EUROPEAN
PRINCIPAL TRADERS
ASSOCIATION

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FIA EPTA 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

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Executive Summary

FIA European Principal Traders Association (FIA EPTA) represents 28 independent European Principal Trading Firms (PTFs) which deal on own account, using their own money for their own risk, to provide liquidity and immediate risk-transfer in exchange-traded and centrally-cleared markets for a wide range of financial instruments, including shares, options, futures, bonds and ETFs. Our members are important sources of liquidity for end-investors and markets across the European Union.

FIA EPTA members are pleased to provide feedback to ESMA on its draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR as amended by the Investment Firm Regulation (IFR).

Well-functioning capital markets are key for ensuring that European companies can develop and grow and for enabling citizens to invest for their future financial needs. In that regard, it is important that European capital markets remain accessible in an appropriate and effective manner for third-country firms, while at the same time ensuring fair, orderly and stable market functioning.

Capital markets are global in nature. The liquidity and services third country-firms provide are essential for European end-investors to efficiently invest and manage their risk; there is simply not sufficient capital and liquidity available within the Union for end-investors to rely on EU-located firms only. Speaking for principal trading firms, we observe that third-country PTFs are active participants as members of EU trading venues and play an important role in providing liquidity to European markets and end-investors. Likewise, FIA EPTA members who are EU investment firms also in many cases are direct members of e.g., U.S. exchanges (without statutory requirements being imposed on those EU firms by U.S. authorities); U.S. end-investors will rely as well on our European members to provide liquidity to them.

To remain globally competitive, FIA EPTA members strongly believe EU capital markets should not unduly constrain third-country firms aiming to provide liquidity on European exchanges or to European counterparties. FIA EPTA members consider that third-country firms should comply with adequate reporting and capital requirements in order to maintain a level playing field with EU firms, but they should

not be unduly burdened with onerous, highly detailed or sensitive reporting requirements (which in turn might set a precedent for EU firms as well).

FIA EPTA members consider this overarching principle should inform ESMA's approach to applying registration and monitoring requirements on third-country firms. We are concerned that many of ESMA's proposed requirements may result in the opposite: effectively closing European markets for otherwise adequately regulated third-country firms as they find it unattractive or uneconomical to provide liquidity to or trade with European counterparties. Similarly, imposing such detailed registration and reporting requirements without due regard to equivalence may create a chain of individual jurisdictions imposing such onerous requirements upon EU firms in return, multiplying regulatory requirements for others main markets outside the EU.

We argue that the presence of adequate supervision in the third-country is the most relevant factor for protecting a level playing field. By contrast, if non-EU regulators were clearly giving their home firms an unfair advantage in terms of requirements or transparency of their operations, this might need to be addressed. However, the granting of equivalence status to the third-country firm's home jurisdiction would imply that this should not be the case.

Only firms from a jurisdiction deemed to be equivalent by the European Commission will be able to benefit from the IFR third-country regime. Consequently, if the outcome of the equivalence assessment has been positive, this means that ESMA should be comfortable to rely on the third-country rules and supervisory practices of the firm's home jurisdiction. However, we note that some of the reporting requirements proposed by ESMA seem to assume that ESMA may in fact *not* be comfortable to rely on the relevant third-country authority, which seems at-odds with the basic premise of equivalence.

We note that the IFR third-country regime does not provide ESMA with direct supervisory responsibilities over third-country firms; reliance on the supervisory scrutiny by the third-country competent authority is fundamental to the EU equivalence regime. Replication or substitution by ESMA of the work done by a third-country firm's home supervisor would, therefore, be inappropriate. However, we are concerned that some of the proposed requirements would de-facto lead to such an outcome.

Hence, we would emphasise the need for ESMA to be mindful of firms globally and to ensure the reporting and monitoring regime is appropriate from a global competitiveness perspective for EU markets. We note that many of the proposed requirements seem to have been proposed implicitly with UK firms in mind. We would expect UK firms to be well placed to provide such information as they already are subject to ICAAP and ILAA requirements. However, U.S. and Asian firms will likely not have this kind of information available in the suggested formats, while being subject to effectively similar supervision.

Further, we would caution that once the IFR third-country regime will apply in-full, it is expected to cut off market access for principal trading firms based in the US and Asia which are regulated under a delegated supervisory regime such as the U.S. SRO regime. We would encourage EU policy makers, including ESMA, to consider unintended consequences of the new regime for EU market liquidity, in particular for key risk management products such as exchange-traded rates and index futures and options. We also reiterate that a third-country firm dealing on own account will only interact with EU counterparties as a remote member of an EU trading venue. Such a firm will at all times be subject to that venue's systems and controls, market monitoring and reporting obligations under MiFID II, requiring the third-country firm to comply with extensive market integrity requirements in relation to its trading activities in the EU.

