

[REDACTED]

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From: [REDACTED]  
Sent: 20 September 2012 08:19  
To: [REDACTED]  
Subject: MiFID/R deal struck in Parliament

[REDACTED]

You are no doubt on top of this but thought it worth feeding in to you what I am hearing about last night's meeting of MIFID/R shadows in Parliament.

As I understand it, Ferber sealed the compromise text for voting on Weds 26 Sept. Only the recitals remain to be finalised this week through bilaterals between Ferber and shadows. This means the EP text is likely to contain:

- **OTF limited to non-equities**
- Limitations on the derivatives that can be traded on an OTF – derivatives subject to **trading obligation must be traded on an exchange or MTF ahead of an OTF** if the instrument is available to trade on either the exchange or MTF (irrespective of pricing)
- **Ban on prop capital in the OTF** – even for client facilitation
- **Mandatory clearing obligation for equities and fixed income** if traded on an exchange, MTF or OTF and clearing available (MIFIR Art 28a)
- Maintains **reference price waiver for equities**
- **New definition of OTC trading** – *'over-the-counter (OTC) trading' means any bilateral trading which is carried out by an eligible counterparty on its own account, outside a trading venue or a SI, on an occasional and irregular basis with eligible counterparties and always at large in scale sizes*
- Obligation to **trade OTC through SI** (incls exemptions)
- Highly **restricted non-discriminatory access provisions** (limited to cash instruments, 12mth timeframe for CCP to respond, no licensing of indices/ benchmarks, deletion of cross netting provisions)
- **Commodity position limits**
- **Inducements protections based on disclosure** of conflicts with flexibility for Member States to go further
- **Flexible market-making obligation for HFT** – subject to written agreement with the trading venue
- **Financial Instrument classification** – insurance contracts linked to investment-related activities now included

Hope helpful. Let me know if you'd like a little colour on some of this.

[REDACTED]

[REDACTED]

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[REDACTED]

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**From:** [REDACTED]  
**Sent:** 19 September 2012 16:35  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** MiFID/MiFIR - LSEG input on CY agenda questions for CWG on 20 Sep  
**Attachments:** 120910 MiFIR access paper v1 0 - final for Council.pdf; 120918 Agenda for Meeting 20 Sept 2012 (Doc #1) - LSEG Comments.docx

[REDACTED]

Further to [REDACTED] email last week, please find attached our responses to the questions raised in the Cypriot Presidency's agenda for tomorrow's Council Working Group, which we have also shared with HMT. You will see that some of the points echo our response to last week's questionnaire on pending technical issues. I hope you find these useful. In particular, I draw your attention to the following points that are of particular interest in the context of the Council debate.

**Articles 28-30 MiFIR** - you are aware of LSEG's support for non-discriminatory access to market infrastructure and benchmarks and of **the importance of defending the Commission's proposals**. We believe that some amendments could be made to the Commission's proposals for articles 28 and 30 that will address concerns raised regarding the impact of liquidity fragmentation, market resilience, systemic risk and IP rights (see Appendix B of separate document attached regarding non-discriminatory access).

**Consolidated tape** - we do not support the Presidency proposal for a single consolidated tape provider - **this needs to be firmly resisted**. It will have the effect of entrenching a monopoly position and reduce innovation and efficiency. A multiple consolidated tape provider model conforming to approved publication standards would be more effective for the market.

**Equity and non-equity pre-trade transparency** - The Cypriot Presidency has "re-instated" the **price reference** and **negotiated trade** waivers in the context of the proposals on OTFs. As you are aware we believe that Council must consider the retention of the existing 4 types of pre trade transparency waivers (for equities). However, we believe there is scope to explore changes to the application of the price reference waiver in the form of a requirement for **price improvement for dark orders**, in order to **ensure primacy of lit markets**.

For your information, our views on these are set out below.

If you have any questions, please do not hesitate to contact me. For your information, our views on these specific areas are set out below.

Regards

[REDACTED]

#### Non-discriminatory access - Articles 28-30 MiFIR

See attached document, where we respond to concerns on market fragmentation, systemic risk and IP rights.

#### Consolidated tape

*We oppose the current presidency text. We believe that by selecting a single commercial provider the proposals risk entrenching a single CTP in a dominant position. This risks stifling innovation and cost efficiency.*

*We support a CTP regime that allows multiple CTPs to exist and provide a consolidated tape in an efficient and market-focused way. We support reliable, high-quality post-trade data for the European market and consider that this will develop as result of the Commission's proposals.*

