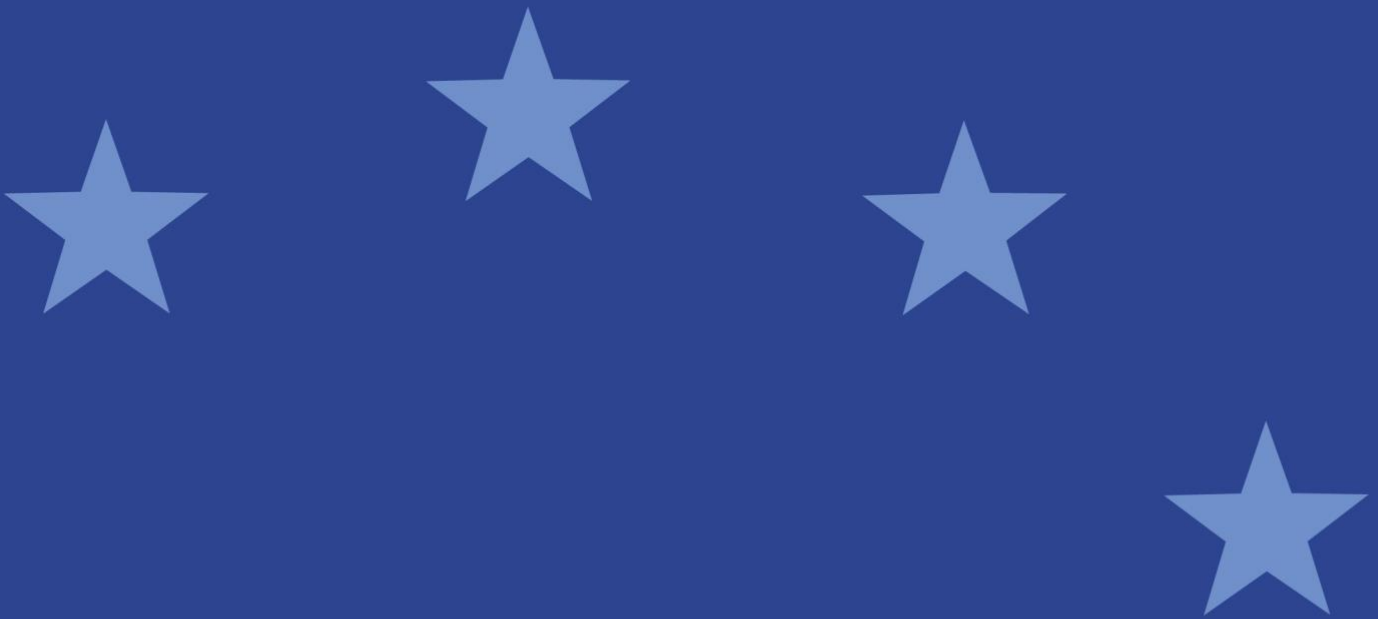




European Securities and
Markets Authority

Response Form to the Consultation Paper

Technical standards for commodity derivatives



Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **23 July 2021**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_CD_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_PFG_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_PFG_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on Position limits and position management in commodities derivatives").



Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

This document will be of interest to asset managers managing retail funds and their trade associations, as well as institutional and retail investors investing into such funds and their associations.

General information about respondent

Name of the company / organisation	FIA and ISDA
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	International

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_CD_00>

FIA and ISDA (the Associations) appreciate the opportunity to comment on ESMA's technical standards relating to position limits following the review of MiFID II.

Our members are largely supportive of the proposals and believe they will improve the current position limits regime.

However, there are some areas that have raised concerns, more specifically, the proposals around the scenario where deliverable supply is substantially higher than open interest. We disagree with the proposals made in the consultation paper as we believe they would unduly constrict the development of contracts and we would like to draw your attention to our response to Questions 9 and 13 for further details.

Another area of concern are the proposals relating to position management, which we believe would benefit greatly from increased flexibility for trading venues to avoid substantial burden on both the venue and market participants. We refer to our response to Questions 16, 17 as well as Questions 6 and 7 of the Cost Benefit Analysis.

