esma European Securities and Markets Authority

Reply form for th
Consultation Paper on MiFID II / MiFI

19 December 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on MiFID II / MiFIR (reference ESMA/2014/1570), published on the ESMA website.

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. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

1. use this form and send your responses in Word format (do not send pdf files except for annexes);
2. do not remove the tags of type <ESMA_QUESTION_CP_MIFID_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
3. 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:

1. if they respond to the question stated;
2. contain a clear rationale, and
3. describe any alternatives that ESMA should consider.

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

Naming protocol:

In order to facilitate the handling of stakeholders responses please save your document using the following format: ESMA_CP_MIFID_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were ESMA, the name of the reply form would be ESMA_CP_MIFID _ESMA_REPLYFORM or ESMA_CP_MIFID_ESMA_ANNEX1

Deadline

Responses must reach us by **2 March 2015**.

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 headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	FIA Associations
Confidential[1]	☐
Activity:	Electronic Trading
Are you representing an association?	☐
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_CP_MIFID_1>
TYPE YOUR TEXT HERE
< ESMA_COMMENT_CP_MIFID_1>

[1] The field will used for consistency checks. If its value is different from the value indicated during submission on the website form, the latest one will be taken into account.

4. Investor protection

Q1. Do you agree with the list of information set out in draft RTS to be provided to the competent authority of the home Member State? If not, what other information should ESMA consider?

<ESMA_QUESTION_CP_MIFID_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_1>

Q2. Do you agree with the conditions, set out in this CP, under which a firm that is a natural person or a legal person managed by a single natural person can be authorised? If no, which criteria should be added or deleted?

<ESMA_QUESTION_CP_MIFID_2>
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Q3. Do you agree with the criteria proposed by ESMA on the topic of the requirements applicable to shareholders and members with qualifying holdings? If no, which criteria should be added or deleted?

<ESMA_QUESTION_CP_MIFID_3>
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<ESMA_QUESTION_CP_MIFID_3>

Q4. Do you agree with the approach proposed by ESMA on the topic of obstacles which may prevent effective exercise of the supervisory functions of the competent authority?

<ESMA_QUESTION_CP_MIFID_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_4>

Q5. Do you consider that the format set out in the ITS allow for a correct transmission of the information requested from the applicant to the competent authority? If no, what modification do you propose?

<ESMA_QUESTION_CP_MIFID_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_5>

Q6. Do you agree consider that the sending of an acknowledgement of receipt is useful, and do you agree with the proposed content of this document? If no, what changes do you proposed to this process?

<ESMA_QUESTION_CP_MIFID_6>
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<ESMA_QUESTION_CP_MIFID_6>

Q7. Do you have any comment on the authorisation procedure proposed in the ITS included in Annex B?

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<ESMA_QUESTION_CP_MIFID_7>

Q8. Do you agree with the information required when an investment firm intends to provide investment services or activities within the territory of another Member State under the right of freedom to provide investment services or activities? Do you consider that additional information is required?

<ESMA_QUESTION_CP_MIFID_8>
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<ESMA_QUESTION_CP_MIFID_8>

Q9. Do you agree with the content of information to be notified when an investment firm or credit institution intends to provide investment services or activities through the use of a tied agent located in the home Member State?

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<ESMA_QUESTION_CP_MIFID_9>

Q10. Do you consider useful to request additional information when an investment firm or market operator operating an MTF or an OTF intends to provide arrangements to another Member State as to facilitate access to and trading on the markets that it operates by remote users, members or participants established in their territory? If not which type of information do you consider useful to be notified?

<ESMA_QUESTION_CP_MIFID_10>
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Q11. Do you agree with the content of information to be provided on a branch passport notification?

<ESMA_QUESTION_CP_MIFID_11>
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<ESMA_QUESTION_CP_MIFID_11>

Q12. Do you find it useful that a separate passport notification to be submitted for each tied agent the branch intends to use?

<ESMA_QUESTION_CP_MIFID_12>
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<ESMA_QUESTION_CP_MIFID_12>

Q13. Do you agree with the proposal to have same provisions on the information required for tied agents established in another Member State irrespective of the establishment or not of a branch?

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<ESMA_QUESTION_CP_MIFID_13>

Q14. Do you agree that any changes in the contact details of the investment firm that provides investment services under the right of establishment shall be notified as a change in the particulars of the branch passport notification or as a change of the tied agent passport notification under the right of establishment?

<ESMA_QUESTION_CP_MIFID_14>
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<ESMA_QUESTION_CP_MIFID_14>

Q15. Do you agree that credit institutions needs to notify any changes in the particulars of the passport notifications already communicated?

<ESMA_QUESTION_CP_MIFID_15>
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<ESMA_QUESTION_CP_MIFID_15>

Q16. Is there any other information which should be requested as part of the notification process either under the freedom to provide investment services or activities or the right of establishment, or any information that is unnecessary, overly burdensome or duplicative?

<ESMA_QUESTION_CP_MIFID_16>
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<ESMA_QUESTION_CP_MIFID_16>

Q17. Do you agree that common templates should be used in the passport notifications?

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<ESMA_QUESTION_CP_MIFID_17>

Q18. Do you agree that common procedures and templates to be followed by both investment firms and credit institutions when changes in the particulars of passport notifications occur?

<ESMA_QUESTION_CP_MIFID_18>
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<ESMA_QUESTION_CP_MIFID_18>

Q19. Do you agree that the deadline to forward to the competent authority of the host Member State the passport notification can commence only when the competent authority of the home Member States receives all the necessary information?

<ESMA_QUESTION_CP_MIFID_19>
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Q20. Do you agree with proposed means of transmission?

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Q21. Do you find it useful that the competent authority of the host Member State acknowledge receipt of the branch passport notification and the tied agent passport notification under the right of establishment both to the competent authority and the investment firm?

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<ESMA_QUESTION_CP_MIFID_21>

Q22. Do you agree with the proposal that a separate passport notification shall be submitted for each tied agent established in another Member State?

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<ESMA_QUESTION_CP_MIFID_22>

Q23. Do you find it useful the investment firm to provide a separate passport notification for each tied agent its branch intends to use in accordance with Article 35(2)(c) of MiFID II? Changes in the particulars of passport notification

<ESMA_QUESTION_CP_MIFID_23>
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Q24. Do you agree to notify changes in the particulars of the initial passport notification using the same form, as the one of the initial notification, completing the new information only in the relevant fields to be amended?

<ESMA_QUESTION_CP_MIFID_24>
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<ESMA_QUESTION_CP_MIFID_24>

Q25. Do you agree that all activities and financial instruments (current and intended) should be completed in the form, when changes in the investment services, activities, ancillary services or financial instruments are to be notified?

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<ESMA_QUESTION_CP_MIFID_25>

Q26. Do you agree to notify changes in the particulars of the initial notification for the provision of arrangements to facilitate access to an MTF or OTF?

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Q27. Do you agree with the use of a separate form for the communication of the information on the termination of the operations of a branch or the cessation of the use of a tied agent established in another Member State?

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Q28. Do you agree with the list of information to be requested by ESMA to apply to third country firms? If no, which items should be added or deleted. Please provide details on your answer.

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<ESMA_QUESTION_CP_MIFID_28>

Q29. Do you agree with ESMA's proposal on the form of the information to provide to clients? Please provide details on your answer.

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Q30. Do you agree with the approach taken by ESMA? Would a different period of measurement be more useful for the published reports?

<ESMA_QUESTION_CP_MIFID_30>
The FIA EPTA* is fully supportive of enhancing transparency and providing as much information to clients as possible to assess execution quality. We agree that RMs, MTFs, OTFs and SIs should be considered an 'execution venue'. However, we disagree that the definition of execution venue should extend to a market maker or liquidity provider or such third country equivalent.

Generally speaking, while market makers can receive orders from clients similar to other venues in the context of RFP systems, market making is a trading activity, not an execution venue, and should not be considered one. In the context of markets using a central continuous order book, market makers and liquidity providers are participants. As such they are anonymous counterparties to transactions and do not know each other's identity. Therefore, an investment firm executing client orders on a trading venue will not be aware that orders may be matched by a market maker and – if so – which market maker. Conversely, a market maker will also not be aware that his quote or order has been matched by an investment firm and – if so – which investment firm. If a market maker were to be considered an execution venue, it would have to comply with requirements to make available information to investment firms (under RTS 6), not knowing which investment firm may have been its counterpart. Additionally, an investment firm having to collect data from an execution venue to determine the top 5 execution venues it uses (under RTS 7) may not know the market maker has been the opposing side of its client orders. These practical limitations are one reason we believe the inclusion of market makers is not appropriate.

We see no danger that omitting market makers and liquidity providers from the definition of execution venue would undermine the protection of investors. A market maker or liquidity provider that is executing orders on behalf of its own clients will in any case be required to operate as an authorised investment firm, subject to compliance with the best execution rules laid down in Article 27 MiFID II and in RTS 7. Similarly, if a market maker is an SI, then the agreements in place with its clients support publication of certain data.

Finally, we believe ESMA's mandate following the publication of the Level 1 text (Article 27(10)(a) MiFID II) was to provide the format, content and periodicity requirements of the reporting, not to define 'execution venue'. By adopting a definition of 'execution venue,' ESMA is determining the scope of Article 27 MiFID II, which should be determined by the European Parliament and the Council.

Therefore, we suggest that ESMA adapt the definition of 'execution venue' in both RTS 6 and RTS 7. The amendment of both definitions is necessary to ensure no conflicting obligations emerge with an investment firm being required to obtain information under RTS 7 from a person not required to deliver this information under RTS 6.

Article 2(3) of RTS 6 should be amended as follows: "Execution venue means a regulated

* This response to Question 30 is submitted solely on behalf of the FIA European Principal Traders Association ("FIA EPTA"). FIA EPTA is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

market, multilateral trading facility, organized trading facility, and systematic internaliser [DELETE ~~and market-maker or other liquidity provider~~.]"

Article 2(1) of RTS 7 should be amended as follows: "Execution venue means a regulated market, multilateral trading facility, organized trading facility, and systematic internaliser [DELETE ~~and market-maker or other liquidity provider~~] or entities that perform a similar function in a third country to the functions performed by any of the foregoing."

Alternative approach

In the event ESMA does not agree with our suggested changes, to avoid the problems highlighted above we would nevertheless request that ESMA clarify that for instruments subject to the trading obligation laid down in Article 23 MiFIR (equity and equity-like) and Article 28 MiFIR (derivatives subject to trading obligations under EMIR), the definition of execution venue will only cover trading venues within the meaning of MiFID (RM, OTF, MTF). Essentially, for these instruments market makers and liquidity providers will not be deemed execution venues.

This is currently already reflected in the title of RTS 6. However, ESMA would enhance legal certainty by including this explicitly in the body of the RTS. To that effect, we suggest the insertion of a second sentence in Article 2(3) of RTS 6:

"**Execution venue means a regulated market, multilateral trading facility, organized trading facility, systematic internaliser and market-maker or other liquidity provider. A market-maker or other liquidity provider will not be deemed an execution venue for financial instruments subject to the trading obligation in Articles 23 and 28 of Regulation (EU) No 600/2014**."

Consistency between RTS 6 and RTS 7

In the event ESMA accepts the alternative approach above, there is a risk of inconsistency between RTS 6 and RTS 7. An investment firm subject to RTS 7 will have to publish data from the top 5 execution venues. It will have to obtain this data from the execution venues which under RTS 7 also include market makers and other liquidity providers. This could lead to the theoretical situation that an investment firm, for a financial instrument subject to the trading obligation of Article 23 and 28 MiFIR, has to collect data from its top 5 execution venues (possibly a market maker or liquidity provider) while that entity is not considered an execution venue under RTS 6 and is thus not obliged to publish the relevant data on execution. To avoid this situation, we would request ESMA to clarify in RTS 7 that the investment firm will only have to publish information based on data it has received from execution venues who are required to publish this data pursuant to RTS 7.

Therefore we would suggest the following insertion in RTS 7:

"**When publishing the information set out in this Regulation, an investment firm will only be required to use data from an execution venue if this execution venue is obliged to publish this data pursuant to [Reference to RTS 6]".**

<ESMA_QUESTION_CP_MIFID_30>

Q31. Do you agree that it is reasonable to split trades into ranges according to the nature of different classes of financial instruments? If not, why?

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Q32. Are there other metrics that would be useful for measuring likelihood of execution?

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<ESMA_QUESTION_CP_MIFID_32>

Q33. Are those metrics meaningful or are there any additional data or metrics that ESMA should consider?

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<ESMA_QUESTION_CP_MIFID_33>

Q34. Do you agree with the proposed approach? If not, what other information should ESMA consider?

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Q35. Do you agree with the proposed approach? If not, what other information should ESMA consider?

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Q36. Do you agree with the proposed approach? If not, what other information should ESMA consider?

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5. Transparency

Q37. Do you agree with the proposal to add to the current table a definition of request for quote trading systems and to establish precise pre-trade transparency requirements for trading venues operating those systems? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_37>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_37>

Q38. Do you agree with the proposal to determine on an annual basis the most relevant market in terms of liquidity as the trading venue with the highest turnover in the relevant financial instrument by excluding transactions executed under some pre-trade transparency waivers? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_38>
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Q39. Do you agree with the proposed exhaustive list of negotiated transactions not contributing to the price formation process? What is your view on including non-standard or special settlement trades in the list? Would you support including non-standard settlement transactions only for managing settlement failures? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_39>
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<ESMA_QUESTION_CP_MIFID_39>

Q40. Do you agree with ESMA's definition of the key characteristics of orders held on order management facilities? Do you agree with the proposed minimum sizes? Please provide reasons for your answers.

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<ESMA_QUESTION_CP_MIFID_40>

Q41. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for shares and depositary receipts? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_41>
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<ESMA_QUESTION_CP_MIFID_41>

Q42. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for ETFs? Would you support an alternative approach based on a single large in scale threshold of €1 million to apply to all ETFs regardless of their liquidity? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_42>
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<ESMA_QUESTION_CP_MIFID_42>

Q43. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for certificates? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_43>
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<ESMA_QUESTION_CP_MIFID_43>

Q44. Do you agree with the proposed approach on stubs? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_44>
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<ESMA_QUESTION_CP_MIFID_44>

Q45. Do you agree with the proposed conditions and standards that the publication arrangements used by systematic internalisers should comply with? Should systematic internalisers be required to publish with each quote the publication of the time the quote has been entered or updated? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_45>
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<ESMA_QUESTION_CP_MIFID_45>

Q46. Do you agree with the proposed definition of when a price reflects prevailing conditions? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_46>
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<ESMA_QUESTION_CP_MIFID_46>

Q47. Do you agree with the proposed classes by average value of transactions and applicable standard market size? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_47>

Q48. Do you agree with the proposed list of transactions not contributing to the price discovery process in the context of the trading obligation for shares? Do you agree that the list should be exhaustive? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_48>

Q49. Do you agree with the proposed list of information that trading venues and investment firms shall made public? Please provide reasons for your answers.

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<ESMA_QUESTION_CP_MIFID_49>

Q50. Do you consider that it is necessary to include the date and time of publication among the fields included in Table 1 Annex 1 of Draft RTS 8? Please provide reasons for your answer.

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<ESMA_QUESTION_CP_MIFID_50>

Q51. Do you agree with the proposed list of flags that trading venues and investment firms shall made public? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_51>

Q52. Do you agree with the proposed definitions of normal trading hours for market operators and for OTC? Do you agree with shortening the maximum possible delay to one minute? Do you think some types of transactions, such as portfolio trades should benefit from longer delays? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_52>
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<ESMA_QUESTION_CP_MIFID_52>

Q53. Do you agree that securities financing transactions and other types of transactions subject to conditions other than the current market valuation of the financial instrument should be exempt from the reporting requirement under article 20? Do you think other types of transactions should be included? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_53>
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<ESMA_QUESTION_CP_MIFID_53>

Q54. Do you agree with the proposed classes and thresholds for large in scale transactions in shares and depositary receipts? Please provide reasons for your answers.

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<ESMA_QUESTION_CP_MIFID_54>

Q55. Do you agree with the proposed classes and thresholds for large in scale transactions in ETFs? Should instead a single large in scale threshold and deferral period apply to all ETFs regardless of the liquidity of the financial instrument as described in the alternative approach above? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_55>
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Q56. Do you agree with the proposed classes and thresholds for large in scale transactions in certificates? Please provide reasons for your answers

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Q57. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer for SFPs and for each of type of bonds identified (European Sovereign Bonds, Non-European Sovereign Bonds, Other European Public Bonds, Financial Convertible Bonds, Non-Financial Convertible Bonds, Covered Bonds, Senior Corporate Bonds-Financial, Senior Corporate Bonds Non-Financial, Subordinated Corporate Bonds-Financial, Subordinated Corporate Bonds Non-Financial) addressing the following points:

(1) Would you use different qualitative criteria to define the sub-classes with respect to those selected (i.e. bond type, debt seniority, issuer sub-type and issuance size)?

(2) Would you use different parameters (different from average number of trades per day, average nominal amount per day and number of days traded) or the same parameters but different thresholds in order to define a bond or a SFP as liquid?

(3) Would you define classes declared as liquid in ESMA's proposal as illiquid (or viceversa)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_57>
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Q58. Do you agree with the definitions of the bond classes provided in ESMA's proposal (please refer to Annex III of RTS 9)? Please provide reasons for your answer.

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<ESMA_QUESTION_CP_MIFID_58>

Q59. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer per asset class identified (investment certificates, plain vanilla covered warrants, leverage certificates, exotic covered warrants, exchange-traded-commodities, exchange-traded notes, negotiable rights, structured medium-term-notes and other warrants) addressing the following points:

(1) Would you use additional qualitative criteria to define the sub-classes?

(2) Would you use different parameters or the same parameters (i.e. average daily volume and number of trades per day) but different thresholds in order to define a sub-class as liquid?

(3) Would you qualify certain sub-classes as illiquid? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_59>
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Q60. Do you agree with the definition of securitised derivatives provided in ESMA's proposal (please refer to Annex III of the RTS)? Please provide reasons for your answer.

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Q61. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer for each of the asset classes identified (FRA, Swaptions, Fixed-to-Fixed single currency swaps, Fixed-to-Float single currency swaps, Float -to- Float single currency swaps, OIS single currency swaps, Inflation single currency swaps, Fixed-to-Fixed multi-currency swaps, Fixed-to-Float multi-currency swaps, Float -to- Float multi-currency swaps, OIS multi-currency swaps, bond options, bond futures, interest rate options, interest rate futures) addressing the following points:

(1) Would you use different criteria to define the sub-classes (e.g. currency, tenor, etc.)?

(2) Would you use different parameters (among those provided by Level 1, i.e. the average frequency and size of transactions, the number and type of market participants, the average size of spreads, where available) or the same parameters but different thresholds in order to define a sub-class as liquid (state also your preference for option 1 vs. option 2, i.e. application of the tenor criteria as a range as in ESMA's preferred option or taking into account broken dates. In the latter case please also provide suggestions regarding what should be set as the non-broken dates)?

(3) Would you define classes declared as liquid in ESMA's proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_61>
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Q62. Do you agree with the definitions of the interest rate derivatives classes provided in ESMA's proposal (please refer to Annex III of draft RTS 9)? Please provide reasons for your answer.

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Q63. With regard to the definition of liquid classes for equity derivatives, which one is your preferred option? Please be specific in relation to each of the asset classes identified and provide a reason for your answer.

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Q64. If you do not agree with ESMA's proposal for the definition of a liquid market, please specify for each of the asset classes identified (stock options, stock futures, index options, index futures, dividend index options, dividend index futures, stock dividend options, stock dividend futures, options on a basket or portfolio of shares, futures on a basket or portfolio of shares, options on other underlying values (i.e. volatility index or ETFs), futures on other underlying values (i.e. volatility index or ETFs):

(1) your alternative proposal

(2) which qualitative criteria would you use to define the sub-classes

(3) which parameters and related threshold values would you use in order to define a sub-class as liquid.

<ESMA_QUESTION_CP_MIFID_64>
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Q65. Do you agree with the definitions of the equity derivatives classes provided in ESMA's proposal (please refer to Annex III of draft RTS 9)? Please provide reasons for your answer.

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<ESMA_QUESTION_CP_MIFID_65>

Q66. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:

(1) Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criterion to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?

(2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?

(3) Would you define classes declared as liquid in ESMA's proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_66>

Q67. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:

(1) Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criteria to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?

(2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?

(3) Would you define classes declared as liquid in ESMA's proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_67>

Q68. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer detailed per contract type and underlying (identified addressing the following points:

(1) Would you use different qualitative criteria to define the sub-classes?

(2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?

(3) Would you define classes declared as liquid in ESMA's proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_68>

Q69. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer per asset class identified (EUA, CER, EUAA, ERU) addressing the following points:

(1) Would you use additional qualitative criteria to define the sub-classes?

(2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average number of tons of carbon dioxide traded per day) but different thresholds in order to define a sub-class as liquid?

(3) Would you qualify as liquid certain sub-classes qualified as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_69>

Q70. Do you agree with ESMA's proposal with regard to the content of pre-trade transparency? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_70>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_70>

Q71. Do you agree with ESMA's proposal with regard to the order management facilities waiver? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_71>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_71>

Q72. ESMA seeks further input on how to frame the obligation to make indicative prices public for the purpose of the Technical Standards. Which methodology do you prefer? Do you have other proposals?

<ESMA_QUESTION_CP_MIFID_72>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_72>

Q73. Do you consider it necessary to include the date and time of publication among the fields included in Annex II, Table 1 of RTS 9? Do you consider that other relevant fields should be added to such a list? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_73>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_73>

Q74. Do you agree with ESMA's proposal on the applicable flags in the context of post-trade transparency? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_74>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_74>

Q75. Do you agree with ESMA's proposal? Please specify in your answer if you agree with:

(1) a 3-year initial implementation period

(2) a maximum delay of 15 minutes during this period

(3) a maximum delay of 5 minutes thereafter. Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_75>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_75>

Q76. Do you agree that securities financing transactions and other types of transactions subject to conditions other than the current market valuation of the financial instrument

should be exempt from the reporting requirement under article 21? Do you think other types of transactions should be included? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_76>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_76>

Q77. Do you agree with ESMA's proposal for bonds and SFPs? Please specify, for each type of bonds identified, if you agree on the following points, providing reasons for your answer and if you disagree providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA_QUESTION_CP_MIFID_77>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_77>

Q78. Do you agree with ESMA's proposal for interest rate derivatives? Please specify, for each sub-class (FRA, Swaptions, Fixed-to-Fixed single currency swaps, Fixed-to-Float single currency swaps, Float -to- Float single currency swaps, OIS single currency swaps, Inflation single currency swaps, Fixed-to-Fixed multi-currency swaps, Fixed-to-Float multi-currency swaps, Float -to- Float multi-currency swaps, OIS multi-currency swaps, bond options, bond futures, interest rate options, interest rate futures) if you agree on the following points providing reasons for your answer and, if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale and size specific to the instrument threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1), provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2), provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed (c) irrespective of your preference for option 1 or 2 and, with particular reference to OTC traded interest rates derivatives, provide feedback on the granularity of the tenor buckets defined. In other words, would you use a different

level of granularity for maturities shorter than 1 year with respect to those set which are: 1 day- 1.5 months, 1.5-3 months, 3-6 months, 6 months – 1 year? Would you group maturities longer than 1 year into buckets (e.g. 1-2 years, 2-5 years, 5-10 years, 10-30 years and above 30 years)?

<ESMA_QUESTION_CP_MIFID_78>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_78>

Q79. Do you agree with ESMA's proposal for commodity derivatives? Please specify, for each type of commodity derivatives, i.e. agricultural, metals and energy, if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA_QUESTION_CP_MIFID_79>
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<ESMA_QUESTION_CP_MIFID_79>

Q80. Do you agree with ESMA's proposal for equity derivatives? Please specify, for each type of equity derivatives [stock options, stock futures, index options, index futures, dividend index options, dividend index futures, stock dividend options, stock dividend futures, options on a basket or portfolio of shares, futures on a basket or portfolio of shares, options on other underlying values (i.e. volatility index or ETFs), futures on other underlying values (i.e. volatility index or ETFs)], if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018

onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA_QUESTION_CP_MIFID_80>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_80>

Q81. Do you agree with ESMA's proposal for securitised derivatives? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA_QUESTION_CP_MIFID_81>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_81>

Q82. Do you agree with ESMA's proposal for emission allowances? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA_QUESTION_CP_MIFID_82>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_82>

Q83. Do you agree with ESMA's proposal in relation to the supplementary deferral regime at the discretion of the NCA? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_83>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_83>

Q84. Do you agree with ESMA's proposal with regard to the temporary suspension of transparency requirements? Please provide feedback on the following points:

(1) the measure used to calculate the volume as specified in Annex II, Table 3

(2) the methodology as to assess a drop in liquidity

(3) the percentages determined for liquid and illiquid instruments to assess the drop in liquidity. Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_84>
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<ESMA_QUESTION_CP_MIFID_84>

Q85. Do you agree with ESMA's proposal with regard to the exemptions from transaprency requirements in respect of transactions executed by a member of the ESCB? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_85>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_85>

Q86. Do you agree with the articles on the double volume cap mechanism in the proposed draft RTS 10? Please provide reasons to support your answer.

<ESMA_QUESTION_CP_MIFID_86>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_86>

Q87. Do you agree with the proposed draft RTS in respect of implementing Article 22 MiFIR? Please provide reasons to support your answer.

<ESMA_QUESTION_CP_MIFID_87>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_87>

Q88. Are there any other criteria that ESMA should take into account when assessing whether there are sufficient third-party buying and selling interest in the class of derivatives or subset so that such a class of derivatives is considered sufficiently liquid to trade only on venues?

<ESMA_QUESTION_CP_MIFID_88>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_88>

Q89. Do you have any other comments on ESMA's proposed overall approach?

<ESMA_QUESTION_CP_MIFID_89>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_89>

Q90. Do you agree with the proposed draft RTS in relation to the criteria for determining whether derivatives have a direct, substantial and foreseeable effect within the EU?

<ESMA_QUESTION_CP_MIFID_90>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_90>

Q91. Should the scope of the draft RTS be expanded to contracts involving European branches of non-EU non-financial counterparties?

<ESMA_QUESTION_CP_MIFID_91>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_91>

Q92. Please indicate what are the main costs and benefits that you envisage in implementing of the proposal.

<ESMA_QUESTION_CP_MIFID_92>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_92>

6. Microstructural issues

Q93. Should the list of disruptive scenarios to be considered for the business continuity arrangements expanded or reduced? Please elaborate.

