ESMA
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4 September 2017

Dear Sirs,

AIMA and MFA response to ESMA Consultation Paper on the evaluation of certain elements of the Short Selling Regulation

The Alternative Investment Management Association (**AIMA**)[1] and Managed Funds Association (**MFA**)[2] thank the European Securities and Markets Authority (**ESMA**) for the opportunity to respond to the ESMA '*Consultation Paper on the evaluation of certain elements of the Short Selling Regulation*' (**the Consultation**).[3] We have awaited the publication of this consultation and are keen to set out our proposals for how '*Regulation (EU) No.236/2012 on short selling and certain aspects of credit default swaps*' (**the SSR**) could be amended to improve its functioning for both national competent authorities (**NCAs**) and market participants.[4]

AIMA and MFA alternative investment manager members are significant participants in EU primary and secondary capital markets. They typically exercise the flexibility to take both long and short positions in financial instruments over various timeframes according to the particular investment strategy being pursued, with short positions in particular financial instruments often taken for the purposes of strategic hedging and broader risk management. To this end, the ability to enter short

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,800 corporate members in over 50 countries. AIMA's fund manager members collectively manage more than $1.8 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 80 members that manage $300 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

[2] Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent and fair capital markets. MFA, based in Washington, DC, is an advocacy, education and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

[3] Available online: https://www.esma.europa.eu/sites/default/files/library/esma70-145-127_consultation_paper_on_the_evaluation_of_certain_aspects_of_the_ssr.pdf

[4] This response follows a joint letter we submitted to the European Commission on 26 October 2016 on the subject of the SSR in the context of the Capital Markets Union https://www.aima.org/resource/eu-short-selling-regulation-in-the-context-of-the-capital-markets-union-aima-joint-response-european-commission.html (ESMA CC'ed)

positions is vital to the efficient risk management by asset managers operating on behalf of EU and other institutional investors. The ability to take short positions in a financial instrument is also important for the purposes of market efficiency and accurate pricing, ensuring liquidity is maximised and the formation of price bubbles is minimised.

The central intention of the SSR was to remove regulatory fragmentation and to improve the functioning of the internal market in financial services. Certain aspects of the regime have indeed proved beneficial, such as the prohibition on naked short sales and new mandatory buy-in rules. However, our members consistently raise issues and shortcomings of the SSR that do not function efficiently or beneficially for NCAs or market participants. Several of these issues are covered directly by the Consultation.

Our response below focuses on Sections 3 and 4 of the Consultation, and, in particular, Section 4 on the transparency of net short positions and reporting requirements. We propose amendments to improve the efficient functioning of the SSR so as to enable it to better meet its regulatory objectives on a long-term basis whilst minimising costs for market participants, NCAs and ESMA.

Our key points are as follows:

- **Centralised source of in-scope instruments and issued share capital information** – we consider that a centralised source of issued share capital and scope information is essential to ensure the efficient functioning of the SSR significant net short position notification regime for both NCAs and market participants. Participants are currently unable to obtain reliable scope and denominator data for their SSR notifications, leading to inadvertent and unnecessary errors and reduced data quality for NCA supervisors. A centralised source of both issued share capital and scope information at EU level, combined with an obligation upon issuers to provide issued share capital figures, would exponentially improve net short position notification quality for NCAs under the SSR and eliminate a huge source of compliance cost and inefficiency for market participants.

- **Centralised reporting mechanism** – we strongly recommend the introduction of a centralised EU SSR notification and disclosure mechanism, alongside the abovementioned source of denominator and scope data. This centralised mechanism would benefit NCAs through enhanced data quality and comparability, reduced erroneous calculations and - if errors in issued share capital data provided by issuers is detected - the efficient centralised cleaning of data. AIMA and MFA members are willing to pay a reasonable cost-based fee to use the mechanism.

- **Extension of notification and disclosure timing to T+2** – the current complexities of making net short position notifications under SSR mean that the 15:30 T+1 deadline is extremely tight for market participants and potentially damages data quality for NCAs. We recommend an extension of the deadline by 24 hours to 15:30 T+2 to maximise the accuracy and timeliness of notifications under the SSR. We also support the additional two-hour period offered to NCAs to make public any disclosable net short positions under Article 6 of the SSR by 17:30, also on T+2.

