

**Memorandum of Understanding**



**European Securities and Markets Authority**



**U.S. Commodity Futures Trading Commission**

**Memorandum of Understanding Related to ESMA's Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Derivatives Clearing Organizations Established in the United States**

In view of central counterparties ("CCPs") established in the United States and registered with the Commodity Futures Trading Commission ("CFTC") as derivatives clearing organizations ("DCOs") having applied or that may apply to the European Securities and Markets Authority ("ESMA") for recognition as CCPs ("Covered CCPs"), pursuant to Article 25 of 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 ("EMIR"), the CFTC and ESMA have reached this Memorandum of Understanding ("MoU") regarding arrangements for cooperation related to ESMA's assessment of compliance and monitoring of the ongoing compliance by the Covered CCPs with the recognition conditions set out in Article 25 of EMIR and with the conditions in paragraphs 2 and 3 of Article 1 ("Equivalence Conditions") in the European Commission Implementing Decision (EU) 2016/377 of 15 March 2016, except for agricultural commodity derivative contracts fulfilling the conditions set out in Article 2 of that Commission Implementing Decision ("Exemption Conditions") (collectively, "Recognition Conditions").

Under Article 25(6) of EMIR, the European Commission has adopted the Commission Implementing Decision (EU) 2016/377 of 15 March 2016 ("Equivalence Decision") determining that i) the legal and supervisory arrangements of the CFTC ensure that Covered CCPs comply with legally binding requirements which are equivalent to the requirements of EMIR (provided that the Covered CCPs fulfil the Equivalence Conditions, subject to the Exemption Conditions), ii) Covered CCPs are subject to effective supervision and enforcement in the United States on an ongoing basis, and iii) the legal framework of the United States provides for an effective equivalent system for the recognition of CCPs under the CFTC's legal regime.

Article 25(2)(c) of EMIR requires the establishment of cooperation arrangements as a precondition for ESMA to recognise CCPs established in the United States to provide clearing services to clearing members or trading venues established in the European Union.

Therefore, the primary purpose of this MoU is two-fold: 1) ensuring the fulfilment of the condition set out in Article 25(2)(c) of EMIR, *i.e.*, that cooperation arrangements have been established as regards the Covered CCPs; and 2) providing ESMA with adequate tools to assess compliance and to monitor the ongoing compliance by the Covered CCPs with the Recognition Conditions.

This MoU is an arrangement between the CFTC and ESMA and not a collective arrangement with other European Union authorities. As such, it will not impact any arrangements which may be agreed directly between other European Union authorities and the CFTC.

## Article 1

### Definitions

For the purpose of this MoU:

- a) "Authority" means a signatory to this MoU or any successor thereto;
- b) "Books and Records" means documents, electronic media, and books and records within the possession, custody and control of, and other information about, a Covered CCP;
- c) "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;
- d) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered CCP;
- e) "Governmental Entity" means:
  - i. If the Requesting Authority is the CFTC, the U.S. Department of the Treasury or the U.S. Board of Governors of the Federal Reserve System; and
  - ii. If the Requesting Authority is ESMA:
    - (a) the competent authority of a Member State in the European Union in which the Covered CCP provides or intends to provide clearing services and which has been selected by the Covered CCP;
    - (b) the competent authority of a Member State in the European Union which is responsible for the supervision of a trading venue established in the European Union that is served or to be served by the Covered CCP;
    - (c) the competent authority of a Member State in the European Union supervising a CCP established in the European Union with which interoperability arrangements with a Covered CCP have been established; or
    - (d) with respect to notification provided by the CFTC to ESMA pursuant to Article 3(4)(e) of this MoU, the competent authority of a Member State in the European Union where, pursuant to Article 25(5) of EMIR, a Covered CCP has extended the range of its activities and services in that Member State.

- f) "Laws and Regulations" means, in relation to ESMA, applicable European Union legislation within ESMA's scope of action as set out in Article 1(2) 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, and, in relation to the CFTC, the Commodity Exchange Act, Dodd-Frank Wall Street Reform and Consumer Protection Act, CFTC regulations and other relevant requirements;
- g) "On-site Inspection" means any regulatory visit by ESMA to the premises of a Covered CCP located in the United States, including inspection of Books and Records;
- h) "Person" includes a natural person, unincorporated association, partnership, trust, investment company or corporation and may be a Covered CCP;
- i) "Requested Authority" means the Authority to whom a request is made under this MoU; and
- j) "Requesting Authority" means the Authority making a request under this MoU.

