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55 Water Street,  
New York, N.Y. 10041  
United States of America

European Securities and Markets Authority  
103 Rue de Grenelle  
Paris, France 75007

20 May 2014

*Via electronic submission*

**Re: Response to ESMA discussion paper dated 20 March on draft technical standards for the Regulation on improving securities settlement in the European Union and on central securities depositories ("CSDR").**

Dear Sir or Madam:

On behalf of The Depository Trust & Clearing Corporation ("DTCC"), we appreciate the opportunity to comment on the Discussion Paper (the "**Discussion Paper**") dated 20 March on draft technical standards for the Regulation on improving securities settlement in the European Union and on central securities depositories ("**CSDR**"). DTCC offers its comments based on its 40+ years of experience as a provider of depository services.

## **DTCC and DTC**

DTCC is a user-owned, user-governed market infrastructure for the global financial services industry. From operating facilities, data centres and offices in 15 countries, DTCC, through its subsidiaries, automates, centralizes, and standardises the post-trade processing of financial transactions, mitigating risk, increasing transparency and driving efficiency for thousands of broker/dealers, custodian banks and asset managers worldwide. In 2013, DTCC's subsidiaries processed securities transactions valued at approximately US\$1.6 quadrillion.

The Depository Trust Company (DTC), is one of DTCC's subsidiaries and was established in 1973. It is the U.S. central securities depository, maintaining custody and providing depository and book-entry services, including the settlement of cleared and bilateral transactions, from 139 countries and territories valued at US\$43 trillion.

DTC is a limited purpose trust company under the Banking Law of New York State and is also a State member bank of the Federal Reserve System and a registered clearing agency under the U.S. Securities Exchange Act of 1934, as amended. As such, DTC is subject to regulation by the New York State Department of Financial Services, the Board of Governors of the Federal Reserve System (which has delegated examination authority to the Federal Reserve Bank of New York) and the Securities and Exchange Commission (SEC).

## **Summary**

This comment letter focuses on aspects of the Discussion Paper and CSDR that are likely to be of most relevance to a third country central securities depository (a "**third country CSD**"), such as DTC. In particular, we focus on question 108 of the Discussion Paper which seeks feedback on ESMA's proposed approach to the level of information that should be provided by a third country CSD that is seeking recognition under Article 25 of CSDR.

Finally we request clarification on issues of scope, application and timing related to CSDR.

## Recognition

DTCC notes that ESMA has stated in the Discussion Paper that "the development of rules on EU recognition of CSDs should follow the general principle of non-discrimination between EU and non-EU CSDs" and that therefore "the definition of the items that a non-EU CSD could provide for EU recognition purposes could be similar to the elements required for the registration of an EU CSD...with due adaptations [to take regard of]...the fact that the supervision of the recognised CSD would be performed outside the EU, and ESMA should rely on cooperation with the home supervisor".

In response to question 108 of the Discussion Paper, DTCC does not consider that taking a non-discriminatory and similar approach to the application processes for recognition and authorisation is problematic in principle, as long as the essential differences between the nature of the two statuses are both recognised and accommodated. For example:

- Third country CSDs should not be required to provide the same information that EU-based CSDs will be required to provide (as anticipated by Annex I of the Discussion Paper). In many cases, these requirements will not be appropriate for, or applicable to, a third country CSD which is obliged to comply with its local regime. We therefore assume that when ESMA mentions "adaptations" to the Annex 1 list, it has this in mind.
- Furthermore, we note that, under EMIR, applicant Third Country CCPs are required to submit information addressing a limited list of 15 items<sup>1</sup>. They are not required to demonstrate that they comply with the detailed EMIR requirements for EU central counterparties. It would be helpful if ESMA could confirm whether it is intending to apply a similar process for third country CSDs.
- A third-country CSD will be required to satisfy the criteria set out in Article 25(4) of the CSDR. It is not appropriate for it to be required to demonstrate compliance with any other matters that are not set out in that Article. Where the Commission has reached a determination of outcomes-based equivalence in respect of a country/jurisdiction, it should be sufficient for a CSD from that country to demonstrate that it complies with that equivalent regime. It should not be required to demonstrate compliance with the exact requirements that would apply to an EU CSD. There should therefore be a much lighter documentary burden for third country CSDs, given that they are already regulated in their home state. It would be most helpful for third country CSDs if the application information to be provided should align with materials which are already made available to the CSD's home regulator.
- Unlike EU CSDs, third country CSDs will be required to comply with a home state regime which will not be identical to the EU regime. Any dual regulatory burden is not something that EU CSDs would need to contend with (indeed, dual regulation is something that the CSDR seeks to eliminate) and so it should be kept to a minimum for third country CSDs. If it is not, access by EU participants to third country markets may be adversely impacted.

