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| Response Form to the Consultation Paper  |
| Technical Advice on Comparable Compliance under article 25a of EMIR  |

**Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 July 2019.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_TACC\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_TACC\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TACC\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open consultations” 🡪 “Consultation on Position limits and position management in commodities derivatives”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from central counterparties (CCPs), clearing members and clients of clearing members.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | CME Group Inc. |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |[ ]
| Country/Region | North-America |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_TACC\_1>

CME Group Inc. (“CME Group”), the parent of Chicago Mercantile Exchange Inc. (“CME”), a registered derivatives clearing organization (“DCO”) with the Commodity Futures Trading Commission (“CFTC”), appreciates the opportunity to comment on the European Securities and Markets Authority’s (“ESMA”) consultation report on *Technical Advice on Comparable Compliance under article 25a of EMIR* (“the Consultation Report”).[[1]](#footnote-2) CME’s clearing house division offers clearing and settlement services for exchange-traded futures and options on futures contracts, as well as certain swaps, including interest rate swap products.

CME Group believes that the European Union (“E.U.”) should adopt a policy of mutual regulatory deference with respect to the oversight of non-E.U. based central counterparties (“CCPs”).[[2]](#footnote-3) For decades, such a policy has allowed market participants around the world to hedge their business risk using exchange-traded derivatives (“ETD”) markets. It also supports efficient markets by generating deep pools of liquidity, encouraging efficient price discovery, and reducing market fragmentation. The CFTC has long permitted CCPs domiciled outside of the United States (“U.S.”) to clear foreign (i.e., non-U.S.) futures for U.S. persons without being subject to CFTC supervision or oversight.[[3]](#footnote-4) In particular, the CFTC has for decades relied on already issued outcomes-based comparability determinations for decades for non-U.S. regulators or exchanges and the firms they oversee, including, but not limited to, for France, Germany, and Spain. An outcomes-based approach is designed to ensure that a CCP is subject to an appropriate regulatory framework, while acknowledging specific requirements may differ in different jurisdictions to accommodate differences in regulatory and market structure. Furthermore, in 2016, after extensive negotiations, the CFTC and E.U. reached an important milestone in furthering mutual regulatory deference by entering into an equivalence agreement, which addresses the E.U.’s key areas of focus with respect to addressing risk that U.S. CCPs may pose to the E.U. This agreement was followed by the E.U.’s recognition of numerous individual U.S. DCOs, including CME, so that E.U. market participants can efficiently access U.S. futures and swaps markets for their hedging needs.

**Executive Summary**

EMIR 2.2 requires that a framework for comparable compliance be established for non-E.U. CCPs designated as systemically important to the E.U. — which under EMIR 2.2 should be applied in accordance with the long-standing principle of mutual regulatory deference.[[4]](#footnote-5) In contrast, the Consultation Report sets forth an inconsistent and deleterious approach to making the EMIR 2.2 required comparability assessments for those non-E.U. CCPs designated as systemically important to the E.U. Ignoring the assessment mechanism embodied in EMIR 2.2 based on comparable regulation to assess non-E.U. CCPs based on their overall regulatory structures, ESMA’s proposed approach departs from traditional notions of comparability by mandating that non-E.U. CCPs designated systemically important to the E.U. comply with the majority of specific laws and regulations adopted for E.U. CCPs under EMIR.[[5]](#footnote-6) In particular, by proposing a requirement-by-requirement approach for determining comparability, rather than a truly outcomes-based approach, ESMA has disregarded the notion of “mutual recognition” based on comparability, and replaced that with rigid conformity to E.U. requirements. This requirement-by-requirement, “one size fits all” approach ignores the goal of achieving desired regulatory outcomes that accord with international standards. It also ignores that regulatory regimes will necessarily differ jurisdiction-to-jurisdiction, and that these differences do not necessarily amount to deficiencies and must be allowed for inherently international markets to function.

Put simply, ESMA's proposed approach disregards the fact that the E.U. has already determined some jurisdictions’ regulatory regimes to be "equivalent" and therefore at least “comparable.” Replacing those determinations, such as the 2016 CFTC-E.U. agreement, with ESMA's new requirement-by-requirement "identical" regulation review would be contrary to the intent underlying EMIR 2.2 as we understand it. Further, for identified “core” provisions, ESMA proposes to mandate that the requirements of the non-E.U. CCP’s home jurisdiction be equal to or at least as stringent as the corresponding E.U. requirements at all times. This results in the direct application of the “core” provisions by non-E.U. CCPs either as their primary standard or a floor to their risk management practices. For this reason, ESMA’s proposed comparable compliance standards represent a step backward from the international regulatory deference on which markets have relied and international trust has been built.

