



Commodity Markets Council – Europe

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Dr. Kay Swinburne MEP

European Parliament
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Dear Dr. Swinburne,

Further to your request for input on the recently published ESMA MiFID2/MiFIR Regulatory Technical Standards (RTS), please find below the preliminary views of the members of the Commodity Markets Council – Europe (CMCE). We have limited our detailed comments to RTS 20 (Ancillary Activity) and RTS 21 (Position Limits).

RTS 20 – Main Business Threshold

- (1) We remain concerned by Article 3 of RTS 20 on main business thresholds (previously “Group Test”). In our view, the proposed assessment on the basis of trading in financial instruments is a poor proxy for the main business of a non-financial entity or group. While we welcome the change set out in Article 3(4), the vast majority of persons seeking to avail of the ancillary activity exemption will have assets, business lines and investments entirely unrelated to their trading in financial instruments as assessed in the revised RTS.

While we appreciate that ESMA has moved away from this option, we continue to support an assessment of trading based on the allocation of accounting capital. While we understand ESMA’s desire to use trading activity as a proxy, we consider the accounting capital test far easier for most market participants to apply and a more accurate assessment per the Article 2(1)(j) and (4) requirements. We would therefore encourage you to support *optionality* in the RTS - specifically amendments to Article 3 of RTS 20 that would allow persons to use either trading activity, or accounting capital to assess whether their non-privileged trading activity is ancillary compared with their main business at group level.

RTS 20 – Hedging exemptions

- (2) CMCE broadly supports the changes ESMA has made on the application of the hedging exemption in the revised RTS provisions. We have long pointed to the inconsistency between the current ESMA EMIR Q&A guidance on portfolio hedging and the Article 10 EMIR provisions. We would however encourage the deletion of the last sentence of Recital 14 in RTS 20. This sentence risks excluding from the hedging exemption the necessary components of a portfolio that may not be demonstrated as objectively measurable as reducing risks, which would deny the reality of firms’ physical business including the management of their risk hedging.

RTS 20 – Intragroup transactions

- (3) CMCE is concerned that absent an Article 13(2) EMIR equivalence decision, intragroup transactions between EU persons and US affiliates cannot be excluded from the numerator of the Group Test in

Article 3 of RTS 20. We would appreciate every effort to encourage the European Commission to deliver these decisions before the application of the new secondary legislation.

RTS 20 – Phase-in

- (4) While CMCE welcomes ESMA's changes to Article 4, we still consider the proposal to apply the ancillary activity exemption on the basis of data covering periods starting from 01 July 2015 impractical and unlawful. We believe that persons seeking to avail of the exemption must be considered provisionally exempt from 03 January 2017 pending completion of their first rolling-year average assessment.

We note with concern that RTS 20 is silent on the data for the Article 2 assessment (non-privileged trading activity v EU trading activity) in the eight (8) asset classes. This provision appears drafted to depend on transaction data reported to trade repositories per Article 9 EMIR and thus only accessible to ESMA. We encourage European legislators to seek a provision mandating ESMA to provide the data required for the Article 2 assessments, to do so quickly and to consider checks and reviews to ensure that the data is credible given concerns about reconciling transactions reports.

RTS 21 – Position Limits

- (5) We recognise the political sensitivity of the proposed position limits regime and we note ESMA's late-stage changes to RTS 21 to curtail the discretion of national competent authorities in setting position limits. We understand ESMA's tactical approach but we caution against undue restrictions on the discretion of national regulators. There is no single position limit suitable for all commodity derivative contracts and lower limits will not lead to lower prices in the underlying commodity. Indeed, such limits are likely to have the opposite effect through inefficient hedging, diminished liquidity and obstacles to price convergence. We encourage you and like-minded legislators to resist the push of others to set limits in the RTS, rather than on the basis of a common methodology as specified in Article 57 MiFID 2.
- (6) While CMCE supports the substantially revised provisions on the RTS 21 hedging exemption, we would appreciate a hedging exemption procedure that is efficient for market participants and national regulators so that that exemptions may be granted for a group of similar contracts where used to manage the risks of commercial activity.
- (7) We note concerns raised as to the application of pre-trade transparency requirements for certain packaged transactions commonly used by commodity market participants for risk management purposes. We consider these transactions to be within the scope of the Article 8(1) MiFIR exemption and we encourage you to support clarifications to this effect.

We hope these comments will be of use to you in your consideration of the MiFID 2 and MiFIR RTS and appreciate your efforts to make the drafting process inclusive. We remain at your disposal to provide any additional information on the above issues.

Yours sincerely,

Jonathan Hill

Chair, Commodity Markets Council – Europe

