

**MEMO# 24280**

May 4, 2010

## **CESR Publishes Consultation Papers on MiFID**

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TO: EQUITY MARKETS ADVISORY COMMITTEE No. 15-10  
INTERNATIONAL COMMITTEE No. 6-10 RE: CESR PUBLISHES CONSULTATION PAPERS ON MIFID

The Committee of European Securities Regulators (“CESR”) published three consultation papers as part of its scheduled review of the European Commission’s Markets in Financial Instruments Directive (“MiFID”). Designed to address areas of the MiFID legal framework considered inadequate, because of restructuring in the European financial markets since the adoption of MiFID, the papers include proposed technical advice by CESR on investor protection and intermediaries, equity markets, and transaction reporting. The papers are summarized below.

### **Consultation on Investor Protection and Intermediaries**

The consultation paper on investor protection and intermediaries examines a number of issues for which review was required by the text of MiFID, including improving execution quality data, establishing a recording requirement for orders received or transmitted by telephone or through electronic communications, identifying complex versus non-complex financial instruments, and clarifying the definition of personal recommendation. [\[1\]](#)

With respect to execution quality data, the MiFID best execution obligations require firms to take all reasonable steps to obtain the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature, or any other consideration relevant to the execution of an order. To satisfy its obligation, a firm

must have adequate information to assess the relative merits of execution venues. The consultation paper discusses two options regarding whether regulatory intervention is necessary to ensure that firms have the information they need to select appropriate execution venues. First, whether CESR should define key metrics that execution venues and data vendors would use on a voluntary basis to provide comparable execution quality data to their members or clients. Second, whether execution venues should be required to produce periodic reports on execution quality using metrics defined by CESR. In the consultation paper, CESR suggests that the obligation to provide data on execution quality should be on execution venues, similar to the reporting regime in the United States under Rule 605 of Regulation NMS. [\[2\]](#)

## **Consultation on Equity Markets**

Among other topics, the consultation paper on equity markets addresses pre- and post-trade transparency, the definition of systematic internalizers, the application of transparency obligations to equity-like instruments, and inconsistencies in the application of MiFID that have impacted the playing field between markets. [\[3\]](#)

### *Pre- and Post-Trade Transparency*

In reviewing pre-trade transparency, CESR proposes in the consultation paper to retain the current reporting requirements, and waivers [\[4\]](#) thereto, but to move to a “rule-based” approach in applying the waivers. [\[5\]](#) The paper also offers additional clarifications on the scope and application of the current waivers. CESR believes this approach should provide greater consistency and more certainty regarding the proper use of the waivers thereby improving pre-trade transparency as a whole.

For post-trade transparency, CESR seeks to offer measures to improve quality, shorten delays for regular and deferred publications, and reduce the complexity of the reporting regime. Specifically, the consultation paper recommends use of the International Standards Organization formats for publication of an identified set of information (i.e., security, price notation, and venue) and transaction types (e.g., VWAP, portfolio transaction, OTC hedge of a derivative, or interfund transfer) to enhance the clarity, reliability and comparability of post-trade transparency information. The paper also suggests providing additional clarity regarding which investment firm shall make information related to OTC transactions public.

To improve the timeliness of publication of post-trade information, CESR proposes that transactions would need to be published as close to instantaneously as technically possible and that the current 3 minute deadline be reduced to 1 minute. [\[6\]](#) CESR also proposes to tighten deadlines with respect to the deferred publication framework, which allows participants, for example, to unwind large trades before making them public. Accordingly, the recommendations in the consultation paper would shorten the delays, which may extend currently up to 3 days after a transaction has been executed, to ensure that all transactions are published no later than the end of the trading day; shorten the intra-day

delay of 180 minutes to 120 minutes; and raise all intra- day transaction size thresholds.

The consultation paper explores whether and how to address consolidation of post-trade data to deliver an adequate and affordable pan-European consolidation of transparency information. CESR notes in its review that consolidation should be a priority and that it believes regulatory intervention will be necessary to achieve this goal. The paper proposes two approaches to post-trade transparency information consolidation: (1) requiring investment firms to publish their trades through Approved Publication Arrangements (“APAs”), which would be approved by regulators and would operate data publication arrangements to prescribed standards or (2) building upon the APA model, requiring all trades to be made available to and published by a single consolidated tape to offer market users a single point of access. [\[7\]](#) CESR suggests that an APA could be a regulated market, [\[8\]](#) multilateral trading facility (“MTF”), [\[9\]](#) or another organization. Further, a firm could use more than one APA, although the firm would have to ensure that each transaction is published only once.

