

MEMO# 30760

June 30, 2017

European Commission Proposes Overhaul of Clearing House Registration and Supervision; Member Call Scheduled on Tuesday, July 18 at 10:30 am (ET)

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June 30, 2017 TO: Derivatives Markets Advisory Committee
Equity Markets Advisory Committee
ICI Global Trading & Markets Committee
Securities Operations Advisory Committee RE: European Commission Proposes Overhaul of Clearing House Registration and Supervision; Member Call Scheduled on Tuesday, July 18 at 10:30 am (ET)

The European Commission (Commission) recently issued a proposal to amend the supervisory regime for central counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR).^[1] The Proposal would have significant implications for all CCPs that operate in the European Union, especially those that are established in third countries and rely on equivalence determinations to meet their EU regulatory obligations. The Proposal would create a new body—the CCP Executive Session—that would play a key role in the authorization and supervision of CCPs, particularly third-country CCPs. The Proposal also would provide for greater oversight of all third-country CCPs and create a regulatory mechanism to require a third-country CCP to relocate to the European Union to provide clearing services within the union if EU authorities determine the CCP poses too much risk to the union or any member state(s).

The Proposal also provides European central banks with a much greater role in CCP supervision, because the Commission believes the role of these banks, as issuers of currency, “is not adequately reflected” in the colleges of national supervisors and other EU authorities that presently supervise CCPs. The lack of adequate central bank representation in CCP regulation causes the “potential for misalignment” when supervisory actions affect key central bank functions, such as price stability, monetary policy, and payment systems.^[2]

Comments on the Proposal must be received by August 9, 2017. **We will hold a conference call on Tuesday, July 18 at 10:30 am (ET) to discuss the Proposal.** Please contact Hellenia Walker at hellenia.walker@ici.org to receive dial-in information for

the call.

Proposed New System for CCP Supervision

The Proposal would grant EU-level authorities a more direct role in CCP supervisory decisions by requiring ESMA (through the CCP Executive Session) and, where appropriate, relevant central banks to consent to national competent authorities' decisions regarding CCP authorization, capital requirements, stress testing, and other matters.[\[3\]](#)

The CCP Executive Session would consist of permanent members and members specific to each CCP. The permanent members would include an independent head and two directors, each of which would be voting members, as well as a representative of the European Central Bank and the Commission, which would be non-voting members. The CCP-specific members would include a representative of the national competent authority of the member state where the CCP is established and a representative of relevant central banks.[\[4\]](#) In an effort to promote consistent decision making, permanent members of the CCP Executive Session would vote on all matters, while CCP-specific members would vote only on issues relevant to that CCP.

Proposed New Supervisory Arrangements for Third-Country CCPs Offering Clearing Services in the European Union

Different Regulatory Structures Depending on the Risk Posed by a CCP

The Proposal aims to enhance the supervision of third-country CCPs offering clearing services within the European Union by differentiating between lower risk, non-systemically important third-country CCPs (Tier 1 CCPs) and third-country CCPs that are or are likely to become systemically important for the European Union or one of its member states (Tier 2 CCPs).[\[5\]](#) ESMA would classify a CCP as a Tier 1 or Tier 2 CCP when the CCP applies for recognition using the following objective criteria:

- The nature, size, and complexity of the CCP's business;
- The effect that the failure of or a disruption to the CCP would have on the financial markets, financial institutions, or the broader financial system, or on the financial stability of the Union or one or more of its member states;
- The CCP's clearing membership structure; and
- The CCP's relationships, interdependencies, or other interactions with market participants and the financial system.[\[6\]](#)

The Commission would clarify these criteria with a delegated act within six months after the Proposal enters into force.[\[7\]](#) Third-country CCPs that are presently recognized under EMIR will be considered Tier 1 CCPs until ESMA determines whether they should be classified as Tier 2 CCPs. The Proposal would require ESMA to make these determinations within a year of the time that the Proposal enters into force.

