28 April 2020

FIA and ISDA response to ESMA's Consultation Paper on Draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR

The Futures Industry Association (**FIA**) and the International Swaps and Derivatives Association (**ISDA**) (together, the **Associations**) welcome the opportunity to respond to ESMA's consultation paper on draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR.

Capital markets are global in nature and, as set out in previous communications to the European Commission and to ESMA, we support the need for a stable and robust framework that is critical to preserve the integrity of and access to EU capital markets, facilitating European financing and growth.

We support ESMA in its increased responsibilities for the registration and monitoring of third-country firms, including regarding regulatory and supervisory co-ordination and co-operation between the EU and third-country regulators.

Executive summary

We have set out our detailed comments below in response to ESMA's questions. Overall, we acknowledge that it is important for ESMA to have access to up-to-date information. However, by way of a high-level summary our key recommendations in relation to the proposals are:

- The information to be requested by ESMA from applicant third-country firms for registration in the ESMA register and thereafter from registered firms on an annual basis goes significantly beyond ESMA's power to require information at the point of registration and beyond the information needed by ESMA to perform its responsibilities under MiFIR. We have suggested below some ways in which the scope of information could be reduced while still enabling ESMA to perform its responsibilities, including clarifying the EU nexus of the information requested and providing that third-country firms may satisfy their annual reporting obligation by supplying material updates (rather than all updates regardless of materiality or relevance to EU business).
- The information requirements at the point of registration risk blurring the line between a registration process (under which firms are required only to satisfy the objective criteria set out in Article 46(2) MiFIR) and an application process (which would imply ESMA having to undertake an additional subjective assessment based on the information that the third country firm has provided).
- Whilst ESMA will have increased responsibilities under the MiFIR third-country regime, they do not extend to direct supervision of third-country firms or assessing their

compliance with obligations equivalent to those that would apply to EU investment firms and ESMA's powers to require information at the point of registration and on an annual basis should not be used to *de facto* carry out these tasks.

- Given that ESMA may temporarily prohibit or restrict the provision of investment services or activities in the Union by a third-country firm that has failed to comply with its annual reporting obligations to ESMA or with a request for information from ESMA, it is critical that the list of information to be reported annually is precise enough that firms can establish whether or not they have complied with the reporting obligation, and that it is possible for firms to obtain and provide to ESMA all of the information on the list. Again, we have suggested below some areas where more precise guidance on the information to be provided would be welcome.
- The volume of information requested could have an impact on ESMA's resources, particularly in relation to the registration requirements. Once an equivalence decision is made in relation to a third-country which carries on a significant amount of business with the EU, it is likely that ESMA will receive a high volume of registration notifications. MiFIR only gives ESMA 180 working days within which to confirm or refuse registration. Given the breadth and level of detail required, it seems likely that reviewing and benchmarking a large number of applications within this period would place a significant strain on ESMA's resources.

Q1: Do you agree with the list of information to be requested by ESMA from applicant third-country firms for registration in the ESMA register? If no, which items should be added or deleted and for which reasons?

We are concerned that the list as currently drafted goes significantly beyond ESMA's power to require information at the point of registration and that these information requirements risk blurring the line between a registration process (under which firms are required only to satisfy the objective criteria set out in Article 46(2) MiFIR) and an application process which would imply ESMA having to undertake an additional subjective assessment based on the information required to be reported).

We are also concerned by the impact that the volume of information requested could have on ESMA's resources, particularly in relation to the registration requirements. Once an equivalence decision is made in relation to a third-country which carries on a significant amount of business with the EU, it is likely that ESMA will receive a high volume of registration notifications. MiFIR only gives ESMA 180 working days from the submission of a complete application within which to confirm or refuse registration. Given the breadth and level of detail required, it seems likely that reviewing and benchmarking a large number of applications within this period would place a significant strain on ESMA's resources.

As stated in ESMA's consultation paper, Article 46(2) of MiFIR requires ESMA to register a third-country firm where the following conditions are met:

a) The European Commission has adopted an equivalence decision in accordance with Article 47(1) MiFIR;

b) The third-country firm is authorised in the jurisdiction in which its head office is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country;

c) Co-operation arrangements have been established pursuant to Article 47(2) of MiFIR;

d) The third-country firm has established the necessary arrangements and procedures to report the information required to be reported annually to ESMA under Article 46(6a) of MiFIR.

