From: Foley, Conor
To: Paul.Willis@fca.org.uk
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Subject: CMCE – Suggested amendments to revised draft RTS 20 (Ancillary Activity exemption)
Date: Tuesday, September 01, 2015 12:06:36 PM

Dear Paul,

Ahead of the Commodity Derivatives Taskforce meeting this week, the members of the Commodity Markets Council – Europe (CMCE) ask you to consider the following amendments and clarifications to revised draft RTS 21 on Article 2(4) MiFID 2 pertaining to the Ancillary Activity exemption.

(1) We consider that Article 2 needs appropriate wording on portfolio hedging. We consider the current ESMA EMIR Q&A at OTC 10(3)(c) to be inconsistent with EMIR and inappropriate for MiFID 2 and MiFIR provisions. Copying this guidance into relevant RTS does not fix this problem. To effectively exclude hedging activity from the exemption calculations, as envisaged by the co-legislators, we suggest the following amendments to Article 2:

(a) include express reference to the hedging effects of derivative contracts in combination with other contracts and through closely correlated instruments in Article 2(1);
(b) delete the last sentence of Article 2(2)(b), which contrary to Article 10(1) CDR 149/2013 precludes classifying a whole portfolio as objectively measurable as reducing risks even if it can be shown that the aggregate effect of the whole portfolio is risk reducing; and
(c) delete the Article 2(3) exclusion from the hedging exemption for necessary components of a portfolio that may not be demonstrated as objectively measurable as reducing risks.

(2) The current draft provides no legal certainty as to the data for the Article 4 “market share test”. This must be addressed in the draft RTS to facilitate any meaningful assessment of a person’s status relative to the proposed thresholds. We note particular questions regarding the treatment of exchange-traded derivatives and intragroup transactions. We support the use of trade repository data but have grave concerns as to the quality of this data. In any case, ESMA’s calculation methodology should be subject to consultation, periodic review and publicly disclosed with a list of all proposed information sources.

(3) We oppose the revised “group test” in Article 5 of draft RTS 20. We do not believe that hedging activity in financial instruments can be used as a proxy for a person’s main business for the purposes of the exemption as it ignores the significant investments of commodity market participants in fixed assets and resource-intensive activities unrelated to derivative markets. We continue to support an assessment of trading activity based on accounting capital. Any revised trading activity assessment must include all relevant trading activity and metrics reflecting activities, assets and investments unrelated to a person’s trading in financial instruments.

(4) With regards to the implementation provisions in Article 7, we consider the use of 2015 data inappropriate. Applying the exemption in this manner would necessarily include activities undertaken prior to any certainty on the exemption or indeed the data for assessing market size. We believe the three-year rolling average should commence no earlier than 03 January 2017. We note no impediment in the MiFID 2 legislation to a proportionate phase-in period for the exemption.

CMCE members thank you for taking the time to review the above-listed points.

Kind regards,

Conor

(On behalf of the Commodity Markets Council – Europe)

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