While an objective and quantifiable tiering test for determining a non-E.U. CCP’s systemic importance to the E.U. might safeguard against this, ESMA has not proposed such an approach in its consultation paper on *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR*, as we explain in our comment letter to the consultation.[[6]](#footnote-7) Despite the fact that ESMA does not, and will not, supervise any E.U. CCPs under EMIR 2.2 or its consultations, the proposed rules will enable ESMA to exercise primary oversight over non-E.U. CCPs like CME. E.U. policy-makers considered granting ESMA supervisory authority over E.U. CCPs during the EMIR 2.2 legislative process, and affirmatively determined it was more appropriate to defer to competent local authorities in E.U. Member States. Deference to non-E.U. local regulators is no less warranted, especially in the case of regulators such as the CFTC, who exercise vigorous oversight pursuant to a regulatory regime the European Commission has already found to be equivalent. In fact, this deference is more justified because jurisdictions found equivalent by the European Commission have not voluntarily agreed to the strictures of membership in the E.U. We urge ESMA to reconsider its proposed comparable compliance approach, and instead pursue an outcomes-based approach that is more clearly aligned with the legislative intent behind EMIR 2.2, affording mutual and appropriate deference to local regulatory authorities.

The Consultation Report proposes a framework that will lead to the imposition of requirements on non-E.U. CCPs that were developed to address the legal regime and market structures and practices of the E.U. In some instances, this will force non-E.U. CCPs to either comply with requirements that are inappropriate for their domestic markets and incompatible with their domestic legal regimes, potentially overriding the CCP’s local regulatory regime, or alternatively, these CCPs may cease offering their risk management tools in the E.U. With respect to the U.S., these E.U. regulations would supplant statutory provisions that Congress has enacted for U.S. DCOs, as well as CFTC regulations that the CFTC adopted with great care and based on its extensive regulatory experience. If non-E.U. CCPs are unable to provide services to E.U. customers for these reasons, it could lead to wider bid-ask spreads, weakened price discovery, and reduced ability for E.U. customers to manage their business risk, all of which undermine efficient markets and could ultimately threaten financial stability and impose unnecessary costs on local farmers, producers, and other end-users. ESMA’s proposals fail to embrace E.U. and U.S. policy-makers’ cooperative approach to cross-border supervision of derivatives markets[[7]](#footnote-8) and threaten to harm healthy, well-regulated global markets. We respectfully urge ESMA to reconsider its proposed comparable compliance approach, and instead pursue an approach that is more clearly aligned with the legislative intent behind EMIR 2.2, basing its assessment on the existence of similar regulatory outcomes.

ESMA's cost-benefit analysis for its proposed approach to comparable compliance suffers from the same flaws as the analysis done for the consultation paper on *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR*. Here too, the risks and burdens that ESMA’s proposal creates are substantial, yet ESMA does not adequately quantify or explain them. These failings deprive market participants of the opportunity to fully understand the costs of ESMA’s proposed comparable compliance approach and to provide an informed response. The costs of adopting standards that are not tethered to systemic risk to the E.U. and are contrary to the spirit of mutual regulatory deference would exceed any putative benefits of ESMA's proposed approach. For these reasons, it is imperative that ESMA issue a detailed assessment of the costs and benefits of its comparable compliance proposal.

<ESMA\_COMMENT\_TACC\_1>

**Questions**

1. : Do you agree on the overall approach proposed for ESMA’s assessment for comparable compliance? What other considerations should be reflected in the assessment for comparable compliance?

<ESMA\_QUESTION\_TACC\_1>

CME Group does not agree with the proposed approach for ESMA’s assessment for comparable compliance. For the reasons below, CME Group respectfully urges ESMA to reconsider its proposed approach to comparable compliance, primarily because it is not, in fact, premised on comparability. EMIR 2.2 requires ESMA to take into account existing European Commission equivalence decisions, and conditions those decisions may impose, in determining whether a non-E.U. CCP is subject to requirements in its home country that are comparable to those of the E.U.[[8]](#footnote-9) In the Consultation Report, however, ESMA effectively overrides those European Commission decisions by dividing requirements for non-E.U. CCPs into “core” and “non-core” provisions without any legal justification. Further, for “core” provisions ESMA proposes to mandate that the requirements of the non-E.U. CCP’s home jurisdiction be equal to or at least as stringent as the corresponding E.U. requirements at all times.