- **Removal of 0.1% incremental thresholds** – we recommend the simplification of the significant net short position thresholds under the SSR; in particular, the elimination of the 0.1% incremental thresholds for additional notifications beyond the main notification and publication thresholds at 0.2% and 0.5% of issued share capital. We do not believe these additional notifications provide a commensurate supervisory benefit to NCAs when compared with the significant costs for participants having to comply with the rules.

- **Objective assessments of dual-listed instruments with a primary listing outside the EU** – we note the application of SSR to non-EU shares with a dual-listing on an EU venue and *vice versa* creates significant compliance difficulties for participants. In addition to the difficulties in discovering which instruments have a dual listing, the Article 16 SSR list of instruments with a primary listing outside of the EU is infrequently updated, thus leading to unnecessary and irrelevant notifications to NCAs. We suggest that a centralised list of in-scope instruments would greatly improve the scope issues of dual-listed instruments, however if this is not introduced we strongly recommend the ability for participants themselves to decide and document - according to robust objective criteria - those shares with a primary listing outside the EU, thus falling outside of the scope of SSR.

- **Duration adjustments for both bonds and derivatives** – AIMA and MFA support Option B within the Consultation to permit the duration adjusted method for both cash and derivative instruments. This would yield results which more closely represent the economic exposure of relevant positions as compared to the results calculated in accordance with the Option A delta approach.

AIMA and MFA would be glad to meet with ESMA and individual steering committee members alongside a selection of fund manager members, either in-person or *via* a conference call, to discuss our response and proposed amendments of the SSR further. If ESMA has any questions or would like to discuss our response further please contact Oliver Robinson of AIMA (orobinson@aima.org) or Matthew Newell of MFA (mnewell@managedfundsfa.org).

Yours faithfully,

/s/

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AIMA

MANAGED FUNDS ASSOCIATION

Annex – AIMA and MFA detailed response to the specific questions

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.

AIMA and MFA believe that trading halts under Article 48 of *Directive 2014/65/EU on markets in financial instruments* (**MiFID II**)[5] provide a superior tool for NCAs seeking to calm disorderly market volatility than bans introduced under Article 23 of SSR.

We note the lack of effectiveness demonstrated by such bans within ESMA's analysis contained in the Consultation. In particular, the lack of a statistically significant impact on stock returns of imposing or lifting SSR short selling restrictions, or proof of causality on volatility reductions.[6] These findings are consistent with academic studies on the US Securities and Exchange Commission (**SEC**) bans on short sales of financial stocks in 2008, which also identify temporary overpricing and negative impacts on market quality though wider spreads and reduced liquidity.[7] ESMA notes at Paragraph 136 of the Consultation that an alternative could be to eliminate the specific ban on short sales contained under Article 23 of the SSR. **We support the deletion of Article 23 and suggest that the MiFID II circuit breakers could instead be used to provide a more balanced and effective response to disorderly short term price movements.**

We consider that a pause of trading in both directions following significant disorderly price volatility is far preferable to a single directional restriction. An absolute halt avoids the distortion of market pricing and reduced liquidity that is caused by a short only ban, whilst providing an opportunity for participants to reconsider the fundamentals of their particular position and, where relevant, to recalibrate their trading systems.

If Article 23 is nonetheless maintained, AIMA and MFA support the proposal to link it with the engagement of circuit breakers by trading venues under Article 48 of MiFID II. We also support maximising the availability of information for market participants that a particular emergency short sale measure is in effect. Therefore, we support all bans being published immediately on the website of the relevant NCA.

We would suggest going further and giving market participants some form of advance warning to enable them to recalibrate their systems and risk management activities. Rather than the ban becoming effective at the exact moment the notice is posted on the NCA(s) website, we suggest that the SSR provide that emergency bans enter into effect at the market opening of the next trading day and that participants are given sufficient notice beforehand. If bans are introduced intraday, we suggest at least one hour be offered to allow market participants to make the appropriate arrangements and to notify the temporary bans to staff internally.

