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Mr. Rodrigo Buenaventura,  
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30 July 2012

Dear Mr. Pearson,

Dear Mr. Buenaventura,

Dear Mrs. Vaillant,

**Concerns regarding the timing and scope of application of obligations of clearing members of CCPs**

The new Regulation on OTC derivatives, central counterparties (CCPs) and trade repositories (EMIR)<sup>1</sup> imposes a number of obligations on clearing members of CCPs. However, EMIR does not explicitly address a number of important issues as to the timing or scope of the application of these provisions. EMIR will be directly applicable and it is important that it is made clear that these obligations only apply to clearing members of existing EU CCPs when the CCP becomes authorised under EMIR and do not apply to clearing members of non-EU CCPs.

It would be inconsistent with the framework of EMIR and wholly impractical if the obligations imposed by EMIR on clearing members of CCPs applied to clearing members of existing EU CCPs before the relevant CCP has been authorised under EMIR and has been able to adapt its rules and procedures to meet the requirements imposed by EMIR or if they extended to clearing members of non-EU CCPs..

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<sup>1</sup> References are to the text of EMIR published by the Council on 4 July 2012.

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In particular, ESMA could use its powers under its founding regulation to give guidance on the issues highlighted in this note by issuing guidelines, recommendations or opinions to promote consistent supervisory practices, after appropriate consultation.<sup>2</sup>

### **Obligations of clearing members under EMIR**

In summary, under Title IV of EMIR, clearing members of a CCP must:

- Article 37(3): have the necessary additional financial resources and operational capacity to clear transactions on behalf of clients;
- Article 38(1): publicly disclose the prices and fees associated with the clearing services provided;
- Article 39(4): keep separate records and accounts that enable them to distinguish their assets and positions at the CCP from the assets and positions of clients;
- Article 39(5): offer the choice between “omnibus client segregation” and “individual client segregation”;
- Article 39(6): where a client opts for individual client segregation, post any excess margin to the CCP;
- Article 39(7): publicly disclose the levels of protection and costs associated with different levels of segregation.<sup>3</sup>

### **Timing of application**

EMIR comes into force on the 20<sup>th</sup> day after publication of the regulation in the Official Journal (Article 91). Recital 93 states that any obligation imposed by the Regulation which is to be further developed by delegated or implementing acts should be understood as applying only from the date on which those acts take effect. However, many of the provisions of Titles III, IV and V applying to CCPs do not envisage the adoption of delegated or implementing acts. In particular, there is no provision for the adoption of delegated or implementing acts under the Articles that apply to clearing members of a CCP referred to above.

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<sup>2</sup> See Articles 16 and 29 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), available at [ESMA](#)

<sup>3</sup> The draft technical standards recently published by ESMA for consultation include provisions which purport to impose additional obligations on clearing members. See e.g. Article 4 ICA of the draft regulatory technical standards on OTC derivatives requiring clearing members to facilitate indirect clearing arrangements, set out in Annex II of ESMA's Consultation Paper on Draft Technical Standards for the Regulation of OTC Derivatives, CCPs and Trade Repositories (25 June 2012). There is an issue as to whether the legal mandate for those technical standards in EMIR provides a legal basis for the imposition of additional obligations on market participants (e.g. in relation to Article 4 ICA, the legal mandate in Article 4(4) EMIR requires technical standards to specify the types of arrangement that constitute indirect clearing arrangements and does not allow for the imposition of additional obligations on clearing members. However, the discussion below of obligations imposed on clearing members under Title IV EMIR should be read as covering any obligation imposed on under delegated or implementing acts under EMIR.

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Nevertheless, Article 89(3) and (4) provide transitional provisions for CCPs authorised in their Member State of establishment before the adoption of all the relevant regulatory technical standards under Titles II, III, IV, VII and VIII. These CCPs must apply for authorisation within six months after the adoption and entry into force of the relevant regulatory technical standards under Titles III and IV. Until a decision is made on the authorisation of a CCP, the national rules on authorisation of CCPs continue to apply and the CCP continues to be supervised by the competent authority in the Member State of establishment.