ESMA states in its consultation paper that it requires the information specified in the draft technical standards in order to carry out its increased responsibilities under the MiFIR third-country regime (as amended by the Investment Firms Regulation).

We understand that ESMA's increased responsibilities are to be confined matters such as monitoring regulatory and supervisory developments, enforcement practices and other market developments in third countries for which equivalence decisions have been made. ESMA is also responsible for identifying situations in which a third-country firm may be acting in a manner clearly prejudicial to the interests of investors or the orderly functioning of markets, or in which a third-country firm has seriously infringed the provisions applicable to it in the relevant third country, and withdrawing registration (temporarily or permanently) if necessary.

However, ESMA's increased responsibilities do not extend to taking direct supervisory responsibility for third-country firms or assessing their compliance with obligations equivalent to those that would apply to EU investment firms. These limitations are recognised in a number of provisions within the MiFID II / MiFIR third country firm regime.

There is a distinct split of responsibilities between the role of the European Commission and ESMA in relation to third country firms. The EC holds responsibility for determining whether a third country firm is subject to equivalent rules in its home jurisdiction. Once an equivalence determination has been made, ESMA's primary responsibility is to register the third country firm and to monitor for situations where registration may need to be withdrawn. We believe that the intention of the legislation was not that ESMA effectively duplicates the equivalence assessment when registering an individual firm.

Furthermore, the provisions regarding withdrawal of supervision also appear to recognise that supervision over the third country firm continues to reside with the third country regulator. Article 49(2) of MiFIR sets out the situations in which ESMA may withdraw registration and states that ESMA can only withdraw the third country firm's registration where ESMA has referred a matter [set out in Article 49(2) of MiFIR] to the third country firm's competent authority and the third country regulator has 'not taken the appropriate measures needed to protect investors or the proper functioning of the markets in the Union…' This acknowledges

that the third country regulator, not ESMA, has the primary responsibility for remediating the actions of the third country firm in relation to its activities in the EU.

We are concerned that the information requirements set out in the draft technical standards go significantly beyond either the scope of the registration criteria set out in Article 46 MiFIR or the scope that would be necessary in order to identify behaviour clearly prejudicial to the interests of investors or the orderly functioning of markets.

These information requirements seem not to be proportionate either to the level of supervision that ESMA is empowered to exercise over third-country firms or to the scale of activities that these firms are likely to carry out within the scope of the Article 46 registration regime. In particular these information requirements are likely to present a significant barrier to entry for third-country firms, particularly those which only intend to provide services or carry on activities with a small number of clients in the Union, resulting in reduced choice for EU entities that wish to receive services or carry on activities with third-country firms. This is in opposition to ESMA's statement in its cost-benefit analysis that it is essential that ESMA's monitoring of the activities of third-country firms does not prevent issuers or investors in the Union from investing or obtaining funding from third-country firms.

We would also ask ESMA to take into account the information that it will receive directly from third-country regulators in accordance with the mechanisms established under Article 47(2)(a) MiFIR, and adjusts its information requests from third-country firms accordingly so that these do not duplicate information that ESMA can obtain from third-country regulators.

In this context, we would like to highlight that the optimal outcome lies in balancing the ability of EU market participants to trade with financial counterparties around the world to diversify risk, to access liquidity and for investment opportunities, and the need to ensure that EU investors are adequately protected when interacting with third-country firms. We consider that the latter is achieved through the equivalence assessment process, which determines whether a third country's rules are equivalent to those in the EU.

In particular, the Associations' members are concerned about the following information requirements in Annex I and have the following requests / recommendations:

- **Field 3**: We would appreciate clarification about the definition of ‘competent authority’ in relation to third country regulators. The concept of ‘NCA’ is a well-defined concept in EU regulation but it is less clear when considered from an overseas perspective. E.g. are self-regulatory organisations (SROs) considered competent authorities for the purposes of this field? A third country firm could be subject to regulatory oversight from many ‘regulators’ but not all of them will necessarily be relevant for the purposes of assessing whether a third country firm should be registered. We consider it should be limited to the ‘principal’ regulatory authority of the parent legal entity (or at least to the financial regulatory authority that regulates the third-country firm for the purposes of the activities and services that it intends to carry on in the Union).

