity derivatives have to comply with under the rules of a trading venue would never be likely to have a significant effect on the price of a commodity derivative or on a related spot commodity contract. At any rate, such requirements are usually public information as they are contained in the rules and regulations of the trading venues. On that basis, it is not appropriate or useful to include these types of information in the non-exhaustive list.

Our members also point out that compensations to the market makers are typically part of an agreement that is negotiated between the trading venue and the market maker and that is not publicly disclosed. Market making is a service that is delivered and compensated. For obvious commercial reasons, information on the content of such exchange of service agreements cannot be expected to be disclosed. If the names of market makers had to be disclosed, some markets would simply not exist. For that reason, market making agreements may include confidentiality clauses about the name of the market maker.

Our members are strongly of the view that examples which do not meet all the conditions of the test in Article 7(1)(b) of MAR, and could not under any reasonably foreseeable circumstances do so, should not be included in the guidelines as an example of information which is reasonably expected or is required to be disclosed in accordance with Article 7(1)(b) of MAR.

We note that the example of MiFID Position reporting is included in paragraph 3 of the guidelines on page 21 of the CP. We would ask for clarity from ESMA that this would not take effect until there is a MiFID position reporting regime, post 3 January 2018.

Q2: Can you think of other examples of information directly relating to commodity derivatives that should be considered in the Guidelines? Please explain.

No comment.

3.3.2 ***Examples of information relating indirectly to commodity derivatives without a related spot market***

Q3: Do you agree with the above examples? If not, please explain.

The guidelines in relation to C10 should be delayed until the application date of MiFID II, as the impact of MiFID II on C10 instruments is still unclear.

Q4: Can you think of other examples of information indirectly relating to commodity derivatives that should be considered in the Guidelines? Please explain.

No comment.

Q5: Do you agree that information relating to the "goods" subject to the freight contract should be considered as information indirectly related to derivatives on freight rates? Please, explain.

On page 22, paragraph 6, it is noted that 'information providers' is a very broad term which would seem to have the ability to capture anyone. Paragraph 6 is broadly drafted and could potentially include a large variety of information, most of which would not meet the other criteria of inside information. We would be grateful, if this example could be further specified.

We believe that it is difficult to link, or foresee, the correlation between goods and the impact this could have on the underlying freight price. Freight derivatives themselves are not specific to cargo. For example, in the list of examples given in paragraph 36, a strike or weather conditions blocking the port are said to affect the transport process and thus the prices of derivatives. In both of these examples, it is hard to see how a strike or the weather is not public information. This example fails the principal text set out on page 7 of the CP; therefore we advise that it should be excluded as it is a false example of non- public information.

Q6: Can you think of other examples of information expected/required to be disclosed in relation to commodity derivatives for which the underlying asset is not an actual commodity as per the MAR definition? Please, specify.

No comment.

3.3.3 ***Examples of information directly relating to a spot commodity contract***

Q7: Can you think of other example of information related to the infrastructures, storage facilities and transportation (e.g. pipeline)? Please specify.

We would urge ESMA to clarify that, just as on page 22 (10) of the CP, the communications issued by conferences must be ***official***. Paragraph 44 of the CP does not clarify this as it says it 'relates to the news or press releases about the outcome of the conferences…'. Otherwise, this section is confusing. There is no legal or regulatory requirement for meeting notes or press releases to be published or

made available to the public. There is also a broader concern about all news having to be disclosed – this would be impractical to achieve.

Q8: Can you think of other examples of information that are expected or required to be made public in relation to agricultural commodities? Please specify.

With reference to paragraph 49 on page 18 of the CP, and storage and delivery: the guidelines address very detailed information and we find it hard to conceive how an isolated event at one warehouse would affect the pricing of the whole market, unless the one warehouse contains a large portion of the overall stock. Any issues affecting storage are typically in the news before the market opens and are thus unlikely to be non-public information.

Further, paragraph 16 of the Guidelines on page 23 of the CP includes information on diseases and changes in subsidy policies, irrespective of the impact of such information on commodity derivatives. We recommend including wording to clarify that this type of information would need to have a material impact. Paragraph 16 could read as follows:

"Information reasonably expected to be disclosed in relation to the existence of a disease materially affecting agricultural products or material changes in the subsidy policies relating to these products that result from decisions of public entities."

Q9: Can you think of other examples of information that are expected or required to be made public in relation to metal commodities?

We would recommend that paragraph 55, page 20, of the CP is restricted to 'material changes', as otherwise the scope is too wide. This also applies to paragraph 17, page 23, i.e. information about the stocks or **material** stock movements of metal commodities in warehouses and storage facilities…'

With regard to paragraph 53 of the CP, an exchange may have information on registered stocks, but there is no expectation that it would publish import and export data, production data, etc. Similarly, information on spot market transactions may be reasonably expected to be disclosed where there is an organised and centralised market for a spot commodity, but in the more general sense of a market, being a series of disparate bilateral trades outside of a trading venue, suggesting that there is an expectation of publication is not accurate and does not reflect market practice. In addition, with regard to metals transactions, we would make the point that not all metal is held on warrant, or on warrant with an EU trading venue, and as such, stocks data can be misinterpreted.