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[5] Available online: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0065

[6] The Consultation, at para. 91-97

[7] "*Short Sale Constraints, Dispersion of Opinion, and Market Quality: Evidence from the Short Sale Ban on U.S. Financial Stocks*" Autore, Billingsley and Kovacs (2009) available online: https://www.sec.gov/comments/s7-08-09/s70809-3779.pdf ; "*The Effects of a Temporary Short-Selling Ban*" Haoshu Tian (2014) available online: https://scholar.princeton.edu/sites/default/files/htian/files/ssban.pdf

MANAGED FUNDS ASSOCIATION

Q11: What are your views on the proposal to change the scope of short term bans under Article 23 of the SSR? Please elaborate.

As above, we believe that Article 23 should be deleted and the MiFIDII trading halts regime used to deal with short term market movements.

If maintained, we strongly disagree with the first proposal within the Consultation to broaden the scope of the Article 23 emergency short sale bans to include OTC trading and derivatives. **We recommend keeping the ban to just "short sales".** As ESMA notes, current bans have been ineffective in their objective of easing selling pressure on particular shares. We disagree that this has anything to do with the fact that OTC and derivatives positions are not caught by bans. Instead we suggest that this is due to the economic fundamentals and technical trends of the underlying issuer. Arguably, the publication of a short ban itself also confirms the riskiness of the particular issuer to the broader market leading to further selling pressure. We believe strongly that in an open public market it is not possible to artificially preserve and protect a stock price from fundamental price movements. However, there should be trading halts to step in as a last resort when trading on public markets becomes excessively volatile and disorderly.

We also note that an extension of bans to all OTC and derivative instruments could have significant consequences for market participants. For example, including derivative instruments could damage market participants' risk management by impairing their abilities to adjust their net long positions during the ban – for example, reducing a long cash equity position for dynamic hedging purposes by using a long put option on that equity. If any such extension to derivatives were introduced, we emphasise that the wording would have to be consistent with that under paragraph 131 of the Consultation Paper, which notes that the ban would be on "taking or increasing *net* short positions". Thus, it should only apply to those participants with existing net short positions, or those moving from a net long to a net short position. It is important for risk management purposes that individual *gross* short positions entered using derivative contracts are not affected for those with net long positions in a particular issuer.

There are also other emergency mechanisms within the SSR which enable restrictions to be placed on both short selling in OTC markets and "similar transactions", for example, under Article 20 of the SSR. We consider that the broadening of Article 23 is unnecessary.

We nonetheless agree with the ESMA proposal not to include index trading to avoid negative impacts on market liquidity and the second proposal within the Consultation to restrict the scope of short-term measures to shares traded on a trading venue. As ESMA notes, the mechanism has been redundant for other financial instruments and, even when used, has been of negligible effectiveness.

Q12: Do you see any reasons to change the current levels of the thresholds regarding the notification to competent authorities and the public disclosure of significant net short positions in shares? Please elaborate.

Yes, **AIMA and MFA do not believe that the additional incremental notification and disclosure thresholds at each 0.1% of issued share capital above the relevant 0.2% and 0.5% thresholds provide a commensurate supervisory or market benefit, and simply result in additional duplicate costs and burdens on market participants,** reducing net returns to EU institutional investors. We recommend that they be deleted. We disagree that the costs to market participants of amending their systems to account for the updated thresholds would outweigh the benefits of these amendments.

Our members recognise the supervisory benefit to NCAs of the 0.2% of issued share capital threshold for private notifications of significant net short positions in shares. We also accept that public disclosures may be desired politically for positions of 0.5% of issued share capital.[8] However, for the purposes of the SSR we suggest that the important information from a market supervisory perspective is binary – i.e., to know which market participants have significant short positions in which publicly issued shares. Similarly for public disclosures, any theoretical benefit to the market is also binary (although indeed we do not believe that there is a benefit) – i.e., the public can see which market participants have a significant net short position in a particular issuer. **Giving exact position details down to the nearest 0.1% we feel goes beyond what is necessary to meet the policy objective of SSR** and risks inefficient and potentially abusive practices by opportunistic market participants seeking either to replicate the 'smart' money or squeeze those with open short positions.

