MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

August 1, 2014

**Via Electronic Submission**

European Securities and Markets Authority
CS 60747
103 rue de Grenelle
75345 Paris Cedex 07
France

**Re: Consultation Paper and Discussion Paper on MiFID II/MiFIR**

Dear Sir or Madam:

Managed Funds Association[1] ("**MFA**") welcomes the opportunity to provide comments to the European Securities and Markets Authority ("**ESMA**") in response to its consultation paper (the "**Consultation Paper**")[2] and Discussion Paper (the "**Discussion Paper**")[3] on MiFID II/MiFIR, both dated 22 May 2014.

MFA supports a regulatory framework that will minimise systemic risk, strengthen investor protection, and promote market discipline and integrity. Our industry is composed of investors who rely on markets to be fair, open, and free from manipulation in order to conduct their businesses. Our members are subject to the same extensive rules and regulations under securities laws as other investors and are longtime advocates of clear guidelines and strong enforcement. MFA therefore appreciates ESMA's efforts to implement a Level 2 regime that is intended to improve market transparency, ensure depth and liquidity of markets, and to increase investor protection.

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[1] Managed Funds Association represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

[2] Available at: http://www.esma.europa.eu/system/files/2014-549_-_consultation_paper_mifid_ii_-_mifir.pdf

[3] Available at http://www.esma.europa.eu/system/files/2014-548_discussion_paper_mifid-mifir.pdf

Given the scope of the Discussion Paper and Consultation Paper, we have outlined in this letter a very brief overview of certain of the points raised in our response. In particular, in this letter, MFA:

(1) strongly supports mandating straight-through-processing, as MFA believes it will benefit the European cleared derivatives markets by leading to the development of more secure and efficient markets;

(2) supports proportionality in the implementation of the rules governing algorithmic and high frequency trading, with the ability for market participants to calibrate trading controls to the features of their specific trading strategies and to the risks faced by their business;

(3) supports careful calibration in relation to the position limits regime, particularly in relation to the distinction between cash-settled and physically settled commodity derivatives;

(4) stresses the importance of ESMA maintaining a strong and active role in implementing the derivatives trading obligation;

(5) supports ESMA's aim of increasing market transparency, while stressing the need for an appropriate system of pre-trade transparency waivers and post-trade transparency deferrals;

(6) encourages a robust system of pre-trade risk controls applying to trading venues, which nonetheless allows a certain level of flexibility for trading venues to calibrate risk controls to the individual characteristics of their venues; and

(7) makes the point that professional investors should have choices regarding how they pay for research, within the confines of the Level 1 text.

We set out in the remainder of this letter a more detailed overview of our position.

## I. Straight-Through-Processing (STP)

- MFA strongly supports STP and believes that mandating STP in the European cleared derivatives markets will lead to the development of more secure and efficient OTC derivatives markets.

- MFA proposes that ESMA should specify the following maximum timeframes within which certain steps in the execution to clearing process should occur, while recognising that such steps are ultimately subject to a requirement to occur as quickly as technologically practicable using automated systems. Accordingly, the maximum time periods specified below represent outer boundaries that would be subject to change over time as technology evolves:

- *Sixty seconds*: the time within which a clearing member should carry out its credit check in relation to a derivative contract submitted to it for clearing;

- *Ten seconds*: the time within which a central counterparty ("**CCP**") should accept a derivative contract submitted to it for clearing; and

- *Two and a half hours*: the maximum period from execution of a bilaterally executed OTC derivative contract to submission of such contract to a CCP.

- MFA encourages ESMA not to conflate the process by which clearing members and CCPs demand and collect margin with the process for submitting and accepting a derivative contract for clearing. MFA considers that the margin collection process will be augmented, rather than harmed, by the introduction of a quicker and more efficient process for submitting and accepting derivative contracts for clearing. MFA urges ESMA not to mandate pre-funding margining arrangements in order to address perceived risks in the margin collection process.

- MFA proposes that derivative contracts executed on a facility or trading venue should be declared *void ab initio* in the rare instances in which the CCP rejects such derivative contracts for clearing. Bilateral execution agreements should not be permissible in these circumstances.

## II. Transparency

- MFA seeks clarity regarding the application of pre-trade transparency requirements to voice trading systems. MFA respectfully urges ESMA to work with market providers to come up with a realistic and cost-effective solution to the introduction of pre-trade transparency for voice trading systems. In particular MFA seeks a pragmatic approach with respect to the requirement for voice trading systems to publish bids, offers, and actionable indications of interest through electronic means to the wider market.

- MFA is concerned by ESMA's proposal that bids, offers and attaching volumes submitted by each "responding entity" should be subject to pre-trade transparency requirements in the context of a request-for-quote system. A defining characteristic of a request-for-quote system is that the requesting participant is the only counterparty to which the quote is disclosed. Thus, the proposed pre-trade transparency requirements would effectively turn a request-for-quote system into some other type of trading system, by eliminating one of the essential features of a request-for-quote system.

- MFA recommends that ESMA adopt a targeted and sufficiently calibrated definition of the term "liquid market." MFA seeks transparency requirements for products that are truly liquid, but supports an effective system of pre-trade transparency waivers and post-trade transparency deferrals for illiquid products and for transactions that are large in scale.

- MFA asks ESMA to develop specific coverage ratios for sub-categories of financial instruments, provided they are set and phased in appropriately. MFA supports a sufficient level of granularity in establishing sub-categories of instruments to ensure that ESMA sets the ratios at an appropriate level.

- MFA supports ESMA's incorporation of an adequate review process into liquidity assessments, given that the liquidity profile of any given class of instruments can change quickly over time.

## III. Regulation of Algorithmic and High Frequency Trading

- MFA does not believe that ESMA needs to define "high frequency trading technique." We believe it would be more effective for ESMA and competent authorities to monitor the markets for abusive trading rather than the means of transaction delivery. Nonetheless, if ESMA determines that it is necessary to define "high frequency trading technique", it should take into consideration a high message intraday rate, a median daily lifetime of orders test and flat or near-flat end-of-day positions.

- MFA supports a principles-based regime that allows market participants to calibrate and customise the risk controls and testing of their algorithms. When it comes to risk controls and testing of individual algorithms, one size does not fit all. Regulators should avoid overly prescriptive requirements, which could lead to a more unsafe rather than safer marketplace.

## IV. Position Limits

- MFA supports a position limits methodology that uses open interest rather than deliverable supply as the baseline for position limits relating to cash settled contracts, as cash-settled and physically-settled transactions are not interchangeable.

- MFA requests that ESMA publish clear guidance on when transactions will be classed as being "economically equivalent" to commodity derivatives traded on trading venues. The criteria for economic equivalence should be expressed in a precise manner and extend only to a narrow and well-defined set of transactions. Such guidance would reduce the risk that a market participant's analysis of whether a contract is "economically equivalent" differs from the view of its national competent authority.

- MFA believes market participants should have a degree of flexibility in determining whether transactions are appropriate to be offset with regard to netting positions.

- Market participants should be given at least twelve months lead time for implementation of the position limits regime, with subsequent notice periods of at least six months prior to any change in the level of position limits in order to avoid market disruption. Position limits should be fixed for a twelve or twenty-four month period to provide greater market stability as market participants often invest or hedge based on longer-termed strategies.

- MFA supports ESMA's proposals for position reports to be submitted on a T+1 basis and for reporting to be aligned with EMIR where possible. MFA believes ESMA should expressly allow for reporting via third parties and that confidentiality safeguards should apply where end clients' positions are being reported.

## III. Derivatives Trading Obligation

- MFA supports ESMA's proposed approach of retaining full oversight and control of the "liquidity" determination which ESMA must make before declaring derivatives subject to mandatory trading.

- MFA supports an expedited process for ESMA to remove derivatives from the trading obligation, along with an ongoing review process assessing the liquidity of each class. Further, an adequate phase-in period, preferably 180 days following the entry into force of the relevant implementing measures, should apply to all market participants for the introduction of the trading obligation.

- MiFIR permits non-EU counterparties to comply with an "equivalent" third country regulatory regime, but only where one of the counterparties is "established in" the relevant third country. As similar wording has created issues under EMIR, MFA supports a broad interpretation of the term "established in" that covers situations where firms are subject to the laws of the third country without actually being established there. Otherwise, firms which are subject to regimes such as the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act may find that they are required to comply with two overlapping and potentially conflicting regimes.

## IV. Organisational Requirements for Trading Venues

- MFA supports ESMA's proposal that trading venues monitor their performance in relation to matters such as gateway-to-gateway latency, matching engine progress, percentage of maximum message capacity used per second and number of trades executed per second. Further, ESMA should consider whether latency providers should be required to disclose information on the quality of their services.

- Market participants need trading venue rules with respect to cancelling, varying or correcting transactions to be clear and predictable, with limited administrative discretion. Also, such policies should apply consistently across market participants, regardless of whether trading is automated or manual.

- MFA supports pre-trade risk controls as they serve to prevent or minimise market disruptions during times of market stress, help restore confidence in the markets and limit harm to customers. In regulating pre-trade risk controls, however, MFA firmly believes that trading venues need to have the flexibility to be able to fine-tune risk controls to their markets.

- MFA supports the provision of testing facilities by trading venues, but cautions against regulations prescribing specific testing procedures. Testing must be properly calibrated to individual algorithms or trading strategies.

## V. Inducements

- MFA believes investment research plays an extremely important role in the investment management industry and it is only appropriate that, for any policy decisions relating to this topic, thorough consultation and extensive study/survey should be conducted to gain a comprehensive understanding of the market. MFA urges ESMA to consider delaying any such proposals for unbundling pending completion of empirical study.

- MFA is concerned that the practical effect of ESMA's unbundling proposal, particularly given the proposed broad definition of research that covers bespoke research, access to analysts, meetings, and analytical models would be that most of the benefits received by portfolio managers that may be in the best interest of their clients would be prohibited from being obtained through dealing commissions. Further, the bundled services model often enables managers to negotiate better pricing with their brokers. Forcing managers to negotiate separately on research may lead to an increase in the overall costs passed on to clients.

## VI. Best Execution

- MFA does not believe that it is proportionate to require investment firms to publish an annual summary of their internal execution quality monitoring. Investment firms are already subject to detailed reporting requirements on execution. This does not appear to provide any additional benefit and it also risks duplicating information already provided.

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MFA thanks ESMA for the opportunity to provide comments on the Consultation Paper and Discussion Paper. We would welcome the opportunity to discuss our views in greater detail. Please do not hesitate to contact the undersigned at (202) 730-2600 with any questions ESMA or its staff might have regarding this letter.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President, Managing Director & General Counsel

European Securities and Markets Authority

# Reply form for the ESMA MiFID II/MiFIR Consultation Paper

22 May 2014

European Securities and Markets Authority

Date: 22 May 2014

## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA MiFID II/MiFIR Consultation Paper, published on the ESMA website (here).

### *Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type <ESMA_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **1 August 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

### *Publication of responses*

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### *Data protection*

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.

# 1. Overview

# 2. Investor protection

## 2.1. Exemption from the applicability of MiFID for persons providing an investment service in an incidental manner

**Q1: Do you agree with the proposed cumulative conditions to be fulfilled in order for an investment service to be deemed to be provided in an incidental manner?**

<ESMA_QUESTION_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_1>

## 2.2. Investment advice and the use of distribution channels

**Q2: Do you agree that it is appropriate to clarify that the use of distribution channels does not exclude the possibility that investment advice is provided to investors?**

<ESMA_QUESTION_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_2>

## 2.3. Compliance function

**Q3: Do you agree that the existing compliance requirements included in Article 6 of the MiFID Implementing Directive should be expanded?**

<ESMA_QUESTION_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_3>

**Q4: Are there any other areas of the Level 2 requirements concerning the compliance function that you consider should be updated, improved or revised?**

<ESMA_QUESTION_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_4>

## 2.4. Complaints-handling

**Q5: Do you already have in place arrangements that comply with the requirements set out in the draft technical advice set out above?**

<ESMA_QUESTION_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_5>

## 2.5. Record-keeping (other than recording of telephone conversations or other electronic communications)

**Q6: Do you consider that additional records should be mentioned in the minimum list proposed in the table in the draft technical advice above? Please list any additional records that could be added to the minimum list for the purposes of MiFID II, MiFIR, MAD or MAR.**

<ESMA_QUESTION_6>
MFA does not have any specific comments on this question. However, we wish to make the following comments on the proposed table in paragraph 7 of the draft technical advice.

One of the types of records listed in the table is "[c]ancellations and modifications of orders" and the content requirement for it is "[t]he records concerning the cancellation and the modifications or orders on own account or executed on behalf of clients or in relation to decision to deal taken in providing the service of portfolio management".

The record requirement on modifications appears to be a new requirement. The MiFID Implementing Regulation refers to "cancellation flag" (see Annex I, Table 1, point 23) but there are no provisions on modification records. It would be helpful if ESMA could provide practical guidance as to how such modification records should be recorded.

We note that in paragraph 6 of the draft technical advice ESMA "may" publish and update guidelines with respect to the content and timing of the record requirements. MFA urges ESMA to provide practical guidance either in the final advice or separately (in which case the relevant guidance should be published along with the final advice) with respect to the relevant items listed in the table in paragraph 7 (including the modification requirement).

<ESMA_QUESTION_6>

**Q7: What, if any, additional costs and/or benefits do you envisage arising from the proposed approach? Please quantify and provide details.**

<ESMA_QUESTION_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_7>

## 2.6. Recording of telephone conversations and electronic communications

**Q8: What additional measure(s) could firms implement to reduce the risk of non-compliance with the rules in relation to telephone recording and electronic communications?**

<ESMA_QUESTION_8>
The draft technical advice proposes that investment firms should establish and maintain effective organisational arrangements, effective oversight and an control and effective recording policy to ensure that investment firms have taken "all reasonable steps" to record relevant conversations and communications and to prevent the use of privately owned equipment which the firm is "unable" to record/copy. However, there is no guidance as to what factors or principles should be taken into account in determining whether or not arrangements are "effective" or whether or not "all reasonable steps" are considered to have been taken.

For example, in the case of privately owned equipment, if it is possible to record or copy the relevant conversations/communications made on a privately owned device but the cost of doing so is prohibitively high (relevant to the size of the firm concerned), *e.g.*, it requires disproportionate (to the size of the firm) investment by the firm in its technology infrastructure, would the firm nonetheless be considered to be "able" to record/copy the relevant conversations or communications? MFA urges ESMA to provide practical guidance either in the final advice or separately (in which case the relevant guidance should be published along with the final advice) in this regard.

Further, as noted in the Consultation Paper, the CESR advice of 29 July 2010 suggested that the recording requirements were not intended to capture internal conversations/communications within a firm. However, ESMA considers that "some" internal calls are subject to the recording requirements where the internal call relates to or is intended to result in transactions that are subject to the recording requirements. This would mean that some internal calls would need to be recorded but others may be excluded. It would be very difficult, if not impossible, to implement in practice such level of granularity. For example, if the recording arrangement is an automatic system, then how would the system determine when to record and when not to record? If the recording arrangement is manual (which seems unlikely given the risk of non-compliance), does this mean each time an employee makes an internal call he or she must make a decision as to whether that call would relate to or is intended to result in relevant transactions?

Thus, ESMA's suggested approach would in effect require firms to record all internal calls. That would present significant challenges (from a cost, operational and technological perspective) for investment firms, particularly large internationally active firms. In addition, this would also raise issues relating to: (i) attorney-client privilege (*e.g.*, internal calls with legal counsel that are privileged communications); (ii) data protection (*e.g.*, employees' personal information may be recorded risking breach of data protection legislation); and (iii) confidentiality (*e.g.*, if regulators request access to such records on internal calls, would the relevant investment firms be entitled to screen which records can be provided, given that internal calls would likely involve commercially sensitive information irrelevant for the purposes of client protection?).

In the absence of any evidence that the current approach is failing (in this regard, we note ESMA's suggested approach appears to be more of an interpretive issue than to address identified failures/risks), MFA urges ESMA to retain the current CESR approach and exclude internal calls within a firm from the recording requirements.

Under the current recording requirements, portfolio managers are exempt from the obligations on the grounds of proportionality where they transmit a decision to deal to an entity under an obligation to record that conversation (paragraph 38 of the CESR advice 10-975). MFA urges ESMA to clarify that such exemption will continue to be available for portfolio managers.

In relation to the telephone/communication recording requirements, Article 69(1)(d) of MiFID II grants national regulators power to require existing recordings of telephone conversations, electronic communications and data traffic records held by an investment firm. It is not entirely clear what "data traffic records" refers to and this is not discussed in the Consultation Paper. Further, Article 16(7) requires that records of telephone conversations or electronic communications must be kept for five years (or if requested by national regulators, up to seven years). It is not clear whether or not the retention period requirement should also apply to "data traffic records". If such data traffic records refers to metadata associated with the relevant telephone conversation or electronic communication (*e.g.*, date of the call, length of time of the call, *etc.*), it would not appear to be controversial to keep records on such data. It would be helpful if ESMA could provide clarification in this regard.

<ESMA_QUESTION_8>

**Q9: Do you agree that firms should periodically monitor records to ensure compliance with the recording requirement and wider regulatory requirements?**

<ESMA_QUESTION_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_9>

**Q10: Should any additional items of information be included as a minimum in meeting minutes or notes where relevant face-to-face conversations take place with clients?**

<ESMA_QUESTION_10>
In this regard, MFA believes that a distinction should be made between retail clients and professional clients. As noted in the "Analysis" section of this chapter, the recording requirements for face-to-face conversations apply only when they result or may result in the services of (i) reception/transmission of orders; (ii) execution of orders on behalf of clients; and (iii) dealing on own account. In relation to retail clients, there may be situations where a retail client gives an order in a face-to-face conversation which the firm then transmits to a third party broker for execution. However, professional clients or eligible counterparties generally do not meet with their brokers and place/execute orders in face-to-face conversations. That is, these requirements would not in practice be triggered in the case of professional clients and eligible counterparties.

Notwithstanding that these requirements may never in practice be triggered, firms will still need to put in place relevant procedures and controls. Therefore, MFA urges that investment firms should be allowed to disapply all recording requirements relating to face-to-face conversations where they deal with professional clients and eligible counterparties only. This is also in line with sub-paragraph 7 of Article 16(7) which provides that the content of face-to-face conversations "may" be recorded by written minutes or notes.

<ESMA_QUESTION_10>

**Q11: Should clients be required to sign these minutes or notes?**

<ESMA_QUESTION_11>
Please see our comments on question 10 above.

<ESMA_QUESTION_11>

**Q12: Do you agree with the proposals for storage and retention set out in the above draft technical advice?**

<ESMA_QUESTION_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_12>

**Q13: More generally, what additional costs, impacts and/or benefits do you envisage as a result of the requirements set out in the entire draft technical advice above?**

<ESMA_QUESTION_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_13>

## 2.7. Product governance

**Q14: Should the proposed distributor requirements apply in the case of distribution of products (e.g. shares and bonds as well as over-the-counter (OTC) products) available on the primary market or should they also apply to distribution of products on the secondary market (e.g. freely tradable shares and bonds)? Please state the reason for your answer.**

<ESMA_QUESTION_14>
As a general comment, MFA urges ESMA to specify in greater detail what would constitute a "product manufacturer" and what would constitute a "product distributor" for these purposes. Although there is no definition of "manufacture" in the text, we note that ESMA's current approach appears to be to interpret the term fairly broadly (*i.e.* simply as a means of distinguishing firms with whom products originate and firms which are involved in distribution). However, without further detail there could be uncertainty surrounding when firms will be caught by the scope of the regime as it applies either to manufacturers or to distributors.

We would also recommend an explicit carve out for investment funds from the scope of the product governance requirements, particularly given that such products are covered by product governance requirements applying under other pieces of legislation, such as the Alternative Investment Fund Managers Directive ("**AIFMD**") and the UCITS Directives.

In response to the question posed, we do not consider it practical that the obligations set out in Article 16, which will take significant time and resources to implement throughout businesses, should be extended to distribution on the secondary market. For example, it would be impractical to expect product manufacturers to oversee the distribution activities of distributors active on the secondary markets given the lack of a contractual relationship between the manufacturer and the distributor.
<ESMA_QUESTION_14>

**Q15: When products are manufactured by non-MiFID firms or third country firms and public information is not available, should there be a requirement for a written agreement under which the manufacturer must provide all relevant product information to the distributor?**

<ESMA_QUESTION_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_15>

**Q16: Do you think it would be useful to require distributors to periodically inform the manufacturer about their experience with the product? If yes, in what circumstances and what specific information could be provided by the distributor?**

<ESMA_QUESTION_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_16>

**Q17: What appropriate action do you think manufacturers can take if they become aware that products are not sold as envisaged (e.g. if the product is being widely sold to clients outside of the product's target market)?**

<ESMA_QUESTION_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_17>

**Q18: What appropriate action do you think distributors can take, if they become aware of any event that could materially affect the potential risk to the identified target market (e.g. if the distributor has mis-judged the target market for a specific product)?**

<ESMA_QUESTION_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_18>

**Q19: Do you consider that there is sufficient clarity regarding the requirements of investment firms when acting as manufacturers, distributors or both? If not, please provide details of how such requirements should interact with each other.**

<ESMA_QUESTION_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_19>

**Q20: Are there any other product governance requirements not mentioned in this paper that you consider important and should be considered? If yes, please set out these additional requirements.**

<ESMA_QUESTION_20>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_20>

**Q21: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements, either as distributors or manufacturers?**

<ESMA_QUESTION_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_21>

## 2.8. Safeguarding of client assets

**Q22: Do you agree with the proposal for investment firms to establish and maintain a client assets oversight function?**

<ESMA_QUESTION_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_22>

**Q23: What would be the cost implications of establishing and maintaining a function with specific responsibility for matters relating to the firm's compliance with its obligations regarding the safeguarding of client instruments and funds?**

<ESMA_QUESTION_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_23>

**Q24: Do you think that the examples in this chapter constitute an inappropriate use of TTCA? If not, why not? Are there any other examples of inappropriate use of or features of inappropriate use of TTCA?**

<ESMA_QUESTION_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_24>

**Q25: Do you agree with the proposal to clarify that the use of TTCA is not a freely available option for avoiding the protections required under MiFID? Do you agree with the proposal to place high-level requirements on firms to consider the appropriateness of TTCA? Should risk disclosures be required in this area? Please explain your answer. If not, why not?**

<ESMA_QUESTION_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_25>

**Q26: Do you agree with the proposal to require a reasonable link between the client's obligation and the financial instruments or funds subject to TTCA?**

<ESMA_QUESTION_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_26>

**Q27: Do you already make any assessment of the suitability of TTCAs? If not, would you need to change any processes to meet such a requirement, and if so, what would be the cost implications of doing so?**

<ESMA_QUESTION_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_27>

**Q28: Are any further measures needed to ensure that the transactions envisaged under Article 19 of the MiFID Implementing Directive remain possible in light of the ban on concluding TTCAs with retail clients in Article 16(10) of MiFID II?**

<ESMA_QUESTION_28>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_28>

**Q29: Do you agree with the proposal to require firms to adopt specific arrangements to take appropriate collateral, monitor and maintain its appropriateness in respect of securities financing transactions?**

<ESMA_QUESTION_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_29>

**Q30: Is it suitable to place collateral, monitoring and maintaining measures on firms in respect of retail clients only, or should these be extended to all classes of client?**

<ESMA_QUESTION_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_30>

**Q31: Do you already take collateral against securities financing transactions and monitor its appropriateness on an on-going basis? If not, what would be the cost of developing and maintaining such arrangements?**

<ESMA_QUESTION_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_31>

**Q32: Do you agree that investment firms should evidence the express prior consent of non-retail clients to the use of their financial instruments as they are currently required to do so for retail clients clearly, in writing or in a legally equivalent alternative means, and affirmatively executed by the client? Are there any cost implications?**

<ESMA_QUESTION_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_32>

**Q33: Do you anticipate any additional costs in order to comply with the requirements proposed in relation to securities financing transactions and collateralisation? If yes, please provide details.**

<ESMA_QUESTION_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_33>

**Q34: Do you think that it is proportionate to require investment firms to consider diversification of client funds as part of the due diligence requirements when depositing client funds? If not, why? What other measures could achieve a similar objective?**

<ESMA_QUESTION_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_34>

**Q35: Are there any cost implications to investment firms when considering diversification as part of due diligence requirements?**

<ESMA_QUESTION_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_35>

**Q36: Where an investment firm deposits client funds at a third party that is within its own group, should an intra-group deposit limit be imposed? If yes, would imposing an intra-group deposit limit of 20% in respect of client funds be proportionate? If not, what other percentage could be proportionate? What other measures could achieve similar objectives? What is the rationale for this percentage?**

<ESMA_QUESTION_36>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_36>

**Q37: Are there any situations that would justify exempting an investment firm from such a rule restricting intra-group deposits in respect of client funds, for example, when other safeguards are in place?**

<ESMA_QUESTION_37>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_37>

**Q38: Do you place any client funds in a credit institution within your group? If so, what proportion of the total?**

<ESMA_QUESTION_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_38>

**Q39: What would be the cost implications for investment firms of diversifying holdings away from a group credit institution?**

<ESMA_QUESTION_39>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_39>

**Q40: What would be the impact of restricting investment firms in respect of the proportion of funds they could deposit at affiliated credit institutions? Could there be any unintended consequences?**

<ESMA_QUESTION_40>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_40>

**Q41: What would be the cost implications to credit institutions if investment firms were limited in respect of depositing client funds at credit institutions in the same group?**

<ESMA_QUESTION_41>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_41>

**Q42: Do you agree with the proposal to prevent firms from agreeing to liens that allow a third party to recover costs from client assets that do not relate to those clients, except where this is required in a particular jurisdiction?**

<ESMA_QUESTION_42>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_42>

**Q43: Do you agree with the proposal to specify specific risk warnings where firms are obliged to agree to wide-ranging liens exposing their clients to the risk?**

<ESMA_QUESTION_43>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_43>

**Q44: What would be the one off costs of reviewing third party agreements in the light of an explicit prohibition of such liens, and the on-going costs in respect of risk warnings to clients?**

<ESMA_QUESTION_44>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_44>

**Q45: Should firms be obliged to record the presence of security interests or other encumbrances over client assets in their own books and records? Are there any reasons why firms might not be able to meet such a requirement? Are there any cost implications of recording these?**

<ESMA_QUESTION_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_45>

**Q46: Should the option of 'other equivalent measures' for segregation of client financial instruments only be available in third country jurisdictions where market practice or legal requirements make this necessary?**

<ESMA_QUESTION_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_46>

**Q47: Should firms be required to develop additional systems to mitigate the risks of 'other equivalent measures' and require specific risk disclosures to clients where a firm must rely on such 'other equivalent measures', where not already covered by the Article 32(4) of the MiFID Implementing Directive?**

<ESMA_QUESTION_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_47>

**Q48: What would be the on-going costs of making disclosures to clients when relying on 'other equivalent measures'?**

<ESMA_QUESTION_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_48>

**Q49: Should investment firms be required to maintain systems and controls to prevent shortfalls in client accounts and to prevent the use of one client's financial instruments to settle the transactions of another client, including:**

<ESMA_QUESTION_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_49>

**Q50: Do you already have measures in place that address the proposals in this chapter? What would be the one-off and on-going cost implications of developing systems and controls to address these proposals?**

<ESMA_QUESTION_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_50>

**Q51: Do you agree that requiring firms to hold necessary information in an easily accessible way would reduce uncertainty regarding ownership and delays in returning client financial instruments and funds in the event of an insolvency?**

<ESMA_QUESTION_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_51>

**Q52: Do you think the information detailed in the draft technical advice section of this chapter is suitable for including in such a requirement?**

<ESMA_QUESTION_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_52>

**Q53: Do you already maintain the information listed in a way that would be easily accessible on request by a competent person, either before or after insolvency? What would be the cost of maintaining such information in a way that is easily accessible to an insolvency practitioner in the event of firm failure?**

<ESMA_QUESTION_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_53>

## 2.9. Conflicts of interest

**Q54: Should investment firms be required to assess and periodically review - at least annually - the conflicts of interest policy established, taking all appropriate measures to address any deficiencies? Please also state the reason for your answer.**

<ESMA_QUESTION_54>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_54>

**Q55: Do you consider that additional situations to those identified in Article 21 of the MiFID Implementing Directive should be mentioned in the measures implementing MiFID II? Please explain your rationale for any additional suggestions.**

<ESMA_QUESTION_55>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_55>

**Q56: Do you consider that the distinction between investment research and marketing communications drawn in Article 24 of the MiFID Implementing Directive is sufficient and sufficiently clear? If not, please suggest any improvements to the existing framework and the rationale for your proposals.**

<ESMA_QUESTION_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_56>

**Q57: Do you consider that the additional organisational requirements listed in Article 25 of the MiFID Implementing Directive and addressed to firms producing and disseminating investment research are sufficient to properly regulate the specificities of these activities and to protect the objectivity and independence of financial analysts and of the investment research they produce? If not, please suggest any improvements to the existing framework and the rationale for your proposals.**

<ESMA_QUESTION_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_57>

## 2.10. Underwriting and placing – conflicts of interest and provision of information to clients

**Q58: Are there additional details or requirements you believe should be included?**

<ESMA_QUESTION_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_58>

**Q59: Do you consider that investment firms should be required to discuss with the issuer client any hedging strategies they plan to undertake with respect to the offering, including how these strategies may impact the issuer client's interest? If not, please provide your views on possible alternative arrangements. In addition to stabilisation, what other trading strategies might the firm take in connection with the offering that would impact the issuer?**

<ESMA_QUESTION_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_59>

**Q60: Have you already put in place organisational arrangements that comply with these requirements?**

<ESMA_QUESTION_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_60>

**Q61: How would you need to change your processes to meet the requirements?**

<ESMA_QUESTION_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_61>

**Q62: What costs would you incur in order to meet these requirements?**

<ESMA_QUESTION_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_62>

## 2.11. Remuneration

**Q63: Do you agree with the definition of the scope of the requirements as proposed? If not, why not?**

<ESMA_QUESTION_63>
Under the proposed advice, the remuneration requirements would apply to "all relevant persons who can have a material impact, directly or indirectly, on investment and ancillary services provided by the firm, regardless of whether the clients are retail or professional, to the extent that the remuneration of such persons and related incentives – including non-financial remuneration such as in-kind benefits and career progression – may create a conflict of interest that encourages them to act against the interests of the clients".

The key remuneration provisions are set out in Article 24(10) of MiFID II which provides that investment firms shall not remunerate or assess staff performance in a way that conflicts with their duty to act in the best interests of their clients. Recital 77 of MiFID II contains essentially the same wording and states that this is "to further protect *consumers*" (emphasis added). This is also recognised in Article 24(10) which refers expressly to "retail client". Thus, it appears that the MiFID II remuneration requirements are intended to apply in relation to retail clients only. MFA accordingly urges ESMA to remove any reference to professional clients, and to limit the scope of remuneration requirements to retail clients only.

If ESMA is nonetheless of the view that the remuneration requirements should apply in relation to professional clients as well, MFA would urge ESMA to include a proportionality principle in the final advice, which is not currently included in the draft technical advice. That is, investment firms should apply the remuneration requirements taking into account the nature, scale and complexity of their businesses and the nature and range of investment services and activities. This principle is expressly recognised by ESMA in its remuneration guidelines for MiFID I (ESMA 2013/606) (paragraph 18), which are used as basis for the advice in this section.

Further, given the generic phraseology, it is not entirely clear what type of personnel would fall within the proposed scope. For example, how should "material impact on services" be interpreted? Notwithstanding the reference to indirect impact, this seems to refer only to front office staff and those responsible for supervising such staff because only such staff can potentially "act" against the interests of the clients (a back-office employee, *e.g.*, an IT engineer, may be considered to have a material indirect impact on the services provided given the importance of technology to investment firms but he/she would not be able to act against the interests of the clients since he/she may not even know who the clients are).

For the reasons discussed, MFA does not agree with the proposed scope.

<ESMA_QUESTION_63>

**Q64: Do you agree with the proposal with respect to variable remuneration and similar incentives? If not, why not?**

<ESMA_QUESTION_64>
In this regard, the proposed advice provides that remuneration and similar incentives may be "partly" based on commercial criteria, but should be "principally" based on criteria reflecting compliance with the applicable regulations, the fair treatment of clients and the quality of services.

MFA does not agree with such prescriptive criteria. Whilst it is entirely appropriate for remuneration policies to incorporate qualitative as well as quantitative criteria, MFA believes that investment firms should be permitted to determine criteria that are the most appropriate to their circumstances and the relevant weight attached to such criteria.

In addition, with respect to the remuneration requirements as a whole, MFA urges ESMA to adopt a proportionality principle (*e.g.*, similar to the one under the AIFMD remuneration requirements) whereby an investment firm can disapply certain requirements on the basis of the nature, scale and complexity of its business and the type of clients the firm is permitted to deal with. This would align the requirements of MiFID II with those of the AIFMD.

<ESMA_QUESTION_64>

## 2.12. Fair, clear and not misleading information

**Q65: Do you agree that the information to retail clients should be up-to-date, consistently presented in the same language, and in the same font size in order to be fair, clear and not misleading?**

<ESMA_QUESTION_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_65>

**Q66: Do you agree that the information about future performance should be provided under different performance scenarios in order to illustrate the potential functioning of financial instruments?**

<ESMA_QUESTION_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_66>

**Q67: Do you agree that the information to professional clients should comply with the proposed conditions in order to be fair, clear and not misleading? Do you consider that the information to professional clients should meet any of the other conditions proposed for retail clients?**

<ESMA_QUESTION_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_67>

## 2.13. Information to clients about investment advice and financial instruments

**Q68: Do you agree with the objective of the above proposals to clarify the distinction between independent and non-independent advice for investors?**

<ESMA_QUESTION_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_68>

**Q69: Do you agree with the proposal to further specify information provided to clients about financial instruments and their risks?**

<ESMA_QUESTION_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_69>

**Q70: Do you consider that, in addition to the information requirements suggested in this CP (including information on investment advice, financial instruments, costs and charges and safeguarding of client assets), further improvements to the information requirements in other areas should be proposed? If yes, please specify, by making reference to existing requirements in the MiFID Implementing directive.**

<ESMA_QUESTION_70>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_70>

## 2.14. Information to clients on costs and charges

**Q71: Do you agree with the proposal to fully apply requirements on information to clients on costs and charges to professional clients and eligible counterparties and to allow these clients to opt-out from the application of these requirements in certain circumstances?**

<ESMA_QUESTION_71>
MFA does not support the proposal to apply the cost information requirements to professional clients and eligible counterparties. Professional clients and eligible counterparties have sufficient knowledge and experience as regards the investment activities and transactions in which they engage. In some cases professional clients and eligible counterparties also negotiate the relevant terms of business, as opposed to retail clients who are typically not in a position to negotiate the terms on which they receive services. Professional clients and eligible counterparties are sufficiently informed on the relevant costs associated with the services provided to them.

Further, the proposal would be difficult to implement in practice. For example, when two eligible counterparties deal with each other, there is a question as to who is the client. Eligible counterparties are also often competitors in the same markets. Forcing them to disclose or provide a

detailed breakdown of costs (as proposed) would be inappropriate from a commercial perspective. In addition, it is difficult to see any investor protection issue in such situations.

In any event, there is already an opt-in mechanism which MFA believes is sufficient to address any perceived investor protection issues: a professional client or eligible counterparty can always request to be treated as a retail client, either generally or on a trade-by-trade basis, as is permitted under MiFID II (see Annex II and Article 30(2) respectively).

Client categorisation would risk having little or no practical significance under the proposal.

If ESMA is of the view that the proposal should be implemented as currently drafted, MFA would urge ESMA to revise the proposed opt-out provisions. As currently proposed, the possibility to opt out does not apply to the service of investment advice or portfolio management or where the financial instruments are derivatives. ESMA states that these cases justify the full application of the cost information requirements. However, there is no explanation or evidence as to why it is so justified. The proposed exclusions appear to have assumed that portfolio management services and derivative instruments are necessarily complex.

Therefore, if ESMA is of the view that the cost information requirements should apply to professional clients and eligible counterparties, MFA would urge ESMA to make the opt-out mechanism available in relation to all investment firms and instruments.

<ESMA_QUESTION_71>

**Q72: Do you agree with the scope of the point of sale information requirements?**

<ESMA_QUESTION_72>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_72>

**Q73: Do you agree that post-sale information should be provided where the investment firm has established a continuing relationship with the client?**

<ESMA_QUESTION_73>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_73>

**Q74: Do you agree with the proposed costs and charges to be disclosed to clients, as listed in the Annex to this chapter? If not please state your reasons, including describing any other cost or charges that should be included.**

<ESMA_QUESTION_74>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_74>

**Q75: Do you agree that the point of sale information on costs and charges could be provided on a generic basis? If not, please explain your response.**

<ESMA_QUESTION_75>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_75>

**Q76: Do you have any other comments on the methodology for calculating the point of sale figures?**

<ESMA_QUESTION_76>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_76>

**Q77: Do you have any comments on the requirements around illustrating the cumulative effect of costs and charges?**

<ESMA_QUESTION_77>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_77>

**Q78: What costs would you incur in order to meet these requirements?**

<ESMA_QUESTION_78>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_78>

## 2.15. The legitimacy of inducements to be paid to/by a third person

**Q79: Do you agree with the proposed exhaustive list of minor non-monetary benefits that are acceptable? Should any other benefits be included on the list? If so, please explain.**

<ESMA_QUESTION_79>
As further discussed below, MFA does not agree with the proposed approach and believes that investment research, whether generic or tailored, should be considered to be a minor non-monetary benefit provided it enhances the quality of services provided to the client and could not impair compliance with the duty to act in the best interests of the clients.

We set out further discussion below on the topic of minor non-monetary benefits.

General

Article 24(7) and 24(8) of MiFID II prohibit investment firms that provide investment advice on an independent basis or portfolio management services from accepting and retaining fees, commissions or any monetary or non-monetary benefits paid or provided by any third party in relation to the provision of the service to their clients. Minor non-monetary benefits that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client should be clearly disclosed and are excluded from this prohibition.

In this regard, ESMA's draft technical advice is that minor non-monetary benefits should only qualify as such "when they are reasonable and proportionate and of such a scale that they are unlikely to influence the recipient's behaviour in any way that is detrimental to the interests of the relevant client". MFA agrees in principle with this proposed definition.

However, we have serious concerns with respect to the discussion set out in the "Analysis" section of this chapter. MFA notes that the issues discussed, in particular unbundling, do not appear to have been consulted upon during the legislative process of MiFID II.

As indicated in Recital 74 of MiFID II, the aim of the requirements is to "strengthen the protection of investors and increase clarity to clients as to the service they receive". MFA wishes to note that investor protection and transparency are more of an issue in the traditional investment management industry because: (i) such investment managers are contractually required to bear the relevant costs (*e.g.*, research); and (ii) a significant proportion of their investors are retail investors who do not have the opportunity to negotiate their own terms and who may not have full disclosure as to the payment arrangements between the managers and their service providers (*e.g.*, brokers).

The situation with the hedge fund industry, however, is very different. Hedge fund investors are almost exclusively professional clients (institutional investors or other sophisticated investors) who are typically assisted by advisers, consultants and/or legal counsel in carrying out detailed due diligence on the fund manager and in assessing (and, in some cases, negotiating) investment terms. This means that hedge fund investors are very much aware of the cost allocation arrangements between the manager and its brokers. Accordingly, the allocation of costs is disclosed and contractual in nature and any risk in respect of investor protection and transparency is significantly mitigated because the investor (being professional) has made an informed decision to accept the level of protection and disclosure.

We believe that the concept of minor non-monetary benefit should take into account the distinction between investment advisors/managers who deal primarily with professional clients and investment advisors/managers who primarily serve retail clients. This will provide important protection for those who need it, but will avoid interfering with contractual arrangements for those who are able and should be given the right to choose the level of protection they consider appropriate.

<u>Investment Research</u>

ESMA considers that any investment research that involves a third party allocating valuable resources to a specific portfolio manager would not constitute a minor non-monetary benefit and could be judged to impair compliance with the duty to act in the client's best interest, and that "research" for these purposes would include "privileged access to research analysts (*e.g.*, face-to-face meetings or conference calls), bespoke reports or analytical models, investor field trips, or services linked to research such as corporate access and market data services", on the ground that "any research that is tailored or bespoke in its content or rationed in how it is distributed or accessed would be of a scale and nature that would influence the recipient's behaviour".

<u>Influence on recipient's behaviour</u>

While we understand that ESMA believes that the exemption for minor non-monetary benefits should be read strictly such that those likely to influence the recipient's behaviour should not be allowed, we wish to note, first of all, that this appears to assume that any influence of research would necessarily have an adverse effect on the quality of services to, and the interests of, clients.

Further, we believe that influence on behaviour should not be the conclusive factor in considering whether or not a piece of research should be a minor non-monetary benefit. The precise purpose of all research, generic or bespoke, is arguably to influence the recipient's behaviour (*e.g.*, to prompt the recipient to pursue investment ideas further (in the case of generic research) or to enter into specific transactions (in the case of bespoke research)).

Rather, the test should be whether such influence adversely affects the quality of services to, and the interest of, clients, as specified in Article 24(7) and (8). This is also recognised in ESMA's formal draft technical advice, which provides that influence should be such "that is detrimental to the interests of the relevant client" (see above).

MFA wishes to note that bespoke research which by its nature is tailored to the circumstances of particular transactions or strategies is likely to be far more useful than generic research which may not provide any meaningful insight or in-depth analysis and as such would be more likely to assist investment managers in terms of ensuring the best interest of their clients.

Evidence for harming clients' interest

As noted above, it appears to be assumed that the influence of bespoke research would necessarily be detrimental to a client's best interest. ESMA does not appear to provide any substantive evidence for taking that position. In this regard, ESMA refers in passing to allegedly "common" practices whereby a portfolio manager agrees to higher execution charges which are used to cross-subsidise additional services such as "high-value research" provided by the same broker, or a portfolio manager increases order flows to the broker by "churning" client portfolios to gain access to valuable research for free.

Cross-subsidy

In relation to the issue of cross-subsidy and the assumption that this practice is prevalent in the investment management industry, there appears to be an assumption that there is a standard level of execution rates with which comparison can be made to determine whether a particular rate is "higher". Given the vast variety of investment mandates and trading methodologies, it is very difficult, if not impossible, to determine an optimal level of execution rates, in the absence of any empirical study.

Even if a particular level of execution rates could be determined to be "higher" and part of which is used to subsidise the provision of valuable research, there is no reason why this is unacceptable provided that the research enhances the quality of services and the client's interest, and such arrangements are clearly disclosed to the client.

"Churning"

In relation to the issue of "churning", the UK Financial Services Authority ("**FSA**") (the predecessor to the current Financial Conduct Authority (the "**FCA**")) commissioned Oxford Economic Research Associates ("**OXERA**") in 2003 (when it first consulted on the use of dealing commission) to conduct an extensive study into the dealing commission arrangements between portfolio managers and brokers to inform its then policy on this topic. OXERA found no evidence of "churning" (or "overtrading" as referred to in its report) and the then FSA also recognised that it

was "almost impossible" to provide any meaningful quantitative measure, given the variety of managers' mandates, to judge what the appropriate amount of trading might be. The OXERA report is available at: http://www.fsa.gov.uk/pubs/cp/cp176_oxera_assessment.pdf. OXERA published another report into the impact of the then UK dealing commission rules in April 2009; but the report did not contain any discussion on this point.

In addition, MFA wishes to note that "churning" or "overtrading" (if it were practised) would affect the performance of the portfolio manager, which in turn may impact on the management fees the portfolio manager is able to obtain. Thus, there is a significant disincentive for portfolio managers to engage in such practices.

Unbundling

ESMA further suggests that portfolio managers or independent advisers should obtain bespoke research under "distinct and separate" contractual arrangements with a broker or other third party (subject to meeting their other MiFID requirements) that include a reasonable level of payment for such research. Portfolio managers or independent advisers would also need to ensure that the terms of such arrangements are not influenced by other services the firm acquires directly on behalf of its clients from the same broker/third party (*e.g.*, execution of transactions).

This proposed approach, read together with the suggested broad definition of research, would in effect impose a complete prohibition on the provision of brokerage services in the full service or bundled form whereby all brokerage services including execution and research are provided as a whole with no separate pricing for each component. In other words, research would need to be "unbundled" from the execution services and provided separately.

