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Patrick Pearson,
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European Commission – DG FISMA
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27 August 2020

Dear Mr. Planta,

Dear Mr. Pearson,

Request for extension of relief on Brexit-related novations

The International Swaps and Derivatives Association (**ISDA**) and the Association for Financial Markets in Europe (**AFME**) (together, the **Joint Associations**) are grateful for the work of the Commission and the European Supervisory Authorities in taking action to mitigate the impacts for EU and UK market participants of the UK's departure from the EU without reaching an agreement on the long-term relationship between the UK and EU.

In particular, we welcomed the enactment of Commission Delegated Regulation (EU) 2019/564[1] and Commission Delegated Regulation (EU) 2019/565[2] (together, the **Novation RTS**), which were designed to enable UK counterparties to novate derivatives contracts to EU counterparties during a 12-month period following the UK's departure from the EU without that novation triggering clearing or margin requirements for those contracts under the European Market Infrastructure Regulation (**EMIR**). We are very grateful for the Commission's and the ESAs' work on this and their prompt action to replace the predecessor Commission Delegated Regulations (EU) 2019/396 and 2019/397 after the European Council agreed to an extension of the two-year period referred to in Article 50(3) of the Treaty on European Union, as a result of which those earlier Regulations would not apply.

However, the Novation RTS will not act to mitigate the effects of the end of the transitional period at the end of 2020, as they did not start to apply because a decision was taken to extend

1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.099.01.0003.01.ENG&toc=OJ:L:2019:099:TOC

2 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0565&from=EN

the two year period referred to in Article 50(3) of the Treaty on European Union beyond 31 December 2019.

We respectfully request the Commission and the ESAs to amend the Novation RTS so that the transitional relief in Article 1 will start to apply as soon as possible and continue to be available for a period of 12 months from 31 December 2020 (or, if it is thought more appropriate, to replace the Novation RTS with new Commission Delegated Regulations).

Ideally the relief would be available in relation to novations that take place prior to the end of the transitional period as well as those that take place in the following 12 months. If the relief is only available in relation to novations that take place after 31 December 2020, this would effectively require EU counterparties to choose between novating as soon as possible and triggering margin and clearing obligations that do not currently apply, or novating after 31 December 2020 with the benefit of relief under the Novation RTS but with the risk of triggering licensing and other requirements in the UK in the period between 31 December 2020 and the date of the novation (as well as the risk that their UK counterparty is unable to support life cycle events with respect to their contracts over the same period, as they would trigger licensing and other requirements in the relevant EU jurisdiction).

We note that the original Novation RTS provided that the relief would only be available where "non-centrally cleared OTC derivative contracts are novated for the sole purpose of replacing a counterparty established in the UK with a counterparty established in a Member State". We understand the reason for this limitation to UK established counterparties was that the relief was available exclusively to facilitate Brexit related novations. It has since come to our attention that, as a direct consequence of Brexit, some non-UK third-country firms do need to novate their contracts to their European entity since their UK traders and sales people supporting their global business can no longer support that business from the UK. In order to support those firms who wish to novate their contracts to their European entity, we would ask that the Novation RTS are extended so that the relief would be available "where non-centrally cleared OTC derivative contracts are novated for the sole purpose of replacing a counterparty established in the UK, or operating from the UK, with a counterparty established in a Member State".

Amending (or replacing) the Novation RTS in the way proposed above would ensure that they achieve their intended objective if the transitional period under the withdrawal agreement comes to an end on 31 December 2020 without an agreement on the long-term relationship between the UK and EU. Many EU counterparties to derivatives contracts with UK counterparties have been unwilling to agree to the novation of those contracts where the novation would trigger clearing or margin requirements for the EU counterparties to the novated contract. Amending (or replacing) the Novation RTS in the way proposed above would provide the EU counterparties to these contracts with valuable flexibility because it would enable them to agree the novation of their contracts to an EU counterparty at their earliest convenience without triggering clearing or margin requirements.

We consider that it is important that the Commission and the ESAs act now to replace the Novation RTS in the way proposed above so that the replaced RTS can enter into application as soon as possible before 31 December 2020. We consider that urgent action is needed because new RTS replacing the Novation RTS cannot enter into force unless the European Parliament and the Council have expressed their no objection to the RTS within the periods specified in the regulations establishing the ESAs. Therefore there needs to be adequate time, after the adoption by the Commission of the new RTS, for the Parliament and the Council to consider the RTS before 31 December 2020. Ideally the amended Novation RTS should be adopted no later than October.

We would welcome the opportunity to discuss this issue with you and are also very happy to answer any questions you may have in the meantime.

Yours sincerely,

Scott O'Malia, Chief Executive Officer International Swaps and Derivatives Association, Inc.	Rick Watson, Managing Director and Head of Capital Markets Association for Financial Markets in Europe

About AFME

The Association for Financial Markets in Europe (**AFME**) is the voice of all Europe's wholesale financial markets, providing expertise across a broad range of regulatory and capital markets issues. We represent the leading global and European banks and other significant capital market players. We advocate for deep and integrated European capital markets which serve the needs of companies and investors, supporting economic growth and benefiting society. We aim to act as a bridge between market participants and policy makers across Europe, drawing on our strong and long-standing relationships, our technical knowledge and fact-based work.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 925 member institutions from 75 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube.