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August 12, 2015

Via European Commission Online Questionnaire

European Commission

Re: *Public Consultation on Regulation (EU) No 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories*

Dear Sir or Madam:

ICI Global[1] appreciates the opportunity to provide comments on the consultation paper issued by the European Commission ("EC") on its review of the implementation of the European Market Infrastructure Regulation ("EMIR").[2] The Consultation Paper seeks input from stakeholders regarding the views and experiences of market participants in the implementation of EMIR to date.

ICI Global members, as market participants representing millions of investors, generally support EU policymakers' goal of providing greater oversight and transparency of the derivatives markets. Our members – investment companies that are registered under the Investment Company Act of 1940 and other regulated funds in jurisdictions around the world (collectively, "regulated funds")[3] – use derivatives in a variety of ways. Derivatives are a particularly useful

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[1] The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$19.5 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

[2] Public Consultation on Regulation (EU) No 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories, dated 21 May 2015, *available at* http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/consultation-document_en.pdf ("Consultation Paper").

[3] For purposes of this letter, the term "regulated fund" refers to any fund that is organized or formed under the laws of a nation, is authorized for public sale in the country in which it is organized or formed, and is regulated as a public investment company under the laws of that country. Generally, such funds are regulated to make them eligible for sale to the retail public, even if a particular fund may elect to limit its offering to institutional investors. Such funds typically are subject to substantive regulation in areas such as disclosure, form of organization, custody, minimum capital, valuation, investment restrictions (*e.g.*, leverage, types of investments or "eligible assets," concentration limits and/or

portfolio management tool in that they offer regulated funds considerable flexibility in structuring their investment portfolios. Uses of derivatives include, for example, hedging positions, equitizing cash that a regulated fund cannot immediately invest in direct equity holdings, managing a regulated fund's cash positions more generally, adjusting the duration of a regulated fund's portfolio, or managing a regulated fund's portfolio in accordance with the investment objectives stated in a regulated fund's prospectus. To employ derivatives in the best interests of fund investors, our members have a strong interest in ensuring that the derivatives markets are highly competitive and transparent.

ICI Global members engage in derivatives transactions in the European Union ("EU") or that involve an EU counterparty. Therefore, we support efforts to ensure a regulatory regime in the EU for OTC derivatives that encourages liquidity, fairness, and transparency. Given that many derivatives transactions are conducted across multiple jurisdictions, we also support efforts for real and meaningful coordination among regulators on how derivatives regulations will be applied to market participants that engage in cross-border transactions.

We recognize that developing the appropriate regulatory framework for derivatives and avoiding unintended consequences are very difficult tasks. Accordingly, we appreciate the EC's efforts to seek input from stakeholders on the implementation of EMIR to date. We urge the EC to conduct a thoughtful and comprehensive analysis of the multitude of issues raised in connection with the implementation of EMIR that impact on our members. We hope that our detailed response to the consultation will be helpful to the EC in considering appropriate amendments to EMIR.

* * *

If you have any questions on our response, please feel free to contact the undersigned, Susan Olson at +1-202-326-5813, or Jennifer Choi at +1-202-326-5876.

Sincerely,

/s/

Dan Waters
Managing Director
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diversification standards). Examples of such funds include: US investment companies regulated under the Investment Company Act of 1940 ("Investment Company Act"); EU "Undertakings for Collective Investment in Transferable Securities," or UCITS; Canadian mutual funds; and Japanese investment trusts.

ICI GLOBAL RESPONSES TO EUROPEAN COMMISSION
EMIR IMPLEMENTATION REVIEW

1. INFORMATION ABOUT YOU

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2. YOUR OPINION

Part II - General questions

Question 2.2: Clearing Obligations

Under EMIR, OTC derivatives transactions that have been declared subject to a clearing obligation must be cleared centrally through a CCP authorised or recognised in the Union. ESMA has proposed a first set of mandatory clearing obligations for interest rate swaps which are yet to come into force. Counterparties are therefore in the process of preparing to meet the clearing obligation, to the extent that their OTC derivatives contracts are in scope of the requirements.

(a) With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR? (5000 character(s) maximum)

ICI Global wishes to highlight to the European Commission ("EC") the importance of ensuring that there is adequate client access to clearing through central counterparties ("CCPs").

