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September 5, 2013

European Regulators Advise EU Commission on Equivalence of Non-EU Derivatives Rules

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 74-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 67-13
ICI GLOBAL MEMBERS
INTERNATIONAL MEMBERS No. 39-13
SEC RULES MEMBERS No. 83-13 RE: EUROPEAN REGULATORS ADVISE EU COMMISSION ON
EQUIVALENCE OF NON-EU DERIVATIVES RULES

Recently, the European Securities and Markets Authority (“ESMA”) published its advice to the EU Commission on the equivalence of the regulatory regimes for OTC derivatives of non-EU countries with the European Markets Infrastructure Regulation (“EMIR”). ESMA has provided advice on the equivalence of the regulatory regimes of the United States, Australia, Hong Kong, Japan, Singapore and Switzerland. [\[1\]](#) ESMA compared the third-country rules with EMIR requirements for central clearing, reporting, central counterparties (“CCPs”), trade repositories (“TRs”), non-financial counterparties, and risk mitigation techniques for uncleared trades. This memorandum briefly summarizes the final report for the United States. [\[2\]](#)

The EU Commission is expected to use ESMA’s technical advice to prepare possible implementing regulations concerning the equivalence between the legal and supervisory framework of the United States and EMIR. If the EU Commission does make such an equivalence determination, US regulations would apply in lieu of certain provisions of EMIR. In addition, if the EU Commission adopts these implementing regulations, ESMA may recognize a CCP or a TR authorized in the United States.

In the Final Report, ESMA generally finds the US requirements equivalent in some areas and proposes “conditional equivalence” for certain areas in which ESMA does not find equivalence. Annexes III to VIII of the Final Report contain a line-by-line comparison of the US derivatives laws and EMIR.

CCPs

ESMA advises the EU Commission to consider that CCPs authorized in the United States are subject to effective supervision and enforcement and that the US legal framework provides for an effective equivalent system for the recognition of CCPs authorized under third-country legal regimes. ESMA also advises that the US legal and supervisory arrangements ensure that CCPs authorized in the United States comply with legally binding requirements that are equivalent to the requirements in EMIR only for those CCPs that have adopted internal policies, procedures, rules, models and methodologies that constitute legally binding requirements and have incorporated provisions that are broadly equivalent to certain legally binding requirements for CCPs under EMIR. [\[3\]](#) Those specifically identified provisions are set forth in the Final Report.

TRs

ESMA advises the EU Commission to consider that TRs authorized in the United States do comply with legally binding requirements that are equivalent to the requirements laid down in EMIR under certain conditions. The TRs must have adopted internal policies, procedures, rules, models and methodologies that constitute legally binding requirements and incorporate provisions that are broadly equivalent to the legally binding requirements for TRs for operational separation and collection of data on valuation and collateral. ESMA advises the Commission to consider the US legal, supervisory, and enforcement arrangements as not equivalent to the requirements in Articles 9 and 13 of EMIR.

Potential Duplicative or Conflicting Requirements

Clearing Obligation

ESMA concludes that the EU and US regimes are broadly equivalent for the purposes of the clearing obligation. Because of the potential differences in the scope of the products subject to the clearing obligation and to whom the clearing obligation may apply (and the understanding between the regulators in the European Union and the United States that the strictest rule should apply), ESMA advises the EU Commission to grant an equivalence determination that would allow disapplication of Article 4 of EMIR if two conditions are satisfied. First, the product subject to the clearing obligation in the European Union also is subject to the clearing obligation in the United States. Second, the entity in the United States is a non-exempted entity or, if exempted, it would benefit from an exemption under EMIR if established in the European Union.

Timely Confirmation

ESMA advises the EU Commission to grant equivalence with respect to the rules on timely confirmation only under the following conditions: (1) the relevant transaction is executed between an EU counterparty and a swap dealer (“SD”) or major swap participant (“MSP”) subject to the jurisdiction of the Commodity Futures Trading Commission (“CFTC”) and (2) reporting of unconfirmed trades to European competent authorities is not disappplied.

Portfolio Reconciliation

ESMA advises the EU Commission to grant equivalence that would allow for the disapplication of the portfolio reconciliation obligation under the following conditions: (1) where the transaction is between a financial firm or a non-financial counterparty above the clearing threshold and an SD or MSP, the SD or MSP apply the provisions applicable to transactions between SDs and MSPs; and (2) where the transaction is between a non-financial counterparty below the clearing threshold and an SD or MSP, the SD or MSP apply

the provisions applicable to transactions to counterparties other than SD or MSP.

Portfolio Compression

ESMA advises the EU Commission to grant equivalence and allow for the disapplication of the EMIR provision on portfolio compression where the entity subject to the requirement in the European Union enters into transactions with an SD or MSP subject to the CFTC regime.

Dispute Resolution

ESMA reports that neither the European Union nor the CFTC regime is more stringent and the disapplication of the EU regime might lead to a lower standard depending on the situation. ESMA, therefore, advises the EU Commission not to grant equivalence to the United States with respect to dispute resolution.

Bilateral Margin and Capital

ESMA advises the EU Commission to suspend a decision on equivalence of the EU and US rules with respect to bilateral margin and capital until the relevant EU and US rules are finalized.

Effective Supervisory and Enforcement Arrangements

ESMA advises the EU Commission to grant equivalence to the United States with respect to the effective supervisory and enforcement arrangements.

Jennifer S. Choi
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endnotes

[1] ESMA's reports are available at
http://www.esma.europa.eu/system/files/2013-1159_technical_advice_on_third_country_regulatory_equivalence_under_emir_australia.pdf;
http://www.esma.europa.eu/system/files/2013-1160_technical_advice_on_third_country_regulatory_equivalence_under_emir_hong_kong.pdf;

http://www.esma.europa.eu/system/files/2013-1158_technical_advice_on_third_country_regulatory_equivalence_under_emir_japan.pdf;

http://www.esma.europa.eu/system/files/2013-1161technical_advice_on_third_country_regulatory_equivalence_under_emir_singapore.pdf;

http://www.esma.europa.eu/system/files/2013-1162_technical_advice_on_third_country_regulatory_equivalence_under_emir_switzerland.pdf

[2] Final Report, Technical Advice on Third Country Regulatory Equivalence under EMIR – US, European Securities Markets Authority (September 1, 2013), available at
http://www.esma.europa.eu/system/files/2013-1157_technical_advice_on_third_country_regulatory_equivalence_under_emir_us.pdf (“Final Report”).

[3] According to ESMA, it would only grant recognition to CCPs authorized in the United

States that have adopted such policies and procedures.

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