In this regard, we note that the FCA published a discussion paper in July 2014 on possible reforms to the UK dealing commission rules. The FCA Discussion Paper (DP 14/3) is available at: http://www.fca.org.uk/static/documents/discussion-papers/dp14-03.pdf. The FCA expresses its support for ESMA's suggested approach to unbundling research from execution. The key rationale provided by the FCA is that unbundling would result in investment managers exercising the same degree of vigour in scrutinising research costs as they would other costs paid out of their pocket. In other words, research should be part of the "standard cost of doing business" for managers (see paragraph 5.61 of FCA DP 14/3).

This rationale, similar to that underlying ESMA's suggested approach, appears to assume that investment research is for the sole benefit of the investment managers (both the FCA and ESMA discuss research in terms of its value to the managers). However, the sole purpose of investment research is to improve the performance of the portfolio/funds managed by the investment managers. In other words, research is directly connected with and solely for, the interest of investors. There is a fundamental difference between investment research and, say, free trading software provided by the brokers; the latter clearly bearing no direct connection with performance and thus justifiably part of the standard costs of doing business.

Impact of unbundling

While this "unbundling" proposal is not included in the formal draft technical advice to the European Commission, we note that the proposal appears to go beyond the text of Articles 24(7) and (8) of MiFID II. Articles 24(7) and (8) clearly envisage that minor non-monetary benefits are excluded from the prohibition on third party payments. However, the practical effect of such unbundling, particularly given the proposed broad definition of research which covers bespoke research, access to analysts, meetings and analytical models, etc. (as noted above), would be that very few benefits received by portfolio managers that may be in the best interest of the clients could qualify as minor non-monetary benefits and thus could be exempted from the prohibition.

Although ESMA suggests that generic research distributed to a wide audience may be permissible as a minor non-monetary benefit, there would appear to be no need for a portfolio manager to consider whether or not such generic research could qualify as a minor non-monetary benefit exempted from the prohibition on third party payment since generic research is by definition ("accessible by a large number of persons or…the public") available for free in any event. Further, it is doubtful as to what benefit, if any, such generic research would be able to provide in terms of improving the quality of services and enhancing the interests of the clients.

Further, unbundling may also increase the costs that will eventually be passed on to investors, which would be detrimental to their best interests. In the investment management industry, the bundled services model often enables managers to negotiate better pricing with their brokers; thus, forcing managers to negotiate separately on research may lead to an increase in the overall costs passed on to clients. Also, hedge fund managers trade various products, and dealing commission paid to their brokers can be embedded. For example, swap spreads (which are typically wider than "pure" commission) enable an investment manager to recapture some of the value embedded in such spreads given that there is no disaggregation requirement. However, the proposed unbundling may compel investment managers to pay the same overall price for the services but may seriously limit managers' ability to extract value from commission embedded in other products (to the detriment of hedge fund investors).

Where the broker provides its services as part of a complete package, it might not be willing to separate research from other services. Consequently, the investment manager may have to engage a separate broker to provide research only. This may also lead to an increase of overall costs since the existing broker may not necessarily reduce its price for not having to provide research.

Such an increase in costs would inevitably be passed on to the managers' clients, contrary to the stated objective of enhancing the interest of clients.

<u>Impact on investment in SMEs</u>

The EU is currently encouraging and trying to create a market for small and medium sized enterprises ("**SMEs**"). The proposed unbundling will also affect that policy initiative. This is because generic research/information is limited on SMEs as brokers or research providers tend to focus on large companies. Specific or tailored research is vital with respect to SMEs given the lack of public information on them. Under the unbundling approach investment managers who wish to invest into the SME sector would have to enter into "separate and distinct" arrangements to purchase such research. However, given the size and diversity of the SME market, investment man-

agers would be unlikely to want to do so; this would in turn reduce potential investment into the SME sector.

MFA wishes to note that ESMA in paragraph 5 of the formal draft technical advice advises that minor non-monetary benefits should include, amongst others, "information or documentation relating to a financial instrument (including **financial research**) or an investment service. This information could be **generic in nature or personalised** to reflect the circumstances of an individual client" (emphasis added). MFA agrees with the approach proposed in paragraph 5 of the draft technical advice and urges ESMA to clarify in the final advice that investment research, generic or tailored, should be considered to be a minor non-monetary benefit provided it enhances the quality of services provided to the client and could not impair compliance with the duty to act in the best interests of the clients.

In this regard, the OXERA 2009 report noted that, since the then FSA dealing commission rules coming into effect (limiting the use of dealing commission to only permitted research and execution-related services), there had been indication of a "deterioration of research coverage of FTSE small stocks".

Implied commissions

In the hedge fund sector, managers trade various products and dealing commissions can be embedded in, for example, swap spreads, *i.e.* there are no separate dealing commissions that are payable by the manager. In such circumstances, it would be difficult for firms to unbundle research from commissions since technically no commissions are payable, and it would be even more difficult to calculate a "reasonable level of payment" for research (as proposed by ESMA). In addition, unbundling may lead to changes to the entire trading structure of the relevant instruments (*e.g.*, swaps) which may not necessarily be in the best interests of the clients.

Tax consequences

Under the UK VAT regime, there is some uncertainty as regards whether or not the provision of investment research is subject to VAT. It appears that the basic position is that the provision of independent research services is subject to VAT while the provision of research in the course of facilitating or arranging trading activities are exempt from VAT. The current accepted practice is that brokers who provide research as part of their brokerage services do not usually charge VAT. Under the proposed unbundling, since brokers would be forced to provide research as a separate business, VAT might become applicable. This could result in a situation where some brokers may no longer be willing to provide research, which would in turn lead to a potential concentration of research service providers. Even if such brokers can adjust and provide research as a separate business, any applicable VAT would be passed on to the investment firms which would in turn pass on such costs (*e.g.*, through management fee) to their clients.

As noted above, research is solely for the benefit of investors. As a result of unbundling, investors would effectively be paying more for the same research than they would otherwise have to pay under the current bundled services model. This would not seem to be in the best interest of investors.

Further study

There is economic justification for bundling, given the economies of scope in producing/pricing the relevant services (*e.g.*, research) which could reduce transaction costs, and would in turn be in the best interest of investors.

Investment research plays an extremely important role in the investment management industry, and third party payment arrangements in the industry are a complex area which affects both investment managers and sell-side service providers. It is only appropriate that, for any policy decisions relating to this topic, thorough consultation and extensive study/survey are conducted to gain a comprehensive understanding of this market, which will inform better policy options.

In this regard, we wish to note that the current Consultation Paper will not be followed by any further consultations and that ESMA aims to provide its final advice on the issues dealt with in the Consultation Paper to the European Commission at the end of 2014. MFA urges ESMA to consider delaying any such proposals for unbundling pending empirical studies being carried out.

International dimension

MFA wishes to note that in the United States, investment managers can rely on section 28(e) of the U.S. Securities Exchange Act of 1934 which establishes a safe harbour for "brokerage and research services." Pursuant to its interpretive release issued in 2006, the Securities and Exchange Commission ("**SEC**") recognises that "eligible research" for the purposes of the "safe harbour" (*i.e.*, research that can be purchased with soft dollars) includes "meetings with corporate executives to obtain oral reports on the performance of a company." Other goods and services falling under the "safe harbour" include, for example, seminars or conferences if they truly relate to research, software that provides analyses of securities portfolios, corporate governance research and ratings services if they provide reports and analyses about issuers, which can have a bearing on the companies' performance outlook, and consultants' services if they provide advice with respect to portfolio strategy.

MFA does not wish to suggest that ESMA should necessarily adopt the position taken by the U.S. Congress and the SEC. However, MFA wishes to highlight the additional operational complexity that may be introduced to, *e.g.*, U.S. hedge fund managers with an EU presence.

If the "unbundling" approach were adopted in the EU, the differences between the EU and U.S. rules would bring considerable uncertainty; for example, some of what qualifies as eligible research under the SEC rules would not constitute a minor non-monetary benefit. This would have an adverse impact on, for example, an investment manager who aggregates orders across its affiliates in the EU and U.S. Similarly, this would also have an impact on EU investment managers with a U.S. presence, U.S. brokers with an EU presence and EU brokers with a U.S. presence.

Further, MFA wishes to note that the "unbundling" approach may also have other unintended consequences. For example, Section 202(a)(11)(C) of the U.S. Investment Advisers Act of 1940 excludes from the definition of "investment adviser" thereunder "any broker or dealer whose performance of [the relevant services (including, *e.g.*, advising through publication or writings)]

is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor".

It is generally understood that "hard dollar" cash payment (as opposed to "soft dollar" payment through dealing commissions) would likely constitute "special compensation". On that basis, where a U.S. broker-dealer accepts hard dollar cash payments for providing bespoke research (as would be the case given the proposed requirement for "distinct and separate" contracts), there is a risk that the U.S. broker-dealer may be considered to be an investment adviser within the Investment Advisers Act of 1940 and thus may need to register with the SEC also as an investment adviser.

This could have a significant impact not only on U.S. sell-side service providers but also on EU investment managers whose ability to obtain quality research may be severely limited (for example, if the manager focuses on the U.S. market and the relevant U.S. brokers stop providing research to avoid having to register with the SEC as investment advisers).

In this regard, MFA wishes to note further that other non-EU countries may also have their own dealing commission rules. Given the global nature of the investment management industry, international coordination and comprehensive study are needed to understand the potential consequences and to ensure a level playing field.

Interaction with other EU law

ESMA also advises the European Commission to consider applying the same restriction on investment research (as discussed in its analysis) to firms falling under the UCITS Directive and the Alternative Investment Fund Managers Directive ("**AIFMD**") to achieve a level playing field.

The provisions of the UCITS Directive and the AIFMD do not envisage the proposed unbundling approach, and amendments to these pieces of legislation, being EU primary legislation, would take a considerable amount of time to materialise. This would mean that, if the European Commission adopted the unbundling approach for the purposes of MiFID II, investment firms authorised under MiFID II would be subject to stricter requirements than *e.g.*, alternative investment fund managers authorised under the AIFMD. This would not appear to be a level playing field.

<ESMA_QUESTION_79>

**Q80: Do you agree with the proposed approach for the disclosure of monetary and non-monetary benefits, in relation to investment services other than portfolio management and advice on an independent basis?**

<ESMA_QUESTION_80>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_80>

**Q81: Do you agree with the non-exhaustive list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met? If not, please explain and provide examples of circumstances and situations where you believe the enhancement test is met. Should any other circumstances and/or situations be included in the list? If so, please explain.**

<ESMA_QUESTION_81>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_81>

**Q82: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.**

<ESMA_QUESTION_82>
As noted above, the proposed "unbundling" approach is not included as part of the formal draft technical advice to the European Commission and thus we understand that it is not within the requirements referred to above that need to be complied with.

Should "unbundling" be considered to be part of the requirements that investment firms need to comply with, MFA would wish to note that "unbundling" may lead to increased costs both for investment managers and their clients.

In the investment management industry, the bundled services model often enables managers to negotiate better pricing with their brokers; thus, forcing managers to negotiate "distinct and separate" arrangements for investment research would lead to an increase in the overall costs which may be passed on to the clients (*e.g.*, through management fees).

In addition, particularly in the hedge fund sector, managers trade various products and dealing commissions can be embedded in, for example, swap spreads, *i.e.* there are no separate dealing commissions that are payable by the manager. Forcing such managers to unbundle may result in additional costs that the managers may not otherwise have to incur (*e.g.*, the broker may not necessarily lower the spreads simply because now the relevant research has to be separately priced under a different arrangement).

Further, where a broker provides its services as part of an integrated whole, it may not be able to or may be unwilling to separate research from execution services. Consequently, the investment manager may have to engage a separate broker to obtain required research. This may also lead to an increase of overall costs since the existing broker may not necessarily reduce its price for not having to provide research.

In addition, an investment manager typically engages with more than one broker. Depending on the number of brokers that an investment manager engages with, the costs of unbundling may potentially be very significant; such costs would be passed on to the clients (*e.g.*, through management fees).

<ESMA_QUESTION_82>

## 2.16. Investment advice on independent basis

**Q83: Do you agree with the approach proposed in the technical advice above in order to ensure investment firm's compliance with the obligation to assess a sufficient range of financial instruments available on the market? If not, please explain your reasons and provide for alternative or additional criteria.**

<ESMA_QUESTION_83>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_83>

**Q84: What type of organisational requirements should firms have in place (e.g. degree of separation, procedures, controls) when they provide both independent and non-independent advice?**

<ESMA_QUESTION_84>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_84>

**Q85: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.**

<ESMA_QUESTION_85>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_85>

## 2.17. Suitability

**Q86: Do you agree that the existing suitability requirements included in Article 35 of the MiFID Implementing Directive should be expanded to cover points discussed in the draft technical advice of this chapter?**

<ESMA_QUESTION_86>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_86>

**Q87: Are there any other areas where MiFID Implementing Directive requirements covering the suitability assessment should be updated, improved or revised based on your experiences under MiFID since it was originally implemented?**

<ESMA_QUESTION_87>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_87>

**Q88: What is your view on the proposals for the content of suitability reports? Are there additional details or requirements you believe should be included, especially to ensure suitability reports are sufficiently 'personalised' to have added value for the client, drawing on any initiatives in national markets?**

<ESMA_QUESTION_88>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_88>

**Q89: Do you agree that periodic suitability reports would only need to cover any changes in the instruments and/or circumstances of the client rather than repeating information which is unchanged from the first suitability report?**

<ESMA_QUESTION_89>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_89>

## 2.18. Appropriateness

**Q90: Do you agree the existing criteria included in Article 38 of the Implementing Directive should be expanded to incorporate the above points, and that an instrument not included explicitly in Article 25(4)(a) of MiFID II would need to meet to be considered non-complex?**

<ESMA_QUESTION_90>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_90>

**Q91: Are there any other areas where the MiFID Implementing Directive requirements covering the appropriateness assessment and conditions for an instrument to be considered non-complex should be updated, improved or revised based on your experiences under MiFID I?**

<ESMA_QUESTION_91>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_91>

## 2.19. Client agreement

**Q92: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement with their professional clients, at least for certain services? If yes, in which circumstances? If no, please state your reason.**

<ESMA_QUESTION_92>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_92>

**Q93: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement for the provision of investment advice to any client, at least where the investment firm and the client have a continuing business relationship? If not, why not?**

<ESMA_QUESTION_93>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_93>

**Q94: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement for the provision of custody services (safekeeping of financial instruments) to any client? If not, why not?**

<ESMA_QUESTION_94>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_94>

**Q95: Do you agree that investment firms should be required to describe in the client agreement any advice services, portfolio management services and custody services to be provided? If not, why not?**

<ESMA_QUESTION_95>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_95>

## 2.20.

## 2.20. Reporting to clients

**Q96: Do you agree that the content of reports for professional clients, both for portfolio management and execution of orders, should be aligned to the content applicable for retail clients?**

<ESMA_QUESTION_96>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_96>

**Q97: Should investment firms providing portfolio management or operating a retail client account that includes leveraged financial instruments or other contingent liability transactions be required to agree on a threshold with retail clients that should at least be equal to 10% (and relevant multiples) of the initial investments (or the value of the investment at the beginning of each year)?**

<ESMA_QUESTION_97>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_97>

**Q98: Do you agree that Article 43 of the MiFID Implementing Directive should be updated to specify that the content of statements is to include the market or estimated value of the financial instruments included in the statement with a clear indication of the fact that the absence of a market price is likely to be indicative of a lack of liquidity?**

<ESMA_QUESTION_98>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_98>

**Q99: Do you consider that it would be beneficial to clients to not only provide details of those financial instruments that are subject to TTCA at the point in time of the statement, but also details of those financial instruments that have been subject to TTCA during the reporting period?**

<ESMA_QUESTION_99>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_99>

**Q100: What other changes to the MiFID Implementing Directive in relation to reporting to clients should ESMA consider advising the Commission on?**

<ESMA_QUESTION_100>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_100>

## 2.21. Best execution

**Q101: Do you have any additional suggestions to provide clarity of the best execution obligations in MiFID II captured in this section or to further ESMA's objective of facilitating clear disclosures to clients?**

<ESMA_QUESTION_101>
Paragraph 6 of the draft technical advice provides that "[w]hile prior express consent is not required for firms transmitting or placing orders that may be executed outside a RM, MTF or OTF, investment firms should provide…appropriate information before proceeding…" and that "[t]his should include **relevant information** on the execution policies of the entities that they have selected to execute transactions, in **each** category of financial instruments" (emphasis added).

This gives rise to a number of important questions. For example, it is not clear what constitutes "relevant information" for these purposes. If this means a summary of the execution policy of the executing brokers, it is not clear who should prepare such a summary, the firm or its executing brokers. If the investment firm is required to prepare such a summary, it may be difficult for the firm to do so, *e.g.* an executing broker's executing policy may be too complex to be summarised sufficiently and the firm may be liable for any error or inaccuracy (in this regard, it is also not clear how any liability should be allocated between the investment firm and its executing brokers). Further, there may be more than one intermediary along the chain of execution: for example, where an investment firm transmits an order to its broker and that broker then transmits the order to the ultimate executing broker which faces the market. In such circumstances, if the investment firm has to prepare a summary of the execution policy of each intermediary along the chain or if each intermediary (being an investment firm itself) has to prepare a summary and passes that on to the upstream transmitting firm, that would be very difficult, if not impossible, to operate in practice.

Even if where the summary is provided to the investment firm by an executing broker itself (*e.g.*, if the executing broker is also subject to MiFID II) and the investment firm is permitted under its contractual arrangements with the executing broker to forward that summary to the firm's clients, how should liabilities (if any) be allocated in the event of the summary being considered to be incomplete, erroneous or otherwise insufficient to meet the requirement?

Given those difficulties and the potential liabilities, the result would likely be that investment firms subject to this requirement would simply attach the executing brokers' policies to their own policy. Depending on the number of executing brokers the investment firm engages with and the level of sophistication of such executing brokers, the final document provided to the clients may be very long and complicated; this would not achieve the stated objective of clear disclosure.

In light of the issue raised above, MFA suggests that investment firms should not be required to provide additional "relevant information" on execution policies of their executing brokers.

If ESMA is nonetheless of the view that such requirement should apply, MFA proposes that the requirement should be amended so that such investment firms are only required to: (i) disclose

clearly that they transmit or place orders with a third party executing broker for execution; and (ii) provide "relevant information" on the executing broker's policy upon request by a client.

MFA further proposes that such investment firms may satisfy their obligation under point (ii) above by providing a link (where available) to the execution policy of the relevant executing broker on the broker's website or by forwarding a copy of the executing broker's policy. It should also be clarified that the investment firms should not be held liable for anything contained in their executing broker's policies.

<ESMA_QUESTION_101>

**Q102: Do your policies and your review procedures already the details proposed in this chapter? If they do not, what would be the implementation and recurring cost of modifying them and distributing the revised policies to your existing clients? Where possible please provide examples of the costs involved.**

<ESMA_QUESTION_102>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_102>

## 2.22. Client order-handling

**Q103: Are you aware of any issues that have emerged with regard to the application of Articles 47, 48 and 49 of the MiFID Implementing Directive? If yes, please specify.**

<ESMA_QUESTION_103>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_103>

## 2.23. Transactions executed with eligible counterparties

**Q104: Do you agree with the proposal not to allow undertakings classified as professional clients on request to be recognised as eligible counterparties?**

<ESMA_QUESTION_104>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_104>

**Q105: For investment firms responding to this consultation, how many clients have you already classified as eligible counterparties using the following approaches under Article 50 of the MiFID Implementing Directive:**

<ESMA_QUESTION_105>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_105>

**Q106: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements?**

<ESMA_QUESTION_106>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_106>

## 2.24. Product intervention

**Q107: Do you agree with the criteria proposed?**

<ESMA_QUESTION_107>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_107>

**Q108: Are there any additional criteria that you would suggest adding?**

<ESMA_QUESTION_108>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_108>

# 3. Transparency

## 3.1. Liquid market for equity and equity-like instruments

**Q109: Do you agree with the liquidity thresholds ESMA proposes for equities? Would you calibrate the thresholds differently? Please provide reasons for your answers.**

<ESMA_QUESTION_109>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_109>

**Q110: Do you agree that the free float for depositary receipts should be determined by the number of shares issued in the issuer's home market? Please provide reasons for your answer.**

<ESMA_QUESTION_110>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_110>

**Q111: Do you agree with the proposal to set the liquidity threshold for depositary receipts at the same level as for shares? Please provide reasons for your answer.**

<ESMA_QUESTION_111>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_111>

**Q112: Do you agree with the liquidity thresholds ESMA proposes for depositary receipts? Would you calibrate the thresholds differently? Please provide reasons for your answers.**

<ESMA_QUESTION_112>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_112>

**Q113: Do you agree that the criterion of free float could be addressed through the number of units issued for trading? If yes, what *de minimis* number of units would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.**

<ESMA_QUESTION_113>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_113>

**Q114: Based on your experience, do you agree with the preliminary results related to the trading patterns of ETFs? Please provide reasons for your answer.**

<ESMA_QUESTION_114>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_114>

**Q115: Do you agree with the liquidity thresholds ESMA proposes for ETFs? Would you calibrate the thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).**

<ESMA_QUESTION_115>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_115>

**Q116: Can you identify any additional instruments that could be caught by the definition of certificates under Article 2(1)(27) of MiFIR?**

<ESMA_QUESTION_116>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_116>

**Q117: Based on your experience, do you agree with the preliminary results related to the trading patterns of certificates? Please provide reasons for your answer.**

<ESMA_QUESTION_117>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_117>

**Q118: Do you agree with the liquidity thresholds ESMA proposes for certificates? Would you calibrate the thresholds differently? Please provide reasons for your answer.**

<ESMA_QUESTION_118>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_118>

**Q119: Do you agree that the criterion of free float could be addressed through the issuance size? If yes, what *de minimis* issuance size would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.**

<ESMA_QUESTION_119>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_119>

**Q120: Do you think the discretion permitted to Member States under Article 22(2) of the Commission Regulation to specify additional instruments up to a limit as being liquid should be retained under MiFID II?**

<ESMA_QUESTION_120>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_120>

## 3.2. Delineation between bonds, structured finance products and money market instruments

**Q121: Do you agree with ESMA's assessment concerning financial instruments outside the scope of the MiFIR non-equity transparency obligations?**

<ESMA_QUESTION_121>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_121>

## 3.3. The definition of systematic internaliser

**Q122: For the systematic and frequent criterion, ESMA proposes setting the percentage for the calculation between 0.25% and 0.5%. Within this range, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications.**

<ESMA_QUESTION_122>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_122>

**Q123: Do you support calibrating the threshold for the systematic and frequent criterion on the liquidity of the financial instrument as measured by the number of daily transactions?**

<ESMA_QUESTION_123>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_123>

**Q124: For the substantial criterion, ESMA proposes setting the percentage for the calculation between 15% and 25% of the total turnover in that financial instrument executed by the investment firm on own account or on behalf of clients and between 0.25% and 0.5% of the total turnover in that financial instrument in the Union. Within these ranges, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the thresholds should be set at levels outside these ranges, please specify at what levels these should be with justifications.**

<ESMA_QUESTION_124>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_124>

**Q125: Do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of shares traded? Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.**

<ESMA_QUESTION_125>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_125>

**Q126: ESMA has calibrated the initial thresholds proposed based on systematic internaliser activity in shares. Do you consider those thresholds adequate for:**

<ESMA_QUESTION_126>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_126>

**Q127: Do you consider a quarterly assessment of systematic internaliser activity as adequate? If not, which assessment period would you propose? Do you consider that one month provides sufficient time for investment firms to establish all the necessary arrangements in order to comply with the systematic internaliser regime?**

<ESMA_QUESTION_127>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_127>

**Q128: For the systematic and frequent criterion, do you agree that the thresholds should be set per asset class? Please provide reasons for your answer. If you consider the thresholds should be set at a more granular level (sub-categories) please provide further detail and justification.**

<ESMA_QUESTION_128>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_128>

**Q129: With regard to the 'substantial basis' criterion, do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of instruments traded. Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.**

<ESMA_QUESTION_129>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_129>

**Q130: Do you agree with ESMA's proposal to apply the systematic internaliser thresholds for bonds and structured finance products at an ISIN code level? If not please provide alternatives and reasons for your answer.**

<ESMA_QUESTION_130>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_130>

**Q131: For derivatives, do you agree that some aggregation should be established in order to properly apply the systematic internaliser definition? If yes, do you consider that the tables presented in Annex 3.6.1 of the DP could be used as a basis for applying the systematic internaliser thresholds to derivatives products? Please provide reasons, and when necessary alternatives, to your answer.**

<ESMA_QUESTION_131>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_131>

**Q132: Do you agree with ESMA's proposal to set a threshold for liquid derivatives? Do you consider any scenarios could arise where systematic internalisers would be required to meet pre-trade transparency requirements for liquid derivatives where the trading obligation does not apply?**

<ESMA_QUESTION_132>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_132>

**Q133: Do you consider a quarterly assessment by investment firms in respect of their systematic internaliser activity is adequate? If not, what assessment period would you propose?**

<ESMA_QUESTION_133>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_133>

**Q134: Within the ranges proposed by ESMA, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications and where possible data to support them.**

<ESMA_QUESTION_134>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_134>

**Q135: Do you consider that thresholds should be set as absolute numbers rather than percentages for some specific categories? Please provide reasons for your answer.**

<ESMA_QUESTION_135>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_135>

**Q136: What thresholds would you consider as adequate for the emission allowance market?**

<ESMA_QUESTION_136>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_136>

## 3.4. Transactions in several securities and orders subject to conditions other than the current market price

**Q137: Do you agree with the definition of portfolio trade and of orders subject to conditions other than the current market price? Please give reasons for your answer?**

<ESMA_QUESTION_137>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_137>

## 3.5. Exceptional market circumstances and conditions for updating quotes

**Q138: Do you agree with the list of exceptional circumstances? Please give reasons for your answer. Do you agree with ESMA's view on the conditions for updating the quotes? Please give reasons for your answer.**

<ESMA_QUESTION_138>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_138>

## 3.6. Orders considerably exceeding the norm

**Q139: Do you agree that each systematic internaliser should determine when the number and/or volume of orders sought by clients considerably exceed the norm? Please give reasons for your answer?**

<ESMA_QUESTION_139>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_139>

## 3.7. Prices falling within a public range close to market conditions

**Q140: Do you agree that any price within the bid and offer spread quoted by the systematic internaliser would fall within a public range close to market conditions? Please give reasons for your answer.**

<ESMA_QUESTION_140>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_140>

## 3.8. Pre-trade transparency for systematic internalisers in non-equity instruments

**Q141: Do you agree that the risks a systematic internaliser faces is similar to that of an liquidity provider? If not, how do they differ?**

<ESMA_QUESTION_141>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_141>

**Q142: Do you agree that the sizes established for liquidity providers and systematic internalisers should be identical? If not, how should they differ?**

<ESMA_QUESTION_142>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_142>

# 4. Data publication

## 4.1. Access to systematic internalisers' quotes

**Q143: Do you agree with the proposed definition of "regular and continuous" publication of quotes? If not, what would definition you suggest?**

<ESMA_QUESTION_143>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_143>

**Q144: Do you agree with the proposed definition of "normal trading hours"? Should the publication time be extended?**

<ESMA_QUESTION_144>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_144>

**Q145: Do you agree with the proposal regarding the means of publication of quotes?**

<ESMA_QUESTION_145>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_145>

**Q146: Do you agree that a systematic internaliser should identify itself when publishing its quotes through a trading venue or a data reporting service?**

<ESMA_QUESTION_146>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_146>

**Q147: Is there any other mean of communication that should be considered by ESMA?**

<ESMA_QUESTION_147>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_147>

**Q148: Do you agree with the importance of ensuring that quotes published by investment firms are consistent across all the publication arrangements?**

<ESMA_QUESTION_148>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_148>

**Q149: Do you agree with the compulsory use of data standards, formats and technical arrangements in development of Article 66(5) of MiFID II?**

<ESMA_QUESTION_149>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_149>

**Q150: Do you agree with the imposing the publication on a 'machine-readable' and 'human readable' to investment firms publishing their quotes only through their own website?**

<ESMA_QUESTION_150>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_150>

**Q151: Do you agree with the requirements to consider that the publication is 'easily accessible'?**

<ESMA_QUESTION_151>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_151>

## 4.2. Publication of unexecuted client limit orders on shares traded on a venue

**Q152: Do you think that publication of unexecuted orders through a data reporting service or through an investment firm's website would effectively facilitate execution?**

<ESMA_QUESTION_152>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_152>

**Q153: Do you agree with this proposal. If not, what would you suggest?**

<ESMA_QUESTION_153>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_153>

## 4.3. Reasonable commercial basis (RCB)

**Q154: Would these disclosure requirements be a meaningful instrument to ensure that prices are on a reasonable commercial basis?**

<ESMA_QUESTION_154>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_154>

**Q155: Are there any other possible requirements in the context of transparency/disclosure to ensure a reasonable price level?**

<ESMA_QUESTION_155>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_155>

**Q156: To what extent do you think that comprehensive transparency requirements would be enough in terms of desired regulatory intervention?**

<ESMA_QUESTION_156>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_156>

**Q157: What are you views on controlling charges by fixing a limit on the share of revenue that market data services can represent?**

<ESMA_QUESTION_157>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_157>

**Q158: Which percentage range for a revenue limit would you consider reasonable?**

<ESMA_QUESTION_158>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_158>

**Q159: If the definition of "*reasonable commercial basis*" is to be based on costs, do you agree that LRIC+ is the most appropriate measure? If not what measure do you think should be used?**

<ESMA_QUESTION_159>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_159>

**Q160: Do you agree that suppliers should be required to maintain a cost model as the basis of setting prices against LRIC+? If not how do you think the definition should be implemented?**

<ESMA_QUESTION_160>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_160>

**Q161: Do you believe that if there are excessive prices in any of the other markets, the same definition of "*reasonable commercial basis*" would be appropriate, or that they should be treated differently? If the latter, what definition should be used?**

<ESMA_QUESTION_161>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_161>

**Q162: Within the options A, B and C, do you favour one of them, a combination of A+B or A+C or A+B+C? Please explain your reasons.**

<ESMA_QUESTION_162>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_162>

**Q163: What are your views on the costs of the different approaches?**

<ESMA_QUESTION_163>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_163>

**Q164: Is there some other approach you believe would be better? Why?**

<ESMA_QUESTION_164>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_164>

**Q165: Do you think that the offering of a 'per-user' pricing model designed to prevent multiple charging for the same information should be mandatory?**

<ESMA_QUESTION_165>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_165>

**Q166: If yes, in which circumstances?**

<ESMA_QUESTION_166>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_166>

# 5. Micro-structural issues

## 5.1. Algorithmic and high frequency trading (HFT)

**Q167: Which would be your preferred option? Why?**

<ESMA_QUESTION_167>
In MFA's view, and as supported by academics, the term "high frequency trading" describes the usage of sophisticated technology that implements traditional trading strategies; and as such, it is the individual trading strategies that need to be assessed rather than the means of transaction delivery. We believe it would be more effective for ESMA and competent authorities to monitor the markets for abusive trading rather than the means of transaction delivery. Also, in light of the wide variety of markets and trading practices covered by MiFID II, we recommend that ESMA does not attempt to put in place a comprehensive definition of the term "high frequency trading technique".

However, if a definition of high frequency trading technique is to be created, MFA considers that the elements contained in both Option 1 and Option 2 are relevant to the definition of high frequency trading, but is of the view that neither test should be used in isolation. Instead, ESMA should define the term to include the combined tests in order to reflect the component parts of both options, as well as include as a third element that the technique results in flat or near-flat end-of-day positions. Such a test would therefore take into consideration: (i) a high message intraday rate; (ii) a median daily lifetime of orders test; and (iii) flat or near-flat end-of-day positions.

Of the two options presented by ESMA, however, we would note that Option 1 is marginally preferable given that it takes a broader range of factors into account in assessing whether a firm could be classed as a high frequency trader.

<ESMA_QUESTION_167>

**Q168: Can you identify any other advantages or disadvantages of the options put forward?**

<ESMA_QUESTION_168>
The two messages per second threshold incorporated into Option 1 is set too low, particularly given that it is intended to apply across trading in a range of financial instruments. For example, the Bank for International Settlements noted in its Report on High-Frequency Trading in the Foreign Exchange Market that high frequency traders in the FX markets can operate with a latency of less than one millisecond, compared with 10-30 milliseconds for non-high frequency algorithmic traders. While this is not to say that traders maintain this speed consistently throughout the trading day, it nevertheless suggests that the two messages per second standard would be too low for these markets. Any such "frequency" threshold incorporated into the final test should preferably be set on an individual product basis, rather than operating across all products.

Option 2 takes into account the fact that the risk holding period for high frequency traders is generally very short, which is positive. It would also allow for the assessment of what is "short" in this context to be varied according to different trading venues. However, it does not take into account any other factors that may cause a strategy to be "high frequency" rather than simply "algorithmic", and as such, it risks capturing firms which do not in fact engage in high-frequency trading practices.

Both options lack explicit consideration of the fact that high frequency traders will generally end the day with low or no inventory, and that their inventories will generally remain low when compared to the volume of transactions in which they engage.

<ESMA_QUESTION_168>

**Q169: How would you reduce the impact of the disadvantages identified in your preferred option?**

<ESMA_QUESTION_169>
As noted in our response to Q167, we would mitigate the disadvantages of both options by combining them and including explicit consideration of the fact that high frequency traders will generally end the day with flat or near-flat positions.

<ESMA_QUESTION_169>

**Q170: If you prefer Option 2, please advise ESMA whether for the calculation of the median daily lifetime of the orders of the member/participant, you would take into account only the orders sent for liquid instruments or all the activity in the trading venue.**

<ESMA_QUESTION_170>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_170>

**Q171: Do you agree with the above assessment? If not, please elaborate.**

<ESMA_QUESTION_171>
ESMA has proposed in this context that "if a member's or participant's strategy falls under the definition of high frequency trading strategy in one trading venue, that member/participant should be considered as subject to MiFID provisions across the EU". MFA acknowledges that engaging in a high-frequency trading strategy may bring a market participant within the scope of the MiFID authorisation regime (i.e. given the narrower scope of the dealing on own account exemption as set out in MiFID II). However, under Article 17 of MiFID II, engaging in a high-frequency trading strategy also carries the responsibility of storing in an approved form accurate and time sequenced records of all placed orders, including cancellations of orders, executed orders and quotations on trading venues. It is not uncommon for a market participant to have multiple independent strategies. To the extent that a market participant engages in a high frequency trading strategy on one trading venue but not on others, they should only be required to keep time-sequenced records in relation to the trading venue on which they are pursuing the high frequency trading strategy.

<ESMA_QUESTION_171>

## 5.2. Direct electronic access (DEA)

**Q172: Do you consider it necessary to clarify the definitions of DEA, DMA and SA provided in MiFID? In what area would further clarification be required and how would you clarify that?**

<ESMA_QUESTION_172>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_172>

**Q173: Is there any other activity that should be covered by the term "DEA", other than DMA and SA? In particular, should AOR be considered within the DEA definition?**

<ESMA_QUESTION_173>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_173>

**Q174: Do you consider that electronic order transmission systems through shared connectivity arrangements should be included within the scope of DEA?**

<ESMA_QUESTION_174>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_174>

**Q175: Are you aware of any order transmission systems through shared arrangements which would provide an equivalent type of access as the one provided by DEA arrangements?**

<ESMA_QUESTION_175>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_175>

# 6. Requirements applying on and to trading venues

## 6.1. SME Growth Markets

**Q176: Do you support assessing the percentage of issuers on the basis of number of issuers only? If not, what approach would you suggest?**

<ESMA_QUESTION_176>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_176>

**Q177: Which of the three different options described in the draft technical advice box above for assessing whether an SME-GM meets the criterion of having at least fifty per cent of SME issuers would you prefer?**

<ESMA_QUESTION_177>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_177>

**Q178: Do you agree with the approach described above (in the box** Error! Reference source not found.**), that only falling below the qualifying 50% threshold for a number of three consecutive years could lead to deregistration as a SME-GM or should the period be limited to two years?**

<ESMA_QUESTION_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_178>

**Q179: Should an SME-GM which falls below the 50% threshold in one calendar year be required to disclose that fact to the market?**

<ESMA_QUESTION_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_179>

**Q180: Which of the alternatives described above on how to deal with non-equity issuers for the purposes of the *"at least 50% criterion"* do you consider the most appropriate? Please give reasons for your answer.**

<ESMA_QUESTION_180>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_180>

**Q181: Do you agree that an SME-GM should be able to operate under the models described above, and that the choice of model should be left to the discretion of the operator (under the supervision of its NCA)?**

<ESMA_QUESTION_181>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_181>

**Q182: Do you agree that an SME-GM should establish and operate a regime which its NCA has assessed to be effective in ensuring that its issuers are "appropriate"?**

<ESMA_QUESTION_182>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_182>

**Q183: Do you agree with the factors to which a NCA should have regard when assessing if an SME-GM's regulatory regime is effective?**

<ESMA_QUESTION_183>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_183>

**Q184: Do you think that there should be an appropriateness test for an SME-GM issuer's management and board in order to confirm that they fulfil the responsibilities of a publicly quoted company?**

<ESMA_QUESTION_184>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_184>

**Q185: Do you think that there should be an appropriateness test for an SME-GM issuer's systems and controls in order to confirm that they provide a reasonable basis for it to comply with its continuing obligations under the rules of the market?**

<ESMA_QUESTION_185>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_185>

**Q186: Do you agree with** Error! Reference source not found.**,** Error! Reference source not found. **or** Error! Reference source not found. Error! Reference source not found.**?**

<ESMA_QUESTION_186>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_186>

**Q187: Are there any other criteria that should be set for the initial and on-going admission of financial instruments of issuers to SME-GMs?**

<ESMA_QUESTION_187>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_187>

**Q188: Should the SME-GM regime apply a general principle that an admission document should contain sufficient information for an investor to make an informed assessment of the financial position and prospects of the issuer and the rights attaching to its securities?**

<ESMA_QUESTION_188>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_188>

**Q189: Do you agree that SME-GMs should be able to take either a 'top down' or a 'bottom up' approach to their admission documents where a Prospectus is not required?**

<ESMA_QUESTION_189>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_189>

**Q190: Do you think that MiFID II should specify the detailed disclosures, or categories of disclosure, that the rules of a SME-GM would need to require, in order for admission documents prepared in accordance with those rules to comply with Article 33(3)(c) of MiFID II? Or do you think this should be the responsibility of the individual market, under the supervision of its NCA?**

<ESMA_QUESTION_190>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_190>

**Q191: If you consider that detailed disclosure requirements should be set at a MiFID level, which specific disclosures would be essential to the proper information of investors? Which elements (if any) of the proportionate schedules set out in Regulation 486/2012 should be dis-applied or modified, in order for an admission document to meet the objectives of the SME-GM framework (as long as there is no public offer requiring that a Prospectus will be drafted under the rules of the Prospectus Directive)?**

<ESMA_QUESTION_191>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_191>

**Q192: Should the future Level 2 Regulation require an SME-GM to make arrangements for an appropriate review of an admission document, designed to ensure that the information it contains is complete?**

<ESMA_QUESTION_192>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_192>

**Q193: Do you agree with this initial assessment by ESMA?**

<ESMA_QUESTION_193>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_193>

**Q194: In your view which reports should be included in the on-going periodic financial reporting by an issuer whose financial instruments are admitted to trading on an SME-GM?**

<ESMA_QUESTION_194>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_194>

**Q195: How and by which means should SME-GMs ensure that the reporting obligations are fulfilled by the issuers?**

<ESMA_QUESTION_195>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_195>

**Q196: Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph** Error! Reference source not found.**) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?**

<ESMA_QUESTION_196>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_196>

**Q197: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements/additional relief to those envisaged by MAR?**

<ESMA_QUESTION_197>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_197>

**Q198: What is your view on the possible requirements for the dissemination and storage of information?**

<ESMA_QUESTION_198>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_198>

**Q199: How and by which means should trading venues ensure that the dissemination and storage requirements are fulfilled by the issuers and which of the options described above do you prefer?**

<ESMA_QUESTION_199>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_199>

**Q200: How long should the information be stored from your point of view? Do you agree with the proposed period of 5 years or would you prefer a different one (e.g., 3 years)?**

<ESMA_QUESTION_200>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_200>

**Q201: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements to those presented in MAR?**

<ESMA_QUESTION_201>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_201>

## 6.2. Suspension and removal of financial instruments from trading

**Q202: Do you agree that an approach based on a non-exhaustive list of examples provides an appropriate balance between facilitating a consistent application of the exception, while allowing appropriate judgements to be made on a case by case basis?**

<ESMA_QUESTION_202>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_202>

**Q203: Do you agree that NCAs would also need to consider the criteria described in paragraph** Error! Reference source not found. Error! Reference source not found. **and** Error! Reference source not found.**, when making an assessment of relevant costs or risks?**

<ESMA_QUESTION_203>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_203>

**Q204: Which specific circumstances would you include in the list? Do you agree with the proposed examples?**

<ESMA_QUESTION_204>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_204>

## 6.3. Substantial importance of a trading venue in a host Member State

**Q205: Do you consider that the criteria established by Article 16 of MiFID Implementing Regulation remain appropriate for regulated markets?**

<ESMA_QUESTION_205>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_205>

**Q206: Do you agree with the additional criteria for establishing the substantial importance in the cases of MTFs and OTFs?**

<ESMA_QUESTION_206>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_206>

## 6.4. Monitoring of compliance – information requirements for trading venues

**Q207: Which circumstances would you include in this list? Do you agree with the circumstances described in the draft technical advice? What other circumstances do you think should be included in the list?**

<ESMA_QUESTION_207>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_207>

## 6.5. Monitoring of compliance with the rules of the trading venue - determining circumstances that trigger the requirement to inform about conduct that may indicate abusive behaviour

**Q208: Do you support the approach suggested by ESMA?**

<ESMA_QUESTION_208>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_208>

**Q209: Is there any limitation to the ability of the operator of several trading venues to identify a potentially abusive conduct affecting related financial instruments?**

<ESMA_QUESTION_209>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_209>

**Q210: What can be the implications for trading venues to make use of all information publicly available to complement their internal analysis of the potential abusive conduct to report such as managers' dealings or major shareholders' notifications)? Are there other public sources of information that could be useful for this purpose?**

<ESMA_QUESTION_210>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_210>

**Q211: Do you agree that the signals listed in the Annex contained in the draft advice constitute appropriate indicators to be considered by operators of trading venues? Do you see other signals that could be relevant to include in the list?**

<ESMA_QUESTION_211>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_211>

**Q212: Do you consider that front running should be considered in relation to the duty for operators of trading venues to report possible abusive conduct? If so, what could be the possible signal(s) to include in the list?**

<ESMA_QUESTION_212>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_212>

# 7. Commodity derivatives

## 7.1. Financial instruments definition - specifying Section C 6, 7 and 10 of Annex I of MiFID II

**Q213: Do you agree with ESMA's approach on specifying contracts that "must" be physically settled and contracts that "can" be physically settled?**

<ESMA_QUESTION_213>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_213>

**Q214: Which oil products in your view should be caught by the definition of C6 energy derivatives contracts and therefore be within the scope of the exemption? Please give reasons for your view stating, in particular, any practical repercussions of including or excluding products from the scope.**

<ESMA_QUESTION_214>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_214>

**Q215: Do you agree with ESMA's approach on specifying contracts that must be physically settled?**

<ESMA_QUESTION_215>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_215>

**Q216: How do operational netting arrangements in power and gas markets work in practice? Please describe such arrangements in detail. In particular, please describe the type and timing of the actions taken by the various parties in the process, and the discretion over those actions that the parties have.**

<ESMA_QUESTION_216>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_216>

**Q217: Please provide concrete examples of contracts that must be physically settled for power, natural gas, coal and oil. Please describe the contracts in detail and identify on which platforms they are traded at the moment.**

<ESMA_QUESTION_217>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_217>

**Q218: How do you understand and how would you describe the concepts of "force majeure" and "other bona fide inability to settle" in this context?**

<ESMA_QUESTION_218>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_218>

**Q219: Do you agree that Article 38 of Regulation (EC) No 1287/2006 has worked well in practice and elements of it should be preserved? If not, which elements in your view require amendments?**

<ESMA_QUESTION_219>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_219>

**Q220: Do you agree that the definition of spot contract in paragraph 2 of Article 38 of Regulation (EC) 1287/2006 is still valid and should become part of the future implementing measures for MiFID II? If not, what changes would you propose?**

<ESMA_QUESTION_220>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_220>

**Q221: Do you agree that the definition of a contract for commercial purposes in paragraph 4 of Article 38 of Regulation (EC) 1287/2006 is still valid and should become part of the future implementing measures for MiFID II? If not, what changes would you propose? What other contracts, in your view, should be listed among those to be considered for commercial purposes?**

<ESMA_QUESTION_221>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_221>

**Q222: Do you agree that the future Delegated Act should not refer to clearing as a condition for determining whether an instrument qualifies as a commodity derivative under Section C 7 of Annex I?**

<ESMA_QUESTION_222>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_222>

**Q223: Do you agree that standardisation of a contract as expressed in Article 38(1) Letter c of Regulation (EC) No 1287/2006 remains an important indicator for classifying financial instruments and therefore should be maintained?**

<ESMA_QUESTION_223>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_223>

**Q224: Do you agree with the proposal to maintain the alternatives for trading contracts in Article 38(1)(a) of Regulation (EC) No 1287/2006 taking into account the emergence of the OTF as a MiFID trading venue in the future Delegated Act?**

<ESMA_QUESTION_224>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_224>

**Q225: Do you agree that the existing provision in Article 38(3) of Regulation (EC) No 1287/2006 for determining whether derivative contracts within the scope of Section C(10) of Annex I should be classified as financial instruments should be updated as necessary but overall be maintained? If not, which elements in your view require amendments?**

<ESMA_QUESTION_225>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_225>

**Q226: Do you agree that the list of contracts in Article 39 of Regulation (EC) No 1287/2006 should be maintained? If not, which type of contracts should be added or which ones should be deleted?**

<ESMA_QUESTION_226>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_226>

**Q227: What is your view with regard to adding as an additional type of derivative contract those relating to actuarial statistics?**

<ESMA_QUESTION_227>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_227>

**Q228: What do you understand by the terms "reason of default or other termination event" and how does this differ from "except in the case of force majeure, default or other bona fide inability to perform"?**

<ESMA_QUESTION_228>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_228>

## 7.2. Position reporting thresholds

**Q229: Do you agree with the proposed threshold for the number of position holders? If not, please state your preferred thresholds and the reason why.**

<ESMA_QUESTION_229>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_229>

**Q230: Do you agree with the proposed minimum threshold level for the open interest criteria for the publication of reports? If not, please state your preferred alternative for the definition of this threshold and explain the reasons why this would be more appropriate.**

<ESMA_QUESTION_230>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_230>

**Q231: Do you agree with the proposed timeframes for publication once activity on a trading venue either reaches or no longer reaches the two thresholds?**

<ESMA_QUESTION_231>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_231>

## 7.3. Position management powers of ESMA

**Q232: Do you agree that the listed factors and criteria allow ESMA to determine the existence of a threat to the stability of the (whole or part of the) financial system in the EU?**

<ESMA_QUESTION_232>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_232>

**Q233: What other factors and criteria should be taken into account?**

<ESMA_QUESTION_233>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_233>

**Q234: Do you agree with ESMA's definition of a market fulfilling its economic function?**

<ESMA_QUESTION_234>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_234>

**Q235: Do you agree that the listed factors and criteria allow ESMA to adequately determine the existence of a threat to the orderly functioning and integrity of financial markets or commodity derivative market so as to justify position management intervention by ESMA?**

<ESMA_QUESTION_235>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_235>

**Q236: What other factors and criteria should be taken into account?**

<ESMA_QUESTION_236>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_236>

**Q237: Do you consider that the above factors sufficiently take account of "the degree to which positions are used to hedge positions in physical commodities or commodity contracts and the degree to which prices in underlying markets are set by reference to the prices of commodity derivatives"? If not, what further factors would you propose?**

<ESMA_QUESTION_237>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_237>

**Q238: Do you agree that the listed factors and criteria allow ESMA to determine the appropriate reduction of a position or exposure entered into via a derivative?**

<ESMA_QUESTION_238>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_238>

**Q239: What other factors and criteria should be taken into account?**

<ESMA_QUESTION_239>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_239>

**Q240: Do you agree that some factors are more important than others in determining what an "appropriate reduction of a position" is within a given market? If yes, which are the most important factors for ESMA to consider?**

<ESMA_QUESTION_240>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_240>

**Q241: Do you agree that the listed factors and criteria allow ESMA to adequately determine the situations where a risk of regulatory arbitrage could arise from the exercise of position management powers by ESMA?**

<ESMA_QUESTION_241>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_241>

**Q242: What other criteria and factors should be taken into account?**

<ESMA_QUESTION_242>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_242>

**Q243: If regulatory arbitrage may arise from inconsistent approaches to interrelated markets, what is the best way of identifying such links and correlations?**

<ESMA_QUESTION_243>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_243>

# 8. Portfolio compression

**Q244: What are your views on the proposed approach for legal documentation and portfolio compression criteria?**

<ESMA_QUESTION_244>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_244>

**Q245: What are your views on the approach proposed by ESMA with regard to information to be published by the compression service provider related to the volume of transactions and the timing when they were concluded?**

<ESMA_QUESTION_245>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_245>

European Securities and Markets Authority

# Reply form for the ESMA MiFID II/MiFIR Discussion Paper

22 May 2014

European Securities and Markets Authority

Date: 22 May 2014

## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA MiFID II/MiFIR Discussion Paper, published on the ESMA website (here).