*In addition, we would argue:*

- *Concrete steps have already taken by industry to reduce data costs to users:*
  - *Separation of post trade data products*
  - *Availability of free 15 minute delayed data*
  - *Professional vs non professional fees*
- *These steps recognise a) that broad participation in securities markets requires that market data is accessible to all investors and b) that trading venues face fierce competition in attracting order flow – price data has become a competitive tool to differentiate themselves from one another.*
- *Data costs from trading venues represent only a low % (8-15% according to Atradia study) of overall cost of data, therefore to reduce a cross the board will require much wider effort. Focusing on one element, or setting up CTP as a utility, will not of itself necessarily reduce overall costs for users.*
- *Post trade data, like other services, should continue to be subject to competition. Trading venues are exposed to competition in all areas of their business and it seems odd to select one component of the market which MiFID has opened up to competition to be subject to this sort of regulation.*
- *Market data forms part of this competitive environment and the production of high quality data needs constant adaption to changing technological environments in order to prevent a race to the bottom in terms of quality and reliability.*

#### **Pre-trade transparency**

*On pre-trade transparency for equity/ equity-like –*

- *We fully support the reaffirmation all four pre-trade waivers established in MiFID-I in the Council working document #2 (i.e. price reference, large in scale, negotiated trade and order management facility).*
- *However, we recognise that there is scope for greater consistency and certainty in the interpretation and application of the waivers.*
- *For example, the following policies could be explored to ensure that waivers add to the market structure:*
  - ***Price improvement for all dark orders*** (i.e. that any “systematic” execution in the dark on RM, MTF, OTF, SI or OTC MUST deliver meaningful price improvement of at least one tick over the best bid/offer price in the primary lit market).
  - *Limit the range of prices (between the bid and offer) for which the reference price waiver can apply*
  - *Minimum order size for the reference price waiver*
  - *A harmonised less granular tick regime across all venues including RMs, MTFs, OTFs and SIs and OTC.*
    - *This would strengthen incentives to post public/visible limit orders, thereby increasing the depth and diversity of flow in public limit order books and their resiliency to price/liquidity shocks, substantially increase the proportion of orders that participate directly in the price formation process, improve market transparency and the quality of*

*price formation and reduce the number of price levels at which orders could be posted in order books.*

*On pre-trade transparency for non-equities –*

- *We support the more flexible approach of the compromise text for non-equities, including the recognition of RFQ and voice-brokered systems and the type of investor. However, in order to ensure that voice trading does not have less exacting requirements than electronic trading, the criteria for calibrating transparency waivers in Article 8 should include reference to market model so that forms of electronic trading (e.g. request for quote) are also appropriately treated.*
- *The exclusion of essential criteria such as market model, specific trading characteristics and type of order will restrict the ability of ESMA to take into account all relevant circumstances and interests when determining the level of transparency.*

**Consolidated tape**

*We oppose the current presidency text. We believe that by selecting a single commercial provider the proposals risk entrenching a single CTP in a dominant position. This risks stifling innovation and cost efficiency.*

*We support a CTP regime that allows multiple CTPs to exist and provide a consolidated tape in an efficient and market-focused way. We support reliable, high-quality post-trade data for the European market and consider that this will develop as result of the Commission's proposals.*

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**From:** [REDACTED]  
**Sent:** 19 September 2012 09:44  
**To:** [REDACTED]  
**Subject:** Position limits - track change edits in MiFID compromise text - consolidated 28 8 2012  
**Attachments:** MiFID compromise text - consolidated 28 8 2012 (TOWens edit).doc

[REDACTED]

As promised here are the suggestions typed into the text. We have gone for 'minimum change, maximum effect' and of course would have changed a lot more in an ideal world etc etc

Hope Cyprus was fun!

[REDACTED]

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[REDACTED]

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From: [REDACTED]  
Sent: 18 September 2012 10:43  
To: [REDACTED]  
Subject: Position limits material

Dear [REDACTED]

I promised to get you something, hope not too late.

In terms of the drafting, we have made minor amendments to the text for consistency - see Article 59(3); Art 59(3)(c); and Art 59(3)(d). I will send separately as track changes to the latest presidency text, as I'm currently on blackberry.

As regards argumentation:

Art 59 (4), (5), & (7): we understand and support the intention to make more transparent position limit regimes and offer national competent authorities and ESMA a 'manual override'. Apart from Article 59, Regulated Markets are under a range of requirements under Title III of the Directive, including Article 56 on monitoring compliance with both its own rules and laws against market abuse. Separate to Title III, a Regulated Market has significant incentives to maximise the effectiveness of price formation and oversee markets which are free from abuse. It is in the best position to understand the specific markets and whether position limits are required; to respond quicker to market events and address the risk of price manipulation of its contracts. With this in mind, it is ICE's view that the most efficient approach to limit setting is to provide the competent authority and the market operators with the responsibility to determine position limits. Technical standards set by ESMA should be restricted to ensuring consistency of approach, rather than setting the limits themselves either explicitly or implicitly.

In relation to Article 59(3)(b), it is ICE's view that this provision will provide the Exchange will significant and valuable information to enable it to control for abusive behaviours. By having the ability to request sight of positions held in the underlying physical contract, the Exchange can monitor and control for potential market price manipulations or squeezes. ICE strongly supports having this provision in place.