- **Field 4**: We would suggest limiting this field to services and activities that the firm intends to carry on in the Union (rather than seeking to cover all services and activities that a third-country firm may carry on). It is unlikely that the scope of authorisation of third-country firms will map closely to the MiFID categorisations of investment services and financial instruments. For example, the third country firm may provide services in their home country which do not fit within the pre-defined list of investment services/activities listed in the Annex of MiFID II. Some activities overseas may not be regulated in the EU. For example, marketing and provision of FX spot products/services may not be a regulated activity in certain EEA member states while this may be a regulated product subject to licensing requirements in the home state of the 3rd country firm.

  We also note that Article 1(4) of the technical standards set out in Annex III requires this information to be provided through a written declaration issued by the competent authority that authorised the third-country firm. From past experience, non-EU authorities in many jurisdictions are reluctant to provide declarations of this sort (or may be restricted from doing so under national law). We would recommend that ESMA includes alternative ways of providing this information, including providing a link to a publicly available register showing the firm's permissions. However, in many jurisdictions publicly available registers or other information may not be available. If this is the case, another alternative may be for the firm itself to give a representation regarding its authorised status.

- **Field 5**: The number of clients/counterparties is likely to be a proxy due to a multi-jurisdictional nexus of clients/counterparties and their legal representatives. For example, a third-country firm may have a contractual relationship with a non-EU fund which is managed by an EU asset manager. While the direct contractual relationship would be with the non-EU fund, day-to-day contact would be with the EU asset manager.

  We would also welcome confirmation from ESMA that third-country firms are not required to update this information until the scheduled annual update. For example, if a third-country firm states in its registration form that it intends to be active in France, but subsequently deals with clients and counterparties in other Member States, we understand that the firm would not be required to update the information in its registration form prior to dealing with clients in other jurisdictions or subsequently, until the next annual report to ESMA falls due.

- **Field 6**: We recommend ESMA not to ask for information about the third country firm's strategy in respect to its EEA operations or to justify why it is not setting up a branch, as this appears to be outside of ESMA's remit. It would be more appropriate for this type of information to be provided to the firm's home regulator rather than to ESMA. Therefore, it is not clear how this information could be relevant to ESMA's obligation to register a third-country firm. Our concern is that this appears to be an instance where

ESMA may inadvertently take de-facto supervisory oversight over the firm and how it runs its business.

- **Fields 7 and 8**: Similarly, we recommend ESMA not to ask for information about the management board of the third-country entity and other persons who effectively direct the business. Article 46(6a) refers only to governance arrangements "including key function holders for the activities of the firm in the Union". As a result, we understand that a third-country firm would only need to notify key function holders in relation to the activities that it intends to carry on in the Union, rather than the entirety of its management board and all other persons who effectively direct the business.
- **Field 9**: We would appreciate if ESMA could also confirm that a third-country firm may notify the work address and contact details of relevant function holders rather than their personal address, in order to avoid triggering prohibitions on disclosure of sensitive or personal information in the relevant third country.
- **Field 10**: The rationale for asking for information about the planned marketing strategy of the third-country firm in the Union is unclear.
- **Fields 13, 14, 15, 16, 17, 20 and 21**: These fields require the third-country firm to provide information on the arrangements that it has in place to comply with suitability, best execution, product governance and conflicts of interest requirements, as well as on its arrangements to protect and manage the funds and assets of clients and other arrangements the firm may deem relevant to provision of its services in an honest, fair and professional manner. However, as third-country firms are not required to comply with these requirements under MiFID2 / MiFIR we are of the view that this is not an area in which ESMA has the competence or responsibility to supervise these firms. The Commission may take into account the existence or otherwise of requirements equivalent to these when taking an equivalence decision, but once the Commission has decided that a third-country firm is subject to equivalent requirements and that it is also subject to adequate supervision to ensure compliance with these requirements, these requirements remain a matter for supervision by the home competent authority of the third-country firm. We suggest steering clear of the application of duplicate supervision due to the lack of authorisation on ESMA's part. As a result, we recommend not to include these fields in either the registration form or in the annual reports that third-country firms must make to ESMA.
- **Field 22**: Again, we do not consider that this field should be included in either the registration form or in the annual reports that third-country firms must make to ESMA. Third-country firms are not required to comply with the requirements in relation to outsourcing under MiFID2 / MiFIR, so any outsourcing arrangements will remain the exclusive competence of the firm's national competent authority. It is advisable to follow the principle of proportionality and recognise that it could be disproportionate to require third-country firms who may only be providing services to a small number of clients or counterparties in the Union to provide this information. Notably, it is also

likely to be difficult for third-country firms to identify the critical or important operational functions that support their activities in the Union as distinct from those that support their global activities.

