

MEMO# 30696

May 10, 2017

European Commission Issues Proposal to Amend Its Derivatives Rules; Member Call Scheduled on Thursday May 18 at 12:00 pm (ET)

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May 10, 2017 TO: Derivatives Markets Advisory Committee
Equity Markets Advisory Committee
ICI Global Trading & Markets Committee
Securities Operations Advisory Committee RE: European Commission Issues Proposal to Amend Its Derivatives Rules; Member Call Scheduled on Thursday May 18 at 12:00 pm (ET)

The European Commission (Commission) recently proposed a variety of amendments to the European Market Infrastructure Regulation (EMIR).^[1] The Proposal includes targeted amendments that the Commission believes could eliminate disproportionate costs and burdens and simplify the regulation.^[2] ICI Global recommended certain of these amendments in response to a public consultation on the operation of EMIR during the summer of 2015.^[3] Concurrently, the Commission issued a communication to the Parliament, the Council and the European Central Bank regarding supervision of central counterparties (CCPs).^[4] The Commission will issue a legislative proposal on CCP supervision in June.

Comments on the Proposal must be received by July 5, 2017. ICI Global anticipates commenting on the Proposal. **We will hold a conference call on Thursday, May 18 at 12:00 pm (ET) to discuss the Proposal.** Please contact Helenia Walker at helenia.walker@ici.org to receive dial-in information for the call.

Proposed Amendments to EMIR

The Commission proposes amendments to the following aspects of EMIR: the clearing obligation, the reporting obligation, the registration and supervision of trade repositories, and access to data in trade repositories. The Proposal also would require the Commission to evaluate EMIR and prepare and submit a general report on the regulation, together with appropriate proposals, to the European Parliament and Council within three years of date of entry into application of the amended regulation. This section explains the details of the proposed amendments that could have the most direct impact on funds.

Amendments to the Clearing Obligation

- **Removal of the frontloading requirement.** EMIR presently imposes a frontloading requirement (*i.e.*, a requirement to clear retroactively certain OTC derivatives that were entered into before the start date of the clearing obligation). In response to an ICI Global comment, the Proposal would remove this requirement.[\[5\]](#)
- **Clearing threshold for financial counterparties.** The Proposal would establish a clearing threshold for financial counterparties, so small financial counterparties—that might have limited access to clearing services—would not be subject to the clearing mandate. Presently, EMIR provides a clearing threshold for non-financial counterparties that ranges from €1 billion – €3 billion of aggregate month-end notional exposure, depending on the class of derivatives.[\[6\]](#) The Proposal would set the threshold for financial counterparties at the same level. A financial counterparty that exceeds the threshold for one class of derivatives would need to clear all transactions subject to a clearing obligation, regardless of asset class.[\[7\]](#)
- **Expanded definition of financial counterparty.** The Proposal would amend the definition of “financial counterparty” in Article 2 of EMIR to include alternative investment funds (AIFs) registered under national law that are currently considered non-financial counterparties, central securities depositories, and securitization special purpose entities.
- **Suspension of clearing obligation.** The Proposal would give the Commission the power to temporarily suspend any clearing obligation on the basis of a request by European Securities and Markets Authority (ESMA) and explains the procedure for the suspension. This change is generally consistent with ICI Global’s recommendation that the Commission provide a mechanism for ESMA to suspend or remove the clearing obligation for the protection of market participants.[\[8\]](#)
- **Access to clearing.** The Proposal would amend EMIR to require clearing members and clearing member clients that provide indirect clearing services to do so under fair, reasonable, and non-discriminatory commercial terms, as specified by the Commission.
- **Protecting client assets in case of a CCP or clearing member bankruptcy.** The Proposal would clarify that assets covering client positions are not considered part of the insolvency estate of a CCP or clearing member if they meet three criteria: (1) the positions are recorded in separate accounts; (2) the netting of positions recorded in different accounts is prevented; and (3) the assets covering the positions recorded in an account are not exposed to losses connected to positions recorded in another account.[\[9\]](#) The Commission believes this provision would give clients certainty that their assets are protected and can be ported to other clearing members.

