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GFMA CWG response to the HM Treasury Consultation on the Transposition of the Markets in Financial Instruments Directive II

The Global Financial Markets Association (GFMA)¹ Commodities Working Group (CWG) welcomes the opportunity to comment on the HM Treasury Consultation on the Transposition of the Markets in Financial Instruments Directive II and includes below its response to the questions related to the Position Limits and Reporting regimes (Chapter 4 - Questions 6-10).

Chapter 4 – Position Limits and Reporting

Question 6: Do you agree that the regulation adequately transposes the position limit regime established by Article 57 MiFID II?

We welcome HMT's proposal, however we note that in some instances the drafting would benefit from more clarity and the regulation should generally refer to establishing limits on the size of the 'net positions' which a person can hold at all times in commodity derivatives traded on trading venues and economically equivalent OTC contracts.

In particular, we have some concerns regarding the proposed draft Regulation and consider that it does not adequately transpose the position limit regime in the following areas:

- 1) **Scope of commodity derivatives subject to position limits:** Regulation 6(1)(a) refers to "commodity derivatives which are traded only on trading venues in the United Kingdom" (emphasis added). While this distinguishes between commodity derivatives traded on UK trading venues and those traded both on trading venues in the UK and in other Member States, it appears to mean that if a commodity derivative is traded on a trading venue in the UK and also on a third country market, that commodity derivative would not be subject to the position limits regime, as it would not be traded only in the UK.

Regulation 6(1)(a) should be amended to capture commodity derivatives which are traded on trading venues in the UK or both in the UK and on third country markets, but not on trading venues in other Member States given Regulation 6(1)(b) covers this situation.

Moreover, we note that page 22 of the Consultation Paper states that "where two persons in a third country with no link to the UK trade economically equivalent OTC contracts the limits do not apply". We understand that this means that a person would need to trade in relevant venue traded commodity derivatives in order to trigger the position limits, and that a person could not trigger the position limits by trading in economically equivalent OTC contracts alone. We would welcome confirmation of this in the draft regulation.

¹ The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, visit www.gfma.org. GFMA is registered on the EU Transparency Register, registration number 898223513605-51.

- 2) **Hedging exemption:** Regulation 6(4) reflects the exemption in MiFID II for hedging risk reducing contracts. However, MiFID II indicates that it will be necessary for persons subject to the position limits regime to apply to the relevant competent authority in order to use this exemption. The Regulation does not appear to give the FCA the power to grant this exemption.

The Regulation should be amended to give the FCA the power to grant this exemption, and regulation 6(4) should be amended to refer to positions exempted by the FCA (or by the relevant competent authority).

- 3) **Cooperation arrangements on position limits:** Article 57(6) MiFID II requires competent authorities to "put in place cooperation arrangements including exchange of relevant data". This appears to indicate that arrangements should be made before it becomes necessary to exchange data, and that the arrangements should cover at least exchange of relevant data. Regulation 5 only requires the FCA to exchange relevant data.

The Regulation should be amended to require the FCA to put in place cooperation arrangements including the exchange of relevant data.

- 4) **Consultation requirement:** Article 57(6) requires the central competent authority to consult the competent authorities of other trading venues before imposing position limits on contracts traded on trading venues in other Member States. This does not appear to be reflected in the Regulation, which only appears to deal with the position where the FCA disagrees with a position limit imposed by another competent authority.

The Regulation should be amended to require the FCA to consult the competent authorities of other trading venues before imposing position limits where the FCA is the central competent authority.

Question 7: Do you agree that the amendments to the Recognition Requirement Regulations adequately transpose the position reporting and management regime established by Articles 57 and 58 MiFID II?

We agree that the amendments to the Recognition Requirement Regulations adequately transpose the position reporting and position management regime as it applies to the rules of recognised trading venues, subject to the following comments.

Regulation 7BA(c) and (d) omit the references to appropriateness which were included in Article 57 MiFID II.

- Regulation 7BA(c) should read: "require a person to terminate or reduce a position on a temporary or permanent basis and to unilaterally take appropriate action..."
- Regulation 7BA(d) should read "where appropriate, require a person..."

Question 8: Do you agree that the position reporting and management regime established by Articles 57 and 58 MiFID II for Investment Firms and Credit Institutions operating trading venues be detailed in FCA Rules?

Yes, we agree that FCA Rules are the appropriate place for these provisions. We have some further comments regarding the position reporting regimes under Article 58:

- **Article 58(2):** We understand that the Article 58(2) position reporting regime for investment firms trading in commodity derivatives or emission allowances or derivatives thereof outside of a trading venue will also be detailed in FCA Rules.

We believe that it is necessary to clarify the scope of persons subject to the obligation and ensure that the FCA has the necessary powers to make rules implementing this regime.

The definition of "investment firm" in Article 4(1)(1) MiFID II is not limited to investment firms authorised under MiFID, but covers any entity whose regular occupation or business is the provision of investment services and/or performance of investment activities. In addition, Article 1(6) MiFID II states that Articles 57 and 58 also apply to persons exempt under Article 2.

As a result, the FCA will need to have the power to make the necessary rules in relation to persons who are within the scope of the position reporting regime under Article 58 MiFID II, including entities which are not FCA authorised persons.

- **Article 58(3):** Similarly, the draft Regulations do not appear to cover the reporting obligation under Article 58(3), and we understand that this reporting obligation will also be detailed in FCA Rules. Again, FCA will need to be given the power to make the necessary rules in relation to all "members or participants of regulated markets, MTFs and clients of OTFs" to which position limits apply.

It would also be useful to clarify how the territorial application would work where the relevant venue is in one Member State but the member or participant is in another. For example, we understand that the UK rules impose the reporting obligation on a French or German entity that is a member of a UK venue, and that French or German rules would impose a reporting obligation on UK entities that are members of French or German venues.

Question 9: Do you agree that the powers of the FCA reflect those provided for under MiFID II? In particular, in relation to Article 69(2)(p) and 69(1)(j) MiFID II?

We have the following comments regarding the FCA power to require information. The wording of regulation 9 does not exactly reflect the wording of Article 69(2)(j) MiFID II. For example, it does not state that the FCA may require or demand the provision of information "including all relevant documentation", or specify that the information may relate to a position "or exposure". HMT may consider that the wording of regulation 9 is adequate to transpose Article 69(2)(j). We are raising this point because the wording of regulation 9 does not follow the exact copy-out approach taken elsewhere in the Regulation.

Question 10: Do you have any further comments on the drafting of the secondary legislation in respect of the position limits and reporting regimes?

We have no further comments.