Many market participants (such as regulated funds) that do not have the resources to become direct clearing members will rely on the services of clearing members to clear their OTC derivative contracts through CCPs and to satisfy their obligations under the European Market Infrastructure Regulation ("EMIR"). If market participants find it difficult to access client clearing, they may be prohibited effectively from entering into derivative contracts and may therefore be forced not to hedge their positions, which could increase risk and impact the liquidity of certain derivative classes (or subsets thereof). Moreover, the lack of access to client clearing could force market participants to find uncleared derivative alternatives, which would be contrary to the objectives of the G-20 derivatives reforms.

The regulatory environment applicable to clearing members, and in particular the leverage ratio under the Capital Requirements Directive (CRD) IV, is increasing the cost to clearing members of providing client clearing services. We are concerned that increasing costs have discouraged clearing members from offering client clearing, particularly to smaller market participants or those that only enter into a small volume of derivative transactions although they are categorized as financial counterparties ("FCs") under EMIR.

If your answer is yes, please provide evidence or specific examples. How could these be addressed? (5000 character(s) maximum)

We already see evidence of clearing members withdrawing from providing client clearing services. Any withdrawal necessarily reduces clients' choice and the market capacity for client clearing. We urge the EC to monitor closely regulatory requirements and developments applicable to clearing members to ensure that it remains economically viable for clearing members to offer client clearing services to all those that are subject to an EMIR clearing obligation. Regulatory requirements should not result in clearing members withdrawing their client clearing offerings or limiting services to clients clearing only a significant volume of transactions.

(b) Are there any other significant ongoing impediments or unintended consequences with respect to preparing to meet clearing obligations generally in accordance with Article 4 of EMIR? (5000 character(s) maximum)

We highlight two matters to the EC in relation to the implementation of EMIR's clearing obligation that are of concern to our members.

I. <u>Process for prompt removal/suspension of the clearing obligation</u>

For the European Securities and Markets Authority ("ESMA") to disapply or suspend EMIR's clearing obligation with respect to any class of derivative contracts (or subset thereof), the EC must adopt new regulatory technical standards ("RTS") or amend existing RTS. This process can take a significant amount of time. ESMA should have the authority to act promptly to remove or suspend a clearing obligation in urgent circumstances. For example, a particular class of derivatives (or subset thereof) may suffer a sudden decline in liquidity or a CCP may lose its authorisation, resulting in there no longer being a sufficient number of CCPs available to clear a particular class of derivatives contract (or subset thereof). In such situations, ESMA would need to act quickly to remove the clearing obligation, which is not possible under the current procedures for creating or amending RTS.

Indeed, ESMA identified this issue in its first consultation paper on the clearing obligation, in which it states (at paragraph 67):

> Therefore, during the 2015 review of EMIR foreseen by Article 85(1), ESMA will flag that the clearing obligation process may need to be reviewed to take into account the fact that the classes that had been deemed subject to the clearing obligation in the past may no longer satisfy the necessary conditions in the future, and that the time of the procedure to amend the RTS is unsuited to the level of urgency that such a modification may require.

II. <u>Elimination of frontloading requirement</u>

EMIR's frontloading requirement applies to derivative contracts that are declared subject to mandatory clearing prior to a "frontloading period." The frontloading requirement obligates counterparties that enter into those derivative contracts during the frontloading period to clear those contracts by no later than the time when the clearing obligation begins to apply to them if the contracts have a specified minimum remaining maturity. The frontloading period runs from two (in the case of Category 1 counterparties) or five (in the case of Category 2 counterparties) months following the RTS in respect of the clearing obligation entering into force until the expiry of the phase-in period for Category 1 or Category 2, as applicable.

We appreciate ESMA's most recent proposals with respect to frontloading, which reduce significantly the negative impact of this requirement. We remain concerned, however, that even a limited application of the frontloading obligation will prove to be damaging and disruptive to the market. In particular, cleared and uncleared transactions are priced differently. Therefore, it will be difficult to price contracts entered into during the frontloading period. As a consequence, we expect that transactions subject to frontloading will be voluntarily cleared, effectively eliminating the phase-in period provided by ESMA. Alternatively, parties may terminate a large number of derivative contracts at the expiry of the phase-in period, which may increase risk and instability in the financial markets.