<ESMA_QUESTION_CP_MIFID_93>

Contrary to ESMA's proposal, the FIA Associations[2] believe in the case of firms dealing on own account and not executing client orders, the most appropriate response may be to implement disaster recovery procedures leading toward a controlled wind-down of outstanding orders and positions, rather than enforcing a resumption of 'full-swing' trading that might actually lead to increased risk. We suggest (and have made draft amendments accordingly) that ESMA clarify that the requirement to have in place "business continuity arrangements to ensure a timely resumption of trading" should not be the leading principle: adverse market impact should be avoided in all cases, but where there is no regulatory need or commercial compulsion (e.g. due to servicing clients), it should remain the firm's decision to resume trading operations or, rather, manage positions and control ordering, including toward an orderly winding-down.

Market participants should have crisis management procedures in place for managing automated trading software and operational failures. The ability to manage a crisis should not be inhibited by an overly prescriptive crisis management procedure. Instead these procedures should be designed by the market participant that intends to use them and should be commensurate with the type of business they are conducting. For example, a firm handling customer trades should consider the needs of the customers when developing a disaster recovery/business continuity plan whereas a firm trading exclusively for its own account will have different needs. Given the

[2] This response is submitted jointly on behalf of the Futures Industry Association ("FIA"), Futures Industry Association Europe ("FIA Europe") and the FIA European Principal Traders Association ("FIA EPTA").

FIA is the leading trade organisation for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearing organisations, our member firms play a critical role in the reduction of systematic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouse for derivatives transactions. FIA's regular members, which act as the majority clearing members of the US exchanges, handle more than 90 percent of the customer funds held for trading on US futures exchanges.

FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPs, vendors, law firms and con-sultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe formed an affiliation with FIA under a new structure – FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

FIA EPTA is affiliated with FIA and is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

diversity of market participants that exists today it is infeasible, and potentially dangerous, to design overly prescriptive crisis management procedures for all participants.

We recommend removing the requirement to have duplicate hardware components to permit continuous operation in case of a failover (for any type of participant). This requirement would be strictly contrary to market best practice, which seeks to avoid "hot failovers" (i.e. transferring operations to a different site without first having resolved issues that may be continuing). The manner in which firms maintain infrastructure that is appropriate to fulfilling their continuity obligations should reside with the firm: the rules should prescribe that adequate infrastructure and human capital is available for adequate failover systems; not prescribe the use of dual infrastructure. In practice, the requirement where appropriate to have a functional back-up site for managing controlled operations will entail firms arranging appropriate connectivity and infrastructure that should be sufficient to satisfy ESMA's concerns.

From a practical perspective, we believe the main requirements a disaster recovery program for algorithmic trading should include are: a review of the systems and data center vulnerabilities and threats; establishment of adequate contingency and disaster recovery plans; validation of the plans via exercises and tabletop reviews; performance of regular reviews of systems to check for compliance with the requirements and performance of regular reviews by a responsible party containing recommendations; and conclusions of the review. The content of a disaster recovery plan itself should comprise (1) a functional communications protocol for updating key staff, (2) clear procedures for disaster recovery including for relocating to back-up sites where necessary, and (3) alternative arrangements to manage (not necessarily trade) existing orders in order to minimise risk exposure for both the individual firm and the market as a whole. We would therefore suggest that ESMA's list of disruptive scenarios in Article 20(2)(b) be a non-exhaustive list of examples of what firms can consider in determining appropriate arrangements, rather than a minimum list, or alternatively edit the list to contain only items (1), (2), and (3) in the paragraph above.

PROPOSED AMENDMENTS TO RTS 13 RECITAL 2 & ARTICLE 20:

RECITAL 2:

The risks arising from algorithmic trading can be present in any trading model supported by electronic means. Therefore, this regulation applies to all investment firms who are engaged in algorithmic trading, ~~independently~~ **in a manner appropriate to the nature, scale and complexity** of their business model~~, size or complexity~~.

ARTICLE 20:

Business continuity arrangements

1. Investment firms shall ~~demonstrate that they~~ have ~~adequate and effective~~ business continuity arrangements in relation **to their t**rading systems **which are proportionate to the nature, scale and complexity of their business** ~~to address disruptive incidents including, but not limited to, system failures~~. **[Note: struck text is duplicative of paragraph below.]**

2. Business continuity arrangements of investment firms shall be able to effectively deal with disruptive incidents and **where appropriate** ensure a timely resumption of trading **or controlled**

management (including wind-down) of outstanding orders and positions. The arrangements shall cover at least the following:

(a) governance for the development and deployment of the arrangements;

(b) consideration of an adequate range of robust, challenging, but credible scenarios relating to the operation of their trading systems which require specific continuity arrangements **such as**~~including at the minimum~~: system failures, communication disruptions and loss of key staff whether due to technical or operational problems, market or credit events, natural disasters or environmental emergencies, IT security issues or deliberate interference with trading systems, or human error; **[Note: some items on this list are duplicative of others and not relevant; not appropriate as a minimum list.]**

(c) back-up of business critical data~~, including compliance,~~ that flows through their trading systems; **[Note: duplicative; 'business critical data' would imply critical compliance data]**

(d) ~~duplication of hardware components to permit continuous operation in case of a failover;~~ **[Note: avoiding a 'hot fail over' is a best practice recommended by the FIA Associations with respect to automated trading; this requirement would mandate investment firms to act contrary to best practice and potentially lead to disorderly trading.]**

(e) procedures for relocating to, and operating the trading system from, a back-up site, where having such a site is appropriate to the nature, scale and complexity of the algorithmic trading activities of the investment firm;

(f) staff training on the operation of the business continuity arrangements and individuals' roles;

(**g**) ~~business continuity arrangements~~ **documented disaster recovery procedures** ~~that are bespoke to each of the venues that it accesses~~;

~~(h) kill functionality usage policy;~~ [**Note: this is duplicative, as it is required elsewhere in Section 2]** and,

(**g**~~i~~) **alternative** arrangements for the investment firm to ~~trade~~ **manage** ~~all~~ existing orders ~~manually~~. **[Note: mandating manual trading of existing orders does not make sense in all situations and could create rather than reduce risk; likewise, if an investment firm's appropriate response is to 'turn trading systems off,' the requirement should not mandate continued trading of existing orders, but rather the management thereof (i.e. winding down/closing positions).]**

3. Investment firms exclusively dealing on own account and not executing orders on behalf of clients may include arrangements to effect a controlled management of outstanding orders and positions, including an orderly winding down of business, where appropriate.

4. Investment firms shall review their business continuity arrangements on an annual basis and modify the arrangements in light of the review.

<ESMA_QUESTION_CP_MIFID_93>

Q94. With respect to the section on Testing of algorithms and systems and change management, do you need clarification or have any suggestions on how testing scenarios can be improved?

<ESMA_QUESTION_CP_MIFID_94>

According to Article 17(1) of MiFID II investment firms must ensure their systems are fully tested and properly monitored. The FIA Associations agree with most of ESMA's proposals for how to achieve this.

However, we have a material concern with ESMA's proposed approach to non-live testing having to occur in trading venue testing environments. To be clear, the FIA Associations support investment firms engaging in non-live testing of their algorithms, but we believe ESMA has proposed unrealistic requirements for trading venues with respect to non-live testing against disorderly trading conditions. Therefore, consistent with our response to draft RTS 13, we consider it both more effective and cost-efficient to place this obligation with the investment firms directly.

ESMA suggests trading venues should be able to design scenarios with functionalities, protocols and structure reproducing live environment conditions including disorderly trading circumstances, and that these scenarios should be as close to market situations as possible. This is tantamount to requiring trading venues to replicate the full production environment, and to be effective, to create scenarios bespoke to each individual trading firm. Any realistic simulation environment would have to include regression testing against multiple date ranges as well as a full scope of market data applicable to the algorithm, and the trading venue would have to ensure the test environment is identical to production in terms of:

- the software version of the matching engine and features available in production;
- the quality and accuracy of information (trade and order book updates) distributed to participants
- administration tools (bulk deletion, setting limits etc.).

Because this is unrealistic, trading venues do not at present offer full-scale simulation environments; the test environments currently available typically use only a partial data set and include a sub-set of symbols traded on that venue. In other words, trading venues can offer a "sandbox" in which investment firms can play around, but the sandbox is by definition only a sample and not a realistic mirror of the live experience. Requiring trading venues to build environments meeting ESMA's proposed specifications would be enormously costly and time-consuming with very little benefit. Therefore, to the extent non-live testing is a step mandated by regulation, we consider it more both effective and cost-efficient to place this obligation with the investment firms directly. Nothing prevents trading venues offering and charging for 'value-add' testing services. Any such 'value-adding' testing services should not be mandatory, however, and market participants should have discretion as to whether to subscribe to them or not.

Furthermore, there is concern that if ESMA were to proceed with this proposal it would create an issue for the industry around who bears the cost. The FIA Associations believe it would be neither fair nor equitable that trading venues be expressly permitted to transfer the cost of design and provision of costly testing environments to members and participants. Both trading venues and investment firms have respective regulatory obligations to develop and implement test environments, to perform conformance testing and to test algorithms against disorderly trading

conditions. The costs incurred by trading venues in satisfying their regulatory obligations should be borne by the trading venues.

Additionally with respect to ESMA's proposed testing framework, while we agree it is good practice and generally reflects market practice to keep the production environments on separate computers from other environments, particularly the "test" environment, we believe ESMA's wording is not ideal. Focusing on systems "critical to the separate and independent functioning" is likely to be open to interpretation. We would suggest shortening this requirement to: "An investment firm shall ensure a clear segregation between its production environment and environments for testing and development."

Finally, we have proposed to delete the requirement for annual stress testing from the list of minimum requirements for investment firms. Stress testing is a type of non-functional testing that confirms a system operates in an acceptable manner during periods of atypical amounts of external inputs and internal events. Typically stress testing is accomplished by subjecting the system to atypical loads over varying periods of time. We believe this type of testing can be useful to some trading firms, and some firms will undertake this type of testing, but it would be disproportionate to apply as a minimum standard across all investment firms. This type of testing is not critical and is more appropriate in the context of trading venues that have structural capacity requirements.

PROPOSED AMENDMENTS TO RTS 13 SECTION 1 (ARTICLES 8-15):

Section 1
Testing of algorithms and systems and change management

Article 8
General

An investment firm shall ensure **a clear segregation between its production environment and environments for testing and development** ~~that software, hardware and network infrastructure which is critical to the separate and independent functioning of the production and testing environments is kept segregated at all times~~.

[**Note: there are no definitions for 'trading system,' 'algorithm,' 'strategy,' or 'production environment' in the draft RTS, such that the scope and application of Chapter III provisions remain unclear.**]

Article 9
Conformance testing

1. An investment firm shall pass conformance testing:

(a) with the trading venue where it is a direct member or participant; and

(b) with its DEA provider where the investment firms accesses the trading venue through direct electronic access.

2. Such conformance testing shall take place when implementing a new access to a trading venue's system or when there is a change in the trading venue's direct electronic access

functionality. Investment firms shall be required to determine when they must re-certify due to a change within their system or substantial hardware changes. **[Note: 'system' is not defined in the draft RTS; depending on how this is defined, we would suggest deleting "or substantial hardware changes," as hardware is not highly relevant for conformance testing purposes.]**

Article 10

Initial testing

1. An investment firm shall, prior to the initial deployment or **substantial** update of a trading system, algorithm or strategy, make use of clearly delineated development and testing methodologies. These methodologies should address process design and execution, division of responsibilities, allocation of sufficient resources, escalation procedures, and sign-off by a responsible party within the investment firm.

2. The testing methodologies for algorithms and trading strategies~~,~~ shall include performance simulations or back testing and, for members or participants of a trading venue, non-live testing within a ~~trading venue~~ testing environment. These methodologies shall ensure that:

(a) the operation of the trading system, algorithm or strategy is compatible with the investment firm's regulatory obligations as well as the rules of the trading venues they access;

(b) embedded compliance and risk management controls work as intended, including generating error reports ~~automatically~~; and

(c) the trading system, algorithm or strategy does not contribute to disorderly trading~~, and can continue to work effectively in stressed market conditions~~. **[Note: operating in 'stressed market conditions' is not a regulatory obligation for all investment firms.]**

3. Investment firms shall adapt algorithm tests, including non-live tests within ~~the trading venue~~ testing environments**,** to the strategy **for which** the firm will use the algorithm ~~for~~ including **by taking into account the** markets to which it will send orders and the structure of **those** markets. Investment firms shall undertake further testing if there are substantial changes to the venue in which the system, algorithm or strategy is to be used.

4. Investment firms shall also keep records of any material changes made to their proprietary software, allowing them to accurately determine:

(a) when a change was made;

(b) who made the change;

(c) who approved the change; and,

(d) the nature of the change. [Note: The FIA Associations recommend inserting this section from Article 15, as it deals with "material changes" and therefore is more appropriate to initial testing rather than "ad hoc" change management.]

Article 11

Testing within a non-live environment

1. Members or participants of a trading venue and an investment firms accessing the trading venue through sponsored access shall test their trading strategies and algorithms in non-live ~~trading venue's~~ testing environments to prevent disorderly trading.

2. Investment firms that are not accessing a trading venue as a member or participant, but through direct market access service, shall make use of such non-live ~~trading venue~~ testing environments where this is appropriate to the nature, scale, and complexity of their business and the risks that their trading algorithms or systems may pose to the orderly trading on the relevant trading venue.

3. When testing their trading strategies, algorithms and systems in a non-live ~~trading venue~~ testing environment, the investment firm shall retain responsibility at all times for assessing the testing results and for making the required changes to the relevant algorithm, trading strategy or system as appropriate.

Article 12

Controlled deployment of algorithms

1. Investment firms shall deploy new trading algorithms, pre-existing algorithms that were successfully deployed on other trading venues, and material changes to previous architecture, in a live environment in a controlled and cautious fashion by setting limits on the deployment.

2. **During this deployment, the investment firm shall set reasonable** ~~**L**~~**limits** ~~shall be placed~~ on the number of financial instruments being traded, the price, value and number of orders, the ~~strategy~~ positions and the number of markets to which orders are sent.

Article 13

~~**Annual stress testing**~~

~~An investment firm shall test their systems, procedures and controls at least on an annual basis to ensure they are capable of withstanding significant and extraordinary market pressures or external events. Such on-going tests should be appropriate to the nature of the trading activity that the investment firm carries out, and shall at least consist of:~~

- ~~(a) initiating, running and stopping a large number of algorithms in parallel, and at least as many algorithms as the firm used on its most active day of trading over the previous 6 month period;~~

- ~~(b) running high messaging volume tests using at least twice the highest volume of messaging by the firm over the previous 6 month period;~~

- ~~(c) running high trade volume tests using at least twice the highest volume of trading by the firm over the previous 6 month period ; and,~~

~~(d) performing penetration tests and vulnerability tests to safeguard their systems against cyber-attacks.~~ **[Note: the FIA Associations consider annual stress testing to be a highly artificial test within the framework for investment firms that do not otherwise have capacity requirements (it may be more appropriate in the context of trading venues analysing system capacity). Provided the rest of the provisions in this RTS are followed, investment firms' trading systems will be functioning on a daily basis in a risk-controlled manner that does not contribute to disorderly trading. Therefore we propose to delete this step from the minimum requirements for investment firms.]**

Article 14

Annual review and validation of systems

1. An investment firm shall run an annual validation process whereby it shall review and evaluate its trading systems and trading algorithms, ~~and~~ the associated governance, accountability and sign-off framework and ~~associated~~ **relevant** ~~business continuity~~ **disaster recovery** arrangements.

2. The risk control function shall ~~lead~~ **be responsible for** the elaboration of the validation report and shall include staff that have relevant technical knowledge. Compliance functions shall be made aware of the results of these validation reports. The validation report ~~and the operational setup stemming from it~~ must be **periodically assessed** ~~audited~~ by the firm's internal audit function or by an independent third party audit.

3. The validation report and supporting documents, approved by the investment firm's senior management, will be available to the relevant national competent authority upon request.

4. In this validation process, investment firms shall assess their compliance with Article 17 of Directive 2014/65/EU on markets in financial instruments taking into account the nature, scale and complexity of their business. ~~Accordingly, they shall establish and maintain more stringent organisational requirements where appropriate.~~

5. In undertaking this self-assessment, investment firms shall at least take into account the elements provided in Annex I.

6. Investment firms shall act on the basis of these review processes and validation reports to remedy deficiencies identified. ~~The review process, and validation reports, shall be produced independently and assessed through internal audits with the involvement of any other department whose responsible person is appointed and replaced by senior management or by outsourcing it to third parties. Reviews of trading strategy performance shall, in equal measure, include an assessment of the impact on market integrity and resilience as well as on profit and loss resulting from the deployment of the strategy~~.

Article 15

"Ad hoc" change management

1. Any "ad hoc" changes to the production environment shall be subject to review ~~and sign-off~~ **[Note: "Ad hoc" changes, such as bug fixes, should not require additional sign off, as the**

material aspects of the software have already been tested.] by ~~senior management~~**appropriately qualified personnel [Note: minor changes should not require senior management involvement]** within the investment firm. The depth of the review shall be appropriate to the magnitude of the proposed change. ~~This review shall also establish whether further testing is needed and what type of testing shall be carried out~~. **[Note: The preceding sentence regarding "depth of review" implies an examination of whether change is material and would require additional testing.]**

2. Investment firms shall establish procedures for communicating requirements and **"ad hoc"** changes in the functionality of their systems. ~~Investment firms shall also keep records of any material changes made to their proprietary software, allowing them to accurately determine:~~

~~(a) when a change was made;~~

~~(b) who made the change;~~

~~(c) who approved the change; and,~~

~~(d) the nature of the change.~~ **[Note: The FIA Associations recommend moving this text to Article 10, as it deals with "material" rather than "ad hoc" changes.]**

<ESMA_QUESTION_CP_MIFID_94>

Q95. Do you have any further suggestions or comments on the pre-trade and post-trade controls as proposed above?

<ESMA_QUESTION_CP_MIFID_95>

Investment firms themselves have the most experience, and the greatest commercial interest, in developing and operating sophisticated and effective risk management. To maximize the effectiveness of a suite of risk controls, their designs should be tailored to each individual firm, taking into consideration the performance of their systems, the unique needs of their markets and instruments, and the nuances associated with introducing new functionality to their systems. Any risk control that is overly prescriptive may fail to take into account the unique characteristics of the diverse market participants, exchanges, trading strategies, and instruments that exist today, thus adding to rather than reducing risk. Further, prescriptive requirements may quickly become obsolete as markets, technology, and trading strategies evolve.

The FIA Associations are of the general view that the pre-trade risk controls proposed by ESMA are appropriate. However, we strongly believe that solutions that are straightforward to implement (price collars, volume controls, repeated / 'hanging' order throttle) will have a much larger beneficial impact than very complicated controls (such as market impact assessment and checking against resting orders in the order book). We have included below what we consider to be appropriate amendments to Article 21 of the draft RTS.

PROPOSED AMENDMENTS TO RTS 13 ARTICLE 21:

Article 21

Pre-trade controls on order entry and post-trade controls

1. Investment firms shall have appropriate pre-trade controls on order entry, which shall be reinforced by appropriate, real time**, or as near to real time as is practical** post-trade controls. **[Note: 'real-time' is not a clear concept in the context of post-trade timelines.]**

2. Investment firms' ~~order management~~ **trading** systems **[Note: 'order management system' is an undefined term not used elsewhere in this RTS]** should prevent orders from being sent to trading venues that are outside of pre-determined parameters covering price and volume, and should have controls in place to prevent unintentional submission and repetition of orders.

3. Investment firms shall establish and enforce appropriately calibrated pre-trade risk limits that are appropriate for the investment firm's **nature, scale and complexity (including** capital base, clearing arrangements, trading style, risk tolerance and experience**)**~~, which includes, but is not limited to, variables such as length of time since being established and its reliance on third party vendors~~.**[Note: not relevant]**

4. The pre-trade controls as referred to in paragraph ~~(~~1~~)~~ shall apply to all instrument types, and shall include as appropriate ~~to~~ the specific trading strategy and product:

(a) Price collars which automatically block or cancel orders that do not meet set price parameters, differentiated as necessary for different financial instruments~~, both on an order-by-order basis and over a specified period of time~~; **[Note: this is not necessary for a price collar]**

~~(b) Maximum order value for shares and equity-like instruments which prevent orders with uncommonly large order values from entering order books. Limits may should be set in notional value with the ability to be set per product~~; **[Note: a value check is price (already checked in (a)) times volume (already checked in (c)), so this check is not needed and would unnecessarily slow systems down.]**

(c) Maximum order volume which prevent orders with an uncommonly large order size from entering the order books. Limits shall be set in shares or lots;

~~(d) Repeated automated execution throttles which control the number of times a strategy was already applied. If a configurable number of repeated executions was applied, the system shall be disabled until a human re-enables it~~; **[Note: this text is highly unclear; if ESMA intends this as a check on repeated order submissions (hanging orders), the outbound message rates check and/or maximum messages limit below will capture this anyway; therefore it is not necessary.]**

(d) ~~(e)~~ Outbound message rates ~~on a strategy specific basis~~ **[Note: it may not be optimal risk management to monitor on a strategy basis; some trading venues monitor on a per session basis. Firms should be able to choose the proper level of aggregation.]** , which monitor the number of order messages their trading systems send to a trading venue in a given period of time; and,

(e) ~~(f)~~ Maximum messages limit which prevent sending an excessive number of messages to order books ~~and prevent~~ **that jeopardise~~ing~~** the integrity of the trading system.

5. The post-trade controls as referred to in paragraph ~~(~~1~~)~~ shall include as a minimum and as appropriate to the specific trading strategy and product the maximum long and short positions

and overall strategy for derivatives products, which restrict trading beyond a specified position threshold, with limits to be set in units appropriate to the asset class and product type.

6. ~~Investment firms shall be able to automatically block or cancel orders from a trader if they are aware that a trader does not have permission to trade a particular financial instrument~~. Investment firms shall be able to automatically block or cancel orders where they risk compromising the firm's own risk thresholds. Controls shall be applied, where appropriate, on exposures to individual clients, financial instruments, traders, trading desks or the investment firm as a whole. **[Note: struck text is duplicative of the rest of the paragraph.]**

7. Investment firms shall have procedures and arrangements for dealing with orders which have been automatically blocked by the investment firm's pre-trade controls but which the firm nevertheless wishes to submit. Such procedures and arrangements shall be on a temporary and exceptional basis.

8. Where the pre-trade controls are overridden in relation to a specific trade, this shall only occur with the full knowledge and an active approval of relevant staff responsible **for the risk control function**~~in risk management~~.

9. Investment firms shall ~~continuously~~ **[Note: duplicative of 'real time']** monitor on a real time**, or as near to real time as is practical,** basis the post-trade controls it has in place. In cases where a post-trade control is triggered, the firm shall undertake appropriate action, including but not limited to, adjusting or shutting down the relevant trading algorithm or trading system.

FURTHER AMENDMENTS TO ARTICLES 16 & 17 THAT BEAR ON RISK CONTROLS:

Article 16

Real-time monitoring

1. Investment firms shall, during the hours they are sending orders to trading venues, monitor in real time**, or as near to real time as is practical,** all trading activity that takes place through their systems, including that of its clients, for signs of disorderly trading, including from a cross-market, cross-asset class, or cross-product perspective, in cases where the firm engages in such activities. This monitoring shall be conducted by staff who understand the firm's trading flow and who have the training, experience and tools that enable them to monitor and control the trading systems and troubleshoot and respond to operational and regulatory issues in a timely manner. ~~These staff members shall have the authority to take remedial action when necessary, and shall be accessible to the firm's competent authority, and to the trading venues on which the firm is active, as well as, where applicable, to relevant staff at its DEA provider, clearing member, or central counterparty (CCP).~~ **[Note: It is reasonable that staff may be compelled to provide info to a NCA or other statutory body but not to private third parties.]**

2. In addition to monitoring by the actual trader in charge of the algorithm, such monitoring shall be undertaken by one or more ~~independent~~ risk control functions within the firm. **[Note: trading flow should be monitored by a second pair of eyes; however, requiring an 'independent' risk control function potentially implies a stand-alone risk control function, which would disproportionate for some firms.]**

3. Investment firms shall maintain real-time and accurate trade and account information which is complete, accurate and consistent, and they shall reconcile as soon as practicable~~, and in real time where it is possible,~~ their own electronic trading logs with records regarding their current ~~outstanding orders and~~ **[Note: this requirement may provide more noise than signal for firms]** risk exposures (drop copies) provided by the trading venue to which they send orders, by their broker or DEA provider, by their clearing member or CCP, by their data providers, or by other relevant business partners. An investment firm shall have the capability, especially in the case of intra-day trade of derivatives, to calculate the outstanding exposure of the traders and clients in real time**, or as close to real time as practical,** at appropriate levels of aggregation.

4. The monitoring systems at investment firms shall have real-time**, or as near to real-time as practical,** alerts that assist staff in identifying which **trading system** ~~algorithm~~ is not behaving as expected~~ and when is that taking place~~. When alerts are made, the investment firm shall have a process in place to take prompt remedial action including, as necessary, an orderly withdrawal from the market. ~~The monitoring systems shall also provide alerts in relation to algorithms and DEA orders triggering circuit breakers implemented by the trading venue.~~

Article 17
Kill functionality

1. Investment firms shall have the ability, as an emergency measure, to immediately cancel all of the firm's outstanding orders at all trading venues to which the firm is connected by means of a kill functionality.

2. Additionally, the investment firm shall separately have a capability to cancel outstanding orders at individual trading venues, or originating from individual traders, trading desks, or, where applicable, clients**, as appropriate**. ~~This implies that the investment firm shall be in the position to know which algorithms correspond to the traders and, if applicable, the clients~~. **[Note: this capability is implicit in the first sentence.]**

<ESMA_QUESTION_CP_MIFID_95>

Q96. In particular, do you agree with including "market impact assessment" as a pre-trade control that investment firms should have in place?

<ESMA_QUESTION_CP_MIFID_96>
The FIA Associations do not agree that the "market impact assessment" envisaged by ESMA is a relevant, effective pre-trade control. Aside from technical issues in implementing this control, we believe any such assessment would be highly subjective and theoretical. We believe this control is more effectively addressed by the existing pre-trade controls "maximum order size" and "price collar" already prescribed within this RTS. Furthermore, we believe that it is more appropriate for investment firms and supervisory authorities to monitor for disorderly conduct or abusive market orders within the context of existing market abuse regulations as part of post trade monitoring.
<ESMA_QUESTION_CP_MIFID_96>

Q97. Do you agree with the proposal regarding monitoring for the prevention and identification of potential market abuse?

<ESMA_QUESTION_CP_MIFID_97>
As a general comment, the FIA Associations strongly believe an investment firm's market abuse obligations are more properly addressed in Regulation (EU) No. 596/2014 on market abuse

("MAR"); we would advise ESMA against trying to replicate them here, as that risks confusion, interpretive slippage, and may potentially expand the scope of obligations beyond what is required in the MAR legislation.