## **Article 2**

### **General provisions**

1. Pursuant to the regime under EMIR for recognition of third-country CCPs, ESMA does not have direct supervision or enforcement powers over the Covered CCPs and relies fully on the supervision and enforcement capabilities of the CFTC, which supervises and enforces compliance with the CFTC's Laws and Regulations.
2. This MoU does not cover cooperation with regards to CCPs established in the European Union because ESMA does not have direct supervisory powers in respect of such CCPs. For the avoidance of doubt, this MoU does not cover, in particular, cooperation in respect of CCPs established in the European Union of which ESMA is a member of the supervisory college.
3. This MoU is a statement of intent to consult, cooperate and exchange information in connection with ESMA's assessment of compliance and monitoring of the ongoing compliance by the Covered CCPs with the Recognition Conditions. The cooperation and information sharing arrangements under this MoU should be

interpreted and implemented in a manner that is permitted by, and consistent with, the laws and other legal or regulatory requirements applicable to each Authority.

4. This MoU does not create any legally binding obligations, confer any rights or supersede any domestic laws. This MoU does not confer upon any Person the right or ability, directly or indirectly, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this MoU.
5. This MoU is not intended to limit or condition the discretion of an Authority in any way in the discharge of its regulatory responsibilities or to prejudice or affect in any way the individual responsibilities, competencies or autonomy of any Authority. This MoU does not limit an Authority to taking solely those measures described herein in fulfilment of its responsibilities and mandates. In particular, this MoU does not affect any right of any Authority to communicate with or obtain information or documents from any Person subject to its jurisdiction that is established in the territory of the other Authority.
6. The Authorities should, within the framework of this MoU, provide each other with the fullest cooperation permissible under their Laws and Regulations in relation to ESMA's assessment of compliance and monitoring of the ongoing compliance by the Covered CCPs with the Recognition Conditions. Following consultation, cooperation may be denied:
  - a) Where the cooperation would require an Authority to act in a manner that would violate its Laws and Regulations; or
  - b) On the grounds of national public interest for the CFTC or of European public interest for ESMA.
7. The Authorities represent that no domestic laws or regulations should prevent them from providing assistance to one another.
8. To facilitate communication and cooperation under this MoU, the Authorities hereby designate contact persons as set forth in the Appendix, which may be amended from time to time by an Authority transmitting revised contact information to the other Authority.

## Article 3

### Scope of cooperation

1. The Authorities recognise the importance of close communication concerning the Covered CCPs and intend to cooperate regarding:
  - a) general issues, including with respect to regulatory, supervisory or other developments concerning the Covered CCPs;
  - b) issues relevant to the operations, activities and services of the Covered CCPs; and
  - c) any other areas of mutual interest.
2. The Authorities recognize in particular the importance of close cooperation in the event that a Covered CCP, particularly one whose failure likely would be systemically important to an Authority, experiences, or is threatened by, a potential financial crisis or other Emergency Situation.
3. Cooperation will be most useful in circumstances where issues of regulatory concern may arise, including but not limited to:
  - a) the initial application of a Covered CCP for recognition in the European Union pursuant to Article 25 of EMIR;
  - b) changes in a Covered CCP's internal rules, policies and procedures that could affect the way in which the Covered CCP complies with any Recognition Conditions; or
  - c) regulatory or supervisory actions or approvals taken by the CFTC or ESMA in relation to a Covered CCP, including changes to the relevant obligations and requirements to which the Covered CCPs are subject that may impact the Covered CCPs' continued compliance with the Recognition Conditions.
4. *Notification.* The Authorities shall seek to inform each other as soon as practicable of:
  - a) any known material event that could adversely impact the financial or operational stability of a Covered CCP, including where the Covered CCP is deemed to be in breach of the conditions of any registration or recognition, or of any Laws and Regulations to which it is subject;
  - b) enforcement or regulatory actions or sanctions, including the withdrawal, revocation, suspension or modification of any registration or recognition

concerning or related to a Covered CCP and which may have a material effect on the Covered CCP;

- c) in respect of notification by ESMA to the CFTC, any permission or approval granted to a Covered CCP to provide clearing services to clearing members, trading venues or, when known to the CCP, clients established in the European Union, including in respect of the United States branches of entities established in the European Union;
- d) in respect of notification by ESMA to the CFTC, any request by ESMA to a Covered CCP to observe a measure that ESMA has adopted to ensure compliance with the Recognition Conditions or to cease a practice that ESMA determines is contrary to the Recognition Conditions;
- e) any material extension of the range of activities and services that a Covered CCP provides with respect to current or new asset classes or current or new European Union trading venues; and
- f) material changes to the Laws and Regulations to which the Covered CCPs are subject.

The information to be provided by an Authority pursuant to this paragraph will refer to the Covered CCPs registered or recognised by that Authority. The determination of what constitutes “material event”, “adversely impact”, “material effect”, “material extension”, or “material changes” will be left to the reasonable discretion of the Authority providing the information.

