

From: Sonja Erica Väisänen
Sent: 30 July 2018 17:41
Cc: cmce@humbrophy.com
Subject: For your response by Fri 10 August – Sample notification emails in bookout agreements

Dear Member of the CMCE MiFID WG,

As discussed last Thursday, 26 July during the call of the MiFID WG on the classification of physical forwards, we are writing to you to ask you to send us the text of a sample notification email of a bookout agreement. We will then aggregate the texts provided and circulate a draft notification text for your approval.

During the call, a member of the advisory team provided an overview of two sample contracts which are attached (SUKO 90 and Open Sec Nafta) in light of the definitions of C5 and C7 of Annex 1 in MiFID II. Please find the call summary below.

It was decided that one way to help bolster the analysis would be to review and potentially improve the communications used in connection with bookouts under the OSN contract. The contract provides for a "Bookout Proposal" and members agreed that it would be productive to try to agree a standardisation of the language used in those communications to reflect the general understanding of the way the OSN is intended to operate.

Please send us examples of ones that you use by **Friday 10 August**.

Thank you very much in advance. We remain at your disposal should any questions arise.

Best regards,
Sonja

+ + + Summary of the CMCE MiFID WG call – 26 July 2018 + + +

A member of the advisory team provided an overview of the issue at hand, and started by explaining that whether these contracts can be deemed financial instruments under MiFID can be derived from 2 sources:

1. Annex 1 C5 of MiFID II meaning "Options, futures, swaps, forwards and any other derivative contracts relating to commodities **that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;**"
2. Annex 1 C7 of MiFID II meaning "Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;"

One member asked about optionality for cash settlement and whether the ability for one counterparty to unilaterally impose cash settlement on the other counterparty would qualify it as a C5 contract, but if a decision to cash settle by both parties can be made on a mutual basis then it is not a C5. The advisors agreed with this in principle.

A member of the advisory team gave an overview of the **SUKO 90 Terms – clause 20 A** – particularly on **the book-out clause**.

The **Open Spec Nafta Far East Open (2017 Edition)** contract contains provisions:

- 8.6 which provides that circles may be settled by payment of a settlement fee;
- 8.7 which details the mechanism for cash-settlement on a circleout; and
- 8.8 which provides for the timing for agreement through silence to a "Bookout Proposal" once notified by one party to the other.

A member of the advisory team asked how such notifications work in practice. The market practice around the way in which the contract is operated would have a bearing on its interpretation and if the

parties treat the contract as requiring subsequent and unconstrained) constrained consent for a Bookout Proposal to work, that would likely influence the interpretation of Clause 8.

To address this lack of clarity, there are several options:

1. maintain the status quo;
2. make clarificatory amendments to Bookout Proposal emails (and encourage a standardisation of approach on their use);
3. make clarificatory amendments to the terms of the standard OSN contract.

Members expressed that they wished to investigate option 2 as it seemed reasonably practicable.

It was decided that members will send their examples of notification messages, and that they would be merged and circulated to members.

From: Sonja Erica Väisänen

Sent: 24 July 2018 18:40

Cc: cmce@humbrophy.com

Subject: CMCE - Call of the MiFID WG to discuss physical forward contracts - Thu 26 July at 10:00 GMT

Dear Member of the CMCE MiFID WG,

Thank you to those who have provided us with their availability for the first call of the CMCE MiFID sub-group on physical forward contracts.

Based on the information provided to us, we will have the call on Thursday 26 July between **10:00 and 11:00 AM London time**. The dial-in details can be found here below as well in the calendar invitation which will be sent to you.

Following the issues faced by CMCE members and members of the advisory team in dialling in for the calls, we have spoken with the provider and **if you experience any issues, the best way for the provider to identify the issue is for you to press *0**. An operator will join the line to provide live technical support to the call, and can even dial out to any disconnected parties and connect them.

When joining this call please:

- Announce your name and company affiliation;
- Mute your line to prevent disturbance from background noise; and
- Do not place the call on hold once you have dialled on.