On a specific note, we repeat our concerns regarding the requirement to control for market abuse on a *cross-market, cross-asset class and cross-product basis*. We strongly believe simpler controls that are easier to implement are more effective; we believe most, if not all, instances of market abuse will be flagged by monitoring *single* markets and *single* products but on a *simultaneous* basis. Any indication of abusive trading would then be cross-checked against other relevant markets, the asset class and other relevant products but during the *investigation* phase, not during the (automated) *monitoring* phase, effectively rendering the same level of protection but in a manner that is much more practical to implement.

We have proposed amendments accordingly below.

PROPOSED AMENDMENTS TO RTS 13, ARTICLES 18 & 19:

Article 18

Monitoring for the prevention and identification of potential market abuse

1. An investment firm shall monitor all trading activity that takes place through its **trading** systems, including that of its clients, for signs of potential market abuse. Investment firms shall implement alert systems to flag behaviour ~~likely to give~~ **giving** rise to suspicions of market abuse **as specified in Regulation (EU) No. 596/2014 on market abuse** ~~and in particular market manipulation, including activities on a cross-market, cross-asset class, or cross-product basis. Monitoring on a cross-market, cross-asset class and on cross-product basis should be undertaken where practicable in cases where the firm engages in such activities~~. **[Note: it is not appropriate to provide an exhaustive list here. An investment firm's market abuse obligations are best defined within MAR.]**

2. ~~Such alert systems shall be in place for all orders transmitted, including orders that are executed, modified or cancelled. To this end, investment firms shall have in place adequate, sufficiently scalable systems, including having automated alert systems in relation to at least the indicators of manipulative behaviour relating to false or misleading signals and to price securing as specified by Annex 1.A of Regulation (EU) No. 596/2014 on market abuse[16] and, where appropriate given the nature, scale and complexity of the firm's trading activity, visualisation tools~~. **[Note: An investment firm's market abuse obligations are best defined within MAR; therefore, the paragraph above is sufficient.]**

3. The investment firm's monitoring system shall be **adequate given the nature, scale and complexity of the business**~~, and shall be adaptable to changes in the firm's regulatory obligations and its trading behaviour, including its own trading strategy or that of its clients, the type and volume of instruments traded, the size and complexity of its order flow, and the markets accessed~~. The monitoring system shall be subject to ~~regular~~ review at least once a year, or more frequently if necessary in order to assess whether the monitoring system itself and the

parameters and filters that it employs are still adequate to the firm's trading behaviour and regulatory obligations.

4. Using a sufficiently detailed level of time granularity, the monitoring system shall be able to generate operable alerts at the beginning of the next trading day or, only in cases where manual processes are involved, at the end of the next trading day. The monitoring system shall allow for setting or adjusting the scenario and filter parameters in order to minimize false positive and false negative results. ~~In order to ensure adequate follow-up to alerts, the monitoring system shall be used in parallel with a workflow creation and management system.~~

5. Staff responsible for monitoring the firm's trading activities for the purposes of this Article shall report any trading activity which is ~~potentially~~ not compliant with their firm's policies and procedures or with the firm's regulatory obligations to the individual(s) responsible for such compliance.

6. Investment firms shall have arrangements to identify orders and transactions that require a Suspicious Transaction and Order Report to competent authorities in relation to market abuse **as specified in Regulation (EU) No. 596/2014 on market abuse** ~~(in particular market manipulation) and to submit these reports without delay. If initial enquiries are undertaken, a report shall be made as soon as possible if the enquiries fail to generate a satisfactory explanation for the observed behaviour~~. **[Note: An investment firm's market abuse obligations are best defined within MAR.]**

7. An investment firm shall maintain accurate, complete, and consistent trade and account information by reconciling their own electronic trading logs with records provided by their brokers, clearing members, CCP, data providers, or other relevant business partners**, as applicable and as appropriate to the nature, scale and complexity of the business,** as soon as practicable.

8. ~~If an investment firm uses DEA, it shall be able to report to its DEA provider the name of the client and/or trader who is responsible for the order~~. **[Note: this is a requirement of the DEA provider that can be governed by contract with its clients.]**

Article 19

Accessibility and competence of monitoring staff

1. An investment firm shall ensure that the staff involved in supporting electronic trading operations, including back and middle office staff, have **sufficient capacity, knowledge and experience to fulfil their functions** ~~the necessary authorisations with the relevant trading venues, brokers, DEA providers, clearing members, CCPs, data providers, independent software vendors, and other relevant business partners to provide the appropriate level of support~~. **[Note: The investment firm is responsible for the competence of its staff. Very few positions require external approvals as indicated here: (i) NCAs apply the pre-approved control regime, and (ii) certain venues require a "registered" trader. The relationship between an investment firm and CCPs, data providers, GCMs etc. should be governed by contract or service level agreements.]**

2. Investment firms shall have procedures in place to ensure ~~accessibility to~~ **that** its competent authority, the relevant trading venues and, where applicable, DEA providers **have reasonable access to monitoring staff**. Communication channels shall be identified and tested **periodically** with the aim of ensuring that in an emergency, the adequate staff members with the adequate

level of authority may reach each other in a timely fashion in order to ensure a fair and orderly market. In addition, an out-of-trading hours contact procedure shall also be put in place.

<ESMA_QUESTION_CP_MIFID_97>

Q98. Do you have any comments on Organisational Requirements for Investment Firms as set out above?

<ESMA_QUESTION_CP_MIFID_98>

ARTICLE 24: First, in the Consultation Paper, ESMA states "the DEA provider shall at least be aware of the types of strategies pursued by the potential DEA user…." The FIA Associations believe that the proposed language in Article 24(d) and Article 24(i) is duplicative and that it is the DEA client's 'behaviour' and 'trading pattern', which are important for a DEA provider to understand. A 'strategy' per se would give the DEA provider no real insight into the systemic and other risks posed by a DEA client. The FIA Associations propose amending these Articles in light of the above.

Moreover, the FIA Associations are conscious also that any attempt by a DEA provider to review historical trading patterns or behaviour of a client are difficult from a commercial perspective, as they could be seen to be an attempt to solicit disclosure of client's intellectual property. There are, however, certain criteria that a DEA provider would assess as part of its prospective client assessment, and these have been included in Article 24 (h). Finally, the FIA Associations feel that Articles 24(h) and 24(j) are duplicative in some respects, so has proposed combining the two.

These amendments are set out below:

PROPOSED AMENDMENTS RTS 13 ARTICLE 24:

Article 24
Due diligence by DEA providers on prospective DEA clients

Investment firms offering DEA shall conduct due diligence on their prospective DEA clients, as appropriate to the risks posed by the nature of these clients, the scale and complexity of their prospective trading activities and the service being provided. Such a process shall include an assessment of the level of expected trading and order volume and the nature of connectivity to the relevant trading venues. At a minimum, the process shall cover such matters as:

(a) **Undertaking appropriate client due** diligence specified **in compliance with relevant** ~~the~~ know-your-client, ~~and~~ anti-money laundering **and combating terrorist financing** requirements;

(b) ~~The~~ **Material** governance and **control function arrangements** ~~ownership structure~~;

(c) Whether sponsored access or direct market access shall be provided;

~~(d) Overview of the types of strategies to be undertaken by the DEA user;~~

(d) ~~(e)~~ Access controls over order entry. Where the DEA provider allows clients to use third-party trading software for accessing trading venues it shall ensure that the pre-trade

controls contained in this trading software are at least equivalent to the pre-trade controls set out in this Regulation;

(e) ~~(f)~~ The operational set-up and the systems and controls of the DEA client;

(f) ~~(g)~~ The allocation of responsibility for dealing with actions and errors;

(g) ~~(h)~~ The financial standing of the DEA client **and its ability to meet its financial obligations to the firm**;

(h) ~~(i) The historical trading pattern and behaviour of the DEA client~~ **The expected trading pattern and behavior of the DEA client, including criteria such as frequency of order submission, and volume, strategies and products traded; and**

~~(j) The ability of the client to meet their financial obligations to the firm; and,~~ **[Note: included in (g) as it covers same point regarding financial standing of client]**

(i) ~~(k)~~ If sub-delegation is to be permitted, the DEA provider shall ensure that its DEA client has a due diligence framework in place which is at least equivalent to their own.

ARTICLE 25: While the FIA Associations understand the intent and principle of Article 25, the scope and extent of the details are unclear. The FIA Associations have proposed amending Article 25 to clarify a DEA provider's on-going due diligence requirements to try to ensure that firms understand the policies, processes and procedures they must have in place. In addition, FIA Associations believe that DEA providers should be able to fulfill their obligations under Article 25 by relying on the self-assessments prepared by applicable DEA clients under Article 14. This will reduce the duplicative compliance obligations of both DEA providers and DEA clients. These amendments are set out below.

PROPOSED AMENDMENTS TO RTS 13 ARTICLE 25:

Article 25
On-going review of DEA clients

Investment firms acting as DEA providers shall review their due diligence assessment processes on at least an annual basis and shall carry out annual risk-based reassessment of the adequacy of their clients' systems and controls, in particular taking into account **material** changes to the scale, nature or complexity of their trading activities or strategies, ~~or changes to their~~ **senior and managerial** staffing, ownership structure, trading or bank account, regulatory status, or financial position. **DEA providers shall determine whether there has been a material change in the risk profiles of their DEA clients and their businesses on the basis of information available from public sources or from dealings with their DEA clients during the previous 12 months. In the event that no material changes in risk profile are identified, the DEA provider shall make a record of that finding. In the event that material changes in risk profile are identified, the DEA provider may undertake additional due diligence on the DEA client (using the criteria set out in Article 24 of this Regulation) or undertake such other process as the DEA provider shall deem fit in order to assess the adequacy of its DEA clients' systems and controls.**

Where appropriate, DEA providers may satisfy this obligation by relying upon extracts of the self-assessment prepared by DEA clients pursuant to Article 14 of this RTS if so provided by the relevant DEA client.

ARTICLE 26: The FIA Associations believe it would be helpful to repeat the pre- and post-trade controls set out in Article 21 in Article 26 (since Article 21 does not refer specifically to DEA providers or clients). The pre-and post-trade controls have been amended as per Article 21.

Regarding Article 26.1, the FIA Associations believe that pre-trade credit controls are neither appropriate nor necessary for exchange-traded derivatives. We would refer ESMA to the FIA Associations response to RTS 37, which sets out our position regarding the application of pre-execution limit checks in the exchange traded derivative markets.

In respect of the trade control in Article 21.4 (d), the FIA Associations believe that DEA providers cannot apply such "repeated automated execution throttles which control the number of times a strategy was already applied" as such functionality sits within the algorithm itself, and therefore the DEA provider would not be able to exercise the necessary control.

We have proposed various amendments to Article 26(3) to make DEA providers' and clients' obligations clearer.

With regard to Article 26 (4) (reference to "initial pre-trade controls on order submission, as well as the initial credit and risk limits, which the DEA provider applies to the trading activity of their DEA clients"), we believe it is important to distinguish between pre-trade risk controls as outlined in Section 1, which are designed to prevent trading systems from creating market disruptions, and credit controls, which are designed to prevent a credit event and are calculated on a post-trade basis. Risk controls are used to manage trading activity; for example, pre-trade risk controls are used to manage what is acceptable in terms of order size, number of orders, and other controls discussed within this paper. Credit controls, by contrast, are a key feature of how a broker manages its exposure to its customers through the different types of market activity in which they participate, and as such need to be employed on a post-trade basis due to the diversity of information required to accurately calculate exposure where market participants have the ability to use multiple systems and/or multiple brokers to access the market. In such circumstances both automated traders and the broker clearing the trades may use drop copies and clearing system trade feeds on a near real-time basis, and should also maintain this data for historical review.

Similarly, with Article 26(5)(b), the FIA Associations have proposed drafting changes to make it clear that both negative and positive permissions can be set. Both methods achieve the same result.

Our amendments to Article 26 are set out below:

PROPOSED AMENDMENTS TO RTS 13 ARTICLE 26:

Article 26
Systems and controls of DEA providers

1. DEA providers shall monitor intraday on a real-time basis the **~~credit and market~~** risk to which they are exposed as a result of the clients' trading activity so that the DEA provider can adjust the pre-trade controls on orders**~~, credit~~** and risk limits as necessary.

2. DEA providers shall apply pre- and post-trade controls on the order flow of their clients in accordance with Article 21 of this Regulation **(outlined below for clarity):**

(a) Price collars that automatically block or cancel orders that do not meet set price parameters, differentiated as necessary for different financial instruments, ~~both on an order by order basis and over a specified period of time~~;

~~**(b) Maximum order value for shares and equity-like instruments that prevent orders with order values exceeding such maximum from entering order books. Limits may be set in notional value or quantity with the ability to be set per product;**~~

(b) Maximum order volume which prevent orders with an uncommonly large order size from entering the order books. Limits shall be set in shares or lots.

~~**(c) Repeated automated execution throttles that control the number of times a strategy has been executed without human intervention. If a configurable number of executions have repeated without human intervention, the system shall be disabled until a human re-enables it;**~~

~~(e)~~ (c) Outbound message rates ~~on a strategy specific basis~~, which monitor the number of order messages their trading systems send to a trading venue in a given period of time; and,

~~(f)~~ (d) Maximum messages limit that prevent sending an excessive number of messages to order books ~~and prevent~~ that jeopardise~~ing~~ the integrity of the trading system.

DEA clients shall not be able to send an order to a trading venue without the order passing through the pre-trade controls of the DEA provider.

3. The pre- and post-trade controls to be applied by DEA providers shall not be **controlled by**~~those of~~ a DEA client. DEA providers may use its own proprietary pre- and post-trade controls, third-party controls ~~bought in~~ from a vendor, **controls licensed from a client (under the sole control of the DEA provider),** controls provided by an outsourcer, or controls offered by the trading venue. In each of these circumstances the DEA provider shall remain responsible for the effectiveness of those controls and shall ensure that at all time he is solely entitled to set or modify any parameters or limits that apply to these pre- and post-trade controls. DEA providers that allow clients to use third-party controls for accessing trading venues shall determine pre-trade risk limits and ensure that those pre-trade and post-trade controls are at least equivalent to the obligations set out in this article. The DEA provider shall monitor the performance of the pre- and post-trade controls on an on-going basis.

4. The initial pre-trade controls on order submission, as well as the initial credit and risk limits, which the DEA provider applies to the trading activity of their DEA clients shall be based on their

initial due diligence assessment, and periodic review of the client. The controls applied to these clients should be equivalent regardless of whether the type of access provided is direct market access or sponsored access.

5. DEA providers shall have in place the ability to:

(a) Monitor any orders sent to their systems by DEA users;
(b) Automatically block or cancel orders from a DEA client in financial instruments that a DEA client does not have permission to trade. The investment firm must use an internal flagging system to identify and to block single clients or a small group of clients. **Alternatively, the DEA provider can automatically block orders by restricting access to instruments that the DEA client does have permission to trade**;
(c) Automatically block or cancel orders of a DEA client when they breach the DEA provider's risk management thresholds. Controls shall be applied to exposures to individual clients, financial instruments or groups of clients.
(d) Stop order flow transmitted by their DEA users;
(e) Suspend or withdraw DEA services to any clients where the DEA provider is not satisfied that continued access would be consistent with their rules and procedures for fair and orderly trading and market integrity; and
(f) Carry out, whenever DEA provider deems it necessary, a review of the internal risk control systems of a DEA user.

6. DEA providers shall have procedures that monitor **their** ~~the~~ trading systems and support staff in the event of a trading system error. **[Note: to clarify that monitoring is intended to be carried out in respect of the DEA providers' own systems and staff (not DEA users systems and staff).]** The procedures shall aim at evaluating, managing and mitigating market disruption and firm-wide risk, and shall identify the persons to be notified in the event of an error resulting in violations of the risk profile, or potential violations of a trading venue's rules.

7. DEA providers shall at all times have the ability to identify the different clients that submit orders through their systems by assigning unique IDs.

8. DEA providers shall in accordance with Article 25 of Regulation (EU) No 600/2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, keep at the disposal of the competent authority the relevant data relating to the orders submitted by their DEA clients, including modifications and cancellations, the **material** alerts generated by their monitoring systems and the **material** modifications made to the~~ir~~ **DEA provider's** filtering process. **[Note: FIA Associations expect continued innovation in this area with alerting and monitoring capabilities going beyond the regulatory requirements. The unintended consequence of requiring recording of all alerts and filtering could be a strict adherence to the regulation with associated calibration of system triggers which may limit DEA providers' motivation to harness innovative enhancements due to the scale of additional alerts (many being false positives) that could be generated.]**

ARTICLE 28: With regard to Article 28, the FIA Associations believe an unintended consequence of paragraph 2 could be that a general clearing member ("GCM") would lose discretion as to which entities it chose to take on as clients. We feel this would contradict ESMA's stated position

in the Consultation Paper that "*ESMA recognises this potential risk and the importance for firms to maintain commercial flexibility over who they on-board as clients. The proposal outlined in this CP sets minimum criteria which clearing firms should be assessing clients against but does not impose upon them the requirement to disclose the levels of these criteria*". Therefore we have proposed amendments accordingly.

PROPOSED AMENDMENTS TO RTS 13 ARTICLE 28 & 29:

Article 28
Determination of suitable persons

2. Investment firms acting as a clearing firm shall review their clients' on-going performance against the criteria listed above, and any additional criteria that the clearing firm has imposed, on a~~n~~ **~~annual~~ regular** basis. **The clearing firm shall determine the frequency at which it will review the client's performance against these criteria according to the nature, scale and complexity of the client's business**. ~~Such a review~~ **Reviews of applicable criteria should be consistent** ~~shall be non-discriminatory~~**[Note: Requiring a GCM to conduct reviews that are non-discriminatory would limit the GCM's discretion as to whether or not to accept a particular client]**, transparent and objective **where not in conflict with other laws and regulations applicable to the clearing firm or other obligations of the clearing firm**. The binding written agreement between the clearing firm and clients shall include the above criteria, including the frequency at which the clearing firm will review its clients' performance against these criteria and the consequences of clients not complying with them.

Article 29
Position limits and margining

1. Investment firms acting as a clearing firm shall set and communicate appropriate trading/position limits with their clients in order to mitigate and manage their own counterparty, liquidity, **and** operational ~~and any other~~ risks.

2. Investment firms acting as a clearing firm shall monitor their clients' positions against these limits on real-time, **or as near to real time as is practical,** basis and have appropriate pre- and post- trade procedures for managing the risk of breaches.

3. Investment firms acting as a clearing firm shall document such procedures in writing and maintain records of compliance.

<ESMA_QUESTION_CP_MIFID_98>

Q99. Do you have any additional comments or questions that need to be raised with regards to the Consultation Paper?

<ESMA_QUESTION_CP_MIFID_99>

The FIA Associations have two other material concerns regarding organizational requirements set out in draft RTS 13. These are:

4. Governance (Articles 2-6)
5. IT Outsourcing / Procurement (Article 7)

Governance (Articles 2-6)
The FIA Associations strongly believe the provisions on governance in RTS 13 and RTS 14 should be aligned, in particular we believe those requirements should in every case take into account the nature, scale and complexity of the investment firm or trading venue.

IT Outsourcing / Procurement (Article 7):
The draft RTS introduce new obligations with regard to having in place a stricter governance process around any software and hardware when either procured or outsourced and additional clauses in the agreements concluded with the third part providers/vendors on audit rights for firms and NCAs, access to relevant technical documentation, e.g. access to the source code on request or by entering into a code escrow agreement, and confidentiality arrangements.

First, we note the terms "*outsourcing*" and "*procurement*" are undefined in the draft RTS, which means the scope and application of such provisions is unclear to firms.

Second, we strongly disagree with any requirements dictating the content of commercial agreements between investment firms and their vendors, the latter of which are not subject to this Regulation. Investment firms simply do not have the bargaining power to enforce the content ESMA requests without significant cost attached. The FIA Associations believe the responsibility for compliance is and remains with an investment firm to ensure that documentation regarding any procured or outsourced hardware and software allows it to understand the functioning of such hardware/software *sufficiently* in order to satisfy itself that such outsourcing or procurement allows it to remain compliant with its regulatory and other obligations.

We believe the RTS in this regard should instead specify:

- that using IT outsourcing or third party solutions shall not relieve an investment firms of their obligations pursuant to the RTS, and
- Investment firms shall, in their arrangements with their IT providers, ensure that they will take necessary measures to be able to fulfill their obligations pursuant to the RTS.

We have proposed amendments accordingly:

PROPOSED AMENDMENTS TO RTS 13 ARTICLES 2-7:

CHAPTER II
Organisational requirements for investment firms

Article 2
Governance, ~~and~~ general requirements and the proportionality principle

Investment firms shall, within their overall governance and decision making framework, apply a clear and formalised governance process regarding the development, procurement, outsourcing, and monitoring of their algorithmic trading systems and trading algorithms**, taking into account the nature, scale and complexity of their business**. The governance process shall ensure the following:

(a) that commercial, technical and operational risk and compliance issues are considered when making key decisions **regarding the development, procurement, outsourcing, and monitoring of their algorithmic trading systems and trading algorithms**. ~~In particular, it must embed compliance and risk management principles~~; **[Unclear]**

(b) that the firm has clear lines of accountability, including procedures and processes for the sign-off for the development, deployment, subsequent updates of trading algorithms and for the resolution of problems identified through monitoring. This includes having effective procedures and processes for the communication of information within the investment firm, such that relevant issues can be escalated and instructions can be implemented in an efficient and timely manner; and

(c) that the firm ensures an appropriate segregation of trading functions and middle and back office functions and responsibilities in such a way that unauthorised trading activity cannot be concealed.

Article 3

Role of compliance staff in the governance process

1. Compliance staff shall ~~be responsible for providing clarity on~~ **monitor** the investment firm's **compliance with** regulatory obligations and ~~the~~ **internal** policies and procedures to ~~ensure~~**assess** that the use of the trading systems and algorithms complies with the investment firm's obligations, and that any compliance failures are **remediated** ~~detected and corrected~~. **[Note: compliance cannot be expected to 'ensure' compliance, rather to 'assess,' and 'detection' would be a role for risk; 'remediation' is more appropriate for compliance.]** Compliance staff shall have a general understanding of the way in which trading systems and algorithms operate. Compliance staff are not required to have detailed technical knowledge of the firm's trading system or algorithms operation but shall **have direct access to**~~be in continuous contact with~~ persons with such detailed technical knowledge**,** ~~. Investment firms shall also enable compliance staff to have, at all times, direct contact to~~ the persons who may access the kill functionality and ~~to~~ those who are responsible for the trading system or single algorithm.

2. Where an investment firm outsources its compliance function, or elements thereof, to an external compliance consultant, the investment firm shall engage with, and provide information and access to, the external compliance consultant as it would with its own compliance staff. ~~The investment firm shall reach an agreement with such compliance consultants, ensuring that:~~

~~(a) data privacy is guaranteed; and,~~ **[Note: references to data privacy are not appropriate to the scope of this legislation.]**

~~(b) auditing of the compliance function by internal and external auditors or by the firm's NCA is not constrained~~.

Article 4

Staff policies

1. An investment firm shall have procedures and arrangements, including recruitment and training, to determine its requirements regarding staff resources and to employ an adequate number of

staff with the necessary skills to manage their trading systems and trading algorithms. This shall include employing staff who have knowledge of relevant trading systems and algorithms, the monitoring and testing of such systems and algorithms, the trading strategies that the firm deploys through its trading systems and algorithms, and the investment firm's legal and regulatory obligations.

2. An investment firm shall define the mix of skills and maintain procedures to ensure that recruitment and training provide staff with relevant skills. The investment firm shall ensure that, in addition to technical skills, critical functions, such as compliance, shall be represented by staff with an adequate seniority, offering appropriate challenge as necessary within the governance framework.

Article 5

Staff training on order entry

An investment firm shall ensure that staff involved in the process of order entry have adequate training on order entry procedures. ~~These procedures~~**Such training** shall be kept up-to-date **[Note: Formalised processes are inherently too slow to adapt (through amendments and internal approvals) to the constant changes in trading activity and changes introduced by trading venues. Staff training, rather, must remain up-to-date in this regard to reflect the latest trading activities and trading venue conditions.]** so that the investment firm's trading activity does not ~~affect~~ **impair** fair and orderly trading on the trading venues it accesses, and so that it will comply with the requirements imposed by the relevant trading venues and the competent authority. This shall be achieved through at least one of the following: on-the-job training, classroom-based training, online training, written exams or a combination thereof. The training program shall set clear expectations of the competencies to be mastered by staff involved in the process of order entry, notably to ensure that only duly authorised staff may enter orders into the investment firms' systems, and these competencies shall be appropriately evaluated.

Article 6

Staff understanding of market abuse and disorderly trading conditions

1. An investment firm shall provide initial and on-going refresher training on what constitutes market abuse~~, and attempts of market abuse~~, for all staff involved in the process of order entry. The training shall be tailored to the ~~experience levels and~~ responsibilities of the staff it is being delivered to**, taking into account the nature, scale and complexity of their business**. The training program shall set clear expectations of the knowledge level to be mastered by these staff, and this knowledge level shall be appropriately evaluated.

2. An investment firm shall ~~have procedures to~~ ensure that staff exercising the risk management and compliance functions have sufficient knowledge of trading and trading strategies, in addition to regulatory requirements, including relevant Union and national legislation, rules and guidance, and sufficient skill and authority in order to:

(a) follow up information provided by automatic alerts; and,

(b) challenge staff responsible for trading when the trading activity gives rise to suspicions of disorderly trading or market abuse including attempts of market abuse.

Article 7

IT outsourcing and procurement

1. When outsourcing or procuring **[NOTE: these terms are undefined]** any software or hardware which is used in trading activities, an investment firm shall **remain fully responsible for fulfilling** ~~ensure that its third-party provider enables the firm to fulfill~~ its obligations set out in this Regulation~~, including IT security and IT continuity~~. Specifically, the investment firm shall **have adequate arrangements in place with such third-party providers** to ~~ensure~~ **safeguard its compliance with this Regulation by including** an effective governance process around any such outsourcing or procurement, including the monitoring and review of ~~compliance~~ **performance** by the third-party provider. ~~with the Service Level Agreements that the firm has agreed with its provider~~. ~~Additionally~~:

~~In the case of outsourcing, the firm shall ensure that the third-party provider grants audit rights to the firm and the relevant competent authority.~~

In the case of procurement, the investment firm shall adopt appropriate testing and review measures to assess the security and reliability of the procured hardware or software. ~~Additionally, the firm shall ensure that it and the relevant competent authority have the right to assess the development, maintenance, quality assurance and testing procedures of the provider, as well as having access to relevant technical documentation.~~

2. An investment firm shall ensure that documentation regarding any procured or outsourced hardware and software ~~is provided, which~~ **shall** allow~~s~~ the investment firm to:

(a) sufficiently understand ~~its detailed~~ **the** functioning **of such hardware or software**; and

(b) satisfy itself ~~so~~ as to ~~enable the firm~~ **its ability** to comply with its ~~regulatory and other~~ obligations **pursuant to this Regulation**.