<ESMA_COMMENT_CD_00>



Questions

Q1 : Do you agree with ESMA's proposal regarding the impact of the new hedging exemption on the aggregation of positions? If not, please elaborate.

<ESMA_QUESTION_CD_01>

We agree with this proposal.

<ESMA_QUESTION_CD_01>

Q2 : Do you agree with ESMA's proposal for positions qualifying as risk-reducing? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_02>

We agree with this proposal.

<ESMA_QUESTION_CD_02>

Q3 : Do you agree with ESMA's proposal on the application procedure for financial entities?? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_03>

We support this proposal.

<ESMA_QUESTION_CD_03>

Q4 : Do you agree with ESMA's proposal on the application procedure for mandatory liquidity provision exemption? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_04>

We agree with this proposal.

<ESMA_QUESTION_CD_04>

Q5 : Do you agree with ESMA's proposal on qualifying positions? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_05>

We agree with this proposal.

<ESMA_QUESTION_CD_05>

Q6 : Do you agree with ESMA's proposed definition of financial entities? If not, please elaborate.

<ESMA_QUESTION_CD_06>

We agree with this proposal.

<ESMA_QUESTION_CD_06>

Q7 : Do you agree with ESMA's proposal regarding the aggregation and netting of positions in a commodity derivative? If not, please elaborate and provide an alternative proposal where available.



<ESMA_QUESTION_CD_07>

The Associations agree with the deletion of the reference to “the same commodity derivative” and the treatment of minis and balmos.

However, our members believe that there is no need for a specific reference to “spread contracts”. The spread contracts are not actual outright contracts but rather trading strategies whereby the two legs consist of outright contracts that are executed at the same time. Each of the legs already falls under the position limit for the outright contract. Consequently, we recommend removing the reference to spreads in Art. 3 (2) or RTS 21a.

<ESMA_QUESTION_CD_07>

Q8 : Do you agree with ESMA’s proposal for significant volumes? If not, please elaborate.

<ESMA_QUESTION_CD_08>

We agree with this proposal.

<ESMA_QUESTION_CD_08>

Q9 : Do you agree with ESMA’s proposal? If not, please elaborate and provide an alternative proposal where available.

<ESMA_QUESTION_CD_09>

FIA and ISDA Members strongly disagree with this proposal. We believe that deliverable supply is the appropriate proxy to look at someone’s ability to corner a market. Open interest, on the other hand, is not. It is crucial that the baseline of the position limit is a proper reflection of a position holder’s ability to corner market.

We also note that markets for which deliverable supply is substantially higher than open interest are typically small markets for which exchange trading has not been fully developed yet and hence more trading is taking place outside that market. We are concerned that using open interest could hamper the development of that exchange traded market, without providing any regulatory benefits, especially as there is no increased risk of market cornering.

Furthermore, we believe it would ensure consistency as well as legal certainty should RTS21 refer to the definition of agricultural derivative contracts set out in the so-called MiFID II “quick fix”, instead of “derivative contracts with an underlying that qualifies as food intended for human consumption”. The MiFID II “quick fix” defines agricultural commodity derivatives as “derivative contracts relating to products listed in Article 1 of, and Annex I, Parts I to XX and XXIV/1, to, Regulation (EU) No 1308/2013 of the European Parliament and of the Council (*), as well as to products listed in Annex I to Regulation (EU) No 1379/2013 of the European Parliament and of the Council (**).

(*) Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).

(**) Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC).

<ESMA_QUESTION_CD_09>



Q10 : Do you agree with ESMA's proposal? If not, please elaborate.

<ESMA_QUESTION_CD_10>

To ensure the approach works for all asset classes, including agriculture, we strongly recommend taking the same approach as is being proposed for determining the open interest figure in Article 14 of draft RTS 21a, i.e. the NCAs calculates deliverable supply "over a representative period of time" which would depend on the characteristics of the commodity derivative.