A Tier 1 CCP would continue to be subject to the current arrangements and conditions for third-country equivalence decisions adopted by the Commission, while Tier 2 CCPs will be recognized and permitted to provide clearing services in the European Union only if other conditions are satisfied, including:

- The CCP complies, on an ongoing basis, with prudential requirements for EU CCPs, including those related to capital, business conduct, margin, financial resources, and liquidity;[\[8\]](#)

- Relevant central banks confirm that the CCP complies with any conditions imposed by the bank(s) to facilitate their ability to carry out their monetary policy tasks; and
- The CCP provides ESMA with: (1) its unconditional written consent to provide any documents, records, information and data held by the CCP within 72 hours and to grant ESMA access to the CCP’s business premises; and (2) a reasoned legal opinion by an independent legal expert confirming that the consent provided is valid and enforceable under the relevant applicable laws.[\[9\]](#)

The Proposal would require ESMA to review the recognition of a third-country CCP at least every two years.

Adjustments to the Process for Recognizing Third-Country CCPs

The Proposal would continue to allow the Commission to issue equivalence determinations—findings that the legal and supervisory framework of a third country fulfill the requirements under EMIR for purpose of recognizing that country’s CCPs—but the Commission would be permitted to make these decisions conditional on the third country fulfilling specified requirements. EMIR presently does not contemplate conditional equivalence. The Proposal would authorize the Commission to adopt a delegated act specifying further criteria that it would consider when making an equivalence determination. ESMA would be responsible for monitoring the regulatory and supervisory developments in third-country regimes that have been deemed equivalent by the Commission.

The Proposal also would introduce a system of “comparable compliance” that would allow a third-country CCP to request that ESMA determine that third-country regulation provides a comparable outcome to EMIR. If ESMA finds comparable compliance exists, it could waive the application of the relevant EMIR provisions.[\[10\]](#) The Commission believes this approach could significantly reduce any burdens resulting from the application of EMIR and third-country CCP regulation. The Commission would be required to adopt a delegated act to specify how ESMA would carry out a comparable compliance determination.

Location Requirement for Tier 2 CCPs

The Proposal would allow ESMA and relevant EU central banks to determine that a Tier 2 CCP poses such a large risk to the financial stability of the European Union or a member state that the CCP cannot be recognized in the EU. If the Commission agrees with this determination, the CCP would need to relocate to the European Union (*i.e.*, be authorized and established in a member state) to provide clearing services in the European Union.[\[11\]](#)

Jennifer S. Choi
Associate General Counsel

George M. Gilbert
Counsel

endnotes

[\[1\]](#) Proposal for a Regulation of the European Parliament and of the Council amending

Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, dated June 13, 2017, *available at* http://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-331_en (Proposal).

[2] See Proposal at 5.

[3] See Proposal at Article 2(7) (inserting new Article 21a of EMIR). The Proposal would establish a dispute resolution procedure in the event that national competent authorities disagree with the view of ESMA or the central bank(s). Central bank consent would be required for a narrower set of issues than CCP Executive Session consent. Specifically, national competent authorities would be required to obtain the consent of an EU central bank only on matters related to the monetary policy tasks of those central banks. The consent would need to be obtained from the EU central bank(s) that issue the currency of the derivatives cleared by the CCP.

[4] See Proposal at Article 1(7) (inserting new Article 44a of EMIR).

[5] See Proposal at Article 2(9) (amending Article 25 of EMIR).

[6] See Proposal at Article 2(9).

[7] The provisions on recognition of third-country CCPs and the location requirement (discussed below) will fully apply upon the entry into force of the delegated act establishing the criteria to determining a Tier 2 CCP.

[8] These requirements are set out in Article 16 and Titles IV and V of EMIR.

[9] See Proposal at Article 2(9). Each Tier 2 CCP would be required to confirm that it satisfies these requirements at least annually. The Proposal also would enhance ESMA's supervisory toolbox to facilitate its greater oversight responsibilities for third-country CCPs by adding new powers to access information, conduct investigations and on-site inspections, and punish CCPs that violate EMIR.

[10] See Proposal at Article 2(10) (inserting Article 25a into EMIR).

[11] See Proposal at Article 2(9)(b) (adding paragraph 2c to Article 25 of EMIR).