We note that NCAs should already have the relevant data necessary to discover the exact positions of individual market participants by virtue of transaction reports submitted under *Directive 2004/39/EC on markets in financial instruments* (**MiFID**),[9] becoming MiFID II, as well as the ability to make *ad hoc* data requests from regulated firms when specific information is desired.[10] From the perspective of NCAs and the market, therefore, **AIMA and MFA consider that there is little benefit of requiring additional notifications and disclosures of the net short position of a participant for position changes between 0.2% and 0.5% and above 0.5%.**

However, the costs of re-notifications at each 0.1% by market participants is significant, especially for those with more dynamic hedging strategies that may cross one or more 0.1% threshold(s) regularly. Our member firms dedicate numerous employee hours every day to comply with the notification and renotification obligation. Due to the disparate notification mechanisms, complex calculations and very poor data availability, SSR notifications have to be completed manually by the vast majority of firms. This often involves double checking all scope and issued share capital data that has been used by any automated systems used to assist the process. The cost of compliance for each firm, therefore, can run to hundreds of thousands of Euros a year. The renotification requirement is a significant component of this cost. The removal of the 0.1% thresholds would go a long way to reducing these costs for alternative investment management firms and, therefore, their end investors including pension funds and insurance companies.

[8] Although we also still disagree strongly in principle with non-anonymised public disclosure of significant net short positions (see our response to Question 13)

[9] Available online: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0039

[10] This is a well-used mechanism by NCAs, with many of our members receiving such requests for *ad hoc* disclosures.

We recommend that the 0.1% incremental thresholds be removed – leaving just thresholds at 0.2% and at 0.5% of issued share capital.

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.

AIMA and MFA disagree with the introduction of an additional anonymised aggregated net short position disclosure regime. We believe that the proposal threatens unnecessary additional cost burdens for NCAs and additional market distortions for market participants. If it were to be introduced, we suggest **it should only be as a replacement for the current public significant net short position disclosure requirement contained under Article 6 of SSR.**

As we explained during the political development process of the SSR, the **one sided publication of granular short position data of individual participants to the broader market introduces the risk of pricing inefficiencies** through asymmetric information and potential herding, as well as the risk of abusive practices seeking to squeeze those market participants with open short positions. Named disclosures also creates dangers of issuer reprisals against market participants with net short positions in their shares.[11] Anonymised aggregate public short position information in place of named position information would serve to reduce the risks of firms being unduly targeted by rival market participants or issuers themselves. However, even anonymised aggregate short position data still threatens the same risks of short squeezes and negative pricing implications from asymmetric information being provided to the market. We believe that both in principle should be avoided, although aggregate and anonymised data is preferable to named disclosures from the perspective of market quality.

Q14: Do you agree that the notification time should be kept at no later than 15:30 on the following trading day? If not, please explain.

AIMA and MFA disagree that the SSR significant net short position notification time should remain at 15:30 T+1. We appreciate that competent authorities wish for data to be provided as soon as is practicable, however, due to the significant complexity involved in making significant net short position calculations and notifications and the global nature of market participants, **we urge ESMA to reconsider this timeframe to allow market participants an extra day – with notifications and public disclosures to be made by 15:30 on a T+2 basis.**[12]

[11] The use of trading stops to avoid crossing Article 6 public disclosure thresholds is commonplace amongst market participants, as can be seen in NCA private notification data, leading to increased complexity for firms for example when seeking to implement an effective risk management strategy, knowing that a direct hedging position in an EU issuer has an explicit limit of 0.5% of issued share capital.

[12] Our response below focuses on notifications for shares, but the issues apply similarly in the case of sovereign bonds.

We also recommend that this additional time period be accompanied by a **centralised source of scope and issued share capital data for market participants to better enable firms to submit timely and accurate notifications.**

We believe that our proposed additional 24-hour period and centralised source of accurate information for market participants would improve the quality of SSR data for ESMA and NCAs, thus furthering the supervisory objectives of the SSR. The amendments would also enhance the efficient functioning of the SSR for the benefit of market participants.

The below explanation sets out our position and proposals in more detail:

Timezone issues of 15:30 T+1

A significant number of market participants' businesses are global in nature, with different units responsible for undertaking relevant calculations located in different continents and time-zones across the world. **Making a report by 15:30 CET the following day can be extremely difficult for such international participants**. Any temporary lack of connectivity between different locations as a result of a web or other IT issue, even for only a couple of hours, renders position calculations and notifications impossible by 15:30 T+1.

