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Dear Sir or Madam,

The Alternative Investment Management Association[1] ("AIMA") and Managed Funds Association[2] ("MFA") welcome the opportunity to respond to the European Securities and Markets Authority ("ESMA") regarding its Consultation Paper: MiFID II/ MiFIR review report on the transparency regime for non-equity instruments and the trading obligation for derivatives[3] ("the CP").

In our detailed responses to the questions raised in the CP, we make the following points:

- We agree with ESMA that the MiFID II post-trade transparency framework for non-equities has yet to deliver meaningful transparency and is in urgent need of revision, in part to pave the way for a potential post-trade consolidated tape in Europe, which would be of significant benefit to European financial markets. Accordingly, we suggest that:
    - Deferral periods should be significantly shortened
    - The dissemination of the notional amount of large-size trades should be capped
    - The publication of post-trade price data on an aggregated basis across multiple transactions should be removed
    - Deferrals should be harmonised across member states

[1] AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry.

[2] MFA 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 organisation 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 organisations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

[3] ESMA70-156-2189. Online at: https://www.esma.europa.eu/file/54886/download?token=dMSYPM__

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    - OTC derivatives transactions involving a firm that is an SI in the relevant sub-asset class should be subject to post-trade transparency.

- We endorse ESMA's plan to follow up, in close cooperation with competent authorities, on the compliance of trading venues and APAs with the obligation to provide market data free of charge 15 minutes after publication.

- Post-trade name give-up by MTFs and OTFs should be prohibited. EU market participants must be able to access all venues that list instruments subject to the DTO. Post-trade name give-up effectively prevents buy-side market participants from accessing specific venues, and the practice does not comply with the non-discriminatory access requirements in MiFID II. There is no legitimate justification for the continued use of the practice for centrally cleared instruments.

- Separately, we believe that ESMA should look more holistically at the MiFID II obligations in respect of trade and transaction reporting and the already significant reporting burden that falls on buy-side firms. A key way of addressing this problem would be to move to a reporting model where the sell-side is the primary reporting party for both post-trade and transaction reporting, given that sell-side firms typically have the scale necessary to be able to carry the costs associated with reporting.

- We would be concerned about any move to adjust the pre-trade large-in-scale waiver for commodity derivatives, which we believe has worked well.

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We would be happy to discuss any aspect of our response in further detail. Please contact Adam Jacobs-Dean (ajacobs-dean@aima.org) and Michael Pedroni (mpedroni@managedfunds.org).

Yours truly,

/s/ Adam Jacobs-Dean

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Annex: Detailed responses

Pre-trade transparency regime for trading venues in respect of non-equity

Q1: What benefits or impacts would you see in increased pre-trade transparency in the different non-equity markets? How could the benefits/impacts of such pre-trade transparency be achieved/be mitigated via changes of the Level 1 text?

Increasing pre-trade transparency improves competition among liquidity providers and overall liquidity conditions, reduces transaction costs, and facilitates execution quality analysis. Non-equities markets continue to lack meaningful pre-trade transparency.

Q2: What proposals do you have for improving the level of pre-trade transparency available? Do you believe that the simplification of the regime for pre-trade transparency waivers would contribute to the improvement of the level of pre-trade transparency available?

Waivers should be simplified and liquidity thresholds should be recalibrated (including ensuring OTC derivatives subject to the EMIR clearing obligation are always considered liquid for transparency).

Q3: Are you supportive of ESMA's proposal to delete the pre-trade SSTI-waiver? Would you compensate for this by lowering the pre-trade LIS-thresholds across all asset classes or only for selected asset classes? What would be the appropriate level for such adjusted LIS-thresholds? If you do not support ESMA's proposal to delete the pre-trade SSTI-waiver, what should be the way forward on the SSTI-waiver in your view?

Yes, removing the SSTI waiver would simplify the regime. We would support maintaining the current pre-trade LIS waiver.

Q8: Do you agree with ESMA's proposal to require SIs to make available data free of charge 15 minutes after publication? Please explain.

Yes, data that is required to be published under MiFID II should be made available free of charge to market participants. SIs should be required to respect this key aspect of MiFID II that enhances transparency for all market participants.

Post-trade transparency requirements for trading venues and investment firms in respect of non-equity instruments

Q10: Do you agree with ESMA's assessment of the level of post-trade transparency and with the need of a more streamlined and uniform post-trade regime which does not include options at the discretion of the different jurisdictions? If not, please explain why and, where available, support your assessment with data.

We agree with ESMA that the MiFID II post-trade transparency framework for non-equities has yet to deliver meaningful transparency. We note that: only ~5% of off-venue trading activity in OTC derivatives is subject to post-trade transparency (due to the interpretation of TOTV); 90% of on-venue trading activity in OTC derivatives is being granted a four-week deferral; ~85% of trading activity in EU bonds is not being published in real-time, and full transaction details are never published for the vast majority of activity due to indefinite deferrals.