Dial-in details:

Participant code: 8615 922#

Country Dial in numbers:

Belgium +32 (0)2 401 2647

Germany +49 (0) 69 222 215 27

Netherlands +31 (0)207 139 203

Sweden +46 (0) 850 639 451

Switzerland +41 (0)800 661 155

United Kingdom +44 (0)203 147 4827

United States +1 (877) 567 1262

International +1 (847) 944 7617

If you encounter difficulties dialling on to the call or have questions about the call please email cmce@humbrophy.com

Best regards,

Sonja

From: Lucie Binová

Sent: 24 July 2018 10:02

Cc: cmce@humbrophy.com

Subject: CMCE - your availability - MiFID WG to discuss physical forward contracts

Dear Member of the CMCE MiFID WG,

Ahead of the first call of the sub-group on physical forward contracts, please find attached the following example contracts, which have been shared with us by members:

- Open Spec Form Naptha Agreements (2012 and 2017 editions, together the **OSNs**);
- 15 Day BFOE SUKO 90 General Conditions with an amendment template (which we understand is in relatively market standard terms) (the **SUKO 90 Terms**);
- a one month BFOE Master Trading Agreement (the **BFOE Master**).

As you will recall, the proposal is that the working group will seek to evaluate together the risk that book-out and circle out mechanics in these documents could lead some people to regard them as financial instruments under MiFID2. The group's task is to identify areas where that risk might arise and consider whether the risk might be alleviated by amendments to the relevant provisions.

With this in mind we thought it would be helpful to focus your attention in advance of the call on:

- (a) Clauses 8.6 to 8.8 of the OSN (2017 version) and Clauses 8.1 to 8.3 (2012 version), dealing with circle outs and book-out agreements;
- (b) Clause 7.6 of the OSN (2017 version) and Clause 7.5 (2012 Version), dealing with settlement on dry Circle book-outs;
- (c) Clause 3.2 of the OSN (both versions), dealing with part cargoes;
- (d) Clause 20 of the SUKO 90 Terms, dealing with book-outs; and
- (e) Clause 3 of the BFOE Master, dealing with partials.

We propose to discuss (and compare) these provisions and to consider together whether any amendments might be both desirable (from the point of view of the MiFID2 analysis) and commercially feasible.

Please, let us know **your availability** during the following times:

- Thursday **26 July** in the morning between **9:00** and **12:00** London time
- Friday **27 July** in the morning between **9:00** and **12:00** London time

Please do not hesitate to let us know if you have any questions.

Kind regards,
Lucie

Lucie Bínová
Account Director

Hume Brophy | 41 Rue de la Science | 1040 Brussels | Belgium
T +32 (0)2 234 6860 | M +32 (0)473 95 75 52
lucie.binova@humbrophy.com



HUME BROPHY

GLOBAL REACH. LOCAL INFLUENCE.

Brussels | Dublin | London | New York | Hong Kong | Singapore | Frankfurt | Paris

14 Herbert Street, Dublin 2, Ireland T +353 (0)1 662 4712
55 King William Street, London, EC4R 9AD, UK T +44 (0)20 7862 6399
295 Madison Avenue, 12th Floor, New York, NY 10017 T +1-718-4071980
20/F, Central Tower, 28 Queen's Road, Central, Hong Kong T +852-3008-1967
250 North Bridge Road, #15-02A Raffles City Tower, Singapore 179101 T +65 3157 5290
An der Welle 4, 60322 Frankfurt am Main, Germany T +49 (0)69 7593 7030
27 Avenue de l'Opéra, 75001 Paris, France T +33 (0)1 70 38 51 62

www.humebrophy.com

This e-mail is from HUME BROPHY. The e-mail and any files transmitted with it are confidential and may also be privileged and intended solely for the use of the individual or entity to whom they are addressed. Any unauthorised direct or indirect dissemination, distribution or copying of this message and any attachments is strictly prohibited
Personal data is processed in accordance with applicable laws, for more information please see our Privacy Policy <http://humebrophy.com/privacy-notice>.

Hume Brophy's EU Transparency Register ID Number: 3843982938-44