This is particularly the case when an in-scope share is actively traded in the US, thus a participant must wait for the US market to shut prior to making its position calculation. This reduces the time for SSR calculations and notifications by five to six hours for instruments traded on the east coast of the US, and up to nine hours for those traded on the west coast.

Compliance and operational difficulties

Regardless of time-zone issues, SSR net short position calculations are themselves complex and time consuming. Even when an automated overnight position assessment tool is used by firms, there is still a significant amount of manual work involved in compiling and submitting SSR reports which means submitting a notification by 15:30 T+1 is especially difficult.

In order to make notifications and disclosures, market participants must first:

(i) evaluate whether their traded securities globally are in-scope of the SSR;
(ii) obtain the requisite data on the total issued share capital of an issuer (**the denominator**);
(iii) calculate their net short position in the share (**the numerator**), involving the reconciliation, aggregation and netting across numerous accounts, and the decomposition of various indices in which firms have positions; and
(iv) determine if a relevant SSR threshold has been crossed.

Scope of instruments

The SSR applies to all financial instruments as defined under Annex 1 section C of MiFID that are admitted to trading on a trading venue and any derivatives referenced thereto. A 'short position', therefore, not only includes selling the relevant share or debt, but also any transaction creating or

relating to another financial instrument that confers a financial advantage on the natural or legal person in the event of a decrease in the price or value of the share or debt instrument (e.g., options and other derivatives).

No reliable commercial service is available to assist firms in determining which equity or sovereign debt instruments are within scope of the SSR. There are already certain centralised EU scope resources contained within other legislative measures. For example, the ESMA list of shares admitted to trading on a regulated market under MiFID implementing Regulation No 1287/2006,[13] as well as the list under Article 4 of the Market Abuse Regulation (**MAR**) of financial instruments admitted to trading on a trading venue or for which a request for admission to trading has been made. However, these lists do not match the scope of SSR, with the former list too narrow[14] and the latter MAR list too broad.[15]. **Our proposed solution is a specific centralised list of in-scope instruments for the purposes of the SSR.**

Problems surrounding dual listings of third country shares

As we discuss above, the issue of dual listings of shares in the EU and US creates significant timezone difficulties for firms that actively trade in-scope instruments on US markets due to the need to wait for these markets to shut prior to making position calculations and preparing notifications.

Specific issues also regularly arise for third-country shares with a dual listing in the EU that may or may not appear on the Article 16 SSR exempted list for shares with a primary listing outside the EU. The Article 16 list has not always worked effectively and is infrequently updated. Our members have noted cases of EU and third-country companies merging and the new shares' primary trading venue being demonstrably in the relevant third-country, but the exempted list remaining un-updated three months later. There are also significant problems for third-country issuers' shares being unilaterally listed on small Multilateral Trading Facilities in Germany, thus falling technically within scope of SSR but not appearing on the Article 16 list despite the primary trading venue clearly being outside of the EU.

A specific centralised positive list of in-scope instruments for the SSR would enable Article 16 of the SSR to be deleted, thus eliminating the current dual-listing confusion by preventing shares with a primary listing outside of the EU from becoming subject to the SSR. An alternative solution would be to enable market participants to make a reasoned and documented assessment on objective grounds that they believe the primary trading venue of a particular share is outside the EU. Individual participants would need to justify their decisions when subject to periodic or *ad hoc* review by an NCA.

Inaccurate and unreliable issued share capital data

[13] https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_sha

[14] It does not include shares admitted to trading on an MTF or sovereign debt instruments.

[15] Including instruments for which a request for admission to trading has been made, as well as numerous other equity and non-equity instruments beyond shares and sovereign debt instruments

However, **the most significant problem that can cause significant uncertainties and delays in short position notifications is that of erroneous issued share capital data.** Market participants make every reasonable endeavour to obtain accurate and up-to-date information upon which to base their significant net short position calculations, however, there is currently no centralised source of issued share capital data for the purposes of the SSR. Both market based and NCA sources are often inaccurate. Despite this, market participants bear sole responsibility for any errors in that data.[16]

Market participants currently utilise data from a combination of regulatory data feeds, trading venues and issuers themselves to discover the issued share capital of an issuer. However, despite their best endeavours, the figures given to them by each source regularly do not match up.[17] The inconsistency in the data leads to uncertainty, delay and regulatory risk being incurred by a market participant when making a notification, or failing to make a notification as the case may be.