In light of this, we would kindly request ESMA to:

- confirm that the principle established under EMIR in relation to the provision by a third country CCP of limited information will be applied in the case of CSDR and a Third Country CSD and therefore, for ESMA to clarify what this information will be; and
- provide further information on the nature and extent of the "adaptations" referred-to in paragraph 108 of the Discussion Paper.

## Equivalence

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<sup>1</sup> See Article 2 of Commission Delegated Regulation No 153/2013.

DTC is a CSD regulated under US law. Moreover, the Securities and Exchange Commission (SEC) has recently proposed Clearing Agency Standards for clearing agencies<sup>2</sup> (such as DTC and NSCC) that have been designated Systemically Important Financial Institutions (SIFMUs) under the Dodd Frank Act and these standards are intended by the SEC to conform, within reason, to the CPSS IOSCO Principles for Financial Market Infrastructures (PFMIs)<sup>3</sup> and thereby to support a reasonable determination of equivalence.

We note that the recently introduced European Market Infrastructure Regulation ("**EMIR**")<sup>4</sup> provides for a similar regime for the recognition of third country central counterparties ("**TCCCPs**"), which also relies upon a determination of the equivalence of the TCCCP's home state regulatory regime to that of EMIR. In particular, we note that for many jurisdictions, whereas ESMA found that despite there being "gaps" between the various local requirements and specific requirements of EMIR, ESMA advised the Commission to consider that TCCCPs in those jurisdictions are subject to an equivalent regime where they have adopted legally binding requirements (which cannot be changed without the consent of the local regulator) which address each of the identified "gaps".

We would ask ESMA to be mindful of the fact that in many jurisdictions, the regulation of CSDs will have been developed to address local concerns, albeit in many cases having regard to the CPSS-IOSCO Principles for Financial Market Infrastructures. Since the CSDR stems from a purely EU rather than a global initiative, and the regulation of CSDs in many jurisdictions has been developed to address local/home market concerns, ESMA should avoid a prescriptive approach but rather follow one that is based on CPSS IOSCO principles and looks at outcomes on individual CSDs..

It is DTCC's view that any determination of the equivalence of the regulatory regime applying to a third-country CSD should be based on whether the regulatory and supervisory framework in the third country:

- establishes robust criteria for the establishment and operation of the third country CSD;
- provides for a broadly comparable level of scrutiny and oversight of the third country CSD by its home regulator; and
- broadly follows the Principles for Financial Market Infrastructures (PFMIs) established by CPSS IOSCO.

We do not think that an equivalence assessment should seek to effect a precise matching of regulatory requirements to comparable requirements in other jurisdictions.

DTCC also considers that it is not realistic to expect that:

- the local regulatory regimes for third country CSDs will contain provisions that match the specific requirements under CSDR; nor
- third country CSDs should be required to demonstrate compliance with the letter and the detail of the regime for EU CSDs under the CSDR at the same time as complying with their home state regulatory regimes.

DTCC's suggestion is that the word "equivalent" in the context of the Commission's determination should reflect an assessment of whether the third country has a comparable (even if different) robust and strenuous approach to securities settlement, prudential and conduct risk, and not whether the third country regulation is "the same as" the EU regime in terms of its detailed rules.

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<sup>2</sup> <http://www.sec.gov/rules/final/2012/34-68080.pdf>

<sup>3</sup> <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD350.pdf>

<sup>4</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

In relation to EMIR, ESMA has stated that “the information to be provided to ESMA by the applicant third country CCP should not have the objective of replicating the assessment of the third country competent authority but ensuring the CCP is subject to effective supervision and enforcement in that third country thus guaranteeing a high degree of investor protection” and “to allow ESMA to perform a complete assessment, the information provided by the third country CCP should be complemented by that information necessary to assess the effectiveness of the ongoing supervision, enforcement powers and actions taken by the third country competent authority” (EMIR RTS (153/2013) recitals 7 and 8). DTCC believes that these principles should be mirrored in the recognition process that applies under CSDR for third country CSDs.

