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Public Statement of Consultation Practices

The European Securities and Markets Authority (ESMA) has approved the following statement establishing its consultation practices:

The purpose of consultation:

The aim of consultation is to build consensus where possible between all interested and affected parties on what legislation or regulatory action is appropriate and to improve the decision-making process of ESMA by:

1. Benefiting from the expertise of market participants, consumers and end-users, notably in assessing and analysing regulatory issues and possible solutions;
2. Assisting the determination of whether a problem exists which requires a regulatory action, and if so, what form of regulatory action is appropriate;
3. Providing opportunities for alternative approaches to a given issue to be considered;
4. Obtaining information and views on the potential impact of proposals, in particular responses may provide critical data for the development of an Impact Assessment;
5. Obtaining feedback on ESMA's work;
6. Promoting understanding of ESMA's work and role.

To deliver this aim, ESMA emphasises:

1. **Mutual obligations:** Effective consultation places mutual obligations on ESMA and those consulted to work in a manner that promotes the success of the process. This has particular significance when ESMA provides technical advice to the European Commission and when it develops draft regulatory or implementing technical standards, guidelines and recommendations. Timely and complete responses are critical. The scope and timetable of ESMA's work is often determined by external factors, such as legislative deadlines and mandates from the European Commission.
2. **The need for a flexible and proportionate approach** to consultation that can be adapted according to the significance and urgency of an issue, and which should be justified.
3. The need to actively seek out the views of retail investors is considered critical. For this reason, ESMA will place high importance on liaising with retail investors' representatives, including national associations representing their interests.

The guiding principles for consultation: Notwithstanding the need for flexibility, ESMA will

be guided by the following three key principles:

When it does consult, ESMA:

1. may organise informal discussions at an early stage with those most likely to be directly affected, such as organising roundtables with key stakeholders;
2. will consult at a sufficiently early stage to enable the Authority to take the responses into account;
3. will allow those consulted reasonable time to respond, given the complexity of the issue and the time available. For significant issues, ESMA will generally apply a three-month consultation period as a standard, unless an external timetable is imposed or the measure requires urgent action to ensure the smooth functioning of the markets. For 'Calls for Evidence', the minimum period of generally one month will be applied. Where ESMA deviates from these standards, it will provide a clear explanation of the need to alter its process.

Who to consult? ESMA will:

1. Address the full range of interested parties, including market participants, consumers and end users;
2. Make consultation proposals widely known, primarily through ESMA's website;

In addition to ESMA's public consultation, it also takes steps in advance of the public consultation and during the consultation to discuss elements of its proposals with interested parties, work plans etc. (e.g. with the use of roundtables/workshops at an early stage of the work as described above). In particular, this can take place with the Securities and Markets Stakeholder Group and Consultative Working Groups which are linked to Standing Committees. Annex I sets out briefly the role of each of these groups.

When developing draft regulatory technical standards or draft implementing technical standards or guidelines or recommendations, ESMA also takes into account the outcome of the peer reviews, along with any other information acquired by the Authority in carrying out its tasks.

How to consult? ESMA will:

1. Publish an anticipated annual work programme, so that all interested parties know when to expect output from the Authority;
2. Publish on its website, and update regularly, all regulatory technical standards, implementing technical standards, guidelines, recommendations and questions and answers, including overviews that concern the state of play of ongoing work and the planned timing of the adoption of draft regulatory technical standards and draft implementing technical standards;
3. When appropriate, provide an opportunity for interested parties to make submissions on receipt and publication by ESMA of a mandate from the European Commission or on work launched by ESMA at its own initiative. This is done through a 'Call for Evidence';
4. When necessary, release its thinking at various stages;
5. Produce reasoned consultative proposals, based on thorough analysis of the issues

and objectives of the proposal and, where possible, on statistical information, expressed in concise and clear language. In the case of draft technical standards, a cost-benefit analysis will be included in proposals unless this is highly disproportionate in relation to the scope and impact of the proposals concerned or in relation to the particular urgency of the matter. In the case of guidelines, recommendations or other supervisory convergence measures, a cost-benefit analysis will be included in the proposals where appropriate and it will be proportionate in relation to the scope, nature and impact of the measures;

6. Consult using a variety of means, including public hearings/roundtables, technical workshops as well as written consultations;
7. Use appropriate processes when necessary to target consultations better to particular affected parties (such as face-to-face meetings, conference calls with specific stakeholders such as retail investors' representatives).

