



Commodity Markets Council - Europe

C/O Norton Rose Fulbright LLP
3 More London Riverside
London SE1 2AQ
United Kingdom

Tel: +44 (0)20 7444 5693; +32 (0)2 237 6140
Fax: +44 (0)20 7283 6500; +32 (0)2
Eml: conor.foley@nortontrosefulbright.com
Wb: www.commoditymks.org

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Tilman Lueder
Head of Unit C3 - Securities Markets
DG Financial Stability, Financial Services and Capital Markets Union
European Commission
Rue de Spa 2
BE - 1000 Brussels

Amendments to draft RTS 20 (Ancillary Activity exemption)

Dear Tilman,

I am writing to you on behalf of the Commodity Markets Council – Europe (**CMCE**) and regarding amendments to draft regulatory technical standards (**RTS**) for Article 2(4) of Directive 2014/65/EU on markets in financial instruments (“MiFID 2”) proposed by the European Securities and Market Authority (“draft RTS 20”) and under Article 57 MiFID 2 (“draft RTS 21”).

Many CMCE members will seek to avail of the Article 2(1)(j) MiFID 2 exemption. We are encouraged by amendments to RTS 20 that we have heard the Commission will make. We are, however, concerned that without amendment the final Commission draft will not provide for legal certainty for market participants. Our concerns pertaining to phased application of the exemption and the Article 4 calculation period are set out in more detail below.

1. “Main business” assessment and capital calculations

We strongly support amendments to the draft RTS that would introduce an alternative ‘capital employed’ test to determine whether a person’s non-hedge positions in commodity derivatives, emission allowances and derivatives thereof are ancillary to that person’s main business when considered on a group basis. We understand the Commission is minded to set a threshold of 10%. Our members consider this to be reasonable. We support using the simplified approach of Article 360(1) of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (“Capital Requirements Regulation” or CRR) to calculate a capital measure of non-hedge positions. We consider the sum of group total equity plus long-term debt to be an apt metric for main business on a group basis.

We believe that the draft technical standard should present this ‘capital employed’ test as an alternative to the so-called ‘proxy approach’ proposed by the European Securities and Markets Authority (ESMA). We see no legitimate basis to restrict eligible persons to one calculation or another.

2. Assessment periods and phased application

We remain very concerned by any provisions that would require assessment of either the “trading activity” or “main business” calculations retrospectively. We note that Article 2(1)(i) MiFID was not applied retrospectively and we see no basis in the MiFID 2 legislation to do so for the exemption as amended. We understand that some Commission services disagree but note that no argument supporting retrospective application has to date been presented to either the Council of Ministers or European Parliament.

Whatever the legality of retrospective application, we believe that the current timetable will make retrospective application unworkable. Despite repeated reassurances, we have to date received no market data for the purposes of the “trading activity” calculation. We do not expect to see any such data this year and we are sceptical that the preliminary data that may be offered by ESMA will be credible given the deficiencies of reporting under Article 9 of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (“European Market Infrastructure Regulation” or EMIR). Even if credible market data were provided today, market participants would have only 15 months to run the calculations for multiple EU affiliates, restructure trading amongst affiliates, transfer or exit positions, restructure clearing arrangements and seek authorisation for one or more subsidiaries in one or more Member States. The challenges of these tasks should not be underestimated. The material risk of retrospective application is that, come 03 January 2018, market participants are neither authorised nor exempt. In certain jurisdictions, such market participants may be subject to criminal prosecution and their positions could be unenforceable, which in turn risks significant disorder in commodity derivative and emissions markets.

We have consistently advocated a practical approach, whereby a person eligible to use the Article 2(1)(j) MiFID 2 exemption notifies their national competent of authority of their intention to do so and that person is considered to be exempt from the Article 5 MiFID II authorisation requirement until such time as it no longer meets the conditions of the exemption. We believe that such requirements for preliminary exemption could be easily expressed in the draft technical standard.

However, we believe there is basis for compromise. We appreciate the work undertaken by the Commission in amending the “main business” assessment and we do not wish to endanger these amendments. We believe a sensible compromise could be based on commencing calculations from 03 January 2017, by which time we expect the draft technical standard to have entered into force and there to be at least preliminary market data from ESMA. Coupled with the preliminary exemption provisions advocated by CMCE members, market participants would have 24 months within which to complete calculations, restructure businesses and positions accordingly and seek authorisation for affiliates as and where necessary. This would avoid the expected delays to authorisation ahead of 03 January 2018 and widespread disruption to European commodity derivative and emission markets.

We consider such a compromise appropriate, especially as for many market participants the Article 2(1)(j) exemption is part of the solution to the expanded scope of MiFID 2 rather than a complete solution.

3. RTS 21 (Position Limits)

Finally, CMCE members would like to reiterate our support for the revised text of RTS 21 on position limits for commodity derivatives as proposed by ESMA on 02 May 2016. We consider that the proposed methodology grants national competent authorities sufficient discretion to apply lower limits for more volatile contracts while maintaining the possibility of applying higher limits where necessary for less liquid contracts. We therefore encourage the Commission to adopt the final RTS 21 without any further amendments.

We thank you and your colleagues for your continuing work on these most-important provisions in the MiFID 2 legislation. CMCE members and I remain at your disposal should you or your colleagues like to discuss in more detail.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Hill', with a stylized flourish at the end.

Jonathan Hill
Chairman
CMCE Executive Committee