ICE is also of the opinion that the conditions for setting exemptions should be more explicit.

Hope you can use this

[REDACTED]

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[REDACTED]

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**From:** [REDACTED]  
**Sent:** 13 September 2012 19:14  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** FW: MiFID/MiFIR - LSEG input on CY questions on pending technical issues  
**Attachments:** 120828 WD2 - Pending Tech Questions on MiFID MiFIR -Meeting 6 9 2012 v1.4.docx

Hi [REDACTED]  
[REDACTED]

Please find attached brief responses to some of the questions raised by the Cypriot Presidency, for which Member State feedback has been requested. This has also been forwarded to HMT. I hope that a) you find these useful and b) you haven't already submitted your response!

Naturally, we remain very interested in other key areas of MiFID/MiFIR. In the context of the debate in Council, we are particularly interested in the state of play of the following:

- the debate on the **"open access"** provisions in MiFIR articles 28-30 (standardised derivatives and clearing obligation).
- **equity and non-equity pre-trade transparency**, especially the Council's position on the future of the **waiver regime**, established in MiFID 1.
- **consolidated tape**, given the recent Presidency proposal for a single consolidated tape provider (CTP) based on commercial tender.

For your information, our views on these are set out below. Matt, Shrey and myself will be in Brussels at some point over the next couple of weeks - it would be useful if we could arrange for a catch-up on these and other issues.

If you have any questions, please do not hesitate to contact me.

Kind regards  
[REDACTED]

#### LSE Group positions on "open access", "pre-trade transparency" and "consolidated tape" Council proposals in MiFID/MiFIR

- On open access –
  - We support the current Presidency text.
  - the proposals will benefit end-investors and the real economy by lowering the cost of trading and clearing of instruments including exchange-traded derivatives
  - they will diversify risk across a number of well regulated infrastructures, rather than cement it in one or two closed vertical silos.
- On pre-trade transparency for equity/ equity-like –
  - There is a case to retain all four pre-trade waivers established in MiFID-1 (i.e. price reference, large in scale, negotiated trade and order management facility), in contrast to the current Council position which retains only large in scale and order management.



- However, we recognise that there is scope for greater consistency and certainty in the interpretation and application of the waivers.
  - For example, the following policies could be explored to ensure that waivers add to the market structure:
    - **Price improvement for all dark orders** (i.e. that any "systematic" execution in the dark or OTC MUST deliver meaningful price improvement of *at least one tick* over the best bid/offer price in the primary lit market).
    - Limit the range of prices (between the bid and offer) for which the reference price waiver can apply
    - Minimum order size for the reference price waiver
    - A harmonised tick regime across all venues including RMs, MTFs, OTFs and SIs
  - This would strengthen incentives to post public/visible limit orders, thereby increasing the depth and diversity of flow in public limit order books and their resiliency to price/liquidity shocks, substantially increase the proportion of orders that participate directly in the price formation process, improve market transparency and the quality of price formation.
- On pre-trade transparency for non-equities –
    - We support the more flexible approach of the compromise text for non-equities, including the recognition of RFQ and voice-brokered systems and the type of investor. However, In order to ensure that voice trading does not have less exacting requirements than electronic trading, the criteria for calibrating transparency waivers in Article 8 should include reference to market model so that forms of electronic trading (e.g. request for quote) are also appropriately treated.
    - The exclusion of essential criteria such as market model, specific trading characteristics and type of order will restrict the ability of ESMA to take into account all relevant circumstances and interests when determining the level of transparency.
  - On consolidated tape –
    - We oppose the current presidency text.
    - By selecting a single commercial provider the proposals risk entrenching a single CTP in a dominant position.
    - This risks stifling innovation and efficiency.
    - We support a CTP regime that allows multiple CTPs to exist and provide a consolidated tape in an efficient and market-focused way.
    - We support reliable, high-quality post-trade data for the European market and this will develop as result of the Commission's proposals.




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**From:** [REDACTED]  
**Sent:** 17 September 2012 12:46  
**To:** [REDACTED]  
**Cc:**  
**Subject:** MarketAxess Discussion 12th September 2012  
**Attachments:** MAELECFinraRegs09122012v2.pdf; 1205\_-\_esma\_transaction\_reporting\_-\_final.docx

[REDACTED]

Many thanks for meeting with us last week. We found the discussion very useful in understanding the current developments in the MiFID 2 legislative process and appreciated your feedback on how a trading facility such as MarketAxess could be helpful to policy makers as the process continues.

I include 2 attachments:

- A copy of the slides used in our discussion. These summarise the MarketAxess position on aspect of the MiFID proposals and background detail on our experience with similar initiatives in the United States (in Particular with the FINRA 'Trace' transparency mechanism).
- Our submission to the ESMA consultation on transaction reporting, which discusses how EMIR and MiFID trade reporting should be aligned.