### *Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type <ESMA_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **1 August 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

### *Publication of responses*

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### *Data protection*

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.

# 1. Overview

# 2. Investor protection

## 2.1. Authorisation of investment firms

**Q1: Do you agree that the existing work/standards set out in points** Error! Reference source not found. **and** Error! Reference source not found. Error! Reference source not found. **provide a valid basis on which to develop implementing measures in respect of the authorisation of investment firms?**

<ESMA_QUESTION_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_1>

**Q2: What areas of these existing standards do you consider require adjustment, and in what way should they be adjusted?**

<ESMA_QUESTION_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_2>

**Q3: Do you consider that the list of information set out in point** Error! Reference source not found. **should be provided to Home State NCAs? If not, what other information should ESMA consider?**

<ESMA_QUESTION_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_3>

**Q4: Are there any other elements which may help to assess whether the main activities of an applicant investment firm is not in the territory where the application is made?**

<ESMA_QUESTION_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_4>

**Q5: How much would one-off costs incurred during the authorisation process increase, compared to current practices, in order to meet the requirements suggested in this section?**

<ESMA_QUESTION_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_5>

**Q6: Are there any particular items of information suggested above that would take significant time or cost to produce and if so, do you have alternative suggestions that would reduce the time/cost for firms yet provide the same assurance to NCAs?**

<ESMA_QUESTION_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_6>

## 2.2. Freedom to provide investment services and activities / Establishment of a branch

**Q7: Do you agree that development of technical standards required under Articles 34 and 35 of MiFID II should be based on the existing standards and forms contained in the CESR Protocol on MiFID Notifications (CESR/07-317c)? If not, what are the specific areas in the existing CESR standards requiring review and adjustment?**

<ESMA_QUESTION_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_7>

## 2.3. Best execution - publication of data related to the quality of execution by trading venues for each financial instrument traded

**Q8: Do you agree data should be provided by all the execution venues as set out in footnote 24? If not, please state why not.**

<ESMA_QUESTION_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_8>

**Q9: If you think that the different types of venues should not publish exactly the same data, please specify how the data should be adapted in each case, and the reasons for each adjustment.**

<ESMA_QUESTION_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_9>

**Q10: Should the data publication obligation apply to every financial instrument traded on the execution venue? Alternatively, should there be a minimum threshold of activity and, if so, how should it be defined (for example, frequency of trades, number of trades, turnover etc.)?**

<ESMA_QUESTION_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_10>

**Q11: How often should all execution data be published by trading venues? Is the minimum requirement specified in MiFID II sufficient, or should this frequency be increased? Is it reasonable or beneficial to require publication on a monthly basis and is it possible to reliably estimate the marginal cost of increased frequency?**

<ESMA_QUESTION_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_11>

**Q12: Please provide an estimate of the cost of the necessary IT development for the production and the publication of such reporting.**

<ESMA_QUESTION_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_12>

**Q13: Do you agree that trading venues should publish the data relating to the quality of execution with regard to a uniform reference period, with a minimum of specific reporting details and in a compatible format of data based on a homogeneous calculation method? If not, please state why.**

<ESMA_QUESTION_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_13>

**Q14: Is the volume of orders received and executed a good indicator for investment firms to compare execution venues? Would the VBBO in a single stock published at the same time also be a good indicator by facilitating the creation of a periodic European price benchmark? Are there other indicators to be considered?**

<ESMA_QUESTION_14>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_14>

**Q15: The venue execution quality reporting obligation is intended to apply to all MiFID instruments. Is this feasible and what differences in approach will be required for different instrument types?**

<ESMA_QUESTION_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_15>

**Q16: Do you consider that this requirement will generate any additional cost? If yes, could you specify in which areas and provide an estimation of these costs?**

<ESMA_QUESTION_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_16>

**Q17: If available liquidity and execution quality are a function of order size, is it appropriate to split trades into ranges so that they are comparable? How should they be defined (for example, as a percentage of the average trading size of the financial instrument on the execution venue; fixed ranges by volume or value; or in another manner)?**

<ESMA_QUESTION_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_17>

**Q18: Do you agree that a benchmark price is needed to evaluate execution quality? Would a depth-weighted benchmark that relates in size to the executed order be appropriate or, if not, could you provide alternative suggestions together with justification?**

<ESMA_QUESTION_18>
We do not agree that a benchmark price is needed to evaluate execution quality. While price may be an important factor to take into account in evaluating execution quality, it is only one of the

factors in the multi-dimensional best execution standard under MiFID. In selecting a trading venue, an investment firm will need to consider, as required under MiFID, price, costs, speed and likelihood of execution; and there are other factors that may also need to be taken into account such as liquidity/access, service levels or expertise.

Having a benchmark price may place a disproportionate emphasis on price, which could result in the risk of other execution criteria being given less weight than they should be. In any event, given the "wider range of eligible instruments and market structure" in the EU, it would be difficult to develop a meaningful benchmark price and it would seem inevitable that any benchmark price would contain various assumptions/conditions giving rise to potential confusion.

<ESMA_QUESTION_18>

**Q19: What kind of cost should be reported (e.g. regulatory levies, taxes, mandatory clearing fees) and how should this data be presented to enable recipients to assess the total consideration of transactions?**

<ESMA_QUESTION_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_19>

**Q20: What would be the most appropriate way to measure the likelihood of execution in order to get useful data? Would it be a good indicator for likelihood of execution to measure the percentage of orders not executed at the end of the applicable trading period (for example the end of each trading day)? Should the modification of an order be taken into consideration?**

<ESMA_QUESTION_20>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_20>

**Q21: What would be the most appropriate way to measure the speed of execution in order to get useful data?**

<ESMA_QUESTION_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_21>

**Q22: Are there other criteria (qualitative or quantitative) that are particularly relevant (e.g. market structures providing for a guarantee of settlement of the trades vs OTC deals; robustness of the market infrastructure due to the existence of circuit breakers)?**

<ESMA_QUESTION_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_22>

**Q23: Is data on orders cancelled useful and if so, on what time basis should it be computed (e.g. within a single trading day)?**

<ESMA_QUESTION_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_23>

**Q24: Are there any adjustments that need to be made to the above execution quality metrics to accommodate different market microstructures?**

<ESMA_QUESTION_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_24>

**Q25: What additional measures are required to define or capture the above data and relevant additional information (e.g. depth weighted spreads, book depths, or others) How should the data be presented: on an average basis such as daily, weekly or monthly for each financial instrument (or on more than one basis)? Do you think that the metrics captured in the Annex to this chapter are relevant to European markets trading in the full range of MiFID instruments? What alternative could you propose?**

<ESMA_QUESTION_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_25>

**Q26: Please provide an estimate of the costs of production and publication of all of the above data and, the IT developments required? How could these costs be minimised?**

<ESMA_QUESTION_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_26>

**Q27: Would increasing the frequency of venue execution quality data generate additional costs for you? Would these costs arise as a result of an increase of the frequency of the review, or because this review will require additional training for your staff in order to be able to analyse and take into account these data? Please provide an estimate of these costs.**

<ESMA_QUESTION_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_27>

**Q28: Do you agree that investment firms should take the publication of the data envisaged in this Discussion Paper into consideration, in order to determine whether they represent a "material change"?**

<ESMA_QUESTION_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_28>

## 2.4. Best execution - publication of data by investment firms

**Q29: Do you agree that in order to allow clients to evaluate the quality of a firm's execution, any proposed standards should oblige the firm to give an appropriate picture of the venues and the different ways they execute an order?**

<ESMA_QUESTION_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_29>

**Q30: Do you agree that when systematic internalisers, market makers, OTC negotiation or dealing on own account represent one of the five most important ways for the firm to execute clients' orders, they should be incorporated in the reporting obligations under Article 27(6) of MiFID II?**

<ESMA_QUESTION_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_30>

**Q31: Do you think that the data provided should be different in cases when the firm directly executes the orders to when the firm transmits the orders to a third-party for execution? If yes, please indicate what the differences should be, and explain why.**

<ESMA_QUESTION_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_31>

**Q32: Do you consider that information on both directed and non-directed orders is useful? Should the data be aggregated so that both types of order are shown together or separated? Should there be a similar approach to disclosure of information on market orders versus limit orders? Do you think that another categorisation of client orders could be useful?**

<ESMA_QUESTION_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_32>

**Q33: Do you think that the reporting data should separate retail clients from other types of clients? Do you think that this data should be publicly disclosed or only provided to the NCA (e.g. when requested to assess whether there is unfair discrimination between retail clients and other categories)? Is there a more useful way to categorise clients for these purposes?**

<ESMA_QUESTION_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_33>

**Q34: Do you agree that the investment firms should publish the data relating to their execution of orders with regard to a uniform reference period, with a minimum of specific reporting details and in a compatible format of data based on a homogeneous calculation method? If not, please state why.**

<ESMA_QUESTION_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_34>

**Q35: What would be an acceptable delay for publication to provide the clients with useful data?**

<ESMA_QUESTION_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_35>

**Q36: What format should the report take? Should there be any difference depending on the nature of the execution venues (MTF, OTF, Regulated Market, systematic internalisers, own account) and, if so, could you specify the precise data required for each type?**

<ESMA_QUESTION_36>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_36>

**Q37: Do you agree that it is proportionate to require investment firms to publish on an annual basis a summary based on their internal execution quality monitoring of their top five execution venues in terms of trading volumes, subject to certain minimum standards?**

<ESMA_QUESTION_37>
MFA believes that it is not proportionate to require investment firms to publish such a summary on an annual basis. There is already sufficient information on execution quality provided or available to the investors: trading venues are required to publish data relating to execution quality on at least an annual basis and investment firms are required to summarise and publish on an annual basis the top five execution venues in terms of trading volumes and information on execution quality (Article 27(3) and (6) of MiFID II respectively).

It is difficult to see what additional benefit there is in requiring investment firms to publish another annual summary as proposed. The rationale provided by ESMA is that execution quality reporting is intended to help clients evaluate a firm's execution practices and enable clients to analyse the correlation between execution quality data and the venue actually used by investment firms. This assumes that clients will carry out such analysis. Even on the assumption that clients do carry out such analysis, the detailed data already provided rather than an annual summary appear to be more appropriate for the purposes of such in-depth analysis.

Further, ESMA notes that a potential benefit of such annual summary requirement is that it would provide a "strong incentive" for all firms to improve the quality of execution monitoring. This again appears to be based on an assumption that (i) all investment firms behave with exactly the same pattern; and (ii) best execution means exactly the same for all clients in all circumstances regardless of whether retail or non-retail. In other words, there is a quality benchmark against which clients can assess the quality of each firm's monitoring. In this regard, we note that ESMA recognises that there are limits to the ability to specify standard measures of execution quality.

Therefore, MFA does not support this proposal.

In addition, Article 27(3) of MiFID II provides that "following execution of a *transaction* on behalf of a client the investment firm shall inform the client where *the order* was executed" (emphasis added). This seems to suggest that the investment firm shall inform the client of the trading venue following *each* trade. In the case of retail clients, there may be arguments to justify this requirement (which, if interpreted as discussed here, even in those cases appears to be overly onerous). In the case of professional clients, firms may execute hundreds of trades a day for one single client (*e.g.*, a large pension fund); there is no justification to require firms to make such disclosure after each trade. MFA urges ESMA to clarify that firms may satisfy this obligation by providing a list of trading venues at the start of the relationship. Alternatively, ESMA should clarify that this provision, on the assumption that it would be interpreted as discussed here, should only apply to trades executed on behalf of retail clients.

<ESMA_QUESTION_37>

**Q38: Do you have views on how 'directed orders' covered by client specific instructions should be captured in the information on execution quality? Is it possible to disaggregate reporting for directed orders from those for which there are no specific instructions and, if so, what the most relevant criteria would be for this exercise?**

<ESMA_QUESTION_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_38>

**Q39: Minimum standards to ensure that the summary of the firm's internal execution quality monitoring of their top five execution venues (in terms of trading volumes) is comprehensive and contains sufficient analysis or context to allow it to be understood by market participants shall include the factors set out at paragraph 29. Do you agree with this analysis or are there any other relevant factors that should be considered as minimum standards for reporting?**

<ESMA_QUESTION_39>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_39>

**Q40: Can you recommend an alternative approach to the provision of information on execution quality obtained by investment firms, which is consistent with Article 27(6) of MiFID II and with ESMA's overall objective to ensure proportionate implementation?**

<ESMA_QUESTION_40>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_40>

**Q41: Do you agree that ESMA should try to limit the number of definitions of classes of instruments and provide a classification that can be used for the different reports established by MiFID and MiFIR?**

<ESMA_QUESTION_41>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_41>

**Q42: If this approach is not viable how should these classes be defined? What elements should be taken into consideration for that classification? Please explain the rationale of your classification. Is there a need to delay the publication of the reporting for particular class of financial instruments? If the schedule has to be defined, what timeframe would be the most relevant?**

<ESMA_QUESTION_42>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_42>

**Q43: Is any additional data required (for instance, on number of trades or total value of orders routed)?**

<ESMA_QUESTION_43>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_43>

**Q44: What information on conflicts of interest would be appropriate (inducements, capital links, payment for order flow, etc.)?**

<ESMA_QUESTION_44>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_44>

# 3. Transparency

## 3.1. Pre-trade transparency - Equities

**Q45: What in your view would be the minimum content of information that would make an indication of interest actionable? Please provide arguments with your answer.**

<ESMA_QUESTION_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_45>

**Q46: Do you agree with ESMA's opinion that Table 1 of Annex II of Regulation 1287/2006 is still valid for shares traded on regulated markets and MTFs? Please provide reasons for your answer.**

<ESMA_QUESTION_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_46>

**Q47: Do you agree with ESMA's view that Table 1 of Annex II of Regulation 1287/2006 is appropriate for equity-like instruments traded on regulated markets and MTFs? Are there other trading systems ESMA should take into account for these instruments? Please provide reasons for your answer.**

<ESMA_QUESTION_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_47>

**Q48: Do you agree with ESMA's view that ADT remains a valid measure for determining when an order is large in scale compared to normal market size? If not, what other measure would you suggest as a substitute or complement to the ADT? Please provide reasons for your answer.**

<ESMA_QUESTION_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_48>

**Q49: Do you agree that ADT should be used as an indicator also for the MiFIR equity-like products (depositary receipts, ETFs and certificates)? Please provide reasons for your answers.**

<ESMA_QUESTION_49>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_49>

**Q50: Do you think there is merit in creating a new ADT class of 0 to €100,ooo with an adequate new large in scale threshold and a new ADT class of €100,000 to €500,000? At what level should the thresholds be set? Please provide reasons for your answer.**

<ESMA_QUESTION_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_50>

**Q51: Do you think there is merit in creating new ADT classes of €1 to €5m and €5 to €25m? At what level should the thresholds be set? Please provide reasons for your answer.**

<ESMA_QUESTION_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_51>

**Q52: Do you think there is merit in creating a new ADT class for 'super-liquid' shares with an ADT in excess of €100m and a new class of €50m to €100m? At what level should the thresholds be set?**

<ESMA_QUESTION_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_52>

**Q53: What comments do you have in respect of the new large in scale transparency thresholds for shares proposed by ESMA?**

<ESMA_QUESTION_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_53>

**Q54: Do you agree with the ADT ranges selected? Do you agree with the large in scale thresholds set for each ADT class? Which is your preferred option? Would you calibrate the ADT classes and related large in scale thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).**

<ESMA_QUESTION_54>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_54>

**Q55: Which is your preferred scenario? Would you calibrate the ADT classes differently? Please provide reasons for your answers.**

<ESMA_QUESTION_55>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_55>

**Q56: Do you agree that the same ADT classes should be used for both pre-trade and post-trade transparency? Please provide reasons for your answers.**

<ESMA_QUESTION_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_56>

**Q57: How would you calibrate the large in scale thresholds for each ADT class for pre- and post-trade transparency? Please provide reasons for your answers.**

<ESMA_QUESTION_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_57>

**Q58: Do you agree with ESMA's view that the large in scale thresholds (i.e. the minimum size of orders qualifying as large in scale and the ADT classes) should be subject to a review no earlier than two years after MiFIR and Level 2 apply in practice?**

<ESMA_QUESTION_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_58>

**Q59: How frequently do you think the calculation per financial instrument should be performed to determine within which large in scale class it falls? Which combination of frequency and period would you recommend?**

<ESMA_QUESTION_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_59>

**Q60: Do you agree with ESMA's opinion that stubs should become transparent once they are a certain percentage below the large in scale thresholds? If yes, at what percentage would you set the transparency threshold for large in scale stubs? Please provide reasons to support your answer.**

<ESMA_QUESTION_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_60>

**Q61: Do you agree with ESMA's view that the most relevant market in terms of liquidity should be the trading venue with the highest turnover in the relevant financial instrument? Do you agree with an annual review of the most relevant market in terms of liquidity? Please give reasons for your answer.**

<ESMA_QUESTION_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_61>

**Q62: Do you agree with ESMA's view on the different ways the member or participant of a trading venue can execute a negotiated trade? Please give reasons for your answer.**

<ESMA_QUESTION_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_62>

**Q63: Do you agree that the proposed list of transactions are subject to conditions other than the current market price and do not contribute to the price formation process? Do you think that there are other transactions which are subject to conditions other than the current market price that should be added to the list? Please provide reasons for your answer.**

<ESMA_QUESTION_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_63>

**Q64: Do you agree that these are the two main groups of order management facilities ESMA should focus on or are there others?**

<ESMA_QUESTION_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_64>

**Q65: Do you agree with ESMA's general assessment on how to design future implementing measures for the order management facility waiver? Please provide reasons for your answer.**

<ESMA_QUESTION_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_65>

**Q66: Are there other factors that need to be taken into consideration for equity-like instruments? Please provide reasons for your answer.**

<ESMA_QUESTION_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_66>

**Q67: Do you agree that the minimum size for a stop order should be set at the minimum tradable quantity of shares in the relevant trading venue? Please provide reasons for your answer.**

<ESMA_QUESTION_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_67>

**Q68: Are there additional factors that need to be taken into consideration for equity-like instruments?**

<ESMA_QUESTION_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_68>

**Q69: Which minimum overall sizes for iceberg orders are currently employed in the markets you use and how are those minimum sizes determined?**

<ESMA_QUESTION_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_69>

**Q70: Which minimum sizes and which methods for determining them should be prescribed via implementing measures? To what level of detail should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?**

<ESMA_QUESTION_70>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_70>

**Q71: Which methods for determining the individual peak sizes of iceberg orders are currently employed in European markets?**

<ESMA_QUESTION_71>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_71>

**Q72: Which methods for determining peaks should be prescribed by implementing measures, for example, should these be purely abstract criteria or a measure expressed in percentages against the overall size of the iceberg order? To what level of details should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?**

<ESMA_QUESTION_72>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_72>

**Q73: Are there additional factors that need to be taken into consideration for equity-like instruments?**

<ESMA_QUESTION_73>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_73>

## 3.2. Post-trade transparency - Equities

**Q74: Do you agree that the content of the information currently required under existing MiFID is still valid for shares and applicable to equity-like instruments? Please provide reasons for your answer.**

<ESMA_QUESTION_74>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_74>

**Q75: Do you think that any new field(s) should be considered? If yes, which other information should be disclosed?**

<ESMA_QUESTION_75>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_75>

**Q76: Do you think that the current post-trade regime should be retained or that the identity of the systematic internaliser is relevant information which should be published? Please provide reasons for your response, distinguishing between liquid shares and illiquid shares.**

<ESMA_QUESTION_76>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_76>

**Q77: Do you agree with the proposed list of identifiers? Please provide reasons for your answer.**

<ESMA_QUESTION_77>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_77>

**Q78: Do you think that specific flags for equity-like instruments should be envisaged? Please justify your answer.**

<ESMA_QUESTION_78>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_78>

**Q79: Do you support the proposal to introduce a flag for trades that benefit from the large in scale deferral? Please provide reasons for your response.**

<ESMA_QUESTION_79>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_79>

**Q80: What is your view on requiring post-trade reports to identify the market mechanism, the trading mode and the publication mode in addition to the flags for the different types of transactions proposed in the table above? Please provide reasons for your answer.**

<ESMA_QUESTION_80>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_80>

**Q81: For which transactions captured by Article 20(1) would you consider specifying additional flags as foreseen by Article 20(3)(b) as useful?**

<ESMA_QUESTION_81>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_81>

**Q82: Do you agree with the definition of "normal trading hours" given above?**

<ESMA_QUESTION_82>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_82>

**Q83: Do you agree with the proposed shortening of the maximum permissible delay to 1 minute? Do you see any reason to have a different maximum permissible deferral of publication for any equity-like instrument? Please provide reasons for your answer**

<ESMA_QUESTION_83>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_83>

**Q84: Should the deferred publication regime be subject to the condition that the transaction is between an investment firm dealing on own account and a client of the firm? Please provide reasons for your answer.**

<ESMA_QUESTION_84>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_84>

**Q85: Which of the two options do you prefer in relation to the deferral periods for large in scale transactions (or do you prefer another option that has not been proposed)? Please provide reasons for your answer**

<ESMA_QUESTION_85>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_85>

**Q86: Do you see merit in adding more ADT classes and adjusting the large in scale thresholds as proposed? Please provide alternatives if you disagree with ESMA's proposal**

<ESMA_QUESTION_86>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_86>

**Q87: Do you consider the thresholds proposed as appropriate for SME shares?**

<ESMA_QUESTION_87>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_87>

**Q88: How frequently should the large in scale table be reviewed? Please provide reasons for your answer**

<ESMA_QUESTION_88>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_88>

**Q89: Do you have concerns regarding deferred publication occurring at the end of the trading day, during the closing auction period?**

<ESMA_QUESTION_89>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_89>

**Q90: Do you agree with ESMA's preliminary view of applying the same ADT classes to the pre-trade and post-trade transparency regimes for ETFs? Please provide reasons for your answer.**

<ESMA_QUESTION_90>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_90>

## 3.3. Systematic Internaliser Regime - Equities

**Q91: Do you support maintaining the existing definition of quotes reflecting prevailing market conditions? Please provide reasons for your answer.**

<ESMA_QUESTION_91>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_91>

**Q92: Do you support maintaining the existing table for the calculation of the standard market size? If not, which of the above options do you believe provides the best trade-off between maintaining a sufficient level of transparency and ensuring that obligations for systematic internalisers remain reasonable and proportionate? Please provide reasons for your answer.**

<ESMA_QUESTION_92>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_92>

**Q93: Do you agree with the proposal to set the standard market size for depositary receipts at the same level as for shares? Please provide reasons for your answer.**

<ESMA_QUESTION_93>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_93>

**Q94: What are your views regarding how financial instruments should be grouped into classes and/or how the standard market size for each class should be established for certificates and exchange traded funds?**

<ESMA_QUESTION_94>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_94>

## 3.4. Trading obligation for shares (Article 23, MiFIR)

**Q95: Do you consider that the determination of what is non-systematic, ad-hoc, irregular and infrequent should be defined within the same parameters applicable for the systematic internaliser definition? In the case of the exemption to the trading obligation for shares, should the frequency concept be more restrictive taking into consideration the other factors, i.e. 'ad-hoc' and 'irregular'?**

<ESMA_QUESTION_95>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_95>

**Q96: Do you agree with the list of examples of trades that do not contribute to the price discovery process? In case of an exhaustive list_would you add any other type of transaction? Would you exclude any of them? Please, provide reasons for your response.**

<ESMA_QUESTION_96>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_96>

**Q97: Do you consider it appropriate to include benchmark and/or portfolio trades in the list of those transactions determined by factors other than the current valuation of the share? If not, please provide an explanation with your response.**

<ESMA_QUESTION_97>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_97>

## 3.5. Introduction to the non-equity section and scope of non-equity financial instruments

**Q98: Do you agree with the proposed description of structured finance products? If not, please provide arguments and suggestions for an alternative.**

<ESMA_QUESTION_98>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_98>

**Q99: For the purposes of transparency, should structured finance products be identified in order to distinguish them from other non-equity transferable securities? If so, how should this be done?**

<ESMA_QUESTION_99>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_99>

**Q100: Do you agree with the proposed explanation for the various types of transferable securities that should be treated as derivatives for pre-trade and post trade transparency? If not, please provide arguments and suggestions for an alternative.**

<ESMA_QUESTION_100>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_100>

**Q101: Do you agree with ESMA's proposal that for transparency purposes market operators and investment firms operating a trading venue should assume responsibility for determining to which MiFIR category the non-equity financial instruments which they intend to introduce on their trading venue belong and for providing their competent authorities and the market with this information before trading begins?**

<ESMA_QUESTION_101>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_101>

**Q102: Do you agree with the definitions listed and proposed by ESMA? If not, please provide alternatives.**

<ESMA_QUESTION_102>
MFA strongly disagrees with ESMA's approach of excluding debt issued by third country governments or government agencies and departments from the definition of "sovereign debt". Although we appreciate that ESMA's approach has been guided by the Article 4 of MiFID II, in our view it is vital that debt issued by third country governments and agencies is included within the scope of this definition. To the extent that such debt is not included within the definition, national competent authorities will not, for example, be able to utilise their power to authorise the publication of several sovereign debt transactions in aggregated form for an indefinite period of time (see Article 11(3) of MiFIR). It is vital that sovereign debt issued by third country issuers benefits from the full range of transparency suspension and relaxation powers available, given the potential for volatility in sovereign debt markets to seriously affect financial stability and trading conditions in the wider markets. We note in this regard that both U.S. sovereign debt and European sovereign debt fall outside the scope of the U.S. transparency regime. Taking a more stringent approach to sovereign debt issued by third country issuers under the MiFID II regime will thus create inconsistency on a global scale, and may make market participants more reluctant to trade in third country sovereign debt through EU trading venues.

<ESMA_QUESTION_102>

## 3.6. Liquid market definition for non-equity financial instruments

**Q103: Do you agree with the proposed approach? If you do not agree please provide reasons for your answers. Could you provide for an alternative approach?**

<ESMA_QUESTION_103>
MFA agrees with ESMA's approach of taking into account a combination of: (i) a minimum number of transactions; and (ii) a minimum number of trading days on which at least one transaction occurred, above which a market would satisfy the "average frequency" requirement. In MFA's view, both the number of trades over a given period and the number of days on which trading has occurred may be of relevance in assessing average frequency. Assessing the number of days on which trading has occurred will allow ESMA to assess whether trading has been fairly consistent throughout the relevant time period or whether, for example, there have been periods of low liquidity, which would indicate that the market may not be suitable for full transparency requirements on an ongoing basis. If a longer "look-back" period is used, this parameter will be particularly relevant (a shorter period may not show up such periods of low liquidity).

The number of transactions that occurred during the period in question will also be relevant given that this parameter illustrates overall market activity; markets with a higher number of transactions will in general be more suitable for full transparency requirements.

However, as noted in our response to Q110, regardless of which approach is adopted in relation to the frequency of transactions, ESMA should bear in mind that using such historical trade data alone may not be indicative of market depth or liquidity for trading different products. Market depth, as evidenced for example by the number of dealers quoting two-way markets in a product, and the notional sizes of the quoted bids and offers, is an equally instructive liquidity indicator.

We note that ESMA has not specified a particular time period during which it will assess average frequency, but has instead simply noted that it may "if necessary" consider different time periods for different classes of financial instruments. MFA supports ESMA's proposal to vary its approach according to the different features of particular instruments. We also suggest that ESMA retain some flexibility in its determination of the length of the look-back period, so as to adjust its liquidity-related assessments more responsively to material market changes. MFA expects that over the next few years there will be a substantial evolution in the trading characteristics of instruments affected by the change in scope of MiFID II transparency requirements, particularly in relation to the derivatives market (given, for example, the derivatives trading obligation). For example, the number of market participants may increase, the average trade size may be lower, *etc.* In addition, there could be one-off, long-term changes or shorter-term shocks that alter the trading patterns for a specific derivative contract or class of financial instruments, warranting targeted adjustments to the relevant look-back period.

<ESMA_QUESTION_103>

**Q104: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?**

<ESMA_QUESTION_104>
MFA agrees that Option 2 is preferable to Option 1 given that basing the "average size" calculation on notional and the number of trading days could help to prevent more volatile markets with periods of low liquidity from being declared subject to the trading obligation. As ESMA notes, Option 2 (which would calculate average size based on total turnover of

transactions divided by the number of transactions rather than by trading days) would ignore uneven distributions of transactions over time.

While there may be some value in using Option 1 to assess the size of the individual transactions which occurred during the relevant period, Option 1 should only be used in addition to and in connection with Option 2, and not as a sole or exclusive parameter. If Option 1 is factored into the regime, ESMA would also have to bear in mind that the "average" value of transactions can vary widely between asset classes, so a one-size-fits-all threshold would be highly inappropriate in this regard.
<ESMA_QUESTION_104>

**Q105: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?**

<ESMA_QUESTION_105>
As a general point, ESMA should bear in mind that products may be traded infrequently in certain markets, but there could still be a "liquid market" in the sense that ready and willing buyers and sellers are always available. As such, although in very small markets there may be concerns surrounding the identity of market participants being discoverable from transparency data, MFA would recommend that less importance is placed on this criterion in comparison to the other proposed criteria (*e.g.* average volume and value).

With this in mind, and in order to ensure that transparency requirements are applied to the correct markets, ESMA could place some importance on the number of liquidity providers active in the market, in addition to assessing the overall number of market participants. However, exclusively taking into account the number of members or participants with a "contractual arrangement to provide liquidity", without looking at the broader marketplace, could prove too restrictive in practice. For that reason, Option 1, which takes into account all market members and participants, seems preferable to Option 2 as currently phrased.

In relation to Option 3, we would simply note that taking into account clients of members and participants of trading venues as well as direct members or participants would be a more complex calculation to run in practice than the calculation required under Option 1.
<ESMA_QUESTION_105>

**Q106: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?**

<ESMA_QUESTION_106>
MFA generally agrees with ESMA's approach to the collection of data on bid-ask spreads, particularly given that the stated approach implicitly recognises that in some situations there may simply not be any reliable data on the bid-ask spread.

As a general comment, while ESMA notes that "the tighter the bid-ask spread the more liquid the respective financial instrument" (see paragraph 24, page 121 of the Discussion Paper), in our view ESMA should also appreciate that in certain cases, the application of transparency requirements will lead to bid-ask spread compression. Therefore, for an otherwise suitably standardised and liquid product, citing a wide bid-ask spread as a reason should not be considered as a com-

plete or exclusive reason to avoid implementing transparency requirements.
<ESMA_QUESTION_106>

**Q107: Should different thresholds be applied for different (classes of) financial instruments? Please provide proposals and reasons.**

<ESMA_QUESTION_107>
MFA strongly agrees with ESMA's statement that "the definition of the spread thresholds should take into account the specifics of the individual classes of financial instruments". Bid-ask spread will vary depending on the class of financial instruments, volatility and risk, and potentially also on the notional size and maturity of transactions within that class.
<ESMA_QUESTION_107>

**Q108: Do you have any proposals for appropriate spread thresholds? Please provide figures and reasons.**

<ESMA_QUESTION_108>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_108>

**Q109: How could the data necessary for computing the average spreads be obtained?**

<ESMA_QUESTION_109>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_109>

**Q110: Do you agree with the proposed approach? If you do not agree please providereasons for your answer. Could you provide an alternative approach?**

<ESMA_QUESTION_110>
As noted in our response to Q105, data on market size is likely to be of less importance than the other factors noted by ESMA (although see also our views on spreads, as set out in our response to Q106). However, as also noted, information on whether there are ready and willing buyers and sellers on a consistent basis may be a significant indicator of liquidity.

As a general comment, regardless of which approach is adopted in relation to calculating the frequency and size of transactions, we wish to underscore that using such historical trade data to assess liquidity does have limitations for indicating market depth. Market depth, as evidenced, for example, by the number of dealers quoting two-way markets in a product, and the notional sizes of the quoted bids and offers, is an equally instructive liquidity indicator.

<ESMA_QUESTION_110>

**Q111: Overall, could you think of an alternative approach on how to assess whether a market is liquid bearing in mind the various elements of the liquid market definition in MiFIR?**

<ESMA_QUESTION_111>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_111>

**Q112: Which is your preferred scenario or which combination of thresholds would you propose for defining a liquid market for bonds or for a sub-category of bonds (sovereign, corporate, covered, convertible, etc.)? Please provide reasons for your answer.**

<ESMA_QUESTION_112>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_112>

**Q113: Should the concept of liquid market be applied to financial instruments (IBIA) or to classes of financial instruments (COFIA)? Would be appropriate to apply IBIA for certain asset classes and COFIA to other asset classes? Please provide reasons for your answers**

<ESMA_QUESTION_113>
In terms of calculating the liquidity threshold for each class of instruments, we note that ESMA is consulting on two options: (i) a specialist working group, which would determine the threshold based on data analysis and consultation with stakeholders; and (ii) a coverage ratio, which would be set such that a specific proportion of transactions in each class of instruments would always be subject to transparency. ESMA has likened the coverage ratio mentioned in its second option to the U.S. Commodity Futures Trading Commission ("**CFTC**")'s set percentage of 67% total notional of derivative transactions, beneath which transactions will fall below block sizes.

MFA supports the introduction of a coverage ratio in theory, but we stress that any such ratio should be set and phased in appropriately. For example, ESMA could follow the CFTC's approach of initially setting the ratio at 50% for certain asset classes, and increasing its level over time. In addition, different sub-categories of financial instruments should each have their own coverage ratio; an appropriate level of granularity in setting sub-categories of instruments will be essential to ensuring that the ratio is set at an appropriate level. In particular, transaction features such as maturity and notional should be taken into account in sub-dividing categories of financial instruments for these purposes.

Both the COFIA and the IBIA approaches have different strengths: the COFIA approach would be easier to apply in practice and would give greater certainty as to which instruments are likely to benefit from pre-trade transparency waivers and post-trade transparency deferrals, while the IBIA approach may be more likely to guard against the risk of individual instruments being incorrectly categorised as liquid (*i.e.*, given that individual instruments will be assessed on a case-by-case basis).

Despite the potential advantages of the IBIA approach, we are concerned that it would prove impractical and costly if applied across the board. The COFIA approach appears more workable, although its success would depend on the sub-categories of instruments used in the calculations being sufficiently granular in nature. Transaction features such as maturity, notional, currency and underlying should be taken into account in ensuring that the sub-categories of instruments used in the COFIA approach are sufficiently homogeneous in terms of liquidity.

Nevertheless, despite MFA's general preference for COFIA, a hybrid COFIA/IBIA approach may in fact be optimal, with COFIA used for those categories of instruments which can easily be categorised according to their liquidity profile, and IBIA used for those categories of instruments (*e.g.*, exotics) which have divergent characteristics and which are more difficult to divide into groups which are "homogenous" in terms of liquidity.

Regardless of which approach is chosen, the liquidity profile of a class of instruments may change very quickly, and as such it is important to build an adequate review process into the liquidity assessment. In particular, ESMA's suggestion that the liquidity threshold be calibrated only bi-annually seems rather infrequent, particularly if intervening changes dictate a more responsive, interim calibration.

<ESMA_QUESTION_113>

**Q114: Do you have any (alternative) proposals how to take the 'range of market conditions and the life-cycle' of (classes of) financial instruments into account - other than the periodic reviews described in the sections periodic review of the liquidity threshold and periodic assessment of the liquidity of the instrument class, above?**

<ESMA_QUESTION_114>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_114>

**Q115: Do you have any proposals on how to form homogenous and relevant classes of financial instruments? Which specifics do you consider relevant for that purpose? Please distinguish between bonds, SFPs and (different types of) derivatives and across qualitative criteria (please refer to Annex 3.6.1).**

<ESMA_QUESTION_115>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_115>

**Q116: Do you think that, in the context of the liquidity thresholds to be calculated under MiFID II, the classification in Annex 3.6.1 is relevant? Which product types or sub-product types would you be inclined to create or merge? Please provide reasons for your answers**

<ESMA_QUESTION_116>
*Relevance of Annex 3.6.1*

We would suggest that as a minimum, sub-categories of instruments used in the COFIA approach should be split according to the "other potential liquidity sub-categories" column of Annex 3.6.1. This portion of the table appears fairly granular and would take into account factors such as maturity, notional amount, underlying, settlement type and currency, all of which may be relevant to an instrument's liquidity. However, for those instruments where the class would have to be split to an extremely narrow degree to form homogenous categories of liquidity, or where it is impossible to form such homogenous categories at all, the IBIA approach may be more appropriate than COFIA. In particular, certain sub-categorisations (such as the category of "exotic derivatives" currently proposed by ESMA) may at present be too broad to cover only those instruments with a very similar or identical liquidity profile.

*Granularity of Annex 3.6.1*

It is important that ESMA sets product classes at a sufficiently granular level, in order to avoid mixing product types which may in practice have very different liquidity profiles. It is positive in this respect that the "sub-product type" category of Annex 3.6.1 would split out "plain vanilla" fixed to floating interest rate swaps from other types of interest rate derivatives, such as swaptions, caps, floors and inflation swaps. The trading characteristics and liquidity profiles of

these products exhibit material differences (the most important of which in this context is their average notional trade size).

We also support the fact that the CDS section of Annex 3.6.1 differentiates between tranched and untranched index CDS; in our view there should be entirely separate sub-categories applying to indexes, options, and tranches. However, we would also prefer Annex 3.6.1 to acknowledge a separate category applicable to the then-current five-year on-the-run CDS indexes, given that "on-the-run" indexes trade much more frequently than "off-the-run" indexes.

As an overall comment applying to all categories of instruments covered by Annex 3.6.1, the granularity of the differing categories can be optimised by taking into account different product types within each asset class alongside the features of transactions contained in "other potential liquidity sub-categories" (such as spread, tenor and currency). We therefore support the fact that Annex 3.6.1 aims to distinguish between instruments along these lines.

*Issue of Package Transactions*

We would also like to draw ESMA's attention to the categorisation of "package transactions" in this context. In particular, we believe that the issue of "package" vs. "outright" transactions should be included in the financial taxonomy set out in Annex 3.6.1. For example, in Section 4(b) of Annex 3.6.1, this "package" vs. "outright" distinction should be included in the "other potential liquidity sub-categories" column. As noted in our response to Q175, "package" transactions involve the simultaneous and contingent execution of two or more instruments, as opposed to "outright" transactions which involve the execution of only one instrument.

The treatment of package transactions emerged as a significant stumbling block during the imposition of the trading obligation in the U.S., and the challenges that have arisen continue to be dealt with *via* no-action relief from the CFTC. Thus, the issue of package transactions will be particularly relevant to the extent that the sub-categorisations set out in Annex 3.6.1 are employed for the purposes of the derivatives trading obligation (ESMA notes at paragraph 24, page 191 of the Discussion Paper that there is likely to be a significant overlap between liquidity assessments made in the context of the derivatives trading obligation and the transparency regime).

