30 June 2016
ESAs 2016 50

Lord Jonathan Hill,
EU Commissioner for Financial Stability,
Financial Services and Capital Markets Union
European Commission
Rue de la Loi 200
B-1049 Brussels
Belgium

Subject: Delayed adoption of the Joint draft Regulatory Technical Standards on risk mitigation techniques for non-centrally cleared OTC derivatives

Dear Commissioner Hill,

Following the communication of 9 June 2016 from the European Commission staff and the public communication by the European Commission on the delayed adoption of the Joint draft Regulatory Technical Standards on risk mitigation techniques for non-centrally cleared OTC derivatives (RTS on bilateral margins), the ESAs would like to express their strong concerns with this delay, and would like to ask you to keep this delay as short as possible, for the following reasons:

First, the calendar for the implementation of these requirements was agreed at international level. The ESAs and the European Commission promoted the implementation timeline of the BCBS-IOSCO agreement and worked together with the other two major jurisdictions (the United States of America and Japan) for its consistent and coordinated implementation. We think it is important that we honour those commitments agreed with our international counterparts, as the delay raises substantial uncertainty regarding the overall implementation.

Secondly, the ESAs would like to highlight that a delay in the endorsement of the technical standards would not only generate uncertainty within the European Union but might also raise a number of cross-border issues:

(a) In accordance with the BCBS-IOSCO agreement, a large number of financial counterparties and some non-financial groups should start exchanging variation margin from 1 March 2017. This is also the date foreseen in the draft RTS. This timeline is relevant for the entire industry as it is of utmost importance for the implementation efforts under way. A delay may require re-negotiation of existing agreements.
(b) The absence of a new timeline, including the phase-in of initial margin, may put third-country authorities in a difficult position. They would not be able to clarify with their firms the supervisory expectations in relation with those jurisdictions that have not yet implemented margin rules, including the European Union.
(c) The lack of requirements on the margin exchange for intragroup transactions may generate uncertainty for those international groups that end up being subject to third-country rules with no clarity, neither for the groups themselves nor for the third-country supervisors, on the implementation of the European Union rules.

Thirdly, the ESAs believe that although the firms captured by the first date of application are small in number, they still represent a significant size of the market and therefore a substantial source of systemic risk. This is particularly relevant given the global nature of the OTC derivative market, which makes an international alignment of the rules for these large banks of utmost importance. In addition, the statement in the communication by the European Commission that these entities would be captured by other jurisdictions is not entirely correct. The delay in the European Union might incentivise global banks to use their European operations to carry out OTC derivatives transactions and only part of those might be covered by extraterritorial provisions from other jurisdictions. Furthermore, we do not consider that bringing European banks under the internationally agreed standards through the extra-territorial application of other jurisdictions is consistent with the position that the Union has kept in recent times.

The communication from the European Commission refers to the fact that the original timeline would not have allowed the standards to be finalised by September. In this respect, the ESAs would like to stress the following: a) the European Commission had set a deadline for the submission of the RTS of end of February and the draft standards were delivered only one week after the established deadline; b) the European Commission has been involved in the entire process of the development of the standards; and c) the ESAs went through an extensive early legal review with the objective of streamlining the adoption process by the European Commission. These three aspects had the common objective to target an adoption of the standards that would allow being aligned with the other jurisdictions for a September start.

During the policy making process the ESAs have worked closely with the European Commission and sought to achieve a proper balance among the various components. This process included one discussion paper, two public consultations, a detailed analysis of the technical aspects, intensive interactions with industry stakeholders and third-country authorities. As the outcome of such interaction with the various stakeholders, the final draft RTS include additional flexibility compared to the text in the consultation papers to address important stakeholder concerns. One notable example is the timing for the margin exchange. On that aspect, the ESAs sought the balance between the increased risk of relaxing the requirements and the operational constraints highlighted by industry stakeholders; this resulted in a pragmatic approach that takes into account time zone differences and enables participants to exchange margins with lower frequency. Similar balance is achieved requiring pension scheme arrangements to monitor their collateral composition daily only in case they have an extremely high exposure to a single counterparty, thus leaving the possibility for a quarterly monitoring.

Based on all of these elements, the three ESA Boards took the final decision on these RTS that reflect the position of the European Union supervisory authorities.

Against this background and considering the significant negative impact of the delayed adoption of the standards, the ESAs ask the European Commission to reconsider the delayed calendar for the adoption of the RTS on bilateral margins. Any delay should be kept as short as possible.

The ESAs stand ready to provide any further support or clarification.

Yours sincerely,

Gabriel Bernardino	Andrea Enria	Steven Maijoor
Chairperson, EIOPA and Chair of the Joint Committee of the ESAs	Chairperson, EBA	Chair, ESMA

cc:

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