

5 October 2012

ESMA
103 rue de Grenelle
75345 Paris
France

By online submission to: www.esma.europa.eu

Dear Sir

Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps

The IMA represents the asset management industry operating in the UK. Our Members include independent fund managers, the investment arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. They are responsible for the management of £4.2 trillion of assets, which are invested on behalf of clients globally. These include authorised investment funds, institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles. In particular, our Members represent 99% of funds under management in UK-authorised investment funds (i.e. unit trusts and open-ended investment companies). The IMA's authoritative Asset Management Survey 2012 recorded that IMA member firms were managing 38% of the domestic equity market for clients.

We welcome the opportunity to comment on the discussion and proposals made in your paper. While our members are not market makers, and so will not be making use of the exemption directly, they do use market makers, and would be very concerned if the liquidity in relevant markets were impacted by a restrictive implementation of the exemptions.

In general we support the response submitted by ISDA and AFME, in that the proposals could have significant, unintended, detrimental effects on the sell-side market makers which will have a consequential negative impact on the ability of asset managers to access the market on behalf of their clients.

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Market making is vital in facilitating trading by our members. It provides liquidity, immediacy of trading and reduced transaction costs. It is a vital cog in the efficient and effective running of financial markets.

In general we consider that the proposed Guidelines will overly restrict the exemption agreed at Level 1. It also seems that certain provisions would result in a restructuring of the relevant markets and of existing business models. No such restructuring was discussed, or required at Level 1. There is no delegation in the Level 1 text to ESMA (or the Commission) in this regard.

We would support and advocate an approach which focuses on relevant market making activities rather than making markets in specific instruments as consistent with the construction of the exemption in the Regulation (particularly given the clear inclusion of client facilitation activities in the Level 1 definition of "market making activities", which are naturally led by client demand).

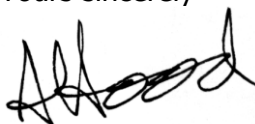
Because new financial instruments are created daily market makers would have to submit daily notifications to their home competent authority in order for them to make markets in those instruments under exemption. This could ultimately cause a drying up of liquidity in securities that have not been accepted as falling within the scope of the market-making exemption for a firm, which would make it more difficult for corporates to finance themselves in the capital markets.

Asset managers, as clients, can ask a market maker to deal in specific financial instruments at any time. The mere fact that a market maker may not have traded that instrument for a while should not prevent them from being able to rely on the market making exemption if approached by a client requesting to trade in that share. A market maker's ability to respond to its clients' appetite to buy certain shares, sovereign debt or other relevant financial instruments should not be hampered by the exemption notification process.

The requirement for third country entities, seeking to use the exemption on the basis of their membership of a third country market, to notify the relevant EU competent authority would require a declaration by the Commission that a particular third country has an equivalent legal and supervisory framework for its markets. We understand that no such declarations have been made as yet. We are concerned that delays and uncertainty in this area may impact the ability of our member firms to access certain non-EU markets, to the detriment of their clients.

We look forward to hearing from you if there is any clarification that you would find useful on the points we have raised. We would be happy to meet to discuss the thinking behind the market disclosure requirements.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Adrian Hood', with a stylized, cursive script.

Adrian Hood
Regulatory Adviser

Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps

III. Definition and scope of the exemption for market making activities

Q1: Do you agree with the above approach regarding the definition and scope of the exemption for market making activities? Please explain.

No. Our concerns and objections are set out above.

IV. Determination of the competent authority that should be notified

Q2: Do you agree that when determining the RCA for notification purposes the third country entity should assess the turnover in relation to its market making activities as defined in Article 2(1)(k) of the Regulation? Please explain.

No comment.

V. General principles and qualifying criteria of eligibility for the exemption

Q3 Do you agree with general principles applicable to persons intending to make use of the exemption under Article 17(1) of the Regulation? Please explain.

We would not agree with the wording of the first bullet point, as we are concerned that the requirement that a market maker must be a member of a trading venue on which it deals as principal in that instrument will, *inter alia*, prevent market makers providing their services for those instruments which do not deal on any trading venue, e.g. debt of certain sovereigns, all sovereign CDS and most derivatives.

We would not disagree with the market maker having to be a member of a trading venue and deal as principal in the financial instrument concerned, but as two unconnected tests.

Q4 Do you agree with principles applicable to persons carrying out market making activities in accordance with Article 2(1)(k)(i) of the Regulation? In your view which of the two options in paragraph 44 should apply to quotes entered when carrying out market making activities? Do you see another alternative to the two options pro-posed? Please provide explanations.

We would agree that the overriding applicable principle should be that market making activity must provide liquidity to the market. Anything that limits or reduces their ability to provide liquidity should be avoided.

Otherwise we have no comment on the proposed principles.

Q5 Do you agree with the principles applicable to persons carrying out market making activities in accordance with Article 2(1)(k)(ii) of the Regulation? Please explain.

We are concerned that there are stocks that trade infrequently and therefore no market maker would be able to demonstrate that it has dealt in that stock on a frequent and systematic basis. This would lead to a loss of market makers and thus liquidity in these markets.

Q6 Do you agree with the qualifying criteria for the comparable size of orders? Please explain.

No comment

Q7 Do you agree with the qualifying criteria for competitive price of orders? Please explain.

No comment

Q8 Which option do you favour? Please justify.

No comment

Q9 Do you agree with the qualifying criteria for on-going presence on the market? Do you think different criteria should apply when conducting market making activities in sovereign debt? Please explain.

We do not see that the requirement that a market maker's presence on the market be regular and on-going should mean that they need be active every day that the market is open. See also our response to question 5.

We are concerned that such qualifying criteria would reduce the number of firms making markets in less liquid instruments, further reducing liquidity, to the detriment of investors.

Q10 Do you agree with the ESMA approach towards assessment of notification of intent to make use of the exemption? Please explain.

No comments

Q11: Would you agree that frequency and systemic basis of the activities exempted under Article 2(1)(k)(ii) capacity should be assessed against the same qualifying criteria as applicable to systemic internalisers under Article 21(1) of the Commission Regulation (EU) No 1287/2006? Please provide explanations.

No comment

Q12: In your opinion, what would be the most appropriate qualifying criteria in terms of percentage to assess scale of activity eligible for exemption under Article 2(1)(k)(ii) capacity in comparison to overall proprietary trading?

No comment

VI. Exemption process

Q13 Do you agree that the above information needs to be provided in the notification form? Should historical data be also provided with the notification form? Please provide justifications.

Given the overriding principle that market making provide liquidity to the market we are concerned that these requirements could result in a restriction of the ability of market makers to make markets which would have a significant effect on liquidity and stability.

VII. Transitory measures

Q14: Do you agree with a period of 6 months after application of the Guidelines for revising and assessing notifications made before entry into force of the Guidelines? Please explain.

While we understand the desire to review the situation once it has settled down we are concerned that this review could even further deter firms from providing market maker services, further damaging liquidity.

VIII. Information to be published by ESMA on its website in accordance with Article 17(13)

Q15: Do you agree that a list of market makers and authorised primary dealers published on the ESMA website according to Article 17(13) should at least include the above in-formation? What additional information should be included? Please justify.

No comment.