

MEMO# 30794

July 21, 2017

ICI Global Draft Comment Letter in Response to ESMA Proposal to Require Certain Derivatives to Be Traded on a Trading Venue; Member Comment Requested By July 27

[30794]

July 21, 2017 TO: Derivatives Markets Advisory Committee

Equity Markets Advisory Committee

ICI Global Regulated Funds Committee

ICI Global Trading & Markets Committee

Securities Operations Advisory Committee RE: ICI Global Draft Comment Letter in Response to ESMA Proposal to Require Certain Derivatives to Be Traded on a Trading Venue; Member Comment Requested By July 27

As previously reported, the European Securities and Markets Authority (ESMA) recently published a consultation paper on how to implement the trading obligation for derivatives under the Markets in Financial Instruments Regulation (MiFIR).^[1] Once a class of derivatives becomes subject to the clearing obligation under the European Market Infrastructure Regulation (EMIR), ESMA determines whether that class (or a subset of the class) should be subject to the trading obligation. If ESMA determines the trading obligation should apply to the class, those derivatives must be “concluded” a regulated market, multilateral trading facility, organized trading facility, or a third country trading venue deemed to be equivalent by the European Commission.

ICI Global’s draft comment letter on the Consultation Paper is attached for your review. If you have any comments on the draft letter, please send them in writing to George Gilbert at george.gilbert@ici.org **by close of business on Thursday, July 27.**

The draft letter recommends that ESMA take six steps to reduce the potential for the introduction of the trading obligation to disrupt derivatives markets. Specifically, the draft letter:

- Explains the importance of ensuring that any trading obligation accounts for the cross-border nature of derivatives markets and urges ESMA and other EU authorities to work closely with international regulators as soon as possible (before the implementation of

any trading obligation) to ensure that counterparties to cross-border derivatives transactions can satisfy applicable trading obligations in the European Union and a third country.

- Advocates for the implementation of an emergency mechanism to suspend the trading obligation. ESMA has preliminarily determined that it lacks authority under MiFIR to devise this mechanism, so the draft urges ESMA to request that the Commission create the mechanism directly or grant ESMA the power to do so.
- Expresses concern that ESMA has not proposed any exemption from the trading obligation for derivatives transactions entered as part of a package transaction. The letter suggests that a package transaction should be subject to the trading obligation only if the package itself trades on a venue with adequate liquidity to support the trading obligation. ESMA has preliminarily determined that it lacks authority under MiFIR to issue this type of exemption, so the draft urges ESMA to request that the Commission create a workable trading obligation for package transactions directly or grant ESMA exemptive authority to do so.
- Describes certain shortcomings of the test that ESMA proposes to use to assess the liquidity of classes of derivatives for purposes of applying the trading obligation and offers certain refinements that would improve the reliability of this test.
- Urges ESMA to ensure that adequate protections exist to protect the confidentiality of trades above the large-in-scale threshold.
- Requests that ESMA provide an adequate period of time in their final regulatory technical standards for market participants to implement the trading obligation.

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[Attachment](#)

endnotes

[1] See ICI Memorandum No. 30753 (June 23, 2017), *available* at <https://www.iciglobal.org/iciglobal/pubs/memos/memo30753>. For the full text of ESMA's proposal, see European Securities and Markets Authority, Consultation Paper, The trading obligation for derivatives under MiFIR (19 June 2017), *available* at https://www.esma.europa.eu/sites/default/files/library/esma70-156-71_cp_trading_obligation.pdf (Consultation Paper).