<ESMA_QUESTION_CP_MIFID_99>

Q100. Do you have any comments on Organisational Requirements for trading venues as set out above? Is there any element that should be clarified? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_100>

ARTICLE 8: The FIA Associations* believe the content of Article 8, which requires venues to conduct initial and on-going due diligence on prospective and existing member firms on the basis of published standards, is likely to duplicate the requirements imposed by national competent authorities on authorised investment firms. Trading venues should be able to place reliance on a firm's regulated status and only confirm those controls that are specific to the venue. This would not, for example, include an investment firm's disaster recovery arrangements.

In addition, we believe trading venues should be able to apply a risk-based approach with regard to the annual assessments in Article 8.3 when deciding the level of scrutiny that should be applied in respect of each member. Requiring trading venues to duplicate the same approach to assessments for all members each year would be costly, resource-intensive for all parties and unnecessary where a trading venue may have frequent in-depth interaction with certain members throughout the year.

Finally, the FIA Associations favour an industry-led standardisation of the information to be exchanged between trading venues and their members to ensure that costs are minimised when replicating due-diligence requirements across multiple trading platforms. The

* This response is submitted jointly on behalf of the Futures Industry Association ("FIA"), Futures Industry Association Europe ("FIA Europe") and the FIA European Principal Traders Association ("FIA EPTA").

FIA is the leading trade organisation for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearing organisations, our member firms play a critical role in the reduction of systematic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouse for derivatives transactions. FIA's regular members, which act as the majority clearing members of the US exchanges, handle more than 90 percent of the customer funds held for trading on US futures exchanges.

FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPs, vendors, law firms and con-sultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe formed an affiliation with FIA under a new structure – FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

FIA EPTA is affiliated with FIA and is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

standardisation of the forms and layout across the industry would increase efficiency both when completing and assessing the information.

We have set out our proposed amendments to Article 8 below:

AMENDMENTS TO RTS 14 ARTICLE 8 PARAGRAPHS 3 & 5:

Article 8

Due diligence for members or participants of trading venues

3. At least once a year, a trading venue shall ~~assess~~ **conduct a risk-based assessment of** the compliance of its members with the standards in paragraph 1 and check whether its members remain registered as investment firms.

4. A trading venue shall have in place predefined criteria and procedures making reference to the sanctions that the trading venue may impose on a non-compliant member, including suspending access to the trading venue and losing the condition of member.

5. A trading venues shall maintain **(for at least five years)** records of:

a. the documentation setting out the criteria and procedures for the due diligence activity;

b. the due diligence records arising from the yearly assessment; and

c. the list of members that failed the yearly assessment.

SECTION 3 Capacity and monitoring obligations

ARTICLES 12 & 15: Regarding the periodic review of the performance and capacity of the trading systems in Article 15, the FIA Associations fully support the obligation for trading venues to run stress tests. However, we believe that the trading venues themselves are best placed to determine the range of adverse scenarios against which the venue should test. We have set out our proposed amendments below:

PROPOSED AMENDMENTS RTS 14 ARTICLES 12 & 15:

Article 12

Trading venues' capacity

1. Trading venues shall ensure that **they have the necessary controls in place to**

manage a gradual degradation in system performance when the message load on their trading systems increases to twice the historical peak and beyond. This test should be applied only where the doubling of the historical peak in a particular message type is plausible. ~~have sufficient capacity to accommodate at least twice the highest number of messages per second and per value as the maximum recorded on that system in one day (historical peak).~~

[No further amendments Article 12]

Article 15

Periodic review of the performance and capacity of the trading systems

1. Trading venues shall review and evaluate the performance of their trading systems, and associated process for governance, accountability, sign-off and associated business continuity arrangements at least once a year. They shall act on the basis of these reviews and evaluations to promptly remedy any identified deficiencies. As part of the review programme, trading venues shall run stress tests. ~~where the design of adverse scenarios shall contemplate the functioning of the system under:~~

~~(a) the historical peak of messages managed by the system and successive multipliers beyond that level;~~

~~(b) unexpected behaviour of critical constituent elements of the trading system, associated systems and communication lines. In particular, the on-going stress testing should identify how hardware, software and communications respond to potential threats, covering all trading phases, trading segments and type of instruments to identify systems or parts of the system with tolerance or no tolerance to the adverse scenarios;~~

~~(c) random combination of (both stressed or not stressed) and unexpected behaviour of critical constituent elements.~~

2. Trading venues shall **ensure that they** have the **necessary powers under their rules** ~~ability to determine the~~ **require that their** members ~~that should~~ participate in its stress tests. **Trading venues must consider the conflicts in respect of members' and participants' resources, time and ability to manage multiple testing processes simultaneously that may arise through stress testing carried out by a number of trading venues at the same time.** ~~and fine them in case they do not collaborate in it.~~

[No further amendments Article 15]

SECTION 4 ARTICLE 16-19 Business continuity arrangements: The FIA Associations believe these requirements would create significant barriers to entry for start-up venues, and that there should be some scope for considering market-share or volume de minimis thresholds before the full requirements are applied to a trading venue.

Under Article 19, trading venues should be able to cancel orders under a range of circumstances. We believe that this requirement should only apply to 'resting' orders and should not include requests from the CCP – CCPs can reject or invalidate transactions in certain circumstances but they will not cancel orders at a trading venue. This will always be carried out by the trading venue under its own rules.

We have proposed amendments to these articles below:

PROPOSED AMENDMENTS TO RTS 14 ARTICLES 16-19:

Article 16

Business continuity arrangements

1. Trading venues shall be able to demonstrate on an on-going basis that their systems have sufficient stability by having effective business continuity arrangements to address disruptive incidents **including, but not limited to, system failures**.

[No further amendments to Article 16]

Article 17

Business continuity plan

AMENDMENTS ONLY TO PARAGRAPH 3:

3. The business continuity plan shall take into account at least the following adverse scenarios and risks:

(a) destruction or inaccessibility of facilities in which they are allocated to operating units or critical equipment;

(b) unavailability of trading systems;

(c) deliberate **or accidental** breaches of the security of the trading system **or alteration of critical data or documents**;

(d) unavailability **or deliberate acts or omissions** of staff essential to the operation of the trading system **likely to adversely affect the operation of the business of the trading venue**;

(e) disruption of the operation of infrastructure such as electricity and telecommunications;

(f) **consequences of** natural disasters;

(g) ~~alteration~~ **corruption** or loss of critical data and documents.

[No further amendments to Article 17]

Article 18

On-going review of business continuity arrangements and information to competent authorities

INSERT NEW PARAGRAPH 3:

7. **The operation of any testing of the business continuity plan shall not interrupt normal trading activity or cause disorderly trading conditions.**

Article 19

Prevention of disorderly trading conditions

1. Trading venues shall have at least the following arrangements to prevent disorderly trading and breaches of capacity limits:

(a) limits per member on the number of orders sent (throttle limits) per second to prevent flooding of the order book;

(b) mechanisms to manage volatility **in accordance with Article 20 of this Regulation**;

(c) pre- and post-trade controls;

(d) requirements on their members to have pre- and post-trade controls;

2. Trading venues shall be able to:

(a) ~~obtain~~ **request to be provided on an expedited basis with** information from any member/participant or user to monitor compliance with the rules and procedures of the trading venue relating in particular to organisational requirements and trading controls;

(b) suspend the access of a member or a trader's ID to the trading system at the trading venue's own initiative or at the request of that member, a clearing member, the CCP (in the pre-defined cases by the CCP's governing rules) or the competent authority;

(c) cancel **resting** orders at least under the following circumstances:

(i) on request of a member that is technically unable to delete its own orders;

(ii) when the order book is corrupted by erroneous duplicated orders;

(iii) in cases of a suspension initiated either by the market operator or the regulator; and

(iv) ~~**in cases of a request from the CCP in the pre-defined cases of the CCP's governing rules**~~ **(FIA Note: CCPs will reject or invalidate transactions in certain circumstances but they will not cancel orders at**

the trading venue – this would be carried out by the trading venue under their own rules.)

(d) cancel or correct transactions; and

(e) balance order entrance between their different gateways to avoid collapses.

3. Trading venues shall set up and maintain their policies and procedures in respect of:

(a) mechanisms to manage volatility **in accordance with Article 20 of this Regulation**;

(b) pre- and post-trade controls used by the venue and those necessary for their members or participants to access the market including the functioning of the kill functionality;

(c) information requirements to members/participants;

(d) suspension of access;

(e) cancellation policy in relation to orders and transactions including, at least:

(i) cases to invoke the intervention policy which will only include malfunction of the trading venue's mechanisms to manage volatility or the trading system;

(ii) the timing and procedure to follow;

(iii) specific procedures to effectively cancel a transaction (including a reverse trade, transfer position, cash settlement and a price adjustment);

(iv) reporting and transparency obligations;

(v) dispute resolution procedures; and

(vi) measures to minimise erroneous trades;

(vii) throttling arrangements including at least:

(viii) timeframe of throttling for each case;

(ix) equal-treatment policy among market participants and members (unless they are throttled on an individual basis); **and**

~~(x) **penalties that the trading venues shall effectively impose pursuant to their internal rules in cases where inadequate behaviour from one or several member/s has led to throttling; and~~ (FIA Note: trading venues already have rules governing such scenarios and are best placed to decide when enforcement action is required and what the appropriate sanction should be.)**

(xi) measures to be adopted following a throttling event.

[No further amendments Article 19]

ARTICLE 20: The FIA Associations believe trading venues should not be directed to limit volatility generally, unless it jeopardises system integrity. Volatility should not be considered detrimental to the interests of market participants unless it creates disorderly trading conditions. Further, we believe these provisions seem to have been drafted very much from an equities perspective. For example, expecting a trading venue "to be informed where there is a significant price movement in a financial instrument traded on another trading venue"; how should a non-equities trading venue define "same"? Is that the same underlying, the same contract terms, a correlated/related instrument?

We have suggested amendments accordingly:

PROPOSED AMENDMENTS TO RTS 14 ARTICLE 20:

Article 20

Mechanisms to manage volatility

1. Trading venues shall ensure that appropriate mechanisms to **~~automatically~~** halt or constrain trading are operational at all times in all phases of trading (from opening to close of trading) **~~and, to be informed where there is a significant price movement in a financial instrument traded on another trading venue where the same instrument is traded~~** .

[No further amendments to Article 20]

ARTICLES 21 & 22: The FIA Association comments in relation to the pre-trade controls in Article 21 reflect comments made in respect of RTS 13 Article 21 – that the maximum order value control in unnecessary as value is a function of price (covered in (a)) and volume (covered in (c)). It is also stated in Article 21.2 (c) that order submission should be entirely stopped once a limit is breached. We have made some textual amendments to provide for the fact that limits can be applied to, for example, different trading desks of a particular investment firm and so to stop all order flow for the entire firm would unnecessarily disrupt the trading/hedging activity of other parts of the firm.

With regard to Article 22 (Kill functionality), the FIA Associations believe that the circumstances in which such kill functionality is activated should include disconnect and log-out from the trading system. We also believe that access to such functionality should be provided by a trading venue to applicable members in order to permit them to fulfil their own regulatory obligations such as clearing members exercising control over the order flow of the non-clearing exchange members for whom they clear.

Our amendments to Articles 21 & 22 are set out below:

PROPOSED AMENDMENTS TO RTS 14 ARTICLE 21:

Article 21

Pre-trade controls

1. Trading venues shall ensure that their members operate the pre-trade risk limits and controls described in the Regulation on the organisational requirements for investment firms engaged in algorithmic trading. Additionally, trading venues shall operate:

(a) price collars which automatically block or cancel orders that do not meet set price parameters with respect to different financial instruments, both on an order-by-order basis and over a specified period of time**; and**

~~(b) maximum order value (fat-finger notional limits) which prevent orders with uncommonly large order values from entering order books by reference to notional values per financial instrument; and~~

(b) maximum order volume which prevent orders with an uncommonly large order size from entering order books by reference to limits set in shares or lots.

2. The controls mentioned in paragraph 1 shall ensure:
(a) their automated application and monitoring in real-time with the ability to readjust the limits even during the trading session and in all its phases;

(b) order submission **in relation to an affected instrument, trading desk, trading firm, member or client (as appropriate)** is entirely stopped once a limit is breached **and if orders continue to be submitted in breach**; and

(c) there are in place mechanisms to authorise orders above the pre-set limits upon request from member.

3. A trading venue shall act on the basis of fair and non-discriminatory pre-determined criteria to ensure orderly trading in determining the pre-trade controls for its members.

4. Trading venues shall disclose the general framework of pre-trade controls to their members and participants.

Article 22

Kill functionality

Trading venues shall have a manual “kill functionality” that, when activated, disables the ability of a member or participant to trade and cancels all resting orders of that firm **including in circumstances such as ‘cancel on disconnect’ and ‘cancel on log-out’**. **Trading**

venues shall provide members with the necessary access to such "kill functionality" to enable such firms to fulfil their applicable regulatory obligations.

<ESMA_QUESTION_CP_MIFID_100>

Q101. Is there any element in particular that should be clarified with respect to the outsourcing obligations for trading venues?

<ESMA_QUESTION_CP_MIFID_101>

The FIA Associations have no further comments on the outsourcing obligations, in principle. However, the requirement to report the intention to outsource operational functions and the authorisation of the outsourcing of critical operational functions by the NCA will create significant administrative overheads for those authorities as well as trading venues. We encourage ESMA to rethink the intention to introduce such reporting requirements.

<ESMA_QUESTION_CP_MIFID_101>

Q102. Is there any additional element to be addressed with respect to the testing obligations?

<ESMA_QUESTION_CP_MIFID_102>

With respect to testing obligations, the FIA Associations does not believe additional elements need to be addressed; rather, we have the following comments per section on what has been proposed.

Article 10 (Testing the member's capacity to access trading systems): We believe testing on a technical and functional level is appropriate in the context of conformance testing to be completed prior to a member being permitted to join a trading platform and access the market for the first time. However, in ESMA's proposal, trading venues are required to undertake conformance testing including both the technical and functional capabilities set out in paragraph 2 in all three of the following circumstances: (1) before accessing the market for the first time, (2) on their members' new algorithms or (3) before deploying any material changes to the core elements of a pre-existing algorithm. Owing at least in part to lack of clarity around what constitutes a "new algorithm" or changes to a "core element" of a pre-existing algorithm, we believe it is superfluous to re-conformance test such algorithms for existing members using the same functionality. For example, market makers frequently adjust the parameters of their algorithms to adapt to dynamic changes in market infrastructure such as price, liquidity or fees. Parameter changes to a market making algorithm may involve changes to the order submission profile of the member but not necessarily alter any technology or mechanism of order submission. We consider it unnecessary to subject such an algorithm to technical and functional testing anew. Rather, we recommend ESMA clarify that technical and functional capability testing relates to accessing the market for the first time. With respect to existing members' new or changed algorithms, such testing should be at the discretion of the trading venue if appropriate to protect its integrity and the orderliness of trading.

Article 11 (testing member algorithms to avoid disorderly trading conditions): We believe ESMA has proposed unrealistic requirements for trading venues with respect to non-live testing against disorderly trading conditions; therefore, consistent with our response to draft RTS 13, we think this requirement should remain with the investment firms rather than trading venues. ESMA suggests trading venues should be able to design scenarios with functionalities, protocols and structure reproducing live environment conditions including disorderly trading circumstances, and that these scenarios should be as close to market situations as possible. This is tantamount to requiring trading venues to replicate the full production environment, and to be effective, creating scenarios bespoke to each individual trading firm. Any realistic simulation environment would have to include regression testing against multiple date ranges as well as a full scope of market data applicable to the algorithm, and the trading venue would have to ensure the test environment is identical to production in terms of:

- the software version of the matching engine and features available in production;
- the quality and accuracy of information (trade and order book updates) distributed to participants
- administration tools (bulk deletion, setting limits etc.).

Due to these reasons, trading venues do not at present offer full-scale simulation environments; the test environments currently available typically use only a partial data set and include a sub-set of symbols traded on that venue. In other words, trading venues can offer a "sandbox" in which investment firms can play around, but the sandbox is by definition only a sample and not intended to mirror the complete production experience. Requiring trading venues to build such would be enormously costly and time-consuming with very little benefit. Therefore, to the extent non-live testing is mandated by regulation, we consider it more both effective and cost-efficient to place this obligation with the investment firms directly. However, there is nothing to prevent trading venues offering and charging for 'value-add' testing services. Any such 'value-adding' testing services should not be mandatory, however, and market participants should have discretion as to whether to subscribe to them or not.

Furthermore, we believe that a trading venue's testing relating to 'disorderly trading conditions' are already adequately covered by other requirements in this draft RTS. For example, if the trading venue has properly stress-tested its own technological requirements and built and planned for the appropriate infrastructure to ensure its system has sufficient capacity to cope during times of high volume per Section 3 'capacity and monitoring obligations', then the requirements to simulate periods of insufficient capacity for a venue are duplicative. Member algorithms can be tested for times of extreme order submission rates, but we consider this to be covered by Section 2 Article 9 'testing of the trading systems'.

A conformance testing environment should focus on the instrument groups and functionality. It should be sufficient to provide representative instruments from each instrument class. The

full, identical setup of simulation vs. production only increases complexity and cost without additional benefit. This is even more the case in the context of capacity and latency characteristics; hence, stress testing does not make sense and will not reveal any usable information, as it is stress under certain conditions that is key. This can only be tested one-on-one, not in an open simulation environment. It should therefore be left to trading venues to determine which specific scenarios should be included as part of any stress testing process.

We have set out our propose amendments to Section 2 on Testing accordingly:

PROPOSED AMENDMENTS TO RTS 14 SECTION 2 TESTING ARTICLES 9-11:

Section 2
Testing

Article 9

Testing of the trading systems

1. Trading venues shall, prior to deploying a trading system or any **material** update to a trading system, make use of clearly delineated development and testing methodologies which ensure at least that:

(a) The operation of the trading system is compatible with the trading venue's obligations under Directive 2014/65/EU and other relevant Union or national law;

(b) The compliance and risk management controls embedded in the systems work as intended, including generating error reports automatically; and

(c) The trading system can continue to work effectively in case of significant increase of the number of messages managed by the system.

2. Trading venues shall be in a position ~~at all times~~ to demonstrate **upon request from their NCA** that they have taken all reasonable steps **to satisfy their obligations under Article 19 of this Regulation** to avoid that their trading systems contribute to disorderly trading conditions.

Article 10

Testing the member's capacity to access trading systems

1. Trading venues shall pre-determine and require their members to undertake conformance testing **of their trading infrastructure appropriate to the nature, scale and complexity of their business**:

(a) before accessing the market for the first time **and shall encourage participants/members to perform testing in a testing environment;**
(b) before deploying new algorithms ~~or, algorithms used in other trading venues;~~ and
(c) before deploying any material changes to the core elements of a pre-existing algorithm.

2. The conformance testing in paragraph **1 (a)** shall include both technical and functional level testing at least:

(a) In respect of the functional test, the most basic functionalities such as submission, modification or cancellation of an order or an indication of interest and include at least static and market data. ~~**download and all business data flows (such as trading, quoting and trade reporting);**~~

(b) ~~In respect of the technical test, the connectivity (including cancel/don't cancel on disconnect, market data feed loss and throttles), recovery (including cold intra-day starts) and the handling of suspended instruments or stale market data.~~ **In respect of the technical test, the connectivity, recovery and the handling of suspended instruments.**

3. **The conformance testing in relation to paragraph 1 (b) and (c) should include technical and functional level testing that the trading venue considers appropriate to protect its integrity and the orderliness of trading.**

4. Trading venues shall provide a conformance testing environment to its actual or prospective members with the following characteristics:

(a) accessible in equivalent conditions to the rest of the trading venue's testing services;

(b) the list of financial instruments available for testing shall be **a representative subset of the ones** available in the live environment **covering each instrument class**;

(c) availability during general market hours or on a pre-scheduled periodic basis if outside market hours;

(d) supported by knowledgeable staff; and

(e) **a** report**s** with the outcome of the testing should be made available exclusively to the actual or prospective member.

5. Trading venues shall specify phases for the conformance test and their content, provide specific timeframes to complete the test and specify whether the associated cost is charged.

6. Regardless of any additional testing methods that the actual or prospective member may use, trading venues shall require their actual or prospective members to use its testing facilities.

7. Trading venues shall not grant access to members ~~**or algorithms**~~ which are unable to **provide written confirmation that it has passed** ~~pass~~ the conformance testing.

Article 11

Testing the members' algorithms to avoid disorderly trading conditions

1. Trading venues shall require their members to undertake testing of their trading algorithms to avoid creating or contributing to disorderly trading conditions before **members** accessing the market for the first time and before **deploying** ~~the deployment of~~ new algorithms **on the trading venue**, ~~well-functioning algorithms used in other trading venues~~ and material changes to previous **strategies** ~~architecture~~.

~~2. Trading venues shall design a set of appropriate scenarios with functionalities, protocols and structure reproducing live environment conditions including disorderly trading circumstances. The testing environment and the pre-determined scenarios shall be as close to market situations as possible.~~

3. ~~Trading venues shall also provide a self-certification front-end so as to permit unusual scenarios to be simulated where the member can test a selection of scenarios that it considers suitable to its activity~~**.**

4.
~~Regardless of any alternative testing methods that the member or participant may use in addition, trading venues shall require their members or participants to use the testing facilities provided to this end. Trading venues shall ensure that the testing environment and the designed scenarios are as close to market situations as possible.~~

Trading venues shall not grant access to members or participants who did not pass the ~~trading venues'~~ testing to avoid disorderly trading conditions.

<ESMA_QUESTION_CP_MIFID_102>

Q103. In particular, do you agree with the proposals regarding the conditions to provide DEA?

<ESMA_QUESTION_CP_MIFID_103>

Regarding the conditions to provide DEA, the FIA Associations favour an industry-led standardisation of the information to be exchanged between trading venues and their members to ensure that costs are minimised when replicating due diligence requirements across multiple trading platforms. The due diligence workload for trading venues relating to their members is potentially much less onerous than the requirements and due diligence workload for investment firms on their DEA clients, as the investment firm facilitating DEA may have a much greater number of DEA clients to assess when carrying out its due diligence requirements. Therefore, standardisation of the forms and layout across the industry would increase efficiency both when completing and assessing the information.

With regard to the systems and controls that should apply to the provision of DEA, the FIA Associations believe that the specific controls should be left to the trading venue to define. The trading venue will have comprehensive rules governing market conduct, prohibited trading practices, controls to prevent disorderly trading conditions and overall compliance obligations with such rules, so we believe that the level of prescription in Article 23 is unnecessary.

We have set out our relevant amendments to Articles 23 and 24 accordingly:

PROPOSED AMENDMENTS TO RTS 14 ARTICLES 23:

PARAGRAPH 1(d):

1(d) the description of the systems and controls to be established and maintained in order to ensure **(on a best endeavours basis)** that the provision of DEA does not adversely affect compliance with the rules of the trading venue, lead to disorderly trading **conditions** or facilitate conduct that may involve market abuse or attempts of market abuse. The means to ensure the adequacy and effectiveness of the systems and controls should include at least:

i. ~~monitoring requirements including DEA user definition and product definition, recognition of DEA orders submitted by DEA users, control of the overall trading activity carried out by DEA users, monitoring the frequency of DEA orders that have overridden the existing controls and system alerts in terms of price, size and number~~;
details of the minimum set of controls to be implemented by DEA providers in light of the DEA service offering to their clients; and

ii. prior written authorisation policy by the DEA provider in relation to DEA users' sub-delegating the DEA to their own clients.

PARAGRAPH 1(f):

(f) Whether sub-delegation of DEA to third parties is permitted and if so, provisions to ensure that the DEA provider is able to identify the different order flows from beneficiaries of the sub-delegation (DEA users or sub-delegates) which submit orders through its systems. For these purposes, it will not be necessary for the DEA provider to know the identity of the users accessing the trading venue via sub-delegation **or any of the other information required to be reported by investment firms pursuant to Articles 7 or 8 of RTS 32**.

PARAGRAPH 2

2. Trading venues that permit DEA Sponsored Access through their systems shall require the members who provide Sponsored Access to comply with the requirements for DEA providers contained in Article **16 and** 26 of the Regulatory Technical Standards on organisational requirements of investment firms engaged in algorithmic trading **and shall provide appropriate functionality in order to permit such firms to meet these requirements, including, but not limited to, direct "kill functionality" rights and access**. In particular, trading venues shall ensure that such DEA providers are at all times solely entitled to set or modify the parameters or limits that apply to the ~~pre-trade and post-trade controls over the~~ order **and transaction** flow of **their** ~~its~~ clients.

PROPOSED AMENDMENTS TO ARTICLE 24:

Article 24

Systems and controls of DEA providers and trading venues permitting DEA through their systems

1. In addition to the pre-trade controls that members shall have to access a trading venue, trading venues permitting DMA through their systems shall request DEA providers to have the ability (and shall provide the appropriate functionality) to:

(a) monitor any orders sent to their systems by DMA users **or using their log-ins by Sponsored Access users**;

(b) stop orders flow transmitted by their DMA user;

(c) suspend or withdraw DEA services to any clients where DEA provider is not satisfied that continued access would be consistent with the trading venue's rules and procedures for fair and orderly trading and market integrity; and

(d) ~~carry out, wherever the DEA provider deems it necessary, a review of the internal risk control systems of the DEA user~~ **otherwise comply with its obligations under RTS 13**.

2. In addition to the pre-trade controls that trading venues shall have in place, trading venues permitting Sponsored Access through their systems shall:

(e) Request SA providers to have the abilities described under paragraph 1(c) and (d) of this article;

(f) Monitor the orders flow sent to their systems by Sponsored Access users;

(g) ~~Stop orders transmitted by any single Sponsored Access user directly~~. **[FIA Note: this is unnecessary due to "kill functionality" requirements elsewhere]**

4. Trading venues shall cancel the provision of Sponsored Access to those users which have **(to the best knowledge, information and belief of the Sponsored Access provider)** infringed a requirement of Directive 2014/65/EU, Regulation (EU) No 600/2014 and Regulation (EU) No 596/2014 or the trading venue's internal rules.

5. **A trading venue shall be permitted to set controls and standards in respect of all or some of its members reflecting the principles of this Article 24 that are proportionate to the type of member and its business/activity profile.**

<ESMA_QUESTION_CP_MIFID_103>

Q104. Do you agree with the proposed draft RTS? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_104>
The FIA Associations* believe the RTS 15 provisions appropriately reflect the requirements of Article 17.3 of MiFID 2 and the directions to ESMA. However, we have three concerns. These are listed below:

1. Aligning the 30% & 50% presence thresholds
2. Definition of competitive prices
3. Exceptional circumstances relating to extreme volatility

We address points 1 and 3 below in our responses to Questions 105 and 107 respectively.

