6 December 2018

Mr. Patrick Pearson
Head of Unit C2 – Financial Markets Infrastructure
European Commission - DG FISMA
Building SPA2, 1049 Brussels
Belgium

Dear Mr. Pearson,

European Market Infrastructure Regulation (EMIR): Proposed Regulatory Technical Standards (RTS) extending the deferred dates of application of the clearing obligation to intragroup transactions

The International Swaps and Derivatives Association (ISDA) strongly welcomes the Final Report of the European Securities and Markets Authority (ESMA) dated 27 September 2018 on the Clearing Obligation under EMIR (no. 6)[1] proposing an extension to 21 December 2020 of the deferred dates of application of the clearing obligation to intragroup transactions between EU and non-EU counterparties.

We ask that the Commission act as soon as possible to endorse, without amendment, ESMA's proposed RTS extending these deferred dates of application of the clearing obligation. We would also welcome confirmation that the Commission will work with the European Parliament and the Council to ensure the early publication of the RTS in the Official Journal so that, if possible, the RTS come into force before 21 December 2018, the first deferred date of application of the clearing obligation to intragroup transactions.

We also welcome ESMA's public statement of 31 October 2018 on the clearing and trading obligations ahead of the 21 December 2018 deadline[2] stating that, if the RTS do not come into force in time, it expects competent authorities to not prioritise their supervisory actions towards group entities that benefit from the derogation for intragroup transactions meeting certain conditions on and after 21 December 2018.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 68 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

[1] ESMA70-151-1768.

[2] ESMA70-151-1773.

firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

The proposed RTS

There are currently three Commission Delegated Regulations on the clearing obligation under EMIR. They mandate a range of interest rate and credit derivative classes to be cleared. These Commission Delegated Regulations contain a deferred date of application of the clearing obligation for intragroup transactions satisfying certain conditions and where one of the counterparties is in a third country, in the absence of the relevant equivalence decision. However, the deferred dates are soon approaching and there have not been any equivalence decisions to date with regards to the clearing obligation.

Under the first Commission Delegated Regulation on interest rate derivatives denominated in the G4 currencies, the clearing obligation will apply to these intragroup transactions from 21 December 2018. Under the Commission Delegated Regulations on credit default swaps and interest rate derivatives denominated in other EEA currencies, the clearing obligation will apply to these intragroup transactions from 9 May 2019 and 9 July 2019 respectively.

The application of the clearing obligation to intragroup transactions in these classes of derivatives would also result in the application of the obligation to execute transactions on a trading venue under the Markets in Financial Instruments Regulation (MiFIR) where those transactions are also subject to the trading obligation under MiFIR. Under the Commission Delegated Regulation on the trading obligation for certain derivatives under MiFIR, the trading obligation for those derivatives applies from the later of 3 January 2018 and the dates specified in the Commission Delegated Regulations on the clearing obligation for the relevant category of counterparties.

The Final Report proposes RTS that would prolong the temporary derogation from the clearing obligation for intragroup transactions by two years for the Commission Delegated Regulation on interest rate derivatives denominated in the G4 currencies, i.e., until 21 December 2020. The proposed RTS would also align the date for the other two Commission Delegated Regulations to 21 December 2020 as well.

ISDA strongly welcomes the move to extend the derogation from the clearing obligation for intragroup transactions concerning third-country entities based in jurisdictions which do not benefit from an equivalence determination under Article 13(2) of EMIR. Were the derogation not extended, the impact on the ability of European derivative market participants to operate on a cross-border basis would be severe.

Therefore, we would welcome the Commission's endorsement of the proposed RTS, without amendment, as soon as possible.

We would also welcome confirmation from the Commission that it will work with the European Parliament and the Council to ensure the early publication of the RTS in the Official Journal so that, if possible, the RTS come into force before 21 December 2018.[3] Under ESMA's founding regulation, even if the Commission endorses ESMA's proposed RTS without amendment, the RTS cannot be published in the Official Journal and come into force until both the European Parliament and the Council have indicated that they do not object to the RTS or

[3] Article 4 of the draft RTS provide that the RTS enter into force on the day after publication in the Official Journal.

one month has elapsed - and the Parliament or the Council may extend this one-month period for a further month on their own initiative.

Need for regulatory forbearance

Even if the Commission were now to endorse the RTS, there is a risk that that the RTS will not come into force before the clearing obligation in respect of interest rate derivatives denominated in the G4 currencies begins to apply to intragroup transactions on 21 December 2018.

Therefore, we welcome ESMA's public statement of 31 October 2018 on the clearing and trading obligations 21 December 2018 deadline. That statement notes the impending 21 December 2018 deadline for the start of the clearing obligation for intragroup transactions in interest rate derivatives denominated in G4 currencies if the proposed RTS do not come into force in time. It also notes that the same deadline applies to the clearing of those derivatives by 'Category 4 counterparties' (broadly, non-financial counterparties over the clearing threshold, i.e., 'NFC+s') if the changes proposed in the EMIR Refit legislative proposal are not adopted in time.

In that statement, ESMA notes that neither ESMA nor competent authorities possess any formal power to dis-apply a directly applicable EU legal text or even delay the start of some of its obligations and that any change to the application of the EU rules would need to be implemented through EU legislation. ESMA nonetheless acknowledges the difficulties that certain groups as well as certain NFCs+ would face on 21 December 2018 to start clearing with CCPs and trading on trading venues some of their OTC derivative contracts in the eventuality that the amendments in the draft RTS or in Refit are not applicable by then.

ESMA stated that it expects competent authorities not to prioritise their supervisory actions towards group entities that benefit from the derogation for intragroup transactions meeting certain conditions on and after 21 December 2018, and towards NFCs+ in the interest rate derivative asset class on or after 21 December 2018, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

We would welcome confirmation from the Commission at the earliest possible opportunity on the points mentioned above. We would be very happy to discuss this further if you have any questions or comments.

Yours sincerely,

Scott O’Malia

CEO

ISDA

cc. Fabrizio Planta, Head, Markets, ESMA