In the paper, CESR seeks comment on whether it would be appropriate to require data vendors to provide pre- and post-trade transparency information separately instead of the common practice of conditioning the purchase of one category of data upon the purchase of the other. In addition, CESR questions whether such information should be provided to the market free of charge after a delay of 15 minutes.

CESR also proposes to expand transparency by applying the various reporting regimes to additional securities, traded on a regulated market, including depository receipts, ETFs, exchange-traded commodities and certificates. The transparency obligations would apply whether the security was traded on a regulated market, MTF or OTC.

### *Types of Markets and Applicable Regulatory Responsibilities*

The consultation paper explores means to eliminate certain inconsistencies between the various markets operating under MiFID. Specifically, the paper suggests aligning the requirements for regulated markets and MTFs under MiFID, [\[10\]](#) and introducing additional obligations for investment firms operating crossing systems (i.e., dark pools). For example, such investment firms could be required to set up MTFs for their crossing activity once they have reached a certain size on their own or in combination with other crossing systems with which they have a private link, thereby obligating the firms to pre-trade transparency and fair access requirements. In addition, CESR would require investment firms to add the identifier for its crossing system to their post-trade information for all transaction executed on the system. [\[11\]](#)

In the consultation paper, CESR proposes to require systematic internalizers to maintain two-sided quotes and a minimum quote size and to identify themselves in post-trade reports.

## Consultation on Transaction Reporting

The consultation paper on transaction reporting includes measures to clarify the transaction reporting regime under MiFID and assist regulators in market surveillance and the detection of market abuse. [12] Specifically, it would require of all regulators the mandatory and uniform collection of client and counterparty identifiers. In addition, regulators would be tasked to require the reporting of identifiers when orders are transmitted for execution, with the transmitting firm either providing the identifier to the receiving firm or reporting the transaction, including the client identifier, to the regulator. Finally, the consultation paper examines introducing a transaction reporting obligation to all members of regulated markets or MTFs whether they are investment firms or not.

Heather L. Traeger  
Associate Counsel

### endnotes

[1] See Committee of European Securities Regulators, Consultation Paper, CESR Technical Advice to the European Commission in the Context of the MiFID Review – Investor protection and Intermediaries, April 13, 2010, available at: <http://www.cesr.eu/popup2.php?id=6544>.

[2] Rule 605 of Regulation NMS was designed to improve public disclosure of order execution quality. It requires market centers that trade national market system securities to make monthly electronic reports that include information about each market center's quality of executions on a stock-by-stock basis, including how market orders of various sizes are executed relative to the public quotes. These reports also must disclose information about effective spreads and must disclose the extent to which a market center provides executions at prices better than the public quotes to investors using limit orders.

[3] See Committee of European Securities Regulators, Consultation Paper, CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets, April 13, 2010, available at: <http://www.cesr.eu/popup2.php?id=6548>.

[4] A regulator may grant waivers in the following circumstances: orders that are large in scale, reference price systems, systems which formalize negotiated transactions, and orders held in an order management facility.

[5] In the consultation paper, CESR states that its research revealed that more than 90 percent of trading on organized public markets in Europe is pre-trade transparent and that the majority of trading without pre-trade transparency takes place using the waivers for negotiated trades and for orders that are large in scale.

[6] CESR also clarifies that the 3 minute deadline should be used only in exceptional circumstances where the systems available do not allow for publication of the post-trade information in a shorter period of time.

[7] In the consultation paper, CESR explains that the various markets would be required to send their information to the consolidated tape free of charge but the consolidated tape

facility could charge a fee to its subscribers for real-time reports. The data would become free, however, after 15 minutes. The consolidated tape facility would not be permitted to develop value-added products based on the aggregated data.

[8] A regulated market is the European equivalent of a U.S. exchange.

[9] An MTF is the European equivalent of a U.S. alternative trading system ("ATS") or electronic communications network ("ECN").

[10] As in the United States, exchanges in Europe have expressed concerns that they are faced with more stringent regulatory requirements than their MTF competitors.

[11] Both of these proposals would be similar to recently proposed requirements in the United States. The U.S. Securities and Exchange Commission has proposed: (1) to lower the trading volume threshold above which an ATS disseminating a quote to more than one person must display its best-priced orders publicly and (2) to require dark pools and other ATSs to provide real-time disclosure of the identity of the dark pool that executed a trade. See SEC Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009), available at <http://www.sec.gov/rules/proposed/2009/34-60997.pdf>, and Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated February 22, 2010, available at <http://www.ici.org/pdf/24142.pdf>.

[12] See Committee of European Securities Regulators, Consultation Paper, CESR Technical Advice to the European Commission in the Context of the MiFID Review – Transaction Reporting, April 13, 2010, available at: <http://www.cesr.eu/popup2.php?id=6545>.