If your answer is yes, please provide evidence or specific examples. How could these be addressed? (5000 character(s) maximum)

We urge the EC to take the following measures to address our concerns described above:

I. <u>Prompt removal/suspension of the clearing obligation</u>

We recommend that the EC introduce a mechanism whereby ESMA can suspend or remove the clearing obligation with respect to a class of derivatives (or a subset thereof) without having to produce new or amended RTS. For the protection of market participants, ESMA must have authority to act promptly in response to sudden and unexpected market conditions if it determines that a class of derivatives (or a subset thereof) no longer satisfies the criteria set out in Article 5(4) of EMIR (*i.e.*, degree of standardisation, volume and liquidity, availability of pricing information).

II. <u>Elimination of frontloading</u>

To reduce market instability and unnecessary risk, we encourage the EC to eliminate mandatory frontloading for all categories of market participants for all future classes of derivatives (or subsets thereof) subject to EMIR's clearing obligation.

Question 2.3: Trade reporting

Mandatory reporting of all derivative transactions to trade repositories came into effect in February 2014. The Commission services are interested in understanding the experiences of reporting counterparties and trade repositories, as well as national competent authorities, in implementing these requirements. As noted above, ESMA recently conducted its own consultation on amended versions of these standards. This consultation does therefore not seek any views with respect to the content of either Regulation No. 148/2013 and Regulation No. 1247/2012 nor the proposed amended versions.

Are there any other significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations in accordance with Article 9 of EMIR? (5000 character(s) maximum)

Our members have experienced significant challenges in implementing EMIR's reporting obligation and continue to face issues in reporting their derivative contracts, some of which are described more fully below. Given the ongoing practical difficulties experienced by market participants, the EC should reconsider the current dual-sided reporting regime. The costs of dual-sided reporting outweigh the benefits of such a system.

- *Delegated reporting arrangements*: Many market participants, such as regulated funds, do not have the resources or infrastructure to report their derivative transactions. These entities therefore necessarily rely on the delegated reporting provided by their dealer counterparties. There are numerous drawbacks to delegated reporting arrangements, including: (i) the terms of delegation agreements are not negotiable and are frequently burdensome to regulated funds; (ii) providers of delegated reporting arrangements do not take a consistent approach and exclude different product types and data from their offerings, with the result that regulated funds are forced to put in place expensive and complicated arrangements to report such excluded contracts and data; and (iii) regulated funds find it difficult to verify the data that have been reported on their behalf.

  Moreover, regulated funds that delegate reporting to their counterparties remain liable for any misreporting by their counterparties. ESMA's guidance in its Questions & Answers document (at TR Answer 3b(d)) states that "[w]hen counterparties delegate reporting, including valuations, they retain responsibility for ensuring that reports submitted on their behalf are accurate and for periodically ensuring that they are in agreement with the values submitted on their behalf." Accordingly, regulated funds are required to have procedures to check the reports that have been submitted on their behalf to a trade repository. In addition, in circumstances in which regulated funds delegate the reporting of trade valuations, delegated reporting arrangements generally provide that the dealer will report valuations derived by the dealer marking the relevant transactions to market or to the dealer's proprietary model, rather than the valuations determined by the regulated fund (which are the valuations required to be reported under EMIR). Therefore, although data relating to trade valuations, as part of a regulated fund's "Counterparty Data," do not need to be agreed between the parties as part of the reporting process, regulated funds are obliged to verify the valuations reported on their behalf and amend the data directly at the trade repository if necessary. Verifying each report submitted on their behalf is expensive and administratively burdensome for regulated funds. In addition, the benefits of delegated reporting arrangements are minimized if regulated funds must still undertake a significant verification exercise with respect to the reporting carried out on their behalf.

- *Unique Trade Identifiers ("UTIs")*: Regulated funds may not have the systems in place to generate a UTI. Consequently, they are forced to rely upon their counterparties to generate and communicate the UTI even where the regulated funds are reporting their transactions. The approach for generating or obtaining UTIs varies greatly by counterparty and product type. It is therefore difficult for regulated funds to develop a consistent approach towards obtaining and reporting UTIs within the deadlines for reporting imposed by EMIR.