Regarding the proposed requirements, FIA EPTA members are concerned that many of ESMA's proposals are very wide in scope and overly granular, going well beyond the needs for establishing an effective registration and reporting regime. We question the need for such an onerous approach, which also seems to go well beyond the mandate provided to ESMA under MiFID II/MiFIR as amended by IFR. Also, some of the proposed reporting requirements go further than the obligations Union investment firms are subject to without a clear reason having been provided why this should be the case. It cannot be right for third-country firms to have to disclose more information to ESMA than an EU firm would have to do to its EU NCA.

FIA EPTA members also comment that the large amount of additional reporting that ESMA would receive under the proposed requirements may risk over-extending ESMA's resources and those of NCAs to properly assess the reports they will receive, complicating effective supervisory risk analysis and potentially creating moral hazard risk for firms and undue supervisory risk for ESMA and NCAs.

Hence, FIA EPTA members would encourage ESMA to take a pragmatic approach such that firms can rely on information they already produce rather than requiring them to create new, bespoke reporting procedures and outputs. Additionally, third-country firms should only be subject to additional requirements if EU-based firms are as well, and third-country regulatory requirements do not satisfy such a standard.

Most relevant information which ESMA would require to fulfil its obligations under the new third-country regime as amended by IFR will be contained already in a firm's audited financial statements. We would strongly suggest to ESMA to rely on such information as much as possible for the purposes of reporting to it under the IFR third-country regime.

Finally, as there are extensive MoUs in place between ESMA, EU NCAs and third-country authorities, FIA EPTA members suggest that via this route significant relevant information could be efficiently exchanged between EU and third-country authorities. This may be further facilitated by establishing deeper cooperation among EU NCAs and to further strengthen their operational ability to share data and take joint supervisory action.

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?

FIA EPTA members have the following comments and suggestions in relation to the main information elements suggested by ESMA for the purposes of its proposed registration and monitoring regime for third-country firms:

1) The **scale and scope** of the services and activities carried out by them in the Union, including the geographical distribution across Member States;	FIA EPTA members consider that overall turnover/Net Trading Income for the EU of the previous year should suffice. To the extent possible, all information required should be information already produced by the third-country firm for its existing reporting purposes. In this regard, FIA EPTA members believe a firm's audited financial reports should be used as the basis for such reporting. We reiterate that third-country firms are regulated in their home jurisdiction and subject to existing financial and regulatory reporting obligations. These firms should not need to create new data simply because they deal with an EU counterparty or transact on an EU trading venue, and data produced for compliance with requirements imposed by their home supervisor in the third-country jurisdiction should be considered sufficient for this reporting and monitoring purposes by ESMA.
2) For a third-country firm performing activity referred to in point (3) of Section A of Annex I of MiFID II (dealing on own account), its **monthly minimum, average and maximum exposure** to EU counterparties;	FIA EPTA members consider this information to be irrelevant for monitoring purposes on a periodic basis. Moreover, we would caution that the suggested reporting requirement is very granular and is in relation to sensitive commercial information whose periodic reporting would be disproportionate. Further, FIA EPTA members are concerned that this requirement would cause third-country firms to have to generate new, bespoke and onerous reports, which may lead third-country jurisdictions to impose reciprocal mirrored requirements for EU firms, creating large volumes of reporting without a useful supervisory purpose.

	Instead, firms could provide information of the Member States in which the firm has arrangements with counterparties and how many. The relevant NCA can then request more details if they need such information in relation to a specific ad-hoc supervisory concern.
3) The **turnover and the aggregated value of the assets** corresponding to the services and activities referred to in point (a);	FIA EPTA members consider this information to be irrelevant for third-country firms dealing on own account and suggest that this information should not be required from such firms. We reiterate our view that third-country firms should just be asked to provide audited financial reports annually, stating their net trading income.
The **risk management policy and arrangements** applied by the third-country firm to the carrying out of the services and activities referred to in point (a);	FIA EPTA members consider this to be an inappropriately granular requirement. This would be akin to submitting a de-facto ICAAP. FIA EPTA members suggest that ESMA should rely on the third-country's regulatory regime to be comfortable here.
4) Information on how the activities of the third-country firm in the Union will **contribute to the strategy of the third-country firm** or, where relevant, its group;	We consider that such information is commercially sensitive and not relevant from a monitoring perspective by ESMA. A high-level description of activities (e.g. as contained in the audited financial statement of the third-country firm) should suffice.
5) The governance arrangements, including **key function holders for the activities of the third-country firm** in the Union; and i. the **members of the management body** of the third-country firm and any other persons who effectively direct the business of the third-country firm; ii. information on the **key function holders** for the activities of the third-country firm in the Union with, notably, the CFO and CEO when they are not members of the management body, the heads of internal control functions responsible for the oversight of the activities of the third-country firm in the Union and the individuals responsible for the day-to-day operations of the third-country firm in the Union;	FIA EPTA members consider this suggested reporting requirement to be unnecessarily granular and are concerned about the related on-going sharing of personal information which this requirement would imply. We suggest to ESMA that information of governance arrangements at the central Board level will suffice. We note that such information will be provided in audited financial statements. FIA EPTA members further suggest relying on third-country registers of certified persons where those exist. These are public and can be sent as a link.