- **Fields 23 and 24**: Again, we do not consider that these fields should be included in either the registration form or in the annual reports that third-country firms must make to ESMA. The structure, organisation and monitoring of the compliance and internal audit functions of a third country firm remains the exclusive competence of the firm's national competent authority, and requiring this information seems to aim to duplicate this supervision. In particular, the detailed information required in the annual reports in relation to the compliance function (including any relevant regulatory changes, the manner of monitoring and reviewing of the compliance function, the findings of the compliance function, an overview of correspondence between the compliance function and competent authorities and information regarding any deviation by senior management from important recommendations or assessments issued by the compliance function) seems duplicative of the supervision exercised by the national competent authority. It also appears that the information required by ESMA relates to the global activities of the third-country firm, and not just to activities carried on within the EU. It seems to us that both the level of detail of information required and the geographic scale of that information is disproportionate to the purpose of monitoring ongoing activities of a firm within the EU (and is not relevant to the criteria for registration of a firm).
- In addition, if these detailed information requirements were to be retained, they present a number of difficulties. For example, it is unclear what "findings" of the compliance function a firm is required to disclose, and in many jurisdictions firms will be subject to restrictions on the information they can disclose regarding their correspondence with their main regulator.

The Associations' members also have the following comments:

- **General**: One of the items in Article 1(1)(k) of the draft RTS ‘information on the arrangements (including IT arrangements) set up by the third country firm for algorithmic trading, for high frequency trading (HFT) and for direct electronic access (DEA)’ is not reflected in the table in Annex I.
- We would welcome clarification from ESMA regarding what it means by a "third country firm". We assume that this is a reference to the head office of the relevant third country firm rather than to its entire global presence (including branches in jurisdictions other than the jurisdiction of the head office), and also that these references are limited to any parts of the business of the head office that are materially connected to the provision of services in the EU, but it would be useful to clarify this.

- **Field 3(5)**: Not every jurisdiction has a publicly available register showing the details of firms and individuals authorised by the relevant NCA. If no URL is available, it should be possible for a firm to explain this in its registration form or simply mark this field "N/A".
- **Field 19**: Investor compensation schemes are typically available to retail clients or consumers, rather than to the equivalent of eligible counterparties and professional clients. We would welcome confirmation that ESMA would not propose to reject a firm's registration form on the basis of the responses to questions such as these, particularly when availability or otherwise of any investor compensation schemes is not one of the criteria that a third-country firm must satisfy in order to register with ESMA.

Q2: Taking into account the list of information in Article 46(6a) of MiFIR, as amended by the IFR, do you agree with the list of information that third-country firms providing investment services and investment activities in the Union in accordance with Article 46 of MiFIR should report to ESMA on an annual basis? If no, which items should be added or deleted and for which reasons?

The Associations' members welcome ESMA's proposal to require firms to provide certain information in their annual reports only if there is a material change from the information previously reported.

However, the Associations' members have similar concerns to those raised in our response to Question 1 in relation to the information to be provided at the point of registration.

As mentioned in our response to Question 1, the information requirements seem not to be proportionate either to the level of supervision that ESMA is empowered to exercise over third-country firms or to the scale of activities that these firms are likely to carry out within the scope of the Article 46 registration regime, and seem likely to present a significant barrier to entry for third country firms as well as reducing choice for EU entities that wish to receive services or carry on activities with third-country firms.

Given that ESMA may temporarily prohibit or restrict the provision of investment services or activities in the Union by a third-country firm that has failed to comply with its annual reporting obligations to ESMA under Article 46(6a) or with a request for information from ESMA under Article 46(6a) or (6b) of MiFIR, it is critical that the list of information to be reported annually is precise enough that firms can establish whether or not they have complied with the reporting obligation, and that it is possible for firms to obtain and provide to ESMA all of the information on the list.

In particular, the Associations' members are concerned about the following information requirements in Annex II:

- **Field 15**: We would propose that this field should only have to be completed if there is a material change in the information previously provided.