- *Reporting terminated transactions*: FCs and non-financial counterparties ("NFCs") are required to report to a trade repository by 12 February 2017, all derivative contracts that (i) were outstanding on or entered into on or after 16 August 2012, and (ii) terminated prior to 12 February 2014. This requirement will impose a considerable burden to report a significant volume of terminated transactions on FCs and NFCs. Given that many delegated reporting offerings do not provide for the reporting of terminated trades, smaller firms that rely on delegated reporting would be required to put in place new documentation with their counterparties or develop infrastructure to allow for self-reporting of these trades. We do not believe that the cost and administrative burden involved in putting arrangements in place to report these transactions are proportionate to the minimal benefit to regulators in having access to this historic data for transactions that no longer exist.

- *Low data quality*: We understand that the rates of matched trades are low, particularly where each party reports to a different trade repository. This failure to match trade reports negatively impacts upon the quality and accuracy of data available to regulators and is a feature that arises solely as a result of the dual-sided reporting regime. We remain gravely concerned that regulators are making policy recommendations based on this questionable data.

- *Exchange-traded derivatives*: We also believe that reporting of exchange-traded derivatives by FCs and NFCs is unnecessary. Exchange-traded derivatives are standardised contracts, the terms of which are matched at the relevant exchange. All data relating to these transactions are maintained by the exchanges and the CCPs through which such transactions are cleared. We believe that exchanges and CCPs are better situated to report this data than FCs and NFCs because they already have the relevant information.

If your answer is yes, please provide evidence or specific examples. How could these be addressed? (5000 character(s) maximum)

In light of our comments above, we make the following recommendations in respect of the EMIR reporting obligation:

- *Single-sided reporting regime*: We urge the EC to adopt a single-sided reporting regime under which the counterparty with the greater capacity to report a transaction would be required to report the transaction. With respect to regulated funds, the dealers would be better situated to be the reporting party. Dealers have the resources and infrastructures already in place to undertake this obligation as is evidenced by their ability to offer delegated reporting (albeit with the current flaws of such services). We understand that ISDA is leading an industry effort to create a hierarchy of counterparties that would be required to report under a single-sided reporting regime (*i.e.,* ISDA Blueprint).

  A single-sided reporting regime will address the issues that we have described above with respect to delegated reporting, UTIs, and the reporting of valuation and collateral data. Single-sided reporting also will eliminate the widespread issues experienced in the market with respect to the matching of trade reports. A single-sided reporting regime has been implemented successfully in the United States, and we encourage the EC to adopt a similar approach. We believe that the existing risk mitigation techniques (such as portfolio reconciliation, dispute resolution and timely confirmation requirements) will ensure that discrepancies in key trade terms will be addressed by the parties properly and promptly and that there is no need for both counterparties to report data regarding the same transaction.

Regulators have suggested that dual-sided reporting would provide more accurate information because information regarding a transaction would be provided from two separate sources. We believe achieving greater accuracy of information from a dual-sided reporting system is a "theoretical" benefit/goal at best. The system in practice results in mismatches and degradation of the quality of the data provided to the regulators.

We are confident that the long term costs associated with putting in place delegated reporting arrangements, verifying data, maintaining separate infrastructure for self-reporting contracts/data not covered by delegated reporting, and addressing issues arising from trade reports that fail to match will far outweigh any "theoretical" benefits of a dual-sided reporting regime.

- *Verification of reports:* We recognize that a single-sided reporting regime will not entirely eliminate the need for reporting delegation arrangements; for example, where a regulated fund established in the EU transacts with a non-EU dealer, the regulated fund may wish to delegate the reporting obligation to the non-EU dealer. We therefore request that clear guidance be given regarding the extent and frequency of the verification process to be undertaken by a counterparty that delegates reporting of its derivative contracts.

- *Reporting terminated transactions*: We encourage the EC to remove the requirement to report transactions that terminated prior to 12 February 2014 or to provide that such reporting is optional.

- *Reporting exchange-traded derivatives*: We recommend that the EC remove the requirement for FCs and NFCs to report exchange-traded transactions. The relevant exchanges and CCPs are better equipped than FCs and NFCs to report the data relating to such transactions.

