



Commodity Markets Council - Europe

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31 October 2017

To: Mr Steven Maijoor
Chair, European Securities and Markets Authority
103 rue de Grenelle
75007 Paris, France

With a copy to:

Mr Tilman Lueder, Head of Unit Securities Markets, DG FISMA, European Commission
Mr Fabrizio Planta, Head of Markets Department, ESMA
Mr Edwin Schooling Latter, Chair of ESMA Commodity Derivatives Task Force

Transmitted via electronic mail

Re: MiFID II Ancillary Activity Threshold Calculations under RTS 20

Dear Mr Maijoor,

I am writing to you on behalf of the Commodity Markets Council – Europe (CMCE) regarding the ancillary activity exemption under article 2.1(j) of the Markets in Financial Instruments Directive 2014/65/EU (**MiFID II**) and, in particular, the application of the threshold calculations provided for under articles 2 and 3 of the regulatory technical standards set out in Commission Delegated Regulation 2017/592 (**RTS 20**).

CMCE is an industry association comprised of agriculture, energy, metals and other commodity market participants, price reporting agencies and trading venues. Its members are established and/or operating in the EU, the European Economic Area, Switzerland and neighbouring countries. CMCE engages actively with the European institutions and European and national supervisory authorities to help foster the integrity and effectiveness of the commodity derivatives markets.

Possible ESMA Q&As re-interpreting the scope of the threshold calculations in RTS 20

CMCE Members understand that work may be ongoing within ESMA that could result in the coming weeks in the publication of new Questions and Answers (**Q&As**) on the application of the threshold calculations provided for under RTS 20 with particular regard to the calculation of the numerator in the “overall market threshold” test and the “main business threshold” test.

Firms which use commodity derivatives to manage their commercial and financing risks, like many CMCE Members, rely on the ancillary activity exemption under article 2(1)(j) of MiFID II in respect of this activity.

CMCE Members are concerned that Q&As changing the interpretation of the threshold calculations and effectively narrowing the scope of the ancillary activity exemption at this point in time would not

leave market participants the time needed to prepare for the application of consequent MiFID II obligations, including obtaining authorisation as an investment firm.

MiFID II will be applicable as of 3 January 2018. Given that under three months remain ahead of this date, it will no longer be possible for firms to apply for authorisation as investment firms under MiFID II in time.

Firms that believe they qualify for the exemption in good faith and after considerable diligence, may find themselves unable to do so on the basis of a new narrower interpretation of RTS 20. If so, given the timing, there would be a risk of disruption to the commodity derivatives markets and a potential risk of a sudden drop in liquidity if those firms found themselves unable to trade from 3 January 2018.

Entity-level scope of the numerator of the ancillary activity tests

In this context, we understand that ESMA may be asked to consider re-interpreting RTS 20 so that the “numerator” in each threshold test would be calculated by reference to a group’s overall position and not by reference to that of the relevant legal entity. In our view, the level I text of MiFID II does not justify such an approach, and neither does the drafting of articles 2(2) and 3(3) of RTS 20.

The implementation of the ancillary activity exemption has presented a number of practical challenges to date for the firms that seek to rely on it. Firms have done their best to assess and interpret the exemption, many in open conversation with their national competent authorities (NCAs) on issues not covered by ESMA’s earlier Q&As.

As a result, CMCE Members understand the numerator under the ancillary activity tests in RTS 20 as being calculated by reference to the level of **activity within the relevant legal entity** and not by reference to the activity at aggregate group level. The drafting of article 2(2) and article 3(3) of RTS 20 is clear on this point and results from changes made by the European Commission in the final version of RTS 20, which we believe were based on a conscious decision. For a more detailed explanation of the reading of articles 2(2) and 2(3), please see below.

<p>Drafting of article 2(2) and article 3(3) of RTS 20</p> <p>Article 2(2) RTS 20 provides that where “<i>a person</i> within a group” seeks to establish that its activities (as referred to in article 1 of RTS 20) are ancillary to the main business of the group, it must calculate the size of those activities “by aggregating the gross notional value of all contracts ... to which that person is a party” (emphasis added).</p> <p>Equally, the “main business threshold” test provides alternative methods of calculating a firm’s position against the threshold: the “trading activity” test (under article 3.1(a) of RTS 20) and the “capital employed” test (under article 3.1(b) of RTS 20). In each case the numerator can only be understood to be calculated by reference to the legal entity rather than at an aggregated group level.</p> <p>For the “trading activity test”, article 3.1(a) reflects the choice of words used in article 2(2), clearly providing that the numerator must be calculated by reference to the trading activities of “a person within a group” (emphasis added).</p> <p>For the “capital employed test”, article 3.1(b) should be read in a manner consistent with article 3.1(a) as they are both expressed to relate to “the activities referred to in Article 1”.</p>
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To conclude, CMCE Members ask ESMA to carefully consider the potential impact on the commodity derivatives markets of a re-interpretation of the scope of RTS 20 at this late stage in the run up to the application of MiFID II. We believe that at this point in time such changes would significantly increase

the likelihood of market participants being unable to comply with the MiFID II obligations on time, therefore potentially resulting in market disruption.

We remain at your disposal to further discuss the issue and to provide any clarifications you may need.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Hill". The signature is written in a cursive style with a large initial 'J' and a long horizontal stroke extending to the right.

Jonathan Hill
Chairman
CMCE Executive Committee