

MEMO# 27483

August 22, 2013

Draft ICI and ICI Global Comment Letter on EU Clearing Obligations; Member Comments Requested by September 5

[27483]

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 19-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 62-13
ICI GLOBAL MEMBERS
INTERNATIONAL COMMITTEE No. 20-13 RE: DRAFT ICI AND ICI GLOBAL COMMENT LETTER
ON EU CLEARING OBLIGATIONS; MEMBER COMMENTS REQUESTED BY SEPTEMBER 5

On July 12, 2013, the European Securities and Markets Authority (“ESMA”) issued a discussion paper on the clearing obligation under the European Market Infrastructure Regulation (“EMIR”). [\[1\]](#) The Discussion Paper addresses various aspects of the clearing obligation, including the procedures for the determination of the classes of over-the-counter (“OTC”) derivatives to be subject to the clearing obligation. The Discussion Paper also discusses issues with respect to the clearing obligation for specific types of derivatives.

We have prepared a draft comment letter on the Discussion Paper, which is attached. Comments are due to ESMA by September 12. If you have comments on the draft letter, please provide them to Jennifer Choi at jennifer.choi@ici.org by Thursday, September 5.

The draft letter focuses on one particular type of derivative that should not be subject to mandatory clearing – foreign exchange (“FX”) forwards and swaps, including non-deliverable forwards (“NDFs”). In the letter, we argue that the risk profile for the FX forwards and swaps market is markedly different from other derivatives markets, which makes mandatory clearing of these FX derivatives unnecessary. In particular, as a result of having short maturities, FX forwards and swaps contracts pose significantly less counterparty credit risk than other derivatives. The letter states that the primary risk of FX forwards and swaps is settlement risk, and the predominant way of settling FX forwards and swaps ensures that the risk is essentially eliminated. In addition, the letter states that imposing a clearing obligation on FX forwards and swaps may result in regulatory arbitrage and market fragmentation. The letter notes that the U.S. Department of the Treasury (“U.S. Treasury”) issued a written determination exempting FX forwards and swaps from the definition of “swap,” in accordance with the applicable provisions of the Commodity Exchange Act (“CEA”). The letter states that not subjecting FX forwards and swaps to a

clearing requirement in the European Union would assist with international convergence for this type of OTC derivative and reduce the opportunity for regulatory arbitrage. The letter also urges ESMA not to require clearing of NDFs for reasons similar to those discussed for FX forwards and swaps.

Jennifer S. Choi
Senior Associate Counsel – Securities Regulation

[Attachment](#)

endnotes

[1] Discussion Paper, The Clearing Obligation under EMIR, European Securities Markets Authority (July 12, 2013), available at http://www.esma.europa.eu/system/files/2013-925_discussion_paper_-_the_clearing_obligation_under_emir_0.pdf (“Discussion Paper”).

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