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European Securities and
Markets Authorities (ESMA)

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Basel, 28th April 2020

ESMA draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR

Dear Sirs,

We refer to your 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** published on 31st January 2020.

Please find the response of the Swiss Bankers Association (SBA) on the following pages.

We thank you for taking due consideration of our comments and remain at your disposal for any clarification.

Yours sincerely,
Swiss Bankers Association

August Benz
Deputy CEO
Head Private Banking &
Asset Management

Roberto Battegay
Head of Europe & Private Banking

Schweizerische Bankiervereinigung
Association suisse des banquiers
Associazione Svizzera dei Banchieri
Swiss Bankers Association

Aeschenplatz 7
Postfach 4182
CH-4002 Basel

office@sba.ch
www.swissbanking.org

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ESMA draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR

General remarks

The Swiss Bankers Association (SBA)[1] welcomes the chance to engage with ESMA on the issue of draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR and to present ESMA with our comments on the respective consultation paper. The SBA sees this consultation as important step for the future efficient functioning of the EU equivalence regime. We moreover thank you for reconsidering the timeframe to respond to the consultation in light of the unfortunate situation around the Covid-19 outbreak.

In general, SBA supports the European institutions' targeted efforts to eliminate some of the pitfalls of the existing equivalence regime while at the same time preserving fairness of treatment and level-playing-field between EU firms and third country firms. We also want to underscore the importance of an enhanced regulatory and supervisory coordination and cooperation between the EU and third countries, as this is vital to promote regulatory alignment and ensure a robust and coherent regulatory framework for the provision of financial services across the globe.

While the SBA generally acknowledges the need for ESMA being involved in the monitoring and implementation of equivalence decisions (incl. collecting of data), it is crucial that the reporting obligations for third country firms (upon registration and on annual basis) as adopted within the Investment Firm Review ("IFR") remain proportionate and practicable. In contrast to several positive developments aimed at further developing the Capital Markets Union, some provisions of the draft technical standards (DTS) have raised our concern, as we think they deviate conceptionally from the level 1 text of the IFR. Some of the proposed technical standards would, in fact, lead to a direct supervision of ESMA towards third-country firms on an institution basis. We believe that this is not in line with the intentions of level 1 regulation which defers in principle to the home country supervision once a positive equivalence decision has been taken by the European Commission. Changing this was in our view also not an objective of the IFR.

Therefore, we take the clear view that some of the proposed additional information, as requested by the IFR, could and should be obtained by ESMA in a more efficient and reliable manner from third country regulators, rather than via reporting requirements upon individual third country firms.

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[1] **About the Swiss Bankers Association:** The SBA is the voice of the banking sector in Switzerland. As an umbrella organisation, we represent almost all the banks in Switzerland. Our primary objective is to promote optimal framework conditions for the Swiss financial centre in Switzerland and abroad. To this end, we represent the interests of the banks in industry, politics, and vis-à-vis the government, the authorities and the regulators both in Switzerland and abroad.

The future cooperation agreements based on MiFIR will prove helpful in this regard, as we think they will reflect the specific needs both of ESMA as well as the relevant third country authorities. In that context, it will be of great importance to consider systemic importance, size, nature and dimension of the concrete cross-border activities and the specific nature of each equivalence decision. We therefore call for such pragmatic solutions instead of applying an "one-size-fits-all" approach.

Some of the proposed technical standards seem excessively detailed. Therefore, the SBA advocates for taking into account proportionality aspects when imposing information requirements on third-country firms. They also should have a distinct connection with the concrete activities carried out by such providers under the equivalence regime within the EU Single Market. Where possible, a materiality threshold should be applied by the competent authorities in this regard.

Specific comments on the questions provided within the ESMA Consultation Paper

In addition to the general comments above, we take the liberty to elaborate further on some specific considerations that are particularly important to SBA members. SBA will focus its detailed comments on the first two questions in the ESMA consultation paper since those are of particular importance for Swiss Banks. Our concluding remarks will serve as answer to Question No 6. SBA also generally supports the comments made by the Swiss Finance Council within this consultation.

