Wells Fargo Bank, N.A.
London Branch
One Plantation Place
30 Fenchurch Street
London
EC3M 3BD

Tel: +44 (0)20 7149 8207
Fax: +44 (0)20 7929 4644

European Securities and Markets Authority
CS 60747
103 rue de Grenelle
75345 Paris Cedex 07, France

Email: post-trading@esma.europa.eu

16th September 2013

Dear Sirs,

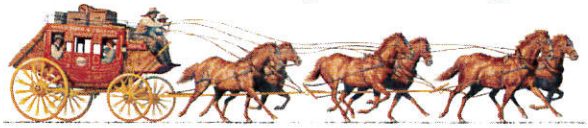
Response from Wells Fargo N.A. London Branch to the ESMA consultation paper entitled "Draft Regulatory Technical Standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR"

We fully support the objectives of EMIR and welcome the recent progress made between the European Commission (EC) and the U.S. Commodity Futures Trading Commission (CFTC) on the question of extra-territoriality of EMIR and Dodd-Frank, as expressed in the recent joint statement on the "Common Path Forward". With both the CFTC/EC and ODRG agreements supported by the G20 (as highlighted in the 5-6 Sept G20 Leaders' declaration), the ability of jurisdictions and regulators to defer to each other where regulations achieve similar outcomes is an important component in minimising the risk that the inconsistent treatment of bank branches and guaranteed subsidiaries between jurisdictions will result in regulatory arbitrage.

However the approach taken by ESMA does not adequately reflect the need to provide for third country branches which are established within the EU with a choice as to which regulation to comply with in respect of transactions with third country entities where appropriate to do so.

The draft RTS potentially creates significant operational difficulties for third country branches established within the EU as they may have to comply with both home state OTC derivative regulation, EMIR or another third country OTC derivative regime dependent upon the location of the counterparty. The operational difficulties in building systems to meet related but different regulatory requirements could limit the viability of branches to facilitate client transactions thus ultimately limiting the role 3rd country branches as providers of liquidity and resultant market disruption.

As a third country branch we would look for ESMA to work with other regulators to harmonise the approach to transactions entered into between local branches of third country entities and to enable them to choose which regulation transactions should be subject to.



We would suggest two means by which this could be achieved in a way which is not inconsistent with the text of EMIR.

a) definition of Financial Counterparty in EMIR is an entity "authorised in accordance with" various directives, including the Banking Consolidation Directive (Directive 2006/48/EC. An EU branch should be able to be designated as a financial counterparty without affecting the entity's status as a third country entity. It would do so by reliance on the fact that it is authorised under local statute in accordance with the relevant Directive. This should be a voluntary self-designation which need only be acknowledged by the national competent authority without affecting those branches which do not self-designate in this way. It is not intended to be inconsistent with the treatment of third country entities – we would therefore ask ESMA to provide an acknowledgement in the recital to the draft RTS that branches are not precluded from doing so.

b) We propose that ESMA broaden in the RTS the definition of transactions which have a direct substantial and foreseeable effect in the EU so as to include transactions entered into by EU branches which consider that, because of factors such as the volume of trades, size of branch, nature of regulatory relationship with the relevant national regulators and location of risk, all its trades with third country entities should be seen as having a direct, substantial and foreseeable effect in the EU. This would be consistent with a prudent self-regulatory approach to regulatory requirements. This provision need only apply to branches who had made such a determination and who opted in to applicability of ESMA. Because ESMA have excluded third country entity trades generally, we do not think that it is necessary to have set criteria for opting in for these reasons.

This would still be subject to the parties' ability to decide to disapply EMIR using Article 13(3), and it would be consistent with the CFTC's treatment of non-US branches of US swap dealers, where Dodd Frank transaction rules may be disapplied by means of substituted compliance.

We would therefore propose an additional section to the RTS:

"4. At least one of the counterparties enters into the OTC derivative contract via a branch in the EU which, by reason of the volume of trades, size of branch, location of risk and/or other relevant factors of either that branch or of the aggregate activities of the branches established in the EU has determined that OTC derivative contracts entered into by such branch have a direct, substantial and foreseeable effect in the EU."

We would be happy to discuss the above in more detail and would welcome the opportunity to do so.

Yours faithfully

Michael Hipwell
Compliance Manager
Wells Fargo Bank, N.A. – London Branch