<ESMA_QUESTION_CD_10>

Q11 : Do you agree with ESMA's proposals regarding Article 14 of RTS 21a? If not, please elaborate and provide alternative proposals.

<ESMA_QUESTION_CD_11>

FIA and ISDA members support the proposal to calculate open interest "over a representative period of time" which would depend on the characteristics of the commodity derivative. However, we believe the same flexibility is needed in special circumstances, as outlined in Art. 14 par. 2.

We disagree with the use of position reporting data insofar as it relates to reported economically equivalent OTC positions. The Associations are not aware of any EEOTC contract having been identified by a NCA or ESMA due to the narrow definition of EEOTC. Thus using position reports based on the interpretation of the definition by a very small minority of market participants should not be taken as evidence of EEOTC and thus not used as basis for inclusion in the open interest calculation.

<ESMA_QUESTION_CD_11>

Q12 : Do you see merit in the new approach considered by ESMA for new and less liquid agricultural commodity derivatives? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_12>

Our members are supporting the ESMA proposal and believe that this proposal is essential for less liquid contracts to develop.

<ESMA_QUESTION_CD_12>

Q13 : Do you agree with ESMA's proposal regarding Article 19 of RTS 21a? If not, please elaborate.

<ESMA_QUESTION_CD_13>

The Associations are supportive of clarifying in Art. 19 par. 3 that where the open interest is significantly lower than the deliverable supply, NCAs shall adjust the other months' position limit upwards to avoid the risk of unduly constraining trading. However, as mentioned before (see our answer to Q9), we do not see an increased risk of market manipulation and hence we do not see the need to adjust the spot month position limit downwards in this case. Such a situation is inherent to markets for which exchange-trading has not much developed yet. The proposal would again hamper such illiquid markets to further develop without providing any benefit.

<ESMA_QUESTION_CD_13>

Q14 : Do you agree with ESMA' proposal regarding the upward adjustment factor to be used in case of a small number of market participants or less than three investment



firms acting as market makers? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_14>

We agree with the proposal.

<ESMA_QUESTION_CD_14>

Q15 : Do you agree with ESMA's proposed amendments to ITS 4? If not, please elaborate.

<ESMA_QUESTION_CD_15>

We agree with the proposal to delete securitized derivatives from ITS 4.

<ESMA_QUESTION_CD_15>

Q16 : Do you agree with ESMA's suggestion to introduce such ongoing position monitoring requirement in the draft RTS? If not, please elaborate.

<ESMA_QUESTION_CD_16>

FIA and ISDA support the proposal for trading venues to have arrangements in place for the ongoing monitoring of positions.

However, the level at which monitoring requirements and accountability levels should apply, i.e. persons with close links, is a foreign concept for EU commodity derivative trading venues, which have no access to such information. It is therefore highly recommended that ESMA uses the existing reporting formats which includes information on end position holder and parent undertaking.

<ESMA_QUESTION_CD_16>

Q17 : Do you agree with ESMA's suggestion to introduce accountability levels as part of position management controls? Do you agree with ESMA's assessment that accountability levels would be of particular relevance for physically settled commodity derivatives? If not, please elaborate and provide alternative proposals.

<ESMA_QUESTION_CD_17>

While FIA and ISDA members are supportive of trading venues having position management in place, they are concerned the current proposal will create considerable burdens for both the trading venues and market participants.

It is important to note that positions are already monitored and investigated as part of sophisticated market surveillance arrangements, for example under MAR and Remit. Therefore, we caution ESMA to stipulate a highly prescriptive process with little room for trading venues' discretion. We believe that the only way for the accountability levels to properly function would be on the condition that discretion is given to the trading venue to determine on which contracts to set those accountability levels, when to actively monitor them (spot month and/or other month or even closer to delivery) and whether indeed to request additional information if an accountability level is exceeded. If not, the position management controls will put a heavy burden on both the exchanges' market surveillance departments and trading participants' compliance departments.

We therefore recommend that in Art. 2 par. 1, 2 and 3, as well as the second part of paragraph 4, the words "shall" are replaced by "may".



