

ESMA'S QUESTION & ANSWER (Q&A) TOOL

QUESTION SUBMISSION FORM

IDENTIFICATION	
1.	<i>Name of entity</i>
	International Capital Market Association
2.	<i>Country of incorporation / Residence</i>
	Other - please specify below
	Switzerland
3.	<i>E-mail address / Other contact details</i>
	ruari.ewing@icmagroup.org
4.	<i>Sector</i>
	Banking
LEGISLATIVE REFERENCE	
5.	<i>Level 1</i>
	Market Abuse Regulation (MAR) Regulation (EU) No 596/2014
6.	<i>Article/s of Level 1 Legislative Act</i>
	Article 11 (Market soundings)
7.	<i>Other relevant Act/s or Guidance</i>
	Associated Regulations (EU/2016/959 and EU/2016/960)
QUESTION	
8.	<i>Subject matter</i>
	Mandatory or optional status of MAR pre-sounding procedures
9.	<i>Question</i>
	“Question: Is compliance with the provisions of Article 11 MAR (and the processes set out in Implementing Regulation EU/2016/959 and Delegated Regulation EU/2016/960 (the “Level 2 Sounding Regulations”) obligatory?”

10. *Proposed answer*

“Answer: When conducting a market sounding, disclosing market participants (DMP) must always comply with the requirements in Article 11.3, Article 11.6 and Article 11.8. Market sounding recipients (MSR) must similarly always comply with the requirements in Article 11.7. It is not mandatory for a DMP to follow the steps at Article 11.5 (see Recital 35 MAR in this regard) and amplified in the Level 2 Sounding Regulations.

However:

- if a DMP follows the steps at Article 11.5 and amplified in the Level 2 Sounding Regulations (as well as complying with Article 11.3), it will be able to take advantage of the protection set out at Article 11.4 of MAR, such that the disclosure of inside information in the course of a market sounding will be deemed to be made in the normal exercise of a person’s employment, profession or duties;
- if a DMP discloses inside information but does not follow the steps at Article 11.5 and in the Level 2 Sounding Regulations, the DMP will need to demonstrate that the disclosure was made in the normal exercise of their employment, profession or duties, in order to comply with Article 10 MAR.

It is not a breach of MAR for a DMP not to follow the processes and requirements set out in the Level 2 Sounding Regulations (including Article 3(1) and 3(4) of Delegated Regulation 2016/960) when disclosing information which is not inside information during a market sounding.”

11. *Relevant background*

There has been some industry uncertainty about whether compliance with the Level 2 sounding Regulations is mandatory, and the suggested Q&A is intended to try and clarify this.