



February 15, 2020

Via Email

International Organization of Securities Commissions (IOSCO)
Calle Oquendo 12
28006 Madrid
Spain
consultation-05-2019@iosco.org

Re: MFA Comments on IOSCO Consultation Report – *Conflicts of interest and associated conduct risks during the debt capital raising process*

Dear Sir or Madam:

Managed Funds Association (“MFA”)¹ welcomes the opportunity to provide comments in response to the IOSCO Consultation Report on *Conflicts of interest and associated conduct risks during the debt capital raising process* (the “**IOSCO Report**”).

MFA’s members are significant participants in global debt capital markets; our members act almost exclusively in the capacity of investors, both in respect of primary market issuances and in secondary market trading of debt instruments.

MFA appreciates IOSCO’s efforts to enhance investor confidence in the integrity of the capital raising process and improve the efficiency of this process as a route for issuers to raise finance. In particular, MFA supports IOSCO for proposing measures to improve access to information to participants in debt capital markets and which seek to reduce conflicts of interests that have the potential to negatively affect investor interests in debt capital markets.

As is set out in further detail below, MFA supports IOSCO’s recommendation that regulators should encourage the timely provision of a range of information to investors in a debt securities offering, as set out in Measure 3 in the IOSCO Report, and IOSCO’s recommendation that regulators should consider requiring firms to have appropriate controls to identify, prevent where possible and manage any conflicts of interest that arise in the preparation of research on a debt securities offering.

¹ MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

Measure 3: Regulators should encourage the timely provision of a range of information to investors in a debt securities offering, where distribution of such information is permitted under local law.

MFA notes that existing rules relating to conflicts of interest in debt capital markets, for example under the European Union (EU) framework for investment services provided for in the Markets in Financial Instruments Directive² and Regulation³ (collectively, “**MiFID II**”), generally have a greater focus on the conflicts of interest which may arise between a bank (or corporate finance firm) and an issuer of debt securities. In particular, investors are generally not regarded as “clients”, either of the issuer or the arranging bank, to whom fiduciary or investor protection duties would otherwise be owed; rather investors are treated as arm’s length counterparties to whom fewer protections apply.

Although public debt securities issuers are, like equity securities issuers, generally required in most jurisdictions to publish an offering document or prospectus, it is MFA members’ experience that such offering documentation often does not contain all materially relevant information which would enable prospective investors to make informed investment decisions with respect to a particular debt security. Moreover, the lack of a fiduciary relationship between the issuer/arranging bank and prospective investors may, in some circumstances, cause issuers to consider their own interests in restricting access to commercially sensitive information above an investor’s need to access information for the purposes of making an investment decision.

On November 29, 2019, MFA and the Alternative Investment Management Association (“**AIMA**”) provided responses to the European Securities and Markets Authority (“**ESMA**”)⁴ consultation paper *MAR Review Report*⁵. Among other things, MFA and AIMA noted that some public issuers, particularly those with only listed bonds, have been narrowly construing the definition of “inside information” under the EU Market Abuse Regulation (“**MAR**”),⁶ so that fundamental documents needed for the accurate evaluation of listed financial instruments are not disclosed. For example, MFA members have experienced documents that are material to the credit structure of an issuer being withheld from the public despite including highly material information, such as restructured liabilities and payout waterfalls, on the basis that such documents do not contain any “inside information”.

In other instances, our members have encountered differential treatment as between an issuer’s existing bondholders, who are able to obtain access to bond transaction documents (albeit subject to non-disclosure agreements), and other market participants to whom the existence of such documents is disclosed but without any disclosure as to the importance of the information within them. Such disparities can be particularly acute when investors are contemplating investments in prospective issuances in the context of frequent issuers who, as IOSCO notes, are often able to announce and then price an issuance within a matter of hours.

² Directive 2014/65/EU on markets in financial instruments.

³ Regulation (EU) No 600/2014 on markets in financial instruments.

⁴ MFA / AIMA letter to ESMA dated 29 November 2019, “*ESMA Consultation Paper: MAR Review Report*”, available at: <https://www.aima.org/uploads/assets/93d9ee13-911c-4c82-829ae09c66e2af19/AIMA-MFA-Response-to-ESMA-MAR-Consultation-Paper.pdf>

⁵ ESMA Consultation Paper, “*MAR Review Report*”. Available online at https://www.esma.europa.eu/sites/default/files/library/mar_review_-_cp.pdf

⁶ Regulation 596/2014 of the European Parliament and of the Council. Available online at <http://data.europa.eu/eli/reg/2014/596/oj>

Prospective investors who are not existing bondholders are at a material information disadvantage versus existing bondholders.

Taking account of the above, MFA asks IOSCO to recommend to regulators that issuers of debt instruments should be required to disclose all relevant bond transaction documents (including, without limitation, any collateral documents and intercreditor documents, as well as all amendments and supplements thereto) to interested investors, without the need for non-disclosure agreements, without requiring such participants to become bondholders first.

In this regard, MFA respectfully suggests amendments to Measure 3 to clarify the information standard. Measure 3, as currently drafted, states that regulators should “encourage” the timely provision of “a range of” information. MFA believes that regulators should instead “require” the timely provision of “all relevant” information. As amended, Measure 3 would read as follows (changes in bold italics):

“Measure 3: Regulators should ***require*** the timely provision of ***all relevant*** information to investors in a debt securities offering, including, without limitation, all deeds and agreements governing the debt securities, including any collateral and intercreditor agreements (together with all amendments and supplements thereto), where distribution of such information is permitted under local law.”

Measure 4: Regulators should consider requiring firms to have appropriate controls to identify, prevent where possible and manage any conflicts of interest that arise in the preparation of research on a debt securities offering.

MFA notes that, unlike equity issuances, new bond issuances are typically not accompanied by research publications. Where such research does exist, this is likely to have been prepared by the arranging bank. MFA notes the potential for conflicts of interest between an arranging bank and an investor in such circumstances. Whereas the bank has an interest in successfully placing the issuer’s debt securities, an investor requires accurate information regarding the issuer, including any potentially negative factors regarding the issuer or its securities, in order to make an informed investment decision.

MFA agrees with IOSCO’s proposed measure to require arranging banks to have appropriate controls to identify, prevent or manage conflicts of interest when preparing research. However, as MFA notes in response to Measure 3, disclosure of all relevant transaction documentation to interested investors, would improve such investors’ ability to assess the merits of an issuance of debt securities better for themselves, which may also mitigate the harm to investors arising from the potential for conflicts of interest in the case of an arranging bank publishing research relating to the issuance.

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February 15, 2020

Page 4 of 4

MFA thanks IOSCO for the opportunity to provide comments on the IOSCO Report. We would welcome the opportunity to discuss our views in greater detail. Please do not hesitate to contact Jennifer Han, or the undersigned at +1 (202) 730-2600 with any questions IOSCO or its staff might have regarding this letter.

Respectfully submitted,

/s/ Michael Pedroni

Michael Pedroni
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