

MEMO# 27895

February 18, 2014

EU Regulators Seek Clarification from EU Commission Regarding Classification of Certain Financial Instruments as Derivatives

[27895]

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 6-14

DERIVATIVES MARKETS ADVISORY COMMITTEE No. 13-14

ICI GLOBAL MEMBERS No. 5-14

INVESTMENT ADVISER MEMBERS No. 6-14

INTERNATIONAL MEMBERS No. 5-14 RE: EU REGULATORS SEEK CLARIFICATION FROM EU COMMISSION REGARDING CLASSIFICATION OF CERTAIN FINANCIAL INSTRUMENTS AS DERIVATIVES

On February 14, the European Securities and Markets Authority (“ESMA”) sent a letter to the European Commission requesting that it adopt measures to clarify whether the definition of “derivatives” for purposes of the European Market Infrastructure Regulation (“EMIR”) would cover certain foreign exchange (“FX”) forwards and physically settled commodity forwards. [\[1\]](#) According to ESMA, EU Member States have not adopted a single or common definition of “derivatives,” which could result in inconsistent application of EMIR. Specifically, ESMA requests that the European Commission clarify the following: (1) the definition of currency derivatives in relation to (a) the frontier between spot and forward and (b) their conclusion for commercial purposes; and (2) the definition of commodity forwards that can be physically settled.

ESMA notes that, until the Commission provides clarification, the national authorities will not implement the relevant provisions of EMIR for contracts that are not clearly identified as derivatives contracts across the European Union, in particular FX forwards with a settlement date up to 7 days, FX forwards concluded for commercial purpose, and physically settled commodity forwards. We understand, however, that it is unclear whether all the Member States will take this approach. [\[2\]](#)

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endnotes

[1] Letter from Steven Majijoor, Chair of European Securities and Markets Authority, to Michael Barnier, Commissioner for Internal Market and Services, European Commission, dated February 14, 2014, available at http://www.esma.europa.eu/system/files/2014-184_letter_to_commissioner_barnier_-_classification_of_financial_instruments.pdf.

[2] Compare Press Release 14/11, Commission de Surveillance du Secteur Financier, available at http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2014/CP1411_EMIR_reporting_obligation_120214.pdf with Central Bank of Ireland FAQs on EMIR, available at <http://www.centralbank.ie/regulation/EMIR/Pages/FAQs.aspx>.

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