### **Host state's confirmation that users will be able to comply with local law**

DTCC notes that Article 25(4)(d) requires, as a condition for recognition of a third country CSD, that “whenever relevant”, the third country CSD must have taken measures that are necessary to allow its users to comply with the relevant national laws in the Member State in which the third country CSD intends to provide services, and that the competent authorities in the Member State must have confirmed the “adequacy” of such measures. We believe that the intent, language and scope of this provision is rather unclear.

It would be helpful if ESMA could provide further details of the rationale for the requirement as in DTCC's view, a user's compliance with the law of its home state jurisdiction should be a matter for the user to establish before and during the course of its relationship with a third country CSD.

DTCC is concerned that a requirement for EU national regulators to confirm whether a third country CSD's arrangements are consistent with aspects of their local law, could, if it is not subject to appropriate limitations, allow local regulators to put in place protectionist and anticompetitive barriers to prevent third country CSDs having participants in the relevant jurisdiction or holding instruments issued by issuers in the relevant jurisdiction, even where the third country has been determined equivalent for the purposes of Article 25(9). In light of these concerns, we would urge ESMA to clarify:

- the intended meaning of the term “*whenever relevant*” in the context of which national laws may be considered by local regulators. Who will determine which national laws are relevant for the purposes of Article 25(4)(d)? Does ESMA intend to issue guidance on what is and is not a relevant “type” of law?
- the words “*in which the third country CSD intends to provide services*” to describe the relevant EU Member State. Is DTCC correct in its assumption that (i) this will apply only to third country CSDs who set up a branch in the relevant Member State, on the basis that any services provided from such branch would be provided “in” that Member State; and (ii) this will not apply where a third country CSD merely provides settlement, notary and / or central maintenance services in respect of an instrument issued in a Member State, on the basis that all relevant “services” would be provided in the third country, rather than “in” the relevant Member State?
- what process ESMA intends to put in place to ensure that any assessment by the competent authorities of Member States is subject to appropriate restrictions and controls to prevent Member States from adopting anti-competitive barriers to the use by domestic issuers of third country CSDs? How will ESMA seek to protect a third-country CSD from having to enter into an unmanageable and unworkable dialogue with any number of local regulators across the EU?

Finally, we would request ESMA to provide clarification on three specific related issues:

- **Scope of core services under CSDR**: DTCC would find it helpful if ESMA could provide further guidance as to the scope of the definitions of the notary service and the central maintenance service under the CSDR. This would be beneficial for third country CSDs whose local settlement, book-keeping and maintenance services may be achieved by different legal mechanisms or local practices to those which are prevalent in Europe. DTCC assumes that, in

line with its overall outcomes-based approach to third country CSDs, ESMA will take a purposive approach to whether a third country CSD is providing a core service under ESMA.

- **CSD Links:** It is our reading of Article 48, when taken together with Article 25(3), that the requirements to be met by CSD links will apply to EU authorised CSDs, which will need to be satisfied that any CSD link (whether with an EU or a third-country CSD) meets the specified standards. This may have a secondary impact on a third-country CSD which establishes a link with an EU CSD. However, Article 48 will not apply directly to a third-country CSD itself.

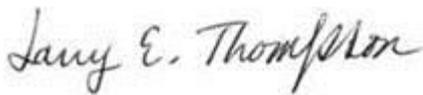
DTCC would kindly request ESMA to confirm if it agrees with our view of the extent to which the requirements applying to links in Article 48 of CSDR would apply to third country CSDs that establish CSD links with EU CSDs.

- **Timing:** DTCC would appreciate if ESMA could clarify expected timescales for:
  - (a) the publication of its draft technical standards for consultation;
  - (b) the finalisation of the technical standards;
  - (c) completion of ESMA's equivalence work in relation to third countries; and
  - (d) finalisation of the European Commission's equivalence decision under Article 25(9).

We would like to thank ESMA for the opportunity to respond to the Discussion Paper.

DTCC is keen to participate actively in this process and to co-operate with ESMA in the development of its technical standards. We look forward to providing further comments to ESMA on any further proposals in relation to the application process for third country CSDs, and in particular, in relation to ESMA's approach to determining the equivalence of the CSDR regime with that of the regime for CSDs in the U.S.

Yours sincerely,



Larry E. Thompson

General Counsel

The Depository Trust & Clearing Corporation

(DTCC)