With regard to point 2, we believe EMSA's proposed definition for 'competitive prices,' meaning "*quotes posted within the average bid-ask spread,*" is unworkable.

Firstly, the concept of 'average' is vague and open to interpretation. Not only must it be calculated intraday, it will also move faster than market makers will be able to adjust.

Secondly, we are greatly concerned that average will be interpreted as "best bid offer" ("BBO"). Market makers cannot quote continuously inside any BBO spread. The most highly paid market making agreements today require only that a market maker meet BBO for a very limited period of time (> 5% of daily trading hours). Furthermore, these are restricted to the most liquid equity instruments. Such requirements would be entirely inappropriate for the vast majority of financial instruments traded on a trading venue. Currently, market practice is to quote within a fixed range of BBO, adjusted for the liquidity of the instrument.

* This response is submitted jointly on behalf of the Futures Industry Association ("FIA"), Futures Industry Association Europe ("FIA Europe") and the FIA European Principal Traders Association ("FIA EPTA").

FIA is the leading trade organisation for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearing organisations, our member firms play a critical role in the reduction of systematic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouse for derivatives transactions. FIA's regular members, which act as the majority clearing members of the US exchanges, handle more than 90 percent of the customer funds held for trading on US futures exchanges.

FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPs, vendors, law firms and con-sultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe formed an affiliation with FIA under a new structure – FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

FIA EPTA is affiliated with FIA and is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

Alternative Approach

The FIA Associations propose to redefine RTS 15 (7) in accordance with ESMA's Short Selling Regulation [EU No 236/2012 on Short Selling and Certain Aspects of Credit Default Swaps] (Short Selling Regulations ("SSR")) guidelines on the market making exemption, which recognise the proportionality principle when defining the market making range. In that context, for liquid instruments ESMA provided that "*competitive prices should be within the maximum bid/offer spreads that are required from market makers/liquidity providers recognized under the rules of the trading venue where they are posted for the concerned instruments*."

This is highly practical as it recognises that trading venues can apply a range that is appropriate to the liquidity of the instrument and sufficient to attract market makers, while imposing a sufficiently ambitious requirement for liquidity provision. This would also be consistent with Article 48 of the MIFID II Level 1 text, which provides for "such a requirement [to be] appropriate to the nature and scale of the trading on that regulated market." Therefore we propose the following alternative definition:

PROPOSED AMENDMENTS TO RTS 15 ARTICLE 1 DEFINITION 7:

(7) 'competitive prices' means quotes posted within the ~~average~~ bid-ask spread**s that are required from market makers recognised under the rules of the trading venue where they are posted for the concerned instruments and where the range is appropriate to the nature and scale of the trading on that regulated market.**

<ESMA_QUESTION_CP_MIFID_104>

Q105. Should an investment firm pursuing a market making strategy for 30% of the daily trading hours during one trading day be subject to the obligation to sign a market making agreement? Please give reasons for your answer.

<ESMA_QUESTION_CP_MIFID_105>

No. The FIA Associations propose that the minimum presence threshold at which an investment firm will be deemed to be pursuing a market making strategy should be symmetric with the minimum presence threshold at which it would be obliged to quote under a market making strategy, both at 50%. There should be a strong correlation between the initial requirement and on-going continuous quoting obligation in order to avoid capturing investment firms that do not intend to operate as a market maker.

Market making is a business model that requires significant product knowledge, risk management expertise, and sophisticated technology to conduct in a prudent manner. There are two potential risks in capturing investment firms that may currently be providing ad hoc liquidity to the market but are not equipped to act as professional market makers: (1) without the experience or capacity to handle a continuous quoting obligation, such investment firms could introduce additional risk to the market and/or contribute to disorderly trading, and (2) many firms will attempt to avoid this consequence by turning off current, passive strategies, which would result in the loss of an important source of ancillary liquidity in European

markets. Trading strategies are configured to trade at a commercially viable level. It is often not economically feasible to 'dial up or down' the percentage at which an investment firm can quote. Thus, investment firms that currently provide liquidity within the 30% to 50% band will be required either to try to raise their presence percentage above 50%, which could be in contravention of prudent risk management practices, or reduce it to below 30%.

The proposed 50% threshold is appropriate because if an investment firm is providing liquidity for a minimum of 50% of the time, it is clear it is a substantial rather than ad hoc activity.

In addition, we recommend that ESMA amend other elements of the market making definition because, as currently drafted, this definition will both over- and under-capture ordering behaviour and not identify true market making strategies. The definition of 'simultaneous' as '*entered into within one second of the other*,' does not reflect practice and is open to gaming and misapplication. We propose to define this in accordance with current trading venue practice, which looks to an investment firm's two-side quotes that exceed the minimum quote size set by the trading venue and are present in the order book at the same time.

Separately, we note that ESMA considers that indirect participants (such as clients of investment firms providing DEA) would be excluded from being considered as a firm pursuing a market making strategy under Article 17(4) of MiFID II. In the same vein, we emphasise the definition of market making strategy should not include any activity occasioned by client facilitation. Where a DEA provider's client pursues a market making strategy as defined in MiFID 2, there should not be a requirement on the DEA provider as the market participant to enter into a market making agreement, if the activity is in fact that of its client.

We have proposed amendments to Articles 1, 2 & 3 accordingly:

AMENDMENTS TO RTS 15: ARTICLES 1, 2 & 3:

CHAPTER I
General provisions

Article 1

Definitions [Note: We would suggest alphabetising definitions for clarity.]

For the purpose of this Regulation:

(1) 'trading venue allowing or enabling algorithmic trading through its systems' means a trading venue where order submission and order matching ~~is~~ **may be** facilitated by electronic means.

(2) 'trading hours' means the duration of continuous auction trading~~, and excludes opening/closing auction sessions~~;

(3) 'normal trading hours' means ~~the duration of continuous auction~~ trading **hours** excluding:

(a) opening/closing**/intra-day** auction sessions;

(b) periods ~~declared to be~~ under stressed market conditions; and

(c) periods ~~declared to be~~ under exceptional market circumstances. **[Note: Stressed market conditions are intended to be declared by the trading venue; exceptional market circumstances may be declared by either the trading venue or the investment firm, to be confirmed subsequently by the trading venue. This is clarified below in the RTS provisions.]**

(4) 'firm quote' means an order ~~or a quote~~ **(whether a bid or an offer) in a sufficiently liquid instrument** that ~~is executable and~~ can be matched against an opposite order or quote under the rules of a trading venue;

(5) 'simultaneous two-way quote' is a **firm** ~~two-way~~ quote where both sides are ~~entered~~ **present** into the order book **at the same time** ~~within one second of one another~~;

[Note: The FIA Associations recommend ESMA not set 'simultaneous' as 'within one second of one another,' as this would enable gaming by participants who could stagger the timing of posted orders by 1.1 second to avoid classification. Current market practice measures 'simultaneous' by the total amount of time a market participant has orders in the book that can be matched. Therefore, we also recommend amending the definition of 'comparable size' to ensure that it looks for minimum quote size. As currently drafted, the elements of this definition will both over- and under-capture ordering behavior and not identify true market making strategies.]

(6) 'comparable size' means that the size of the opposite **sides of the simultaneous two-way** quote~~s~~ posted in the order book **are equal to or bigger than the minimum quote size set by the trading venue and do** ~~does~~ not diverge more than 50% of each other.

(7) 'competitive prices' means quotes posted within the ~~average~~ bid-ask spread**s that are required from market makers recognised under the rules of the trading venue where they are posted for the concerned instruments and where the range is appropriate to the nature and scale of the trading on that regulated market.**

(8) 'stressed market condition' refers to a condition declared by the trading venue where the price discovery process and market liquidity is materially affected by at least one of the following:

(a) ~~Significant change in the number of messages being sent to and received from, the systems of a trading venue;~~ **[Note: We see (a) as a subset of (b) so should either be given as an example or removed entirely.]**

~~(b)~~ Significant short-term changes in terms of market volume **(including a significant change in the number of messages being sent to and received from the systems of a trading venue)**; or

~~(c)~~ **(b)** Significant short term changes in terms of price (i.e. volatility).

~~The said condition includes volatile market conditions or 'fast markets' as defined by the trading venue.~~ [**Note: If ESMA intends to re-define these market conditions, it should do so without regard to previous (undefined) practice.**]

(9) 'disorderly trading conditions' means situations where the maintenance of fair, orderly and transparent execution of trades is compromised by:

(a) a trading systems' performance ~~which is~~ **being** significantly affected by delays and interruptions;

(b) multiple erroneous orders or transactions~~, including cases where orders are not resting for sufficient time to be executed~~; ~~or~~

(c) a trading venue has~~ving~~ insufficient capacity~~.~~**;**

(d) price formation being significantly disrupted (including throttling of orders by the trading venue);

(e) significant short term changes or interruptions in volumes of data sent to or received from the systems of a trading venue;

(f) failure of or interruptions to a trading venue's system of pre- or post-trade risk controls (or any failure of a trading venue's system to perform as set out in [RTS 14]).

(10) 'sufficiently liquid instrument' means [TBD].

CHAPTER II

Requirements for investment firms engaged in algorithmic trading technique pursuing a market making strategy

Article 2

General requirements

[Article 17(3) Directive 2014/65/EU]

1. Investment firms engaged in algorithmic trading and intending to pursue a market making strategy in a trading venue shall ~~communicate their intention to the~~ **notify the trading** venue **thereof**.

2. Investment firms engaged in algorithmic trading and pursuing a market making strategy shall sign a market making agreement ~~following the notification by~~ **with** the trading venue. ~~in that respect, when the trading venue has detected the effective implementation of a market making strategy without prior notification~~.

3. In cases where an investment firm is not willing to ~~engage~~ **sign a market making** ~~in such~~ agreement ~~following the notification by~~ **with** the trading venue, it shall disconnect the strategy identified.

Article 3

Circumstances in which an investment firm is deemed to pursue a market making strategy

(Article 17(4) Directive 2014/65/EU)

1. For the purposes of this Regulation, an investment firm shall be deemed to pursue a market making strategy if it is posting firm, simultaneous two-way quotes of comparable size and competitive prices in at least one financial instrument on a single trading venue for no less than ~~30~~ **50** % of the daily trading hours during one ~~trading day~~ **(calendar) month period**. **[Note: the FIA Associations believe a one day period carries a significant risk of systematic misclassification; a calendar month period is easily implementable for venues, as this is how systems are current set up to monitor for market making performance on a calendar month basis.]**

~~2. Such strategies may include quotes that are not symmetrical around the mid-point of the market bid-ask range for that financial instrument.~~

<ESMA_QUESTION_CP_MIFID_105>

Q106. Should a market maker be obliged to remain present in the market for higher or lower than the proposed 50% of trading hours? Please specify in your response the type of instrument/s to which you refer.

<ESMA_QUESTION_CP_MIFID_106>

The FIA Associations agree with the proposed 50% threshold during "normal trading conditions." Our proposed amendments to Article 4 are set out below:

PROPOSED AMENDMENTS TO RTS 15, ARTICLE 4:

Article 4

Minimum obligations to be specified in the market making agreement

(Article 17(3) Directive 2014/65/EU)

1. The content of the binding written agreement referred to in Article 17(3)(b) of Directive 2014/65/EU shall include, at least:

(a) ~~The organisational requirements for the investment firm in terms of systems and~~

~~controls with respect to their activity under the market making agreement as described below;~~ **[Note: The inclusion of organisational requirements here and in Article 4(2)(b) is contrary to ESMA's analysis at paragraph 30 of section 4.3 of ESMA/2014/1570 concluding that these requirements were duplicative.]**

~~(b)~~ The financial instrument/s covered by the agreement;

(~~c~~**b**) The specific obligations of the investment firm in terms of percentage of trading hours, size of the quotes and spread; ~~and~~

(~~d~~**c**) The incentives provided by the trading venue for the performance of the obligations according to the market making scheme under the normal and stressed market conditions, and in particular when trading is resumed after volatility interruptions**; and**

(d) The notice period for terminating the agreement in the event investment firms wish to cease operating the market making strategy identified. **[Note: the RTS is otherwise unclear about the timing of ceasing to act as a market maker (can that be same day? one month?); therefore it is helpful if market making agreements specify a notice period.]**

2. The agreement shall include at least the following requirements for investment firms:

(a) posting firm, simultaneous two-way quote of comparable size and competitive prices in at least one financial instrument on the trading venue for no less than 50 % of the daily trading hours;

(b) separating the identity of orders and quotes submitted in the performance of the market making agreement from other order flows;

~~(c)~~ maintaining records of orders and transactions relating to these activities so that these records can be distinguished from other trading activities and be made available to the trading venue and the competent authority; and

(~~d~~**c**) implementing procedures to ensure the fulfilment of the requirements under (a) and (b), including having appropriate and effective ~~surveillance,~~ compliance and audit resources to enable relevant monitoring of its market making activity under these requirements. **[Note: surveillance is not appropriate in the context of ensuring compliance with market making performance obligations, as it would imply controlling for market abuse, which is dealt with elsewhere in RTS 13 and MAR 16.2.]**

3. The agreement shall specify that an investment firm engaged in a market making agreement may suspend its market making activity without ~~incurring any penalties from the trading venue, if the trading venue determines the state of its market to be under~~ **consequences in the event of** exceptional circumstances as defined in this Regulation. **[Note: This RTS only considers a 'fine' for failure to comply (in Article 10); 'penalties' is nowhere defined and may imply a regulatory breach. The FIA Associations consider it crucial that a regulatory breach only be deemed to have occurred upon a material or systematic breach of the obligations contained in this RTS, as a regulatory breach may trigger notification requirements to clearing firms and regulators outside the EU and significantly impact a firm's ability to continue business.]**

<ESMA_QUESTION_CP_MIFID_106>

Q107. Do you agree with the proposed circumstances included as "exceptional circumstances"? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_107>

The FIA Associations agree with the introduction of extreme volatility as an exceptional circumstance but consider the draft wording to be too restrictive in that it requires an interruption of trading with respect to all instruments traded on a trading venue. Requiring an interruption to all, rather than one or more instruments, means such circumstances are likely to be extremely rare, which would exclude more localised, but just as serious, extreme volatility events impacting one or more instruments or asset class, but not all instruments.

Furthermore, investment firms are assessed for compliance with market making obligations on a per instrument, per venue basis. Therefore it is inconsistent to require a volatility event across all instruments traded on a venue for an exceptional circumstance to be present. This would be contrary to Article 17(7) of MiFID II, as it would require an investment firm to continue quoting in a situation that may be contrary to its ability to maintain prudent risk management. Instead, the FIA Associations believe that the circumstances of extreme volatility should be assessed at a per instrument level. An investment firm would retain its market making obligations for non-affected instruments.

We have proposed amendments in accordance with our arguments above:

AMENDMENTS TO RTS 15, ARTICLE 5:

Article 5
Exceptional circumstances impeding providing liquidity on a regular and predictable basis
[Article 17(3)(a) and 48(12)(a) Directive 2014/65/EU]

1. A trading venue shall ensure that its market making agreement specifies that in case of exceptional market circumstances as defined below, an investment firm engaged in a market making agreement will not have to adhere to all the obligations stipulated in such an agreement as long as those exceptional circumstances remain.

2. Exceptional circumstances shall only include:

(a) Circumstances of extreme volatility, leading to an interruption of trading with respect to ~~all~~ **one or more** instruments ~~traded on that venue~~ **specific to the market making agreement**;

(b) Political and macroeconomic events**, including** ~~such as~~ acts of war, industrial actions and civil unrest or acts of cyber sabotage;

(c) System and operational matters that imply disorderly trading conditions;

(d) Circumstances which impede the investment firm's ability to maintain prudent risk management practices which are either:

(i) Technological issues including problems with a data feed or other system that is essential in order to be able to carry out a market making strategy;

(ii) Risk management issues, ~~which would encompass problems~~ **including** in relation to capital**,** ~~or~~ clearing **or other issues (such as with a product's underlying) outside an investment firm's control**; and,

(e) For non-equity instruments, when a national competent authority temporarily suspends the pre-trade transparency requirements following a significant decline in liquidity of a particular class of financial instrument in accordance with Article 9(4) of Regulation (EU) No 600/2014.

3. In particular, the exceptional circumstances described in paragraph 2 shall not include any regular or pre-planned information events that may affect the fair value of a financial instrument owing to changes in the perception of market risk **unless such events culminate in exceptional circumstances described above**. Such a circumstance may occur during or outside the trading hours.

4. In assessing the performance of investment firms engaged in a market making agreement, periods affected by an exceptional circumstance shall be taken into account to ensure that non-performance by the investment firms during such times is not penalised.

5. The exceptional circumstances shall be made public by the trading venue as soon as technically possible except in the case of circumstances that impede the investment firm's ability to maintain prudent risk management practice as described **in paragraph 2(d)** above.

6. Trading venues shall ~~validate~~ **confirm the existence of** exceptional circumstances that contradict the investment firm's ability to maintain prudent risk management practice **as described in paragraph 2(d) above**.

7. Trading venues must set out procedures to resume normal trading when the period constituting an exceptional circumstance has concluded. These procedures shall include a guide on the timing of such resumption and shall be made publically available.

8. With the exception of situations mentioned in paragraph (2)(b) above, exceptional circumstances cannot automatically be extended beyond the market close.

<ESMA_QUESTION_CP_MIFID_107>

Q108. Have you any additional proposal to ensure that market making schemes are fair and non-discriminatory? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_108>

The FIA Associations welcome ESMA's proposal on incentivizing quoting during stressed market conditions. However, we believe that Article 8 should be amended to clarify that quoting in stressed market conditions remains at the discretion of the investment firm. In addition, we have proposed clarifying amendments to the provisions on fair and non-discriminatory schemes and the responsibilities of trading venues. Note, trading venues cannot be expected fully to prevent investment firms from operating liquidity provision

strategies in contravention of the requirements of RTS 15; we have made amendments in this regard.

PROPOSED AMENDMENTS TO RTS 15, ARTICLE 8, 9, 10 & 11:

Article 8
Market making scheme

1. Trading venues shall establish a market making scheme which describes:

(a) The specific content of their market making agreements as described above; and

(b) A scheme of incentives for the investment firms subject to the market making agreements that will define:

(i) The minimum parameters to be met in terms of presence, size and spread that shall imply at least posting firm, simultaneous two-way quotes of comparable size and competitive prices in no less than one financial instrument on the trading venue for no less than 50 % of the daily trading hours;

(ii) The parameters that should be met in terms of presence, size and spread to access incentives; and

(iii) The incentives in cases where those parameters have been met. In particular, the market making scheme shall establish:

- Incentives offered for performing a market making strategy during normal trading hours. Trading venues may establish that only the best performers under the market making agreement will access those incentives; and

- Incentives offered in stressed market conditions ~~to compensate~~ for the additional risks taken by investment firms **that accept the obligations of performing during such conditions** ~~engaged in a market making agreement~~.

2. Market making schemes shall specify that an investment firm engaged in a market making agreement may suspend its market making activity without incurring any penalties from the trading venue~~, if the trading venue determines the state of its market to be under~~ **in the event of** exceptional circumstances as defined in this Regulation.

Article 9
Fair and non-discriminatory market making schemes

1. The terms of the market making scheme shall be publicly disclosed on the website of the trading venue.

2. Any proposed changes to the terms of the market making scheme shall be communicated to the existing participants not less than **one month** ~~three months~~ ahead of the proposed effective date.

3. Trading venues shall provide the same incentives, terms and conditions to all members engaged in a market making agreement who perform equally in terms of presence, price and size, according to published, non-discriminatory and objective criteria.

4. Trading venues shall not limit the number of participants in a market making scheme, but may limit the access to the incentives to those members which have met certain parameters either providing a certain degree of quality in the liquidity provided, measured in terms of presence, size and spread, or rewarding only those which have met the requirements above a certain threshold measured in terms of presence, size and spread.

5. The incentives offered under the market making scheme **may be multi-tiered** have to be ~~proportionate~~ **appropriate** to the effective contribution to the liquidity in the trading venue measured in terms of presence, size and spread. In particular, those incentives shall promote the presence of members engaged in market making agreements in case of stressed market conditions.

Article 10

Responsibilities of the trading venue

1. A trading venue shall have in place arrangements in accordance with the nature, scale and complexity of their business to **detect and** identify market making strategies as defined by Article 17(4) of Directive 2014/65/EU pursued by ~~its members~~ **an investment firm, including by taking into account algorithm flags of the relevant orders, and shall require an investment firm that has not notified its intention pursuant to Article 2(1) above, to sign a market making agreement prior to the expiry of the (calendar) month period** in ~~cases where they have not notified in advance their intention to pursue a market making~~ **in which such** strategy **has been identified**.

2. ~~Where it is not practically possible for a trading venue to identify strategies involving more than one venue or more than one financial instrument, it shall have arrangements in place to detect strategies affecting one instrument traded in its venue~~**. [Note: This text is contrary to ESMA's analysis that it is not practically possible for trading venues to identify market making strategies involving more than one venue, and is therefore adds confusion.]**

~~3.~~ Trading venues shall monitor and enforce compliance by investment firms of all requirements specified in this Regulation and the market making agreements. In particular, a trading venue shall:

(a) have the ability to set negative incentives to ensure that firms pursuing a market making strategy shall:

(i) ~~Inform~~ **Notify** the trading venue **prior to implementing** ~~before the implementation of~~ the strategy;

(ii) Sign a market making agreement ~~following the notification by the trading venue where the firm has been detected as pursuing a market making strategy~~;

~~(iii) Prevent those firms from implementing that strategy in cases where the firm rejects signing the market making agreement; and~~ **[Note: trading venues cannot practically prevent firms from providing two-side orders that contribute liquidity in contravention of this RTS and cannot be held responsible for such. The negative incentives, in addition to order-to-transaction ratios, will be sufficient to mitigate the risk that firms disregard these provisions.]**

(b) ~~(iv)~~ ~~E~~ **ensure** that firms engaged in a market making agreement meet the respective requirements laid down in the agreement on a ~~systematic~~ **consistent** basis. In this respect, trading venues shall ensure that non-compliant firms are not only excluded from potential benefits, but also risk a ~~significant~~ fine**;**

(~~b~~**c**) put in place ~~effective~~ measures to verify the effective provision of liquidity on an ongoing basis, and to detect that the obligations under the market making agreements are fulfilled; and,

(~~d~~**d**) keep a detailed record on ~~the measures and~~ penalties adopted, as well as on the monitoring activity carried out on ~~members'~~ **investment firms'** ~~behaviour~~ **compliance** with market making obligations.

4. Trading venues shall publicly disclose on their website:

(a) The terms of the market making scheme;

(b) The names of all members that have signed a market making agreement; and

(c) The financial instruments covered by those agreements.

Article 11

Requirement for trading venues with respect to market making agreements during stressed market conditions

1. Trading venues shall identify and communicate to the members engaged in a market making agreement **in a timely, fair and non-discriminatory manner** the existence of stressed market conditions in ~~their~~ **such** market ~~through readily accessible channels~~.

2. Trading venues shall establish procedures to determine stressed market conditions, and the trading arrangements during such stressed market conditions. These procedures shall be publicly available.

<ESMA_QUESTION_CP_MIFID_108>

Q109. Do you agree with the proposed regulatory technical standards? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_109>

The FIA Associations* generally agree with the proposed RTS 16. However, we believe RTS 16 as currently drafted fails to consider some crucial points:

The FIA Associations strongly believe the regulation should explicitly require trading venues to establish “derogatory arrangements” for investment firms that enter into market making agreements. Professional market makers will necessarily have higher messaging rates than other participants. We have made amendments to Recital 7 and Article 3 accordingly;

Trading venues must be in control of setting the maximum permitted ratios of unexecuted orders to transactions. We understand it is ESMA’s intent to specify a formula for trading venues to use in calculating OTRs rather than to specify a calculation of the maximum OTR; therefore, we believe the word ‘maximum’ in Recital 7 and Article 3(4) is erroneous and have made amendments to Article 3(4) and (5) accordingly.

Also, any OTR regime should include a floor, below which no breach will be deemed to have occurred. This is necessary to account for illiquid instruments as well as to emphasize the actual system load generated through messaging. We have made amendments to Article 3(4) accordingly.

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* This response is submitted jointly on behalf of the Futures Industry Association ("FIA"), Futures Industry Association Europe ("FIA Europe") and the FIA European Principal Traders Association ("FIA EPTA").

FIA is the leading trade organisation for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearing organisations, our member firms play a critical role in the reduction of systematic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouse for derivatives transactions. FIA's regular members, which act as the majority clearing members of the US exchanges, handle more than 90 percent of the customer funds held for trading on US futures exchanges.

FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPs, vendors, law firms and con-sultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe formed an affiliation with FIA under a new structure – FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

FIA EPTA is affiliated with FIA and is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

PROPOSED AMENDMENTS TO RECITAL 7:

Recital 7: This Regulation sets out the procedures to specify the ~~maximum~~ ratio of unexecuted orders to transactions with respect to all market participants. **[Note: we understand it is ESMA's intent to specify a formula for calculating OTRs rather than to specify procedures for calculating the maximum OTR; therefore, we believe the word 'maximum' here is erroneous.]** However, trading venues ~~may~~ **should** establish derogatory arrangements **for financial instruments** for firms ~~engaged in~~ **that enter into** market making agreements **relating to those financial instruments** ~~as long as those firms effectively provide liquidity on a regular and frequent basis to the overall market~~.

PROPOSED AMENDMENTS TO ARTICLE 3 (4)-(7):

4. For the purposes of Article 48(6) of Directive 2014/65/EU, trading venues shall determine the ~~maximum~~ ratio of unexecuted orders to transactions as follows: **[Note: ESMA should only define the method for calculating the OTR; the trading venue can set the actual limits – delete word "maximum".]**

(a) In volume terms: $$\frac{\text{Total volume of orders} \quad -1}{\text{Total volume of transactions}+\textbf{floor}}$$

(b) In number terms: $$\frac{\text{Total numer of orders} -1}{\text{Total number of filled } \textbf{and} \text{ partially filled transactions}+\textbf{floor}}$$

5. A trading venue shall calculate the maximum ratio of unexecuted orders to transactions in both volume and number terms at least once a year**, or more frequently as circumstances require**. For that purpose, trading venues shall take into account all the orders submitted by all members and participants across all phases of the trading sessions, including the auctions, during the preceding twelve months' trading.

6. The ratio of unexecuted orders to transactions calculated by the trading venue in accordance with this Article shall be considered as exceeded by a member or participant of the trading venue on a trading session where the trading activity of this member or participant in one specific instrument, taking into account all phases of the trading session including the auctions, exceeds any of the two ratios specified under paragraph 4.

