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To:

Verena Ross
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By email to: Verena.ross@esma.europa.eu

cc:

Lord Harrison - Chairman, EU Economic and Financial Affairs
Sub-Committee
c/o: Stuart Stoner – Clerk, EU Economic and Financial Affairs
Sub-Committee

By email to: stoners@parliament.uk

cc:

UK Representation to the EU

By e-mail to: Ivan.Smyth@fco.gov.uk

12 December 2014

Dear Ms Ross

**Review of the EU Financial Regulatory Framework - Evidence to the House of Lords
EU Sub-Committee on Economic and Financial Affairs**

The City of London Law Society (“**CLLS**”) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the “**Committee**”). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We read with interest the oral evidence you gave to the Economic and Financial Affairs Sub-Committee of the House of Lords Select Committee on the European Union on 28 October 2014, as part of the Review of the EU Financial Regulatory Framework.

We fully recognise the challenges that ESMA has faced and to some extent continues to face in its level 2 work. We believe many difficulties in recent years have arisen because Directives and Regulations "hardwire" certain implementation dates at a point when it is simply unknown (and unknowable) as to whether there is any prospect of the necessary secondary legislation being made in the time frame envisaged. Slippages at the ESMA and European Commission (the "Commission") level in relation to the production of secondary legislation then impact badly and unfairly on firms who suffer from the fact that the implementation date is fixed even though the legislation has barely been made. Some examples of these issues are highlighted in our response to the [HMT Review of the Balance of Competences \(Single Market: Financial Services and the Free Movement of Capital - Call for Evidence\)](#)

We strongly support ESMA's Public Statement of Consultation Practices and its preference for holding at least two rounds of consultation, having open hearings, and allowing sufficient time for responses. We agree that Directives and Regulations should be drafted so that there is a simple process for changing such dates and would support ESMA's request for the inclusion of more flexible deadlines which move with the finalisation of the legislation.

We acknowledge that ESMA's task in seeking to understand the drivers for the inclusion of certain legal provisions in the legislation at level 1 can be difficult, and that the legislative intention is not always as clear as it should be on the face of the legislation. We were however somewhat troubled by the suggestion in your evidence that in order to enable you to fully understand what the co-legislators really intended when they drafted a certain piece of legislation, ESMA should be more involved in the level 1 process and in particular more closely associated with some of the debates. Although it is not entirely clear precisely what you had in mind, we would be most concerned if an organisation that is not directly or formally part of the EU legislative process were to purport to become an interpreter or arbiter of legislative intent (or at least of legislative intent as perceived by the particular ESMA attendees), without formal accountability or full transparency, on the basis of access to private debates.

It seems to us that, to the extent that the legislative intention cannot be discerned from the text, the fault lies squarely in the legislation that fails to deliver clarity and certainty. The appropriate remedy must surely be to improve the quality of the primary legislation, and of the process that delivers such legislation, which should be more transparent and accessible. Whether or not that can be achieved in the near term, it would seem to us a wholly inappropriate use of ESMA's limited resources to field individuals of the calibre required to make sense of the debates and record in an accessible and usable form the material required, perhaps several years later, to support ESMA's endeavours in developing level 2 and level 3 measures.

Furthermore, the nature of the compromises struck in reaching agreement on Parliamentary and Council texts, and subsequently in trilogue, is such that there may be no common intention. A particular form of words may settle a point precisely because the words are ambiguous in intention as much as literal meaning (and can therefore support alternative, even opposing, purposes) or because they avoid a clear intention of other words which were obstructing agreement.

We do however agree that it would be sensible for ESMA to be consulted at an early stage, in particular by the Commission, but potentially also by the co-legislators, about proposed legislative provisions which would require ESMA to develop draft regulatory or implementing technical standards, or provide technical advice in relation to proposed delegated acts, both as to timing and as to proposed remit or scope.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact either Peter Richards Carpenter by telephone on +44 (0) 20 3400 4178 or by email at peter.richards-carpenter@blplaw.com, or Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours sincerely

Karen Anderson

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