Regarding post trade reporting transparency, we feel the current Trace mechanism offers a reasonable template for how Fixed Income OTC Corporate bond trade size disclosure could work. Trades are reported in size buckets, up to \$100k (nominal) in size, \$100k-\$100MM, \$1MM-\$5MM and \$5MM+. US High Grade corporate markets have grown in net volume terms since Trace was introduced.

On pre trade transparency, it is a welcome development that the notion of 'indicative', as well as 'firm' pricing is included in the formulation of appropriate regulation. It will be difficult, however, to select precise criteria to measure 'how firm' an indicative precise will be in actual trading, especially as we traverse the less liquid end of the market that corporate bond trading encompasses. A platform such as ours, however, can help investors by providing performance measures and guidance in this area, and in a way that adjusts to the normal variations in market conditions that occur from month to month.

Please do not hesitate to contact us if there are any other questions we can assist with.

Regards,

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 05 September 2012 11:49  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** UBS views on third country provisions in Presidency compromise text  
**Attachments:** 04092012 UBS position on third country\_clean.doc; Amendments to Cypriot Presidency Proposal 20120904.doc; Legal Disclaimer.txt

Dear [REDACTED]

Following our discussions in Brussels before the summer break, and in advance of the attachés meeting this Thursday, we would like to take the liberty to share with you our position on the latest Presidency Compromise proposals in regards to the third country access provisions, and hope that you will find them useful.

#### **Own exclusive initiative - Recitals 55, 74**

**Recital 55:** We endorse the proposed changes to recital 55 (old recital 30) which fortify the link to the third country regime. In doing so, however, we believe that is important to expand the provision not to be narrowly focussed on instruments and transactions, but for consistency purposes to ensure that recital 55 applies to all investment services, activities and ancillary services. The text would then read:

*Proposal: A service can be considered to be provided at the own exclusive initiative of the client notwithstanding that the client demands it on the basis of any communication containing a promotion or offer of financial instruments, **investment services, activities, together with any ancillary services**, made by any means that by its very nature is general and addressed to the public or a larger group or category of clients or potential clients.*

**Recital 74:** We also support this wording, but would suggest to clarify what is meant by "solicits" rather than implying that solicitation goes beyond promotion and advertising, as follows in the last sentence:

*Proposal: The exemption does not apply in relation to the provision of any other services or activities unless initiated at their own exclusive initiative by the clients on the same basis. In case a third country firm solicits clients or potential clients in the Union **or by promoting or advertising investment services or activities together with ancillary services in the Union**, it should not be deemed as a service provided at the own exclusive initiative of the client.*

#### **Requirement to provide services "through" a branch**

We remain concerned in relation to the proposal concerning active solicitation business. The proposal maintains the hurdle of requiring foreign firms to pass investment services to retail clients through a branch and this without the grant of a passport. This also excludes the possibility of providing services to private banking clients on an active basis cross-border into the Union, because the retail category as applied today encompasses also portfolio management for wealthy private banking clients and because under the proposal, clients who have opted up to professional would also have to be serviced through a local branch in the relevant Member State.

Moreover, a foreign firm would not only have to pass services through the branch, but it would also have to establish a branch in each and every Member State where it wishes to service wealth management clients. This would not only for smaller firms, but also for larger ones be a *very high entry barrier* into the EU market, and thus negatively affect competition as well as the service offering to residents in the Union.

Alternative solutions:

**Option 1 - Local representative:**

One possibility would be to replace the branch requirement by a requirement to have a local representative which could be set up to

- (i) ensure the supervision of cross border business,
- (ii) ensure compliance with oversight obligations in regards to the foreign firm's cross-border business into a EU Member State
- (iii) serve as a point for notice and enforcement.

In addition, we suggest as set out below that the foreign firm would need an authorisation for active provision of services cross-border, and cooperation agreements would have to be entered into by the relevant foreign and competent EU authority. The foreign firm could also be required to post a bond to facilitate possible enforcement of fines, unless there are other forms of guarantees (e.g. adequate capitalisation).

As this is a new idea, we have not yet formulated detailed amendments, but can do so on very short notice.

**Option 2 - Raise the bar for retail clients to opt up to professionals:**

A second possibility would be to substantially raise the bar for retail clients to be able to opt-up to a professional client, and to treat those that do meet the higher requirements in the same manner as "per se" professional clients. More specifically we would suggest that only retail clients with minimum investable assets of EUR 1,000,000 are given the option to opt-up (please note that investable assets required today are EUR 500,000.) This would allow to adequately differentiate between wealth management and retail clients reflecting different service needs and requirements.

