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COMMUNICATION TO THE COMMISSION

on the intention to endorse, with amendments, the draft Regulatory and Implementing Technical Standards submitted by ESMA with regard to the details of securities financing transactions (SFTs) to be reported to trade repositories in accordance with Articles 4(9) and 4(10) of Regulation (EU) 2015/2365 and to amend, accordingly, the Implementing Technical Standards with regard to the details to be reported to trade repositories in accordance with Article 9(6) of Regulation (EU) No 648/2012

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A. Background

Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse (SFTR) was published in the Official Journal of the European Union (EU) on 23 December 2015, and entered into force on 12 January 2016.

The key objective of SFTR is to improve the transparency of the securities financing market. In particular, market participants are required to report securities financing transactions (SFTs) to a central database, a trade repository. This will allow public authorities to better observe market developments, such as the build-up of leverage in the financial system. Consequently, supervisors will be able to take better-targeted and timelier actions to mitigate the potential risks associated with SFTs, if necessary.

Following the respective mandates under SFTR, ESMA submitted to the Commission on 30 March 2017 a final report with four draft regulatory technical standards and two draft implementing technical standards. The standards cover: (i) the application and registration of trade repositories; (ii) the operational standards for trade repositories in terms of validating, processing and reconciling SFT reports received from market participants; (iii) access of public authorities to SFT data held by trade repositories; and (iv) the details of SFTs that market participants have to report to trade repositories (incl. formats and frequencies).

The founding Regulation of ESMA¹ lays out a procedure for the endorsement of draft regulatory and implementing technical standards developed by ESMA. In particular, Articles 10(1) and 15(1) of the Regulation provide that where the European Parliament and the Council delegate power to the Commission to adopt regulatory or implementing technical standards, respectively, ESMA is required to submit the draft regulatory and implementing technical standards to the Commission for endorsement. Where the Commission intends to endorse those draft regulatory and implementing technical standards with amendments, it shall send them back to ESMA explaining why it intends to endorse them with amendments.

B. Assessment of the draft technical standards under SFTR

¹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

The draft regulatory and implementing technical standards submitted by ESMA are necessarily lengthy and of a complex technical nature, covering detailed reporting requirements, calculation methodologies and broader issues concerning the authorisation and operations of trade repositories. Recognising the number and range of market participants that will have to implement the requirements of the regulatory and implementing technical standards, it is of paramount importance that the final versions of the standards to be adopted by the Commission provide clarity and certainty. It was therefore necessary to make a number of clarifications and slightly restructure parts of the draft standards so that they better reconcile the intentions of ESMA with applicable principles of legislative drafting. These improvements have been identified through staff discussions and are not considered as changing the substance of the draft standards.

However, it is necessary to *amend a particular provision in the implementing and regulatory technical standards on the details of SFTs that market participants have to report to trade repositories*. More specifically, the draft technical standards submitted by ESMA provide for the mandatory use of potentially forthcoming industry standards (legal entity identifiers for branches and unique trade identifiers for transactions) for reporting to trade repositories once these standards would be ‘*endorsed by ESMA*’ in the future. During discussions with ESMA, it became clear that the Commission and ESMA had a different understanding as to how such potentially forthcoming standards would be endorsed by ESMA and, hence, how that process should be reflected in the regulatory and implementing technical standards under SFTR. To ensure legal certainty, the proposed amendment clarifies that - after the adoption of the technical standards - the responsibility to introduce changes to the reporting requirements due to potentially forthcoming industry standards remains with the Commission on the basis of an according proposal by ESMA. The proposed amendment avoids that the wording in the draft technical standards submitted by ESMA be understood as delegating regulatory powers on potential future reporting requirements directly to ESMA, which is legally not possible under the legal framework governing the European Supervisory Authorities.

It is therefore proposed to remove from the draft technical standards the references to ‘endorsements by ESMA’ of potentially forthcoming industry standards and to restrict the reporting obligations to requirements that market participants can comply with using current rather than future industry standards. To take account of further evolution in the field of industry standards, it is proposed to add recitals in the implementing technical standards, explaining that work is currently ongoing for the development of legal entity identifiers for branches and unique trade identifiers for transactions. The proposed recitals also mention that the use of such industry standards – once available and considered appropriate by ESMA and the Commission for the purposes of SFT reporting– could be required through an amendment of the relevant technical standards on the basis of a proposal by ESMA.

Procedurally, under Articles 10 and 15 of the founding Regulations of ESMA, the following options are available to the Commission: to endorse regulatory or implementing technical

standards without amendments, not to endorse them, to adopt them in part or with amendments. In the case of the draft implementing and regulatory technical standards on the SFT details to be reported to trade repositories, it is recommended to endorse them with amendments. This is to provide clarity and legal certainty on the fact that only the Commission, under the scrutiny of the European Parliament and Council, is empowered to introduce mandatory reporting requirements.

It is therefore proposed that the Commission, acting in accordance with the procedures set out in Articles 10(1) and 15(1) of the founding Regulation of ESMA, and taking full account of financial services legislation in general, and Regulation (EU) 2015/2365 in particular, informs ESMA of its intention to endorse with amendments the draft implementing and regulatory technical standards on the SFT details to be reported to trade repositories.

ESMA has then a six-week period to re-submit the draft implementing and regulatory technical standards in the form of a formal opinion after which the Commission may adopt the amended implementing and regulatory technical standards.

Due to cross-references in the legal texts, *the remaining technical standards under SFTR which are finalised in principle can only be adopted jointly with the proposed amended implementing and regulatory standards on the SFT details to be reported to trade repositories.*

C. Proposed amendment of the implementing technical standards on details to be reported to trade repositories under Regulation (EU) No 648/2012

The different understanding between the Commission and ESMA on the meaning of an ‘endorsement by ESMA’ that materialised during the discussions on the technical standards under SFTR is also relevant in the context of the implementing technical standards under Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

EMIR was published in the Official Journal of the European Union (EU) on 27 July 2012, and entered into force on 16 August 2012. Among other requirements, it stipulates the reporting of derivative contracts to trade repositories, similar to the requirements in SFTR.

Commission Implementing Regulation (EU) 2017/105² lays down the implementing technical standards for the format and frequency of reports to trade repositories under EMIR. It also refers to endorsements of industry standards by ESMA in two provisions (Articles 4(9) and 4a(1)). To ensure legal certainty, it is proposed to amend Commission Implementing Regulation (EU) 2017/105 in accordance with the proposed amendments of the draft technical standards under SFTR, i.e. by removing references to endorsements by ESMA.

² Commission Implementing Regulation (EU) 2017/105 of 19 October 2016 amending Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories

D. Conclusion

The Commission is therefore invited to:

- approve the enclosed letter, in which it communicates to ESMA (i) its intention to endorse with amendments the draft regulatory and implementing technical standards on the SFT details to be reported to trade repositories, (ii) its request to submit an amendment to the implementing technical standards on details of derivative contracts to be reported under EMIR and (iii) the reasons for the proposed amendments. The letter includes an Annex containing the amended draft implementing and regulatory technical standards as proposed by the Commission; and
- authorise the Director General of Directorate General of Financial Stability, Financial Services and Capital Markets Union to sign and transmit the letter enclosed to ESMA on behalf of the Commission.