7. **Trading venues should establish derogatory arrangements for financial instruments for firms that enter into market making agreements relating to those financial instruments.**

Further, the FIA Associations believe the draft RTS does not take into account the disparity in the quality of trading venue infrastructure (for example, trading venues that do not adequately invest in their systems architecture may set maximum ratios of unexecuted orders to transactions to a low threshold rather than investing to improve their systems capacity and resilience). We have made amendments to the Recitals (addition of new Recital 9) accordingly:

PROPOSED AMENDMENTS INSERTING NEW RECITAL 9:

New Recital 9: **Trading venues shall continually review their capacity and resiliency so as to ensure that the risks and challenges posed by technological developments are properly addressed, ensuring business continuity resilience of trading venues and their ability to ensure fair and orderly trading through their systems.**

Further, new trading venues' ratios will naturally vary as they establish liquidity; OTRs without appropriate provisions for new trading venues could act as an anti-competitive restriction that constrains their ability to grow. The same argument above applies to new products until the profile of the instrument is sufficient to draw investor liquidity. We have made amendments to Article 3(5) accordingly (set out above) and to Recital 6 accordingly:

PROPOSED AMENDMENTS TO RECITAL 6:

Recital 6: The methodology for the determination of the maximum ratio of unexecuted orders to transactions that may be entered into the system by a member or participant should be supported by an adequate observation period of the ratios effectively incurred. ~~For~~ Newly established venues~~, they~~ should have in place projections for these purposes **and may reassess ratios on a regular basis as the number of financial instruments admitted to trading, members or participants, orders and transactions change**.

<ESMA_QUESTION_CP_MIFID_109>

Q110. Do you agree with the counting methodology proposed in the Annex in relation to the various order types? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_110>

The FIA Associations agree that all *input* messages intended to solicit eventual executions should count as a single order. While we acknowledge ESMA's concern about facilitating the creation by trading venues of increasingly complex order types, we continue to recommend that automatic unexecuted/executed output messages from the venue back to the member should be discounted, such that an unexecuted or executed FOK or IOC input message from the member counts as a single order. We believe that a cancellation should not be included in this definition as it is placed by a market maker to reduce its resting market making risk exposure.

<ESMA_QUESTION_CP_MIFID_110>

Q111. Is the definition of "orders" sufficiently precise or does it need to be further supplemented? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_111>
The FIA Associations agree that all *input* messages should equate to a single order as described, including submission or modification, initiated by the member.
<ESMA_QUESTION_CP_MIFID_111>

Q112. Is more clarification needed with respect to the calculation method in terms of volume?

<ESMA_QUESTION_CP_MIFID_112>
No, however we believe that calculation based on number of instruments is significantly less relevant for equity venues than the calculation of the number of orders or executions.
<ESMA_QUESTION_CP_MIFID_112>

Q113. Do you agree that the determination of the maximum OTR should be made at least once a year? Please specify the arguments for your view.

<ESMA_QUESTION_CP_MIFID_113>
We believe looking at trading activity across a year does not sufficiently consider different market situations, i.e. low volume times or high volatility periods. In addition, neither future volatility nor capacity of the trading platform would be considered. Following the introduction of a ratio, a venue might need to adjust the parameters to fine-tune the limits. We would therefore suggest determining a max ratio annually but permitting trading venues to make ad-hoc adaptions during periods of high volatility.

<ESMA_QUESTION_CP_MIFID_113>

Q114. Should the monitoring of the ratio of unexecuted orders to transactions by the trading venue cover all trading phases of the trading session including auctions, or just the continuous phase? Should the monitoring take place on at least a monthly basis? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_114>
As OTR monitoring is related to system usage, monitoring should be ongoing, so at least on a monthly basis or more frequently as determined by a specific venue according to its technological capability.

The FIA Associations believe it is sensible to separate the continuous trading phases from other trading phases, as the order submission profiles generally significantly differ, but this is venue-specific and would best be determined by the specific trading venue. If the venue determines that amalgamation of the various trading phases would distort the OTR calculations, make them less meaningful, and lead to a degradation of the OTR monitoring purpose and aim, then that venue should be allowed the flexibility to determine the most sensible approach.
<ESMA_QUESTION_CP_MIFID_114>

Q115. Do you agree with the proposal included in the Technical Annex regarding the different order types? Is there any other type of order that should be reflected? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_115>
Subject to our answer to Question 110, we agree.
<ESMA_QUESTION_CP_MIFID_115>

Q116. Do you agree with the proposed draft RTS with respect to co-location services? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_116>

The FIA Associations* strongly agree with the provisions of Article 2 of draft RTS 17 with respect to co-location services and in particular the application of the principles of fairness, objectivity, transparency and non-discrimination by trading venues within the context of the provision of co-location services.

The FIA Associations agree that trading venues should be fully transparent about the co-location services they provide. We agree that transparency includes information detailing:

- The specifications of the services they offer;
- The criteria for accessing those services; and
- The costs of those services in sufficient granularity that stakeholders can assess the individual costs associated with each of the aspects of the service offering (execution fees, ancillary fees, rebates, connectivity fees etc.).

Such information should be equally available to all interested users, either publically disclosed or on request. This level of transparency will ensure that users can evaluate the offering in an informed manner and ensure a level playing field.
We agree that all users should have non-discriminatory access to co-location services and that conditions and pricing be transparent. The specified access criteria should also detail the

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methodology to be adopted by the trading venue in prioritising potential customers when there is a lack of capacity at a co-location site.

We also agree that trading venues should periodically assess their provision of co-location services to customers to ensure that they have applied the principles of fairness, objectivity, transparency and non-discrimination in compliance with published and transparent policies and procedures, including where applicable ensuring that any provider to which the venue has outsourced the colocation services fulfils the trading venue's regulatory obligations.
<ESMA_QUESTION_CP_MIFID_116>

Q117. Do you agree with the proposed draft RTS with respect to fee structures? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_117>

The FIA Associations broadly welcome EMSA's proposals regarding transparency and non-discrimination with regard to fee structures and co-location access. However, we note that no proposals or initiatives have been provided within this consultation or within RTS 17 that would address the escalating and disproportionate costs associated with co-location and access fees in the EU. Our members are concerned that the EU remains non-competitive on cost compared with other markets such as the US and Asia Pacific trading regions. We believe this competition and cost imbalance will not be voluntarily addressed by trading venues or co-location providers based in the EU, and that only explicit requirements mandated by regulatory technical standards or other provisions developed by ESMA or the Commission will provide the necessary downward pressure on explicit and implicit trading costs.

Specifically with respect to draft RTS 17, we provide the following comments:

Article 3: We strongly agree that in the interests of transparency and fairness, trading venues should provide complete and accessible information on fee structures including all chargeable fees (such as execution fees, connectivity fees, pricing fees, licencing fees etc.) and all potential rebates and incentives. In Article 3.4 and 3.5, we welcome the RTS whereby trading venues should treat participants in a non-discriminatory manner and in accordance with published and objective criteria. We believe this is a cornerstone of fairness and transparency.

Article 4: We agree that any incentives or disincentives should be pre-determined and publically available. This will enable participants to assess in a fair and equal basis the merits of participating on a venue. Equally we agree that the application of incentives and disincentives must be based on non-discriminatory, measurable and objective parameters. This provides for the fair and equitable application of rules amongst all participants.

Article 6: Pursuant to the FIA Associations' proposed changes to the proposed framework for testing against disorderly trading conditions in RTS 13 and RTS 14, we have made consequent amendments to RTS 17 Article 6. To summarise, we propose to delete the reference to trading venues' charging for the development and provision of testing algorithms against disorderly trading. In our comments on RTS 13 and 14 we have set out our material concern with ESMA's proposed approach to non-live testing having to occur in trading venue testing environments. As currently drafted, ESMA's requirements for trading venues to design and build such environments to be useful to firms will impose enormous costs on both trading venues (and investment firms by virtue of this RTS 17) for very little return in terms of the testing of algorithms. To be clear, the FIA Associations support

investment firms engaging in non-live testing of their algorithms, but we believe investment firms should provide or source the environments in which to do this, and thus strongly recommend amending this requirement to delete the reference to “trading venues.”

Additionally, we strongly believe it would be neither fair nor equitable that trading venues be expressly permitted to transfer the (inevitably unreasonably expensive) cost of designing and providing such testing environments to members and participants. We are concerned underlying this proposal is a perception that algorithmic trading is a cost borne by trading venues. It is not. Trading venues benefit from investment firms that engage in algorithmic trading in financial instruments admitted to trading on those trading venues. Trading venues charge investment firms that engage in algorithmic trading according to transactions executed. The more investment firms, the more transactions, the more revenue accrues to that trading venue. Both trading venues and investment firms therefore have equal interest in the investment firm and its algorithms meeting all relevant testing requirements and being able to be deployed on the trading system. Consequently, we believe each should bear its respective costs of compliance directly. However, we would not oppose trading venues offering and charging for ‘value-add’ testing services against disorderly trading in addition to the basic scenarios required by regulation. Any such ‘value-adding’ testing services should not be mandatory, however, and market participants should have discretion as to whether to subscribe to them or not.

Our amendments to RTS 17 are set out below:

PROPOSED AMENDMENTS TO RTS 17:

RECITALS 4 & 5:

(4) Directive 2014/65/EU establishes new obligations for trading venues **and investment firms respectively** with respect to the resilience of the markets, and more specifically, on the testing of algorithms. ~~It is considered that trading venues may legitimally transfer the costs of design and provision of basic testing environments to their prospective members or participants or to current ones which have to test new algorithms or modifications to existing algorithms.~~ As long as those basic **requirements are met,** ~~scenarios fulfil the requirement to effectively permit testing a number of plausible scenarios,~~ nothing prevents trading venues from developing more added-value services and testing scenarios in these areas and charge for them as they consider appropriate**, subject to the user subscribing to those additional services**.

(5) Post-trade services such as clearing and settlement services are ~~would~~ not ~~be~~ considered within the scope of this Regulation. ~~For these services, reference should be made to Article 38 of EMIR.~~

ARTICLE 6:

Article 6
Fee structures and testing obligations

A trading venue may charge current and prospective members and participants the costs incurred in developing and providing conformance testing ~~and testing of algorithms against disorderly trading conditions~~ **in accordance with Article 3**.

<ESMA_QUESTION_CP_MIFID_117>

Q118. At which point rebates would be high enough to encourage improper trading? Please elaborate.

<ESMA_QUESTION_CP_MIFID_118>
The FIA Associations reiterate comments made during the summer consultation: we do not believe that the structural parameters of fee schedules including rebates are significant inducements one way or another to trading behaviour that might lead to an increased probability of disorderly trading conditions.

In most cases, trading venues establish fee structures in reasonable dialogue with their commercial audiences, such that fee structures should reflect a rational approach to charging for services based on market participants' actual and bona fide use of such services.

To the extent any market participant may be incentivised to engage in non-bona fide trading behaviour in order to secure better pricing (e.g. by intentionally trading specific volume or value in order to trigger bucket or tranche pricing as further discussed below), this should be investigated on the merits and dealt with, if applicable, under relevant anti-market abuse provisions.

In our view, certain regulatory requirements or prohibitions, such as an overly restrictive view on the "exceptional circumstances"/equivalent exclusions under which a market maker may cease continuous quoting, are more likely to encourage improper trading than the parameters of fee schedules.
<ESMA_QUESTION_CP_MIFID_118>

Q119. Is there any other type of incentives that should be described in the draft RTS?

<ESMA_QUESTION_CP_MIFID_119>
No.
<ESMA_QUESTION_CP_MIFID_119>

Q120. Can you provide further evidence about fee structures supporting payments for an "early look"? In particular, do you agree with ESMA's preliminary view regarding the differentiation between that activity and the provision of data feeds at different latencies?

<ESMA_QUESTION_CP_MIFID_120>

The FIA Associations are not aware of any fee structures that support payments for an "early look". The concept of "early look" should not be confused with the principles of fairness, objectivity, transparency and non-discrimination by trading venues within the context of the provision of co-location services. In this context (and detailed more fully in Question 116), we believe that trading venues should be fully transparent about the co-location services they provide, including providing specifications of the services they offer; the criteria for accessing those services; and the costs of those services in sufficient granularity so that users can assess the individual costs associated with each of the aspects of the service offering (execution fees, ancillary fees, rebates, connectivity fees etc.).

Where ESMA refers to "early look" in respect of the release of price sensitive surveys to commercial customers, such as the University of Michigan's much publicised consumer report, we agree that such early access is both unfair and potentially contrary the market

abuse regulations. In such circumstances, we agree that price sensitive information should be disclosed appropriately and in accordance with the market abuse regulations.
<ESMA_QUESTION_CP_MIFID_120>

Q121. Can you provide examples of fee structures that would support non-genuine orders, payments for uneven access to market data or any other type of abusive behaviour? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_121>
The FIA Associations are not aware of any examples of fee structures that would support non-genuine orders, payments for uneven access to market data or any other type of abusive behaviour, particularly in the absence of 'cliff edge pricing' and a ban on 'early look'.
We believe the principles of transparency and non-discrimination by trading venues within the context of the provision and access to information on fee structures would ensure that all market participants are treated in an fair and equitable manner.
<ESMA_QUESTION_CP_MIFID_121>

Q122. Is the distinction between volume discounts and cliff edge type fee structures in this RTS sufficiently clear? Please elaborate

<ESMA_QUESTION_CP_MIFID_122>
The FIA Associations have proposed some amendments to distinguish further between legitimate volume discounts and the cliff edge type of fee structures ESMA proposes to ban:

PROPOSED AMENDMENTS TO RTS 17 RECITALS 7 & 8:

(7) The practice of 'cliff edge' pricing is prohibited. **Trading venues may offer threshold-based incentives to members or participants that enter into a market making agreement** ~~to be explicitly banned as it may encourage intensive trading before a certain time limit to reach a threshold or to obtain a higher market share, leading to a potential stress of market infrastructures~~.

(8) **This Regulation is without prejudice to Articles 12 and 13 of Regulation (EU) No 600/2014 on [MiFIR].**

PROPOSED AMENDMENTS TO RTS 17 ARTICLE 1 DEFINITIONS 3, 4 & 5:

(3) 'cliff edge' means a fee structure ~~implying that if~~ **whereby a member or participant whose transactions** ~~trading~~ exceeds a given threshold **benefits from a discounted fee on all their transactions for defined period of time**~~, all of their trades benefit from a lower fee for a set period, including in some cases trades which have already been executed as opposed to just the marginal trade executed subsequent to reaching the threshold;~~

(4) 'rebate' means a refund paid by the trading venue to a member or participant of a portion of the execution fee charged to the **member or participant** ~~market maker or any other type of economic incentives paid~~ for its market making service in **individual or specified groups of products or instruments** ~~shares or a basket of shares~~;

(5) 'volume discount' means a price differentiation scheme based on the total **transaction** ~~trading~~ volume, the total number of **transactions** ~~trades~~ or the cumulated ~~trading~~ fees generated by one member **or participant** whereby the **fee for** marginal transactions ~~trade~~ executed **upon** ~~subsequent to~~ reaching the threshold is reduced; **[Note: this**

definition does not recur in the draft RTS]

PROPOSED AMENDMENTS TO RTS 17 ARTICLES 4 & 5:

Article 4
Incentives and disincentives

Any rebate, incentive or disincentive **offered** ~~provided~~ under a fee structure shall **be set out in a** ~~pre-determined by~~ publicly available document **by** ~~of~~ the trading venue and based on non-discriminatory, measurable and objective parameters including volumes ~~effectively~~ traded, services ~~effectively~~ used and the provision of specific services, such as provision of liquidity provided by a market maker.

CHAPTER IV
Fee structures that may create incentives for disorderly trading

Article 5
General [restate]

1. A trading venue shall not offer cliff edge fee structures ~~where, upon reaching a certain threshold of transactions total trading volume, a member or participant may benefit from a discount on the total number of trades or the cumulated trading fees generated by a trader benefit from a discount including those trades already executed~~.

2. A trading venue may offer threshold-based incentives to members or participants that enter into a market making agreement.

<ESMA_QUESTION_CP_MIFID_122>

Q123. Do you agree that the average number of trades per day should be considered on the most relevant market in terms of liquidity? Or should it be considered on another market such as the primary listing market (the trading venue where the financial instrument was originally listed)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_123>

First, the FIA Associations* believe that the proposed tick size measures introduce considerable complexity and will have an uncertain, but certainly significant, impact on

* This response is submitted jointly on behalf of the Futures Industry Association ("FIA"), Futures Industry Association Europe ("FIA Europe") and the FIA European Principal Traders Association ("FIA EPTA").

FIA is the leading trade organisation for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearing organisations, our member firms play a critical role in the reduction of systematic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouse for derivatives transactions. FIA's regular members, which act as the majority clearing members of the US exchanges, handle more than 90 percent of the customer funds held for trading on US futures exchanges.

FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPs, vendors, law firms and con-sultants. FIA Europe works with its members to maintain

European markets. We believe the impact on market microstructure could be material enough potentially to *create* rather than prevent disorderly functioning of the markets. Considering that ESMA states in the Consultation Paper "[...] *it is not possible to predict with certainty what the exact impact of a change in tick sizes will be to the spread to tick ratio*," it is especially worrying that such high-impact changes are being considered without time for more extensive study and within the confines of a very inflexible legislative process. We cannot overstress the potential 'ripple effect' of amending tick size regimes on other microstructural items such as order-to-trade ratios and market making obligations (in terms of size and spread).

Therefore, while we welcome ESMA's suggestions to analyse the effects of tick size regime changes on spread-to-tick-ratios, order-to-trade ratios, queuing time and other indicators during an annual review, we believe the "flexibility mechanism" of proposing to revise the draft technical standards to the Commission in the event changes are found wanting, is insufficient. **We strongly urge ESMA to include a provision in draft RTS 18 that would allow national competent authorities to intervene and temporarily derogate from the tick size tables in case of degradation of market microstructure, with a notification requirement to ESMA.**

As a final general comment, we are not aware of any instances of disorderly functioning of the markets that have been caused by inappropriate tick sizes in European markets (the rationale for these provisions in MiFID II). We understand ESMA's theoretical concern that too fine tick sizes could lead to thin liquidity at the top of the book, serve as a deterrent to large orders, and may even push these orders away from lit venues. However, as we stated during the summer consultation, we are equally concerned that too large tick sizes will lead to wider spreads, as volumes that are currently quoted at tight spreads will consolidate at new, wider spreads. Within this context, we believe that the FESE models currently deployed widely across the EEA markets are already sufficient, and that measures to formalise these existing and widely adopted principles would be more appropriate than a fundamental redesign of EEA market tick size microstructure.

Specifically in response to Question 123, the FIA Associations do not agree that the average number of trades per day should be considered on the most relevant market in terms of liquidity. ESMA intends to harmonise tick sizes across Europe. Taking only the average number of trades from the trading venue considered the most 'relevant' market in terms of liquidity would create a prima facie inconsistency in the application of the tick regime

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constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe formed an affiliation with FIA under a new structure – FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

FIA EPTA is affiliated with FIA and is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

depending on how much fragmentation exists. In 2007, MiFID was introduced to allow new trading venues to emerge and compete with traditional stock exchanges (regulated markets). As a result, many stocks now trade on a multitude of trading platforms, i.e. the market has become fragmented. Characteristics of such platforms differ vastly (including among sub-segments of a market) even within a single investment firm acting as a trading venue. We would consider it severely flawed almost 10 years later to look at a single venue rather than to look at all the trading activity across Europe.

In addition, the average number of trades will necessarily decrease every time a new multilateral trading facility starts taking volume from other markets. For example, the most relevant market in Spain, where 80% of trades take place on the primary market (Bolsas y Mercados Españoles), may be straightforward, but not so in the UK, where only 50% of trading occurs on the London Stock Exchange and where BATS CHI-X has the most market share for certain symbols.[3] In the example of the UK, we think it would be strange to omit either of those markets from a measure reflecting liquidity. Furthermore, the level of off-exchange trading (OTC, dark pools, broker crossing networks) also differs significantly across instruments, creating even more inconsistencies when setting a tick size level.

We also miss a dynamic component in the proposed table. There might be years where the number of trades is significantly lower or higher due to market circumstances. This will obviously have an effect on tick sizes for the following year, i.e. tick sizes will either become too large or too small. We also envisage events during a year that might affect the proper tick size but where tick size cannot be changed until later (such as share splits or reverse stock splits, and the consequences of index inclusion (or exclusion)).

Therefore, we believe that the average number of trades per day on all European trading venues should be considered, including regulated markets, multi-lateral trading facilities, systematic internalisers, OTC and dark pools. We note that this is in line with the Protocol on the Operation of CESR MiFID Database, updated in 2010, which takes in addition to the most relevant market in terms of liquidity as required by MiFID, the data from the three most relevant MTFs in terms of overall market share in relation to all shares in the MiFID Database and would include data from OTC transactions once it is technically feasible to use such data in a manner that ensures quality. [4]

We note that the approach adopted by ESMA within this question will determine the average number of trades for each instrument. This variable means that it is not possible for the FIA Associations to undertake a risk assessment of changes, as there are too many unknown variables which impact the ultimate liquidity band. We reiterate that it is incumbent on ESMA to provide full data and metrics that detail the impact the proposals will have on European market microstructure.

We have set out proposed amendments accordingly:

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[3] This excludes OTC.
[4] http://www.esma.europa.eu/system/files/09_172d.pdf

PROPOSED AMENDMENTS TO RTS 18 ARTICLE 1 DEFINITION 3:

(3) 'number of trades per day' means the number of transactions carried out in a given ~~financial instrument~~ **share** ~~on the most relevant market in terms of liquidity~~ **on all European trading venues on which such instrument trades, including OTC, dark pools and systematic internalisers**, excluding transactions executed in accordance with one of the pre-trade transparency waivers provided under Article 4(1)(a) to (c) of Regulation (EU) No 600/2014;

PROPOSED AMENDMENTS TO RTS 18 ARTICLE 2 PARAGRAPH 2:

2. ~~Competent authorities of the most relevant market in terms of liquidity shall ensure that the identification of the liquidity band applicable to each share, depositary receipt and certificate for which they are the relevant competent authority is provided. To that end, the most relevant market in terms of liquidity for each share, depositary receipt and certificate traded or admitted to trading on a European Union trading venue shall publish the average number of trades per day in that financial instrument calculated over the previous twelve months of trading or, where applicable, that part of the year during which that financial instrument was admitted or traded on a trading venue and was not suspended from trading~~.

2. ESMA shall ensure that the identification of the liquidity band applicable to each share is provided. To that end, all trading venues, systematic internalisers and OTC platforms in Europe shall deliver to ESMA for each share traded or admitted to trading on their venue the average number of trades per day in that share calculated over the previous twelve months of trading or, where applicable, that part of the year during which that financial instrument was admitted or traded on a trading venue, in a format provided by ESMA. [Note: this should be specified by ESMA in guidelines.] Based on these figures ESMA shall then calculate the average number of trades on all trading venues, systematic internalisers and OTC platforms in Europe for each share admitted to trading or traded on a European trading venue.

<ESMA_QUESTION_CP_MIFID_123>

Q124. Do you believe a more granular approach (i.e. additional liquidity bands) would be more suitable for very liquid stocks and/or for poorly liquid stocks? Do you consider the proposed tick sizes adequate in particular with respect to the smaller price ranges and less liquid instruments as well as higher price ranges and highly liquid instruments? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_124>

As stressed above, amending the current tick size regimes may disturb a very delicate balance with potentially far-reaching ancillary effects. The FIA Associations (and the market generally, we believe) have had insufficient time and access to data to perform the thorough analysis needed to answer this question completely. The FIA Associations believe there are too many unknowns for us to opine on the proposed liquidity bands, particularly in the

absence of data or the possibility of assessing data from all relevant trading platforms in the EU interdependently.

It is also feasible that once a new tick size table is implemented, the revised tick size will have a direct impact on the average daily number of trades, which in turn will have a material impact in that, after the first assessment period, a substantial number of instruments classified in one band will transfer to another liquidity band. The FIA Associations (and the market generally, we believe) have had insufficient time and access to data to perform the thorough analysis needed to predict the short term impact of this. We believe it is incumbent on ESMA to undertake and publish full and detailed analysis.

Additionally we would propose to add to the annual review discussed in paragraph 31 of section 4.6 of the consultation paper: “monitoring the amount of trading occurring at the mid-point.” Trading at the mid-point would be a strong indication that the tick size is too large.

Finally, we think that the liquidity bands should consider turnover. Using the average number of executed transactions would imply that retail stocks that trade more often will fall into most liquid band, whereas stocks that trade largely as part of institutional orders will fall into the lower bands and therefore have higher tick sizes.

We have set out proposed amendments accordingly:

PROPOSED AMENDMENTS TO RTS 18 RECITAL 7:

(7) For the purpose of this annual review of the tick size regimes, it should be considered in particular the appropriateness of the number of liquidity bands and of both the upper and lower bounds of each liquidity band. Particular attention should be given to the spread to tick ratio; whether a large number of orders are sent to the order book hindering the reading of the order book; **the amount of trading occurring at the mid-point;** the median lifetime of the orders or the order-to-trade ratio; the queuing time and any other relevant market quality indicator such as the price volatility of the stocks, with attention to the behaviour of the control group.

<ESMA_QUESTION_CP_MIFID_124>

Q125. Do you agree with the approach regarding instruments admitted to trading in fixing segments and shares newly admitted to trading? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_125>

The FIA Associations believe for shares newly admitted to trading that have no volume metrics to analyse, it is better to overestimate than underestimate expected volumes (and hence set a smaller tick size), as this will likely result in more liquidity attracting to the new share.

Regarding instruments admitted to trading in fixing segments, we are unable to provide an answer because we seek clarity on the definition of “fixing segments.”
<ESMA_QUESTION_CP_MIFID_125>

Q126. Do you agree with the proposed approach regarding corporate actions? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_126>
Yes, the FIA Associations generally agree with the proposed approach. The venue should have sufficient historical data and experience with corporate actions to provide an accurate initial estimate of the post-event liquidity band. Further a review within six weeks based on the first four weeks of trading should be sufficient in most instances, but when necessary the venue should be allowed to use less than four weeks of trade data for their review and potential resultant adjustment. We believe that after six weeks the parameters should be fixed and no further adjustments outside of the normal review process should be allowed.
<ESMA_QUESTION_CP_MIFID_126>

Q127. In your view, are there any other particular or exceptional circumstances for which the tick size may have to be specifically adjusted? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_127>
The FIA Associations believe there are several products that will need to be managed outside of the standard tick size regime. These would include:

ETFs: We believe the tick size approach taken by ESMA to be well suited for a majority of ETFs. However, for some types of ETFs, including money market and fixed income, the tick sizes proposed are far too large, exceeding current average spreads in some instances by a factor of four or more. Also for other highly liquid ETFs, specifically those based on equity indexes, the tick sizes proposed are too large and may restrict proper price formation in the order book.

Further to the examples described above, we suggest that the proposed tick size regime for ETFs include an exemption process for those ETFs where there would be a material deviation from current spreads or tick sizes. In order to provide a quantitative framework for such exemptions, we propose that the most relevant market in terms of liquidity may establish a different tick size in order to provide the relevant ETF with a more appropriate spread-to-tick size ratio regime to better reflect the liquidity or other characteristics of that ETF. This decision should furthermore (be taken only after consultation with the respective issuer of that ETF and should) apply to all trading venues to ensure that the objective of a harmonised tick size regime in Europe is reached.