The components or legs of a package transaction are priced or quoted together as a single economic transaction. The market for, and liquidity profile of, package transactions thus differ from that of the individual instruments that may comprise a package transaction when executed on an outright basis. Given the differing liquidity profiles, when it comes to conducting the liquidity analyses for the purposes of applying the trading obligation, ESMA should consider "package" transactions separately from "outright" transactions. While certain package transactions are very standardised and liquid, and thus may be appropriate for inclusion within the scope of full transparency requirements or the trading obligation, others are not – even those comprised of instruments that if executed on a stand-alone or "outright" basis may individually be liquid enough to be subject to full transparency requirements or the trading obligation. In the U.S. for example, some package transactions already trade on SEFs, and are effectively required to do so, but many others do not. Thus, CFTC had to resort to issuing no-action relief to facilitate a staggered compliance timeline for mandatory SEF trading of various types of package transactions.

Package transactions are relatively common, particularly in the "rates" asset class, and come in a variety of types:

- Swap Curve: package of two swaps of differing tenors;
- Swap Butterfly: package of three swaps of differing tenors;
- Swap Spreads: government bonds vs. swaps typically within similar tenors;
- MBS Basis: TBAs (Agency MBS) vs. swaps;
- Invoice Spreads: T-note or T-bond futures vs. swaps;
- Cash/Futures Basis: Eurodollar futures bundles vs. swaps; and
- Delta-Neutral Option Packages: caps, floors, or swaptions vs. swaps.

By allowing market participants simultaneously to price and execute multiple instruments of a single overall economic transaction, package transactions improve pricing and decrease transaction costs for the following reasons:

- A single package transaction will have a significantly tighter bid-offer spread than each stand-alone instrument, reflecting the fact that the package transaction has significantly lower market risk than an outright swap transaction.
- Separately executing each stand-alone instrument (within a package) would require paying the bid-offer on each leg as though they were each outright transactions, resulting in a cumulative bid-offer that is a multiple of the bid-offer of a package transaction.
- There is more efficient risk transfer and hedging, because a market participant exchanges the net risk of the package with a single counterparty, rather than the outright risk on each instrument within the package with different counterparties.

In MFA's view, package transactions should therefore be viewed as "complete" instruments with their own liquidity profiles, rather than their individual legs being considered separately for the purposes of the liquidity assessment undertaken for the purposes of both the transparency regime and the derivatives trading obligation.

<ESMA_QUESTION_116>

**Q117: Do you agree with the proposed approach? If not, please provide rationales and alternatives.**

<ESMA_QUESTION_117>

In MFA's view, the power to temporarily suspend transparency requirements where liquidity drops below a certain threshold should be used only rarely, with an appropriate regulatory distinction being made by national competent authorities between pre- and post-trade transparency requirements. We note in this context the important relationship between pre-trade transparency and the derivatives trading obligation that would warrant parallel application or suspension of both requirements by national competent authorities. However, although national competent authorities have been given the power to temporarily suspend pre-transparency requirements, there is no equivalent power in the context of the trading obligation. Indeed, the process for suspending the trading obligation is fairly time-consuming, and involves drafting regulatory technical standards, which would be subject to a fixed review period. There is

therefore a concern that pre-trade transparency requirements could be suspended while the trading obligation is still in force, leaving market participants with no market data to support mandatory trading activities. Finally, we believe that post-trade transparency should be universally applied by national competent authorities.

Thus, we agree that a high bar should be set for the use of national competent authorities' powers to suspend transparency requirements, involving both qualitative and quantitative arguments which include the use of empirical analysis and market data.

<ESMA_QUESTION_117>

**Q118: Do you agree with the proposed thresholds? If not, please provide rationales and alternatives.**

<ESMA_QUESTION_118>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_118>

## 3.7. Pre-trade transparency requirements for non-equity instruments

**Q119: Do you agree with the description of request-for-quote system? If not, how would you describe a request-for-quote system? Please give reasons to support your answer.**

<ESMA_QUESTION_119>
As noted in our response to Q124, a defining characteristic of request-for-quote ("RFQ") systems is that the requesting participant is the only counterparty to which the quote is disclosed. We feel that the proposed definition as currently framed does not place sufficient emphasis on this aspect of RFQ systems.

Thus, in our view the definition of an RFQ system should stress that a quote will be disclosed only to the member or participant which requested the quote, on an exclusive basis. In addition, the proposed definition does not highlight that a request for a firm quote would generally follow a prior "indicative" quote having been provided to the requesting member or participant.

We would therefore recommend that the definition be altered to incorporate the fact that in an RFQ system quotes are disclosed on an exclusive basis to the requesting member or participant, and that quotes disclosed in this context will be "firm" quotes.

<ESMA_QUESTION_119>

**Q120: Do you agree with the inclusion of request-for-stream systems in the definition of request-for-quote system? Please give reasons to support your answer.**

<ESMA_QUESTION_120>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_120>

**Q121: Do you think that – apart from request-for-stream systems – other functionalities should be included in the definition of request-for-quote system? If yes, please provide a description of this functionality and give reasons to support your answer.**

<ESMA_QUESTION_121>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_121>

**Q122: Do you agree with the description of voice trading system? If not, how would you describe a voice trading system?**

<ESMA_QUESTION_122>
We would recommend that ESMA amend the definition to make clear that the operator of the voice trading system must have some active role in arranging transactions; otherwise, there is a danger that the scope of the definition could encompass bilateral OTC trading entered into between two parties *via* a telecommunications system. Only multilateral voice trading systems should be caught by transparency requirements applying to trading venues in this context (*i.e.*, given that trading venues are defined in MiFIR as being multilateral in nature). Pure bilateral execution systems (*e.g.*, voice single dealer platforms) should not be required to operate in compliance with Articles 8 and 10 of MiFIR.

We note that instant messaging may fulfil a very similar role to telephone conversations where market participants are communicating with their brokers, and as such ESMA should interpret "voice negotiation" as extending to electronic forms of communication such as instant messaging.

ESMA should also give further consideration to how the new transparency regime will apply to hybrid platforms with a voice traded element, and whether such systems will fit within the definition of a voice traded platform. In our view, those hybrid systems which first route orders to a broker by telephone may be appropriate for inclusion in the scope of a "voice trading system", even if the actual execution of the transaction later takes place electronically (particularly given that these systems are appropriate for application of the "size specific to the instrument" pre-trade transparency waiver which is available to voice trading systems).

As a general comment, MFA remains unsure of how pre-trade transparency requirements are likely to work in the context of voice trading systems, and in particular whether the requirement for voice trading systems to publish bids, offers and actionable indications of interest through electronic means to the wider market is likely to work effectively. ESMA should work with market providers to come up with a realistic and cost-effective solution to the introduction of transparency in this situation.

<ESMA_QUESTION_122>

**Q123: Do you agree with the proposed table setting out different types of trading systems for non-equity instruments?**

<ESMA_QUESTION_123>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_123>

**Q124: Do you think that the information to be made public for each type of trading system provides adequate transparency for each trading system?**

<ESMA_QUESTION_124>
MFA is concerned by the conflict between the pre-trade transparency requirements proposed by ESMA and permitted trading modalities for executing derivatives subject to the trading obligation. Specifically, ESMA proposes to permit trading venues to use an RFQ system as one of the permitted modalities for executing transactions in derivatives that are subject to the trading obligation, and one defining characteristic of an RFQ system is that the requesting participant is the only counterparty to which the quote is disclosed (see Section 3.7 paragraph 10, at page 149 of the Discussion Paper). However, ESMA is proposing that the "bids and offers and attaching volumes submitted by each responding entity" should be made public pre-trade (see Section 3.7 paragraph 16, at page 151 of the Discussion Paper). MFA believes that making this information public pre-trade would effectively turn an RFQ system into some other type of system by eliminating one of the essential features of an RFQ. By definition, an RFQ combines selective provision of disclosure combined with selective execution of quotes. The willingness of market participants to provide quotes and the terms under which they do so is influenced by their expectation that quotes will be selectively distributed and executed. MFA recommends that ESMA exercise the authority that it has to make necessary calibration for different types of trading systems in order to preserve the spirit and intent of RFQs (see Article 3(2) of MiFIR, which requires that transparency requirements "be calibrated for different types of trading systems").

<ESMA_QUESTION_124>

**Q125: Besides the trading systems mentioned above, are there additional trading models that need to be considered for pre-trade transparency requirements in the non-equity market space?**

<ESMA_QUESTION_125>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_125>

**Q126: If you think that additional trading systems should be considered, what information do you think should be made public for each additional type of trading model?**

<ESMA_QUESTION_126>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_126>

**Q127: Based on your experience, what are the different types of voice trading systems in the market currently? What specific characteristics do these systems have?**

<ESMA_QUESTION_127>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_127>

**Q128: How do these voice trading systems currently make information public or known to interested parties at the pre-trade stage?**

<ESMA_QUESTION_128>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_128>

**Q129: Do you agree with ESMA's approach in relation to the content, method and timing of pre-trade information being made available to the wider public?**

<ESMA_QUESTION_129>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_129>

**Q130: Do you agree with the above mentioned approach with regard to indicative pre-trade bid and offer prices which are close to the price of the trading interests? Please give reasons to support your answer**

<ESMA_QUESTION_130>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_130>

**Q131: If you do not agree with the approach described above please provide an alternative**

<ESMA_QUESTION_131>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_131>

## 3.8. Post-trade transparency requirements for non-equity instruments

**Q132: Do you agree with the proposed content of post-trade public information? If not, please provide arguments and suggestions for an alternative.**

<ESMA_QUESTION_132>
In general, MFA agrees with the proposed content of post-trade public information (including information on trading day and time, instrument identification, unit price and price notation, quantity, quantity notation and venue identification). We feel that this set of data has worked effectively in the context of the equities transparency regime and will be suitable for non-equity instruments as long as the appropriate transactions (*e.g.*, large in scale transactions) benefit from appropriate waivers and deferrals.

We note, however, that on page 160 of the Discussion Paper ESMA states that:

> *with respect to give-up/give in trades, ESMA is considering whether the inclusion of these trades in post-trade data provides the market with additional and necessary information or risks giving an inflated view of the true trading activity. On the other hand, ESMA is of the view that such trades must be captured and identified as such and therefore, the key issue is whether or not they should be published in post-trade reports.*

Although the proposals in relation to give-up trades are not entirely clear, we would caution ESMA against requiring post-trade transparency data to be published twice in relation to the trade's pre-give-up and post-give-up state. It is difficult to know what value this additional information would provide to the market; indeed, attaching post-trade transparency requirements to both the pre-give-up and the post-give-up trade may (as ESMA notes) would simply give an inflated view of trading activity in a particular market. Importantly, such an approach to post-trade transparency requirements could be highly misleading for market participants, given that the pre-give-up information would reflect "old" market data, which market participants may not

be able to distinguish from current market data. The primary value of post-trade transparency data is in our view the real-time availability of pricing data, and attaching transparency requirements to transactions in their pre-give-up state could adversely affect the quality and reliability of such pricing data.

We note that when a similar question arose in relation to the European Market Infrastructure Regulation ("**EMIR**") reporting regime, ESMA determined that where a give-up occurs within one business day following execution and there has not been any change of the economic terms of the original trade, the trade need only be reported in its post-give-up state. A similar approach should preferably be taken in this context.
<ESMA_QUESTION_132>

**Q133: Do you think that the current post-trade regime for shares on the systematic internaliser's identity should be extended to non-equity instruments or that the systematic internaliser's identity is relevant information which should be published without exception?**

<ESMA_QUESTION_133>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_133>

**Q134: Is there any other information that would be relevant to the market for the above mentioned asset classes?**

<ESMA_QUESTION_134>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_134>

**Q135: Do you agree with the proposed table of identifiers for transactions executed on non-equity instruments? Please provide reasons for your answer.**

<ESMA_QUESTION_135>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_135>

**Q136: Do you support the use of flags to identify trades which have benefitted from the use of deferrals? Should separate flags be used for each type of deferral (e.g. large in scale deferral, size specific to the instrument deferral)? Please provide reasons for your answer.**

<ESMA_QUESTION_136>
In general, flags attaching to deferrals are more helpful in terms of informational value than flags attaching to pre-trade transparency waivers (as proposed by ESMA in this context), although we are unsure what value a "give-up/give-in" flag will add and are of the view that this category could be omitted.

We were surprised by ESMA's statement that "not necessarily both sides of the transactions will be large in scale" in this context (see page 159 of the Discussion Paper), given that the large in scale threshold is designed to apply in the same way across all counterparties. If this statement in fact refers to the difference between block and allocation trades, we would prefer that post-trade transparency requirements apply at block rather than allocation level. Publicising post-trade transparency data at allocation level would have limited informational value, and could potentially even have a distortive effect on market data.

<ESMA_QUESTION_136>

**Q137: Do you think a flag related to coupon payments (ex/cum) should be introduced? If yes, please describe the cases where such flags would be warranted and which information should be captured.**

<ESMA_QUESTION_137>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_137>

**Q138: Do you think that give-up/give-in trades (identified with a flag) should be included in post-trade reports or not made public? Please provide reasons for your answers.**

<ESMA_QUESTION_138>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_138>

**Q139: Do you agree that securities financing transactions should be exempted from the post-trade transparency regime?**

<ESMA_QUESTION_139>
MFA agrees that securities financing transactions should be exempted from the post-trade transparency regime. Transparency requirements could become onerous in the context of repurchase or re-hypothecation transactions, and it is unclear what benefit transparency would bring to the market in these situations. We note that there is an exemption applying to similar transactions in shares as a result of the MiFID Implementing Regulation, and we would prefer this exemption to be reproduced in the context of non-equity instruments.

<ESMA_QUESTION_139>

**Q140: Do you agree that for the initial application of the new transparency regime the information should be made public within five minutes after the relevant non-equity transaction? Please provide reasons for your answer.**

<ESMA_QUESTION_140>
Although MFA sees the value in a "backstop" time limit by which transparency data must be published, ESMA should preferably build some flexibility into its proposals. For example, we note that ESMA's requirement for a maximum deadline of five minutes appears to have been partially informed by statistics relating to the Trade Reporting and Compliance Engine ("TRACE") operated by FINRA in the U.S. (*e.g.*, at page 169 of the Discussion Paper, ESMA states that in practice over 80% of all corporate and agency transactions publicised through the TRACE system are made public within five minutes). This timeframe for publication may in fact decrease in future given that the TRACE system is about to be updated and improved. However, currently the TRACE system is subject to a 15-minute reporting deadline, and while we appreciate ESMA's desire to implement a timeframe which is as short as possible, it would be optimal to have international consistency in this regard.

We would also note that the TRACE system is relevant only to fixed income securities such as corporate and agency bonds, and the MiFID II transparency regime extends beyond this to other financial instruments (such as derivatives). For consistency, we support an aligned publication timeframe with the TRACE system for bonds and similar fixed income instruments, other than

derivatives. For derivatives, we support an aligned timeframe with the U.S. CFTC's Part 43 real-time public reporting requirement.

Thus, although MFA is supportive of access to market data being as fast and efficient as possible, we would advocate for the EU regime to be appropriately harmonised with TRACE for bonds and similar instruments, and the CFTC's Part 43 reporting timeframes for derivatives, but in each case with flexibility built into the applicable standard such that it may keep pace with evolving international regulation and technological developments.

We would however note that if ESMA goes ahead with its proposal to impose a five-minute deadline, it should consider whether a phase-in of the publication deadline would be appropriate for RFQ, voice and hybrid systems given that ESMA itself notes that they may find it difficult to publish information within the five-minute deadline. For this reason it may be advisable to allow them a longer timeframe at least initially, in order to give the operators of such systems time to adapt to the new requirements (this may be particularly relevant in the context of voice trading).

<ESMA_QUESTION_140>

**Q141: Do you agree with the proposed text or would you propose an alternative option? Please provide reasons for your answer.**

<ESMA_QUESTION_141>
An appropriate regime for the deferred publication of post-trade transparency data is extremely important for non-equity instruments given that many such instruments are relatively illiquid. Deferred publication allows market participants a period of time prior to publication of the details of a transaction during which they may undertake offsetting transactions without as much risk of other market participants anticipating such offsetting transactions and "trading against" the entity in question.

MFA therefore supports ESMA's approach of carefully considering the application of the deferral regime to transactions which are large in scale, illiquid transactions and transactions of a size that would expose liquidity providers to undue risks.

Given that national competent authorities, rather than ESMA, will in practice authorise deferred publication of transactions, it is important to ensure that the transparency regime is applied in a consistent and harmonised fashion throughout the EU.

ESMA's decision to grant a longer deferral period for illiquid transactions than for liquid transactions which are large in size may be justified given that it would presumably take longer to source and enter into an offsetting trade in an illiquid market. However, the deferral periods proposed by ESMA may nevertheless be too short; in particular, the deferral periods proposed for large in size transactions appear to have been copied across from the proposed equities transparency regime. Simply replicating the regime applying to equities may be inappropriate even for more liquid non-equities.

<ESMA_QUESTION_141>

**Q142: Do you agree that the intra-day deferral periods should range between 60 minutes and 120 minutes?**

<ESMA_QUESTION_142>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_142>

**Q143: Do you agree that the maximum deferral period, reserved for the largest transactions, should not exceed end of day or, for transactions executed after 15.00, the opening of the following trading day? If not, could you provide alternative proposals? Please provide reasons for your answer.**

<ESMA_QUESTION_143>
As noted in our response to Q141, the deferral periods proposed for large in size transactions appear to have been copied across from the proposed equities transparency regime. These deferral periods may be inappropriate for non-equity instruments (even those falling outside the "illiquid market" category), and it is vital that market participants are given the chance to hedge or unwind their transactions before details of the trade are made public.

<ESMA_QUESTION_143>

**Q144: Do you consider there are reasons for applying different deferral periods to different asset classes, e.g. fixing specific deferral periods for sovereign bonds? Please provide arguments to support your answer.**

<ESMA_QUESTION_144>
MFA is in favour of the deferral regime being calibrated to different asset classes, in light of their differing levels of liquidity and trading patterns.

<ESMA_QUESTION_144>

**Q145: Do you support the proposal that the deferral for non-equity instruments which do not have a liquid market should be until the end of day + 1? Please provide reasons for your answer.**

<ESMA_QUESTION_145>
As noted in our response to Q144, MFA would prefer to see the deferral regime being calibrated to the characteristics of individual asset classes and categories of financial instruments. While a T+1 deadline may well be appropriate for the majority of markets, presumably the deadline should be longer for extremely illiquid markets where it could take more than one day to source an offsetting transaction.

<ESMA_QUESTION_145>

**Q146: Do you think that one universal deferral period is appropriate for all non-equity instruments which do not have a liquid market or that the deferrals should be set at a more granular level, depending on asset class and even sub asset class. Please provide reasons for your answer.**

<ESMA_QUESTION_146>
As noted in our response to Q145, it may be appropriate to distinguish between instruments falling within the "illiquid" category of instruments such that longer deferral periods apply in markets with exceptionally low levels of liquidity. Failing to allow for market participants to

hedge or unwind their positions could result in liquidity providers being deterred from engaging in as many transactions in future. As such, providing for an appropriate deferral period in each case is a significant concern, and if it would take more than one business day to source an offsetting transaction in particularly illiquid markets, the deferral period should presumably reflect this longer timeframe. If the COFIA approach is used in assessing liquidity, it could be instructive to assess instruments according to the class they fall into for the purposes of COFIA.

<ESMA_QUESTION_146>

**Q147: Do you agree with the proposal that during the deferred period for non-equity instruments which do not have a liquid market, the volume of the transaction should be omitted but all the other details of individual transactions must be published? Please provide reasons for your answer.**

<ESMA_QUESTION_147>
In our view, volume is the key data point which needs to be masked during the deferral period. Publication of other details is considerably less significant in this regard.

<ESMA_QUESTION_147>

**Q148: Do you agree that publication in an aggregated form with respect to sovereign debt should be authorised for an indefinite period only in limited circumstances? Please give reasons for your answers. If you disagree, what alternative approaches would you propose?**

<ESMA_QUESTION_148>
ESMA's decision to restrict the indefinite deferral of post-trade transparency data on sovereign debt transactions to limited situations (*i.e.*, where conditions are such that they may impact on the market as a whole, create uncertainty, or affect financial stability) seems appropriate given the restriction on access to data that an indefinite deferral would involve.

However, please also see our response to Q102, which contends that ESMA should include debt issued by third country governments or government agencies and departments in the definition of "sovereign debt" for these purposes.

<ESMA_QUESTION_148>

**Q149: In your view, which criteria and/or conditions would it be appropriate to specify as indicating there is a need to authorise extended/indefinite deferrals for sovereign debt??**

<ESMA_QUESTION_149>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_149>

**Q150: In your view, could those transactions determined by other factors than the valuation of the instrument be authorised for deferred publication to the end of day? Please provide reasons for your answer.**

<ESMA_QUESTION_150>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_150>

## 3.9. The transparency regime of non-equity large in scale orders and transactions

**Q151: Do you agree with the proposed option? Which option would be more suitable for the calibration of the large in scale requirements within an asset class?**

<ESMA_QUESTION_151>
Option 1 would ensure that the most illiquid instruments, when assessed on an individual basis, would benefit from the most generous waiver and deferral regimes (*i.e.*, since the threshold for a "large in scale" order would be reduced for less liquid instruments). Nevertheless, Option 2 would likely be more workable when applied across the full range of financial instruments caught by the scope of the new regime. It would also be less costly to put into effect and would provide greater certainty as to when instruments are caught by the scope of the large in scale regime. For Option 2 to operate effectively, however, the relevant classes of financial instruments would have to be set at an appropriate level of granularity to ensure that only those instruments with a very similar or identical liquidity profile were included in the class.

If ESMA does go forward with Option 2, we would suggest a regular review of the relevant thresholds given that trading patterns may change over time. In particular, reviewing and re-setting the thresholds for large in scale transactions only every two years may be too infrequent to ensure that the thresholds keep pace with market developments.

<ESMA_QUESTION_151>

**Q152: Do you consider there are reasons for opting for different options for different asset classes? Please provide arguments.**

<ESMA_QUESTION_152>
As in the case of the COFIA/IBIA approaches, if Option 2 is chosen, it may be appropriate to utilise Option 1 in certain limited cases (*i.e.*, where ESMA is unable to set meaningful sub-categories of instruments with an identical or near-identical liquidity profile).

<ESMA_QUESTION_152>

**Q153: Do you agree that the choice between the two options should be consistent with the approach adopted for the assessment of liquidity? If not, please provide arguments.**

<ESMA_QUESTION_153>
Broadly, we would agree that consistency between the two choices and the COFIA/IBIA approach would be helpful in implementing the new regime. As noted in our response to Q152, for those instruments where COFIA has been found to be appropriate Option 2 should be used, whereas for instruments where COFIA is found to be unsuitable and IBIA is used, Option 1 should be implemented.

<ESMA_QUESTION_153>

**Q154: Do you agree with the proposed approach? If no, which indicator would you consider more appropriate for the determination of large in scale thresholds for orders and transactions?**

<ESMA_QUESTION_154>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_154>

**Q155: Do you agree that the proxy used for the determining the large in scale thresholds should be the same as the one used to assess the average size of transactions in the context of the definition of liquid markets? Please provide arguments.**

<ESMA_QUESTION_155>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_155>

**Q156: In your view, which option would be more suitable for the determination of the large in scale thresholds? Please provide arguments.**

<ESMA_QUESTION_156>
MFA would support the introduction of a "coverage ratio" (*i.e.*, Option B), but only to the extent that the ratio is phased in appropriately, *e.g.*, following the CFTC's approach of setting an initial ratio of 50%, which is intended to be increased following a phase-in period. We note that if Option B is used, different sub-categories of financial instruments should each have their own coverage ratio, set on an individual basis. If product categories are set too broadly and capture dissimilar product types, the resulting blended data set would yield a large in scale threshold set too low for certain instruments, and too high for others. Thus, product categories should take into account different product types within each asset class alongside the features of transactions contained in "other potential liquidity sub-categories" column of Annex 3.6.1 (such as spread, tenor and currency).

<ESMA_QUESTION_156>

**Q157: Alternatively which method would you suggest for setting the large in scale thresholds?**

<ESMA_QUESTION_157>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_157>

**Q158: In your view, should large in scale thresholds for orders differ from the large in scale thresholds for transactions? If yes, which thresholds should be higher: pre-trade or post-trade? Please provide reasons to support your answer.**

<ESMA_QUESTION_158>
MFA would support international harmonisation with the CFTC regime, which takes the simpler approach of treating the two categories in the same way.

<ESMA_QUESTION_158>

**Q159: Do you agree that the large in scale thresholds should be computed only on the basis of transactions carried out on trading venues following the implementation of MiFID II? Please, provide reasons for the answer.**

<ESMA_QUESTION_159>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_159>

**Q160: Do you think that the condition for deferred publication of large in scale transactions currently applying to shares (transaction is between an investment firm that deals on own account and a client of the investment firm) is applicable to non-equity instruments? Please provide reasons for your answer.**

<ESMA_QUESTION_160>
A condition that only large in scale transactions which are entered into between an investment firm that deals on own account and a client of the investment firm are eligible for post-trade deferral seems overly restrictive in the context of non-equity transactions. We note that this condition was put in place in relation to the equities transparency regime for the reason that "only when investment firms put their capital at risk to facilitate the trade of a third party is there a reason for deferring the publication of price and quantity of the transaction". MFA is concerned, however, that a similarly restrictive approach in relation to non-equity markets could lead to a withdrawal of liquidity or to market participants which are not investment firms or clients thereof being forced to divide their trades into smaller transactions.

<ESMA_QUESTION_160>

**Q161: Do you agree that the large in scale regime should be reviewed no earlier than two years after application of MiFIR in practice?**

<ESMA_QUESTION_161>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_161>

## 3.10. Size specific to the instrument

**Q162: Do you agree with the above description of the applicability of the size specific to the instrument? If not please provide reasons for your answer.**

<ESMA_QUESTION_162>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_162>

**Q163: Do you agree with the proposal that the size specific to the instrument should be set as a percentage of the large in scale size? Please provide reasons for you answer.**

<ESMA_QUESTION_163>
Setting the size specific to the instrument threshold as a percentage of the large in scale size is likely to be the most cost-effective and simple solution as long as the size specific to the instrument threshold is set at a level below the large in scale threshold (*i.e.*, given that it is intended to cover transactions which would ordinarily fall outside the scope of the large in scale regime but which would nevertheless be inappropriate for full transparency requirements).

<ESMA_QUESTION_163>

**Q164: In your view, what methodologies would be most appropriate for measuring the undue risk in order to set the size specific threshold?**

<ESMA_QUESTION_164>

Although MFA is generally in favour of robust transparency requirements, we feel that it is vital to set a relatively generous regime of waivers and deferrals applying to RFQ and voice trading systems, where the size specific to the instrument threshold will have most impact. The regime can, if necessary, be re-calibrated following an initial phase-in period during which operators of voice and RFQ trading systems bring their systems into compliance with MiFID II transparency requirements.

It seems to us that the question of measuring a transaction size "which would expose liquidity providers to undue risk" is rather subjective in nature, particularly given that the risk which liquidity providers are able and willing to take on will vary from provider to provider. Thus, while we would suggest that ESMA calibrates its approach to different markets, and takes into account input from liquidity providers on this subject, it would likely be simplest to set a single percentage for each sub-category of financial instruments, having regard to preserving market liquidity to the greatest extent possible.

<ESMA_QUESTION_164>

**Q165: Would you suggest any other practical ways in which ESMA could take into account whether, at such sizes, liquidity providers would be able to hedge their risks?**

<ESMA_QUESTION_165>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_165>

**Q166: Do you agree with ESMA's description of how the size specific to the instrument waiver would interact with the large in scale waiver? Please provide reasons for your answer.**

<ESMA_QUESTION_166>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_166>

**Q167: Do you agree with ESMA's description of how the size specific to the instrument deferrals would interact with the large in scale deferrals? In particular, do you agree that the deferral periods for the size specific to the instrument and the large in scale should differ and have any specific proposals on how the deferral periods should be calibrated? Please provide reasons for your answer.**

<ESMA_QUESTION_167>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_167>

## 3.11. The Trading Obligation for Derivatives

**Q168: Do you agree that there should be consistent categories of derivatives contracts throughout MiFIR/EMIR?**

<ESMA_QUESTION_168>
Consistency between MiFID II and EMIR is broadly desirable given that it will make implementation of the MiFID II regime easier for market participants. We also note in this context that a clearing determination made in relation to a class of derivatives under EMIR may

trigger an assessment of whether those derivatives should also be subject to mandatory trading under Article 32 of MiFIR.

Nevertheless, the assessment of whether the trading obligation should apply is clearly intended to operate separately and independently from the assessment of whether a class of derivatives is suitable for mandatory clearing under EMIR. In MFA's view, it may be beneficial to split derivatives into more granular sub-categories for the purposes of the trading obligation than for the purposes of the clearing obligation. For example, currently for USD fixed-to-floating interest rate swaps in the U.S., while the clearing obligation applies to a broad range of tenors (28 days to 50 years) and regardless of start date (spot-starting or forward-starting), the trading obligation only applies to spot-starting swaps at specific benchmark tenors (2, 3, 4, 5, 6, 7, 10, 12, 15, 20, 30 years).

Although derivatives which are subject to clearing are more likely to be suitable for mandatory trading, the trading obligation should only be applied to those sub-categories of cleared derivatives which are the most liquid. In particular, the fact that a derivative transaction is eligible for clearing does not necessarily equate to its suitability for mandatory trading under MiFIR, particularly given the sporadic or discontinuous liquidity that exists in certain derivative markets. Thus, as noted, more granular sub-categories of derivatives (potentially split according to their liquidity profile) may need to be considered in relation to the trading obligation.

Given our view that clearing-eligible transactions are the transactions which are most likely to be eligible for mandatory trading, we do not consider (at least initially) that ESMA should expand the remit of the trading obligation beyond the scope of cleared transactions to those transactions which are uncleared (*i.e.*, pursuant to Article 32(4)).

<ESMA_QUESTION_168>

**Q169: Do you agree with this approach to the treatment of third countries?**

<ESMA_QUESTION_169>
ESMA's proposal to draft Level 2 measures relating to those transactions between third country counterparties which have a "direct, substantial and foreseeable effect" in the EU along similar lines to EMIR is positive, given that the relevant EMIR technical standards apply in an appropriately well-defined set of circumstances, which market participants are now familiar with.

As a more general point in relation to third country counterparties, Article 33 of MiFIR permits non-EU counterparties to comply with an "equivalent" third country regulatory regime rather than with the MiFIR trading obligation, but only where one of the counterparties is "established in" the relevant third country. Similar wording has caused problems under EMIR, and in MFA's view, the term "established in" should be given a broad interpretation, such that it is considered to apply to firms subject to the laws of an equivalent non-EU jurisdiction without actually being established there. Otherwise, firms which are subject to regimes such as Dodd Frank due to the regime's extraterritorial scope may find that they are required to comply with two overlapping and potentially conflicting pieces of regulation. This cannot be the intent of Article 33, which is described as a "mechanism to avoid duplicative or conflicting rules".

Finally, when ESMA comes to consider the equivalence of third country trading venues, it should preferably take a holistic approach to assessing the third country regulatory regime, rather than a more prescriptive line-by-line approach. It is important that the European Commission adopts equivalence decisions pursuant to Article 28(4) of MiFIR in time for the entry into force of the trading obligation. For example, where market participants are already trading a swap or class of swaps that later becomes subject to the EU trading obligation on a U.S. swap execution facility ("SEF"), this should be sufficient to satisfy the EU trading obligation.

<ESMA_QUESTION_169>

**Q170: Do you agree with the proposed criteria based anti-avoidance procedure?**

<ESMA_QUESTION_170>
As noted in our response to Q169, MFA supports consistency between the EMIR and the MiFIR regimes, and we believe that the anti-avoidance procedure implemented under EMIR would translate well to MiFIR, particularly given that it applies in an appropriately restricted set of circumstances.

<ESMA_QUESTION_170>

**Q171: Do you think it would be reasonable for ESMA to consult venues with regard to which classes of derivatives contracts are traded on venue? Do you think venues would be well placed to undertake this task?**

<ESMA_QUESTION_171>
Article 32(2)(a) requires ESMA to assess which classes of derivatives are currently being traded on trading venues, or which have been admitted to trading on trading venues. To this end, ESMA will be required to collate the necessary data from trading venues.

Nevertheless, in MFA's view, the liquidity test is of primary importance in assessing whether derivatives are appropriate to be declared subject to mandatory trading, while the "venue test" is simply an initial hurdle. Thus, we support ESMA's proposed approach of retaining full oversight and control of the "liquidity" determination which is required to be made before derivatives can be declared subject to mandatory trading. Trading venues may be well placed to assist ESMA by providing data to inform ESMA's liquidity analyses. ESMA should not rely on trading venues, however, to make determinations as to which classes of derivatives should be subject to the trading obligation. We note in this respect that ESMA may not need to ask trading venues which classes of derivatives are "appropriate" for inclusion in the trading obligation ahead of the public consultation, since trading venues will have the chance to respond to the public consultation in any event.
<ESMA_QUESTION_171>

**Q172: The discussion in section 3.6 on the liquid market for non-equity instruments around 'average frequency', 'average size', 'number and type of active market participants' and average size of spreads is also relevant to this chapter and we would welcome respondent's views on any differences in how the trading obligation procedure should approach the following:**

<ESMA_QUESTION_172>
As a general point, ESMA should bear in mind that in certain markets, although products may be traded infrequently, there may still be a "liquid market" in the sense that there are always buyers

and sellers available. In addition, and regardless of which approach is adopted in relation to frequency and size of transactions, it should be borne in mind that using such historical trade data alone may not be indicative of market depth or liquidity for trading different products. Market depth, as evidenced for example by the number of dealers quoting two-way markets in a product, and the notional sizes of the quoted bids and offers, is an equally instructive liquidity indicator.

In relation to point (i), both the number of trades over a given period and the number of days on which trading has occurred may be of relevance in assessing average frequency. However, the number of days on which trading has occurred may be the more relevant criterion, given that it will allow ESMA to assess whether trading is fairly consistent throughout the relevant time period, or whether there are spikes in trading at certain times (potentially indicating volatility, or perhaps seasonal trends in trading patterns). Markets where there are repeated periods of low liquidity are less likely to be appropriate for mandatory trading (particularly given the prospective difficulties presented by the MiFID II process in relation to removing categories of derivatives from the scope of the trading obligation during periods of low liquidity). Nevertheless, it would also be useful to know how many trades occurred over the relevant period; if trading has been fairly consistent and in addition there have been a higher than average number of trades during the relevant period, the class of derivatives is more likely to be suitable for mandatory trading.

In relation to point (ii), MFA believes that ESMA should retain some regulatory flexibility in its determination of the length of the look-back period during which liquidity is assessed so as to adjust its liquidity assessments more responsively to material market changes. MFA expects that over the next few years there will be substantial evolution in the trading characteristics of the derivatives market. For example, the number of market participants may increase, the average trade size may be lower, *etc.* In addition, there could also be one-off, long-term changes or shorter-term shocks that altered the trading patterns for a specific derivative contract or asset class that would warrant targeted adjustments to the look-back period for one or more derivative categories.

In relation to point (iii), it would be appropriate to base the "average size" calculation on notional and the number of trading days, for similar reasons to those described above; *i.e.*, such a calculation will help to prevent more volatile markets with periods of low liquidity from being declared subject to the trading obligation.

In relation to point (iv), for products that are not traded on trading venues already, there may not always be reliable data on the bid-ask spread (although we note that pursuant to Section 3.6 on "Average Size of Spreads", ESMA's approach would mean that bid-ask spreads would only be calculated and taken into account to the extent that they are published by the most relevant market in terms of liquidity, and where certain additional requirements are met). As a general comment, while ESMA notes that the tighter the bid-ask spread, the more liquid the derivative, MFA believes ESMA should also appreciate that in certain cases the movement of a given contract onto a trading venue following the application of the trading obligation may lead to bid-ask spread compression as trading in the contract is exposed to more competition. Therefore, a wide bid-ask spread, in and of itself, should not necessarily preclude a contract from being subject to the trading obligation.
<ESMA_QUESTION_172>

**Q173: Do you have a view on how ESMA should approach data gathering about a product's life cycle, and how a dynamic calibration across that life cycle might work? How frequently should ESMA revisit its assumptions? What factors might lead the reduction of the liquidity of a contract currently traded on venue? Are you able to share with ESMA any analysis related to product lifecycles?**

<ESMA_QUESTION_173>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_173>

**Q174: Do you have any suggestions on how ESMA should consider the anticipated effects of the trading obligation on end users and on future market behaviour?**

<ESMA_QUESTION_174>
Transitioning the trading of standardised and liquid derivatives onto trading venues, if implemented in a careful and thoughtful manner, has the potential to deliver a number of benefits to end users, including access to more sources of liquidity, tighter pricing, and lower trading costs. However, this transition should be managed prudently to ensure a smooth implementation of the trading obligation.

An appropriate public consultation in relation to each class of derivatives which ESMA declares subject to mandatory trading will help ESMA assess how the trading obligation is likely to affect end users in practice. ESMA should give end users time fully to digest and respond to its proposals during the consultation period.

ESMA should use its authority to exclude large in scale orders from the scope of the trading obligation in order to ensure that best execution for larger orders is not impaired. In general, connectivity and access to trading venues will also be important considerations for end users. Therefore, ESMA should draft the relevant technical standards in such a way as to ensure that there are no barriers to electronic access to trading venues and that end users' participation on such venues does not expose them to a disproportionate regulatory burden.

In terms of future market behaviour, ESMA could consider the experiences of other jurisdictions which have already implemented mandatory trading, such as the U.S. Within the EU, the trading obligation should be phased in by product (not type of market participant), beginning with only the most liquid categories of derivatives. MFA believes ESMA should assess the impact of mandatory trading on trading patterns and liquidity provision in relation to the most liquid categories of derivatives before considering the inclusion of additional categories of derivatives within the scope of mandatory trading. As noted in our response to Q175 below, ESMA should consider "package" transactions separately from "outright" transactions for these purposes. While certain package transactions may be sufficiently standardised and liquid for inclusion in the scope of the trading obligation, others may not be, even where their component transactions might be considered sufficiently liquid on an individual basis.
<ESMA_QUESTION_174>

**Q175: Do you have any other comments on our overall approach?**

<ESMA_QUESTION_175>
MFA has the following overall comments on the Level 2 regime:

*Importance of phase-in period*

An adequate phase-in period should apply to the introduction of the trading obligation for all market participants at the same time. MFA does not recommend different phase-in periods for different types of market participants. MFA is very concerned that different phase-in periods applying to different types of market participants would both fragment liquidity and subject different groups of market participants to dramatically different access to execution. For these reasons, MFA recommends a period of 180 days for all market participants after the date on which regulatory technical standards specifying the class or classes of derivatives which are to be subject to the trading obligation enter into force. We note in this regard Article 32(1)(b) of MiFIR, which provides that ESMA must develop draft regulatory technical standards specifying the date or dates from which the trading obligation takes effect, "including any phase-in".

An adequate phase-in or transitional period for all market participants will provide market participants the requisite time to update their systems and procedures in order to comply with the trading obligation. In particular, market participants may be required to connect to new trading venues, which will potentially involve updates to information technology systems, operational changes, and the negotiation of onboarding documentation to trade on such venues. If the phase-in or transitional period is too short, only those market participants with the greatest resources to devote to these issues will be able to trade in the relevant class of derivatives, which could result in a lack of competition and potentially, a decline in liquidity.

*Removing derivatives from the scope of the trading obligation*

In MFA's view, the assessment of whether a class of derivatives is suitable for mandatory trading should be considered to be a fluid and ongoing assessment. It is extremely unfortunate that the process for removing derivatives from the scope of the trading obligation is so time-consuming. We would strongly suggest that a more expedited process would be preferable in order for ESMA to address sharp or sudden declines in the liquidity of derivatives subject to mandatory trading. Nevertheless, we realise that this is an issue posed by the Level 1 text itself.

As noted in our response to Q117, while national competent authorities have been given the power to temporarily suspend transparency requirements, there is no equivalent power in the context of the trading obligation. Thus, there is a concern that transparency requirements could be suspended while the trading obligation is still in force, leaving market participants with no market data to support mandatory trading activities.

In order to ensure that ESMA has early warning of which derivatives may need to be removed from the scope of the trading obligation, MFA recommends that ESMA establish and administer a clear process for assessing the liquidity of derivatives on an ongoing basis, and for commencing the process for removal from the scope of mandatory trading where necessary. ESMA should in particular put in place a process for periodically revisiting its initial assessment of liquidity. If the relevant class of derivatives is no longer trading effectively in an exchange-traded environment (as confirmed by market trading data), ESMA should immediately commence the process for removing the class from the scope of mandatory trading.

*Register of derivatives subject to the trading obligation*

It is vital that the register of derivatives which are subject to the trading obligation to be maintained on ESMA's website is sufficiently precise and detailed to provide market certainty in relation to the classes of derivatives are subject to the trading obligation.

*Package transactions*

MFA would like to draw ESMA's attention to the treatment of "package transactions" under the trading obligation. The treatment of package transactions emerged as a significant stumbling block during the imposition of the trading obligation in the U.S., and the challenges that have arisen continue to be dealt with *via* no-action relief from the CFTC. We thus make recommendations to ESMA that will ensure a smooth implementation of the trading obligation with respect to package transactions in the EU, and avoid the issues that arose in the U.S.

"Package" transactions involve the simultaneous and contingent execution of two or more instruments, as opposed to stand-alone or "outright" transactions which involve the execution of only one instrument. The components or legs of a package transaction are priced or quoted together as a single economic transaction. The market for, and liquidity profile of, package transactions thus differs from that of the individual instruments that may comprise a package transaction when executed on an outright basis. Given the differing liquidity profiles, when it comes to conducting the liquidity analyses for the purposes of applying the trading obligation, ESMA should consider package transactions separately from outright transactions. While certain types of package transactions are very standardised and liquid, and thus may be appropriate for inclusion within the scope of the trading obligation, others are not – even those comprised of instruments that if executed on a stand-alone or outright basis may individually be liquid enough to be subject to the trading obligation. In the U.S. for example, some types of package transactions already trade on SEFs, as they are now required to do so under the CFTC's phased compliance timeline for the trade execution requirement. But many other types of package transactions do not, which the CFTC has addressed by issuing no-action relief.

Package transactions are relatively common, particularly in the "rates" asset class, and come in a variety of types:

- Swap Curve: package of two swaps of differing tenors;
- Swap Butterfly: package of three swaps of differing tenors;
- Swap Spreads: government bonds vs. swaps typically within similar tenors;
- MBS Basis: TBAs (Agency MBS) vs. swaps;
- Invoice Spreads: T-note or T-bond futures vs. swaps;
- Cash/Futures Basis: Eurodollar futures bundles vs. swaps; and
- Delta-Neutral Option Packages: caps, floors, or swaptions vs. swaps.

By allowing market participants simultaneously to price and execute multiple instruments of a single overall economic transaction, package transactions improve pricing and decrease transaction costs for the following reasons:

- A single package transaction will have a significantly tighter bid-offer spread than each stand-alone instrument, reflecting the fact that the package transaction has significantly lower market risk than an outright swap transaction.
- Separately executing each stand-alone instrument (within a package) would require paying the bid-offer on each leg as though they were each outright transactions, resulting in a cumulative bid-offer that is a multiple of the bid-offer of a package transaction.
- There is more efficient risk transfer and hedging, because a market participant exchanges the net risk of the package with a single counterparty, rather than the outright risk on each instrument within the package with different counterparties.

The source of the complications that arose in the U.S. related to the wording used in the final rule that applied the U.S. trading obligation. Specifically, the language defined "required transaction" as "any transaction involving a swap that is subject to the trade execution requirement". By using the phrase "involving a swap", the rule language effectively applied the trading obligation to any package transaction that included a single instrument that had been subject to the trading obligation on a stand-alone or outright basis.

