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5 September 2016

ESMA  
CS 60747  
103 rue de Grenelle  
75345 Paris Cedex 07, France

Dear Sir/Madam

**RE: Consultation on the clearing obligation for financial counterparties with a limited volume of activity**

FIA<sup>1</sup> members welcome the opportunity to respond to the ESMA Consultation Paper on a proposal to amend the phase-in period of the clearing obligation for financial counterparties with a limited volume of activity (the “Consultation Paper”).

**FIA members support the response submitted to the Consultation Paper by the International Swaps and Derivatives Association (“ISDA”). In addition, for the reasons outlined below, FIA members ask ESMA and the European Commission to introduce a similar delay to defer the implementation of the explicit indirect clearing arrangements under MiFIR<sup>2</sup> in order to provide a consistency of application of the EMIR and MiFIR indirect clearing arrangements and to provide sufficient time for CCPs, clearing members and clients to establish these new requirements.**

Any deferral of the clearing obligation for Category 3 counterparties also has the effect of deferring the establishment of indirect clearing arrangements under EMIR until June 2019, during which time the Commission may determine that certain counterparties will be exempt from the clearing obligation (and therefore from the associated indirect clearing arrangements). FIA members propose that MiFIR explicit clearing arrangements should also be deferred in order that consideration can be given as to whether to exempt equivalent exchange traded derivatives (“ETD”) counterparties from the MiFIR requirement for explicit indirect clearing arrangements.

Indirect clearing requirements were introduced in EMIR for OTC derivatives as a means for smaller counterparties subject to the clearing obligation to meet that obligation. Indirect clearing requirements were then carried across to MiFIR for ETD with the mandate that the two sets of requirements should be consistent. Despite differences between ETD and OTC derivatives, ESMA drafted two identical RTSs under EMIR and MiFIR and so one expects that consistency in requirements would also extend to scope of application.

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<sup>1</sup> 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 principal members of derivatives clearinghouses worldwide, FIA’s member firms play a critical role in the reduction of systemic risk in global financial markets.

For more information, visit [FIA.org](http://FIA.org)

<sup>2</sup> Final Report – Draft regulatory technical standards on indirect clearing arrangements under EMIR and MiFIR.

As ESMA is already aware<sup>3</sup>, indirect clearing arrangements have existed in the ETD market for many years, but, most importantly, not in the form as being proposed by the MiFIR draft RTS, which is currently with the Commission for consideration. At present, indirect clients' positions at the clearing member and CCP level are included within the position and asset sets of the client that provides trading and clearing services for them and are not explicitly identified in discrete position and collateral accounts (the simple OSA and the GOSA accounts proposed in the RTS) at the level of the CCP or clearing member. Accordingly, the indirect clients currently benefit from the protection afforded by the segregation choice made by the client under EMIR.

If the indirect clearing requirements under EMIR are effectively deferred, it would be consistent to also defer the very same requirements when clearing ETD under MiFIR. The end result is the same – because of lack of indirect clearing arrangements on the OTC side, counterparties that must clear cannot get into clearing. ETD contracts are already cleared and indirect clearing arrangements are very common in practice; however, the inability of firms to implement the explicit indirect clearing requirements by January 2018 could force such firms to withdraw their existing indirect clearing services and as a result prevent certain counterparties, particularly those in longer chains, from accessing ETD markets. This is an undesirable and suboptimal outcome in respect of OTC derivatives and ETD, as it is often smaller, non-systemically important counterparties that are likely to lose out should consistency between the scope of application of the requirements not be achieved.

There is a clear correlation of impact between the proposal to defer the clearing obligation for Category 3 counterparties (which will in turn obviate the need for EMIR indirect clearing arrangements to be established for OTC contracts) and the request for a deferral of the effective date of the MiFIR indirect clearing arrangements. The purpose of the Consultation Paper published by ESMA is to *“collect feedback on a proposal to extend the phase-in period for the clearing obligation to the smallest financial counterparties (those in Category 3), justified by the difficulties that those counterparties are facing in establishing the necessary clearing arrangements to meet their compliance deadline and the limited impact in terms of systemic risk that these counterparties represent”*<sup>4</sup>, and expanded upon in section 2.2, Access to clearing for financial counterparties, para 10: *“ESMA is aware that the access to CCP clearing (and hence the compliance with the clearing obligation) remains an issue for many financial counterparties, and in particular the smallest ones”*.

This is further reinforced in paragraphs 12-17 of the Consultation Paper, which sets out the difficulties for Category 3 counterparties in meeting the clearing obligation as a result of the timing of the release of the final EMIR RTS for indirect clearing, the resultant lack of time for counterparties to meet the compliance deadlines and the costs associated with indirect clearing.

Similar to the EMIR RTS, the MiFIR indirect clearing RTS remains to be finalised and agreed. It is estimated that CCPs, clearing members and clients will have approximately 12 months before the effective date of 3 January 2018 to make the necessary changes to their existing indirect clearing arrangements.

**FIA members therefore propose that a further derogation to the MiFIR indirect clearing RTS be added in the interest of ensuring the consistency of application of the MiFIR RTS with the EMIR indirect clearing RTS such that the current indirect clearing arrangements, whereby the imbedded positions of the indirect client benefit from the same level of segregation and protection afforded**

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<sup>3</sup> FIA responses to Q614 of the MiFID II/MiFIR Discussion Paper – 22 May 2014, ESMA/2014/548 and to Q244 of the MiFID II/MiFIR Consultation Paper – 19 December 2014, ESMA/2014/1570.

<sup>4</sup> Paragraph 4 of the Consultation Paper.

**to the direct client, continue to be permissible until such time as the Category 3 counterparty clearing obligation (and thus the EMIR indirect clearing arrangements) take effect, i.e. June 2019.**

This will also allow sufficient time for the systems, procedures, processes and documentation to support the MiFIR indirect clearing arrangements to be developed, tested and implemented. Without this derogation there is a very real risk that certain market participants, whose ETD positions are currently cleared via the existing indirect clearing arrangements, will be excluded from central clearing. This exclusion from the benefits of central clearing cannot be the intention of the RTS and continued access to clearing, albeit included within the client's position set, must be a better alternative than a total exclusion from clearing for such indirect participants.

Kind regards

A handwritten signature in black ink, appearing to read 'S. Puleston Jones', with a horizontal line underneath.

Simon Puleston Jones

Head of Europe, FIA