It would be inconsistent with this framework and wholly impractical if the requirements of Titles III, IV and V applied to existing EU CCPs or their clearing members prior to the time when the CCP is authorised under EMIR. EMIR envisages that existing CCPs and their clearing members will need time to adapt to the new requirements, in particular as these provisions also apply to CCPs clearing exchange traded derivatives and securities transactions. For example, many of these CCPs do not currently offer individual segregation or portability and will need to put appropriate arrangements in place before they can obtain authorisation (and it is possible that in some cases national laws will need to be changed in order to ensure that these procedures are enforceable). It is simply not practical for the obligations in EMIR to apply to existing CCPs and their clearing members before the CCP has been able to adapt its rules and procedures to meet the requirements of EMIR. The transitional provisions were intended to provide time for this to occur.

Therefore, we ask ESMA or the Commission to confirm that, with respect to a CCP established in the EU and authorised under national law prior to the adoption of the regulatory technical standards referred to in Article 89(3):

- a) the obligations imposed on CCPs in Titles III, IV and V; and
- b) the obligations of clearing members in Title IV

do not apply to that CCP or its clearing members until such time as the CCP is authorised under EMIR.

### **Scope of application**

Article 1(2) of EMIR states that it applies to CCPs and their clearing members and defines these terms as follows:

'CCP' means a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer (Article 1(1))

'clearing member' means an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation (Article 1(14))

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The provisions of Article 1(2) and the wording of these definitions are capable of applying to CCPs established within or outside the EU and to clearing members of any such CCP. Furthermore, the various obligations imposed by Titles IV and V on CCPs and their clearing members are not expressed in terms that explicitly limit their scope to EU CCPs or to clearing members of such CCPs (similarly, the obligations in Article 16 in Title III relating to the capital of CCPs are not expressed in terms that limit its scope to EU CCPs).

However, Article 14(1) states that "where a legal person established in the Union intends to provide clearing services as a CCP, it shall apply for authorisation" under EMIR and Title II set out the process for dealing with those applications, including certain criteria applicable to CCPs. Furthermore, Article 25 provides that a CCP established in a third country may only provide clearing services to clearing members or trading venues established in the EU if the CCP is recognised by ESMA and provides a framework for the recognition of non-EU CCPs. In particular, Article 25(2)(a) and (6) provide that a CCP established outside the EU can only be recognised by ESMA where the Commission has made a determination that CCPs in the relevant third country are subject to legally binding requirements equivalent to those in Title IV of EMIR.

It would be inconsistent with this framework and wholly impractical if the obligations imposed on CCPs and their clearing members in Titles III, IV and V (other than Article 25) extended to non-EU CCPs or clearing members of such CCPs. The intention of Article 25 is that non-EU CCPs providing clearing services to clearing members and trading venues in the EU should be exempt from those obligations (on the basis that they are subject to equivalent regulation) and Recital 59 makes clear that non-EU CCPs should not be precluded from providing clearing services indirectly to persons in the EU through a non-EU clearing member. Any other result would potentially lead to non-EU CCPs and their clearing members potentially being subject to overlapping and potentially conflicting regulation, a result which EMIR was designed to avoid.

Therefore, we ask ESMA or the Commission to confirm that:

- a) The obligations imposed on CCPs in Titles III, IV and V only apply to CCPs established in the EU (with the exception of the obligations of non-EU CCPs under Article 25); and
- b) The obligations imposed on "clearing members" in Title IV only apply to clearing members of CCPs established in the EU.

However, it should also be recognised that CCPs established in the EU may have clearing members established outside the EU which provide clearing services to non-EU clients. It will be important to consult on whether and how the obligations imposed on clearing members apply with respect to non-EU clearing members. We would be pleased to discuss this separately.

Yours sincerely,

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George Handjinicolaou,

Deputy Chief Executive Officer and Head of Europe, Middle East and Africa

*For more information please contact Roger Cogan ([rcogan@isda.org](mailto:rcogan@isda.org)).*