Question 2.4: Risk Mitigation Techniques

Risk mitigation techniques are provided for under Articles 11(1) and 11(2) of EMIR and further defined in Commission Delegated Regulation (EU) No 149/2013. Risk mitigation techniques began entering into force in March 2013 and apply to OTC derivative transactions that are not centrally cleared. They include obligations with respect to transaction confirmation, transaction valuation, portfolio reconciliation, portfolio compression and dispute resolution.

Are there any significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations in accordance with Articles 11(1) and (2) of EMIR? (5000 character(s) maximum)

Our members have experienced the following issues in connection with the implementation of EMIR's risk mitigation techniques:

- *Portfolio reconciliation*: With respect to EMIR's portfolio reconciliation requirements, non-dealer market participants (such as regulated funds) invariably act as "data receivers." In other words, their role in the reconciliation process is to receive data from their dealer counterparties and to check them against their own books and records. This task is made very difficult by the fact that EMIR does not prescribe a list of terms that must be reconciled.

  Article 13(2) of Commission Delegated Regulation (EU) No 149/2013 ("Delegated Regulation") requires counterparties to reconcile "key trade terms that identify each particular OTC derivative contract" and the valuation of the contract. ESMA has given guidance in its Questions & Answers document (OTC Answer 14(b)) that, in addition to a contract's valuation, the "key trade terms" should include "other relevant details to identify each particular OTC derivative contract, such as the effective date, the scheduled maturity date, any payment or settlement dates, the notional value of the contract and currency of the transaction, the underlying instrument, the position of the counter-parties, the business day convention and any relevant fixed or floating rates of the OTC derivative contract."

  Dealer counterparties that send over the data to regulated funds, however, do not take a consistent approach to the definition of key trade terms, and regulated funds frequently receive, and are expected to reconcile, lengthy spreadsheets from their counterparties that differ, in terms of content, across counterparties. Although many of the terms set out in such spreadsheets are unlikely to be "key" trade terms, regulated funds have difficulty persuading dealer counterparties to remove the superfluous data. As a result, regulated funds face the administrative burden of reconciling trade terms that are not "key."

- *Marking to model*: Under Article 11(2) of EMIR, FCs and NFCs exceeding the clearing threshold ("NFC+s") are expected to mark their OTC derivative contracts to model on a daily basis in circumstances in which market conditions prevent daily marking to market. FCs and NFC+s are required to have a model in place that satisfies the requirements of Article 17 of the Delegated Regulation. Many market participants transact only derivative contracts for which marking to market is likely to remain available. We consider it costly, complicated and unnecessarily burdensome for these market participants (such as regulated funds) to put a model in place in the very unlikely event that daily marking to market is not possible.

- *Disputes*: Under Article 15 of the Delegated Regulation, counterparties are required to have dispute resolution arrangements with respect to the recognition or valuation of OTC derivative contracts and the exchange of collateral. ESMA's guidance in its Questions & Answers document (OTC Answer 15(a)) states that "discrepancies that amount to a value below a predefined threshold do not count as disputes." ESMA has not provided, however, any indication of the amount of an acceptable threshold and counterparties are required to agree on an appropriate threshold. This approach is burdensome because regulated funds transact with multiple counterparties that have differing views as to the appropriate threshold.

If your answer is yes, please provide evidence or specific examples. How could these be addressed? (5000 character(s) maximum)

We make the following recommendations in respect of the matters described above:

- *Portfolio reconciliation*: The EC should provide further clarification as to the specific terms that must be reconciled as part of the portfolio reconciliation process.
- *Marking to model:* The requirement that FCs and NFC+s develop and document a model, which is unlikely to be used for non-complex OTC derivatives (for example, GBP/EUR FX forwards) is expensive and administratively burdensome. These costs are entirely disproportionate to the risk that market conditions will ever arise that prevent marking to market of such contracts. Accordingly, the EC should remove this requirement, except to the extent that it is necessary to use a model to value OTC derivative contracts that cannot be valued by marking to market in the ordinary course of business.
- *Disputes*: We encourage the EC to provide guidance regarding an appropriate threshold.