Amendments to the Reporting Obligation

- **Reporting historic transactions.** The Proposal would remove the requirement to report historic transactions (*i.e.*, those transactions that were not outstanding on the starting date of the reporting obligation on February 12, 2014). ICI Global advocated for this change.[\[10\]](#)
- **Reporting hierarchy.** The Proposal would establish or clarify reporting obligations for the following types of transactions:
 - All exchange-traded derivatives would be reported by the CCP that clears the transaction (and the counterparties would no longer have reporting obligations), as requested by ICI Global;[\[11\]](#)
 - For transactions between a financial counterparty and a non-financial

- counterparty not subject to the clearing obligation, the financial counterparty would be responsible for reporting on behalf of both counterparties; and
- The management company that manages a UCITS or AIF that is a counterparty to an OTC derivative contract would be responsible for reporting on behalf of that UCITS or AIF.
- **Standardizing reporting requirements.** The Proposal directs ESMA to develop draft implementing technical standards that would ensure uniform technical standards for reporting requirements. The standards would require the use of global legal entity identifiers, international securities identification numbers, and unique trade identifiers in reports to trade repositories.

Trade Repository Data

- **Improving data quality in trade repositories.** The Proposal would require a trade repository to have adequate procedures for the reconciliation of data between trade repositories, to have adequate procedures to ensure the quality of reported data, and to establish policies for the orderly transfer of data to other trade repositories. A trade repository also would be required to grant counterparties access to all data reported on their behalf to allow for verification of its accuracy.
- **Third-country access to trade repository data.** The Proposal would grant authorities in third countries direct access to data held in the European Union under certain circumstances.

Commission Communication on CCP Supervision

In light of the growing systemic importance of CCPs, the Commission believes that there is a need for enhancement of the current supervisory arrangements, which rely on the home Member State coordinating with national authorities and ESMA. The Commission also highlights the upcoming withdrawal of the United Kingdom (in which a substantial volume of transactions denominated in Euro are conducted) from the European Union and how that will affect the regulation and supervision of clearing in Europe.

To that end, the Commission will propose further legislative changes in June that could include enhanced supervision of systemically important CCPs at the EU level and/or “location requirements” (*i.e.*, a requirement for a CCP to be established in the European Union).

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endnotes

[\[1\]](#) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision

of trade repositories and the requirements for trade repositories, dated May 4, 2017, available at http://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-208_en (Proposal).

[2] The Proposal follows the Commission's report on EMIR, which it issued in November 2016, pursuant to Article 85(1) of the regulation. See ICI Memorandum 30428 (November 29, 2016) available at <https://www.iciglobal.org/iciglobal/pubs/memos/memo30428>.

[3] See Letter from Dan Water, Managing Director, ICI Global, to European Commission, dated August 12, 2015, available at <https://www.ici.org/pdf/29246.pdf>.

[4] Communication from the Commission to the European Parliament, the Council, and the European Central Bank Responding to challenges for critical financial market infrastructures and further developing the Capital Markets Union (May 4, 2017), available at https://ec.europa.eu/info/sites/info/files/170504-emir-communication_en.pdf.

[5] See Appendix to Letter from Dan Water, Managing Director, ICI Global, to European Commission, dated August 12, 2015, available at <https://www.ici.org/pdf/29246.pdf>.

[6] See ESMA's description of EMIR rules applicable to non-financial counterparties, available at <https://www.esma.europa.eu/regulation/post-trading/non-financial-counterparties-nfcs>.

[7] The Proposal differs from the current requirement for non-financial counterparties to clear OTC derivatives. Non-financial counterparties that exceed the threshold must clear only those OTC derivatives in the asset class(es) for which the clearing threshold has been exceeded and for which a clearing obligation exists.

[8] See Appendix to Letter from Dan Water, Managing Director, ICI Global, to European Commission, dated August 12, 2015, available at <https://www.ici.org/pdf/29246.pdf>.

[9] These criteria are specified in Article 39(9) of EMIR.

[10] See Appendix to Letter from Dan Water, Managing Director, ICI Global, to European Commission, dated August 12, 2015, available at <https://www.ici.org/pdf/29246.pdf>.

[11] *Id.*