We believe that ESMA could learn from this experience and craft the application of the trading obligation in the EU in a manner that avoids inadvertently subjecting certain package transactions to the trading obligation before it is appropriate to do so based on the actual liquidity in the market for that package transaction. We believe that one of the most straightforward ways to do this would be to reflect "package" vs. "outright" transactions in the financial taxonomy that is being used for the calculation of the liquidity criteria (see Annex 3.6.1. of the Discussion Paper). For example, in 4(b), this "package" vs. "outright" distinction should be included in the final "other potential liquidity sub-categories".
<ESMA_QUESTION_175>

## 3.12. Transparency Requirements for the Members of ESCB

**Q176: Do you agree that the above identifies the types of operations that can be undertaken by a member of the ESCB for the purpose of monetary, foreign exchange and financial stability policy and that are within the MiFID scope? Please give reasons to support your answer.**

<ESMA_QUESTION_176>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_176>

**Q177: What is your view about the types of transactions for which the member of the ESCB would be able to provide prior notification that the transaction is exempt?**

<ESMA_QUESTION_177>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_177>

## 3.13. Article 22, MiFIR: Providing information for the purposes of transparency and other calculations

**Q178: Do you have any comments on the content of requests as outlined above?**

<ESMA_QUESTION_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_178>

**Q179: Do you have proposals on how NCAs could collect specific information on the number and type of market participants in a product?**

<ESMA_QUESTION_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_179>

**Q180: Do you consider the frequency of data requests proposed as appropriate?**

<ESMA_QUESTION_180>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_180>

**Q181: How often should data be requested in respect of newly issued instruments in order to classify them correctly based on their actual liquidity?**

<ESMA_QUESTION_181>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_181>

**Q182: What is your view of ESMA's initial assessment of the format of data requests and do you have any proposals for making requests cost-efficient and useful for all parties involved?**

<ESMA_QUESTION_182>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_182>

**Q183: Do you consider a maximum period of two weeks appropriate for responding to data requests?**

<ESMA_QUESTION_183>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_183>

**Q184: Do you consider a storage time for relevant data of two years appropriate?**

<ESMA_QUESTION_184>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_184>

# 4. Microstructural issues

## 4.1. Microstructural issues: common elements for Articles 17, 48 and 49 MiFID II

**Q185: Is there any element that has not been considered and/or needs to be further clarified in the ESMA Guidelines that should be addressed in the RTS relating to Articles 17, 48 and 49 of MiFID II?**

<ESMA_QUESTION_185>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_185>

**Q186: Do you agree with the definition of 'trading systems' for trading venues?**

<ESMA_QUESTION_186>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_186>

**Q187: Do you agree that the requirements under Articles 48 and 49 of MiFID II are only relevant for continuous auction order book systems and quote-driven trading systems and not for the other systems mentioned above?**

<ESMA_QUESTION_187>
MFA agrees that the requirements contained in Articles 48 and 49 are only relevant to continuous auction order book systems and quote-driven trading systems. In particular, these trading systems are most likely to be relevant to the regulation of algorithmic trading, and certain features of Article 48 and 49 would not translate well to a request-for-quote or voice trading system, for example.

<ESMA_QUESTION_187>

**Q188: Which hybrid systems, if any, should be considered within the scope of Articles 48 and 49, and why?**

<ESMA_QUESTION_188>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_188>

**Q189: Do you agree with the definition of "trading system" for investment firms?**

<ESMA_QUESTION_189>
We note that ESMA is proposing to define the term "trading system" as "all internal or external systems where...algorithms are deployed for trading". This definition would include "algorithmic technologies to interpret signals from the market", alongside other "supporting elements" enabling the implementation of algorithmic trading techniques. The definition of a "trading system" is in particular relevant to the scope of Article 17 of MiFID II, which requires, for example, that investment firms ensure their trading systems "are resilient and have sufficient capacity".

In general, MFA would prefer to see a more open-ended, principles-based definition of trading system which could be adapted to the differing trading and execution practices of individual firms, and which would have the ability to keep pace with changing technology and practices in this area. We note that under current proposals, it is rather unclear what would constitute the "supporting elements" of a firm's trading system (*e.g.* which elements of the firm's infrastructure or hardware might be included within the definition).

<ESMA_QUESTION_189>

**Q190: Do you agree with the definition of 'real time' in relation to market monitoring of algorithmic trading activity by investment firms?**

<ESMA_QUESTION_190>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_190>

**Q191: Is the requirement that real time monitoring should take place with a delay of maximum 5 seconds appropriate for the risks inherent to algorithmic trading and from an operational perspective? Should the time frame be longer or shorter? Please state your reasons.**

<ESMA_QUESTION_191>
MFA is supportive of a requirement for appropriate monitoring procedures, given that effective monitoring with minimal time delays will help to promote orderly markets. To this end, firms should be required to have policies and procedures in place to ensure that they use commercially reasonable methods to monitor their trading activities. Nevertheless, it may not be productive for ESMA to identify a specific time limit in relation to "real time" monitoring of algorithmic order entry and execution given the variety of firms which the new rules will affect, and given that technology is likely to develop over time, potentially rendering such a time frame obsolete in the future. Monitoring procedures should in particular be tailored to the firm's trading strategy such that the speed at which firms monitor trading is aligned with the speed at which they trade. Faster trading will require a more rapid monitoring process involving less time delay.

<ESMA_QUESTION_191>

**Q192: Do you agree with the definition of 't+1' in relation to market monitoring of algorithmic trading activity by investment firms?**

<ESMA_QUESTION_192>
As noted in our response to Q191, MFA supports the introduction of a principles-based approach to monitoring, which reflects the features of individual trading strategies and which is proportionate to the type of business undertaken by the investment firm. Again, a fixed monitoring deadline such as T+1 would in our view be overly prescriptive, particularly in light of the wide range of trading strategies employed at firms falling within the scope of the new requirements. Monitoring exclusively on a T+1 basis may in certain cases be appropriate, but in others may not enable firms to identify abusive practices, given, for example, that such practices may only be identifiable when data is assessed over a longer period.

<ESMA_QUESTION_192>

**Q193: Do you agree with the parameters to be considered to define situations of 'severe market stress' and 'disorderly trading conditions'?**

<ESMA_QUESTION_193>
MFA notes the importance of the term "disorderly trading conditions" to the proposed Level 2 regime; for example, under current proposals, investment firms will be required to test algorithms in order to assess whether they could "contribute to disorderly trading". Assessing algorithms against this standard seems to us to be rather vague, and we would prefer a more principles-based approach to testing, specifying the aims or goals which testing is intended to achieve.

In relation to ESMA's proposed definition of disorderly trading, we note that short-term changes in price, volume and number of messages may not in all cases be reflective of "disorderly" trading conditions. Instead, such changes in market activity could simply be indicative of new and significant pieces of information coming to light. In such event, however, trading could become disorderly if trading venues do not keep pace with technological upgrades, such as on bandwidth, or do not have regulatory mechanisms to assist with sudden spikes in volatility. Significant delays, interruptions or errors in transaction processing by trading venues, could, on the other hand, create disorderly trading conditions, particularly given that they may result in order queues, and potentially even mispricing.

<ESMA_QUESTION_193>

**Q194: Do you agree with the aboveapproach?**

<ESMA_QUESTION_194>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_194>

**Q195: Is there any element that should be added to/removed from the periodic self-assessment?**

<ESMA_QUESTION_195>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_195>

**Q196: Would the MiFID II organisational requirements for investment firms undertaking algorithmic trading fit all the types of investment firms you are aware of? Please elaborate.**

<ESMA_QUESTION_196>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_196>

**Q197: Do you agree with the approach described above regarding the application of the proportionality principle by investment firms? Please elaborate.**

<ESMA_QUESTION_197>
MFA strongly supports the application of the proportionality principle and the concept that investment firms should take into account the nature, scale and complexity of their business when implementing the organisational requirements set out in MiFID II.

In MFA's view, the proportionality principle should allow investment firms some level of flexibility and discretion in implementing the organisational requirements set out in MiFID II

(see, for example, our response to Q201, which contends that investment firms should have at least some flexibility in choosing which tests they run on algorithms, in order to ensure that tests are properly calibrated to the risks posed by particular algorithms or trading strategies).

Thus, MFA is concerned by ESMA's statement that the organisational requirements set out in the Discussion Paper are "minimum requirements that all investment firms should meet". Whilst MFA is in favour of a robust regulatory framework which rigorously addresses risk controls and systems safeguards in the context of algorithmic trading, and while we agree with the utility of many of the risk controls proposed by ESMA, it should not always be necessary to apply each of the risk controls proposed by ESMA in every situation. To the contrary, only those risk controls which are considered relevant and appropriate should need to be used by the investment firm in each case, and the question of relevance and appropriateness is an assessment which is best left to the firm itself.

We note ESMA's proposal that in assessing their degree of compliance with Article 17 of MiFID II, investment firms will be required to undertake "a detailed and robust self-assessment of their activities", which will be subject to sign-off by the firm's management body and which must be reviewed at least bi-annually. The adequacy of the firm's self-assessment is to be subject to audit by the firm's internal audit function or by an independent third party audit. We note in this regard that SEC Rule 206(4)-7 requires SEC-registered investment advisers to have policies and procedures reasonably designed to prevent violation by registrants and their supervised persons, and to review on an annual basis the adequacy of policies and procedures established to prevent violation of the Investment Advisers Act of 1940. From our experience, an annual review is the appropriate assessment period. It takes time for a firm to perform a detailed and robust self-assessment; and the more complex or greater number of investment businesses or strategies the firm has in place, the longer such an assessment may take. It also takes time to develop and implement new policies, procedures and/or systems which may be identified as being necessary as a result of an assessment.

Although external compliance audits may be conducted in connection with this annual review, there is no specific requirement under the SEC rule for such audits; rather, the investment adviser's chief compliance officer is tasked with overseeing the review process. Given the similarities between the aim of the self-assessment proposed by ESMA and of SEC Rule 206(4)-7 and in the interests of international harmonisation, we would suggest that ESMA adopt a similar framework of requiring annual review, with no requirement for an external audit.

In MFA's view, a bi-annual assessment would be extremely time-consuming, and would carry a significant cost for investment firms. In addition, it appears from ESMA's proposals that those firms which do not have internal audit function (which are likely to be smaller firms with more limited resources) will be required to rely on an external auditor, which would be very costly in practice. At most, such reviews should only be required to take place annually or following a significant change in the investment firm's business, and there should be no auditing requirement.

A more proportionate way of assessing whether investment firms are complying with the self-assessment obligation in an effective manner would be for national competent authorities to work with and alongside firms in implementing the new regime. This could be achieved *via* periodic case studies or by otherwise reviewing the practices of a control group of investment firms.

<ESMA_QUESTION_197>

**Q198: Are there any additional elements that for the purpose of clarity should be added to/removed from the non-exhaustive list contained in the RTS? Please elaborate.**

<ESMA_QUESTION_198>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_198>

## 4.2. Organisational requirements for investment firms (Article 17 MiFID II)

**Q199: Do you agree with a restricted deployment of algorithms in a live environment? Please elaborate**

<ESMA_QUESTION_199>
While MFA agrees that it may be beneficial for new algorithms to be rolled out in a controlled manner, we would prefer the use of "controlled roll outs" to be left to the discretion of the investment firm, given that they could potentially entail fairly significant limits on trading. In particular, while the controlled roll out requirement may be appropriate for entirely new algorithms, it should not apply in every case to existing algorithms which have undergone changes and restructuring; rather, the decision of whether or not to impose a controlled roll out following changes to the algorithm should be to the discretion of the investment firm. Requiring controlled roll-out to be applied in all cases would be problematic, even in the case of a major change or re-structuring of the algorithm. For example, where the algorithm in question is managing a substantial trading book, ceasing to trade even for a few days while slowly rolling out the change could expose investors to a disproportionate level of risk. In addition, the use of controlled roll-outs should also be optional for algorithms which are already functioning well on one or more trading venues but which the investment firm wishes to roll out onto new trading venues.

<ESMA_QUESTION_199>

**Q200: Do you agree with the parameters outlined for initial restriction? Please elaborate.**

<ESMA_QUESTION_200>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_200>

**Q201: Do you agree with the proposed testing scenarios outlined above? Would you propose any alternative or additional testing scenarios? Please elaborate.**

<ESMA_QUESTION_201>
Although MFA supports ongoing testing of algorithms, firms should be allowed some flexibility in devising and running tests, *i.e.* in line with the proportionality principle. Excessively detailed or specific requirements relating to the type of tests which firms are required to run could lead to testing which has not been properly calibrated to individual algorithms or trading strategies. Ultimately, this could result in trading strategies which are more likely to be unsafe, rather than achieving the desired goal of an overall safer marketplace. In general, therefore, MFA would prefer ESMA to specify the aims or goals which testing is intended to achieve rather than stipulating detailed testing requirements. Such a principles-based regime will allow for market

participants to institute testing programs that are able to evolve as trading strategies and technologies evolve.

In terms of ongoing testing, we note that ESMA has proposed a requirement for investment firms to perform bi-annual tests involving initiating, running and stopping a large number of algorithms in parallel (*i.e.* at least as many algorithms as the firm used on its most active trading day over the previous 6 month period). We are unsure of what such a requirement will achieve, and we are concerned that for firms which run both proprietary algorithms and algorithms belonging to third parties, the testing requirement could become quite complex in practice. In particular, if the third parties with whom algorithms originate are somehow required to participate in the testing exercise it could become very difficult to coordinate in practice.

As a general point, MFA notes that volume tests such as those proposed by ESMA are rather a blunt instrument, and that many firms already assess volume and capacity on a regular or daily basis in any event. Furthermore, making this requirement a bi-annual obligation would significantly raise costs for regulated firms.

<ESMA_QUESTION_201>

**Q202: Do you agree with ESMA's approach regarding the conditions under which investment firms should make use of non-live trading venue testing environments? Please elaborate.**

<ESMA_QUESTION_202>

As a general point, MFA believes that more robust and routine testing of trading software should be encouraged at the trading platform-level. In our view, it is important that testing of critical software becomes a more routine practice, particularly testing the process for suspension of a particular algorithm or trading software in the event that an issue arises in a live environment. Indeed, non-live trading venue testing may in many instances be preferable to testing exclusively within a firm.

However, the utility of non-live testing depends in large part on the quality of the testing facilities offered by trading venues. We note that under current proposals, investment firms will be required to ensure that their algorithms are tested under "appropriate scenarios" and to take all reasonable steps to ensure that they will not contribute to disorderly trading conditions, while trading venues will merely be required to ensure that their testing facilities are as close to real market situations as possible. Given the new testing requirements applying to investment firms, we would like to see a greater regulatory onus on trading venues to ensure that their testing facilities are adequate for these purposes.

In any event, there may be situations in which the testing scenarios provided by trading venues are not sufficient to ensure that algorithms will not contribute to disorderly trading, as ESMA itself acknowledges at page 252 of the Discussion Paper. In these cases, it would seem odd to require on-venue testing alongside other, more appropriate, testing methodologies.

There is also a possibility that if ESMA mandates testing on non-live trading venue environments in every situation, it may result in algorithms not having been tested as thoroughly as they might otherwise have been using other techniques. Thus, while MFA would prefer to see more routine

testing of algorithms in practice, mandating testing on non-live trading venue environments in all situations, even where other testing mechanisms would be more appropriate, may not be the correct solution. We would instead prefer to see market participants being encouraged to use on-venue testing through closer regulation and supervision of the testing facilities offered by trading venues.

If ESMA does go forward with a requirement to use non-live trading venue testing environments, it should clarify that testing is to be undertaken by the owner of the algorithm. For example, in the situation where an investment firm uses its broker's algorithm, the broker should be required to test it.

As a final comment, the standard which investment firms must meet of assessing whether their algorithms could "contribute to disorderly trading" seems somewhat broad and subjective. Although ESMA has proposed a definition of "disorderly trading conditions" which focuses on short-term changes in price and volume, the standard is still rather vague as a benchmark to assess algorithms against (please see our response to Q193 in this regard). Algorithms, by definition, are step-by-step procedures for making computations or calculations. They could be programmed to stop trading under defined circumstances, such as under "disorderly trading conditions", but "disorderly trading conditions" would need to be quantified. Regulators should be cautious in making such requests as requiring algorithms to stop trading in times of market volatility could exacerbate market events, remove liquidity from the markets and drive stock prices down further. It would be better simply to require investment firms to adhere to best practices in testing their algorithms.

<ESMA_QUESTION_202>

**Q203: Do you consider that ESMA should specify more in detail what should be the minimum functionality or the types of testing that should be carried out in non-live trading venue testing environments, and if so, which?**

<ESMA_QUESTION_203>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_203>

**Q204: Do you consider that the requirements around change management are appropriately laid down, especially with regard to testing? Please elaborate.**

<ESMA_QUESTION_204>
MFA supports ESMA's proposal that the depth of review relating to any changes in the production environment should be "appropriate to the magnitude of the proposed change". This approach recognises that investment firms should be permitted to take a flexible approach to change management depending on the complexity of the production environment and on the materiality of the change in question.

However, we note ESMA's statement in this context that "investment firms should ensure that the production and testing environments are kept segregated at all times". It is unclear to us what level of segregation would be required in this context (*e.g.* whether the segregation requirement would apply at software, hardware or network level, or all three). We note in this context that testing environments may at present utilise production market data, and so it is not clear whether they would satisfy the segregation requirement. In addition, testing environments may at present

be connected to production environments such that software can be more easily transferred from the testing environment to the production environment. Again, it is not clear whether this approach would violate the proposed segregation requirement.

As a more general issue, we are concerned about the costs of full segregation, particularly from a hardware perspective, given that it may become very expensive for firms to maintain two entirely separate hardware infrastructures. This is a particular concern for smaller firms, and if ESMA goes forward with this requirement it should consider stopping short of requiring full segregation, particularly for hardware.

As a final comment, we note that the segregation requirement may take some time for firms to implement in practice given that it does not necessarily reflect the current practice (as detailed above). Thus, ESMA should consider attaching a phase-in period to this requirement, in order to allow firms the necessary time to bring their systems into compliance with the new regime.

<ESMA_QUESTION_204>

**Q205: Do you agree with the proposed monitoring and review approach? Is a twice yearly review, as a minimum, appropriate?**

<ESMA_QUESTION_205>
As noted in our response to Q197, we believe that a bi-annual review process is too frequent, and that an annual review process, in line with SEC Rule 206(4)-7, would be more appropriate.

We are generally supportive of a requirement that investment firms implement "kill button" abilities. It is appropriate for firms engaged in algorithmic trading to have the ability to disconnect their trading strategies in the event of a serious software glitch. However, kill buttons should be strictly reserved for emergency situations, and should be used only as a last resort. Using a kill switch may have unforeseen and damaging effects, and may result in a firm being left with an unexpected risk exposure where orders intended to off-set its risk have been cancelled as a result of using the kill switch. Other tools, such as price collars, may be effective in volatile market conditions, and may be implemented with less risk of unforeseen consequences.

MFA does not support the requirement for investment firms to flag their own algorithms. ESMA should bear in mind that many algorithms may interact in order to produce a final trading decision, whether by way of decisions or by contributing information to the decision-making process. Flagging algorithms will produce an unnecessary quantity of data, and the additional IDs generated will not in our view provide a helpful source of data for the purposes of market monitoring. In addition, there is no specific requirement under Article 17 for investment firms to put in place flagging systems.

We recognise, however, that there is a requirement in Article 48(10) of MiFID II for trading venues "to be able to identify, by means of flagging from members or participants, orders generated by algorithmic trading, the different algorithms used for the creation of orders and the relevant persons initiating those orders". Nevertheless, in light of the wording of Article 48(10), we suggest that the process for flagging such orders and algorithms should be trading venue-led, without the need for additional flagging requirements being placed on investment firms as a result of the Level 2 regime.

Also, we note ESMA's proposal that each investment firm should run a "validation process" of all systems and algorithms, and establish a validation report for senior management at least twice yearly. The risk control function will be expected to lead the validation process. It is not entirely clear to us what the concept of "validation" means in this context, or what would be required to meet the necessary standard. In addition, the validation requirement appears to overlap with or replicate ESMA's proposal for sign-off and review procedures in relation to change management and testing. Finally, ESMA should bear in mind that the investment firm's risk control function may not be best placed to "lead" the validation process, given that the firm's risk function may not in practice have the necessary technical expertise to assess complex systems and trading algorithms. ESMA should allow a firm to delegate internally the responsibility of performing the "validation process" function.

<ESMA_QUESTION_205>

**Q206: To what extent do you agree with the usage of drop copies in the context of monitoring? Which sources of drop copies would be most important?**

<ESMA_QUESTION_206>
MFA strongly supports a requirement for trading venues and CCPs to provide real-time post-order receipts or "drop copies," post-trade drop copies, and post-clearing or "position" reports to customers (together, "post-trade reports"). Such post-trade reports would allow investment firms to independently confirm both their orders and trades, and to confirm their overall positions. Post-trade reports also have the potential to mitigate the impact of malfunctioning pre-trade risk controls or algorithms, particularly if they are made available and utilised on a low-latency basis.

Thus, MFA considers that drop copies, along with other post-trade reports, have an important role to play in monitoring and reconciliation by investment firms. However, a specific regulatory requirement that drop copies be used by all investment firms for reconciliation purposes should be accompanied by greater regulation of drop copy services. In particular, drop copy feeds should be required to be provided in real-time (particularly given that ESMA expects reconciliation with drop copy feeds to occur in real-time). Drop copy feeds should include at least a minimum amount of data relating to order and execution, including details of any amendments, cancellation requests, rejections and "leg fill" reports (*e.g.* illustrating whether the buy side or the sell side of a spread order has been fulfilled). Greater regulation of drop copy services is vital to the extent that monitoring and reconciliation against drop copy feeds becomes a regulatory requirement in future. In particular, trading venues do not currently offer drop copies on a consistent basis; certain venues do not offer drop copy services at all, some venues offer a full FIX drop copy, while others offer drop copy feeds which only show executions (such that no acknowledgements, cancellations or rejections appear on the feed). In addition, there is variation as to whether drop copy services can be provided at either a session level or a consolidated member level. As a result of these variations, it is currently a highly significant undertaking for firms to set themselves up to receive drop copies.

As a final comment, if drop copy services are to be a feature of firms' compliance in the future, ESMA should consider whether such services should be required to be provided at a reasonable cost. MFA would prefer any fees attaching to drop copy services to be built into market participants' overall transaction costs rather than being charged on a separate basis.

<ESMA_QUESTION_206>

**Q207: Do you agree with the proposed approach?**

<ESMA_QUESTION_207>
MFA is in favour of measures being taken to ensure that trading systems are as secure as possible from the risk of cyber attacks. However, while we agree with ESMA's aims in this respect, we are concerned that its approach to this issue is overly prescriptive. In our view, investment firms should be given a certain amount of flexibility to implement the new regime in a manner that is proportionate and tailored to the risks faced by their businesses. MFA would therefore prefer a more goal-orientated and less prescriptive regime at Level 2.

We would draw ESMA's attention in particular to the following examples of proposals which we believe are overly prescriptive, and unsuitable when applied across the full range of investment firms affected by the new regime:

- A requirement to put in place an IT system meeting "internationally established and recognised standards": this requirement does not take into account that such standards may not be wholly relevant and appropriate, or indeed sufficiently up to date for the purposes of firms engaged in algorithmic trading;

- A requirement for all investment firms engaged in algorithmic trading to implement two factor authentication for critical access rights: this requirement would not be practical; indeed, we understand that two factor authentication would not generally be used in the context of automated trading systems operated by investment firms; and

- Mandatory code escrow agreements: this requirement would not be workable for smaller firms in light of the costs attaching to such agreements.

<ESMA_QUESTION_207>

**Q208: Is the proposed list of pre trade controls adequate? Are there any you would add to or remove from the list?**

<ESMA_QUESTION_208>
Respectfully, MFA does not agree that with ESMA's statement that pre-trade risk limits should include the full list of controls "as a minimum". Investment firms should have some discretion over which risk limits should be applied in any given situation, depending on an assessment of individual trading strategies and market conditions. While such pre-trade controls may be helpful on an individual basis and in specific circumstances, the proportionality principle should govern which controls are appropriate to be applied in any given situation.

ESMA should avoid framing each individual risk control in an overly prescriptive way. For example, we support ESMA's decision not to set specific limits in relation to maximum message limits, but instead to simply require that firms are able to prevent sending an excessive number of messages to order books. Such flexibility will be key in implementing pre-trade controls; for example, if the maximum message limit were set too low it could increase risk by blocking orders intended to offset risk at times of heavy volume or market distress.

As noted, we consider that the majority of risk controls listed may on an individual basis and in the right circumstances be helpful when implemented in a way that is tailored to the individual firm's trading strategy and current market conditions. However, we would advise ESMA to omit the requirement for repeated automated execution throttles. While a repeated automated execution throttle may in some circumstances be an effective risk control, we believe that the implementation of such throttles should not be mandatory. Algorithms and trading strategies which are functioning as intended and which are not creating market disruption should not be required to be disabled simply because they have re-entered the market a certain number of times.

<ESMA_QUESTION_208>

**Q209: To what extent do you consider it appropriate to request having all the pre-trade controls in place? In which cases would it not be appropriate? Please elaborate.**

<ESMA_QUESTION_209>
As noted in our response to Q208, the proposed controls should not all be required to be implemented at once and utilised in relation to the same trading strategy. The majority of firms which pursue algorithmic trading strategies utilise proprietary technology that has often been structured in a highly individual and customised manner. Such firms should be granted a degree of discretion so that they may properly tailor pre-trade risk controls to their specific trading strategies and to changing market conditions. Requiring all firms to comply with a general list of controls without allowing them a degree of discretion over the form and application of each control may in fact result in inadequate or poorly adapted controls which are less fit for purpose than the status quo.

<ESMA_QUESTION_209>

**Q210: Do you agree with the record keeping approach outlined above?**

<ESMA_QUESTION_210>
ESMA's mandate, as noted in the section of the Discussion Paper on "recordkeeping and co-operation with competent authorities", is to draft technical standards specifying the content and form of the record required to be kept under the fifth subparagraph of Article 17(2). The relevant subparagraph of Article 17(2) provides that "an investment firm that engages in a high-frequency algorithmic trading technique shall store in an approved form accurate and time sequenced records of all its placed orders, including cancellations of orders, executed orders and quotations on trading venues".

MFA notes that ESMA is proposing in this context that such investment firms retain "a description of each decision or execution algorithm". Such a requirement appears to go beyond the obligation in Article 17(2) to simply retain records of placed orders. Although any investment firm which engages in algorithmic trading will be required to retain "a description of the nature of its algorithmic trading strategy" under the second sub-paragraph of Article 17(2), a requirement to record a description of each individual execution algorithm would go beyond even this broader requirement. MFA is concerned that ESMA may be underestimating the time and cost involved in tracking and recording information relating to each execution algorithm. We are also unsure of the level of information which would need to be retained in relation to, for example, variables and inputs involved in the execution algorithm.

Likewise, recording "a designation to identify the algorithm within the investment firm responsible for each investment decision and execution" appears to go beyond the scope of what is required under ESMA's mandate. Beyond the logistical cost of "tagging" each algorithm, MFA is not convinced that such a system would provide much added value to regulators; we do not see, for example, how this information would help regulators in identifying market abuse, or in substantiating an inference or claim of market abuse.

With regard to the increasing amount of data required to be held in relation to the identity of those individuals that have developed each algorithm, MFA believes that ESMA's area of focus should not be so much "who" is behind the algorithm, but what to do once a malfunctioning system is identified.

<ESMA_QUESTION_210>

**Q211: In particular, what are your views regarding the storage of the parameters used to calibrate the trading algorithms and the market data messages on which the algorithm's decision is based?**

<ESMA_QUESTION_211>
In MFA's view, the two additional sets of data on which ESMA is consulting on would prove to be highly burdensome in practice.

In particular, firms should not be required to retain market data messages on the basis of which their algorithms make decisions about whether or not to submit an order. Such a requirement would result in the retention of an enormous amount of data. This would be hugely expensive in practice, particularly given that the data would need to be retained for a period of five years, and the data itself would be of little utility to regulators in practice. Firms' hardware and operating systems will change over time, as will the hardware and operating systems of trading venues. As such, even with all historical market data and parameters involved in the original investment decision or trading strategy, investment firms will not necessarily be able to recreate the reason for their algorithms making a particular trading decision.

Given also that information on what caused an algorithm to submit a particular order could likely be pieced together after the event from trading venues and vendors if required, including this data would be duplicative in practice and would result in a poor cost-benefit pay-off. We also note that investment firms may encounter difficulties in retaining information sold to them by third party data vendors due, for example, to contractual restrictions. In particular, firms may not be permitted to retain the relevant data past a certain time period.

<ESMA_QUESTION_211>

**Q212: Do you consider that the requirements regarding the scope, capabilities, and flexibility of the monitoring system are appropriate?**

<ESMA_QUESTION_212>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_212>

**Q213: Trade reconciliation – should a more prescriptive deadline be set for reconciling trade and account information?**

<ESMA_QUESTION_213>
ESMA should not set a more prescriptive deadline for reconciliation of trade and account information at this time, particularly given that investment firms have no control over when they receive the data required for reconciliation from external sources.

<ESMA_QUESTION_213>

**Q214: Periodic reviews – would a minimum requirement of undertaking reviews on a half-yearly basis seem reasonable for investment firms engaged in algorithmic trading activity, and if not, what would be an appropriate minimum interval for undertaking such reviews? Should a more prescriptive rule be set as to when more frequent reviews need be taken?**

<ESMA_QUESTION_214>
MFA reiterates that bi-annual reviews would create a disproportionate costs burden, particularly on smaller firms. Annual reviews would be more appropriate.

<ESMA_QUESTION_214>

**Q215: Are there any elements that have not been considered and / or need to be further clarified here?**

<ESMA_QUESTION_215>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_215>

**Q216: What is your opinion of the elements that the DEA provider should take into account when performing the due diligence assessment? In your opinion, should any elements be added or removed? If so, which?**

<ESMA_QUESTION_216>
Where the due diligence requirements proposed by ESMA replicate requirements already set out in ESMA's Guidelines on Systems and Controls in an Automated Trading Environment, they are more likely to reflect current market practice and as such are uncontroversial.

Although it may in certain circumstances be appropriate for DEA providers to perform due diligence on "the client's process to develop...the algorithms", there should not be any necessity to disclose sensitive or proprietary information on trading algorithms. This is particularly the case given the lack of confidentiality restrictions in the Level 2 framework proposed by ESMA.

We are especially concerned by ESMA's suggestion that when analysing algorithms provided by the client, the investment firm should take into account the algorithm's source code and functioning. Source codes may represent extremely sensitive commercial data which should not be required to be disclosed. In addition, from a practical perspective source codes are extremely large and would take a significant amount of time to turn over to DEA providers; as such, a requirement to disclose source codes would be commercially impracticable. Thus, while it would not be excessive for DEA providers to review policies and processes in a general or high-level way, a requirement for providers to review codes or to conduct a detailed review of DEA users' change management processes would be excessive.

Market participants invest significant research, time and resources into developing proprietary algorithms. MFA is therefore concerned that if DEA providers are unable to protect sensitive or

proprietary information relating to algorithms, such information could be used by other firms to trade against the market participant, which could in turn cause significant market or financial stress for the market participant. Thus, although we would strongly prefer to see the requirement to disclose such information dropped entirely from the Level 2 text, if ESMA goes forward with implementing such a requirement, it should consider how to ensure that the confidentiality of proprietary information is protected. Moreover, the requirement should prevent a DEA provider from using that information to trade against its client, and should categorise such trading as market abuse.

<ESMA_QUESTION_216>

**Q217: Do you agree that for assessing the adequacy of the systems and controls of a prospective DEA user, the DEA provider should use the systems and controls requirements applied by trading venues for members as a benchmark?**

<ESMA_QUESTION_217>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_217>

**Q218: Do you agree that a long term prior relationship (in other areas of service than DEA) between the investment firm and a client facilitates the due diligence process for providing DEA and, thus, additional precautions and diligence are needed when allowing a new client (to whom the investment firm has never provided any other services previously) to use DEA? If yes, to what extent does a long term relationship between the investment firm and a client facilitate the due diligence process of the DEA provider? Please elaborate.**

<ESMA_QUESTION_218>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_218>

**Q219: Do you agree with the above approach? Please elaborate.**

<ESMA_QUESTION_219>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_219>

**Q220: Do you agree with the above approach, specifically with regard to the granular identification of DEA user order flow as separate from the firm's other order flow? Please elaborate.**

<ESMA_QUESTION_220>
MFA supports in principle the requirement for DEA providers to assign unique IDs to individual DEA users, given that this should help DEA providers to track activity by each of their clients. However, we do not agree with the proposed requirement for DEA users to register their algorithms internally for strategy and order/transaction identification purposes such that each algorithm is given its own identifier. As noted in our response to Q216, market participants invest significant time and resources into developing proprietary algorithms. Although monitoring by DEA providers is important, particularly given their obligation to ensure that trading algorithms do not create market disruption, we do not consider that DEA providers need to become fully familiar with trading strategies and the way in which algorithms are being used in practice. Such a requirement would, if nothing else, create a disproportionate burden on DEA providers themselves.

We would suggest that a more proportionate means of enabling DEA providers to fulfil their obligation to ensure that trading algorithms do not create market disruption would be for providers to require their clients to provide assurances as to the use and testing of algorithms.

MFA supports the proposed requirement for DEA providers to have the ability to immediately halt trading by individual DEA users. However, as noted in previous responses, such "kill switch" type abilities should be used rarely, and only as a last resort due to their impact on individual market participants.

<ESMA_QUESTION_220>

**Q221: Are there any criteria other than those listed above against which clearing firms should be assessing their potential clients?**

<ESMA_QUESTION_221>
While many of the due diligence requirements proposed in relation to the provision of clearing services appear reasonable, MFA is concerned about the due diligence category of "trading patterns and strategy". As noted in our response to Q216, proprietary information should not need to be disclosed by market participants. In any event, we are unsure of what benefits this due diligence category would bring to clearing firms, and whether they would have the time or resources to fully decipher or assess the relevant information.

<ESMA_QUESTION_221>

**Q222: Should clearing firms disclose their criteria (some or all of them) in order to help potential clients to assess their ability to become clients of clearing firms (either publicly or on request from prospective clients)?**

<ESMA_QUESTION_222>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_222>

**Q223: How often should clearing firms review their clients' ongoing performance against these criteria?**

<ESMA_QUESTION_223>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_223>

**Q224: Should clearing firms have any arrangement(s) other than position limits and margins to limit their risk exposure to clients (counterparty, liquidity, operational and any other risks)? For example, should clearing firms stress-test clients' positions that could pose material risk to the clearing firms, test their own ability to meet initial margin and variation margin requirements, test their own ability to liquidate their clients' positions in an orderly manner and estimate the cost of the liquidation, test their own credit lines?**

<ESMA_QUESTION_224>
In general, clearing firms already perform tests on their clients' positions (*e.g.* in terms of overnight tests). However, the proposed requirement to "stress test" clients' positions seems rather open-ended and we are uncertain what would be involved in implementing such a requirement. Overly invasive testing requirements should be avoided.

<ESMA_QUESTION_224>

**Q225: How regularly should clearing firms monitor their clients' compliance with such limits and margin requirements (e.g. intra-day, overnight) and any other tests, as applicable?**

<ESMA_QUESTION_225>
In our view, the question of how regularly to monitor clients' compliance should be left to the clearing firm, based on an assessment of the client's trading strategy.

<ESMA_QUESTION_225>

**Q226: Should clearing firms have a real-time view on their clients' positions?**

<ESMA_QUESTION_226>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_226>

**Q227: How should clearing firms manage their risks in relation to orders from managers on behalf of multiple clients for execution as a block and post-trade allocation to individual accounts for clearing?**

<ESMA_QUESTION_227>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_227>

**Q228: Which type(s) of automated systems would enable clearing members to monitor their risks (including clients' compliance with limits)? Which criteria should apply to any such automated systems (e.g. should they enable clearing firms to screen clients' orders for compliance with the relevant limits etc.)?**

<ESMA_QUESTION_228>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_228>

## 4.3. Organisational requirements for trading venues (Article 48 MiFID II)

**Q229: Do you agree with requiring trading venues to perform due diligence on all types of entities willing to become members/participants of a trading venue which permits algorithmic trading through its systems?**

<ESMA_QUESTION_229>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_229>

**Q230: Do you agree with the list of minimum requirements that in all cases trading venues should assess prior to granting and while maintaining membership? Should the requirements for entities not authorised as credit institutions or not registered as investment firms be more stringent than for those who are qualified as such?**

<ESMA_QUESTION_230>
The majority of due diligence requirements appear to us to be in line with current market practice (as set out in ESMA's Guidelines on Systems and Controls in an Automated Trading Environment). However, ESMA's proposals go further than the Guidelines in some respects, such as requiring the existence of a kill button, and requiring the submission of more detailed

information on outsourcing and business structure. As noted in our response to Q208, we are generally supportive of a requirement that "kill button" abilities be implemented, although their use should be strictly reserved for emergency situations, as a last resort. In relation to other due diligence requirements, we would merely note that market participants should not be required to submit proprietary or commercially sensitive information.

Our understanding is that trading venues would generally perform additional due diligence on members or participants which are not authorised investment firms or credit institutions in any event (*i.e.* pursuant to the Guidelines). Making a distinction between authorised firms which are subject to supervision and unauthorised firms appears appropriate in relation to due diligence requirements as long as the due diligence requirements applying to unauthorised firms are not disproportionate or excessive in nature. The application of due diligence requirements should preferably be transparent in nature, and requirements applied in the same way across similar groups of entities.

As a general point, requirements applying to DEA providers and trading venues (*e.g.* in terms of due diligence requirements) should be harmonised, particularly given that requirements directly imposed by trading venues will likely be passed on to DEA users in any event.

<ESMA_QUESTION_230>

**Q231: If you agree that non-investment firms and non-credit institutions should be subject to more stringent requirements to become member or participants, which type of additional information should they provide to trading venues?**

<ESMA_QUESTION_231>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_231>

**Q232: Do you agree with the list of parameters to be monitored in real time by trading venues? Would you add/delete/redefine any of them? In particular, are there any trading models permitting algorithmic trading through their systems for which that list would be inadequate? Please elaborate.**

<ESMA_QUESTION_232>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_232>

**Q233: Regarding the periodic review of the systems, is there any element that has not been considered and/or needs to be further clarified in the ESMA Guidelines that should be included?**

<ESMA_QUESTION_233>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_233>

**Q234: Do you agree with the above approach?**

<ESMA_QUESTION_234>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_234>

**Q235: Do you think ESMA should determine minimum standards in terms of latency or is it preferable to consider as a benchmark of performance the principle "no order lost, no transaction lost"?**

<ESMA_QUESTION_235>
MFA supports the introduction of obligations for trading venues to monitor their performance in relation to matters such as gateway-to-gateway latency, matching engine progress, percentage of maximum message capacity used per second and number of trades executed per second. ESMA's proposal that trading venues monitor their performance on issues such as latency are therefore positive, as are the proposed measures aimed at strengthening the capacity of trading venues. These proposals will hopefully lead to a better service for market participants, particularly given that overloaded capacity could lead to either a stalled trading system or slower functioning. As a general point, trading venues need to ensure that adequate investment is made into their infrastructure yearly, including their data bandwidth, in order to prevent time delays of accurate market data. Trading venues should also invest in their ability to handle peak volumes and their ability to protect against security infringements.

Rather than imposing minimum standards for latency, ESMA should consider whether latency providers should be required to disclose information on the quality of their services. For example, if latency percentiles were to be published for each connectivity option, it would provide market participants with relatively granular metrics, allowing them to compare latency across different markets.

<ESMA_QUESTION_235>

**Q236: Do you agree with requiring trading venues to be able to accommodate at least twice the historical peak of messages?**

<ESMA_QUESTION_236>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_236>

**Q237: Do you agree with the list of abilities that trading venues should have to ensure the resilience of the market?**

<ESMA_QUESTION_237>
MFA supports pre-trade risk controls as they serve to prevent or minimise market disruptions during times of market stress, help restore confidence in the markets and limit harm to customers. In regulating pre-trade risk controls, however, MFA firmly believes that trading venues need to have the flexibility to be able to fine-tune risk controls to their markets and to adapt and evolve controls with market practices.

Please see our responses to Q205 and Q208 for our views on individual pre-trade controls proposed by ESMA.

<ESMA_QUESTION_237>

**Q238: Do you agree with the publication of the general framework by the trading venues? Where would it be necessary to have more/less granularity?**

<ESMA_QUESTION_238>

In MFA's view, the publication of detailed information relating to pre- and post-trade controls by trading venues is vital in ensuring market certainty. In particular, trading venues should have clear, objective policies and procedures detailing the circumstances that would warrant the use of a kill switch to cancel orders from an individual market participant. ESMA may therefore wish to expand on this element of the framework.

MFA also supports the publication of clear and granular information regarding the trading venue's ability to cancel, modify or correct orders and transactions. In theory, however, the framework proposed by ESMA, which would require information to be published relating to "entitlement to invoke the intervention policy" should ensure that the framework achieves the appropriate level of granularity. As noted in our response to Q239, MFA believes that trading venues should have limited administrative discretion to cancel, vary or correct transactions outside the category of situations appearing in the published framework.

As a general point, we note that publication of trading venues' penalty frameworks may become more significant as a result of new requirements under MiFID II. As such, this may be another area which ESMA should expand on in the Level 2 regime.

<ESMA_QUESTION_238>

**Q239: Which in your opinion is the degree of discretion that trading venues should have when deciding to cancel, vary or correct orders and transactions?**

<ESMA_QUESTION_239>
In MFA's view, the most important aspect of trade cancellation and variation policies is certainty and predictability. Having clear and predictable standards is crucial in helping to manage expectations during periods of volatility. As an illustration of this, during the 2010 Flash Crash, it was not clear to market participants which orders would be cancelled or corrected. Subsequently, U.S. exchanges, in coordination with each other, amended their rules regarding clearly erroneous transactions. In our view, greater certainty in relation to policies on trade cancellation would have been helpful to market participants in managing the effects of the Flash Crash.

Accordingly, we believe that trading venue policies on the issue of cancelling, varying or correcting orders should be clear and objective, with very limited administrative discretion. Policies should apply consistently across market participants, regardless of whether those market participants use automated or manual trading systems, and the trading venue should not use its powers so frequently as to cause market uncertainty; rather, the powers should be reserved for use in exceptional situations, or at times when their use is strictly necessary.

<ESMA_QUESTION_239>

**Q240: Do you agree with the above principles for halting or constraining trading?**

<ESMA_QUESTION_240>
In general, MFA considers trading halts to be a highly effective risk control which may prevent or minimise market disruptions during times of market stress, help restore confidence in the markets and limit harm to market participants. However, we stress that trading halts should be used only in appropriately serious circumstances given that they may impact on the price

discovery process, and given that other controls such as price collars or even selective order cancellation may in certain circumstances be more appropriate given that they are capable of being implemented with fewer unintended consequences.

In general, we agree with the principles listed by ESMA in relation to the application of trading halts. We particularly agree with ESMA's statement that "trading venues shall ensure that appropriate mechanisms to halt trading are in place in all phases of trading (*i.e.* from opening to close of trading)", given that this suggests that different policies may apply to different "phases" of trading. In particular, the use of trading pauses should be considered carefully around close of trading, given that their application at this time could leave market participants with end of day positions which they had not anticipated.

MFA also agrees with the requirement for trading venues to assess the volatility history of "financial instruments that are considered to have similar characteristics" when considering their approach to trading halts given that their approach to implementing trading halts should be calibrated to trading in specific financial instruments.

Finally, the requirement for trading venues to continuously monitor the adequacy of thresholds is positive given that their approach to implementing risk controls should adapt and evolve with market practices.

<ESMA_QUESTION_240>

**Q241: Do you agree that trading venues should make the operating mode of their trading halts public?**

<ESMA_QUESTION_241>
MFA supports a requirement for trading venues to publish the basis on which they intend to implement trading halts, as well as the process surrounding how trading halts will be implemented in practice (which could include information on the process for re-starting trading following the implementation of a trading halt). We note in this context that where trading halts affect specific securities, trading venue rules should address whether trading in related exchange-traded derivative products will also be halted.

As a general point, although MFA supports the use of trading halts where required, we encourage the use of other methods such as limit up-limit down or price collar mechanisms to address significant market volatility, given that such mechanisms may be implemented with fewer consequences for market participants.

<ESMA_QUESTION_241>

**Q242: Should trading venues also make the actual thresholds in place public? In your view, would this publication offer market participants the necessary predictability and certainty, or would it entail risks? Please elaborate.**

<ESMA_QUESTION_242>
MFA is strongly in favour of the "framework" surrounding the implementation of trading halts being made public. However, publishing the actual thresholds would in our view be counterproductive given that publication of such sensitive parameters could lead to certain market participants effectively "gaming" the system, and engaging in market manipulation.