Question 2.5: Exchange of Collateral

Article 11(3) of EMIR mandates the bilateral exchange of collateral for OTC derivative contracts that are not centrally cleared. Article 11(15) mandates the ESAs to further define this requirement, including the levels and type of collateral and segregation arrangements required. The ESAs consulted publically on their draft proposals in the summer of 2014.

The ESA are now in the process of finalising these draft Regulatory Technical Standards. It is therefore recognised that the final requirements are not fully certain at this stage. The Commission services are not seeking comment on the content on the proposed rules published by the ESAs. Nonetheless the Commission services welcome any views from stakeholders on implementation issues experienced to date.

Are there any significant ongoing impediments or unintended consequences anticipated with respect to meeting obligations to exchange collateral in accordance with Article 11(3) under EMIR? (5000 character(s) maximum)

We have commented on the consultation papers published by the European Supervisory Authorities regarding the obligation to exchange collateral in accordance with Article 11(3) of EMIR. We also would welcome the opportunity to comment further on the implementation of the margin requirements after some experience with the adopted RTS.

If your answer is yes, please provide evidence or specific examples. How could these be addressed? (5000 character(s) maximum)

Question 2.6: Cross-Border Activity in the OTC derivatives markets

OTC derivatives markets are global in nature, with many transactions involving Union counterparties undertaken on a cross-border basis or using third country infrastructures. EMIR provides a framework to enable cross-border activity to continue whilst ensuring, on the one hand, that the objectives of EMIR are safeguarded and on the other hand that duplicative and conflicting requirements are minimised.

(a) With respect to activities involving counterparties established in third country jurisdictions; are there any provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis? (5000 character(s) maximum)

We highlight the following key issues under EMIR that relate to entities transacting derivatives on a cross-border basis.

I. <u>Equivalence under Article 13</u>

We are concerned that little or no progress has been made with respect to Article 13 of EMIR, which is intended to ensure that market participants are not subject to different, and potentially contradictory, rules in different jurisdictions. Article 13 provides that if the EC adopts an implementing act declaring that the legal, supervisory and enforcement arrangements of a third country are, essentially, equivalent to EMIR's requirements set out in Article 4 (clearing), Article 9 (record-keeping and trade reporting), Article 10 (NFCs) and Article 11 (risk mitigation techniques), then a pair of counterparties that would otherwise be required to comply with such Articles of EMIR are deemed to have satisfied their obligations by complying with those equivalent rules (provided one of the counterparties is established in the third country).

At the recent public hearing on EMIR, the EC remarked that equivalence determinations under Article 13 are not currently a priority of the EC. The lack of progress in this area will be particularly problematic to market participants once EMIR's clearing and collateral requirements enter into force. At that time, counterparties established in different jurisdictions engaging in cross-border transactions will become subject to duplicative and potentially conflicting regulations resulting in unnecessary costs and administrative burden. Without the necessary equivalence determinations by the EC, Article 13 will have failed its laudable objective of ensuring that counterparties are not subject to duplicative and conflicting regimes.

II. <u>"Establishment" under Article 13</u>

Another difficulty with the application of Article 13 is that the provision is drafted to apply only where "at least one of the counterparties is established" in the relevant equivalent jurisdiction.

The requirement that one of the counterparties be established in the jurisdiction that issued the equivalent rules is problematic in situations in which an entity is subject to such equivalent rules but is not legally established in the relevant jurisdiction. For example, a non-US entity (*e.g.* a Cayman vehicle) may be classified as a "US Person" pursuant to Commodity Futures Trading Commission ("CFTC") rules and therefore subject to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). If the EC adopts an implementing act declaring the Dodd-Frank Act's requirements equivalent to EMIR, then transactions between "US persons" that are not established in the United States and their dealer counterparties that are established in the European Union could not benefit from Article 13 because neither entity is established in the United States. As a result, Articles 4, 9, 10 and 11 of EMIR and the equivalent provisions of the Dodd-Frank Act would continue to apply to these transactions.

This outcome is clearly contrary to the purpose behind Article 13 and could have a very negative impact on cross-border trades involving non-EU and EU counterparties.