Accordingly, we suggest that:

- Deferral periods should be significantly shortened
- The dissemination of the notional amount of large-size trades should be capped as a way to balance the need for enhanced transparency with the need to ensure firms can execute large trades without the risk of the market moving against them
- The publication of post-trade price data on an aggregated basis across multiple transactions should be removed
- Deferrals should be harmonised across member states
- OTC derivatives transactions involving a firm that is an SI in the relevant sub-asset class should be subject to post-trade transparency.

Q11: Do you agree with this proposal? What would be the appropriate level of such a revised LIS-threshold in your view?

Yes, there should be one clear size-based deferral from post-trade transparency requirements.

Q12: In your view, should the real time publication of volume masking transactions apply to transactions in illiquid instruments and above LIS waiver (Option 1) or to transactions above LIS only (Option 2 and Option 3). Please elaborate. If you support another alternative, please explain which one and why.

We support either Option 2 or Option 3. There should be one clear size-based deferral from post-trade transparency with the deferral limited in length and coupled with volume masking. To the extent Option 1 is selected, the liquidity determinations must be recalibrated (including ensuring OTC derivatives subject to the EMIR clearing obligation are always considered to be liquid for transparency purposes).

Q13: Do you agree with the publication of the price and volume of all transactions after a certain period of time, such as two calendar weeks (Option 1 and 2) or do you support the two-steps approach for LIS transactions (Option 3)? Please explain why and provide any alternative you would support. Which is the optimal option in case a consolidated tape would emerge in the future?

We support publishing the full volume of a transaction after a certain period of time.

Q14: Do you agree with ESMA's proposed way forward to issue further guidance and put a stronger focus on enforcement to improve the quality of post-trade data? Are there any other measures necessary at the legislative level to improve the quality of post-trade data? What changes to the transparency regime in Level 1 could lead to a substantial improvement of data quality?

One of the key goals of MiFID II is to improve transparency by ensuring that APAs would publish post-trade transparency data in an easily accessible way. However, we have seen APAs engaging in practices that are contrary to the objectives of the legislation, including imposing restrictions on access to data, publishing information in a format that prevents users from reading, using and copying the information, deleting data shortly after publication, not publishing data on transactions benefiting from a publication deferral, requiring market participants to submit search queries in order to access data and inconsistent approaches to publishing data amendments. These practices appear motivated in part by a desire to compel market participants to subscribe to expensive data packages in order to obtain MiFID II transparency data that should be provided free of charge. ESMA has issued Q&As clarifying that these practices run counter to the objectives of MiFID II but it is critical these requirements are enforced.

We would strongly recommend that ESMA request APAs to publish data amendments consistently. In particular, our members note that some APAs do not tag cancelled or amended trading data to the original trade, As a result, such updated data appears as a new trade which invalidates the purpose for requiring that trade reports be updated or amended as appropriate. Separately, as mentioned above, where a legitimate waiver exists for the delayed publication of trading data because of size or liquidity certain APAs may publish the trade data within two days whilst others may take several weeks or do not publish the trade at all. There needs to be a consistent framework agreed upon and applied across APAs in order to preserve the value and the integrity of this data and to achieve the key objectives of MiFID II.

We therefore strongly support ESMA's conclusion in its MiFID review report on the cost of market data[4] that "the MiFID II/MiFIR objective of making data available free of charge 15 minutes after publication by the trading venues and APAs has not been achieved". We endorse ESMA's plan to follow up, in close cooperation with competent authorities, on the compliance of trading venues and APAs with the obligation to provide market data free of charge 15 minutes after publication with a view to achieving a consistent approach to data publication.

Q15: What would be the optimal transparency regime to help with the potential creation of a CTP?

The transparency framework should be (a) comprehensive (covering both on-venue and off-venue trading activity), and (b) real-time (with only clearly defined and limited deferrals). Otherwise, the CTP will not have access to a sufficient amount of useful data to provide a valuable service to market participants. There is little point to setting up a CTP to publish 4-week delayed data that only covers on-venue trading activity. The transparency framework should also support a CTP providing access to post-trade data at a low cost (or free of charge). Therefore, ESMA should consider requiring trading venues and APAs to provide access to the required post-trade data on a real-time basis free of charge, which would be consistent with the US non-equities regimes.

Q16: Do you agree with ESMA's above assessment? If not, please explain.

Yes, we agree that the current interpretation of TOTV significantly narrows the scope of post-trade transparency for OTC derivatives. The very granular approach developed by ESMA in the TOTV assessment has even created an incentive for certain market participants to duplicate ISIN codes for economically equivalent derivatives in order to engage in bilateral OTC trading that remains outside the transparency regime of MiFID II.

Q17: Are you of the view that the interpretation of TOTV should remained aligned for both transparency and transaction reporting? If not, please explain why.