<ESMA_QUESTION_242>

**Q243: Do you agree with the proposal above?**

<ESMA_QUESTION_243>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_243>

**Q244: Should trading venues have the ability to impose the process, content and timing of conformance tests? If yes, should they charge for this service separately?**

<ESMA_QUESTION_244>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_244>

**Q245: Should alternative means of conformance testing be permitted?**

<ESMA_QUESTION_245>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_245>

**Q246: Could alternative means of testing substitute testing scenarios provided by trading venues to avoid disorderly trading conditions? Do you consider that a certificate from an external IT audit would be also sufficient for these purposes?**

<ESMA_QUESTION_246>
In MFA's view, alternative means of testing could in some cases substitute testing scenarios provided by trading venues. In-house testing may well have been specifically tailored to the features of the algorithm and trading strategies in question, and market participants may have spent a significant amount of time and expense in developing their testing procedures.

We do not consider that a certificate from an external IT audit would be appropriate to evidence the adequacy of such testing procedures; rather, the team involved in designing and operating the testing system would be most appropriate body to sign off on the system's adequacy. The firm's risk team could, if necessary, endorse this assessment.

In any event, market participants should not always be required to utilise testing facilities provided by trading venues when alternative means of testing are also required to be used due to the trading venues' facilities being found to be lacking in some way. This requirement could become unnecessarily duplicative in practice.

Finally, as noted in our response to Q202, the standard of "disorderly trading" would benefit from further thought and clarification.

<ESMA_QUESTION_246>

**Q247: What are the minimum capabilities that testing environments should meet to avoid disorderly trading conditions?**

<ESMA_QUESTION_247>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_247>

**Q248: Do you agree with the proposed approach?**

<ESMA_QUESTION_248>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_248>

**Q249: In particular, should trading venues require any other pre-trade controls?**

<ESMA_QUESTION_249>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_249>

**Q250: Do you agree that for the purposes of Article 48(5) the relevant market in terms of liquidity should be determined according to the approach described above? If, not, please state your reasons.**

<ESMA_QUESTION_250>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_250>

**Q251: Are there any other markets that should be considered material in terms of liquidity for a particular instrument? Please elaborate.**

<ESMA_QUESTION_251>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_251>

**Q252: Which of the above mentioned approaches is the most adequate to fulfil the goals of Article 48? Please elaborate**

<ESMA_QUESTION_252>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_252>

**Q253: Do you envisage any other approach to this matter?**

<ESMA_QUESTION_253>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_253>

**Q254: Do you agree with the list of elements that should be published by trading venues to permit the provision of DEA to its members or participants?**

<ESMA_QUESTION_254>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_254>

**Q255: Do you agree with the list of systems and effective controls that at least DEA providers should have in place?**

<ESMA_QUESTION_255>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_255>

**Q256: Do you consider it is necessary to clarify anything in relation to the description of the responsibility regime?**

<ESMA_QUESTION_256>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_256>

**Q257: Do you consider necessary for trading venues to have any other additional power with respect of the provision of DEA?**

<ESMA_QUESTION_257>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_257>

## 4.4. Market making strategies, market making agreements and market making schemes

**Q258: Do you agree with the previous assessment? If not, please elaborate.**

<ESMA_QUESTION_258>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_258>

**Q259: Do you agree with the preliminary assessments above? What practical consequences would it have if firms would also be captured by Article 17(4) MiFID II when posting only one-way quotes, but doing so in different trading venues on different sides of the order book (i.e. posting buy quotes in venue A and sell quotes in venue B for the same instrument)?**

<ESMA_QUESTION_259>
As a general comment, there needs to be a high level of certainty regarding when a firm will be classed as a market maker, in order that market participants know exactly when they will fall into this category and become subject to the additional obligations which it entails. We note in this context ESMA's proposal that the question of whether two-way quotes have been posted at "competitive prices" should mirror the Guidelines on the Exemption for Market Making Activities and Primary Market Operations under the Short Selling Regulation. This would mean that prices posted by the market maker should be within the maximum bid/offer spreads required from market makers recognised under the rules of the relevant trading venue (*i.e.* the trading venue on which the prices are posted). In our view, any reference to the rules of trading venues as they relate to market making activities is positive given that it will help to ensure the scope of the new rules reflects current market practice. It will also provide greater certainty for market participants, who can refer to the operating rules of their trading venues and direct questions to the venues themselves.

ESMA's proposal to capture firms posting only one-way quotes would expand the scope of the definition beyond traditional market makers to firms engaging in arbitrage activity. This could have far-reaching implications, and could ultimately lead to a withdrawal of liquidity from such sources.

<ESMA_QUESTION_259>

**Q260: For how long should the performance of a certain strategy be monitored to determine whether it meets the requirements of Article 17(4) of MiFID II?**

<ESMA_QUESTION_260>
As a general comment, MFA is in favour of an observation period being applied to determine whether an investment firm should fall under the definition contained in Article 17(4) of MiFID II. In our view, a minimum observation period would help to encourage new entrants to the important role of market making. Six months to a year may be optimal in this regard.

<ESMA_QUESTION_260>

**Q261: What percentage of the observation period should a strategy meet with regard to the requirements of Article 17(4) of MiFID II so as to consider that it should be captured by the obligation to enter into a market making agreement?**

<ESMA_QUESTION_261>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_261>

**Q262: Do you agree with the above assessment?**

<ESMA_QUESTION_262>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_262>

**Q263: Do you agree with this interpretation?**

<ESMA_QUESTION_263>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_263>

**Q264: Do you agree with the above assessment? If not, please elaborate.**

<ESMA_QUESTION_264>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_264>

**Q265: Do you agree with the above interpretation?**

<ESMA_QUESTION_265>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_265>

**Q266: Do you agree with the above proposal?**

<ESMA_QUESTION_266>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_266>

**Q267: Do you agree with the above proposal?**

<ESMA_QUESTION_267>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_267>

**Q268: Do you agree with the approach described (non-exhaustive list of quoting parameters)?**

<ESMA_QUESTION_268>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_268>

**Q269: What should be the parameters to assess whether the market making schemes under Article 48 of MiFID II have effectively contributed to more orderly markets?**

<ESMA_QUESTION_269>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_269>

**Q270: Do you agree with the list of requirements set out above? Is there any requirement that should be added / removed and if so why?**

<ESMA_QUESTION_270>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_270>

**Q271: Please provide views, with reasons, on what would be an adequate presence of market making strategies during trading hours?**

<ESMA_QUESTION_271>
Please see our response to Q273.

<ESMA_QUESTION_271>

**Q272: Do you consider that the average presence time under a market making strategy should be the same as the presence time required under a market making agreement ?**

<ESMA_QUESTION_272>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_272>

**Q273: Should the presence of market making strategies during trading hours be the same across instruments and trading models? If you think it should not, please indicate how this requirement should be specified by different products or market models?**

<ESMA_QUESTION_273>
Bearing in mind that market making schemes are a feature of less liquid as well as very liquid markets, the rules on market making activities should be calibrated to trading conditions on different markets, depending, for example, on their differing levels of liquidity. While a required presence of, say, 80% of a trading venue's trading hours may be appropriate in the case of liquid shares, it may not be appropriate for more illiquid debt instruments. Ultimately, setting a higher threshold for less liquid markets could deter firms from taking on the role of market maker, which is undesirable given that market makers can perform an important role in establishing trading in newer instruments for which there may as yet be no liquid market.

In setting the proportion of trading hours during which market making strategies should stay in continuous operation, ESMA's starting point should be to look at market making arrangements which are already in operation on different trading venues, and to assess the average proportion of time during which market making strategies already stay in operation. Assessing current

market practice will allow ESMA to avoid implementing a drastic change in market practice, which could, as noted, lead to a withdrawal of liquidity. We also feel that the views of trading venues on what would be optimal in this context should be taken into account.

As a general point, it may be best for ESMA to set the percentage lower initially (e.g. at 80% of trading hours rather than 90% for liquid shares) in order to avoid a significant initial market impact. This percentage could then be raised over time if it was considered appropriate, and trading venues could implement a higher threshold in the meantime if they wished.

<ESMA_QUESTION_273>

**Q274: Article 48(3) of MiFID II states that the market making agreement should reflect "where applicable any other obligation arising from participation in the scheme". What in your opinion are the additional areas that that agreement should cover?**

<ESMA_QUESTION_274>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_274>

**Q275: Do you disagree with any of the events that would qualify as 'exceptional circumstances'? Please elaborate.**

<ESMA_QUESTION_275>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_275>

**Q276: Are there any additional 'exceptional circumstances' (e.g. reporting events or new fundamental information becoming available) that should be considered by ESMA? Please elaborate.**

<ESMA_QUESTION_276>
MFA supports ESMA's goal of preventing a withdrawal of liquidity at times when the market needs it most. However, this goal should be balanced against the need for market makers to manage their risk, and indeed, for market making to remain an attractive option. Thus, ESMA's proposals may be overly restrictive, especially when compared to current market practice.

In particular, we note that ESMA has not specifically dealt with the issue of volatility, despite the reference in ESMA's mandate to "circumstances of extreme volatility" (see Article 17(7)(c) of MiFID II). We therefore recommend that ESMA incorporates situations in which continued performance becomes commercially unviable for market makers, given extreme market volatility. Perhaps, as proposed, this would best be dealt with by considering the situation where new information gives rise to significant and unexpected price movements. There is a concern that if firms know in advance that they will be required to continue running a particular market making strategy even in volatile situations where their prices may not reflect fundamental supply and demand characteristics, they may simply choose not to enter the market in the first place.

<ESMA_QUESTION_276>

**Q277: What type of events might be considered under the definition of political and macroeconomic issues?**

<ESMA_QUESTION_277>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_277>

**Q278: What is an appropriate timeframe for determining whether exceptional circumstances no longer apply?**

<ESMA_QUESTION_278>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_278>

**Q279: What would be an appropriate procedure to restart normal trading activities (e.g. auction periods, notifications, timeframe)?**

<ESMA_QUESTION_279>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_279>

**Q280: Do you agree with this approach? If not, please elaborate.**

<ESMA_QUESTION_280>
In general, MFA is supportive of the proposal that market making schemes should not portray a "misleading" impression of liquidity, given that this could contribute to a situation where the prices of financial instruments do not reflect the economic reality of supply and demand. However, in relation to the proposal that "market liquidity should not result exclusively or quasi-exclusively from market-making activity", ESMA should distinguish between liquid instruments for which there is an established market, and markets in newer, illiquid instruments. Where market making schemes have been put in place to "jump start" new markets or trading platforms, it may in fact be appropriate for the majority of liquidity to be provided by market makers. In general, putting an overall "ceiling" on the amount of liquidity which may be provided by market makers may hold trading back in these circumstances.

<ESMA_QUESTION_280>

**Q281: Would further clarification be necessary regarding what is "fair and non-discriminatory"? In particular, are there any cases of discriminatory access that should be specifically addressed?**

<ESMA_QUESTION_281>
In general, MFA is supportive of transparency and of identical treatment across "classes" of market participants. We do not see a problem with incentives being offered to market makers given that such incentives are a common means of encouraging market makers to perform a vital role, but only to the extent that the criteria for qualifying as a market maker are clear, and the incentives are applied in a non-discriminatory way across all market participants which qualify for the class of "market maker".

<ESMA_QUESTION_281>

**Q282: Would it be acceptable setting out any type of technological or informational advantages for participants in market making schemes for liquid instruments? If yes, please elaborate.**

<ESMA_QUESTION_282>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_282>

**Q283: In which cases should a market operator be entitled to close the number of firms taking part in a market making scheme?**

<ESMA_QUESTION_283>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_283>

**Q284: Do you agree that the market making requirements in Articles 17 and 48 of MiFID II are mostly relevant for liquid instruments? If not, please elaborate how you would apply the requirements in Articles 17 and 48 of MiFID II on market making schemes/agreements/strategies to illiquid instruments.**

<ESMA_QUESTION_284>
Yes, MFA agrees that the market making requirements set out in Articles 17 and 48 of MiFID II are more relevant to liquid instruments than to illiquid instruments.

<ESMA_QUESTION_284>

**Q285: Would you support any other assessment of liquidity different to the one under Article 2(1)(17) of MiFIR? Please elaborate.**

<ESMA_QUESTION_285>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_285>

**Q286: What should be deemed as a sufficient number of investment firms participating in a market making agreement?**

<ESMA_QUESTION_286>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_286>

**Q287: What would be an appropriate market share for those firms participating in a market making agreement?**

<ESMA_QUESTION_287>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_287>

**Q288: Do you agree that market making schemes are not required when trading in the market via a market making agreement exceeds this market share?**

<ESMA_QUESTION_288>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_288>

**Q289: In which cases should a market operator be entitled to close the number of firms taking part in a market making scheme?**

<ESMA_QUESTION_289>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_289>

## 4.5. Order-to-transaction ratio (Article 48 of MiFID II)

**Q290: Do you agree with the types of messages to be taken into account by any OTR?**

<ESMA_QUESTION_290>
ESMA has stated that it considers the term "order" to cover all messages relating to an order in this context (*i.e.* submission, price and volume modifications, and deletion of the order). Applying the new regime to deletions as well as to submissions could help to deter undesirable practices such as quote stuffing, and to ensure that trading venues' capacity for receiving messages is not exceeded. However, if all such messages are included within the umbrella term "order", care should be taken to ensure that the OTR is set sufficiently high to allow for trading activities undertaken in good faith. In particular, market participants should not be penalised for needing to cancel or modify their orders. For example, market participants should be permitted to cancel old orders and submit new orders in the case of fast moving markets or other circumstances when prices change quickly.

<ESMA_QUESTION_290>

**Q291: What is your view in taking into account the value and/or volume of orders in the OTRs calculations? Please provide:**

<ESMA_QUESTION_291>
In MFA's view, only message volume and not the value of orders should be taken into account for these purposes. Incorporating the value of orders into the calculation would make the application of the OTR needlessly complex. In addition, taking into account only the volume of messages and not the value of orders would be in line with the purpose of the OTR, which is to dissuade market participants from sending an excessive number of orders to trading venues and acting as an additional burden on trading venues' system capacity (see Recital 65 of MiFID II).

<ESMA_QUESTION_291>

**Q292: Should any other additional elements be taken into account to calibrate OTRs? If yes, please provide an explanation of why these variables are important.**

<ESMA_QUESTION_292>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_292>

**Q293: Do you agree with the proposed scope of the OTR regime under MiFID II (liquid cash instruments traded on electronic trading systems)?**

<ESMA_QUESTION_293>
MFA agrees with ESMA's proposal to limit the OTR regime under MiFID II to liquid "cash instruments" (*i.e.* bonds, equity and equity-like instruments) that are traded on electronic trading venues. We agree that the types of undesirable practices which the OTR is intended to address (such as quote-stuffing) are more likely to be a feature of faster-paced, more liquid markets. However, we would prefer ESMA to calibrate the OTR to the individual features of products falling within this category of instruments.

<ESMA_QUESTION_293>

**Q294: Do you consider that financial instruments which reference a cash instrument(s) as underlying could be excluded from the scope of the OTR regime?**

<ESMA_QUESTION_294>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_294>

**Q295: Would you make any distinction between instruments which have a single instrument as underlying and those that have as underlying a basket of instruments? Please elaborate.**

<ESMA_QUESTION_295>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_295>

**Q296: Do you agree with considering within the scope of a future OTR regime only trading venues which have been operational for a sufficient period in the market?**

<ESMA_QUESTION_296>
It would seem sensible to implement a transitional period for new trading venues, and perhaps also for markets in new financial instruments, given that information on trading patterns will need to be gathered before the OTR can be set at a suitable level.

<ESMA_QUESTION_296>

**Q297: If yes, what would be the sufficient period for these purposes?**

<ESMA_QUESTION_297>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_297>

**Q298: What is your view regarding an activity floor under which the OTR regime would not apply and where could this floor be established?**

<ESMA_QUESTION_298>
MFA supports the concept of a "floor" to the OTR, expressed as a percentage of the overall number of messages sent to that trading venue, under which market participants would not need to be concerned by the OTR regime. Although we are generally supportive of MiFID II applying in a non-discriminatory way across all market participants, the benefit of such a floor would be to ensure that those market participants with low levels of messaging (which are more likely to be smaller players) would not need to spend time and resources ensuring that they remain beneath the OTR threshold. Given that the floor will presumably vary depending on trading conditions and the level at which the OTR is set across different instruments, the level at which the floor is set should be left to the discretion of trading venues.

<ESMA_QUESTION_298>

**Q299: Do you agree with the proposal above as regards the method of determining the OTR threshold?**

<ESMA_QUESTION_299>
We note that ESMA is proposing to set the OTR by capping the OTR threshold at a certain multiplier ("x") of the average OTR observed on any given trading venue per group of instruments. MFA would strongly prefer trading venues to have discretion in setting the OTR,

rather than ESMA imposing a "one-size-fits all" calculation which would apply across all trading venues. The purpose of the OTR is to ensure that trading venues' capacity is not breached and that venues are able to manage the volume of messages received from market participants. Thus, given that they are aware of capacity constraints, trading venues themselves will be best placed to set the level of the OTR,

If ESMA does choose to go ahead with this proposal, it should nevertheless take steps to ensure that the "groups" of instruments referenced in the Discussion Paper are sufficiently granular to ensure to that differences between trading conditions in markets for specific financial instruments are factored into the OTR calculation.

<ESMA_QUESTION_299>

**Q300: In particular, do you consider the approach to base the OTR regime on the 'average observed OTR of a venue' appropriate in all circumstances? If not, please elaborate.**

<ESMA_QUESTION_300>
Although it may be helpful to look at historic data in calculating the OTR going forward, ESMA should be mindful of the fact that historic data will not necessarily reflect future trading conditions and periods of volatility. Therefore, historic data should only be one element of level at which the OTR is set; consideration of the trading venue's capacity and the potential for future periods of volatility may, for example, be others.

<ESMA_QUESTION_300>

**Q301: Do you believe the multiplier x should be capped at the highest member's OTR observed in the preceding period?**

<ESMA_QUESTION_301>
MFA does not agree with this proposal given that it may lead to the OTR being set too low to take account of future volatility, and given that the multiplier "x" may decrease over time as members aim to reduce the number of messages sent in order to ensure that they remain well below the OTR. In addition, capping the multiplier at the highest member's OTR would effectively penalise those trading venues which explicitly aim to have fewer active high frequency traders, given that such venues would have to set the OTR at a lower level (thus increasing the likelihood of breach by members or participants which might not otherwise be affected). As noted in our response to Q299, MFA would in any event prefer there to be greater flexibility for trading venues in setting the OTR, rather than a standard calculation that applies across all venues and financial instruments included in the regime.

<ESMA_QUESTION_301>

**Q302: In particular, what would be in your opinion an adequate multiplier x? Does this multiplier have to be adapted according to the (group of) instrument(s) traded? If yes, please specify in your response the financial instruments/market segments you refer to.**

<ESMA_QUESTION_302>
If ESMA goes forward with its proposal to require the OTR to be calculated by means of a set multiplier, MFA would support the level of the multiplier being adapted according to the characteristics of specific financial instruments included in the regime.

<ESMA_QUESTION_302>

**Q303: What is your view with respect to the time intervals/frequency for the assessment and review of the OTR threshold (annually, twice a year, other)?**

<ESMA_QUESTION_303>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_303>

**Q304: What are your views in this regard? Please explain.**

<ESMA_QUESTION_304>
MFA simply wishes to note that ESMA should take into account the relationship between the OTR and the continuous liquidity obligation set out in Article 17(3); clearly, market makers should not be penalised for attempting to meet the continuous liquidity obligation, which may result in a higher number of messages than would otherwise be sent. Ensuring that the OTR is not breached as a result of the continuous liquidity obligation may necessitate a relaxation of the OTR for market makers.

<ESMA_QUESTION_304>

## 4.6. Co-location (Article 48(8) of MiFID II)

**Q305: What factors should ESMA be considering in ensuring that co-location services are provided in a 'transparent', 'fair' and 'non-discriminatory' manner?**

<ESMA_QUESTION_305>
In relation to transparency, co-location providers should disclose whether they or third parties offer co-location services on a priority basis other than first available. ESMA should also consider whether they should be required to disclose information on the quality of their services. For example, if latency percentiles were to be published for each connectivity option, it would provide market participants with relatively granular metrics, allowing them to compare latency across different markets.

In relation to fairness and non-discrimination, a co-location provider which offers any type of fee break or fee-reduction incentive should make the same offer available to similarly situated customers. Providers should freely offer or publish clear and understandable information about their services and the prices attaching to such services.

Finally, trading venues should be required to maintain a certain amount of capacity at their co-location facilities in order to ensure that new entrants to the trading venue have effective access to co-location sites, and that access is not exclusively reserved for legacy players. This should be achievable by ensuring equal cable lengths from co-location sites to matching engines.

<ESMA_QUESTION_305>

## 4.7. Fee structures (Article 48 (9) of MiFID II)

**Q306: Do you agree with the approach described above?**

<ESMA_QUESTION_306>
MFA generally supports ESMA's approach in this area, particularly its proposal that market participants meeting the same criteria should be able to access the same system of fees and rebates from the trading venue. In our view, this approach should apply not only in relation to fees and rebates, but also in relation to other incentives offered by trading venues (including in relation to market data pricing).

We note ESMA's proposal that discrimination between market participants should be permitted where such discrimination is objectively justified having regard to grounds such as quantity, scope or field of use demanded. While we agree in principal that it may be appropriate to distinguish between different classes of market participants in relation to fees and rebates, the term "field of use" seems rather broad. In our view, the criteria for falling within a particular category of market participants should simply be published clearly and in sufficient detail by the trading venue.

ESMA's neutrality in relation to rebates, discounts and incentives is positive in that it will allow for flexibility. However, although we are aware of ESMA's concern that any incentives based on a high volume or value of trading could encourage high frequency trading practices, we would note that such incentives are merely given in order to attract trading to a particular venue, and that they benefit ordinary market participants and algorithmic traders as well as high frequency traders. In addition, market participants falling within the scope of MiFID II will have an obligation to uphold best execution requirements notwithstanding the application of incentives by trading venues.

<ESMA_QUESTION_306>

**Q307: Can you identify any practice that would need regulatory action in terms of transparency or predictability of trading fees?**

<ESMA_QUESTION_307>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_307>

**Q308: Can you identify any specific difficulties in obtaining adequate information in relation to fees and rebates that would need regulatory action?**

<ESMA_QUESTION_308>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_308>

**Q309: Can you identify cases of discriminatory access that would need regulatory action?**

<ESMA_QUESTION_309>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_309>

**Q310: Are there other incentives and disincentives that should be considered?**

<ESMA_QUESTION_310>

ESMA should consider the maker-taker model in this context. The maker-taker model essentially involves "passive" orders receiving rebates in return for making liquidity available, whereas a fee is attached to "aggressive" orders that cross the spread and "take" liquidity. These additional fees would generally be passed on to end investors.

The maker-taker model may create a conflict of interest for brokers by causing them to route orders in a way that is most cost effective for the brokers themselves rather than for their clients. We believe the best way to address this conflict, rather than prohibit the maker-taker model, is to require brokers to disclose to their clients the amount earned in rebates from this practice and the amount paid in fees. We are concerned that prohibiting the maker-taker model would simply change how brokers may be paid in the future or the nature of the conflict.

<ESMA_QUESTION_310>

**Q311: Do any of the parameters referred to above contribute to increasing the probability of trading behaviour that may lead to disorderly and unfair trading conditions?**

<ESMA_QUESTION_311>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_311>

**Q312: When designing a fee structure, is there any structure that would foster a trading behaviour leading to disorderly trading conditions? Please elaborate.**

<ESMA_QUESTION_312>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_312>

**Q313: Do you agree that any fee structure where, upon reaching a certain threshold of trading by a trader, a discount is applied on all his trades (including those already done) as opposed to just the marginal trade executed subsequent to reaching the threshold should be banned?**

<ESMA_QUESTION_313>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_313>

**Q314: Can you identify any potential risks from charging differently the submission of orders to the successive trading phases?**

<ESMA_QUESTION_314>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_314>

**Q315: Are there any other types of fee structures, including execution fees, ancillary fees and any rebates, that may distort competition by providing certain market participants with more favourable trading conditions than their competitors or pose a risk to orderly trading and that should be considered here?**

<ESMA_QUESTION_315>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_315>

**Q316: Are there any discount structures which might lead to a situation where the trading cost is borne disproportionately by certain trading participants?**

<ESMA_QUESTION_316>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_316>

**Q317: For trading venues charging different trading fees for participation in different trading phases (i.e. different fees for opening and closing auctions versus continuous trading period), might this lead to disorderly trading and if so, under which circumstances would such conditions occur?**

<ESMA_QUESTION_317>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_317>

**Q318: Should conformance testing be charged?**

<ESMA_QUESTION_318>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_318>

**Q319: Should testing of algorithms in relation to the creation or contribution of disorderly markets be charged?**

<ESMA_QUESTION_319>
If testing of algorithms in relation to the creation or contribution of disorderly trading conditions becomes mandatory, testing services should preferably be provided free of charge (*i.e.* given that market participants will have to utilise the relevant testing services in order to fulfil their regulatory obligations). If this is not considered workable, testing should be provided at cost only, even to the extent that testing services are non-mandatory given that high fees may discourage market participants from utilising all testing facilities.

<ESMA_QUESTION_319>

**Q320: Do you envisage any scenario where charging for conformance testing and/or testing in relation to disorderly trading conditions might discourage firms from investing sufficiently in testing their algorithms?**

<ESMA_QUESTION_320>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_320>

**Q321: Do you agree with the approach described above?**

<ESMA_QUESTION_321>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_321>

**Q322: How could the principles described above be further clarified?**

<ESMA_QUESTION_322>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_322>

**Q323: Do you agree that and OTR must be complemented with a penalty fee?**

<ESMA_QUESTION_323>
MFA supports ESMA's approach of enforcing the OTR *via* economic penalties rather than *via* a trading ban.

<ESMA_QUESTION_323>

**Q324: In terms of the approach to determine the penalty fee for breaching the OTR, which approach would you prefer? If neither of them are satisfactory for you, please elaborate what alternative you would envisage.**

<ESMA_QUESTION_324>
The first option proposed by ESMA in relation to penalties attaching to breaches of the OTR threshold ("Option A") seems preferable, since it would allow trading venue operators a greater degree of freedom to calibrate penalty systems to trading conditions on their venues.

However, if ESMA does decide to go forward with Option B, pegging the fine to the number of orders which are submitted after breaching the OTR threshold would be better than pegging it to the value of orders submitted after the breach. Otherwise, one high-value order mistakenly submitted after the OTR threshold has been breached (*e.g.* as a result of an administrative error) could incur the same fine as many smaller orders submitted after breach of the threshold. In addition, as noted in our response to Q291, it would be easier from a technical and operations standpoint to implement a system relying on number rather than value of orders, and such a system would help support the aim of the OTR (*i.e.* to ensure that an excessive burden is not placed on system capacity).

<ESMA_QUESTION_324>

**Q325: Do you agree that the observation period should be the same as the billing period?**

<ESMA_QUESTION_325>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_325>

**Q326: Would you apply economic penalties only when the OTR is systematically breached? If yes, how would you define "systematic breaches of the OTR"?**

<ESMA_QUESTION_326>
MFA would agree with an approach which excludes the imposition of penalties for minor and administrative breaches, as opposed to a "strict liability" approach. We would advocate for a requirement that penalties apply only following a series of breaches occurring over a set period (*e.g.* a month), particularly since this would effectively create a "cure" period.

<ESMA_QUESTION_326>

**Q327: Do you consider that market makers should have a less stringent approach in terms of penalties for breaching the OTR?**

<ESMA_QUESTION_327>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_327>

**Q328: Please indicate which fee structure could incentivise abusive trading behaviour.**

<ESMA_QUESTION_328>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_328>

**Q329: In your opinion, are there any current fee structures providing these types of incentives? Please elaborate.**

<ESMA_QUESTION_329>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_329>

## 4.8. Tick sizes (Article 48(6) and Article 49 of MiFID II)

**Q330: Do you agree with the general approach ESMA has suggested?**

<ESMA_QUESTION_330>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_330>

**Q331: Do you agree with adopting the average number of daily trades as an indicator for liquidity to satisfy the liquidity requirement of Article 49 of MiFID II? Are there any other methods/liquidity proxies that allow comparable granularity and that should be considered?**

<ESMA_QUESTION_331>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_331>

**Q332: In your view, what granularity should be used to determine the liquidity profile of financial instruments? As a result, what would be a proper number of liquidity bands?**

<ESMA_QUESTION_332>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_332>

**Q333: What is your view on defining the trade-off between constraining the spread without increasing viscosity too much on the basis of a floor-ceiling mechanism?**

<ESMA_QUESTION_333>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_333>

**Q334: What do you think of the proposed spread to tick ratio range?**

<ESMA_QUESTION_334>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_334>

**Q335: In your view, for the tick size regime to be efficient and appropriate, should it rely on the spread to tick ratio range, the evolution of liquidity bands, a combination of the two or none of the above?**

<ESMA_QUESTION_335>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_335>

**Q336: What is your view regarding the common tick size table proposed under Option 1? Do you consider it easy to read, implement and monitor? Does the proposed two dimensional tick size table (based on both the liquidity profile and price) allow applying a tick size to a homogeneous class of stocks given its clear-cut price and liquidity classes?**

<ESMA_QUESTION_336>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_336>

**Q337: What is your view regarding the determination of the liquidity and price classes?**

<ESMA_QUESTION_337>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_337>

**Q338: Considering that market microstructure may evolve, would you favour a regime that allows further calibration of the tick size on the basis of the observed market microstructure?**

<ESMA_QUESTION_338>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_338>

**Q339: In your view, does the tick size regime proposed under Option 1 offer sufficient predictability and certainty to market participants in a context where markets are constantly evolving (notably given its calibration and monitoring mechanisms)?**

<ESMA_QUESTION_339>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_339>

**Q340: The common tick size table proposed under Option 1 provides for re-calibration while constantly maintaining a control sample. In your view, what frequency would be appropriate for the revision of the figures (e.g., yearly)?**

<ESMA_QUESTION_340>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_340>

**Q341: In your view, what is the impact of Option 1 on the activity of market participants, including trading venue operators? To what extent, would it require adjustments?**

<ESMA_QUESTION_341>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_341>

**Q342: Do you agree that some equity-like instruments require an equivalent regulation of tick sizes as equities so as to ensure the orderly functioning of markets and to avoid the migration of trading across instrument types based on tick size? If not, please outline why this would not be the case.**

<ESMA_QUESTION_342>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_342>

**Q343: Are there any other similar equity-like instruments that should be added / removed from the scope of tick size regulation? Please outline the reasons why such instruments should be added / removed?**

<ESMA_QUESTION_343>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_343>

**Q344: Do you agree that depositary receipts require the same tick size regime as equities'?**

<ESMA_QUESTION_344>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_344>

**Q345: If you think that for certain equity-like instruments (e.g. ETFs) the spread-based tick size regime[1] would be more appropriate, please specify your reasons and provide a detailed description of the methodology and technical specifications of this alternative concept.**

<ESMA_QUESTION_345>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_345>

**Q346: If you generally (also for liquid and illiquid shares as well as other equity-like financial instruments) prefer a spread-based tick size regime2 vis-à-vis the regime as proposed under Option 1 and tested by ESMA, please specify the reasons and provide the following information:**

<ESMA_QUESTION_346>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_346>

**Q347: Given the different tick sizes currently in operation, please explain what your preferred type of tick size regulation would be, giving reasons why this is the case.**

<ESMA_QUESTION_347>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_347>

**Q348: Do you see a need to develop a tick size regime for any non-equity financial instrument? If yes, please elaborate, indicating in particular which approach you would follow to determine that regime.**

<ESMA_QUESTION_348>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_348>

**Q349: Do you agree with assessing the liquidity of a share for the purposes of the tick size regime, using the rule described above? If not, please elaborate what criteria you would apply to distinguish between liquid and illiquid instruments.**

<ESMA_QUESTION_349>

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[1] Please see the description of Option 2 regarding tick sizes below.
[2] Please see the description of Option 2 regarding tick sizes below.

TYPE YOUR TEXT HERE
<ESMA_QUESTION_349>

**Q350: Do you agree with the tick sizes proposed under Option 2? In particular, should a different tick size be used for the largest band, taking into account the size of the tick relative to the price? Please elaborate.**

<ESMA_QUESTION_350>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_350>

**Q351: Should the tick size be calibrated in a more granular manner to that proposed above, namely by shifting a band which results in a large step-wise change?**

<ESMA_QUESTION_351>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_351>

**Q352: Do you agree with the above treatment for a newly admitted instrument? Would this affect the subsequent trading in a negative way?**

<ESMA_QUESTION_352>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_352>

**Q353: Do you agree that a period of six weeks is appropriate for the purpose of initial calibration for all instruments admitted to the pan-European tick size regime under Option 2? If not, what would be the appropriate period for the initial calibration?**

<ESMA_QUESTION_353>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_353>

**Q354: Do you agree with the proposal of factoring the bid-ask spread into tick size regime through SAF? If not, what would you consider as the appropriate method?**

<ESMA_QUESTION_354>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_354>

**Q355: Do you agree with the proposal to take an average bid-ask spread of less than two ticks as being too narrow? If not, what level of spread to ticks would you consider to be too narrow?**

<ESMA_QUESTION_355>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_355>

**Q356: Under the current proposal, it is not considered necessary to set an upper ceiling to the bid-ask spread, as the preliminary view under Option 2 is that under normal conditions the risk of the spread widening indefinitely is limited (and in any event a regulator may amend SAF manually if required). Do you agree with this view? If not, how would you propose to set an upper ceiling applicable across markets in the EU?**

<ESMA_QUESTION_356>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_356>

**Q357: Do you have any concerns of a possible disruption which may materialise in implementing a review cycle as envisioned above?**

<ESMA_QUESTION_357>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_357>

**Q358: Do you agree that illiquid instruments, excluding illiquid cash equities, should be excluded from the scope of a pan-European tick size regime under Option 2 until such time that definitions for these instruments become available? If not, please explain why. If there are any equity-like instruments per Article 49(3) of MiFID II that you feel should be included in the pan-European tick size regime at the same time as for cash equities, please list these instruments together with a brief reason for doing so.**

<ESMA_QUESTION_358>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_358>

**Q359: Do you agree that financial instruments, other than those listed in Article 49(3) of MiFID II should be excluded from the scope of the pan-European tick size regime under Option 2 at least for the time being? If not, please explain why and which specific instruments do you consider necessary to be included in the regime.**

<ESMA_QUESTION_359>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_359>

**Q360: What views do you have on whether tick sizes should be revised on a dynamic or periodic basis? What role do you perceive for an automated mechanism for doing this versus review by the NCA responsible for the instrument in question? If you prefer periodic review, how frequently should reviews be undertaken (e.g. quarterly, annually)?**

<ESMA_QUESTION_360>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_360>

# 5. Data publication and access

## 5.1. General authorisation and organisational requirements for data reporting services (Article 61(4), MiFID II)

**Q361: Do you agree that the guidance produced by CESR in 2010 is broadly appropriate for all three types of DRS providers?**

<ESMA_QUESTION_361>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_361>

**Q362: Do you agree that there should also be a requirement for notification of significant system changes?**

<ESMA_QUESTION_362>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_362>

**Q363: Are there any other general elements that should be considered in the NCAs' assessment of whether to authorise a DRS provider?**

<ESMA_QUESTION_363>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_363>

## 5.2. Additional requirements for particular types of Data Reporting Services Providers

**Q364: Do you agree with the identified differences regarding the regulatory treatment of ARMs.**

<ESMA_QUESTION_364>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_364>

**Q365: What other significant differences will there have to be in the standards for APAs, CTPs and ARMs?**

<ESMA_QUESTION_365>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_365>

## 5.3. Technical arrangements promoting an efficient and consistent dissemination of information – Machine readability Article 64(6), MiFID II

**Q366: Do you agree with the proposal to define machine-readability in this way? If not, what would you prefer?**

<ESMA_QUESTION_366>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_366>

## 5.4. Consolidated tape providers

**Q367: Should the tapes be offered to users on an instrument-by-instrument basis, or as a single comprehensive tape, or at some intermediate level of disaggregation? Do you think that transparency information should be available without the need for value-added products to be purchased alongside?**

<ESMA_QUESTION_367>
Although it may not be necessary to break down consolidated tapes on an instrument-by-instrument basis, it would be beneficial for the tape to reflect the relevant "trading universe" of instruments, so that the data would be broken down, but on a "class" basis rather than by individual instrument. In particular, data should not be broken down or fragmented along national lines, and should be made available to market participants as soon as technologically possible.

As a general point, MFA would like to see a coherent, pan-European set of operational and conduct standards applying to CTPs.

<ESMA_QUESTION_367>

**Q368: Are there other factors or considerations regarding data publication by the CTP that are not covered in the standards for data publication by APAs and trading venues and that should be taken into account by ESMA?**

<ESMA_QUESTION_368>
Accurate sequencing of information on consolidated tapes, and accuracy as to timestamp (having regard to latency) is crucial. Speed of publication is also essential; information disseminated by CTPs should preferably reach market participants faster than feeds disseminated by trading venues themselves. Otherwise, there is little advantage to the service offered by a CTP, and market participants will have to continue sourcing data from a number of sources rather being able to rely on one central source.

As noted in our response to Q367, MFA is keen to ensure that data offered by CTPs is not fragmented along national lines, but rather that it takes into account trading across the EU. Therefore, in the interests of CTPs providing data on a pan-European basis, ESMA should consider how CTPs should best be regulated. Member States should preferably cooperate in regulating the CTPs, and ESMA should retain some oversight in order to ensure that data is effectively being offered on a pan-European basis.

While we support consolidated tape services being offered on a reasonable commercial basis, CTPs' fee structures should be constructed in such a way as to ensure sufficient funding (*i.e.*, to permit the introduction of new technology).

<ESMA_QUESTION_368>

**Q369: Do you agree that CTPs should be able to provide the services listed above? Are there any others that you think should be specified?**

<ESMA_QUESTION_369>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_369>

## 5.5. Data disaggregation

**Q370: Do you agree that venues should not be required to disaggregate by individual instrument?**

<ESMA_QUESTION_370>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_370>

**Q371: Do you agree that venues should be obliged to disaggregate their pre-trade and post-trade data by asset class?**

<ESMA_QUESTION_371>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_371>

**Q372: Do you believe the list of asset classes proposed in the previous paragraph is appropriate for this purpose? If not, what would you propose?**

<ESMA_QUESTION_372>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_372>

**Q373: Do you agree that venues should be under an obligation to disaggregate according to the listed criteria unless they can demonstrate that there is insufficient customer interest?**

<ESMA_QUESTION_373>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_373>

**Q374: Are there any other criteria according to which it would be useful for venues to disaggregate their data, and if so do you think there should be a mandatory or comply-or-explain requirement for them to do so?**

<ESMA_QUESTION_374>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_374>

**Q375: What impact do you think greater disaggregation will have in practice for overall costs faced by customers?**

<ESMA_QUESTION_375>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_375>

## 5.6. Identification of the investment firm responsible for making public the volume and price transparency of a transaction (Articles 20(3) (c) and 21(5)(c), MiFIR)

**Q376: Please describe your views about how to improve the current trade reporting system under Article 27(4) of MiFID Implementing Regulation.**

<ESMA_QUESTION_376>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_376>

## 5.7. Access to CCPs and trading venues (Articles 35-36, MiFIR)

**Q377: Do you agree that exceeding the planned capacity of the CCP is grounds to deny access?**

<ESMA_QUESTION_377>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_377>

**Q378: How would a CCP assess that the anticipated volume of transactions would exceed its capacity planning?**

<ESMA_QUESTION_378>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_378>

**Q379: Are there other risks related to the anticipated volume of transactions that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA_QUESTION_379>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_379>

**Q380: Do you agree that exceeding the planned capacity of the CCP is grounds to deny access?**

<ESMA_QUESTION_380>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_380>

**Q381: How would a CCP assess that the number of users expected to access its systems would exceed its capacity planning?**

<ESMA_QUESTION_381>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_381>

**Q382: Are there other risks related to number of users that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA_QUESTION_382>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_382>

**Q383: In what way could granting access to a trading venue expose a CCP to risks associated with a change in the type of users accessing the CCP? Are there any additional risks that could be relevant in this situation?**

<ESMA_QUESTION_383>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_383>

**Q384: How would a CCP establish that the anticipated operational risk would exceed its operational risk management design?**

<ESMA_QUESTION_384>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_384>

**Q385: Are there other risks related to arrangements for managing operational risk that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA_QUESTION_385>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_385>

**Q386: Given there will be costs to meeting an access request, what regard should be given to those costs that would create significant undue risk?**

<ESMA_QUESTION_386>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_386>

**Q387: To what extent could a lack of harmonization in certain areas of law constitute a relevant risk in the context of granting or denying access?**

<ESMA_QUESTION_387>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_387>

**Q388: Do you agree with the risks identified above in relation to complexity and other factors creating significant undue risks?**

<ESMA_QUESTION_388>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_388>

**Q389: Q: Are there other risks related to complexity and other factors creating significant undue risks that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA_QUESTION_389>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_389>

**Q390: Do you agree with the analysis above and the conclusion specified in the previous paragraph?**

<ESMA_QUESTION_390>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_390>

**Q391: To what extent would a trading venue granting access give rise to material risks because of anticipated volume of transactions and the number of users? Can you evidence that access will materially change volumes and the number of users?**

<ESMA_QUESTION_391>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_391>

**Q392: To what extent would a trading venue granting access give rise to material risks because of arrangements for managing operational risk?**

<ESMA_QUESTION_392>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_392>

**Q393: Given there will be costs to meeting an access request, what regard should be given to those costs that would create significant undue risk?**

<ESMA_QUESTION_393>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_393>

**Q394: Do you believe a CCP's model regarding the acceptance of trades may create risks to a trading venue if access is provided? If so, please explain in which cases and how.**

<ESMA_QUESTION_394>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_394>

**Q395: Could granting access create unmanageable risks for trading venues due to conflicts of law arising from the involvement of different legal regimes?**

<ESMA_QUESTION_395>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_395>

**Q396: Are there other risks related to complexity and other factors creating significant undue risks that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA_QUESTION_396>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_396>

**Q397: Do you agree with the conditions set out above? If you do not, please state why not.**

<ESMA_QUESTION_397>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_397>

**Q398: Are there any are other conditions CCPs and trading venues should include in their terms for agreeing access?**

<ESMA_QUESTION_398>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_398>

**Q399: Are there any other fees that are relevant in the context of Articles 35 and 36 of MiFIR that should be analysed?**

<ESMA_QUESTION_399>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_399>

**Q400: Are there other considerations that need to be made in respect of transparent and non-discriminatory fees?**

<ESMA_QUESTION_400>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_400>

**Q401: Do you consider that the proposed approach adequately reflects the need to ensure that the CCP does not apply discriminatory collateral requirements? What alternative approach would you consider?**

<ESMA_QUESTION_401>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_401>

**Q402: Do you see other conditions under which netting of economically equivalent contracts would be enforceable and ensure non-discriminatory treatment for the prospective trading venue in line with all the conditions of Article 35(1)(a)?**

<ESMA_QUESTION_402>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_402>

**Q403: The approach above relies on the CCP's model compliance with Article 27 of Regulation (EU) No 153/2013, do you see any other circumstances for a CCP to cross margin correlated contracts? Do you see other conditions under which cross margining of correlated contracts would be enforceable and ensure non-discriminatory treatment for the prospective trading venue?**

<ESMA_QUESTION_403>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_403>

**Q404: Do you agree with ESMA that the two considerations that could justify a national competent authority in denying access are (a) knowledge it has about the trading venue or CCP being at risk of not meeting its legal obligations, and (b) liquidity fragmentation? If not, please explain why.**

<ESMA_QUESTION_404>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_404>

**Q405: How could the above mentioned considerations be further specified?**

<ESMA_QUESTION_405>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_405>

**Q406: Are there other conditions that may threaten the smooth and orderly functioning of the markets or adversely affect systemic risk? If so, how would such risks arise from the provision of access?**

<ESMA_QUESTION_406>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_406>

**Q407: Do you agree with ESMA's proposed approach that where there are equally accepted alternative approaches to calculating notional amount, but there are notable differences in the value to which these calculation methods give rise, ESMA should specify the method that should be used?**

<ESMA_QUESTION_407>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_407>

**Q408: Do you agree that the examples provided above are appropriate for ESMA to adopt given the purpose for which the opt-out mechanism was introduced? If not, why, and what alternative(s) would you propose?**

<ESMA_QUESTION_408>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_408>

**Q409: For which types of exchange traded derivative instruments do you consider there to be notable differences in the way the notional amount is calculated? How should the notional amount for these particular instruments be calculated?**