**Option 3 - Foreign firm authorisation (alone or in combination with Option 1 or 2)**

A third possibility is also to leave the requirement of a branch, but not to require the foreign firm to act through the branch in all cases, if it has obtained an authorisation for doing cross-border business. Authorisation requirements should include prudential requirements, compliance with investor protection and the need to adhere to an investor compensation scheme. International cooperation would be ensured in addition through cooperation agreements providing for on-site inspections between the foreign and the competent authority of the relevant Member State.

We have outlined those proposals in further detail in the attached position paper and have formulated detailed amendments in the attached mark-up to the Presidency proposal. We hope you will find those proposals useful in the continuation of your discussion. We would very much welcome further exchange on this important issue, so please let us know should you have any further question or wish to discuss certain aspects of the third country regime.

With best regards

<<04092012 UBS position on third country\_clean.doc>> <<Amendments to Cypriot Presidency Proposal 20120904.doc>>

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 22 August 2012 15:52  
**To:** [REDACTED]  
**Subject:** Basel rules on bank exposures to CCPs

<http://www.bis.org/publ/bcbs227.pdf>

All the best

[REDACTED]

**ICE Futures Europe/ICE Clear Europe**

**Registered Office:** 5th Floor | Milton Gate| 60 Chiswell Street | London | EC1Y 4SA| United Kingdom

[REDACTED]

[www.theice.com](http://www.theice.com)

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[REDACTED]

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From: [REDACTED]  
Sent: 20 August 2012 11:00  
To: [REDACTED]  
Subject: CME Group Applies to Create an Exchange in the United Kingdom  
Attachments: CME Group in Europe Fact Sheet - August 2012.docx

[REDACTED]

Hope all is well and that you are enjoying the summer – just wanted to pass this announcement along. Please let us know if you have any questions.

Also, we met with [REDACTED] this morning and had a productive exchange on several issues. CME is looking to coordinate specifically on the third-country issues to push back against overreach by the US and retaliation from the EU. We are open to ideas on where to apply our advocacy efforts if you see any opportunities in the coming weeks.

Best regards,

[REDACTED]

News Release Issued: August 20, 2012 3:00 AM EDT

## **CME Group Applies to Create an Exchange in the United Kingdom**

CHICAGO and LONDON, Aug. 20, 2012 /PRNewswire/ -- CME Group, the world's leading and most diverse derivatives marketplace, announced today it is in the process of applying to the United Kingdom's Financial Services Authority (FSA) to create a London-based derivatives exchange. Pending regulatory approval as a Recognized Investment Exchange, CME Europe Ltd will initially begin trading foreign exchange futures products and is expected to launch mid-2013.

"We continue to see an increase in business coming from our diverse set of customers in Europe, with more than 20 percent of our volume now originating from the region," said CME Group Executive Chairman and President Terry Duffy. "Having an exchange in London that can leverage the central counterparty model of CME Clearing Europe will allow us to align ourselves even more closely with our regional customers in both listed futures and over-the-counter markets, and provide additional opportunities to our expanding non-U.S. customer base."

"Our application to establish an exchange in Europe fits within our strategy to grow organically and is an important next step to meet the growing regional demand from our customers," said CME Group Chief Executive Officer Phupinder Gill. "Launching with a suite of FX products allows us to leverage our 40 years of experience in FX futures for customers in the region who access the futures market during the London business day, but we also plan to look at expanding into additional asset classes."

Robert Ray, currently Managing Director, Products and Services, will become Chief Executive Officer of CME Europe. CME Globex will be used as the electronic trading platform and CME Clearing Europe Ltd, which launched in May 2011, will provide central counterparty clearing services.

As the world's leading and most diverse derivatives marketplace, CME Group ([www.cmegroup.com](http://www.cmegroup.com)) is where the world comes to manage risk. CME Group exchanges offer the widest range of global benchmark products across all major asset classes, including futures and options based on interest rates, equity indexes, foreign exchange, energy, agricultural commodities, metals, weather and real estate. CME Group brings buyers and sellers together through its CME Globex® electronic trading platform and its trading facilities in New York and Chicago. CME Group also operates CME Clearing, one of the world's leading central counterparty clearing providers, which offers clearing and settlement services across asset classes for exchange-traded contracts and over-the-counter derivatives transactions. These products and services ensure that businesses everywhere can substantially mitigate counterparty credit risk.

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CME-G

SOURCE CME Group

[REDACTED]

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From: [REDACTED]  
Sent: 24 July 2012 09:07  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: Execution only point MiFID art. 25  
Attachments: Article 25 MiFID MEP wording.doc

[REDACTED]

Good seeing you last night.

As discussed, please find below the detail of the execution only issue that our client, Baillie Gifford, have asked us to raise with you, and the relevant Standard Life (attached) and IMA amendments (below). For completeness sake I have copied in [REDACTED] at UKREP.

Any feedback you might be able to provide on this point would of course be very welcome.

