

4 September 2017

European Securities and Markets Authority
103 rue de Grenelle
75007 Paris
France

Re: Consultation document on the evaluation of certain elements of the Short Selling Regulation.

Dear Sir/Madam,

CFA Institute appreciates the opportunity to comment on ESMA's consultation paper on the evaluation of certain elements of the Short Selling Regulation (SSR).

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behaviour in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 140,000 members in 150 countries and territories, including 133,000 Chartered Financial Analyst® charterholders, and 147 member societies.

Specific Comments

Q1 Taking into account the different regulatory approaches and purposes of MiFID II and SSR, what are your views on the absence of alignment between the definition of 'market making activities' in each of the capacities specified in Article 2(1)(k) of SSR and that of 'market maker' in Article 4(1)(7) of MiFID II? Do you consider that this absence of alignment is not appropriate, and if so what would you suggest?

The consultation document notes that the definition of 'market making activities' in the Markets in Financial Instruments Directive (MiFID II) does not include any references to trading venue membership, while the SSR does include this reference. In addition, the SSR specifies the activities of a market maker that can benefit from exemption from any short-selling restrictions, including providing simultaneous two-way quotes, client facilitation, and hedging activities.

The implication of these differences appear to us to be that the SSR is aiming to define market makers in a more restrictive way, relative to MiFID II, which would in turn reduce the potential universe of market participants eligible for exemptions from any short-selling restrictions. CFA Institute has previously advocated¹ for recognition that short selling is a legitimate investment activity that aids in price discovery and helps maintain market integrity².

CFA Institute believes that introducing another definition of market making in the SSR that is not completely aligned with the definition in MiFID II would add unnecessary complexity to market

¹ <https://www.cfainstitute.org/Comment%20Letters/20030205.pdf>

² <https://www.cfainstitute.org/Comment%20Letters/20090821.pdf>

regulations, and such complexity could lead to unintended consequences. Given the comprehensive consultation and review process leading to adoption of MiFID II, CFA Institute proposes using the MiFID II definition of market making activities as the reference for the SSR.

Q2: Considering the new regulatory framework under the MiFID II/MiFIR, how do you suggest addressing the issue of the membership requirement in relation to those instruments that will remain pure OTC instruments despite the MiFID II/MiFIR framework? Should the membership requirement not apply to those pure OTC instruments? Please provide justifications.

In our response to Q1, we have outlined our belief that the definition of a market maker in the SSR should reference the definition of a market maker in MiFID II. The MiFID II definition of a market maker does not make reference to membership of any trading venues, and we believe this would be appropriate also for the SSR in dealing with exchange-traded, as well as pure over-the-counter (OTC) instruments. As a result, we do not believe that restricting the universe of market making participants eligible for exemptions, via a trading venue membership requirement, from any short-selling restrictions is necessary.

Q3: Where market making activities on exchange-traded instruments are carried out OTC only, should they be able to benefit from the exemptions? Do you consider that the application of the exemptions in those cases can be detrimental to the interest of investor and consumers? Please provide justifications.

The MiFID II/ MiFIR framework expands the universe of instruments that need to trade on-exchange relative to MiFID I, and provides, in our opinion, an excellent reference point for the SSR. As a result, we believe that any market making activities in exchange-traded instruments that are carried out OTC-only under the MiFID II/ MiFIR framework should be considered eligible for exemptions from the SSR. That is to say, we do not consider it necessary for the SSR to re-interpret certain aspects of the MiFID II/ MiFIR framework.

Q4: Do you think that the membership requirement should be deleted where the market making activity in relation to exchange-traded instruments is carried out OTC as well as on a trading venue? Please explain.

Given our responses to Q1 and Q2, we also agree that the membership requirement should be deleted where the market making activity in relation to exchange-traded instruments is carried out OTC as well as on a trading venue. CFA Institute believes that MiFID II provides a suitable definition of market making activities, and an extra layer of checks by the SSR is not necessary.

Q6: Do you think it would be appropriate to enlarge the set of financial instruments eligible for the exemption for market making activities? If so, which financial instrument(s) would you suggest? Please provide justifications.

CFA Institute has a policy position recognising short selling as a legitimate investment activity³. There is limited evidence that short-selling bans are effective at improving the efficient functioning and stability of financial markets. For this reason we would support any moves to enlarge the set of financial instruments eligible for the exemption for market making activities; our preferred approach is to use the MiFID II definition of market making activities, which has the benefit of providing consistency as well as being less restrictive

Q7: Do you think that market makers should be able to notify the list of financial instruments by using indices, as long as they are market making in all the financial instruments included in the used indices? Besides indices, which other sectoral categories / classification could be used by market makers to indicate a group of financial instruments for which the market maker is seeking exemption? Please provide justifications.

CFA Institute supports amending the incumbent approach of applying for short-selling restriction exemptions on an instrument-by-instrument basis. We agree that granting exemptions on the basis of indices, for which a market maker makes markets in every component of the index, and where the market maker would not be required to notify the competent authority when a new instrument is added to the index, would make the process less burdensome. In addition, we would also support a sectoral approach to exemption applications where the sectoral categories are based on existing, recognised sectoral indices. However, we note that applying for an index- or sector-based exemption should be an option that is available in addition to the current instrument-by-instrument approach, rather than as a replacement.

Q10: What are your views on the proposal to change the procedure to adopt short term bans under Article 23 of the SSR? Please elaborate.

Currently, the SSR affords competent authorities (with respect to trading in their own jurisdictions) the ability to agree with and adopt, disagree with, or oppose short-selling restrictions proposed by another competent authority in relation to a particular financial instrument. ESMA notes that the competent authorities themselves find this process to be burdensome and would prefer to not have the power to oppose other competent authority's short-selling measures under Article 23 of the SSR.

ESMA is proposing to revise this procedure so that only the competent authority of the financial instruments concerned can adopt short-selling restrictions on that instrument. Once informed of this decision, the other competent authorities must ensure the ban is effective in their jurisdictions as well.

CFA Institute supports this amendment to the Article 23 procedure. While CFA Institute's policy position is that short-selling is a legitimate investment activity that helps ensure the efficient functioning of financial markets, given the reality of potential short-selling restrictions being adopted by certain Member States, it is preferable for such action to be coordinated and the procedure behind this action to be transparent.

³ <https://www.cfainstitute.org/learning/products/publications/cfm/Pages/cfm.v19.n6.4.aspx>

Q13: Do you see benefits in the introduction of a new requirement to publish anonymised aggregated net short positions by issuer on a regular basis? Can you provide a quantification of the benefit of such new requirement to your activity? Please elaborate.

Currently, Article 11 of the SSR requires competent authorities to provide aggregated net short position summaries to ESMA, without any obligation to publish these publicly. We would agree with measures encouraging or even requiring competent authorities to publish anonymised aggregated net short position data by issuer on a regular basis. We agree with ESMA and the competent authorities that providing such data on a daily basis would likely prove overly burdensome, but note that providing this information on a monthly basis would likely be insufficiently timely. We propose a compromise where such data be published and available to all market participants on a weekly basis.

Concluding Remarks

We welcome this opportunity to comment on the proposed amendments to elements of the Short Selling Regulation. Please do not hesitate to contact us should you wish further elaboration of the points raised.

Yours faithfully,



Sviatoslav Rosov, PhD, CFA
Analyst, Capital Markets Policy, EMEA
CFA Institute

+44 20 7330 9558

sviatoslav.rosov@cfainstitute.org



Rhodri Preece, CFA
Head, Capital Markets Policy, EMEA
CFA Institute

+44 20 7330 9522

rhodri.preece@cfainstitute.org