<ESMA_QUESTION_409>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_409>

**Q410: Are there any other considerations ESMA should take into account when further specifying how notional amount should be calculated? In particular, how should technical transactions be treated for the purposes of Article 36(5), MiFIR?**

<ESMA_QUESTION_410>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_410>

## 5.8. Non- discriminatory access to and obligation to license benchmarks

**Q411: Do you agree that trading venues require the relevant information mentioned above? If not, why?**

<ESMA_QUESTION_411>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_411>

**Q412: Is there any other additional information in respect of price and data feeds that a trading venue would need for the purposes of trading?**

<ESMA_QUESTION_412>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_412>

**Q413: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA_QUESTION_413>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_413>

**Q414: Is there any other additional information in respect of price and data feeds that a CCP would need for the purposes of clearing?**

<ESMA_QUESTION_414>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_414>

**Q415: Do you agree that trading venues should have access to benchmark values as soon as they are calculated? If not, why?**

<ESMA_QUESTION_415>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_415>

**Q416: Do you agree that CCPs should have access to benchmark values as soon as they are calculated? If not, why?**

<ESMA_QUESTION_416>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_416>

**Q417: Do you agree that trading venues require the relevant information mentioned above? If not, why?**

<ESMA_QUESTION_417>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_417>

**Q418: Is there any other additional information in respect of composition that a trading venue would need for the purposes of trading?**

<ESMA_QUESTION_418>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_418>

**Q419: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA_QUESTION_419>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_419>

**Q420: Is there any other additional information in respect of composition that a CCP would need for the purposes of clearing?**

<ESMA_QUESTION_420>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_420>

**Q421: Do you agree that trading venues and CCPs should be notified of any planned changes to the composition of the benchmark in advance? And that where this is not possible, notification should be given as soon as the change is made? If not, why?**

<ESMA_QUESTION_421>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_421>

**Q422: Do you agree that trading venues need the relevant information mentioned above? If not, why?**

<ESMA_QUESTION_422>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_422>

**Q423: Is there any other additional information in respect of methodology that a trading venue would need for the purposes of trading?**

<ESMA_QUESTION_423>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_423>

**Q424: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA_QUESTION_424>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_424>

**Q425: Is there any other additional information in respect of methodology that a CCP would need for the purposes of clearing?**

<ESMA_QUESTION_425>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_425>

**Q426: Is there any information is respect of the methodology of a benchmark that a person with proprietary rights to a benchmark should not be required to provide to a trading venue or a CCP?**

<ESMA_QUESTION_426>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_426>

**Q427: Do you agree that trading venues require the relevant information mentioned above (values, types and sources of inputs, used to develop benchmark values)? If not, why?**

<ESMA_QUESTION_427>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_427>

**Q428: Is there any other additional information in respect of pricing that a trading venue would need for the purposes of trading?**

<ESMA_QUESTION_428>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_428>

**Q429: In what other circumstances should a trading venue not be able to require the values of the constituents of a benchmark?**

<ESMA_QUESTION_429>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_429>

**Q430: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA_QUESTION_430>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_430>

**Q431: Is there any other additional information in respect of pricing that a CCP would need for the purposes of clearing?**

<ESMA_QUESTION_431>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_431>

**Q432: In what other circumstances should a CCP not be able to require the values of the constituents of a benchmark?**

<ESMA_QUESTION_432>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_432>

**Q433: Do you agree that trading venues require the additional information mentioned above? If not, why?**

<ESMA_QUESTION_433>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_433>

**Q434: Do you agree that CCPs require the additional information mentioned above? If not, why?**

<ESMA_QUESTION_434>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_434>

**Q435: Is there any other information that a trading venue would need for the purposes of trading?**

<ESMA_QUESTION_435>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_435>

**Q436: Is there any other information that a CCP would need for the purposes of clearing?**

<ESMA_QUESTION_436>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_436>

**Q437: Do you agree with the principles described above? If not, why?**

<ESMA_QUESTION_437>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_437>

**Q438: Do users of trading venues need non-publicly disclosed information on benchmarks?**

<ESMA_QUESTION_438>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_438>

**Q439: Do users of CCPs need non-publicly disclosed information on benchmarks?**

<ESMA_QUESTION_439>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_439>

**Q440: Where information is not available publicly should users be provided with the relevant information through agreements with the person with proprietary rights to the benchmark or with its trading venue / CCP?**

<ESMA_QUESTION_440>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_440>

**Q441: Do you agree with the conditions set out above? If not, please state why not.**

<ESMA_QUESTION_441>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_441>

**Q442: Are there any are other conditions persons with proprietary rights to a benchmark and trading venues should include in their terms for agreeing access?**

<ESMA_QUESTION_442>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_442>

**Q443: Are there any are other conditions persons with proprietary rights to a benchmark and CCPs should include in their terms for agreeing access?**

<ESMA_QUESTION_443>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_443>

**Q444: Which specific terms/conditions currently included in licensing agreements might be discriminatory/give rise to preventing access?**

<ESMA_QUESTION_444>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_444>

**Q445: Do you have views on how termination should be handled in relation to outstanding/significant cases of breach?**

<ESMA_QUESTION_445>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_445>

**Q446: Do you agree with the approach ESMA has taken regarding the assessment of a benchmark's novelty, i.e., to balance/weight certain factors against one another? If not, how do you think the assessment should be carried out?**

<ESMA_QUESTION_446>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_446>

**Q447: Do you agree that each newly released series of a benchmark should not be considered a new benchmark?**

<ESMA_QUESTION_447>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_447>

**Q448: Do you agree that the factors mentioned above could be considered when assessing whether a benchmark is new? If not, why?**

<ESMA_QUESTION_448>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_448>

**Q449: Are there any factors that would determine that a benchmark is not new?**

<ESMA_QUESTION_449>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_449>

# 6. Requirements applying on and to trading venues

## 6.1. Admission to Trading

**Q450: What are your views regarding the conditions that have to be satisfied in order for a financial instrument to be admitted to trading?**

<ESMA_QUESTION_450>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_450>

**Q451: In your experience, do you consider that the requirements being in place since 2007 have worked satisfactorily or do they require updating? If the latter, which additional requirements should be imposed?**

<ESMA_QUESTION_451>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_451>

**Q452: More specifically, do you think that the requirements for transferable securities, units in collective investment undertakings and/or derivatives need to be amended or updated? What is your proposal?**

<ESMA_QUESTION_452>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_452>

**Q453: How do you assess the proposal in respect of requiring ETFs to offer market making arrangements and direct redemption facilities at least in cases where the regulated market value of units or shares significantly varies from the net asset value?**

<ESMA_QUESTION_453>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_453>

**Q454: Which arrangements are currently in place at European markets to verify compliance of issuers with initial, on-going and ad hoc disclosure obligations?**

<ESMA_QUESTION_454>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_454>

**Q455: What are your experiences in respect of such arrangements?**

<ESMA_QUESTION_455>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_455>

**Q456: What is your view on how effective these arrangements are in performing verification checks?**

<ESMA_QUESTION_456>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_456>

**Q457: What arrangements are currently in place on European regulated markets to facilitate access of members or participants to information being made public under Union law?**

<ESMA_QUESTION_457>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_457>

**Q458: What are your experiences in respect of such arrangements?**

<ESMA_QUESTION_458>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_458>

**Q459: How do you assess the effectiveness of these arrangements in achieving their goals?**

<ESMA_QUESTION_459>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_459>

**Q460: Do you agree with that, for the purpose of Article 51 (3) (2) of MiFID II, the arrangements for facilitating access to information shall encompass the Prospectus, Transparency and Market Abuse Directives (in the future the Market Abuse Regulation)? Do you consider that this should also include MiFIR trade transparency obligations?**

<ESMA_QUESTION_460>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_460>

## 6.2. Suspension and Removal of Financial Instruments from Trading - connection between a derivative and the underlying financial instrument and standards for determining formats and timings of communications and publications

**Q461: Do you agree with the specifications outlined above for the suspension or removal from trading of derivatives which are related to financial instruments that are suspended or removed?**

<ESMA_QUESTION_461>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_461>

**Q462: Do you think that any derivatives with indices or a basket of financial instruments as an underlying the pricing of which depends on multiple price inputs should be suspended if one or more of the instruments composing the index or the basket are suspended on the basis that they are sufficiently related? If so, what methodology would you propose for determining whether they are "sufficiently related"? Please explain.**

<ESMA_QUESTION_462>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_462>

**Q463: Do you agree with the principles outlined above for the timing and format of communications and publications to be effected by trading venue operators?**

<ESMA_QUESTION_463>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_463>

# 7. Commodity derivatives

## 7.1. Ancillary Activity

**Q464: Do you see any difficulties in defining the term 'group' as proposed above?**

<ESMA_QUESTION_464>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_464>

**Q465: What are the advantages and disadvantages of the two alternative approaches mentioned above (taking into account non-EU activities versus taking into account only EU activities of a group)? Please provide reasons for your answer.**

<ESMA_QUESTION_465>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_465>

**Q466: What are the main challenges in relation to both approaches and how could they be addressed?**

<ESMA_QUESTION_466>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_466>

**Q467: Do you consider there are any difficulties concerning the suggested approach for assessing whether the ancillary activities constitute a minority of activities at group level? Do you consider that the proposed calculations appropriately factor in activity which is subject to the permitted exemptions under Article 2(4) MiFID II? If no, please explain why and provide an alternative proposal.**

<ESMA_QUESTION_467>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_467>

**Q468: Are there other approaches for assessing whether the ancillary activities constitute a minority of activities at group level that you would like to suggest? Please provide details and reasons.**

<ESMA_QUESTION_468>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_468>

**Q469: How should "minority of activities" be defined? Should minority be less than 50% or less (50 - x)%? Please provide reasons.**

<ESMA_QUESTION_469>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_469>

**Q470: Do you have a view on whether economic or accounting capital should be used in order to define the elements triggering the exemption from authorisation under MiFID II, available under Article 2(1)(j)? Please provide reasons.**

<ESMA_QUESTION_470>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_470>

**Q471: If economic capital were to be used as a measure, what do you understand to be encompassed by this term?**

<ESMA_QUESTION_471>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_471>

**Q472: Do you agree with the above assessment that the data available in the TRs will enable entities to perform the necessary calculations?**

<ESMA_QUESTION_472>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_472>

**Q473: What difficulties do you consider entities may encounter in obtaining the information that is necessary to define the size of their own trading activity and the size of the overall market trading activity from TRs? How could the identified difficulties be addressed?**

<ESMA_QUESTION_473>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_473>

**Q474: What do you consider to be the difficulties in defining the volume of the transactions entered into to fulfil liquidity obligations?**

<ESMA_QUESTION_474>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_474>

**Q475: How should the volume of the overall trading activity of the firm at group level and the volume of the transactions entered into in order to hedge physical activities be measured? (Number of contracts or nominal value? Period of time to be considered?)**

<ESMA_QUESTION_475>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_475>

**Q476: Do you agree with the level of granularity of asset classes suggested in order to provide for relative comparison between market participants?**

<ESMA_QUESTION_476>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_476>

**Q477: What difficulties could there be regarding the aggregation of TR data in order to obtain information on the size of the overall market trading activity? How could these difficulties be addressed?**

<ESMA_QUESTION_477>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_477>

**Q478: How should ESMA set the threshold above which persons fall within MiFID II's scope? At what percentage should the threshold be set? Please provide reasons for your response.**

<ESMA_QUESTION_478>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_478>

**Q479: Are there other approaches for determining the size of the trading activity that you would like to suggest?**

<ESMA_QUESTION_479>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_479>

**Q480: Are there other elements apart from the need for ancillary activities to constitute a minority of activities and the comparison between the size of the trading activity and size of the overall market trading activity that ESMA should take into account when defining whether an activity is ancillary to the main business?**

<ESMA_QUESTION_480>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_480>

**Q481: Do you see any difficulties with the interpretation of the hedging exemptions mentioned above under Article 2(4)(a) and (c) of MiFID II? How could potential difficulties be addressed?**

<ESMA_QUESTION_481>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_481>

**Q482: Do you agree with ESMA's proposal to take into account Article 10 of the Commission Delegated Regulation (EU) No 149/2013 supplementing EMIR in specifying the application of the hedging exemption under Article 2(4)(b) of MiFID II? How could any potential difficulties be addressed?**

<ESMA_QUESTION_482>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_482>

**Q483: Do you agree that the obligations to provide liquidity under Article 17(3) and Article 57(8)(d) of MiFID II should not be taken into account as an obligation triggering the hedging exemption mentioned above under Article 2(4)(c)?**

<ESMA_QUESTION_483>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_483>

**Q484: Could you provide any other specific examples of obligations of "transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue" which ESMA should take into account?**

<ESMA_QUESTION_484>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_484>

**Q485: Should the (timeframe for) assessment be linked to audit processes?**

<ESMA_QUESTION_485>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_485>

**Q486: How should seasonal variations be taken into account (for instance, if a firm puts on a maximum position at one point in the year and sells that down through the following twelve months should the calculation be taken at the maximum point or on average)?**

<ESMA_QUESTION_486>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_486>

**Q487: Which approach would be practical in relation to firms that may fall within the scope of MiFID in one year but qualify for exemption in another year?**

<ESMA_QUESTION_487>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_487>

**Q488: Do you see difficulties with regard to the two approaches suggested above?**

<ESMA_QUESTION_488>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_488>

**Q489: How could a possible interim approach be defined with regard to the suggestion mentioned above (i.e. annual notification but calculation on a three years rolling basis)?**

<ESMA_QUESTION_489>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_489>

**Q490: Do you agree that the competent authority to which the notification has to be made should be the one of the place of incorporation?**

<ESMA_QUESTION_490>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_490>

## 7.2. Position Limits

**Q491: Do you agree with ESMA's proposal to link the definition of a risk-reducing trade under MiFID II to the definition applicable under EMIR? If you do not agree, what alternative definition do you believe is appropriate?**

<ESMA_QUESTION_491>

MFA agrees that consistency between the EMIR and MiFID II regimes is desirable given that market participants are now familiar with the scope of EMIR, and as such, consistency will help with the practical implementation of MiFID II.

<ESMA_QUESTION_491>

**Q492: Do you agree with ESMA's proposed definition of a non-financial entity? If you do not agree, what alternative definition do you believe is appropriate?**

<ESMA_QUESTION_492>
As noted in our response to Q491, MFA believes that consistency between EMIR and MiFID II is desirable, so the fact that ESMA's definition of a "non-financial entity" would parallel the definition of a "non-financial counterparty" under EMIR is helpful in this sense. However, we would note that ESMA's proposed definition may in future become more restrictive as a result of the broader application of the MiFID II authorisation regime, *i.e.* given that the definition of a "non-financial entity" would exclude MiFID investment firms (a category that is likely to expand in scope as a result of the narrower dealing on own account exemption under MiFID II).

<ESMA_QUESTION_492>

**Q493: Should the regime for subsidiaries of a person other than entities that are wholly owned look to aggregate on the basis of a discrete percentage threshold or on a more subjective basis? What are the advantages and risks of either approach? Do you agree with the proposal that where the positions of an entity that is subject to substantial control by a person are aggregated, they are included in their entirety?**

<ESMA_QUESTION_493>
MFA supports ESMA's approach of looking only to parent/subsidiary relationships and not to sister-company type relationships in the context of aggregation. ESMA's approach is consistent with Article 57 of MiFID II, which requires position limits to be set "on the basis of all positions held by a person and those held on its behalf at an aggregate group level". As such, position limits apply at the legal entity level, together with parent/subsidiary undertakings of that legal entity. We note in this context that investment funds are individual legal entities which may hold positions in commodity derivatives.

In respect of ESMA's proposal to base aggregation on ownership percentage only, MFA would prefer ESMA to adopt a "pro rata approach", such that aggregation is based on proportionate ownership (*i.e.* rather than 100% of a partially owned entity's positions being automatically attributed to the owner). Such pro rata aggregation would help to minimise the risk of commodity derivative positions being double-counted, and would avoid artificial limits being placed on trading.

<ESMA_QUESTION_493>

**Q494: Should the regime apply to the positions held by unconnected persons where they are acting together with a common purpose (for example, "concert party" arrangements where different market participants collude to act for common purpose)?**

<ESMA_QUESTION_494>
The regime should not apply to positions held by unconnected persons where they are acting together with a common purpose. Such a requirement would be a departure from and contrary to

the Level 1 text, given that Article 57 of MiFID II requires position limits to be set "on the basis of all positions held by a person and those held on its behalf at an aggregate group level". As such, Article 57 only contemplates aggregation in the context of a "group". The term "group" is defined in MiFID II by cross-reference to Article 2(11) of the Accounting Directive, which defines "group" fairly narrowly to mean only "a parent undertaking and all its subsidiary undertakings". Thus, requiring aggregation across the positions of unconnected persons acting together with a common purpose would be contrary to the definition of "group", as set out in the Accounting Directive.

In any event, the concept of a "common purpose" appears overly broad and vague, which would make compliance difficult in practice. We note that the Short Selling Regulation does not take into account positions of unconnected persons in this way.

<ESMA_QUESTION_494>

**Q495: Do you agree with the approach to link the definition of economically equivalent OTC contract, for the purpose of position limits, with the definitions used in other parts of MiFID II? If you do not agree, what alternative definition do you believe is appropriate?**

<ESMA_QUESTION_495>
As noted in our response to Q497, MFA has an overall preference for the criteria governing economic equivalence to be based on the CFTC's regime, given that our view that certain aspects of the CFTC regime can be effectively translated to the EU regime and given that harmonisation will make compliance easier on a global scale.

We would also note that certain of the concepts used by ESMA in Option 1 (which is derived from the usage of the term "economically equivalent" in other parts of MiFID II), are somewhat vague. In particular, it is unclear what the phrase "presenting the same risk profile" means in this context. In addition, the proposal to link the equivalence of cash-settled transactions to their physical underlying may require some further thought (see our response to Q496). In our view, it is important that the criteria for economic equivalence are expressed in a precise manner, and that economic equivalence should extend only to a narrow and well-defined set of transactions.

As a general point, the broad criteria to be applied by market participants under Option 1 could become problematic in practice. The broader the criteria to be applied, the greater the risk of the analysis conducted by market participants not conforming with the view of their national competent authority.

Therefore, the greater the certainty surrounding which OTC derivative transactions will be caught by the scope of the new regime, the better. In particular, position limits should be clear and simple enough to be applied on an ongoing basis without the need for continual analysis of whether individual OTC transactions need to be counted towards position limits.

As a final point, we consider that the definition of an "economically equivalent" OTC derivative transaction for these purposes should not necessarily be the same as the definition of the term "economically equivalent contract" which appears in the open access provisions of MiFIR. The position limits and the open access regimes have separate and distinct aims and purposes, and as such should be considered separately.

<ESMA_QUESTION_495>

**Q496: Do you agree that even where a contract is, or may be, cash-settled it is appropriate to base its equivalence on the substitutability of the underlying physical commodity that it is referenced to? If you do not agree, what alternative measures of equivalence could be used?**

<ESMA_QUESTION_496>
A transaction's underlying physical commodity is one criteria which may suggest that an OTC transaction is "economically equivalent" to an exchange-traded transaction. However, as a general point, MFA would caution against treating cash-settled transactions as fungible or fully equivalent to physically-settled transactions. For example, cash-settled transactions are more likely to have been entered into with the intention of hedging a different, related commodity than physically settled transactions.

<ESMA_QUESTION_496>

**Q497: Do you believe that the definition of "economically equivalent" that is used by the CFTC is appropriate for the purpose of defining the contracts that are not traded on a trading venue for the position limits regime of MiFID II? Give reasons to support your views as well as any suggested amendments or additions to this definition.**

<ESMA_QUESTION_497>
Despite the fact that the CFTC position limits regime has been defined with a narrower range of commodity derivatives in mind, MFA would prefer ESMA to use the CFTC regime as a template when drafting its rules on economic equivalence (*i.e.* Option 2), rather than implementing Option 1. Working from the CFTC regime would make the EU position limits regime easier to implement from a global perspective. It also appears to us that Option 2 is clearer in scope than Option 1, and that Option 2 would more effectively capture similarities in the risks posed by exchange-traded and OTC contracts (as opposed to Option 1, which simply includes a broad reference to the transaction's "risk profile").

<ESMA_QUESTION_497>

**Q498: What arrangements could be put in place to support competent authorities identifying what OTC contracts are considered to be economically equivalent to listed contracts traded on a trading venue? ?**

<ESMA_QUESTION_498>
The best way to support competent authorities in implementing the new regime would be to define the categories of OTC derivatives which are to be subject to position limits in the most clear and certain way possible. ESMA (or perhaps competent authorities themselves) should publish clear guidelines on transactions falling within the scope of the regime, preferably including listed examples of OTC derivative transactions which could be classed as "economically equivalent". Such guidelines would be helpful to competent authorities and market participants alike in navigating the new regime. Any guidelines should be sufficiently detailed and principles-based in nature, and should preferably be issued on a "comply or explain" basis in order to ensure harmonisation.

As a general point, MFA would prefer to see a harmonised, pan-European approach to identification of OTC contracts falling within the scope of the position limits regime, so EU-level

guidance from ESMA and a collaborative approach between national competent authorities would be helpful in this respect.

Competent authorities may also find it helpful to seek the views of market participants and to work alongside them in developing their approach to implementation of the new regime. MFA would prefer a gradual phase-in of the position limits regime, whereby competent authorities work with market participants to ensure that the regime is being applied to the correct transactions rather than a more abrupt approach to enforcing the position limits regime. In particular, where market participants have made a good faith determination that a transaction is not "economically equivalent" on the basis of current guidance, ESMA should make clear that they should not be subject to a strict liability standard of enforcement.

<ESMA_QUESTION_498>

**Q499: Do you agree with ESMA's proposal that the "same" derivative contract occurs where an identical contract is listed independently on two or more different trading venues? What other alternative definitions of "same" could be applied to commodity derivatives?**

<ESMA_QUESTION_499>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_499>

**Q500: Do you agree with ESMA's proposals on aggregation and netting? How should ESMA address the practical obstacles to including within the assessment positions entered into OTC or on third country venues? Should ESMA adopt a model for pooling related contracts and should this extend to closely correlated contracts? How should equivalent contracts be converted into a similar metric to the exchange traded contract they are deemed equivalent to?**

<ESMA_QUESTION_500>
In general, ESMA's proposals on netting still appear fairly high-level at this stage, although the proposal that contracts with "different characteristics" may be netted is positive.

In general, overly prescriptive rules on the type of transactions which may be netted should be avoided. We were therefore concerned by ESMA's statement that "additional rules" will be required for contracts with different maturities etc. MFA considers that market participants should be permitted a degree of discretion and flexibility in determining when transactions are appropriate to be fully or partially offset or netted (we note in this context that netting arrangements are permitted across derivatives with differing maturity dates in relation to the commitment method for calculating alternative investment fund ("**AIF**") exposures under the Alternative Investment Fund Managers Directive ("**AIFMD**")). However, to the extent that ESMA does wish to define the circumstances in which such discretion could be exercised, it could adopt a similar approach to the UK Financial Conduct Authority's "evidential" guidelines, which provide non-definitive circumstances indicating that a rule may have been breached or complied with.

MFA agrees with ESMA's approach of permitting netting/aggregation across exchange-traded and OTC derivative transactions, and across contracts which are traded on different exchanges. We support the inclusion of contracts traded on third country trading venues within the netting/aggregation regime, particularly given that markets in certain commodities are global in

nature. In terms of addressing practical obstacles to including such derivatives within the scope of the netting/aggregation regime, we would recommend the use of effective information exchange frameworks between EU competent authorities and competent authorities of third countries.

Any aggregation/netting rules should extend to correlated transactions as well as those which are identical in nature, and should take effect on a portfolio basis.

<ESMA_QUESTION_500>

**Q501: Do you agree with ESMA's approach to defining market size for physically settled contracts? Is it appropriate for cash settled contracts to set position limits without taking into account the underlying physical market?**

<ESMA_QUESTION_501>
While deliverable supply is an appropriate basis for setting limits on physically-settled contracts (*i.e.* given that those contracts involve the making and taking of delivery), the same is not true of cash-settled transactions. Thus, given that there is no economic rationale for linking position limits on cash-settled contracts to deliverable supply, ESMA should avoid using deliverable supply as a basis for calculating market size in the case of cash-settled transactions. MFA considers that gross open interest would be a more appropriate proxy for calculating market size.

ESMA's first approach of basing spot and non spot-month position limits on open interest would therefore be preferable to its alternative of taking deliverable supply into account even for cash settled contracts.

<ESMA_QUESTION_501>

**Q502: Do you agree that it is preferable to set the position limit on a contract for a fixed (excluding exceptional circumstances) period rather than amending it on a real-time basis? What period do you believe is appropriate, considering in particular the factors of market evolution and operational efficiency?**

<ESMA_QUESTION_502>
In MFA's view, a longer fixed period (for example a twelve or twenty four month fixed period) would be vastly preferable. Market participants often invest or hedge based on longer-termed strategies, so fixing position limits for longer periods would have the advantage of increasing market certainty. Amending position limits on a real time basis, on the other hand, would make compliance with the regime extremely difficult and would create a disproportionate cost burden on market participants.

If ESMA does decide to set position limits for longer periods, it would be better to look back over a longer period of trading in setting the limits than is suggested in the Discussion Paper (which refers to "recent history"). This would ensure that a range of potential trading conditions are considered. Market size, may, for example, be influenced by seasonal trends, which might only be apparent from data going back two or more years.

To the extent that ESMA does look back over historic trading patterns in setting limits, it should also be aware of the impact of the "trading cushions" which market participants will likely put in place to prevent themselves breaching position limits. As a result of these trading cushions,

levels of open interest will likely decrease as soon as the position limits regime comes into effect. If recalculation of the limits then looks back to prior open interest levels, the following year's position limits may be set lower as a result of such trading cushions. Not taking these cushions into account could result in a self-reinforcing cycle of position limits, which could ultimately damage liquidity.

<ESMA_QUESTION_502>

**Q503: Once the position limits regime is implemented, what period do you feel is appropriate to give sufficient notice to persons of the subsequent adjustment of position limits?**

<ESMA_QUESTION_503>
A notice period of at least six months would be appropriate, although in our view it would be beneficial for trading venues to have some say in how long notice periods are set in practice (given, for example, that they are well placed to assess and take into account the liquidity of particular contracts and their underlying commodities).

As a general comment, a sufficient notice period is necessary to ensure that no market disruption occurs following a change in position limits. A notice period should also be long enough to give market participants the ability to plan their investment strategies appropriately. In particular, market participants seeking to hedge their exposures in the commodity derivatives markets will require a certain degree of predictability and market certainty in order to develop and pursue effective hedging or investment strategies.

<ESMA_QUESTION_503>

**Q504: Should positions based on contracts entered into before the revision of position limits be grandfathered and if so how?**

<ESMA_QUESTION_504>
MFA strongly supports the grandfathering of positions entered into prior to the revision of position limits. A sudden application of position limits to pre-existing transactions could lead to a large-scale sell off of positions, resulting in higher volatility; this is clearly not the aim of the position limits regime, which was intended to reduce price volatility overall.

<ESMA_QUESTION_504>

**Q505: Do you agree with ESMA's proposals for the determination of a central or primary trading venue for the purpose of establishing position limits in the same derivative contracts? If you do not agree, what practical alternative method should be used?**

<ESMA_QUESTION_505>
ESMA's approach of treating the trading venue on which the largest volume of open interest is held as the "central or primary" trading venue appears appropriate. MFA strongly supports ESMA's view that Article 57(6) of MiFID II (which provides that "where the same commodity derivative is traded in significant volumes on trading venues in more than one jurisdiction, the competent authority of the trading venue where the largest volume of trading takes place shall set the single position limit to be applied on all trading in that contract") will apply only to situations where the same contract is traded on two or more trading venues within the EU. There was previously some concern that the term "jurisdiction" was not limited in any way in the Level 1

text, and that there was therefore the potential for Article 57(6) to apply to non-EU jurisdictions. However, MFA believes that ESMA has taken the correct approach to interpretation in this context given that Article 57(6) refers to "trading venues", and this term is intended to apply only to EU regulated markets, multilateral trading facilities ("**MTFs**"), and organised trading facilities ("**OTFs**").

<ESMA_QUESTION_505>

**Q506: Should the level of "significant volume" be set at a different level to that proposed above? If yes, please explain what level should be applied, and how it may be determined on an ongoing basis?**

<ESMA_QUESTION_506>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_506>

**Q507: In using the maturity of commodity contracts as a factor, do you agree that competent authorities apply the methodology in a different way for the spot month and for the aggregate of all other months along the curve?**

<ESMA_QUESTION_507>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_507>

**Q508: What factors do you believe should be applied to reflect the differences in the nature of trading activity between the spot month and the forward months?**

<ESMA_QUESTION_508>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_508>

**Q509: Do you agree with ESMA's proposal for trading venues to provide data on the deliverable supply underlying their contracts? If you do not agree, what considerations should be given to determining the deliverable supply for a contract?**

<ESMA_QUESTION_509>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_509>

**Q510: In the light of the fact that some commodity markets are truly global, do you consider that open interest in similar or identical contracts in non-EEA jurisdictions should be taken into account? If so, how do you propose doing this, given that data from some trading venues may not be available on the same basis or in the same timeframe as that from other trading venues?**

<ESMA_QUESTION_510>
Open interest in non-EEA jurisdictions should preferably be taken into account in setting limits given that the cash-settled commodity derivatives market is global in nature. Taking into account trading in other jurisdictions will help to prevent limits being set at an artificially low level. As noted in our response to Q500, ensuring that the relevant data is available for regulators to make such assessments will be a matter of effective information exchange between EU competent authorities and competent authorities of third countries.

<ESMA_QUESTION_510>

**Q511: In the absence of published or easily obtained information on volatility in derivative and physical commodity markets, in what ways should ESMA reflect this factor in its methodology? Are there any alternative measures that may be obtained by ESMA for use in the methodology?**

<ESMA_QUESTION_511>
It is difficult to see how volatility could be reflected as a specific factor in the position limit methodology given that position limits will be set on a forward-looking basis, and future volatility is unpredictable in nature. Instead, in setting the position limit methodology ESMA should look back over a sufficiently long period of historic trading to ensure that a range of potential market conditions are captured and taken into account. This should ensure that position limits are set high enough to allow for potential future volatility and the impact that this may have on market liquidity etc.

We also note that Article 57(4) of MiFID II provides that competent authorities must "review position limits" wherever there has been a "significant change in the market", following which position limits will be reset in accordance with ESMA's calculation methodology. This ability to reset limits should operate as an additional safeguard in periods of market volatility, and ESMA should therefore ensure that its methodology allows competent authorities sufficient flexibility to raise limits under such circumstances.

<ESMA_QUESTION_511>

**Q512: Are there any other considerations related to the number and size of market participants that ESMA should consider in its methodology?**

<ESMA_QUESTION_512>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_512>

**Q513: Are there any other considerations related to the characteristics of the underlying commodity market that ESMA should consider in its methodology?**

<ESMA_QUESTION_513>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_513>

**Q514: For new contracts, what approach should ESMA take in establishing a regime that facilitates continued market evolution within the framework of Article 57?**

<ESMA_QUESTION_514>
As ESMA notes, until a new contract becomes established, there may be a small number of market participants who hold positions that are large in percentage terms for the whole market, but small in absolute financial value. Although ESMA's two proposals appear fairly high-level at this stage, our initial view is that Option 2 (*i.e.* setting a minimum level of position limits that would apply across venues generally, and below which trading would be allowed regardless of the size of the position in proportion to market size) would more effectively capture trading conditions in developing markets for new commodity derivatives.

<ESMA_QUESTION_514>

**Q515: The interpretation of the factors in the paragraphs above will be significant in applying ESMA's methodology; do you agree with ESMA's interpretation? If you do not agree with ESMA's interpretation, what aspects require amendment?**

<ESMA_QUESTION_515>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_515>

**Q516: Are there any other factors which should be included in the methodology for determining position limits? If so, state in which way (with reference to the proposed methodology explained below) they should be incorporated.**

<ESMA_QUESTION_516>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_516>

**Q517: What do you consider to be the risks and/or the advantages of applying a different methodology for determining position limits for prompt reference contracts compared to the methodology used for the position limit on forward maturities?**

<ESMA_QUESTION_517>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_517>

**Q518: How should the position limits regime reflect the specific risks present in the run up to contract expiry?**

<ESMA_QUESTION_518>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_518>

**Q519: If a different methodology is set for the prompt reference contract, would it be appropriate to make an exception where a contract other than the prompt is the key benchmark used by the market?**

<ESMA_QUESTION_519>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_519>

**Q520: Do you agree that the baseline for the methodology of setting a position limit should be the deliverable supply? What concrete examples of issues do you foresee in obtaining or using the measure?**

<ESMA_QUESTION_520>
Cash-settled and physically-settled transactions are not interchangeable; they have different features and perform different functions. Thus, different methodologies should apply in each case. In particular, ESMA should use open interest, rather than deliverable supply, as the baseline for the position limits methodology applying to cash-settled transactions.

<ESMA_QUESTION_520>

**Q521: If you consider that a more appropriate measure exists to form the baseline of the methodology, please explain the measure and why it is more appropriate. Consideration should be given to the reliability and availability of such a measure in order to provide certainty to market participants.**

<ESMA_QUESTION_521>
As noted in our response to Q501, we consider that while deliverable supply may be an appropriate baseline for the methodology relating to physically-settled transactions, open interest would be a more appropriate baseline for cash-settled transactions. Cash-settled and physically-delivered contracts are not fungible, and differing methodologies should therefore be adopted for the two types of transaction.

In our view, there is no economic relationship or rationale for linking position limits on cash-settled contracts to deliverable supply, and basing the methodology for cash-settled transactions on deliverable supply could unnecessarily constrain legitimate risk management activity. For example, estimated deliverable supply may be tied to a specific delivery point. While commercial hedgers may use certain benchmark contracts which relate to a certain delivery point to manage their risk, the hedger has no intention of making or taking delivery at that delivery point, but will rather use the cash-settled contract for its superior liquidity and price discovery to hedge risks in other locations or for other related commodities. Thus, tying the calculation of deliverable supply to one particular point would ignore sizable hedging activity in cash-settled contracts and would arrive at a number far too low to accommodate this type of activity.

<ESMA_QUESTION_521>

**Q522: Do you agree with this approach for the proposed methodology? If you do not agree, what alternative methodology do you propose, considering the full scope of the requirements of Article 57 MiFID II?**

<ESMA_QUESTION_522>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_522>

**Q523: Do you have any views on the level at which the baseline (if relevant, for each different asset class) should be set, and the size of the adjustment numbers for each separate factor that ESMA must consider in the methodology defined by Article 57 MiFID II?**

<ESMA_QUESTION_523>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_523>

**Q524: Does the approach to asset classes have the right level of granularity to take into account market characteristics? Are the key characteristics the right ones to take into account? Are the conclusions by asset class appropriate?**

<ESMA_QUESTION_524>
MFA strongly supports an approach whereby the individual characteristics of different commodities are taken into account in setting position limits. Different commodities have unique characteristics based on seasonality, trends and fluctuations, and these characteristics should be reflected in position limits.

With this in mind, given that the high-level categorisations such as gas, coal and power which are mentioned by ESMA in its Discussion Paper appear rather broad, we would support the breaking the categorisations down into further sub-classes.

<ESMA_QUESTION_524>

**Q525: What trading venues or jurisdictions should ESMA take into consideration in defining its position limits methodology? What particular aspects of these experiences should be included within ESMA's work?**

<ESMA_QUESTION_525>
Clearly, the experience of the CFTC in developing a position limits regime is informative in this context. Although MFA does not propose that ESMA fully replicate the CFTC regime, international convergence is desirable (see, for example, our response to Q495, which argues that the criteria for economic equivalence in the EU should mimic similar criteria under the CFTC regime).

<ESMA_QUESTION_525>

**Q526: Do you agree that the RTS should accommodate the flexibility to express position limits in the units appropriate to the individual market? Are there any other alternative measures or mechanisms by which position limits could be expressed?**

<ESMA_QUESTION_526>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_526>

**Q527: How should the methodology for setting limits take account of a daily contract structure, where this exists?**

<ESMA_QUESTION_527>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_527>

**Q528: Do you agree that limits for option positions should be set on the basis of delta equivalent values? What processes should be put in place to avoid manipulation of the process?**

<ESMA_QUESTION_528>
MFA agrees that limits for option positions should be set on the basis of delta equivalent values. However, the possibility of market participants manipulating position calculations is not in our view sufficient justification to prevent them from calculating delta equivalents using their own internal models.

In particular, a standard delta of 0.5 should not be required to be applied in the absence of a trading venue calculation. Applying such a standard across all options would act as an extremely blunt instrument, and would not take account of the wide variation in the nature and scope of contracts falling within the scope of the position limits regime. We see no reason why market participants should not be given the opportunity to more accurately assess their exposure by using proprietary internal models, as long as they are able to provide justification for the results of the calculation to regulators.

<ESMA_QUESTION_528>

**Q529: Do you agree that the preferred methodology for the calculation of delta-equivalent futures positions is the use of the delta value that is published by trading venues? If you do not, please explain what methodology you prefer, and the reasons in favour of it?**

<ESMA_QUESTION_529>

Although certain market participants may wish to rely on delta calculation values used and published by trading venues, we see no reason why they should not also be permitted to use their own internal models to calculate the relevant values. If ESMA wishes to put in place a mechanism for ensuring that market participants' models are producing reasonable results, it could mandate that (1) a model that produces results within 10% of a trading venue model will be presumed to be reasonable unless there is evidence to the contrary; and (2) where a model deviates by more than 10% from the trading venue's model, it may be used where the market participant can demonstrate that the model is reasonable under prevailing market conditions.

<ESMA_QUESTION_529>

**Q530: Do you agree that the description of the approach outlined above, combined with the publication of limits under Article 57(9), would fulfil the requirement to be transparent and non-discriminatory?**

<ESMA_QUESTION_530>
Yes, although as noted in our response to Q498, the database maintained by ESMA should preferably include listed examples of OTC derivative transactions which could be classed as "economically equivalent". These examples should be maintained in order to keep pace with changes in the commodity derivatives markets.

<ESMA_QUESTION_530>

**Q531: What challenges are posed by transition and what areas of guidance should be provided on implementation? What transitional arrangements would be considered to be appropriate?**

<ESMA_QUESTION_531>
MFA considers that adequate lead-time for implementation of the position limits regime will be essential in helping to ensure that all market participants are able to operate in compliance with the new regime from the time of its commencement. We believe that the optimal period in this respect will be twelve months prior to limits becoming effective.

Existing positions acquired prior to the commencement of the position limits regime should be subject to grandfathering arrangements in order to avoid a large-scale sell-off of commodity derivative positions prior to the application of the new regime.

<ESMA_QUESTION_531>

## 7.3. Position Reporting

**Q532: Do you agree that, in the interest of efficient reporting, the data requirements for position reporting required by Article 58 should contain elements to enable competent authorities and ESMA to monitor effectively position limits? If you do not agree, what alternative approach do you propose for the collection of information in order to efficiently and with the minimum of duplication meet the requirements of Article 57?**

<ESMA_QUESTION_532>
ESMA notes in this context that "the efficiency and effectiveness of reporting would be enhanced by standardising the data definitions and the format of the reporting information required by

MiFID II, and other Directives, to the greatest extent possible". MFA considers that standardising the approach to reporting under MiFID II and other pieces of EU regulation will benefit both market participants and competent authorities in implementing the position reporting regime (particularly from a costs perspective).
<ESMA_QUESTION_532>

**Q533: Do you agree with ESMA's definition of a "position" for the purpose of Article 58? Do you agree that the same definition of position should be used for the purpose of Article 57? If you do not agree with either proposition, please provide details of a viable alternative definition.**

<ESMA_QUESTION_533>
MFA agrees that the same definition of a "position" for the purposes of the position reporting regime (Article 58) should be used in connection with the position limits regime (Article 57).

ESMA's definition of a position as the net accumulation of buy and sell transactions in a commodity derivative, emission allowance or derivative on an emission allowance which has yet to be closed out, expired or exercised appears broadly appropriate. However, it should be clarified that a mere indicative bid or offer or indication of interest that does not result in a binding transaction should not count towards a market participants "position" (*i.e.* such that it could potentially result in a breach of position limits).
<ESMA_QUESTION_533>

**Q534: Do you agree with ESMA's approach to the reporting of spread and other strategy trades? If you do not agree, what approach can be practically implemented for the definition and reporting of these trades?**

<ESMA_QUESTION_534>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_534>

**Q535: Do you agree with ESMA's proposed approach to use reporting protocols used by other market and regulatory initiatives, in particular, those being considered for transaction reporting under MiFID II?**

<ESMA_QUESTION_535>
ESMA's aim of harmonising different regulatory reporting regimes is positive in that it will help market participants to utilise data already being collated and prepared for EMIR and MiFID transaction reports.
<ESMA_QUESTION_535>

**Q536: Do you have any specific comments on the proposed identification of legal persons and/or natural persons? Do you consider there are any practical challenges to ESMA's proposals? If yes, please explain them and propose solutions to resolve them.**

<ESMA_QUESTION_536>
In general, ESMA's proposals on the identification of legal and natural persons is positive in that it would be aligned to the identification of persons under the EMIR regime. We would query however, the use of the term "national code" (which, as ESMA notes, could include passport numbers for individuals) given that EMIR uses the more neutral term "client code".

<ESMA_QUESTION_536>

**Q537: What are your views on these three alternative approaches for reporting the positions of an end client where there are multiple parties involved in the transaction chain? Do you have a preferred solution from the three alternatives that are described?**

<ESMA_QUESTION_537>
In MFA's view, confidentiality safeguards should apply where end clients' positions are being reported, and the end client's LEI code should not be passed up a chain of intermediaries. Therefore, MFA would strongly oppose the use of Option 1.

Option 2 is MFA's preferred option given that it would grant the most effective protection to the end client and its identity. While there would be some additional costs involved in setting up the reporting mechanism involved in Option 2, the ongoing costs would not appear to be material. On the other hand, the confidentiality implications for the buy side for any other option are and would remain meaningful.

It should be noted that internal codes such as those envisaged by Option 2 are already being used for reporting purposes in the context of the EMIR regime (for example, internal client codes are required to be used to identify individuals under the prescribed EMIR reporting format). As far as we are aware, the use of such codes has not presented any issues under EMIR and we see no reason why internal codes could not also be used pursuant to Option 2.

<ESMA_QUESTION_537>

**Q538: What alternative structures or solutions are possible to meet the obligations under Article 58 to identify the positions of end clients? What are the advantages or disadvantages of these structures?**

<ESMA_QUESTION_538>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_538>

**Q539: Do you agree with ESMA's proposal that only volumes traded on-exchange should be used to determine the central competent authority to which reports are made? If you do not agree, what alternative structure may be used to determine the destination of position reports?**

<ESMA_QUESTION_539>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_539>

**Q540: Do you agree that position reporting requirements should seek to use reporting formats from other market or regulatory initiatives? If not mentioned above, what formats and initiatives should ESMA consider?**

<ESMA_QUESTION_540>
MFA agrees that position reports filed under MiFID II should be aligned with EMIR transaction reports to the greatest extent possible given that this will make data capture and reporting more efficient and operationally simple for market participants. Such alignment will also be helpful to trade repositories to the extent that they become involved in collecting position reports.

ESMA may also wish to consider reporting formats used under the CFTC regime in this context, given that international convergence would be helpful.

As a general comment, we note that ESMA's proposal for position reports to be submitted on a T+1 basis will be helpful in practice given that T+1 reporting would align the position reporting regime with the EMIR and MiFID transaction reporting regimes (both of which operate on a T+1 basis).
<ESMA_QUESTION_540>

**Q541: Do you agree that ESMA should require reference data from trading venues and investment firms on commodity derivatives, emission allowances, and derivatives thereof in order to increase the efficiency of trade reporting?**

<ESMA_QUESTION_541>
MFA agrees with ESMA's proposal that "in order to support the position reporting of investment firms trading venues should be required to provide reference data on on-venue and economically equivalent OTC contracts". Only trading venues (and not investment firms) should be required to provide such reference data.
<ESMA_QUESTION_541>

**Q542: What is your view on the use of existing elements of the market infrastructure for position reporting of both on-venue and economically equivalent OTC contracts? If you have any comments on how firms and trading venues may efficiently create a reporting infrastructure, please give details in your explanation.**

<ESMA_QUESTION_542>
MFA considers that it would be operationally simpler for market participants to report to trade repositories given that they will likely already have a relationship with a trade repository (*i..e.* pursuant to the EMIR reporting regime), and would therefore be able to begin reporting from the commencement of the MiFID position limits regime without being required to go through on-boarding. Nevertheless, if ESMA does mandate position reporting to Approved Reporting Mechanisms ("ARMs"), it seems likely that trade repositories will seek to become authorised as ARMs in any event. We would, however, note that either ESMA or the trade repositories' national competent authorities may wish to ensure in advance that trade repositories are adequately prepared to receive the requisite volume of position reports given the delays experienced at certain trade repositories when the EMIR reporting regime was initially phased in.