Best regards,

[REDACTED]

cabinet DN

[REDACTED]

[REDACTED]

Baillie Gifford (BG) sells investment trusts packaged into ISAs and regular investment schemes and also a UK regulated Non-UCITS Retail Scheme 'NURS' to retail clients on an execution only basis. BG does not provide advice. If Article 25 of MiFID is not amended, this could be detrimental to their business model and mean that these products could only be sold under the 'appropriateness test.'

As currently drafted, UCITS and shares in companies will be able to be sold to retail clients on an execution only basis but not listed funds and Non-UCITS funds, notwithstanding that they are currently sold to retail clients in the UK on an execution only basis. The main focus in negotiations relating to Article 25 has been on a distinction between complex and non-complex UCITS and whether complex UCITS can be sold, without an assessment of their appropriateness to the retail client first being undertaken. However our concern is with domestic UK funds, which can currently be sold to retail clients on an execution only basis and any curtailment of this.



Please find attached amendments which were submitted to Kay Swinburne by Standard Life, and (below) an amendment submitted by IMA.

These amendments would be helpful to BG and collectively solve their issue. [The IMA wording refers to the current MiFID L2 directive which further defines instruments which are deemed non-complex.]

#### IMA Amendment

- (i) shares admitted to trading on a regulated market or on an equivalent third country market, or on a MTF, where these are shares in companies, and excluding shares in non-UCITS collective investment undertakings which do not meet the requirements of Article 38 in Directive 2006/73 and shares that embed a derivative;

This would remove investment trusts that meet the following criteria (under Art 38 of the current L2 text):-

- there are frequent opportunities to dispose of, redeem, or otherwise realise that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;
- it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument;
- adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 23 July 2012 18:47  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** LSEG Council Response Table for Working Group 24 July 2012

Dear [REDACTED]

I work alongside [REDACTED] in the Government Relations and Public Policy team at London Stock Exchange Group (LSEG).

In advance of tomorrow's Council working group, I would like to take the opportunity to share our comments on selected provisions in the recent Council documents (please see table below). These are additional points arising out of the Cypriot Presidency text to supplement our previous materials you may have received from [REDACTED]

My colleagues and I would be more than happy to elaborate on any of the below or provide further information.

Please let me know if I can be of any further assistance.

Kind regards,  
[REDACTED]

Doc. 1 Scope include exemptions		
Article	Position	Comment
MiFID 2(1)	Support	We support the presidency amendment stating that participants of RM and MTF who are not required to be authorised under this directive by virtue of the exemptions in article 2(1)(a) 2(1)(h) and 2(1)(i) do not also need to meet the restriction in article 2(1)(d) when they deal on own account - but shall be subject to the relevant obligations under article 17 when engaging in algorithmic trading.
MiFID 2(3)	Support	We agree that the criteria for establishing when an activity is to be considered as ancillary to the main business shall take into consideration: - the fulfilment of market maker obligations on a trading venue, in order to stress the essential role that industrial companies, acting as market makers, play in supporting the liquidity in commodities derivatives markets; - the level of capital employed in financial markets both in absolute term and compared with the capital employed in the main

		business; - the level of involvement in financial markets both in absolute terms and compared with the overall size of the market per asset class;
Doc. 5 Investor protection and corporate governance		
MiFID 9(3)	Support	We support the Presidency's amendment. Introducing gender balance requirements that only apply to certain firms within a specific industry is anti-competitive and discriminatory against that industry.
MiFID 48(3)	Support	
Doc. 6 MTF, RM, SME		
MiFID 35(3)	Reject	Revert to COM text. It is critical that the SME market framework permits some flexibility to improve investor confidence in small caps as an asset class. Setting a prescriptive size or profile criteria would inhibit the development of SME markets as: <ul style="list-style-type: none"><li>- It would adversely impact investor perception, lowering confidence and liquidity,</li><li>- Penalise companies for growth and deter them from the public markets, diverting them to other, less public, forms of finance</li></ul>
Doc. 8 Algorithmic trading – Direct Access		
51(2)	Reject	See amendment. Volume and price parameters should be determined at the point of execution, not order entry.  Proposed amendment:  Article 51(2) – MiFID Member States shall require a regulated market to have in place effective systems, procedures and arrangements to reject orders that <b>if, upon execution in their entirety, would</b> exceed pre-determined volume and price thresholds, or are clearly erroneous and to be able to temporarily halt trading <b>or constrain it</b> if there is a significant price movement in a financial instrument on that market or a related market during a short period and, in exceptional cases, to be able to cancel, vary or correct any transaction.
51(7)(c)	Reject	See amendments. Tariff structures are an effective way to control order to trade ratios. Less granular tick sizes are an effective way to subdue rising message volumes. These parameters should be calibrated according to the participant, instrument type and liquidity.