- **Field 16**: We would propose deleting this field. It is unclear why ESMA would require information on the total number of clients and counterparties globally or what ESMA would use this information for. It is also likely that different third-country firms would respond differently to this question, depending on their home jurisdiction. For example, some third-country firms may count clients within the same group as a single client while others may list the individual entities within a particular group.
- **Field 17**: We would propose deleting this field. Again, it is unclear why ESMA would require information on global total net turnover or what ESMA would use this information for.
- **Field 23**: We understand that ESMA requires information on complaints from EU clients and counterparties in order to monitor the scale and scope of investment services and activities provided by third-country firms (recital 4). However, Field 23 requires firms to provide extremely detailed information regarding complaints received per Member State, including the firm's response to complaints received, any compensation paid and actions regarding specific compliance or risk issues identified as a result of the review of client complaints, which seems to go beyond simply monitoring the scale of investment services provided and seems to duplicate some aspects of conduct supervision which remains a competence for the home state regulators of the relevant third country firms.
- **Field 24**: As mentioned in our comments in relation to Annex I, we consider the information requirements of this field to be overly prescriptive. If these requirements are retained, we would propose that a third-country firm should be required to include this information in its annual report only where there has been a material change (for example, it seems unlikely that a firm would change its trading name or website on a regular basis.
- **Fields 27 – 34**: The information required to be reported in these fields goes significantly beyond the requirements of Article 46 of MiFIR and we consider that it is disproportionate to the scale of ESMA's powers in relation to third-country firms. If these fields are retained, we consider that they should be limited to material findings or actions / measures of the relevant functions and also limited to the areas which have a direct impact on any services provided or activities carried on in the Union.

Q3: Do you have any comments about the format details provided in the draft implementing technical standards under Article 46(8) of MiFIR? If no, what would you add, delete or amend and for which reasons?

We welcome the guidance on the format in which information should be provided, and have a few high level comments which may make it easier for firms to comply with these requirements (and for ESMA to review applications and annual reports):

- **Consistency across technical standards**: While we appreciate that Article 46(7) provides that the information to be reported should be set out in regulatory technical standards, while Article 46(8) provides for the format in which that information should be reported to be specified in implementing technical standards, it would be useful if one of these technical standards (e.g., the implementing technical standards on format) could set out both the information to be reported and the format, so that firms have all the relevant information in a single place. This is particularly helpful where firms need to refer to multiple technical standards and annexes to locate the information to be provided in applications for registration, the information to be reported annually and the format for those applications and annual reports (and also helps to ensure that field references are consistent across the technical standards).
- **Option to leave fields blank or complete with "N/A"**: It would be useful if ESMA could clarify that fields may be left blank or completed with "N/A" if there is no information available to complete the field. For example, field 3(5) in both the application and annual report requires firms to state the URL for the register showing the details of firms etc that are authorised and/or supervised by the relevant NCA. In some jurisdictions, there will not be any such URL (many jurisdictions do not have a public register of authorised firms). The current guidance reads "Up to 2,048 alphanumeric characters", which would not allow firms to state "N/A" where there is no such URL. It is unclear whether or not this field could be left blank, or whether firms should give an explanation in place of a URL (e.g., "No public register available"). This will be particularly important for firms to be able to establish whether or not they are submitting a complete application, as ESMA is not required to start considering an application until it determines the application to be complete. An explanation on this issue could be included in Article 3 of the ITS.
- **Drop-down lists**: Fields 4(1) and (2) require firms to identify the activities and financial instruments for which they are authorised in their home jurisdiction by selecting MiFID activities and services or financial instruments from a pre-defined drop-down list. It is highly unlikely that non-EU jurisdictions will regulate activities and instruments which map perfectly to MiFID activities and financial instruments. Even within the EU, jurisdictions which regulated investment activities prior to the Investment Services Directive still define these activities according to their original legislation and not by reference to MiFID, leading to questions of interpretation when it becomes necessary to fit those activities into MiFID categories. For example, the German Banking Act distinguishes dealing on own account (*Eigenhandel*) and trading on own account (*Eigengeschäft*) as two separate licensable investment activities. As another example, the Central Bank of Ireland grants investment firms a general authorisation to carry on investment activities – the public register does not list individual regulated activities.

  A third country firm from a jurisdiction that takes a similar approach to either Germany or Ireland may not easily be able to identify how to respond to the drop-down list,

potentially leading to inconsistencies in applications from firms within the same jurisdiction.