ESMA should determine whether a non-E.U. jurisdiction’s requirements are comparable to EMIR’s by first relying on whether the European Commission has already determined that those requirements are “equivalent” to EMIR’s requirements. If the European Commission has made such an equivalence decision, ESMA should accept its findings. Of course, where the European Commission has made an equivalence decision subject to the compliance of a non-E.U. CCP with certain conditions, it would be appropriate for ESMA to confirm compliance with those conditions in a manner that defers to the current recognition procedures. But further re-litigating the European Commission’s equivalence decision is duplicative and unnecessary.

ESMA proposes an approach that in substance and process would erase determinations the European Commission has already made, upending the concept of comparability as it has existed for decades in international markets. ESMA’s proposed standard for comparability defies the plain meaning of “comparable” — which is “similar” and “of equivalent quality” — by effectively mandating that the majority of requirements be identical. ESMA's proposed method for determining comparability calls for an assessment on a requirement-by-requirement basis, rather than examining whether a non-E.U. CCP’s home jurisdiction’s requirements produce comparable outcomes.

ESMA's proposed approach contravenes the spirit of mutual regulatory deference and fails to appreciate the fundamental reality that different jurisdictions will necessarily have legal regimes, market structures and practices that, while different in some respects from those of the E.U., are nevertheless consistent with internationally agreed upon standards for financial stability and consistent with the E.U.’s own requirements. If ESMA were to implement its current proposal, it could fragment markets, spur protectionist reactions in other jurisdictions, and undermine trust in the E.U.’s willingness to honor its international agreements.

**CME Group Key Concern: The proposal in the Consultation Report is contrary to EMIR 2.2 because it fails to provide for comparable, not identical, compliance, adopts a definition of “comparable” that is contrary to the common definition of the term, and reneges on E.U.’s international obligations under its commitments as part of the G20.**

EMIR 2.2 permits a non-E.U. CCP that has been designated systemically important to the E.U. to satisfy the requirement to comply with Article 16 and Titles IV and V of EMIR through its compliance with comparable requirements in its home country.[[9]](#footnote-10) ESMA takes the regulatory requirements for E.U. CCPs as set out in EMIR and introduces an arbitrary distinction between those requirements as “core” and “non-core” provisions. This distinction is not grounded in the EMIR 2.2. legislative text, international regulator norms, or the commonly held definition of “comparability”. ESMA provides neither a legal basis for any requirement to be identified as core, nor any quantitative or qualitative analysis. Further, ESMA proposes that for a non-E.U. jurisdiction’s requirements to be assessed as “comparable” to the core provisions of EMIR, those requirements must be “equal or at least as strict or conservative as, the corresponding” EMIR requirements at all times.[[10]](#footnote-11) Where a requirement is not equal or at least as strict or conservative as the EMIR requirement, the non-E.U. CCP must adopt the EMIR requirement as a floor or minimum, through rules, policies, and procedures.[[11]](#footnote-12)

As noted above, the common definition of “comparable” is “similar.”[[12]](#footnote-13) Applying this non-controversial definition requires that the non-E.U. jurisdiction’s requirements be only “***similar***” in outcomes to the corresponding EMIR requirements in order to make a comparability determination. Instead, the Consultation Report proposes to redefine the common definition of “comparable” so as to no longer mean “similar” and to instead mean “the same” or “greater than.” The text of EMIR 2.2 does no support transforming and distorting the plain meaning of the word "comparable" in this manner.

EMIR 2.2 requires that the European Commission adopt a delegated act that specifies “the minimum ***elements*** to be assessed for the purposes” (emphasis ***added***) of determining comparable compliance, but the Consultation Report instead identifies minimum ***provisions*** of EMIR where identical compliance must be found.[[13]](#footnote-14) This does not satisfy the requirements of EMIR 2.2, and the mandate that the European Commission has given to ESMA. In the Consultation Report, ESMA acknowledges that its proposed approach is contrary to EMIR 2.2. ESMA states that an “interpretation…whereby any requirement in the third country would be considered non-comparable if it is not equal or at least as strict…or conservative… as the corresponding EMIR requirement, ***would not be in accordance with Article 25a(3) of EMIR, where such requirements still achieve the regulatory objectives***” (emphasis ***added***). As such, ESMA’s proposal does not comport with E.U. law to the extent that it requires non-E.U. CCPs designated as systemically important to the E.U. to comply with the majority of requirements under EMIR, even where the CCP is subject to requirements that achieve similar regulatory objectives.