		<p>Proposed amendment:</p> <p>Article 51(7)(c) - MiFID (c) to set out, <b>appropriately calibrated according to the participant type, instrument type and liquidity of the instrument, the use of tariff-based measures to indicate</b> a maximum <del>and minimum</del> ratio of unexecuted orders to transactions that may <b>take place on</b> <del>be adopted by</del> regulated markets and minimum tick sizes that should be adopted <b>across trading venues and systematic internalisers;</b></p>
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[REDACTED]

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From: [REDACTED]  
Sent: 23 July 2012 18:28  
To: [REDACTED]  
Subject: MiFID2/MiFIR discussion on 3rd Country

[REDACTED]

In advance of tomorrow's MiFID 2/ MiFIR Council Working Group meeting, I would like to share Bank of America's Merrill Lynch thoughts on the 3rd country regime with you, which might be of use.

#### Main Theme

We support the Commission's broad objective of trying to harmonise rules for non-EU firms across the EU as currently there is a fragmented set of rules across the Union which leads to uncertainty for non-EU firms in terms of how the rules are interpreted and applied as compared between Member States. The proposals for a passport for non-EU firms dealing with Professional Counterparties/ECPs is currently based on requirements for equivalence and reciprocity which may lead to time consuming and costly determinations and could lead to the unintended consequences of shutting off firms in certain third country firms from providing services in the EU other than through reverse solicitation, which would be detrimental to EU investors with consequential risks to EU business. The harmonisation of rules relating to (i) the use of a regulatory intermediation structure and (ii) a reverse solicitation regime, as set out in 'Provision of services at the exclusive initiative of the client' inserted in the new Article 44 a, could be an alternative and/or additional permissible route to the passport regime. By 'regulatory intermediation' we mean a structure by which an EU incorporated and passported entity would (a) solicit and market products and services in an EEA jurisdiction and (b) liaise with clients in that EEA jurisdiction, but where a third country entity would act as the booking vehicle in respect of these products and services. The regulatory intermediary would be subject to and comply with local conduct of business rules and would supervised locally by the local member state but would act, in effect as the agent of the third country entity. This method is recognised in the UK as permissible.

Agenda for the CWG meeting on 24 July

Third country regime (doc 13)

Q22: Do member states maintain their position expressed at the meeting of June 7, 2012, even after they have considered the non-paper of the European Commission in relation to the third country regime for third country firms providing investment services in the EU?

See comments above - to harmonize and clarify the rules relating to reverse solicitation and intermediation models employed in the EEA as an alternative/additional routewould allow a consistent approach to be taken across the Union in relation to permitted activities. Specifically: Intermediation

• To permit non-EU firms to provide services to EU persons via an EU authorised intermediary acting as agent for the non-EU firm, without requiring the non-EU firm to be registered in the EU. This structure is already commonly used in some EU jurisdictions and should be accepted and harmonised across the EU. To the extent there may be concerns, particularly in the case of retail clients, that authorisation of the intermediary alone does not provide sufficient client protection, a concept of equivalence could be considered as a requirement for the applicable non-EU jurisdiction but this should be restricted to a minimal base of areas such as capital requirements and, for retail clients, access to an investor compensation scheme. Any determination of equivalence should be on a regulatory objectives and outcomes basis rather than an attempt to match regimes requirement for requirement. Jurisdictions which currently recognise this as permissible are for example UK and Greece. Reverse solicitation proposals:

• The concept of reverse solicitation is not harmonised across the EU leading to uncertainty and uneven compliance. This route should be clearly defined so as to harmonise across the EU. It should be clarified that this route applies also to retail clients.

Q23: Do you agree with the clarification made in MiFID Recital 74 that, after a person has, at its own exclusive initiative, initiated the provision of an investment service with a third country firm, the exemption applies for the duration of their entire relationship?

• Yes we support the clarification that the reverse solicitation exemption should apply on a relationship basis. There are also provisions in this section which state as follows: 'In case a third country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.'

• In relation to this text, there should still be (i) an element of permitted marketing i.e. generic brand advertising/promotion should be allowed, and (ii) no extra-territorial application, i.e. if the client is approached by or has received marketing materials from the financial institution outside the relevant jurisdiction, this should not taint reliance on the reverse solicitation provision. Q26: Do you agree with the addition of a new article, MiFID Article 44a, in relation to the reintroduction of the own initiative exemption? Do you consider that it is necessary, in order to have a European wide common understanding, to define the meaning of the expression 'solicits at their own exclusive initiative'? If yes, should the Commission or ESMA define such an expression?

• Yes. In this regard, we point out that the UK definition of 'solicited' when determining whether a communication from a client was a 'reverse solicitation'. This means the communication would be either initiated by the client or would take place in response to a request from a client. The second leg of the test is important in maintaining flexibility as it enables a financial institution to be proactive in pursuing clients whom it knows want to receive services. Any definition which is provided should also take account of the generic marketing points/extra-territorial points raised above and also the fact that it should apply on an ongoing relationship basis for all MiFID services in relation to all MiFID instruments.