Providing the trading venues with the discretion to set those accountability levels as they deem it necessary and appropriate would be in line with the CFTC rulemaking on position management controls, as well as with MiFID II Art. 57 par. 8 which lays down the powers for trading venues to establish position management controls.

<ESMA_QUESTION_CD_17>

Q18 : In your view, how should accountability levels be set for the spot month and the other months? Based on which methodology or criteria? Should all types of positions count towards the accountability levels?

<ESMA_QUESTION_CD_18>

Please see our response to Q17.

<ESMA_QUESTION_CD_18>

Q19 : Do you agree with ESMA's suggestion to introduce requirements for the review of accountability levels? Do you also agree with ESMA's proposal regarding reporting requirements to the NCA on accountability levels? If not, please elaborate.

<ESMA_QUESTION_CD_19>

We agree with the proposal.

<ESMA_QUESTION_CD_19>

Q20 : In your view, what other types of position management controls could be further specified in the draft RTS?

<ESMA_QUESTION_CD_20>

We do not believe that any position management controls beyond those proposed should be set by ESMA. Rather, trading venues should have the discretion to introduce relevant measures, where necessary.

<ESMA_QUESTION_CD_20>

Cost Benefit Analysis

CBA Q1: This first question aims at identifying the category of firm/entity you belong to. Please provide the total notional amount traded in commodity derivatives traded on a trading venue (and EOTC contracts where relevant in 2020 in thousand euros and the related total number of trades in the relevant boxes).

<ESMA_QUESTION_CD_21>

TYPE YOUR TEXT HERE

Category	Number of employees	Total notional amount traded in 2020 in thousand euros	Number of trades in 2020
Trading venue	[1-50]		
	[51-250]		
	[251-500]		
	>500		

Financial entity	[1-50]		
	[51-250]		
	[251-500]		
	>500		
Non-financial entity	[1-50]		
	[51-250]		
	[251-500]		
	>500		

<ESMA_QUESTION_CD_21>

CBA Q2: for Financial entities: Do you intend to apply for an exemption for risk-reducing positions related to the commercial activities of the commercial entity of the group? What percentage of your positions do these risk-reducing positions account for?

<ESMA_QUESTION_CD_22>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_22>

CBA Q3: Do you intend to apply for an exemption for positions resulting from transactions undertaken to fulfil mandatory liquidity provision? What percentage of your positions do these positions account for?

<ESMA_QUESTION_CD_23>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_23>

CBA Q4: Is there any specific provision in draft RTS 21a that you would expect to be a source of significant cost? If so, please elaborate.

<ESMA_QUESTION_CD_24>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_24>

CBA Q5: Taking into account the size of your firm, would you qualify overall compliance costs with draft RTS 21a as low, medium or high?

<ESMA_QUESTION_CD_25>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_25>

CBA Q6: Is there any specific provision in the draft RTS on position management controls that you would expect to be a source of significant cost? If so, please elaborate.

<ESMA_QUESTION_CD_26>

Yes, we believe that the absence of sufficient discretion for the exchange to implement the position management controls in an appropriate manner and the extension of the position management



controls to cover 'persons with close links' is likely to result in a significant cost to exchanges and market participants.

Any breach of an accountability level would require the exchange to investigate and obtain a substantial amount of information from market participants. Exchanges may have to hire additional market surveillance staff to handle all investigations prompted by alerts and market participants may have to hire additional compliance staff to respond to all information requests.

The extension of the scope of the position management controls to cover 'persons with close links' would require new daily reporting arrangements between the exchange and their clients to be developed, as the information about affiliates covered under the 'persons with close links' requirement is not covered in existing MiFID II position reporting requirements.

<ESMA_QUESTION_CD_26>

CBA Q7: Taking into account the size of your firm, would you qualify overall compliance costs with amended the draft RTS on position management controls as low, medium or high?

<ESMA_QUESTION_CD_27>

We would qualify the estimated compliance costs with the draft RTS on position management controls as unreasonably high and disproportionate.

<ESMA_QUESTION_CD_27>