By requiring that a non-E.U. jurisdiction’s requirements be “the same” or “greater than” the corresponding EMIR requirements, ESMA’s proposal also contradicts E.U. Member States’ commitments as part of the Group of Twenty’s (“G20”) commitment to adopting an approach of mutual regulatory deference with respect to the cross-border oversight of global derivatives markets. In September 2009 and again in 2013, the G20 declared “that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on ***similar*** outcomes” (emphasis ***added***).[[14]](#footnote-15) In line with the objectives of the G20 to commit to an approach of mutual regulatory deference, local policy-makers must be able to adopt requirements that are appropriate for the market structures they oversee and the institutions they regulate and supervise.

Different jurisdictions will naturally have different requirements for a number of reasons, including legal regime, market structure, and trading practices. It would be unreasonable to expect precise congruence in regulatory requirements in a global market. If one jurisdiction’s requirements are not the same or greater than those of another jurisdiction at all times, that does not imply that those requirements deviate from internationally agreed upon standards. The rationale for the Committee on Payments and Market Infrastructures (“CPMI”) and International Organization of Securities Commissions’ (“IOSCO”) *Principles for financial market infrastructures* (“PFMIs”), which set out globally agreed upon standards for CCP risk management, is to allow policy-makers to tailor their regulatory frameworks to the unique characteristics of their markets.[[15]](#footnote-16) For example, given the characteristics of their home-jurisdiction’s market structure, some policy-makers may elect to prioritize credit risk to banks, thereby requiring CCPs to secure the vast majority of their cash due to the fact that their local banks and banking laws are not sufficiently robust with regard to protections for depositors. In contrast, jurisdictions with stronger local banks and banking laws, such as enhanced protections for depositors, may focus on liquidity risk because they view that factor as the more significant and likely risk for CCPs to manage.

**CME Group Key Concern: The proposal in the Consultation Report does not adopt an outcomes-based approach.**

ESMA’s proposals are internally inconsistent with its own narrative in the Consultation Report. In the Consultation Report, ESMA states that a non-E.U. jurisdiction’s requirements should not need to be identical to the requirements under EMIR but should be assessed “***on an outcome-basis***” (emphasis ***added***).[[16]](#footnote-17) However, ESMA’s proposal is for comparable compliance to be assessed on a requirement-by-requirement basis, including by mapping a non-E.U. jurisdiction’s requirements to those of EMIR on a paragraph-by-paragraph basis. This ignores, and prevents ESMA from taking, an outcomes-based approach.

CME Group disagrees with this requirement-by-requirement approach to the execution of a comparable compliance assessment. The way regulatory requirements work together cannot be accounted for where they are evaluated on a requirement-by-requirement basis. For example, margin required at a CCP is dictated by a variety of factors, including, but not limited to, net versus gross customer margining, margin period of risk, and the use of coverage level or confidence interval. Without considering the impact of these factors collectively on a CCP’s margin levels, ESMA may incorrectly assume that one jurisdiction’s standards are more conservative than another. ESMA must ensure that its approach to comparable compliance is truly based on outcomes. A requirement-by-requirement approach does not allow for this because that type of approach fails to consider the relationship between requirements.

**CME Group Key Concern: The proposal in the Consultation Report is contrary to EMIR 2.2 because it fails to take into account the European Commission’s equivalence decisions.**

As part of its assessment of the comparability of a non-E.U. jurisdiction’s requirements ESMA is required by EMIR 2.2 to “take into account” the applicable European Commission equivalence decision and any conditions that decision may impose.[[17]](#footnote-18)

While this might have been inadvertent, ESMA has failed to follow the instructions under EMIR 2.2. Where the European Commission has determined that the legal and regulatory requirements of a jurisdiction outside the E.U. are equivalent to those under EMIR, as evidenced by the adoption of an equivalence decision, it cannot follow logically that the same legal and regulatory requirements are no longer comparable with no change in circumstances. “Equivalence” implies an even higher bar of similarity than “comparability.”[[18]](#footnote-19) And, given the plain English definition of “comparable”, for ESMA to now find such requirements to be non-comparable would render the European Commission’s prior equivalence decision null and void, and supersede it with ESMA’s own assessment.[[19]](#footnote-20)

In issuing an equivalence decision, the European Commission may have included conditions to which the application of that decision may be subject. Where the European Commission has adopted an equivalence decision with conditions, the equivalence of the non-E.U. jurisdiction is dependent on CCPs from that jurisdiction implementing rules and procedures that address the conditions. In that circumstance, the proper approach is for ESMA’s assessment of comparable compliance to be limited to those requirements of EMIR for which the European Commission has included conditions in its equivalence decision.