and iii. the **reporting lines between the key function holders and the senior management** and management body of the third-country firm;	
6) Description of the **marketing strategy** that the third-country firm plans to use for the investment services, investment activities and ancillary services provided in the Union, including: i. details on the planned **use of languages** by the third-country firm with its clients in the Union ii. details on the **arrangements of the third-country firm to comply with its information requirements** under Article 46 of MiFIR;	Regarding the ability of firms to comply with Article 46 information requirements, FIA EPTA members consider that the firm's confirmation that it can comply should suffice.
7) Information on the **structure, organisation of and monitoring by the:** • **compliance** • **internal audit** • **risk management function** function (or equivalent) of the third-country firm;	FIA EPTA members would emphasise the need for ESMA to limit reporting requirements to elements that are directly relevant and necessary for registration and monitoring purposes by EU authorities. We note that the suggested fields 27-34 under Article 2 are requesting information that significantly goes beyond the scope of ESMA's mandate under Article 46 MiFIR and consequently we consider these should be deleted. FIA EPTA members emphasise that some suggested fields would require firms to proactively submit confidential operational information. ESMA and NCAs should only require firms to submit such information on an ad-hoc basis in specific circumstances in case of a suspected material breach.
8) Information about: the **activities of the compliance function** (or equivalent) of the third country firm, with a focus on the operations of the third-country firm in the Union; the **activities of the internal audit function** (or equivalent) of the third country firm, with a focus on the operations of the third-country firm in the Union; the **activities of the risk management function** (or equivalent) and the risk management policy of the third-country firm, with a focus on the operations of the third-country firm in the Union;	FIA EPTA members consider that this information is not in this way relevant for monitoring by ESMA and should not be subject to ex-ante proactive reporting requirements. As per our previous comments, the relevant information can be found in audited financials. We note that compliance/risk/audit work plans, findings, mitigants and strategies are proprietary and sensitive information produced for a firm's internal use and analysis. Disclosure should only be required in case of a suspected material

	breach by the third-country firm on a per-request basis.

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

Regarding the various information elements as relevant, FIA EPTA members reiterate the points made under our comments to Question 1.

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?

No comments

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?

FIA EPTA members do not agree as they consider that Article (41(6) only mandates ESMA to specify the format in which the information should be provided, and does not empower ESMA to add additional elements about which third-country firms would be required to provide information.

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

FIA EPTA members observe that, as currently drafted, ESMA's proposals risk creating a significant regulatory burden for third-country firms (and, in return, potentially as well for EU firms if replicated by third-country jurisdictions in response to these new EU requirements). The regime will require a large amount of information to be compiled and proactively shared, with requirements put to firms which in some cases go beyond ESMA's mandate. This includes the reporting of proprietary data of a commercially or operationally sensitive nature whose relevance for ESMA's monitoring role is oftentimes unclear.

Additionally, we believe that unnecessary burdens (i.e., the ones that are not strictly aimed at creating a level playing field or ensuring adequate supervision or capitalisation of non-EU firms) may deter bona-fide, well-regulated and capitalised third-country firms to interact with European markets.

Consequently, we see the currently proposed approach as being at-odds with achieving the CMU objectives of creating deep and liquid capital markets in the EU. FIA EPTA members observe that from a global perspective, EU markets are already the most expensive to trade of major developed world markets, as a consequence of the extensive and significant regulatory and capital burdens imposed on firms. As the current proposals would add further to these costs and in many cases do not appear to be sufficiently proportionate, we would encourage ESMA to reconsider its approach in those instances.

We are also concerned that ESMA's proposals may trigger reciprocal action from third-country authorities, leading to potentially constraining EU market participants that are active in third-countries and burdening those firms with significant administrative burdens without clear benefits to market integrity or supervision.

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

No comments