Similar issues arise in relation to financial instruments. For example, if a firm is from a jurisdiction where only cash-settled derivatives are regulated financial instruments, how should it identify this in a drop-down list where its options would be to select C(4) derivatives or not? Similarly, in relation to commodity derivatives – if only derivatives in relation to some of the underlyings specified under MiFID2 are regulated in a relevant jurisdiction, is a third-country firm entitled to select C(6) and C(7) or not?

The drop-down list would also not identify activities which a firm is permitted to carry on in its home jurisdiction, but which it is not specifically authorised to carry on (e.g., because the relevant activity is not a regulated activity in the home jurisdiction or because the activity is prohibited for unregulated firms).

- **Character limits for narrative fields**: While character limits are appropriate for fields where a small number of characters may be required, they would seem to be less appropriate for narrative fields where firms would have to count up to 1500 individual letters in order to determine whether or not their response complies with the format requirements. We would propose setting a word (rather than character) limit or else specifying a free text field. For example, field 10(1) requires firms to summarise their marketing strategy in up to 1500 characters. We understand that this limit was intended to distinguish the summary in field 10(1) from the longer description in field 10(2), but it should be possible to make this distinction without requiring firms to count the number of letters in the summary of their marketing strategy.

Q4: Do you agree with the additional details provided in the draft implementing technical standards under Article 41(5) of MiFID II? If no, what would you add, delete or amend and for which reasons?

The Associations are concerned that the current draft of the implementing technical standards (**ITS**) appear to go significantly beyond the scope of ESMA's empowerment in Article 41(6)[1] of MiFID II. Article 41(6) provides that ESMA shall develop draft ITS to specify the format in which the information referred to in Article 41(3) and (4) is to be reported. It does not give ESMA the power to add further items to the list of information to be reported by branches of third-country firms.

In addition, the draft ITS do not appear to specify the format in which the information should be reported. For example, when compared with the draft ITS under Article 46(8), specifying the format in which firms providing cross-border services should provide information, the draft ITS do not specify appropriate ISO standards, character or word limits, drop-down boxes, free

[1] The draft ITS refer to Art 41(5), but Art 41(5) provides for cooperation between competent authorities rather than giving ESMA the power to develop technical standards. We understand that this should in fact refer to Article 41(6).

text etc. By failing to specify the format of information to be reported, there is a risk that different competent authorities will take different approaches to the format of information to be reported to them which could undermine the stated benefits of harmonised, certain and uniform reporting requirements and lead to increased IT costs for third-country groups which have branches established in more than one Member State. The Associations urge ESMA to follow the same approach towards the draft ITS required under Article 41(5) of MiFID II as ESMA has proposed for the draft ITS required under Article 46(8) of MiFIR, focusing on format requirements only.

Regarding the additional details provided in the draft ITS, as mentioned above, Article 41(6) only gives ESMA the power to specify the format in which the information specified in Articles 41(3) and (4) is provided. While Article 41(3) provides that competent authorities may request any additional information that they consider necessary to enable comprehensive monitoring of the activities of the branch, it does not give ESMA the power to specify additional information beyond the information already set out in Article 41(3). This contrasts with the approach under Article 46 MiFIR, where ESMA has the power to develop draft RTS specifying the information to be provided and draft ITS specifying the format.

In particular, the Associations are concerned that the following information specified in the draft ITS goes beyond the information specified in Article 41(3) of MiFID II:

- Information about the provision of investment services and activities in Member States other than the one where the branch is established. This information is not required by Article 41(3) of MiFID II and ESMA does not have the power to add to the list of information in Article 41(3) MiFID II.
- Information about the firm's global activities, such as the total number of clients and counterparties of the third-country firm or the firm's global turnover.
- The average value of assets under management for clients or in relation to which investment advice has been provided. Article 41(3) of MiFID II requires the reporting of the aggregated value of assets only. It does not refer to the average value of assets.
- Information regarding the composition of the management body of the third-country firm and persons who effectively direct the business of the third-country firm. Article 41(3)(g) of MiFID II only requires information about the governance arrangements of the branch and the key function holders for the activities of the branch. In relation to key function holders, we would appreciate if ESMA could confirm that a branch of a third-country firm may notify the work address and contact details of the relevant function holders rather than their personal address, in order to avoid triggering prohibitions on disclosure of sensitive or personal information in the relevant third country.
- Information relating to:
    - Complaints received by the branch or by the third-country firm in relation to the activities of the branch in the Union;