ESMA’s attempts to differentiate between the European Commission’s equivalence decision and ESMA’s proposed assessment for comparable compliance are not persuasive. ESMA notes that an equivalence decision is undertaken at the jurisdictional-level, while proposing an assessment for comparable compliance that would be undertaken at the CCP-level (i.e., entity-based).[[20]](#footnote-21) By requiring that an assessment be conducted at a CCP-level, ESMA proposes that CCPs subject to the local legal and regulatory requirements of a jurisdiction that the European Commission has determined to be equivalent may still not be “adequately” equivalent and that they are not subject to effective supervision and enforcement. Yet, in order to issue the existing equivalence decision the European Commission had to first determine that CCPs in the given jurisdiction ***are*** subject to the requirements that the European Commission has determined to be equivalent, ***and are*** subject to effective supervision and enforcement on an ongoing basis.[[21]](#footnote-22) Effectively, ESMA proposes that it should disregard the European Commission’s decision, by re-assessing whether the non-E.U. jurisdiction provides for effective supervision and enforcement. This approach is especially problematic when taken for non-E.U. jurisdictions that perform detailed, annual examinations of their CCPs’ compliance with local regulatory standards pursuant to their statutory obligations. In these cases, the Consultation Report suggests that ESMA is better placed to evaluate the compliance of a non-E.U. CCP with a non-E.U. regulatory framework than the local regulatory authority which, on an ongoing basis, spends significant time and dedicated resources to examining their local CCPs. This suggestion has significant flaws.

**CME Group Key Concern: The proposal in the Consultation Report ignores proportionality regarding E.U. currency clearing.**

In addition to the areas noted above, the Consultation Report conflicts with and exceeds the scope of EMIR 2.2, and ESMA ignores its mandate from the European Commission in several other ways. In particular, EMIR 2.2 requires that ESMA should consider the extent to which the financial instruments that a non-E.U. CCP clears are denominated in E.U. currencies when conducting its assessment for comparable compliance.[[22]](#footnote-23) In its request for technical advice, the European Commission specifically invited ESMA to reflect on “how to ensure proportionality when carrying out its assessment [for comparable compliance] by considering the extent to which the financial instruments cleared by” a non-E.U. CCP that has been designated systemically important to the E.U. are denominated in E.U. currencies.[[23]](#footnote-24) Yet, the Consultation Report does not propose any proportionality based on the level of clearing for financial instruments denominated in E.U. currencies.

To conform with EMIR 2.2, and the European Commission’s mandate, ESMA’s approach to assessing comparable compliance should consider the degree to which outcomes need to be similar based on the level of clearing by a non-E.U. CCP for financial instruments denominated in E.U. currencies. ESMA fails to comply with this mandate.

Given CME Group’s key concerns, ESMA should reconsider its approach to comparable compliance in the Consultation Report, with a focus on ensuring that the proposals therein conform to EMIR 2.2’s requirements.

<ESMA\_QUESTION\_TACC\_1>

1. : Do you agree that ESMA should accept a requirement in a third country as comparable to a corresponding requirement under EMIR where it is assessed to be, on an outcome basis, equal or at least as strict or conservative as, the corresponding requirement under EMIR?

<ESMA\_QUESTION\_TACC\_2>

For the reasons articulated in CME Group’s response to Q1, in order for ESMA’s approach to comparable compliance to comply with EMIR 2.2 and the E.U.’s international commitments, ESMA should revise Article 1 of its draft technical advice under the Consultation Report as follows:

*“1. For the purposes of the assessment referred to in Article 25a(1) of Regulation (EU) No 648/2012, ESMA shall take into account the following:*

1. *the information provided by a CCP in its resoned request for comparable compliance, as further specified in Article 2 of this Regulation;*
2. *~~the minimum elements specified in Article 3 of this Regulation;~~*
3. *~~the guidance specified in Article 4 of this Regulation~~.*

*6. ESMA shall consider ~~a~~ requirement****s*** *applicable in a third country as comparable to ~~a~~ corresponding requirement****s*** *under Regulation (EU) No 648/2012 ~~only~~ where ~~it is~~* ***they are*** *assessed to be, on an outcome basis~~, either:~~*

1. *~~equal or at least as strict or conservative as,~~ at least* ***similar to*** *the ~~corresponding~~ requirement****s*** *under Regulation (EU) No 648/2012~~, or~~*
2. *~~at least similar to the corresponding requirement under Regulation (EU) No 648/2012, in accordance with the in Articles 3 and 4 of this Regulation~~.”*

\*Deletions are ~~struckthrough~~ and additions are **bolded** and underlined.