A key problem is that there is currently no obligation on issuers to provide an 'issued share capital' figure for the purposes of the SSR.[18] As there is no requirement on them, issuers may report on 'share capital' generally in annual reports or on their website, but they may be using a very different definition of 'issued share capital' to that envisaged by the SSR, in particular often lacking treasury shares.[19] Importantly, it is also completely within the issuer's discretion if or how frequently they publish issued share capital information. Market data providers such as Bloomberg and Reuters can only disseminate information the issuers themselves publish – their figures are, therefore, inherently unreliable. We also consider that the unique SSR figure of 'issued share capital' is somewhat strange and of little economic value for NCA supervision or the market beyond calculating SSR net short positions. If no obligation is imposed on issuers to publish accurate issued share capital data, we would strongly suggest amending the SSR to introduce an alternative denominator figure that issuers are already required to publish.

Certain NCAs have themselves recognised the difficulties of obtaining reliable data. There have been numerous instances of NCAs actively flagging where regulatory data has been wrong, for example, the Comisión Nacional Del Mercado de Valores (**CNMV**) took action in circumstances where securities had been included in an issuer's 'issued share capital' before the effective date of the new shares.[20] The Autoriteit Financiële Markten (**AFM**) has gone a step further and established a central register of share capital on its website for the purposes of both long and short position notifications - contacting firms that submit notifications based on erroneous regulatory data and directing them to instead use

[16] Potentially incurring strict liability penalties from national competent authorities. Some national competent authorities are particularly strict in their enforcement, imposing strict liability fines in all circumstances of late or incorrect notification.
[17] This is often due to the differences in how quickly data is updated by issuers
[18] Whilst current EU transparency rules require that issuers publish total voting rights, there is no similar requirement under the SSR for issuers to publish total issued share capital. Article 15 of the Transparency Directive requires Issuers of shares on regulated markets to make disclosures of the total voting rights and any capital increases or decreases at the end of each calendar month during which a capital increase or decrease has occurred. No comparable obligation exists under SSR.
[19] 'Issued share capital' for SSR purposes includes (a) all share classes; and (b) treasury shares, but such information is not systematically reported. Accordingly, it can be impossible to know if all share classes are being captured, how up to date this information is and whether any shares have been subsequently cancelled.
[20] Earlier in 2016, the Comisión Nacional Del Mercado de Valores (**CNMV**) provided advice in relation to Banco Popular's capital increase due to data providers including those new securities in their issued share capital figures prior to the effective date of the issue. The CNMV distributed a circular being distributed informing participants that the new Banco Popular shares had been admitted to trading.

the share capital figures on the AFM website.[21] The AFM source, however, has met its own problems with data being out-of-date.[22]

AIMA and MFA propose a positive obligation requiring issuers to publish the issued share capital information necessary for SSR calculations and for ESMA to assemble, maintain and publish a single reliable data source in a machine readable format. In particular, we suggest this "golden-source" could be incorporated within the central notifications platform we discuss in our response to Question 16, below and the centralised SSR scope list proposed above. We note the positive example of the Netherlands demonstrates that such a list is possible and suggest that ESMA could provide a vital service by serving as the central repository for this information.

Such a centralised repository would complement the extension of the notification deadline until 15:30 on a T+2 basis. Nonetheless, if the deadline were not to be extended this centralised 'golden source' of issued share capital data would become even more critical to the ongoing application of the SSR.

As we proposed to the European Commission in October 2016, an alternative to introducing a list would be an amendment to the preamble of the SSR to confirm that compliance with Articles 5-8 of the SSR is on a "reasonable endeavours" basis only and that a participant will be held in compliance with the rules as long as they have acted on a reasonable basis by using an "accredited data source" to make the net short position calculation. An "accredited data source" could include: (i) a regulatory data feed – such as Bloomberg or Reuters; (ii) data from the relevant stock exchange on which the security is traded; (iii) an NCA's centralised register; or (iv) the issuer's website itself.