    - The marketing activities of the branch or of the third-country firm in relation to the activities of the branch in the Union;
    - The outsourcing arrangements of the third-country firm and applicable to the operations of the branch in the Union;
    - The arrangements (including IT arrangements) set up by the third-country firm and applicable to the operations of the branch for algorithmic trading, for high frequency trading and for direct electronic access; and
    - The activities of the compliance function or the internal audit function.
- The full extent of information relating to risk management currently specified in the draft ITS (particularly where ESMA has required information to be provided in respect of the third-country firm globally). Article 41(3) of MiFID II only requires the reporting of information relating to the risk management policy and arrangements applied by the branch for the services and activities carried out by the branch in the Member State in which it has been authorised.

We understand that ESMA has the power to specify the format in which the information required by Article 41(3)(e) of MiFID II (in relation to the investor protection arrangements available to the clients of the branch) should be provided (e.g., free text). We do not consider that ESMA has the power to further specify this information.

The Associations acknowledge that it is open to competent authorities to request the above information if they consider such information to be necessary to enable comprehensive monitoring of the activities of the branch. However, particularly in respect of information relating to a third-country firm's global activities, the Associations do not consider that such information is necessary to enable competent authorities to monitor the activities of the branch.

Q5: Do you agree with the cost benefit analysis as it has been described in Annex II?

In relation to the cost-benefit analysis outlined for the MiFIR regime for third-country firms providing investment services and activities without any establishment in the Union, ESMA comments that firms already providing these services in reliance on national third-country regimes may incur costs when putting in place the necessary arrangements to register with ESMA and report annually to ESMA under Article 46 of MiFIR. ESMA goes on to state that it expects these costs to be "compensated by the introduction of a harmonised regime giving them access to eligible counterparties and professional clients throughout the Union, sparing them the costs of having to monitor national third-country regimes of all jurisdictions where they provide investment services and carry out investment activities".

However, in many jurisdictions there are no or only minimal costs associated with carrying on these activities on a cross-border basis with eligible counterparties and per se professional clients. For example, firms doing cross-border business into Ireland can do so without the need for a formal application or annual reports to the local regulator. The same is also true for firms doing cross-border business into jurisdictions which do not have a formal exemption regime

but where it is possible to do business on the basis of reverse solicitation or otherwise without triggering local licensing requirements.

Even in jurisdictions where there is currently a periodic or annual reporting obligation imposed on third-country firms carrying on activities in the relevant EU member state, these reporting obligations typically require third-country firms to provide significantly less information to the local regulator than ESMA is currently proposing. This is the case even in jurisdictions where (in contrast to ESMA) the local competent authority does have the power to supervise third-country firms with regard to their activities in the relevant jurisdiction.

While third-country firms relying on these national regimes would need to monitor changes in local regulation in each Member State where they provide services or carry out investment activities, they will still have to do this even following an equivalence decision, for example where the Commission has only made a partial equivalence decision or in order to be prepared for the eventuality that equivalence is withdrawn and they need to fall back to using the individual national third-country regimes again. As a result, it is unlikely that equivalence will result in significant reductions in cost in this area.

In addition, as mentioned above we are also concerned by the impact that the volume of information requested could have on ESMA's resources, particularly in relation to the registration requirements. Once an equivalence decision is made in relation to a third country which carries on a significant amount of business with the EU, it is likely that ESMA will receive a high volume of registration notifications. MiFIR only gives ESMA 180 days within which to confirm or refuse registration. It seems likely that reviewing and benchmarking a large number of applications within this period would place a significant strain on ESMA's resources. While Article 60 of the Investment Firms Regulation provides for the Commission to report on the impact on ESMA's resources of the assumption of new powers and duties by 31 December 2021, it seems likely that an earlier review would be required if any equivalence decisions are likely to be made prior to that date, particularly if those equivalence decisions may relate to jurisdictions whose firms currently carry on a significant amount of business with EU clients and counterparties.

Q6: Are there any additional comments that you would like to raise and/or information that you would like to provide?

No further comments.

Annex

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry.

FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the leading global trade association for the futures, options and centrally cleared derivatives markets, FIA represents all sectors of the industry, including clearing firms, exchanges, clearing houses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 73 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter @ISDA.