5. *Exchange of Written Information.* Each Authority, upon written request, intends to provide the other Authority with assistance in endeavouring to obtain information not otherwise available to the Requesting Authority and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with the Laws and Regulations to which the Covered CCPs are subject, provided that the Authority is authorized to collect such information. Such requests shall be made pursuant to Article 4 of this MoU, and the Authorities anticipate that such requests will be made in a manner that is consistent with the goal of minimizing administrative burdens.

The information covered by this paragraph includes:

- a) information that would assist ESMA in assessing that a Covered CCP complies with the Recognition Conditions, both in the context of an initial recognition and, thereafter, on an ongoing basis;
- b) information that would assist the Requesting Authority in verifying that a Covered CCP complies with the relevant obligations and requirements of the Laws and Regulations of the Requesting Authority;

- c) information that would assist ESMA in verifying compliance with its request to a Covered CCP to observe a measure that ESMA has adopted to ensure compliance with the Recognition Conditions or to cease a practice that ESMA determines is contrary to the Recognition Conditions;
- d) information that would assist the Requesting Authority in understanding changes to the relevant obligations and requirements to which the Covered CCPs are subject under the Laws and Regulations of the Requested Authority;
- e) information relevant to the financial and operational condition of a Covered CCP, which might include periodic reports submitted directly by a Covered CCP to the Requested Authority;
- f) relevant regulatory information and filings that a Covered CCP is required to submit to the Requested Authority; and
- g) regulatory reports and assessments, or findings or information contained therein, prepared by an Authority in respect of a Covered CCP.

#### **Article 4**

##### **Execution of requests for information**

1. To the extent possible, a request for written information pursuant to Article 3(5) should be made in writing (which may be transmitted electronically) and addressed to the relevant contact person identified in the Appendix. A request generally should specify at least the following:
  - a) the information sought by the Requesting Authority;
  - b) a concise description of the matter that is the subject of the request;
  - c) the purpose for which the information is sought, including the Laws and Regulations applicable to the activity; and
  - d) the desired time period for reply and, where appropriate, the urgency thereof.

Information responsive to the request, as well as any subsequent communication between the Authorities, may be transmitted electronically. Any electronic transmission should use means that are appropriately secure in light of the confidentiality of the information being transmitted.



2. In Emergency Situations, the Authorities shall endeavour to notify each other of the Emergency Situation and communicate information between each other as deemed appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency Situations, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

## **Article 5**

### **On-site Inspections**

1. ESMA does not intend to conduct any On-site Inspection of the Covered CCPs as part of its assessment of compliance and monitoring of the ongoing compliance by Covered CCPs with the Recognition Conditions, since under Article 25(6) of EMIR the European Commission has adopted the Equivalence Decision.
2. Given that ESMA, in respect of Covered CCPs, relies fully on the supervision and enforcement capabilities of the CFTC, which supervises and enforces compliance with the CFTC's Laws and Regulations, On-site Inspections by ESMA officers will only be considered in exceptional circumstances and subject to the prior agreement of the CFTC.
3. In such exceptional circumstances, the Authorities should discuss and reach understanding on the terms regarding an On-site Inspection by ESMA officers, in particular in determining the respective roles and responsibilities of the Authorities. ESMA will act in accordance with the following procedure before conducting an On-site Inspection:
  - a) ESMA will consult the CFTC with a view to reaching an understanding on the intended timeframe for, and the purpose and scope of, any On-site Inspection. The CFTC may, in its discretion, accompany or assist the visiting ESMA officials during the On-site Inspection.
  - b) When establishing the scope of any proposed On-site Inspection by ESMA officials, ESMA will consider the supervisory activities of the CFTC given ESMA's reliance on the supervision and enforcement capabilities of the CFTC in respect of Covered CCPs and will consider any information that was made available or is capable of being made available by the CFTC.
  - c) The CFTC will assist ESMA in reviewing, interpreting and analysing the contents of public and non-public Books and Records and obtaining information from directors and senior management of a Covered CCP.

## **Article 6**

### **Permissible uses of information**

1. The Requesting Authority may use non-public information obtained under this MoU solely for the purpose of ensuring, monitoring or assessing compliance by a Covered CCP with the Laws and Regulations of the Requesting Authority.
2. Before using non-public information furnished under this MoU for any purpose other than that stated in Article 6(1), the Requesting Authority must obtain the written consent of the Requested Authority for the intended use. If consent is denied by the Requested Authority, the Authorities will consult to discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
3. If an Authority ("Receiving Authority") receives, via a party that is not a signatory to this MoU, non-public information originally provided by the other Authority ("Disclosing Authority") that is related to the Disclosing Authority's supervision and oversight of a Covered CCP and that the Receiving Authority is aware was obtained by the third party from the Disclosing Authority on a confidential basis, the Receiving Authority will use and treat the information in accordance with the terms of this MoU.
4. The restrictions in this Article do not apply to an Authority's use of information it obtains directly from a Covered CCP. However, where non-public information is provided to the Requesting Authority pursuant to an information-sharing request pursuant to Article 4 of this MoU, the restrictions in this MoU apply to the use of the information by that Requesting Authority.