We note that implementation of and on-going compliance with trade and transaction reporting obligations has been one of the greatest compliance challenges associated with MiFID II for our members, requiring significant one-off and on-going investment in reporting systems. Our members report, depending upon their size, that they may have multiple information technology and other employees daily working on transaction reporting in

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[4] ESMA70-156-1606. MiFID II/MiFIR Review Report No. 1 On the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments. Online at: https://www.esma.europa.eu/sites/default/files/library/mifid_ii_mifir_review_report_no_1_on_prices_for_market_data_and_the_equity_ct.pdf

order to comply with ESMA's transaction reporting specifications. Under the current requirements, transaction reporting is and will remain highly resource intensive.

A key way of addressing this problem would be to move to a reporting model where the sell-side is the primary reporting party for both post-trade and transaction reporting, given that sell-side firms typically have the scale necessary to be able to carry the costs associated with maintaining the operational infrastructure necessary for reporting. For buy-side firms, maintaining such systems represents a disproportionate burden given their scale and the significant duplication inherent in rules that require both sides of the transaction to make reports. We note that this issue is separate and distinct from the question of whether the concept of TOTV should be retained.

Q18: Which of the three options proposed, would you recommend (Option 1, Option 2 or Option 3)? In case you recommend an alternative way forward, please explain.

We do not believe that the status quo (Option 1) is appropriate given the broad recognition that the MiFID II / MiFIR framework has not in a meaningful way delivered on its objective of increasing transparency for certain asset classes, including OTC derivatives. However, we are concerned that Options 2 and 3 as currently elaborated would further increase the reporting burden on buy-side firms that we highlight in our response to Question 17.

We therefore believe that ESMA should consider an alternative option, whereby OTC derivatives transactions involving a firm that is a systematic internaliser in the relevant sub-asset class would be presumed to be subject to post-trade transparency, i.e. there would be no TOTV test for these transactions. Accordingly, any such transaction would be subject to post-trade transparency, with the systematic internaliser fulfilling the reporting obligation. For those transactions that do not involve a systematic internaliser, the current post-trade reporting framework would remain as is (including the concept of TOTV).

We believe this would subject a significant share of trading in OTC derivatives to post-trade transparency, whilst ensuring that the reporting obligation is discharged by the firms with the most developed reporting infrastructure.

<u>Derivatives Trading Obligation</u>

Q20: Do you have any remarks on the assessment of Article 28 of MiFIR? Please explain.

We support amending Article 28(4) to ensure that central aspects of the MiFID II framework are considered as part of equivalence decisions. These include ensuring third-country trading venues (a) provide market participants with non-discriminatory access and (b) apply comparable transparency requirements to derivatives subject to the DTO.

Q23: Do you have a view on this or any other issues related to the application of the DTO?

We recommend that ESMA focus on:

- Prohibiting post-trade name give-up by MTFs and OTFs. EU market participants must be able to access all venues that list instruments subject to the DTO. Post-trade name give-up effectively prevents buy-side market participants from accessing specific venues, and the practice does not comply with the non-discriminatory access requirements in MiFID II. There is no legitimate justification for the continued use of the practice for centrally cleared instruments. For these reasons, the US CFTC has

recently proposed to prohibit "post-trade name give-up" for OTC derivatives that are centrally cleared and executed anonymously.

- Evaluating whether the DTO benefits clients. The DTO should increase market transparency and competition, and lead to lower transaction costs. However, it was only implemented for clients in late 2019 and therefore ESMA should specifically consider the impact on clients, including the portion of the market that continues not to be subject to the DTO.

- Reconsidering pre-arranged trading for DTO instruments. While pre-arranged trading may be appropriate for large-sized transactions, allowing too many transactions to be pre-arranged undermines the intent of the DTO, which is to transition trading onto transparent and competitive trading venues. We recommend that ESMA use the post-trade LIS threshold rather than the pre-trade LIS threshold for these purposes.

Level 2 review (adjustment of bond liquidity status)

Q27: Do you agree with ESMA proposal not to move to stage 2 for the determination of the pre-trade SSTI thresholds for all non-equity instruments except bonds? Please explain.

No, as detailed in the report, the current regime has not delivered meaningful pre-trade transparency in non-equities asset classes and therefore we recommend moving to stage 2.

Commodity derivatives

Q31: What is your view on the analysis and proposals related to the pre-trade LIS thresholds for commodity derivatives? Which proposal to mitigate the counterintuitive effect of the current percentile approach do you prefer (i.e. keep the current methodology but modify its parameters, or change the methodology e.g. using a different metric for the liquidity criteria)? Please justify your views and proposals with quantitative elements where available.

We would be concerned about any move to adjust the large-in-scale waiver in this context, which we believe has worked well and given that this could undermine the ability of end investors to trade in a manner that protects them from the market moving against them.