As a related matter, ESMA should expressly allow for delegated reporting via third parties rather than requiring each market participant to report directly.
<ESMA_QUESTION_542>

**Q543: For what reasons may it be appropriate to require the reporting of option positions on a delta-equivalent basis? If an additional requirement to report delta-equivalent positions is established, how should the relevant delta value be determined?**

<ESMA_QUESTION_543>
If option positions are to be expressed on a delta-equivalent basis, firms should be permitted to calculate the delta equivalent using their own internal models rather than relying on calculations published by trading venues or a standard delta. As noted in our response to Q528, we particularly disagree with a standard delta of 0.5 being applied to all option positions for which no trading venue calculation is available.
<ESMA_QUESTION_543>

**Q544: Does the proposed set of data fields capture all necessary information to meet the requirements of Article 58(1)(b) MiFID II? If not, do you have any proposals for amendments, deletions or additional data fields to add the list above?**

<ESMA_QUESTION_544>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_544>

**Q545: Are there any other fields that should be included in the Commitment of Traders Report published each week by trading venues other than those shown above?**

<ESMA_QUESTION_545>
The fields in the Commitment of Traders Report should preferably be aligned with the Commitments of Traders data published under the CFTC regime, in order to promote international convergence.

<ESMA_QUESTION_545>

# 8. Market data reporting

## 8.1. Obligation to report transactions

**Q546: Do you agree with ESMA's proposal for what constitutes a 'transaction' and 'execution of a transaction' for the purposes of Article 26 of MiFIR? If not, please provide reasons.**

<ESMA_QUESTION_546>
Under the current proposals, where a discretionary manager makes an investment decision and instructs another party to carry out a trade (in other words, placing orders with another firm), that discretionary manager would be considered to be "executing" transactions.

While we do not disagree with this broad concept of execution, we wish to note that when a discretionary manager places an order with a broker, it is placing an order on behalf of the portfolio/client and the broker is often, particularly in the hedge fund industry, selected by the relevant client at the time of granting the investment discretion to the manager. In other words, it is also appropriate to say that the discretionary manager is transmitting orders from its clients to the relevant brokers. As such, a discretionary manager performs both the role of executing transactions (in the narrow sense of the word) and transmitting orders.

Where a discretionary manager is treated as a firm that executes orders (as currently proposed), the discretionary manager would need to make transaction reports itself. At the same time, the broker that actually executes the orders (in the narrow sense of the word) would need to make transaction reports as well. This would be contrary to the objective of avoiding double reporting both stated in MiFIR (see Recital 35 of the MiFIR) and expressed throughout the Discussion Paper.

We believe a discretionary manager should be treated as an order transmitter, *i.e.* it should be allowed to transmit all the required information to the relevant broker who would make the transaction report, thereby avoiding duplicative reporting. Further, ESMA states that the reason for requiring discretionary managers to make transaction reports is that "[i]t is important for NCAs to receive information where investment firms act under a discretionary mandate and receive it in a consistent way in order to successfully automate the flagging up of potentially abusive transaction reports and effectively monitor for market abuse". MFA fails to see any hindrance or obstacle to this objective if discretionary managers are treated as order transmitters: the exactly same transactions are reported (albeit by the executing broker) with exactly the same information (as required under MiFIR).

MFA thus urges ESMA to clarify that Article 26(4) of MiFIR applies to discretionary managers as well as investment firms transmitting orders.

In addition, where discretionary managers delegate investment management activities to a third party, such discretionary managers should be allowed to rely on their delegates in relation to any

transaction reporting obligations (*i.e.*, as discussed above, delegate to elect to make the relevant transaction report itself or to transmit all the required information to the executing broker).

<ESMA_QUESTION_546>

**Q547: Do you anticipate any difficulties in identifying when your investment firm has executed a transaction in accordance with the above principles?**

<ESMA_QUESTION_547>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_547>

**Q548: Is there any other activity that should not be reportable under Article 26 of MiFIR?**

<ESMA_QUESTION_548>
MFA considers that the following activities should also be added to the list of non-reportable actions:

- expiration of derivatives (as well as other securities that have an expiry date); and
- terminating/concluding transactions where the conditions for the transaction have been clearly pre-established and reported.

<ESMA_QUESTION_548>

**Q549: Do you foresee any difficulties with the suggested approach? Please elaborate.**

<ESMA_QUESTION_549>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_549>

**Q550: We invite your comments on the proposed fields and population of the fields. Please provide specific references to the fields which you are discussing in your response.**

<ESMA_QUESTION_550>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_550>

**Q551: Do you have any comments on the designation to identify the client and the client information and details that are to be included in transaction reports?**

<ESMA_QUESTION_551>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_551>

**Q552: What are your views on the general approach to determining the relevant trader to be identified?**

<ESMA_QUESTION_552>
MFA does not have a strong view in relation to this question. However, MFA urges that ESMA should consider issuing practical guidelines or clarifications with respect to data protection.

ESMA notes in the Discussion Paper that personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes, and accurate relevant and not excessive.

Investment firms will need more practical guidance to ensure compliance with those general principles.

<ESMA_QUESTION_552>

**Q553: In particular, do you agree with ESMA's proposed approach to assigning a trader ID designation for committee decisions? If not, what do you think is the best way for NCAs to obtain accurate information about committee decisions?**

<ESMA_QUESTION_553>
Please see our comments on Q552.

<ESMA_QUESTION_553>

**Q554: Do you have any views on how to identify the relevant trader in the cases of Direct Market Access and Sponsored Access?**

<ESMA_QUESTION_554>
Please see our comments on Q552.

<ESMA_QUESTION_554>

**Q555: Do you believe that the approach outlined above is appropriate for identifying the 'computer algorithm within the investment firm responsible for the investment decision and the execution of the transaction'? If not, what difficulties do you see with the approach and what do you believe should be an alternative approach?**

<ESMA_QUESTION_555>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_555>

**Q556: Do you foresee any problem with identifying the specific waiver(s) under which the trade took place in a transaction report? If so, please provide details.**

<ESMA_QUESTION_556>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_556>

**Q557: Do you agree with ESMA's proposed approach to adopt a simple short sale flagging approach for transaction reports? If not, what other approaches do you believe ESMA should consider and why?**

<ESMA_QUESTION_557>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_557>

**Q558: Which option do you believe is most appropriate for flagging short sales? Alternatively, what other approaches do you think ESMA should consider and why?**

<ESMA_QUESTION_558>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_558>

**Q559: What are your views regarding the two options above?**

<ESMA_QUESTION_559>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_559>

**Q560: Do you agree with ESMA's proposed approach in relation to reporting aggregated transactions? If not, what other alternative approaches do you think ESMA should consider and why?**

<ESMA_QUESTION_560>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_560>

**Q561: Are there any other particular issues or trading scenarios that ESMA should consider in light of the short selling flag?**

<ESMA_QUESTION_561>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_561>

**Q562: Do you agree with ESMA's proposed approach for reporting financial instruments over baskets? If not, what other approaches do you believe ESMA should consider and why?**

<ESMA_QUESTION_562>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_562>

**Q563: Which option is preferable for reporting financial instruments over indices? Would you have any difficulty in applying any of the three approaches, such as determining the weighting of the index or determining whether the index is the underlying in another financial instrument? Alternatively, are there any other approaches which you believe ESMA should consider?**

<ESMA_QUESTION_563>
MFA prefers the first option, *i.e.*, reporting transactions where all components of the index are traded on a trading venue. However, within this option, MFA proposes that investment firms should be allowed to choose either (i) to populate the transaction report of all underlying components of the index (as proposed by ESMA), or (ii) to report the index code as specified by the index provider (if available) (this would reduce the practical issues that may be faced by firms under point (i)).

The second option (*i.e.*, the threshold option) and the third option (as regards OTC derivatives) would be too onerous for firms to implement and may lead to inconsistencies between market participants in terms of identifying which instruments fall within Article 26(2)(a) of MiFIR and thus is required to be reported (particularly given the lack of clarity on trading venues; please see below).

MFA wishes to comment more generally on the issuing of establishing whether an instrument falls within the scope of Article 26(2) MiFIR. Given that ESMA states it is "challenging and impractical" to publish a single "golden source" of reportable financial instruments, MFA urges ESMA to establish and maintain an exhaustive list of all trading venues under MiFID II (including MTFs, OTFs and systematic internalisers).

In this regard, MFA notes that ESMA currently maintains an exhaustive list of regulated markets and MTFs and that it should not be difficult to add the relevant new trading venues under MiFID II (*e.g.*, OTFs) into the current list.

<ESMA_QUESTION_563>

**Q564: Do you think the current MiFID approach to branch reporting should be maintained?**

<ESMA_QUESTION_564>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_564>

**Q565: Do you anticipate any difficulties in implementing the branch reporting requirement proposed above?**

<ESMA_QUESTION_565>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_565>

**Q566: Is the proposed list of criteria sufficient, or should ESMA consider other/extra criteria?**

<ESMA_QUESTION_566>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_566>

**Q567: Which format, not limited to the ones above, do you think is most suitable for the purposes of transaction reporting under Article 26 of MiFIR? Please provide a detailed explanation including cost-benefit considerations.**

<ESMA_QUESTION_567>
MFA prefers XML format because this is the format used currently by the majority of investment firms and this is also the format for reporting under the AIFMD.

<ESMA_QUESTION_567>

## 8.2. Obligation to supply financial instrument reference data

**Q568: Do you anticipate any difficulties in providing, at least daily, a delta file which only includes updates?**

<ESMA_QUESTION_568>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_568>

**Q569: Do you anticipate any difficulties in providing, at least daily, a full file containing all the financial instruments?**

<ESMA_QUESTION_569>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_569>

**Q570: Do you anticipate any difficulties in providing a combination of delta files and full files?**

<ESMA_QUESTION_570>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_570>

**Q571: Do you anticipate any difficulties in providing details of financial instruments twice per day?**

<ESMA_QUESTION_571>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_571>

**Q572: What other aspects should ESMA consider when determining a suitable solution for the timeframes of the notifications? Please include in your response any foreseen technical limitations.**

<ESMA_QUESTION_572>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_572>

**Q573: Do you agree with the proposed fields? Do trading venues and investment firms have access to the specified reference data elements in order to populate the proposed fields?**

<ESMA_QUESTION_573>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_573>

**Q574: Are you aware of any available industry classification standards you would consider appropriate?**

<ESMA_QUESTION_574>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_574>

**Q575: For both MiFID and MAR (OTC) derivatives based on indexes are in scope. Therefore it could be helpful to publish a list of relevant indexes. Do you foresee any difficulties in providing reference data for indexes listed on your trading venue? Furthermore, what reference data could you provide on indexes?**

<ESMA_QUESTION_575>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_575>

**Q576: Do you agree with ESMA's intention to maintain the current RCA determination rules?**

<ESMA_QUESTION_576>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_576>

**Q577: What criteria would you consider appropriate to establish the RCA for instruments that are currently not covered by the RCA rule?**

<ESMA_QUESTION_577>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_577>

<ESMA_QUESTION_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_1>

## 8.3. Obligation to maintain records of orders

**Q578: In your view, which option (and, where relevant, methodology) is more appropriate for implementation? Please elaborate.**

<ESMA_QUESTION_578>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_578>

**Q579: In your view, what are the data elements that cannot be harmonised? Please elaborate.**

<ESMA_QUESTION_579>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_579>

**Q580: For those elements that would have to be harmonised under Option 2 or under Option 3, do you think industry standards/protocols could be utilised? Please elaborate.**

<ESMA_QUESTION_580>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_580>

**Q581: Do you foresee any difficulties with the proposed approach for the use of LEI?**

<ESMA_QUESTION_581>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_581>

**Q582: Do you foresee any difficulties maintaining records of the Client IDs related with the orders submitted by their members/participants? If so, please elaborate.**

<ESMA_QUESTION_582>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_582>

**Q583: Are there any other solutions you would consider as appropriate to track clients' order flows through member firms/participants of trading venues and to link orders and transactions coming from the same member firm/participant?**

<ESMA_QUESTION_583>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_583>

**Q584: Do you believe that this approach allows the order to be uniquely identified If not, please elaborate**

<ESMA_QUESTION_584>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_584>

**Q585: Do you foresee any difficulties with the implementation of this approach? Please elaborate**

<ESMA_QUESTION_585>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_585>

**Q586: Do you foresee any difficulties with the proposed approach? Please elaborate**

<ESMA_QUESTION_586>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_586>

**Q587: Do you foresee any difficulties with the proposed approach? Please elaborate.**

<ESMA_QUESTION_587>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_587>

**Q588: Would the breakdown in the two categories of order types create major issues in terms of mapping of the orders by the Trading Venues and IT developments? Please elaborate**

<ESMA_QUESTION_588>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_588>

**Q589: Do you foresee any problems with the proposed approach?**

<ESMA_QUESTION_589>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_589>

**Q590: Are the proposed validity periods relevant and complete? Should additional validity period(s) be provided? Please elaborate.**

<ESMA_QUESTION_590>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_590>

**Q591: Do you agree that standardised default time stamps regarding the date and time at which the order shall automatically and ultimately be removed from the order book relevantly supplements the validity period flags?**

<ESMA_QUESTION_591>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_591>

**Q592: Do venues use a priority number to determine execution priority or a combination of priority time stamp and sequence number?**

<ESMA_QUESTION_592>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_592>

**Q593: Do you foresee any difficulties with the three options described above? Please elaborate.**

<ESMA_QUESTION_593>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_593>

**Q594: Is the list of specific order instructions provided above relevant? Should this list be supplemented? Please elaborate.**

<ESMA_QUESTION_594>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_594>

**Q595: Are there any other type of events that should be considered?**

<ESMA_QUESTION_595>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_595>

**Q596: Do you foresee any difficulties with the proposed approach? Please elaborate.**

<ESMA_QUESTION_596>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_596>

**Q597: Do you foresee any problems with the proposed approach? Do you consider any other alternative in order to inform about orders placed by market makers and other liquidity providers?**

<ESMA_QUESTION_597>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_597>

**Q598: Do you foresee any difficulties in generating a transaction ID code that links the order with the executed transaction that stems from that order in the information that has to be kept at the disposal of the CAs? Please elaborate.**

<ESMA_QUESTION_598>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_598>

**Q599: Do you foresee any difficulties with maintaining this information? Please elaborate.**

<ESMA_QUESTION_599>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_599>

## 8.4. Requirement to maintain records of orders for firms engaging in high-frequency algorithmic trading techniques (Art. 17(7) of MIFID II)[3]

[3] Please note that this section has to be read in conjunction with the section on the "Record keeping and co-operation with national competent authorities" in this DP.

**Q600: Do you foresee any difficulties with the elements of data to be stored proposed in the above paragraph? If so, please elaborate.**

<ESMA_QUESTION_600>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_600>

**Q601: Do you foresee any difficulties in complying with the proposed timeframe?**

<ESMA_QUESTION_601>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_601>

## 8.5. Synchronisation of business clocks

**Q602: Would you prefer a synchronisation at a national or at a pan-European level? Please elaborate. If you would prefer synchronisation to a single source, please indicate which would be the reference clock for those purposes.**

<ESMA_QUESTION_602>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_602>

**Q603: Do you agree with the requirement to synchronise clocks to the microsecond level?**

<ESMA_QUESTION_603>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_603>

**Q604: Which would be the maximum divergence that should be permitted with respect to the reference clock? How often should any divergence be corrected?**

<ESMA_QUESTION_604>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_604>

# 9. Post-trading issues

## 9.1. Obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP)

**Q605: What are your views generally on (1) the systems, procedures, arrangements supporting the flow of information to the CCP, (2) the operational process that should be in place to perform the transfer of margins, (3) the relevant parties involved these processes and the time required for each of the steps?**

<ESMA_QUESTION_605>
MFA welcomes the opportunity to comment on ESMA's questions relating to straight-through processing ("**STP**"). STP has been functioning in the EU exchange-traded derivative markets for some time. However, we believe that mandating STP will benefit the European cleared derivatives markets by leading to the development of more secure and efficient OTC derivatives markets and we strongly support this initiative.

In particular, MFA notes the comments made by ESMA in the Discussion Paper in support of STP (at paragraph 9.1(9)), as set out below:

> It is generally accepted that STP makes markets work more efficiently. Indeed, STP reduces operational risk by removing the risk of human error. It increases certainty in the market as participants know more rapidly whether a trade has been accepted or rejected. It makes price formation more efficient. Finally STP significantly reduces the length of time during which counterparties to a bilateral derivative contract are exposed to each other's counterparty credit risk.

We strongly endorse ESMA's comments.

MFA also notes that STP has been functioning in the U.S. derivatives markets for almost two years and encourages ESMA to benefit from the experience in implementing STP, and infrastructure used to support STP which is available in the U.S., when considering the best means by which to mandate STP in the European cleared derivative markets.

Under Article 29(3) of MiFIR, ESMA is required to draft regulatory technical standards (the "**STP RTS**") specifying the minimum requirements for systems, procedures and arrangements required in relation to STP, including acceptance timeframes, taking into account the need to ensure proper management of operational and other risks. When specifying such systems, procedures and arrangements, MFA notes that it is important for ESMA to distinguish between derivative contracts which are executed on an exchange, trading venue, platform, OTF, MTF or other facility (a "**Facility**") and bilaterally negotiated OTC derivative contracts, given that the systems, procedures and arrangements supporting the flow of information to the CCP are different where a derivative contract is executed on a Facility. For this reason, MFA encourages

ESMA to consider introducing certain new definitions in the STP RTS, which will allow differentiation of derivative contracts on this basis.

MFA believes that ESMA should supplement the existing definitions of "exchange-traded derivative" as defined at Article 2(1)(32) of MiFIR and "OTC derivative" as defined at Article 2(7) of EMIR in order to achieve the required distinction. Many derivative contracts which the market would traditionally identify as exchange-traded derivatives fall within the EMIR definition of OTC derivatives. For example, derivatives traded on a third-country market are covered by the OTC derivative definition, unless such market is considered to be equivalent to a regulated market in accordance with Article 28 of MiFIR. Similarly, derivatives traded on an OTF or MTF would also fall within the EMIR definition of OTC derivatives. Therefore the term "OTC derivative" captures OTC derivatives which are executed both on and off a Facility. Accordingly, when drafting the STP RTS, it would be easiest for ESMA to draw a distinction between those OTC derivatives executed on a Facility and those OTC derivatives which are not executed on a Facility. The MiFIR definition of "exchange-traded derivative" would then operate alongside such new definitions.

In this context, MFA also believes that ESMA should make it clear that the systems, procedures and arrangements introduced by the STP RTS are not relevant to either existing or "legacy" derivative contracts which are required to be frontloaded pursuant to the clearing obligation under EMIR, or those contracts which parties voluntarily elect to clear at a later date following execution. Therefore, MFA believes that STP should only be relevant to new derivative contracts which are intended or required to be cleared upon execution.

We have set out below our responses to the three questions posed by Q605 of the Discussion Paper.

*(1) What are your views generally on the parties involved in submitting a transaction for clearing to the CCP?*

We have set out below a brief description of the parties involved in the process of execution-to-clearing (*i.e.*, in submitting a derivative contract to a CCP for clearing):

(a) the original parties to the derivative transaction which is intended to be cleared (the "**Transacting Counterparties**");
(b) the clearing members ("**CMs**"), one or both of whom may also be Transacting Counterparties;
(c) for derivatives executed on a Facility, the relevant Facility on which the derivative contract may be executed; and
(d) for bilaterally executed OTC derivatives (*i.e.*, not executed on a Facility), the relevant system or platform used to match and affirm trade terms ("**Matching/Affirmation Platform**").

*(2) What are your views generally on the flow of information to the CCP and the timing involved?*

We have set out below a description of how information flows to the CCP as part of the process by which transactions are submitted for clearing. As noted above, this process differs depending on whether or not the relevant derivative contract is executed on a Facility. We have also set out below the timings for the relevant steps involved.

| | **Derivatives executed on a Facility** | **Bilaterally executed OTC derivatives** |
|---|---|---|
| **Execution of contract between Transacting Counterparties** | Execution | Execution |
| **Entry of trade details/ affirmation of derivative contract** | Trade details are entered and the derivative contract is affirmed at the Facility upon execution | Transacting Counterparties submit trade details post execution to a Matching/Affirmation Platform where the derivative contract is then affirmed. |
| **Submission of trade details and clearing details to CCP** | Facility submits the derivative contract upon execution | Matching/Affirmation Platform will submit the derivative contract upon submission of trade details/affirmation of derivative contract. This step should occur as quickly as technologically practicable and in any event no later than two and a half hours following execution. |
| **CM acceptance/rejection** | This step occurs prior to execution, via a pre-execution credit check of an order. Once such a check is passed, the CM's approval is attached to any resulting execution. | This step occurs post-execution, often by the CCP sending a message to the CM requesting that it accept a trade that has been submitted. MFA believes that the CM acceptance/rejection should take place as quickly as technologically practicable and in any event no later than sixty seconds following submission to the relevant CM. |
| **CCP acceptance/rejection** | MFA believes that this step should take place as quickly as technologically practicable, and in any event no later than ten seconds following submission to the relevant CCP. | MFA believes that this step should take place as quickly as technologically practicable, and in any event no later than ten seconds following submission to the relevant CCP/approval by the CM. |

MFA also wishes to make two observations regarding the meaning of the requirement to complete a task "as quickly as technologically practicable using automated systems" (the "**AQATP**

**Standard**"). First, ESMA is required (under Article 29(3) of MiFIR) to specify acceptance time-frames and we suggest that when ESMA specifies such timeframes it should take into account the changing nature of the AQATP Standard. Any specified timeframes should be seen as outer boundaries, acknowledging that a task may and should be concluded immediately where possible. In other words, meeting the outer boundary may not be compliant with the AQATP Standard where more rapid processing is technologically possible. Second, by its nature, the AQATP Standard changes with new technological developments that facilitate faster trade processing, and compliance with that standard must be tested by reference to technology existing at the relevant time. Consequently, ESMA may consider it appropriate to include a mechanism in the RTS for updating the specified timeframes from time to time as systems emerge that make more rapid processing possible. For example, when maximum CCP acceptance timeframes were mandated in the U.S., the CFTC prescribed that acceptance should occur within sixty seconds. Recently, the period was reduced by the CFTC to ten seconds. Such mandated reduction was introduced in order to reflect the fact that CCP acceptance was occurring within a shorter timeframe, *i.e.*, in a matter of seconds. In essence, improvements had changed what was "technologically practicable".

*(3) What are your views generally on the operational process that should be in place to perform the transfer of margins?*

MFA wishes to emphasise to ESMA that the process for demanding and collecting margin should not be confused with the process for submitting and accepting a derivative contract for clearing.

The operational process which currently applies to the transfer of margin is broadly as follows: Once a derivative contract has been accepted by the CCP for clearing, the CCP registers a trade between itself and each of the respective CMs (each a "**CM/CCP Transaction**"). Simultaneously, an equal and opposite trade arises under the clearing documentation in place between each Transacting Counterparty and its CM (a "**CM/Transacting Counterparty Transaction**"). The existence of a new CM/CCP Transaction will affect the CCP's next calculation of its exposure towards the CM and will result in the CCP calling for initial margin and variation margin from the CM, and/or making a payment of variation margin to the CM. Equally, the existence of a new CM/Transacting Counterparty Transaction will affect the CM's next calculation of its exposure towards the Transacting Counterparty and will result in the CM calling for initial margin and variation margin from the Transacting Counterparty, and/or making a payment of variation margin to the Transacting Counterparty.

Given that CCPs and CMs calculate exposure regularly (*i.e.*, on an intraday, or, at the least, on a daily basis), MFA does not believe that a significant period will elapse during which any of the parties in the transaction chain are under-collateralised. Further, MFA does not consider that the process described above will be affected in any way by the introduction of a quicker and more efficient process for submitting and accepting a derivative contract for clearing. By contrast, near real-time clearing will permit CCPs and CMs to have a far better picture of their outstanding exposure at any given point in time, which will augment, rather than adversely affect, their risk management capabilities (as opposed to trying to provision for an unknown quantity of incoming trades). Finally, CCPs and CMs already have time-tested practices in place which have been approved by their respective regulators to manage and address the risk exposures associated with

their clearing businesses, including the timing surrounding margin calculation and transfer. Accordingly, MFA does not believe that a perceived timing mismatch in the transfer of margin should be regarded by ESMA as a justification for delaying the process for submitting and accepting derivative contracts for clearing. Nor should such perceived timing mismatch be regarded as a justification for requiring margin to be pre-funded, given that pre-funding arrangements would transfer temporary exposure from CCPs and CMs to clients who are not as well equipped to manage counterparty risk effectively.
<ESMA_QUESTION_605>

**Q606: In particular, who are currently responsible, in the ETD and OTC context, for obtaining the information required for clearing and for submitting the transaction to a CCP for clearing? Do you consider that anything should be changed in this respect? What are the current timeframes, in the ETD and OTC context, between the conclusion of the contract and the exchange of information required for clearing on one hand and on the other hand between the exchange of information and the submission of the transaction to the CPP?**

<ESMA_QUESTION_606>
The entities responsible for obtaining the information required for clearing a derivative contract differ depending on whether the derivative contract is executed on a Facility or is a bilaterally executed OTC derivative. Where a Facility is involved in the execution process, the Facility will obtain the necessary information and will submit the trade to the CCP. This should be done directly and immediately post-trade, without the intervention of any "middleware" or any post-trade manual affirmation processes. On the other hand, where parties execute an OTC derivative bilaterally, each Transacting Counterparty is responsible for entering the relevant trade details into the relevant Matching/Affirmation Platform and such Matching/Affirmation Platform will then submit the trade to the CCP.

In each case, the standard which applies to the submission process in accordance with Article 29 of MiFIR is the AQATP Standard.

MFA considers that existing processes used for exchange-traded derivatives (which are immediate and automatic) are sufficient and that therefore, the AQATP Standard is being met with respect to such derivatives. However, the AQATP Standard is mandated for all cleared derivatives, including OTC derivatives executed on a Facility. In order to facilitate compliance with the AQATP Standard for OTC derivatives executed on a Facility, ESMA will need to prescribe that CMs carry out their credit checks of client orders pre-execution. Consequently, CM credit-checks will not delay the submission process.

However, with respect to bilaterally executed OTC derivatives, MFA believes that there are two potential causes of delay: (1) a certain amount of time inevitably elapses from execution of the derivative contract to submission of the derivative contract to the CCP (during which time trade details are entered at the Matching/Affirmation Platform and the derivative contract is affirmed); and (2) even when entry and affirmation of the derivative contract through the Matching/Affirmation Platform occurs promptly after execution, and the derivative contract is submitted promptly to the CCP, CMs carry out their credit checks post execution and, in many cases, after the relevant trade has been submitted to the CCP, causing a delay to the acceptance of the trade by the CCP.

Accordingly, MFA suggests that ESMA should strengthen the mandate for the submission process to be at the AQATP Standard by stipulating two maximum time periods. The first period should be the time between trade execution and submission of the derivative contract to the CCP and the second period should be the time within which a CM may carry out its credit checks once it receives details of the derivative contract. The AQATP Standard (as mandated in Article 29 of MiFIR) will, of course, remain and will require parties to adapt their processes as technology changes and allows quicker submission/acceptance times, however the fallback maximum time periods will ensure that trade submission/acceptance occurs within a reasonably short period of time. MFA proposes the following maximum time periods for this purpose: (1) within two and a half hours following execution with respect to the time between trade execution and submission of the derivative contract to the CCP; and (2) within sixty seconds following submission to the CM with respect to the time within which CMs ought to carry out their credit checks.
<ESMA_QUESTION_606>

**Q607: What are your views on the balance of these risks against the benefits of STP for the derivatives market and on the manner to mitigate such risks at the different levels of the clearing chain?**

<ESMA_QUESTION_607>
MFA wishes to reiterate its strong support for STP, some of the benefits of which we have described at Q605 above. We believe that the advantages which will result from the introduction of STP to the European cleared derivatives markets far outweigh any perceived risks. The advantages include:

- Reduction of systemic risk: Eliminating any window of counterparty credit risk between execution and clearing further reduces systemically risky interconnectedness in the derivatives markets.

- Promotion of competition among clearing members: Decoupling the provision of execution and clearing services ensures that clearing members can compete on a standalone basis based on the robustness, quality, and pricing of their clearing services.

- Promotion of competition among derivatives dealers: Removing barriers to entry for alternative liquidity providers enables smaller derivatives dealers to compete on more equal terms with the current limited universe of large derivatives dealers who presently control the vast majority of liquidity in the derivatives market.

- Increasing market depth and liquidity: Ensuring that more derivatives dealers are able to compete for a client's execution business will increase the depth of the market. In addition, the emergence of an all-to-all-market and an environment that allows for new entrants to the market on the buy-side as well as the sell-side will enhance liquidity.

- Narrowing bid-ask spreads: Increased competition, the entry of alternative liquidity providers, the development of an all-to-all market, and the emergence of electronic and/or anonymous execution will combine to narrow bid-ask spreads in the derivatives markets.

- Improving access to best execution: The ability to transact freely with any execution counterparty in the market, unfettered by unwarranted sub-limits on execution size, coupled with narrower bid-ask spreads, improves access to best execution. This applies equally to smaller participants as it does to larger participants, and applies, as noted above, in periods of market stress or volatility.

- Benefiting real economy: Increased competition and better pricing in the derivatives markets directly benefits investors, including pension funds and endowments, on whose behalf institutional investors manage money. In addition, tighter pricing in the derivatives market and a wider variety of liquidity providers ensures that corporate end users can more economically and efficiently conduct their hedging and risk management activities.

We have outlined at Q605 above the operational process in place for the transfer of margin between a Transacting Counterparty and a CM and between a CM and a CCP. As noted above, we do not consider that the described process results in significant credit risk. In reaching this conclusion, we have taken into account not only the brief period which elapses between the acceptance of a trade for clearing and demands for/delivery of margin, but also other significant protections available to CCPs and CMs in this regard. These protections include:

1. the discretion which CCPs and CMs have to accept derivative contracts and the credit checks conducted by these entities before accepting a derivative contract;
2. the frequent basis on which margin is calculated and demanded by CCPs and CMs;
3. the collection of initial margin by CCPs and CMs in respect of all derivative contracts;
4. the discretion of CCPs and CMs to reduce trading limits immediately or at short notice;
5. the capital reserves which CCPs and CMs are required to have in place under regulatory capital requirements;
6. the ability of CCPs and CMs to call a default for a failure by their counterparty to transfer margin in time.

In addition to the above, CCPs are also required to have robust risk management procedures in place and default fund contributions which afford further protection.

As we have already stated, we believe that to the extent there are any remaining risks in the margin transfer process, such risks are already inherent in such process and would not be exacerbated by the introduction of STP, given that the process of trade submission and acceptance is separate from the calculation and request for margin transfers. MFA strongly urges ESMA not to allow delays in the submission and acceptance process on the grounds of perceived risks in the operational mechanics of margin transfers.

In particular, the discussion relating to pre-funding of margin in the Discussion Paper causes MFA concern. MFA encourages ESMA not to mandate a pre-funding margin transfer model and to instead rely upon the robust margin requirements already imposed on CCPs under Article 41 of EMIR. MFA firmly believes that the use of particular margining arrangements should be a matter for determination by the parties themselves, based on their risk management and operational procedures, their assessment of their counterparties' creditworthiness and the strict parameters permitted by EMIR. MFA is of the view that, a pre-funding arrangement does not remove coun-

terparty credit risk, it simply reallocates it, so that the party providing margin is exposed to its counterparty prior to execution of the relevant derivative contract. At the same, requiring pre-funding of margin unnecessarily ties up capital and limits the flexibility with which market participants can execute their investment and risk management decisions.
<ESMA_QUESTION_607>

**Q608: When does the CM assume the responsibility of the transactions? At the time when the CCP accepts the transaction or at a different moment in time?**

<ESMA_QUESTION_608>
The CM becomes a party to a CM/CCP Transaction and a CM/Transacting Counterparty Transaction at the point when the CCP accepts the relevant derivative contract for clearing. However, the CM "assumes responsibility" for such transactions or agrees that it will enter into such transactions at an earlier point in time, namely when the CM completes its credit checks and provided, of course, that the relevant derivative contract is accepted for clearing by the CCP.

In the context of exchange-traded derivatives, CMs typically carry out their credit checks pre-execution. MFA believes that pre-execution credit checks are appropriate in all circumstances where a derivative contract is executed on a Facility and considers that ESMA should mandate pre-execution credit checks with respect to such derivative contracts, as pre-execution credit checks considerably reduce delays in the submission and acceptance process and thereby increase clearing certainty.

On the other hand, where OTC derivatives are executed bilaterally, CMs generally carry out credit checks post-execution. MFA believes that it is appropriate for such checks to be carried out post-execution, given that a Transacting Counterparty may only provide the details of its CM at the point where the trade details are entered and the derivative contract affirmed at the Matching/Affirmation Platform and not before such time. MFA does not consider that post-execution credit checks significantly delay the submission and acceptance process, provided that they are carried out in accordance with the AQATP Standard and, in any event, within sixty seconds following submission to the relevant CM.
<ESMA_QUESTION_608>

**Q609: What are your views on how practicable it would be for CM to validate the transaction before their submission to the CCP? What would the CM require for this purpose and the timeframe required? How would this validation process fit with STP?**

<ESMA_QUESTION_609>
In MFA's view it is practicable for a CM's credit checks to be carried out prior to the derivative contract being submitted to the CCP. Mandating such a process would significantly decrease delays in the submission and acceptance process and would facilitate and strengthen STP. This process is already required for OTC derivatives traded on swap execution facilities in the U.S.

As noted above, MFA believes that it would be appropriate for pre-execution credit checks to be mandated whenever a derivative is executed on a Facility. In order for this process to be mandatory, the CMs will require the cooperation of the relevant Facilities to facilitate operationally the pre-execution limit checking of orders.

Where OTC derivatives are executed bilaterally, MFA does not see any impediment to post-execution credit checks being carried out in accordance with the AQATP Standard and, in any event, within sixty seconds of submission to the relevant CM. We do not see why these checks could not occur at the point where the trade details are entered and the derivative contract affirmed at the Matching/Affirmation Platform (*i.e.*, prior to submission to the CCP); although we recognise that the CM may carry out its credit check in three different ways: (1) the CM posts its limits to the CCP and the CCP carries out the credit check, (2) the CCP sends a message to the CM asking it to accept a derivative contract, or (3) the relevant Matching/Affirmation Platform facilitates the CM credit check prior to submission to the CCP. In any event, in order for CMs to comply with a requirement to complete their credit checks as efficiently and quickly as possible, the CMs would need to be connected to the relevant Matching/Affirmation Platform, so as to be able to check trades and communicate with the other parties in the process on a real-time basis.
<ESMA_QUESTION_609>

**Q610: What are your views on the manner to determine the timeframe for (1) the exchange of information required for clearing, (2) the submission of a transaction to the CCP, and the constraints and requirements to consider for parties involved in both the ETD and OTC contexts?**

<ESMA_QUESTION_610>
In MFA's view, the following timeframes are relevant to STP: (1) the period from execution of a derivative contract to submission of such contract for clearing; (2) the time taken by the CM to carry out its credit checks; and (3) the time taken by the CCP to accept or reject a derivative contract for clearing. Each timeframe is considered separately below.

*(1) Execution of a derivative contract to submission of such derivative contract for clearing:*

In the context of exchange-traded derivatives, execution, entry of trade details, affirmation and submission of the contract to the CCP take place simultaneously on the exchange. In MFA's view, such an instantaneous process is appropriate for all derivatives executed on Facilities, including OTC derivatives traded on a Facility.

In the context of bilateral OTC derivatives, MFA considers that ESMA should mandate the maximum period which may elapse between execution and submission to the CCP; although the AQATP Standard means that trades should be submitted for clearing within the shortest deadlines possible. MFA proposes that the AQATP Standard should apply with a maximum deadline of two and a half hours following execution which could readily be achieved using the infrastructure currently available to market participants and will be consistent with current industry documentation.

*(2) CM credit checks:*

As noted above, MFA encourages ESMA to mandate pre-execution credit checks by CMs in circumstances where the relevant derivative contract is executed on a Facility. The exchange-traded derivative market already operates in this way and should be available for use in the context of derivative contracts executed on other Facilities. In particular, MFA considers that the use of a Matching/Affirmation Platform is not appropriate where a derivative contract is executed on a Facility as the use of such systems or platforms introduces unnecessary delay in the submis-

sion/acceptance process and allows CMs a “last look” prior to submission; although their credit checks will already have been passed at this stage.

Where OTC derivatives are executed bilaterally, as noted above, MFA believes that the CM ought to be required to carry out its credit checks in accordance with the AQATP Standard, and, in any event, within sixty seconds of submission to the relevant CM.

*(3) CCP acceptance or rejection:*

MFA considers that the CCP should be able to accept or reject a trade in accordance with the AQATP Standard and, in any event, within a matter of seconds. In the U.S., a ten-second period is permitted for such acceptance or rejection. MFA proposes that such a period would be equally appropriate in Europe and would helpfully contribute towards international convergence in the field of cleared derivative contracts.
<ESMA_QUESTION_610>

**Q611: What are your views on the systems, procedures, arrangements and timeframe for (1) the submission of a transaction to the CCP and (2) the acceptance or rejection of a transaction by the CCP in view of the operational process required for a strong product validation in the context of ETD and OTC? How should it compare with the current process and timeframe? Does the current practice envisage a product validation?**

<ESMA_QUESTION_611>
As discussed in our response to Q610, MFA considers that a ten-second period is appropriate for a CCP to accept or reject a trade and respectfully requests that ESMA mandate this period as the maximum period allowed to a CCP for such acceptance or rejection, provided that the AQATP Standard should prevail. Such ten second period would apply from submission of the derivative contract to the CCP or, if the CM carries out a post-submission credit check (with respect to an OTC derivative contract which is not executed on a Facility), from the point at which the CM approves the derivative contract.

MFA wishes to emphasise to ESMA that, in MFA's view, concerns relating to product validation should not be exaggerated. Derivative contracts which are executed on a Facility are necessarily of a standardised nature, as ESMA recognises in the Discussion Paper. Similarly, when ESMA determines which OTC derivatives ought to be subject to EMIR's clearing obligation, under Article 5(4)(a) of EMIR, ESMA is required to take into account the degree of standardisation exhibited by such derivative contracts. Accordingly, derivative contracts which do not have such standard features will not be subject to mandatory clearing under EMIR.

Finally, with respect to OTC derivatives which are voluntarily cleared, MFA considers that the CCPs have robust mechanisms in place in order to instantaneously validate products submitted to them; for example, CCPs frequently control the trade sources or channels by which trades are submitted to them. Consequently, trades which do not satisfy the required data fields are immediately rejected by the CCP or are not even permitted to be submitted to the CCP.

In conclusion, MFA believes that existing practices relating to product validation are effective and sufficient to enable and support STP. In any event, product validation by the CCP can be instantaneous (the instrument either passes the filters for what is accepted for clearing or it does

not), and can easily be done within the overall 10-second timeframe permitted for CCP acceptance.
<ESMA_QUESTION_611>

**Q612: What should be the degree of flexibility for CM, its timeframe, and the characteristics of the systems, procedures and arrangements required to supporting that flexibility? How should it compare to the current practices and timeframe?**

<ESMA_QUESTION_612>
In MFA's view, all relevant derivative contracts are capable of being submitted and accepted for clearing within the timeframes proposed in this response. The number of derivative contracts which would benefit from CMs having greater flexibility is negligible and should be balanced against the many advantages which a rapid submission and acceptance process will bring to the European cleared derivatives markets. Accordingly, MFA favours a rigid approach towards STP timeframes and, as noted previously, believes that CMs ought to carry out their credit checks pre-execution or within prescribed timeframes post-execution.

MFA considers that the introduction of a robust mechanism for the treatment of rejected derivative contracts (as discussed at Q613 below) is a suitable alternative to allowing CMs greater flexibility and that, as a whole, the European cleared derivatives markets will benefit from such an approach. The vast majority of derivative contracts will be accepted for clearing within very short deadlines which will increase market efficiency and reduce any uncertainty on the part of the Transacting Counterparties as to the status of a derivative contract. Furthermore, any derivative contracts which are rejected will be rejected quickly, allowing Transacting Counterparties to enter into new derivative contracts or take other remedial actions as soon as possible, and without the market having moved significantly following the initial trade execution. Such an approach would reduce systemic risk to a far greater extent than an approach which favours flexibility of the CM above a rapid trade submission and acceptance process. A more rigid approach will also necessarily result in the development of robust, reliable and scalable infrastructure to support STP. Flexibility, on the other hand, may result in a less disciplined approach and inconsistency among market participants.
<ESMA_QUESTION_612>

**Q613: What are your views on the treatment of rejected transactions for transactions subject to the clearing requirement and those cleared on a voluntary basis? Do you agree that the framework should be set in advance?**

<ESMA_QUESTION_613>
MFA agrees with the distinction which ESMA has drawn in Q613 between derivative contracts subject to the clearing requirement and derivative contracts cleared on a voluntary basis. However, MFA also considers that ESMA ought to further subdivide derivative contracts into those derivative contracts which are executed on a Facility, and those which are bilaterally executed OTC derivatives, as the options available to the Transacting Counterparties post-rejection differ across these transaction types, as we explain further below.

MFA understands that the incidence of rejected trades is extremely low. Accordingly, the STP RTS should be prepared with this fact in mind. It would not be appropriate to undermine STP or dictate market structure by concern for what is a rare event.

In MFA's view, derivative contracts which are executed on a Facility and which are rejected for clearing ought to be *void ab initio*. This outcome would also be consistent with the CFTC's prescribed outcome in the U.S. Indeed, in respect of derivatives which are required to be cleared, any other outcome would be illogical; such derivatives may only be entered into between the relevant parties as cleared derivatives.

However, so far as derivatives executed on a Facility are concerned, execution agreements should not be permissible. To permit such agreements would necessarily inhibit all-to-all trading as it is not feasible to expect every market participant to have such an agreement in place with each other market participant. In order to assist in the transition to a *void ab initio* regime, ESMA could consider introducing a period of time within which parties to a derivative contract that is rejected from clearing may mutually agree to "resubmit" the derivative contract, *i.e.*, the original derivative contract is void, but the parties may submit a new derivative contract for clearing that has the same economic terms as the rejected derivative contract. Such resubmission should occur promptly and should only be permitted once.

On the other hand, MFA understands that market participants may use execution agreements, pursuant to which counterparties agree the consequences of a rejection prior to execution, in the context of bilateral OTC derivatives. The consequences specified in such an execution agreement would likely differ depending on whether a derivative contract was subject to a mandatory clearing obligation under EMIR or not. In the former case, the available outcomes could be: (1) the derivative contract is *void ab initio*; or (2) the Transacting Counterparties resubmit the derivative contract for clearing; or (3) the Transacting Counterparties terminate the derivative contract and pay breakage costs. In the latter case the Transacting Counterparties would also be free to continue the derivative contract as a bilateral trade, although such an outcome would be subject to the Transacting Counterparties agreeing appropriate terms for the bilateral trade and should not be mandatory.

Finally, MFA notes that a robust STP mechanism will mean that Transacting Counterparties will know very quickly if a derivative contract has been rejected and if they are required to enter into a new derivative contract, or take other actions. MFA believes that such certainty across the cleared derivatives markets in Europe will greatly increase the safety and efficiency of such markets.

<ESMA_QUESTION_613>

## 9.2. Indirect Clearing Arrangements

**Q614: Is there any reason for ESMA to adopt a different approach (1) from the one under EMIR, (2) for OTC and ETD? If so, please explain your reasons.**

<ESMA_QUESTION_614>
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**Q615: In your view, how should it compare with current practice?**

<ESMA_QUESTION_615>
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