ESMA Question No 1: *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? Please provide detailed answers.*

Position of the SBA:

- It can generally be said that the information requested by ESMA from applicant third-country firms upon registration go beyond the provisions provided for in the adopted IFR level 1 text. In our view, the IFR level 1 text did not extend the reporting requirements imposed on third-country firms upon registration with ESMA. ESMA should therefore specify the arrangements and procedures that it expects third country firms to have in place. In that context, we believe the Delegated Regulation (EU) 2016/2022 still covers all relevant aspects needed for registration in the ESMA register. In addition, we would highlight the fact that ESMA is not mandated to supervise compliance with the third country investor protection rules, which is why we cannot support the intended extension of ESMA's technical standards on reporting requirements for third-country firms to this area. We also do not believe this would be appropriate given the fact that the European Commission's adequacy decision will already be based on a detailed equivalence assessment that will consider both whether the respective third-country legislative and supervisory framework contains equivalent provisions and produces similar outcomes as well whether these provisions are efficiently enforced by the third-country competent authorities.

- Against the backdrop of the above, we respectfully call for a reconsideration of the DTS with a clear focus on the principle of proportionality, as we believe that only material changes incl. a distinct connection with the concrete activities carried out by the respective third-country firms under the equivalence regime should form the basis for information requests towards those firms. In our view, ESMA's current approach harbors the great risk of receiving granular and possibly misleading data sets on an individual third-country firm basis that would prove counterproductive with regard to ESMA's general monitoring duties regarding regulatory and supervisory developments in a third country, as introduced by IFR. As we stated under our general remarks above, we would encourage ESMA to follow a pragmatic approach and use well-established mechanisms for the exchange of information between regulators, particularly in view of the future cooperation agreements between ESMA and relevant third-country authorities. In addition, publicly-available data can also serve as relevant information source for certain information requested.

ESMA Question No 2: 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? Please provide detailed answers.

Position of the SBA:

- As stated above, we generally acknowledge ESMA's new responsibilities regarding the monitoring of firms from third countries for which equivalence decisions have been adopted. We also note that this monitoring task makes it for ESMA necessary to obtain certain information directly from third-country market participants. However, we strongly believe that the needed information about regulatory and market developments should be obtained at country level, rather than on an individual firm level and that such information should be obtained from the respective third country authority, as they are primarily in charge of identifying misconduct by market participants and have the most relevant information on market developments in the respective jurisdiction. We refer to comments made above. As to the concrete list of information in Article 46(6a) of MiFIR, as amended by the IFR, our members particularly highlighted the following obligations, which, in their view can be better obtained via a direct exchange of information between ESMA and the relevant third country authorities:
  - Obligation to report any material change and relevant developments in the regulatory requirements over the last 12 months;
  - Far-ranging information requirements on **complaints handling processes;**
  - Descriptions and explanations on any **deviation by senior management** from important recommendations or assessments issued by the compliance function

- In addition, the reporting obligation on deviation from recommendations issued by the compliance divisions of the respective third-country firms should be limited to material findings

obtained by the authority supervising the third country firm and to areas which have a direct impact on any services provided or activities carried out in the European Union under the equivalence regime.

Concluding Remarks

Overall, the SBA is of the opinion that in the current environment, the provision of investment services, also towards professional clients and eligible counterparties which need significantly less protection than retail investors and elective professionals, remains highly regulated. The risk of significant market fragmentation should therefore be weighted by policy-makers when introducing any additional reporting requirements towards market participants. We see a considerable risk that the far-ranging information and reporting requirements, as proposed within the DTS, could lead to additional administrative and compliance costs for third-country firms and ultimately would have negative consequences for cross-border service provision, investment and economic growth in general. This should be avoided, as recent events highlight the vital importance of well-functioning and integrated capital markets across Europe.