III. <u>Recognition of Non-US CCPs</u>

We are concerned that the EC has not made an equivalence determination with respect to US CCPs, despite having done so for CCPs in Australia, Hong Kong, Japan and Singapore and ESMA has recognized CCPs in these jurisdictions. Many entities subject to EMIR enter into derivative contracts with entities subject to US rules including the obligation to clear certain types of instruments. If these entities enter into derivatives transactions that are subject to mandatory clearing under EMIR and the Dodd-Frank Act, the counterparties could not comply with their respective clearing obligations without a CCP that could clear under both US and EU rules. Currently, only one CCP could clear contracts that would satisfy the clearing obligations under both regulatory regimes.

Failure to recognize promptly US CCPs could deter US and EU counterparties from engaging in cross-border transactions because of the limited number of available CCPs that could be used to satisfy the clearing obligation under both the EU and US rules and could result in further fragmentation of the derivatives market.

In addition, we are aware that from 15 December 2015, significantly higher capital charges will apply to consolidated EU banking groups with respect to the exposures of group entities that are clearing members of non-EU CCPs that ESMA has not recognized under EMIR. Such a capital charge may cause clearing members that are part of such a consolidated EU banking group to choose not to clear through non-EU CCPs that have not been recognized, which will further reduce the choice of CCPs available to market participants.

If your answer is yes, please provide evidence or specific examples. How could these be addressed? 5000 character(s) maximum

We make the following recommendations in relation to the matters described above:

I. <u>Equivalence under Article 13</u>

We strongly urge the EC to take action to adopt implementing acts under Article 13 of EMIR declaring the relevant legal, supervisory and enforcement arrangements of other jurisdictions, in particular the United States, as being equivalent to EMIR. Indeed, we would support a phased-in approach towards the granting of equivalence (*i.e.,* whereby certain obligations are granted equivalence ahead of others, such as the clearing obligation and those obligations under EMIR that are currently in force prior to the collateral requirements for uncleared OTC derivatives) if the alternative were a single determination at a later time.

II. <u>"Establishment" under Article 13</u>

We urge the EC to clarify that an entity is considered to be "established" in a jurisdiction for purposes of Article 13 if it is subject to the relevant rules of that jurisdiction and does not have to be domiciled or organized in that jurisdiction.

III. <u>Recognition of Non-US CCPs</u>

The EC should resolve its remaining issues with US regulators and make its determination with respect to the equivalence of US CCPs promptly. ESMA will need sufficient time after the EC determination to recognize US CCPs prior to 15 December 2015.

Question 2.10: Additional Stakeholder Feedback

In addition to the questions set out above, the Commission services welcome feedback from stakeholders on any additional issues or unintended consequences that have arisen during the implementation of EMIR which are not covered by those questions.

Are there any significant ongoing impediments or unintended consequences with respect to any requirements or provisions under EMIR and not referenced in the preceding questions that have arisen during implementation? (5000 character(s) maximum)

At the EC's public hearing on EMIR on 29 May 2015, we understand that a suggestion was made that a classification database be introduced through which all counterparties would be required to classify themselves under EMIR. We do not believe the introduction of a database is necessary and would be particularly concerned if buy-side participants (such as regulated funds) would be required to finance the database. There are already tools available in the market by which firms can provide their EMIR classification to their counterparties, for example, ISDA Amend, the ISDA 2013 EMIR NFC Representation Protocol, and the ISDA EMIR Classification Letter. Furthermore, a party could request a representation from a counterparty regarding its EMIR classification as part of the derivative documentation. In our view, a classification database is unnecessary and would place an additional financial and administrative burden on smaller counterparties.

If your answer is yes, please provide evidence or specific examples. How could these be addressed? (5000 character(s) maximum)

There are multiple methods by which entities are able to communicate their classification under EMIR to their counterparties. We do not believe a classification database is necessary. Entities currently face difficulties in determining the classification of their counterparties not because of a lack of ways for obtaining the classification information but because of a lack of clarity under EMIR regarding how certain non-EU entities (such as investment vehicles and public bodies) should be classified under EMIR. Accordingly, we urge the EC to focus on providing clarifications on the application of the various EMIR classifications rather than on implementing a new classification database.

3. ADDITIONAL INFORMATION

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

Please see attached cover note.