In general, we would consider it sufficient to review ETF spread data on an annual basis to identify ETFs that qualify for a tick size exemption. However, for newly admitted ETFs we propose to establish a review scheme similar to that for newly listed equities, i.e. no later than six weeks after the ETF has started trading, the listing trading venue shall determine if the ETF qualifies for a [potential] tick size exemption on the basis of spread data obtained from the first four weeks of trading. In case the ETF qualifies for a tick size exemption, the listing trading venue shall consider the previous trading history of ETFs having similar

characteristics and determine on this basis the applicable tick size [after consultation with the respective issuer of that ETF].

We have set out proposed amendments accordingly:

PROPOSED AMENDMENTS TO RTS 18 ARTICLE 5:

Article 5
Tick size regime for ETFs

1. A trading venue shall apply tick sizes which are greater than or equal to the tick sizes specified in this Article in respect of the exchange-traded funds (ETF) traded on it irrespective of the nature of their underlying.

2. A trading venue shall apply to the ETFs traded on it the tick size table corresponding to the most liquid liquidity band in the Annex.

[NEW] 3. the tick size table corresponding to the most liquid liquidity band in the Annex does not accurately reflect the liquidity profile of a given ETF, it may apply a tick size that deviates from the tick size specified in the Annex. ESMA shall develop guidelines to specify the exemption process.

[NEW] 4. In the case of ETFs admitted to trading or traded for the first time, no later than six weeks after the ETF has started trading, the most relevant market in terms of liquidity shall determine if the ETF qualifies for a tick size exemption according to Art. 5 (3) of Draft RTS 18 on the basis of the first four weeks of trading.

Certificates: The FIA Associations understand that ESMA has done no analysis on the impact of the proposed tick size regime on certificates. We strongly recommend undertaking this analysis before finalising the regime for these products. Acknowledging we have done limited analysis, we believe the proposed table works for certificates quoted per unit but not for certificates quoted in percent. The tick size of a certificate quoted in percent depends on its maturity, and therefore should be exempt and left to the issuer to set the appropriate tick size. A one size fits all approach does not work for these types of instruments.

Depository Receipts: We likewise recommend first undertaking analysis on the impact of the proposed tick size regime on depository receipts before suggesting any regime where the impact is unknown.

We would therefore propose to strike references to both depository receipts and certificates (~~depositary receipts and certificates~~) throughout draft RTS 18.

<ESMA_QUESTION_CP_MIFID_127>

Q128. In your view, should other equity-like financial instruments be considered for the purpose of the new tick size regime? If yes, which ones and how should their tick size regime be determined? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_128>

The FIA Associations do not believe that any additional instruments should be considered. The current proposal covers the vast majority of equity instruments. We only suggest clarifying that the ETF tick size regime (including the exemption process that we propose above) applies to similar exchange traded products such as Exchange Traded Notes (ETNs) and Exchange Traded Commodities (ETCs), to be consistent. We would be happy for ESMA to return to this topic in a few years once sufficient experience has been gained with the current proposal. We would propose to add a new definition as follows:

'Exchange Traded Funds (ETFs)' for the purpose of this Regulation includes also Exchange Traded Commodities (ETCs) and Exchange Traded Notes (ETNs).

<ESMA_QUESTION_CP_MIFID_128>

Q129. To what extent does an annual revision of the liquidity bands (number and bounds) allow interacting efficiently with the market microstructure? Can you propose other way to interact efficiently with the market microstructure? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_129>

The FIA Associations agree with ESMA's proposal to conduct an initial review of the regime after six months and then revert to an annual review. Further we believe the review process should take into account events that may require an intermittent adjustment of the tick size for a certain instrument (such as stock splits, reverse stock splits, index inclusion or other reasons for a change in liquidity or price characteristics), or usual market circumstances which result in time periods when the number of trades is significantly lower or higher than normal.

Again, we strongly suggest an amended provision that would allow the national competent authority to intervene and temporarily derogate from the new tick size in case of degradation of market microstructure with a notification requirement to ESMA.

We have set out proposed amendments accordingly:

PROPOSED AMENDMENTS TO RTS 18 ARTICLE 2 PARAGRAPH 4:

4. Following the publication of the liquidity band applicable to each share~~, depositary receipt and certificate~~ and before the start of the next trading day, each trading venue on which that instrument is traded or admitted to trading shall allocate the liquidity band in accordance with the table in the Annex. **ESMA shall conduct a review six months after this Regulation shall become applicable. If a degradation of market microstructure has been detected, the relevant competent authority may deviate from the existing regime, which deviation shall then become applicable to all regulated markets and multilateral**

trading facilities on which the share is traded until a revised RTS has been implemented.

<ESMA_QUESTION_CP_MIFID_129>

Q130. Do you envisage any short-term impacts following the implementation of the new regime that might need technical adjustments? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_130>
The FIA Associations believe that the introduction of the proposed tick size regime will have an immediate and substantial impact on European market microstructure. On the opening of trading on the initial day, we estimate that over 75% of European instruments will trade under a new tick size. This change will result in temporary market dislocation, as market participants adjust to the new market reality. There is the potential for significant market volatility as natural market equilibrium is reached. Furthermore, we anticipate that retail and institutional flow will naturally step out of the market until initial uncertainties are resolved. During this time we see significant opportunity for some participants to exploit temporary market inefficiencies.
<ESMA_QUESTION_CP_MIFID_130>

Q131. Do you agree with the definition of the "corporate action"? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_131>
No, the FIA Associations do not agree with the proposed definition because it does not include dividends, which should be added. As explained in our response to Question 126 we endorse a flexible approach: we believe the tick size change resulting from corporate actions should be decided upon by the venue with the highest turnover, generally the primary market.

We have set out proposed amendments accordingly:

PROPOSED AMENDMENTS TO RTS 18 RECITAL 9:

(9) Following the annual **(or as often as material changes in product characteristics require a trading venue to adjust the tick size intermittently, such as a split or a reverse split of the relevant instrument, or a material shift in pricing or liquidity characteristics e.g. by inclusion in, or exclusion from, an index or market segment)** ~~revision~~ **review** of the liquidity bands, trading venues should be in a position to immediately apply the tick size corresponding to a new liquidity band including outstanding orders.

PROPOSED AMENDMENTS TO RTS 18 ARTICLE 1 DEFINITION 8:

(8) 'corporate action' means splits (sub-division), reverse splits (consolidation), scrip issues (capitalisation or bonus issue), capital repayments, **dividends,** rights issues or entitlement offers, takeovers and mergers and stock conversions.

<ESMA_QUESTION_CP_MIFID_131>

Q132. Do you agree with the proposed regulatory technical standards?

<ESMA_QUESTION_CP_MIFID_132>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_132>

Q133. Which would be an adequate threshold in terms of turnover for the purposes of considering a market as "material in terms of liquidity"?

<ESMA_QUESTION_CP_MIFID_133>
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<ESMA_QUESTION_CP_MIFID_133>

4. Data publication and access

Q134. Do you agree with ESMA's proposal to allow the competent authority to whom the ARM submitted the transaction report to request the ARM to undertake periodic reconciliations? Please provide reasons.

<ESMA_QUESTION_CP_MIFID_134>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_134>

Q135. Do you agree with ESMA's proposal to establish maximum recovery times for DRSPs? Do you agree with the time periods proposed by ESMA for APAs and CTPs (six hours) and ARMs (close of next working day)? Please provide reasons.

<ESMA_QUESTION_CP_MIFID_135>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_135>

Q136. Do you agree with the proposal to permit DRSPs to be able to establish their own operational hours provided they pre-establish their hours and make their operational hours public? Please provide reasons. Alternatively, please suggest an alternative method for setting operating hours.

<ESMA_QUESTION_CP_MIFID_136>
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<ESMA_QUESTION_CP_MIFID_136>

Q137. Do you agree with the draft technical standards in relation to data reporting services providers? Please provide reasons.

<ESMA_QUESTION_CP_MIFID_137>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_137>

Q138. Do you agree with ESMA's proposal**?**

<ESMA_QUESTION_CP_MIFID_138>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_138>

Q139. Do you agree with this definition of machine-readable format, especially with respect to the requirement for data to be accessible using free open source software, and the 1-month notice prior to any change in the instructions?

<ESMA_QUESTION_CP_MIFID_139>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_139>

Q140. Do you agree with the draft RTS's treatment of this issue?

<ESMA_QUESTION_CP_MIFID_140>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_140>

Q141. Do you agree that CTPs should assign trade IDs and add them to trade reports? Do you consider necessary to introduce a similar requirement for APAs?

<ESMA_QUESTION_CP_MIFID_141>
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<ESMA_QUESTION_CP_MIFID_141>

Q142. Do you agree with ESMA's proposal? In particular, do you consider it appropriate to require for trades taking place on a trading venue the publication time as assigned by the trading venue or would you recommend another timestamp (e.g. CTP timestamp), and if yes why?

<ESMA_QUESTION_CP_MIFID_142>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_142>

Q143. Do you agree with ESMA's suggestions on timestamp accuracy required of APAs? What alternative would you recommend for the timestamp accuracy of APAs?

<ESMA_QUESTION_CP_MIFID_143>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_143>

Q144. Do you agree with ESMA's proposal? Do you think that the CTP should identify the original APA collecting the information form the investment firm or the last source reporting it to the CTP? Please explain your rationale.

<ESMA_QUESTION_CP_MIFID_144>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_144>

Q145. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that you envisage in case of implementation of the proposal.

<ESMA_QUESTION_CP_MIFID_145>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_145>

Q146. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that you envisage in case of implementation of the proposal.

<ESMA_QUESTION_CP_MIFID_146>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_146>

Q147. With the exception of transaction with SIs, do you agree that the obligation to publish the transaction should always fall on the seller? Are there circumstances under which the buyer should be allowed to publish the transaction?

<ESMA_QUESTION_CP_MIFID_147>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_147>

Q148. Do you agree with the elements of the draft RTS that cover a CCP's ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_148>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_148>

Q149. Do you agree with the elements of the draft RTS that cover a trading venue's ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_149>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_149>

Q150. In particular, do you agree with ESMA's assessment that the inability to acquire the necessary human resources in due time should not have the same relevance for trading venues as it has regarding CCPs?

<ESMA_QUESTION_CP_MIFID_150>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_150>

Q151. Do you agree with the elements of the draft RTS that cover an CA's ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_151>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_151>

Q152. Do you agree with the elements of the draft RTS that cover the conditions under which access is granted? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_152>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_152>

Q153. Do you agree with the elements of the draft RTS that cover fees? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_153>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_153>

Q154. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that do you envisage in case of implementation of the proposal.

<ESMA_QUESTION_CP_MIFID_154>
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<ESMA_QUESTION_CP_MIFID_154>

Q155. Do you agree with the elements of the draft RTS specified in Annex X that cover notification procedures? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_155>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_155>

Q156. Do you agree with the elements of the draft RTS specified in [Annex X] that cover the calculation of notional amount? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_156>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_156>

Q157. Do you agree with the elements of the draft RTS that cover relevant benchmark information? If not, please explain why and, where possible, propose an alternative approach. In particular, how could information requirements reflect the different nature and characteristics of benchmarks?

<ESMA_QUESTION_CP_MIFID_157>
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<ESMA_QUESTION_CP_MIFID_157>

Q158. Do you agree with the elements of the draft RTS that cover licensing conditions? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_158>
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<ESMA_QUESTION_CP_MIFID_158>

Q159. Do you agree with the elements of the draft RTS that cover new benchmarks? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_159>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_159>

8. Requirements applying on and to trading venues

Q160. Do you agree with the attached draft technical standard on admission to trading?

<ESMA_QUESTION_CP_MIFID_160>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_160>

Q161. In particular, do you agree with the arrangements proposed by ESMA for verifying compliance by issuers with obligations under Union law?

<ESMA_QUESTION_CP_MIFID_161>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_161>

Q162. Do you agree with the arrangements proposed by ESMA for facilitating access to information published under Union law for members and participants of a regulated market?

<ESMA_QUESTION_CP_MIFID_162>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_162>

Q163. Do you agree with the proposed RTS? What and how should it be changed?

<ESMA_QUESTION_CP_MIFID_163>
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<ESMA_QUESTION_CP_MIFID_163>

Q164. Do you agree with the approach of providing an exhaustive list of details that the MTF/OTF should fulfil?

<ESMA_QUESTION_CP_MIFID_164>
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<ESMA_QUESTION_CP_MIFID_164>

Q165. Do you agree with the proposed list? Are there any other factors that should be considered?

<ESMA_QUESTION_CP_MIFID_165>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_165>

Q166. Do you think that there should be one standard format to provide the information to the competent authority? Do you agree with the proposed format?

<ESMA_QUESTION_CP_MIFID_166>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_166>

Q167. Do you think that there should be one standard format to notify to ESMA the authorisation of an investment firm or market operator as an MTF or an OTF? Do you agree with the proposed format?

<ESMA_QUESTION_CP_MIFID_167>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_167>

9. Commodity derivatives

Q168. Do you agree with the approach suggested by ESMA in relation to the overall application of the thresholds? If you do not agree please provide reasons.

<ESMA_QUESTION_CP_MIFID_168>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_168>

Q169. Do you agree with ESMA's approach to include non-EU activities with regard to the scope of the main business?

<ESMA_QUESTION_CP_MIFID_169>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_169>

Q170. Do you consider the revised method of calculation for the first test (i.e. capital employed for ancillary activity relative to capital employed for main business) as being appropriate? Please provide reasons if you do not agree with the revised approach.

<ESMA_QUESTION_CP_MIFID_170>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_170>

Q171. With regard to trading activity undertaken by a MiFID licensed subsidiary of the group, do you agree that this activity should be deducted from the ancillary activity (i.e. the numerator)?

<ESMA_QUESTION_CP_MIFID_171>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_171>

Q172. ESMA suggests that in relation to the ancillary activity (numerator) the calculation should be done on the basis of the group rather than on the basis of the person. What are the advantages or disadvantages in relation to this approach? Do you think that it would be preferable to do the calculation on the basis of the person? Please provide reasons. (Please note that altering the suggested approach may also have an impact on the threshold suggested further below).

<ESMA_QUESTION_CP_MIFID_172>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_172>

Q173. Do you consider that a threshold of 5% in relation to the first test is appropriate? Please provide reasons and alternative proposals if you do not agree.

<ESMA_QUESTION_CP_MIFID_173>
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<ESMA_QUESTION_CP_MIFID_173>

Q174. Do you agree with ESMA's intention to use an accounting capital measure?

<ESMA_QUESTION_CP_MIFID_174>
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<ESMA_QUESTION_CP_MIFID_174>

Q175. Do you agree that the term capital should encompass equity, current debt and non-current debt? If you see a need for further clarification of the term capital, please provide concrete suggestions.

<ESMA_QUESTION_CP_MIFID_175>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_175>

Q176. Do you agree with the proposal to use the gross notional value of contracts? Please provide reasons if you do not agree.

<ESMA_QUESTION_CP_MIFID_176>
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<ESMA_QUESTION_CP_MIFID_176>

Q177. Do you agree that the calculation in relation to the size of the trading activity (numerator) should be done on the basis of the group rather than on the basis of the person? (Please note that that altering the suggested approach may also have an impact on the threshold suggested further below)

<ESMA_QUESTION_CP_MIFID_177>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_177>

Q178. Do you agree with the introduction of a separate asset class for commodities referred to in Section C 10 of Annex I and subsuming freight under this new asset class?

<ESMA_QUESTION_CP_MIFID_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_178>

Q179. Do you agree with the threshold of 0.5% proposed by ESMA for all asset classes? If you do not agree please provide reasons and alternative proposals.

<ESMA_QUESTION_CP_MIFID_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_179>

Q180. Do you think that the introduction of a de minimis threshold on the basis of a limited scope as described above is useful?

<ESMA_QUESTION_CP_MIFID_180>
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<ESMA_QUESTION_CP_MIFID_180>

Q181. Do you agree with the conclusions drawn by ESMA in relation to the privileged transactions?

<ESMA_QUESTION_CP_MIFID_181>
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<ESMA_QUESTION_CP_MIFID_181>

Q182. Do you agree with ESMA's conclusions in relation to the period for the calculation of the thresholds? Do you agree with the calculation approach in the initial period

suggested by ESMA? If you do not agree, please provide reasons and alternative proposals.

<ESMA_QUESTION_CP_MIFID_182>
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<ESMA_QUESTION_CP_MIFID_182>

Q183. Do you have any comments on the proposed framework of the methodology for calculating position limits?

<ESMA_QUESTION_CP_MIFID_183>
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<ESMA_QUESTION_CP_MIFID_183>

Q184. Would a baseline of 25% of deliverable supply be suitable for all commodity derivatives to meet position limit objectives? For which commodity derivatives would 25% not be suitable and why? What baseline would be suitable and why?

<ESMA_QUESTION_CP_MIFID_184>
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<ESMA_QUESTION_CP_MIFID_184>

Q185. Would a maximum of 40% position limit be suitable for all commodity derivatives to meet position limit objectives. For which commodity derivatives would 40% not be suitable and why? What maximum position limit would be suitable and why?

<ESMA_QUESTION_CP_MIFID_185>
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<ESMA_QUESTION_CP_MIFID_185>

Q186. Are +/- 15% parameters for altering the baseline position limit suitable for all commodity derivatives? For which commodity derivatives would such parameters not be suitable and why? What parameters would be suitable and why?

<ESMA_QUESTION_CP_MIFID_186>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_186>

Q187. Are +/- 15% parameters suitable for all the factors being considered? For which factors should such parameters be changed, what to, and why?

<ESMA_QUESTION_CP_MIFID_187>
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<ESMA_QUESTION_CP_MIFID_187>

Q188. Do you consider the methodology for setting the spot month position limit should differ in any way from the methodology for setting the other months position limit? If so, in what way?

<ESMA_QUESTION_CP_MIFID_188>
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<ESMA_QUESTION_CP_MIFID_188>

Q189. How do you suggest establishing a methodology that balances providing greater flexibility for new and illiquid contracts whilst still providing a level of constraint in a clear and quantifiable way? What limit would you consider as appropriate per product class? Could the assessment of whether a contract is illiquid, triggering a potential wider

limit, be based on the technical standard ESMA is proposing for non-equity transparency?

<ESMA_QUESTION_CP_MIFID_189>
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<ESMA_QUESTION_CP_MIFID_189>

Q190. What wider factors should competent authorities consider for specific commodity markets for adjusting the level of deliverable supply calculated by trading venues?

<ESMA_QUESTION_CP_MIFID_190>
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<ESMA_QUESTION_CP_MIFID_190>

Q191. What are the specific features of certain commodity derivatives which might impact on deliverable supply?

<ESMA_QUESTION_CP_MIFID_191>
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<ESMA_QUESTION_CP_MIFID_191>

Q192. How should 'less-liquid' be considered and defined in the context of position limits and meeting the position limit objectives?

<ESMA_QUESTION_CP_MIFID_192>
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<ESMA_QUESTION_CP_MIFID_192>

Q193. What participation features in specific commodity markets around the organisation, structure, or behaviour should competent authorities take into account?

<ESMA_QUESTION_CP_MIFID_193>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_193>

Q194. How could the calculation methodology enable competent authorities to more accurately take into account specific factors or characteristics of commodity derivatives, their underlying markets and commodities?

<ESMA_QUESTION_CP_MIFID_194>
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<ESMA_QUESTION_CP_MIFID_194>

Q195. For what time period can a contract be considered as "new" and therefore benefit from higher position limits?

<ESMA_QUESTION_CP_MIFID_195>
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<ESMA_QUESTION_CP_MIFID_195>

Q196. Should the application of less-liquid parameters be based on the age of the commodity derivative or the ongoing liquidity of that contract.

<ESMA_QUESTION_CP_MIFID_196>
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<ESMA_QUESTION_CP_MIFID_196>

Q197. Do you have any further comments regarding the above proposals on how the factors will be taken into account for the position limit calculation methodology?

<ESMA_QUESTION_CP_MIFID_197>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_197>

Q198. Do you agree with ESMA's proposal to not include asset-class specific elements in the methodology?

<ESMA_QUESTION_CP_MIFID_198>
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<ESMA_QUESTION_CP_MIFID_198>

Q199. How are the seven factors (listed under Article 57(3)(a) to (g) and discussed above) currently taken into account in the setting and management of existing position limits?

<ESMA_QUESTION_CP_MIFID_199>
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<ESMA_QUESTION_CP_MIFID_199>

Q200. Do you agree with the proposed draft RTS regarding risk reducing positions?

<ESMA_QUESTION_CP_MIFID_200>
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<ESMA_QUESTION_CP_MIFID_200>

Q201. Do you have any comments regarding ESMA's proposal regarding what is a non-financial entity?

<ESMA_QUESTION_CP_MIFID_201>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_201>

Q202. Do you agree with the proposed draft RTS regarding the aggregation of a person's positions?

<ESMA_QUESTION_CP_MIFID_202>
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<ESMA_QUESTION_CP_MIFID_202>

Q203. Do you agree with ESMA's proposal that a person's position in a commodity derivative should be aggregated on a 'whole' position basis with those that are under the beneficial ownership of the position holder? If not, please provide reasons.

<ESMA_QUESTION_CP_MIFID_203>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_203>

Q204. Do you agree with the proposed draft RTS regarding the criteria for determining whether a contract is an economically equivalent OTC contract?

<ESMA_QUESTION_CP_MIFID_204>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_204>

Q205. Do you agree with the proposed draft RTS regarding the definition of same derivative contract?

<ESMA_QUESTION_CP_MIFID_205>
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<ESMA_QUESTION_CP_MIFID_205>

Q206. Do you agree with the proposed draft RTS regarding the definition of significant volume for the purpose of article 57(6)?

<ESMA_QUESTION_CP_MIFID_206>
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<ESMA_QUESTION_CP_MIFID_206>

Q207. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

<ESMA_QUESTION_CP_MIFID_207>
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<ESMA_QUESTION_CP_MIFID_207>

Q208. Do you agree with the proposed draft RTS regarding the procedure for the application for exemption from the Article 57 position limits regime?

<ESMA_QUESTION_CP_MIFID_208>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_208>

Q209. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

<ESMA_QUESTION_CP_MIFID_209>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_209>

Q210. Do you agree with the reporting format for CoT reports?

<ESMA_QUESTION_CP_MIFID_210>
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<ESMA_QUESTION_CP_MIFID_210>

Q211. Do you agree with the reporting format for the daily Position Reports?

<ESMA_QUESTION_CP_MIFID_211>
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<ESMA_QUESTION_CP_MIFID_211>

Q212. What other reporting arrangements should ESMA consider specifying to facilitate position reporting arrangements?

<ESMA_QUESTION_CP_MIFID_212>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_212>

10. Market data reporting

Q213. Which of the formats specified in paragraph 2 would pose you the most substantial implementation challenge from technical and compliance point of view for transaction and/or reference data reporting? Please explain.

<ESMA_QUESTION_CP_MIFID_213>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_213>

Q214. Do you anticipate any difficulties with the proposed definition for a transaction and execution?

<ESMA_QUESTION_CP_MIFID_214>
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<ESMA_QUESTION_CP_MIFID_214>

Q215. In your view, is there any other outcome or activity that should be excluded from the definition of transaction or execution? Please justify.

<ESMA_QUESTION_CP_MIFID_215>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_215>

Q216. Do you foresee any difficulties with the suggested approach? Please justify.

<ESMA_QUESTION_CP_MIFID_216>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_216>

Q217. Do you agree with ESMA's proposed approach to simplify transaction reporting? Please provide details of your reasons.

<ESMA_QUESTION_CP_MIFID_217>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_217>

Q218. 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_CP_MIFID_218>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_218>

Q219. Do you agree with the proposed approach to flag trading capacities?

<ESMA_QUESTION_CP_MIFID_219>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_219>

Q220. 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_CP_MIFID_220>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_220>

Q221. Do you agree with ESMA's approach for deciding whether financial instruments based on baskets or indices are reportable?

<ESMA_QUESTION_CP_MIFID_221>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_221>

Q222. Do you agree with the proposed standards for identifying these instruments in the transaction reports?

<ESMA_QUESTION_CP_MIFID_222>
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<ESMA_QUESTION_CP_MIFID_222>

Q223. Do you foresee any difficulties applying the criteria to determine whether a branch is responsible for the specified activity? If so, do you have any alternative proposals?

<ESMA_QUESTION_CP_MIFID_223>
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<ESMA_QUESTION_CP_MIFID_223>

Q224. Do you anticipate any significant difficulties related to the implementation of LEI validation?

<ESMA_QUESTION_CP_MIFID_224>
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<ESMA_QUESTION_CP_MIFID_224>

Q225. Do you foresee any difficulties with the proposed requirements? Please elaborate.

<ESMA_QUESTION_CP_MIFID_225>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_225>

Q226. Are there any cases other than the AGGREGATED scenario where the client ID information could not be submitted to the trading venue operator at the time of order submission? If yes, please elaborate.

<ESMA_QUESTION_CP_MIFID_226>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_226>

Q227. Do you agree with the proposed approach to flag liquidity provision activity?

<ESMA_QUESTION_CP_MIFID_227>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_227>

Q228. Do you foresee any difficulties with the proposed differentiation between electronic trading venues and voice trading venues for the purposes of time stamping? Do you believe that other criteria should be considered as a basis for differentiating between trading venues?

<ESMA_QUESTION_CP_MIFID_228>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_228>

Q229. Is the approach taken, particularly in relation to maintaining prices of implied orders, in line with industry practice? Please describe any differences?

<ESMA_QUESTION_CP_MIFID_229>
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<ESMA_QUESTION_CP_MIFID_229>

Q230. Do you agree on the proposed content and format for records of orders to be maintained proposed in this Consultation Paper? Please elaborate.

<ESMA_QUESTION_CP_MIFID_230>
The FIA Associations* would like to ensure that investment firms that engage in high frequency algorithmic trading technique can decide for themselves the format and associated protocols in which the required order data set be maintained. Many of such investment firms trade on a wide range of trading venues and therefore will choose to retain such audit trail data in a format that is consistent globally. This facilitates storage optimisation and therefore cost efficiencies but also allows such firms to efficiently recreate required data sets in the applicable format as and when requested to do so by a competent authority.

We therefore request to add a recital that makes this clear and which is consistent with the flexibility afforded to trading venues under RTS 34.

PROPOSED INSERTION IN RTS 35 OF NEW RECITAL 3:

* This response is submitted jointly on behalf of the Futures Industry Association ("FIA"), Futures Industry Association Europe ("FIA Europe") and the FIA European Principal Traders Association ("FIA EPTA").