How does ESMA process consultation responses? ESMA will:

1. Give due consideration to all responses received;
2. Make public all responses to formal consultations, unless the respondent requests otherwise, and make public a summary of the responses received;
3. Make public the advice of the Securities and Markets Stakeholder Group, and the separate advice of its Members;
4. Publish feedback addressing all major points raised;
5. Consult, if possible, for a second time if the response to the first consultation reveals significant problems, or where revised proposals are radically different from the original proposals on which consultation was based;
6. Publish overviews that concern the state of play of ongoing work and the planned timing of the adoption of draft regulatory technical standards and draft implementing technical standards;
7. Publish all formal proposals and advice, including advice to the European Commission, as well as draft technical standards, guidelines and recommendations, and opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence.

If it is not possible for ESMA to follow the principles described above, it will publicly explain its reasons.

When necessary, ESMA will review this statement of consultation practices.

A diagrammatic representation of the consultation process is set out in Annex II.

Annex I

ESMA has a number of groups it uses to consult in addition to its public consultation. In particular these include: the Securities and Markets Stakeholder Group and Consultative Working Groups. These are described briefly below:

Securities and Markets Stakeholder Group

In accordance with the ESMA Regulation (Article 37), ESMA has established a Securities and Markets Stakeholder Group (SMSG). The SMSG consists of 30 members. These individuals are appointed to represent in balanced proportions financial market participants operating in the Union, their employees as well as consumers, users of financial services and representatives of SMEs. The SMSG members include:

- a) 13 members representing, in balanced proportions, financial market participants operating in the Union;
- b) 13 members representing employees' representatives of financial market participants operating in the Union, consumers, users of financial services and representatives of SMEs; and
- c) 4 members who are independent top-ranking academics.

The SMSG Members shall serve for a period of four years, following which a new selection procedure shall take place through a public call for interest published on ESMA's website.

According to the ESMA Regulation, the main tasks of the SMSG are:

1. to advise ESMA on actions taken in accordance with the Regulation concerning regulatory technical standards and implementing technical standards;
2. to advise ESMA on actions taken in accordance with the Regulation concerning guidelines and recommendations, to the extent that these do not concern individual financial institutions; and
3. to advise and assist ESMA in assessing the potential impact of the proposed draft regulatory and implementing technical standards, guidelines and recommendations, to the extent that these do not concern individual financial institutions.

The SMSG may submit advice on any issue related to the tasks of ESMA with particular focus on the areas listed above and on the following ones, thus:

1. requesting, as appropriate, ESMA to investigate the alleged breach or non-application of Union law;
2. contributing to the Authorities¹ efforts to establish a European common supervisory culture and consistent supervisory practices;
3. advising the ESMA on its peer review activity; and
4. contributing to the ESMA's assessment of market developments, including stress tests.

The SMSG may submit advice to the Authority on any issue related to the tasks of the Authority with particular focus on the tasks set out in Articles 10 to 16, 29, 30 and 32 of the ESMA

¹ The European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

Regulation.

Where SMSG members cannot agree on advice, one third of its members or the members representing one group of stakeholders can issue separate advice.

The list of SMSG members will be published on ESMA's website. Members are natural persons with significant experience individually can represent the wide range of stakeholders affected by ESMA's work.

Consultative Working Groups (CWGs)

Many of ESMA's standing committees, use the specific expertise of market participants, academics and consumer representatives who specialise in the specific area or work stream that the group has been mandated to work on. The purpose of these groups is to provide informal advice to the respective standing committees in charge of a policy proposal in the course of developing a policy line in relation to specific technical matters, or to give a view on specific aspects of the proposals. These groups are also used as a sounding board for work plans. These members are requested to provide expertise and not advocacy for specific national or institutional positions. Members of the CWGs are appointed and participate in their personal capacity. The composition of the CWGs is made public through ESMA's website. Members of the CWGs are selected for a term of two years renewable. ESMA will have the final authority regarding how to take into account the advice of the CWGs as part of ESMA's work.

ANNEX II - ESMA's Consultation Process