Please to not hesitate to contact me if you have any further questions.

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 23 July 2012 18:26  
**To:** [REDACTED]  
**Subject:** MiFID2/ MiFIR discussion on 3rd Country regime  
**Attachments:** BofAML Position Paper – MiFIR-MiFID 2- May 2012.pdf

[REDACTED]

I trust you're well. In advance of tomorrow's MiFID 2/ MiFIR Council Working Group meeting, I would like to share Bank of America's Merrill Lynch thoughts on the 3 country regime with you, which might be of use.

#### Main Theme

- We support the Commission's broad objective of trying to harmonise rules for non-EU firms across the EU as currently there is a fragmented set of rules across the Union which leads to uncertainty for non-EU firms in terms of how the rules are interpreted and applied as compared between Member States.
- The proposals for a passport for non-EU firms dealing with Professional Counterparties/ECPs is currently based on requirements for equivalence and reciprocity which may lead to time consuming and costly determinations and could lead to the unintended consequences of shutting off firms in certain third country firms from providing services in the EU other than through reverse solicitation, which would be detrimental to EU investors with consequential risks to EU business.
- The harmonisation of rules relating to (i) the use of a regulatory intermediation structure and (ii) a reverse solicitation regime, as set out in 'Provision of services at the exclusive initiative of the client' inserted in the new Article 44 a, could be an alternative and/or additional permissible route to the passport regime.
- By 'regulatory intermediation' we mean a structure by which an EU incorporated and passported entity would (a) solicit and market products and services in an EEA jurisdiction and (b) liaise with clients in that EEA jurisdiction, but where a third country entity would act as the booking vehicle in respect of these products and services. The regulatory intermediary would be subject to and comply with local conduct of business rules and would supervised locally by the local member state but would act, in effect as the agent of the third country entity. This method is recognised in the UK as permissible.

#### Agenda for the CWG meeting on 24 July

##### Third country regime (doc 13)

**Q22:** Do member states maintain their position expressed at the meeting of June 7, 2012, even after they have considered the non-paper of the European Commission in relation to the third country regime for third country firms providing investment services in the EU?

- See comments above – to harmonize and clarify the rules relating to reverse solicitation and intermediation models employed in the EEA as an alternative/additional route would allow a consistent approach to be taken across the Union in relation to permitted activities.

Specifically: Intermediation



- To permit non-EU firms to provide services to EU persons via an EU authorised intermediary acting as agent for the non-EU firm, without requiring the non-EU firm to be registered in the EU. This structure is already commonly used in some EU jurisdictions and should be accepted and harmonised across the EU.
- To the extent there may be concerns, particularly in the case of retail clients, that authorisation of the intermediary alone does not provide sufficient client protection, a concept of equivalence could be considered as a requirement for the applicable non-EU jurisdiction but this should be restricted to a minimal base of areas such as capital requirements and, for retail clients, access to an investor compensation scheme.
- Any determination of equivalence should be on a regulatory objectives and outcomes basis rather than an attempt to match regimes requirement for requirement.
- Jurisdictions which currently recognise this as permissible are for example UK and Greece.

#### Reverse solicitation proposals:

- The concept of reverse solicitation is not harmonised across the EU leading to uncertainty and uneven compliance. This route should be clearly defined so as to harmonise across the EU.
- It should be clarified that this route applies also to retail clients.

**Q23:** Do you agree with the clarification made in MiFID Recital 74 that, after a person has, at its own exclusive initiative, initiated the provision of an investment service with a third country firm, the exemption applies for the duration of their entire relationship?

- Yes we support the clarification that the reverse solicitation exemption should apply on a relationship basis.
- There are also provisions in this section which state as follows:  

‘In case a third country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.’
- In relation to this text, there should still be (i) an element of permitted marketing i.e. generic brand advertising/promotion should be allowed, and (ii) no extra-territorial application, i.e. if the client is approached by or has received marketing materials from the financial institution **outside** the relevant jurisdiction, this should not taint reliance on the reverse solicitation provision.

**Q26:** Do you agree with the addition of a new article, MiFID Article 44a, in relation to the reintroduction of the own initiative exemption? Do you consider that it is necessary, in order to have a European wide common understanding, to define the meaning of the expression ‘solicits at their own exclusive initiative’? If yes, should the Commission or ESMA define such an expression?

- Yes. In this regard, we point out that the UK definition of ‘solicited’ when determining whether a communication from a client was a ‘reverse solicitation’. This means the communication would be either initiated by the client or would take place in response to a request from a client. The second leg of the test is important in maintaining flexibility as it enables a financial institution to be proactive in pursuing clients whom it knows want to receive services.
- Any definition which is provided should also take account of the generic marketing points/extra-territorial points raised above and also the fact that it should apply on an ongoing relationship basis for all MiFID services in relation to all MiFID instruments.