Q15: Do you agree that the publication time should be changed at no later than 17:30 on the following trading day? Please elaborate.

Consistent with our concerns that market participants are not given sufficient time to evaluate whether their traded securities globally are in-scope of the SSR; obtain the requisite data on the denominator; calculate the numerator across numerous trading accounts; determine if a relevant threshold has been crossed; and compile and submit net short position notifications, AIMA and MFA empathise with the operationally difficult position of NCAs currently being required to publish relevant net short positions immediately. **We therefore support the extra two hours proposed by ESMA for NCAs to publish those positions.**

The potential consequences of too severe a timeframe was demonstrated on 24 January 2017 when the AFM accidentally published its entire list of historic private significant net short position notifications received under Article 5 of the SSR since 2012, instead of the public list of significant net short position disclosures it was due to publish under Article 6 of the SSR. We believe that a repeat

[21] Available here: https://www.afm.nl/en/professionals/registers/alle-huidige-registers.aspx?type=%7BF25D2CA1-B93C-4331-B025-85DF328CD505%7D

[22] Members have experienced issues with the AFM database itself being over 10 days out of date due to corporate actions not being taken into account.

of such significant errors could be avoided by giving NCAs more time to publish the list of positions under Article 6 of SSR.

As per our response to Question 14 and our request to make position notifications T+2, we reiterate our strong belief that **this should be 17:30 on a T+2 basis** due to the need to offer market participants an extra 24 hours to make notifications.

Q16: What are your views on a centralised notification and publication system at Union level? Can you provide a quantification of the benefit of such centralised notification to your activity? What are your views on levying a fee on position holders to have access to and report through such a centralised system? Please elaborate.

AIMA and MFA are believe strongly that **a centralised notification and publication system at EU level is essential and would make a significant positive difference to the accuracy of data for use by all NCAs, the ease of publication of such data by NCAs and the significantly lowered cost of reporting and data handling by both market participants and NCAs.**

Market participants currently experience significant cost and complexity when seeking to comply with the SSR notification and disclosure obligations across different Member States due to the disparate methodologies and formats adopted by different NCAs. Each authority has implemented its own approach to receiving SSR short position notifications. Methodologies range from online platforms (as used by France, Germany and the Netherlands) – to email, fax and direct posting (used by other Member States such as the UK, Ireland, Sweden, Poland and Greece). Also, when required, the pre-approval processes to register with the relevant mechanism is often different across Member States. For example, the static data required regarding a reporting entity is often different and making changes to that data is often cumbersome.[23]

Certain Member States even require the use of multiple mechanisms. For example, the German Federal Financial Supervisory Authority (**BaFin**) receives private notifications through a web-based portal, but public disclosures through an entirely separate system – the Bundesanzeiger (**Federal Gazette**). The latter newspaper system requires multiple operational processes and duplication on the part of market participants and takes up to several weeks for approval to be obtained, which can lead to delays if the disclosure threshold is crossed quickly. The Bundesanzeiger also uses billing practices that are prone to errors and introduce unnecessary extra costs.[24] This results in a process that takes three times as long as the submission of a short position to BaFin.

AIMA and MFA suggest that a single centralised IT driven and uniform notification and disclosure mechanism for shares, sovereign debt and uncovered sovereign CDS would improve compliance rates by avoiding the need for each market participant to make notifications to numerous separate

[23] In Denmark, a participant must change the contact email address each time that static data is changed in relation to the reporting entity.

[24] Members have often been served with overlapping and/or duplicate invoices generated by Tesch Inkasso - the payment collection company for the Bundesanzeiger – which itself chases aggressively despite its own many errors.

systems and a newspaper, introduce an efficient scalable solution to reduce operational burdens on NCAs and improve data quality. To this end, we would encourage ESMA to work with the European Commission and Member State NCAs to establish such a mechanism, linking it to the golden source of scope and issued share capital data provided by issuers we suggest in our response to Question 14 above. We believe that a centralised system could be readily accomplished, for example, through the establishment of a single website for pan-European notifications allowing single-batch uploading of notifications using a single file format. A centralised mechanism, alongside a golden source of denominator data, would benefit NCAs through enhanced data quality, reducing erroneous calculations and, if an error in the denominator data provided by issuers is detected, allowing for the efficient centralised cleaning of data rather than having to rely on each individual NCA to detect and amend their own received notifications.