## **Article 7**

### **Confidentiality and onward sharing of information**

1. Except as provided in Article 7(2)-(3) or pursuant to a legally enforceable demand, each Authority will keep confidential, to the extent permitted by law, non-public information shared under this MoU, requests made under this MoU, the contents of such requests, and any other matters arising under this MoU. The terms of this MoU are not confidential.
2. As required by law, it may become necessary for a Requesting Authority to share non-public information obtained under this MoU with a Governmental Entity in its jurisdiction. In such circumstances and to the extent permitted by law:

- a) The Requesting Authority intends to notify the Requested Authority; and
  - b) Prior to the Requesting Authority sharing the non-public information, the Requesting Authority will provide adequate assurances to the Requested Authority concerning the Governmental Entity's use and confidential treatment of the information, including, as necessary, assurances that:
    - i. The Governmental Entity has confirmed that it requires the information for a purpose within the scope of its jurisdiction; and
    - ii. The information will not be shared by the Governmental Entity with other parties without getting the prior written consent of the Requested Authority.
3. Except as provided in Article 7(2), the Requesting Authority must obtain the prior consent of the Requested Authority before disclosing non-public information received under this MoU to any non-signatory to this MoU. The Requested Authority will take into account the level of urgency of the request and respond in a timely manner. During an Emergency Situation, consent may be obtained in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification. If consent is denied by the Requested Authority, the Requesting and Requested Authorities will consult to discuss the reasons for withholding approval of such disclosure and the circumstances, if any, under which the intended disclosure by the Requesting Authority might be allowed.
  4. To the extent possible, the Requesting Authority intends to notify the Requested Authority of any legally enforceable demand for non-public information that has been furnished under this MoU. When complying with the demand, the Requesting Authority intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.
  5. The Authorities intend that the sharing or disclosure of non-public information, including deliberative and consultative materials, pursuant to the terms of this MoU, will not constitute a waiver of privilege or confidentiality of such information.

## **Article 8**

### **Successor authorities**

1. Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of the MoU shall apply to the successor authority or authorities performing those relevant functions, such successor authority or authorities shall become a signatory or signatories to this

MoU without the need for any further amendment to this MoU, and notice will be provided to the other Authority. This will not affect the right of any Authority to give written notice as provided in Article 11(2) that it no longer wishes to be a signatory to this MoU if it wishes to do so.

## **Article 9**

### **Amendments**

1. The Authorities intend to periodically review the functioning and effectiveness of cooperation arrangements between the Authorities. This MoU may be amended with the written consent of all signatories.

## **Article 10**

### **Execution of the MoU**

1. This MoU will enter into force on the date that it is signed by ESMA and the CFTC.

## **Article 11**

### **Termination**

1. This MoU will remain operative for an unlimited period of time.
2. If an Authority wishes to no longer be a signatory to this MoU, it shall provide thirty (30) calendar days prior written notice to the other Authority.
3. If an Authority gives such notice, the parties will consult concerning the disposition of any pending requests. If an agreement cannot be reached through consultation, cooperation will continue with respect to all requests for assistance that were made under the MoU before the expiration of the 30-day period until all requests are fulfilled or the Requesting Authority withdraws such request(s) for assistance.
4. In the event of termination of this MoU, information obtained under this MoU will continue to be treated in the manner described under Articles 6 and 7.

- 5. If this MoU is terminated without being substituted in a reasonable timeframe by an equivalent arrangement, pursuant to Article 25 of EMIR, ESMA will consider the withdrawal of recognition of the Covered CCPs.

**Signatures**

Date:

2/6/2016

<p>European Securities and Markets Authority</p>                <p><b>Steven Maijor Chairman</b></p>	<p>Commodity Futures Trading Commission</p>                <p><b>Timothy G. Massad Chairman</b></p>
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Appendix

**Contact Persons**

European Securities and Markets Authority	Commodity Futures Trading Commission
Name: Fabrizio Planta Telephone: + 33 1 5836 4270 Email: fabrizio.planta@esma.europa.eu	Name: Jeffrey M. Bandman Telephone: 202-418-5044 Email: jbandman@cftc.gov