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Press Release

ESMA amends MiFID II standards on non-equity transparency and position limits

The European Securities and Markets Authority (ESMA) has issued today two Opinions proposing amendments to its draft Regulatory Technical Standards (RTSs) under the Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR). ESMA proposes to revise the RTS on non-equity transparency – which includes requirements in respect of bonds, structured finance products, emission allowances and derivatives – and the RTS on the methodology for the calculation and application of position limits for commodity derivatives. The Opinions were produced in response to proposed amendments by the European Commission to these draft RTSs.

Phase-in regime for non-equity transparency

MiFID II will extend transparency requirements to non-equity products, the implementation of which is detailed in ESMA's draft RTS. While overall supportive of the approach taken in the draft RTS, on 20 April 2016 the Commission requested ESMA to phase-in the application of certain parts of this new transparency regime to mitigate possible liquidity risks to bond markets. Under the phased-in approach, initially less demanding transparency requirements would be applied. These would be gradually strengthened over a period of four years until they reach the level of transparency initially proposed by ESMA. Consequently, significantly fewer instruments than initially proposed would be subject to the real-time transparency regime at the start of MiFID II.

Under the Commission's proposal, the RTS would only specify the criteria applicable for the first stage of the phase-in and ESMA would conduct a yearly liquidity assessment. In the case of a favourable liquidity assessment, the transparency regime of the RTS would be strengthened by applying the regular legislative procedure for changing an RTS. Overall, ESMA supports the more cautious transparency regime as suggested by the Commission. However, ESMA proposes a different phase-in procedure. The Commission procedure for a regular RTS change risks to result in no meaningful improvement of transparency for many non-equity instruments, which would run contrary to the objective stated in MiFIR to strengthen transparency and improve the functioning of the internal market. In addition, it creates legal uncertainty and is burdensome for all parties involved. Therefore, ESMA is proposing an automatic phase-in, with all the stages already prescribed in the RTS. This automated phase-in would be accompanied by an annual liquidity assessment by ESMA and the RTS would be amended in case of significantly negative impacts on liquidity.

Finally, to ensure that also newly issued corporate and covered bonds are subject to a more cautious transparency regime, the ESMA Opinion proposes to adjust the liquidity status of newly issued corporate and covered bonds by increasing the issuance size thresholds.

RTS on position limits for commodity derivatives

MiFID II will introduce position limits, or caps on the number of commodity contracts that can be held, to commodity derivatives which will need to be set by national regulators. In order to ensure a harmonised approach to applying such limits, ESMA's draft RTS provides a methodology for calculating those limits on commodity derivatives traded on trading venues and economically equivalent OTC contracts. While overall supportive of the approach taken in the RTS, the European Commission asked ESMA to consider a number of amendments for:

- commodity derivatives with an agricultural underlying;
- the methodology in cases where deliverable supply and open interest of a contract differ significantly; and
- defining which contracts which are traded OTC only could be considered as economically equivalent to contracts traded on-venue.

ESMA is supportive of most of the changes proposed by the Commission and understands the concerns about speculation and possible impacts on food prices. Therefore, ESMA proposes to lower the position limits for derivatives with foodstuffs as an underlying to 2.5%. In addition, ESMA suggests that in circumstances where deliverable supply and open interest diverge significantly, the other months' position limits should be adjusted accordingly. Finally, the definition of contracts traded "OTC only" has been slightly widened in order to prevent circumventions of the position limits regime by trading OTC.

Background

In September 2015, ESMA submitted 28 draft RTSs under MiFID II/ MiFIR for endorsement to the Commission. On 20 April 2016, the Commission has asked ESMA to amend three RTSs, notably on non-equity transparency, position limits and ancillary activities. ESMA has sent today its two Opinions on non-equity transparency and position limits to the Commission which has to decide whether or not endorse the proposed changes. An Opinion on the third RTS on ancillary activities is currently being finalised by ESMA and will be issued later this month.

Notes for editors

1. ESMA's mission is to enhance investor protection and promote stable and orderly financial markets. The mission is based on the three objectives of:

   - investor protection;
   - orderly markets; and
   - financial stability.

   It achieves these objectives through four activities:

   1. assessing risks to investors, markets and financial stability;
   2. completing a single rulebook for EU financial markets;
   3. promoting supervisory convergence; and
   4. directly supervising specific financial entities.

2. ESMA achieves its mission within the European System of Financial Supervision (ESFS) through active cooperation with NCAs and securities markets regulators, in particular the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA).

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