We disagree that market participants would not want such a mechanism due to their sunk costs associated with multiple NCA mechanisms. **The long term operational savings for each individual participant would massively outweigh any short term costs associated with updating internal systems.** In particular, a centralised notification and publication platform would enable market participants to develop automated reporting systems to reduce the hours employees currently spend each day manually checking and submitting net short position notifications.

Our member firms are willing to pay a reasonable cost-based fee in order to obtain a centralised reporting platform and golden source of data. Current Member State platforms are not free, for example the German Federal Gazette charges €30 per public notification. AIMA and MFA, however, strongly recommend that the access fee be invoiced periodically rather than *per* notification. A per notification invoicing system such as that used by the German Federal Gazette would be extremely burdensome to administer both for ESMA and for market participants – with potentially hundreds of invoices being generated per firm over an annual period. **Invoicing users on either a quarterly, semi-annual or annual basis would make more sense operationally**.

Should ESMA consider that this mechanism is unfeasible, we suggest that a standardised template and communication method at least be developed and implemented by all NCAs. This standard notification form and mechanism could be in Excel format with certain information tailored to the relevant NCA - such as logo and contact details. The single communication method of these Excel files could be through email, which would permit our members to develop more automated solutions to the compilation and submission of notifications than is currently possible.

Q17: Which other amendments, if any, would you suggest to make the notification less burdensome?

As we note in our response to Question 14, AIMA and MFA believe strongly that a centralised data source containing the in-scope instruments and issued share capital data would make notifications far less burdensome, with a relevant obligation on issuers to regularly publish such issued share capital data for the purposes of the SSR.

We also **recommend that indices are removed from the calculation of a significant net short position and that convertible bonds are able to contribute to the long position a participant has in the shares of a particular issuer**.

Convertible bonds represent an economic long interest in the equity of the relevant issuer through the imbedded call option within the instrument, enabling the investor to convert the bond into a certain number of shares according to the relevant conversion ratio at a particular conversion price. The fixed income component of the convertible bond pays a reduced coupon in recognition of the fact that the investor benefits from participating in upward movement in the share price beyond the conversion price. Convertible bonds represent an important mezzanine financing mechanism for corporate issuers that may not otherwise be able to obtain standard debt or equity financing on economic terms. We consider that excluding them from long positions, thus increasing the potential number of short position notifications and disclosures in the particular issuer, could in fact result in an artificially pessimistic picture being painted of the investor sentiment in the issuer - in direct juxtaposition with the objectives of the SSR. We believe strongly that convertible bonds should be accounted for as part of a market participant's long position.

The inclusion of indices within the calculation of a net short position itself creates significant complexities and costs for firms when attempting to accurately calculate their net short positions. We note that index positions are not used by market participants to obtain targeted direct positions in individual issuers, short or long, rather they are used to take broad systematic risk positions for portfolio construction and risk management purposes. Firms are seeking access to a market "beta", and are not seeking idiosyncratic exposures to the decrease or increase if individual issuers. Therefore, we suggest that index positions are not relevant for the purpose of the SSR supervisory objectives to identify and monitor the active significant net short positions of market participants.

Q19: What are your views on the method that should be favoured, the nominal method or the duration-adjusted method as described above? In the latter case, do you think that the thresholds should be changed? Please elaborate.

As we noted in our letter to the European Commission in October 2016, market participants report interpretation difficulties coupled with a lack of economic logic in the calculation and notification provisions for sovereign debt positions – namely that the two different methodologies for calculating cash versus derivative positions produces net position figures that can differ significantly from the economic reality.[25]

We are grateful for the discussion of this issue in the Consultation and support the ability to duration adjust derivatives as well as the underlying cash bond. To this end, AIMA and MFA support Option B within the Consultation – the duration adjusted method for both cash and derivative instruments given this would yield results which more closely represent the economic exposure of relevant positions as compared to the results calculated in accordance with Option A.

[25] Article 3(5) of the SSR, together with the relevant Commission Delegated Regulation (**DR 918/2012**) and ESMA's Questions & Answers on the implementation of the SSR