FIA is the leading trade organisation for the futures, options and over-the-counter cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearing organisations, our member firms play a critical role in the reduction of systematic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouse for derivatives transactions. FIA's regular members, which act as the majority clearing members of the US exchanges, handle more than 90 percent of the customer funds held for trading on US futures exchanges.

FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPs, vendors, law firms and con-sultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe formed an affiliation with FIA under a new structure – FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

FIA EPTA is affiliated with FIA and is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

ESMA is conscious that prescribing a specific format in which the records should be maintained might result in operational difficulties for investment firms that engage in a high frequency algorithmic trading technique. Therefore such investment firms are permitted to keep the relevant data according to their own classifications and protocols under the condition that upon request of the competent authority such data will be provided in the format prescribed in this Regulation.

<ESMA_QUESTION_CP_MIFID_230>

Q231. In your view, are there additional key pieces of information that an investment firm that engages in a high-frequency algorithmic trading technique has to maintain to comply with its record-keeping obligations under Article 17 of MiFID II? Please elaborate.

<ESMA_QUESTION_CP_MIFID_231>
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<ESMA_QUESTION_CP_MIFID_231>

Q232. Do you agree with the proposed record-keeping period of five years?

<ESMA_QUESTION_CP_MIFID_232>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_232>

Q233. Do you agree with the proposed criteria for calibrating the level of accuracy required for the purpose of clock synchronisation? Please elaborate.

<ESMA_QUESTION_CP_MIFID_233>

1. **The level of accuracy requirements**

The FIA Associations* strongly believe the requirement to calibrate to a maximum divergence of 1 nanosecond for certain trading venues and investment firms is vastly excessive, does

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FIA Europe, formerly the Futures and Options Association (FOA), represents some 175 firms involved in the exchange-traded and centrally-cleared derivatives markets – including banks, brokers, commodity firms, exchanges, CCPs, vendors, law firms and con-sultants. FIA Europe works with its members to maintain constructive dialogue with government and regulatory authorities and deliver high standards of industry practice. FIA Europe formed an affiliation with FIA under a new structure – FIA Global. Under this arrangement, FIA, FIA Europe and FIA Asia have strengthened their influence on cross-border issues, substantially increasing the coordination and information flow between regions and providing a powerful global voice to express the views of their members. The organisations preserve their ability to deal with legislative, regulatory and market issues in their respective time-zones and continue to operate with their own leadership and staff, separate boards of directors and distinct memberships.

not reflect currently available technology (or technology expected to be available in the short term), and would result in a massive cost to the industry.

To highlight the extent of this burden, please consider the following examples:

First, ESMA states in its own Cost-Benefit Analysis (page 440, Table 1) that the most precise synchronisation protocol (PTP) achieves only an accuracy of 20-100 nanoseconds.

Second, there are very few examples of achieving accuracy in the order of nanoseconds at all, let along 1 nanosecond. The National Physical Laboratory, the UK standard for time keeping, is accurate to within 4 nanoseconds of UTC[5] whilst the OPERA experiment at CERN, which famously published results describing faster than light particles due to a time measurement anomaly, achieved an accuracy of less than 10 nanoseconds when measuring particle flight time[6]. The fact that these publicly funded, national institutes of advanced technology cannot achieve clock accuracies of 1 nanosecond highlights the impracticality of instructing financial institutions to succeed where they have not.

Furthermore, the requirement to calibrate to a 1 microsecond level of accuracy relative to UTC represents a significant technical challenge compared to current market practice, and will require substantial investment in technology including dedicated lines and network hardware, which we cannot support. To increase accuracy a further thousandfold would be many, many, many times harder.

2. Separating clock synchronisation requirements for trading venues and for investment firms.

The FIA Associations do not support ESMA's suggestion to link clock synchronisation requirements for investment firms directly to the trading venues on which they trade.

Trading venues do not cater to one specific type of market participant. Indeed, the largest trading venues are able to offer deep pools of liquidity because they serve a heterogeneous collection of investment firms. Following ESMA's proposal, investment firms that rely solely on humans entering manual orders will face excessive IT costs because one of the trading venues on which they trade also happens to cater to latency sensitive clients.

An unintended consequence of this approach could be that only the largest trading firms will be able or willing to invest in meeting the regulatory requirement for accuracy, and that as a result, smaller firms may cease to trade directly on trading venues.

The FIA Associations believe ESMA should determine the clock synchronisation requirements based on other characteristics as outlined in below in our point 3.

FIA EPTA is affiliated with FIA and is comprised of 25 EU-based firms that trade their own capital in the exchange-traded markets. FIA EPTA members engage in manual, automated and hybrid methods of trading and are active in a variety of asset classes, such as equities, foreign exchange, commodities and fixed income. Members of FIA EPTA are a critical source of liquidity in the exchange-traded markets, allowing those who use the markets to manage their business risks to enter and exit the markets efficiently.

[5] See http://www.npl.co.uk/educate-explore/what-is-time/why-do-we-need-accurate-time
[6] See http://press.web.cern.ch/press-releases/2011/09/opera-experiment-reports-anomaly-flight-time-neutrinos-cern-gran-sasso

3. Determining clock synchronisation for investment firms

The FIA Associations believe that ESMA should define clock synchronisation requirements for all investment firms by specifying one level of accuracy and granularity. Additionally, ESMA should require a stricter level of accuracy and granularity for those orders originating from a firm defined as operating a high frequency algorithmic trading technique (Art. 4(1)(40) of MIFID II).

However, it is important that ESMA recognise many legal entities for large investment firms will be classed as HFATT firms due to one small part of their overall activity. These entities are constructed of a diverse set of trading activities across the various asset classes and leverage a number of differing in-house/vendor trading platforms, and in most cases the majority of their algorithms, systems and activities will be for non-HFT activity. While it makes sense for organisational requirements to apply at the legal entity level, it does not make sense to require microsecond granularity time-stamping for all non-HFT activities because the costs of implementing changes to all systems would be significant. This would also mean that independent software vendors who provide trading systems for non-HFT purposes (i.e. a click to trade screen vendor) would be forced by investment firms to implement a level of time stamping that could be uneconomical. Given that investment firms will clearly identify in their self-assessment the nature of the activities that they provide as well as requirements around algorithm testing and flagging it will be straight-forward for investment firms to identify their HFT systems. It is therefore entirely feasible to propose that a lower granularity of time stamping is required only for these systems that are involved with high frequency algorithmic trading. This would also ensure that there was full transparency to NCAs. If a system is used for HFT flows in any way then the more granular time stamping requirements would apply.

While we acknowledge that for true, extreme low latency firms, accuracy requirements of 1 microsecond may be achievable and appropriate, we know this standard would not be viable for many firms that will end up described as having HFT-activity. Therefore, the FIA Associations believe that the 1 microsecond granularity and 100 microsecond accuracy proposal for HFT above will meet the objectives of regulators while ensuring that inappropriate costs are not incurred by large financial participants.

We believe that this approach is more elegant and less costly by leveraging an existing MIFID II definition whilst still capturing the order flows that may require a higher accuracy and granularity for monitoring purposes. It also has the advantage of proportionality in that firms for whom latency is unimportant will not be obliged to invest in the technology and expertise to create timestamps at an accuracy level that is irrelevant for their activities. Therefore, we propose thresholds as shown in Table 4 under Point 5.

4. More requirements bands for trading venues

The FIA Associations support ESMA's proposal to determine the trading venue's granularity and accuracy requirement by estimating the gateway-to-gateway latency and relating the outcome with a specific requirement band. In addition, we believe that ESMA can enhance this proposal in two ways.

Firstly, the bands proposed by ESMA in RTS 13, Table 1, Annex I increase by a factor of 1,000, with correspondingly sharp increases in technology cost and implementation difficulty. We believe that bands should increase by a factor of 10, as shown in Table 1 below.

TABLE 1: ADDED BANDS FOR TRADING VENUES

Band	Gateway-to-gateway latency time of the trading venue
1	1 millisecond or greater
2	100 microsecond to 999 microseconds
3	10 microseconds to 99 microseconds
4	9 microseconds or less

Under ESMA's proposal, the required granularity expressed relative to the gateway-to-gateway latency varies significantly within each band. As shown in Table 2 below, granularity varies between 100% and 0.1% of the gateway-to-gateway latency. The FIA Associations believe it would be better to reduce this variance to a range between 100% and 10%, only allowing jumps of a factor of 10. An excessively low granularity (i.e. below 10%) has little marginal benefit for monitoring because timestamps are already 10x more granular than the observed gateway-to-gateway latency. Also, the requirement to increase relative accuracy under ESMA's existing proposal will equate to a significant portion of overall implementation costs. This shortcoming, and implementation costs, will be reduced if ESMA introduces a larger number of bands as per Table 1.

TABLE 2: GRANULARITY RELATIVE TO GATEWAY-TO-GATEWAY LATENCY

Band	Gateway-to-gateway latency time of the trading venue	Absolute Granularity	Lowest value when granularity expressed relative to gateway-to-gateway latency	Largest value when granularity expressed relative to gateway-to-gateway latency
1	1 millisecond or greater	1 millisecond	-	100%
2	1 microsecond to 999 microseconds	1 microsecond	0.1%	100%
3	999 nanoseconds or less	1 nanosecond	0.1%	-

Secondly, we do not believe nanosecond accuracy and granularity are in any way practically achievable. Currently, it is still uncertain how technology will be implemented that achieves sub-microsecond gateway-to-gateway latency and how that technology behaves. Consequently, the FIA Associations believe that ESMA should not aim to regulate that unknown technology. Instead, the evolution of financial markets shall be monitored on an on-going basis by national competent authorities and the European Securities and Markets Authority (ESMA) with a view to propose amendments when necessary. This review should take place at least on an annual basis.

Therefore, we propose thresholds as shown in Table 3 under our point 5 below.

5. Proposal for accuracy and granularity requirements

Considering all the feedback provided in our points 1 to 4 above, the FIA Associations believe that Table 3 and Table 4 describe a more balanced proposal for ESMA to consider.

TABLE 3: PROPOSAL ACCURACY AND GRANULARITY REQUIREMENT FOR TRADING VENUES

Band	Gateway-to-gateway latency time of the trading venue	Granularity	Accuracy
1	1 millisecond or greater	1 millisecond	1 millisecond
2	100 microseconds to 999 microseconds	1 microseconds	100 microsecond
3	10 microseconds to 99 microseconds	1 microseconds	10 microseconds
4	9 microseconds or less	1 microsecond	1 microsecond

TABLE 4: PROPOSAL ACCURACY AND GRANULARITY REQUIREMENTS FOR INVESTMENT FIRMS

	Granularity	Accuracy
Base requirement	1 millisecond	1 millisecond
Systems that are involved with high frequency algorithmic trading technique	1 microsecond	100 microseconds

Additionally, some participants drafting this response expressed concern that smaller firms that may be captured under the high frequency algorithmic trading technique definition, but which are nevertheless not focused on being competitive in latency terms, would find a microsecond requirement too costly and technically difficult. A potential consequence of this may be that such firms withdraw from the market and no longer provide liquidity or otherwise contribute to a varied ecosystem of market participants. To address this, we discussed the potential to add additional bands based on the average latency of the investment firm, but ultimately dismissed this proposal as too complex and too costly. We urge ESMA and the European Commission, however, to be aware that this is another potentially grave consequence of miscalibrating the definition of high frequency algorithmic trading technique definition.

6. When to actually apply timestamps

ESMA/2014/1570, RTS 35, Annex I, Table 1 and 2 state timestamps should be applied at "*the date and exact time of the receipt of the order or making a decision to deal*".

The FIA Associations believe this definition is ambiguous enough to invalidate attempts at clock accuracy. For example, is the receipt of the order when the network packet is first seen on the venues network or when it reaches the first software component or the matching engine? Similarly the '*decision to deal'* can be interpreted as several points along a decision path that include risk and limit checks.

Rather than mandate a specific point that could imply the prescription of specific technology that must be used for clock synchronisation, and as a consequence perhaps not be applicable to a specific firm's architecture, the FIA Associations propose that ESMA simply state that investment firms should apply a timestamp at '*an internally documented, consistent point throughout the firm's organisation*'.

<ESMA_QUESTION_CP_MIFID_233>

Q234. Do you foresee any difficulties related to the requirement for members or participants of trading venues to ensure that they synchronise their clocks in a timely manner according to the same time accuracy applied by their trading venue? Please elaborate and suggest alternative criteria to ensure the timely synchronisation of members or participants clocks to the accuracy applied by their trading venue as well as a possible calibration of the requirement for investment firms operating at a high latency.

<ESMA_QUESTION_CP_MIFID_234>

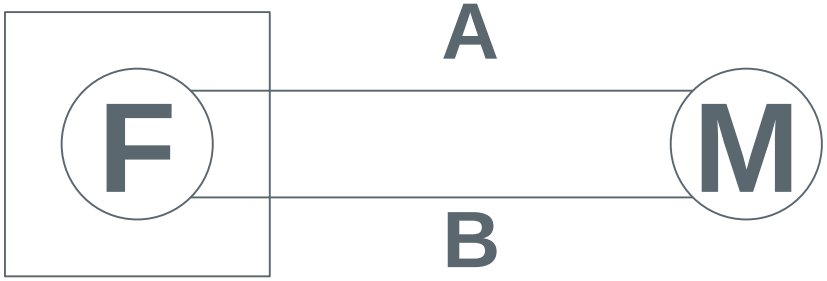
1. **Evidencing compliance with the requirements**

The FIA Associations encourage ESMA to address the process of how investment firms and trading venues can evidence that they are meeting accuracy requirements. We envision substantial difficulties here and advise ESMA to specify that investment firms can evidence their compliance without having to produce empirical evidence.

In order to obtain and produce empirical evidence that the accuracy requirement is met, firms would have to compare their internal business clock with UTC and determine the variation in the observed difference. However, this presents some fundamental difficulties. Figure 1 below depicts a UTC master clock (M) and a business clock within a firm (F). The firm decided to synchronise its business clock using route A, which relies on a particular set of technologies. If the firm wants to evidence its accuracy of F relative to M, it could establish a second route, B, using a different set of technologies. However, even when doing so, the firm would not be able to evidence compliance with the accuracy requirement, as it is uncertain whether empirically observed differences are driven by inaccuracy in route A or B. Thus, producing any meaningful empirical evidence cannot be done without complex testing setups and multiple sets of synchronisation routes. That would be an excessive burden, considering that all investment firms, regardless of their size and technological sophistication, will be required to evidence this compliance.

Therefore, we advise ESMA to specify that investment firms (including those operating trading venues) do not have to produce empirical evidence of compliance with this requirement. Rather, firms should be required to review on a periodic basis the accuracy of their clock synchronisation by analysing the accuracy of each relevant software and hardware component within their technology against such component's accuracy as stated by the provider of that component.

FIGURE 1: MASTER / BUSINESS CLOCK LAYOUT



2. **Considering outliers during operations**

Under the current proposal, ESMA does not allow for outliers when meeting the accuracy requirements. We do not believe that this is appropriate. Trading technology entails a certain amount of jitter or drift within systems that would make a 100% compliance requirement excessively expensive. Thus, the FIA Associations propose that ESMA allows firms to discard 10% of the worst expected outliers (i.e. require compliance 90% of the time) when analysing their accuracy.

Additionally, we propose that ESMA explicitly states for clarity that the requirements only apply during business hours.

3. **Initial enforcement of requirements**

The following comment only applies in the event ESMA does not follow our proposal in point 3 in response to Question 233 above (to distinguish a stricter level of accuracy and granularity for those orders originating from a firm defined as operating a high frequency algorithmic trading technique):

Under ESMA's existing proposal, investment firms can only determine their requirements regarding accuracy and granularity once all trading venues have provided information regarding their categorisation. Thus, ESMA should specify that investment firms may treat the initial announcement of accuracy and granularity by a trading venue as a change in accuracy and granularity in line with Art. 3(5).

4. **Alternative proposal**

Several participants drafting this response wished to record an alternative approach in the event that ESMA does not accept the FIA Associations' proposals for achieving clock synchronisation by investment firms.

In this alternative approach, only trading venues would be required to add timestamps to market events. These timestamps would be included in all outgoing messages (to investment firms and consolidated tape providers) and would follow the accuracy and granularity requirements of Table 3 in section 5 of our answer to Question 233.

Investment firms would be responsible for recording the event or sequence of events that triggered each 'decision to deal'. For each event that they record they would include the timestamp that was provided for that event by the trading venue.

By recording the sequence, cross venue monitoring and detecting instances of market abuse will be simple. Post-trade data from trading venues will contain their timestamps ensuring it can readily be part of a reliable consolidated tape. For best execution, trading firms will be able to study prevailing market conditions using the venue timestamps they receive.

The advantages of this alternative proposal would be:

- It achieves the goal of allowing for the detection of instances of market abuse;
- It solves the 'when to apply time stamps' issue detailed in section 7 of our reply to Question 233;

- It limits the number of parties that have to maintain accurate time stamps, and hence reduces the number of synchronisation problems;
- It would reduce the impact on investment firms in terms of cost and expertise required, particularly for those firms for which latency is not important;
- It would simplify the process to achieve post-trade transparency data readily available as part of a reliable consolidated tape; and,
- It is simple and easily enforceable.

We have set out our complete amendments to RTS 36 below:

PROPOSED AMENDMENTS TO RTS 36: Draft regulatory technical standards on clock synchronisation

COMMISSION DELEGATED REGULATION (EU) No …/…

of [ ]

Supplementing Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of 15 May 2014 of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and the Council [reference to OJ publication details to be included in a footnote] and in particular Article 50(2) thereof,

Whereas:

The current level of fragmentation and automation of the European financial markets makes it critical that there are adequate standards for the synchronisation of business clocks used by trading venues and their members or participants.

Clock synchronisation has a direct impact in many areas. It is essential for conducting cross-venue monitoring and detecting instances of market abuse; it will contribute to ensuring that post-trade transparency data can readily be part of a reliable consolidated tape; lastly clock synchronisation will be beneficial for the assessment of best execution since it will allow to better compare effective transactions to market conditions prevailing at the time of their execution.

In order to attain the objectives set out above, this Regulation specifies that the concept of reportable event includes the following obligations: publication of post-trade transparency data for equity, equity-like and non-equity instruments, as prescribed by Articles 6, 7, 10 and 11 of MiFIR; transaction reporting under Article 26 MiFIR; data

related to orders placed or submitted that might be requested by NCAs to investment firms (Article 25(1) MiFIR) including specific requirements for firms engaged in high frequency algorithmic trading techniques (Article 17(2) of MiFID II); and data related to orders placed or submitted that might be requested by NCAs to trading venues under Article 25(2) MiFIR.

The number of orders received by a trading venue can be very high and in any event, much higher than that of executed transactions, so that for each and every second, a trading venue may receive many orders (e.g. several thousands of orders per second depending on the trading venue and on the financial instruments' volatility and liquidity).

As a result, a time granularity of one second would not be sufficient for the purposes of market manipulation surveillance. Therefore, as a general rule this Regulation sets out a minimum requirement according to which internal clocks of trading venues operating an electronic system cannot diverge by more than one millisecond with respect to the reference time and all reportable events should be time stamped to the nearest millisecond. ~~The members or participants of a trading venue will be obliged to synchronise their clocks according to at least the same time accuracy applied by their trading venue~~.

The rapid evolution of the markets has also led to a situation where in some cases; time stamping to the granularity of one millisecond would not reflect the actual speed at which the system operates. Therefore this Regulation ~~obliges trading venues that have operating systems where the gateway-to-gateway latency is less than one millisecond to synchronise their clocks according to the~~ **obliges certain trading venues and investment firms to time stamp to a more granular** level of accuracy ~~at which the venues measure their latency and to time stamp to that same level of granularity~~.

ESMA is also conscious that there are trading models for which the millisecond granularity might not be relevant or feasible. Therefore trading venues that operate through voice trading only are required to have a maximum divergence from the reference clock of one second.

The evolution of financial markets will be monitored on an on-going basis by national competent authorities and the European Securities and Markets Authority (ESMA) with a view to propose amendments to this Regulation as appropriate in order to adjust the business clock synchronisation requirements. ESMA should also propose an amendment to this Regulation in light of the evolution of financial markets' microstructure, if it is considered that technology advanced sufficiently. This review should take place at least on an annual basis.

This Regulation is based on draft regulatory technical standards submitted by the European Securities and Markets Authority (hereinafter ESMA) to the Commission.

In accordance with Article 10 of Regulation (EU) No 1095/2010, of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority European Securities and Markets Authority), ESMA has conducted open public consultations on such draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the ESMA Securities and Markets Stakeholder Group established in accordance with Article 37 of that Regulation.

HAS ADOPTED THIS REGULATION

CHAPTER I
Definitions

Article 1
Definitions

For the purposes of this regulation the following definitions shall apply:

'Gateway-to-gateway latency' means the time measured **during the live trading period of the trading day** from the moment a message is received from an outer gateway of the trading system, sent through the order submission protocol, processed by the matching engine, and then sent back until an acknowledgement is sent from the gateway.

'Electronic system' means a system where orders are electronically tradable or where orders are tradable outside the system provided that they are advertised through the given system.

'Voice trading system' means a trading system that do**es** not fall under the definition of 'electronic system' according to letter (b) of this Article.

'Reference time' means the Coordinated Universal Time (UTC) issued and maintained by one of the timing centres listed in the latest Bureau International des Poids and Mesures (BIPM) Annual Report on Time Activities.

CHAPTER II
General

Article 2
Reference time

(1) Trading venues and their members or participants shall synchronise the business clocks they use to record the date and time of any reportable event against a common reference time.

(2) For the purpose of paragraph (1), reportable events shall include but shall not be limited to the following:

transactions to be reported under Article 26 of Regulation (EU) No 600/2014;

publication of data under Articles 6, 7, 10 or 11 of Regulation (EU) No 600/2014;

any event affecting the orders placed on a trading venue to be kept at the disposal of the competent authority by the trading venue and its members or participants pursuant to Articles 25 of Regulation (EU) No 600/2014 and Articles 16(6) and 17(2) of Directive 2014/65/EU.

Article 3
Level of accuracy and granularity

A trading venue operating an electronic system shall ensure that its business clocks do not diverge more than one millisecond from the reference time.

By way of derogation from paragraph 1, a trading venue measuring its gateway-to-gateway latency time in less than one millisecond shall synchronise its business clocks in accordance with Table 1 of Annex I based on the trading venue's gateway-to-gateway latency. The trading venue shall use as a reference the gateway-to-gateway latency time measured at the ninety ninth percentile of all orders advertised through their system, **measured over four weeks for the same month each year, for example, February**.

A trading venue that only operates voice trading systems shall ensure that its business clocks do not diverge more than one second from the reference time.

The members or participants of a trading venue referred in paragraphs 1, 2 ~~or 3~~ above shall ensure that the business clocks used by the relevant system to connect to that specific trading venue are synchronised ~~according~~ **in accordance with Table 2 of Annex I** ~~to the same time accuracy applied by the trading venue. Where a member or participant has a system that connects to multiple trading venues, all business clocks used by that system shall have the same or higher granularity and accuracy compared to the most accurate trading venue of which they are a member or participant~~.

~~For the purposes of paragraph 4, where a trading venue changes the accuracy of its business clocks, the members or participants of that venue shall ensure that they implement a corresponding change in the accuracy of the business clocks that are used by the relevant system in a timely manner.~~

Trading venues ~~and their members or participants~~ shall record the date and time of any reportable event to the level of granularity required under Table 1 of Annex I.

Members or participants of trading venues shall record the date and time of any reportable event to the level of granularity required under Table 2 of Annex I.

Article 4

Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

TABLE 1: ACCURACY AND GRANULARITY REQUIREMENT FOR TRADING VENUES

Band	Gateway-to-gateway latency time of the trading venue	Granularity	Accuracy
1	1 millisecond or greater	1 millisecond	1 millisecond
2	100 microseconds to 999 microseconds	1 microseconds	100 microsecond
3	10 microseconds to 99 microseconds	1 microseconds	10 microseconds
4	1 microsecond to 9 microseconds	1 microsecond	1 microsecond

TABLE 2: ACCURACY AND GRANULARITY REQUIREMENTS FOR INVESTMENT FIRMS

	Granularity	Accuracy

Base requirement	**1 millisecond**	**1 millisecond**
Systems that are involved with high frequency algorithmic trading technique	**1 microsecond**	**100 microseconds**

<ESMA_QUESTION_CP_MIFID_234>

Q235. Do you agree with the proposed list of instrument reference data fields and population of the fields? Please provide specific references to the fields which you are discussing in your response.

<ESMA_QUESTION_CP_MIFID_235>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_235>

Q236. Do you agree with ESMA's proposal to submit a single instrument reference data full file once per day? Please explain.

<ESMA_QUESTION_CP_MIFID_236>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_236>

Q237. Do you agree that, where a specified list as defined in Article 2 [RTS on reference data] is not available for a given trading venue, instrument reference data is submitted when the first quote/order is placed or the first trade occurs on that venue? Please explain.

<ESMA_QUESTION_CP_MIFID_237>
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<ESMA_QUESTION_CP_MIFID_237>

Q238. Do you agree with ESMA proposed approach to the use of instrument code types? If not, please elaborate on the possible alternative solutions for identification of new financial instruments.

<ESMA_QUESTION_CP_MIFID_238>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_238>

11. Post-trading issues

Q239. What are your views on the pre-check to be performed by trading venues for orders related to derivative transactions subject to the clearing obligation and the proposed time frame?

<ESMA_QUESTION_CP_MIFID_239>
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<ESMA_QUESTION_CP_MIFID_239>

Q240. What are your views on the categories of transactions and the proposed timeframe for submitting executed transactions to the CCP?

<ESMA_QUESTION_CP_MIFID_240>
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<ESMA_QUESTION_CP_MIFID_240>

Q241. What are your views on the proposal that the clearing member should receive the information related to the bilateral derivative contracts submitted for clearing and the timeframe?

<ESMA_QUESTION_CP_MIFID_241>
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<ESMA_QUESTION_CP_MIFID_241>

Q242. What are your views on having a common timeframe for all categories of derivative transactions? Do you agree with the proposed timeframe?

<ESMA_QUESTION_CP_MIFID_242>
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<ESMA_QUESTION_CP_MIFID_242>

Q243. What are your views on the proposed treatment of rejected transactions?

<ESMA_QUESTION_CP_MIFID_243>
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Q244. Do you agree with the proposed draft RTS? Do you believe it addresses the stakeholders concerns on the lack of indirect clearing services offering? If not, please provide detailed explanations on the reasons why a particular provision would limit such a development as well as possible alternatives.

<ESMA_QUESTION_CP_MIFID_244>
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Q245. Do you believe that a gross omnibus account segregation, according to which the clearing member is required to record the collateral value of the assets, rather than the assets held for the benefit of indirect clients, achieves together with other requirements included in the draft RTS a protection of equivalent effect to the indirect clients as the one envisaged for clients under EMIR?

<ESMA_QUESTION_CP_MIFID_245>
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