In line with the revisions to Article 1 reflected above, ESMA should delete Articles 3 and 4 of its draft technical advice under the Consultation Report, and revise them as follows:

*“****1. When assessing the comparability of provisions of Regulation (EU) No 648/2012 and related Delegated Regulations (EU) No 152/2013 and No 153/2013, the assessment should be limited to the specific condition or conditions introduced by the European Commission in the implementing act adopted in accordance with Article 25(6) of Regulation (EU) No 648/2012.****”*

\*Deletions are ~~struckthrough~~ and additions are **bolded** and underlined.

<ESMA\_QUESTION\_TACC\_2>

1. : Do you agree that the minimum elements to be specified in the Commission’s delegated act should include the core provisions listed in Table 1? What other considerations should be included as minimum elements of the assessment?

<ESMA\_QUESTION\_TACC\_3>

Please refer to CME Group’s responses to Q1 and Q2. In line with these responses, no provisions under EMIR should be identified as core provisions on an *ex ante* or *ex post* basis for the purposes of comparable compliance. The comparable compliance assessment should be limited to the specific condition or conditions introduced by the European Commission in the implementing act adopted in accordance with Article 25(6) of EMIR (i.e., equivalence decision).

<ESMA\_QUESTION\_TACC\_3>

1. : Do you agree that, where a third country requirement can be on average, but not always, equal or at least as strict or conservative as the core provisions listed in Table 1, it can still be accepted as comparable provided that the Tier 2 CCP adopts the corresponding EMIR requirement as a floor or minimum requirement, through adequate rules, policies and procedures?

<ESMA\_QUESTION\_TACC\_4>

Please refer to CME Group’s responses to Q1 and Q2. For an affirmative determination of comparable compliance for a non-E.U. jurisdiction’s requirements (even those provisions specified under Table 1), the requirements should only be required to be “***similar****”* to the requirements under EMIR on an outcomes-driven basis. For the avoidance of doubt, the comparable compliance assessment should be limited to the specific condition or conditions introduced by the European Commission in the implementing act adopted in accordance with Article 25(6) of EMIR (i.e., equivalence decision).

ESMA proposes that where a requirement is not equal or at least as strict or conservative as the EMIR requirement at all times, the non-E.U. CCP must adopt the EMIR requirement as a floor or minimum, through rules, policies, and procedures.[[24]](#footnote-25) As noted above, the common definition of “comparable” requires that the non-E.U. jurisdiction’s requirements be only “***similar***” in outcomes to the corresponding EMIR requirements in order to make a comparability determination. As noted above, imposing E.U. requirements as a floor or minimum requirement redefines the common definition of “comparable” so as to no longer mean “similar” and to instead mean “the same” or “greater than.” The text of EMIR 2.2 does not support transforming and distorting the plain meaning of the word "comparable" in this manner.

By requiring that a non-E.U. jurisdiction’s requirements be “the same” or “greater than” the corresponding EMIR requirements, ESMA is also proposing an approach that contradicts the G20 commitment to deference based on ***similar*** outcomes.[[25]](#footnote-26) As noted in our response to Q1, different jurisdictions will have different requirements for a variety of legitimate, jurisdiction-specific reasons, and no regulator could reasonably expect precise conformity among regulatory requirements in those jurisdictions. However, just because one jurisdiction’s requirements are not the same as or greater than those of another jurisdiction at all times, does not mean that those requirements do not satisfy internationally agreed upon standards, a principle recognized by CPMI-IOSCO in their PFMIs.

<ESMA\_QUESTION\_TACC\_4>

1. : Do you agree that, when a third country requirement is similar but not always equal or at least as strict or conservative as, the provisions not included in the minimum elements and listed in Table 2, it can still be considered to be comparable where it substantially achieves the respective regulatory objectives in accordance with the guidance specified in Table 2?

<ESMA\_QUESTION\_TACC\_5>

Please refer to CME Group’s responses to Q1 and Q2. In all cases (not just those provisions specified in Table 2), for an affirmative determination of comparable compliance for a non-E.U. jurisdiction’s requirements, the requirements should only be required to be “***similar***” to the requirements under EMIR on an outcomes-driven basis. For the avoidance of doubt, the comparable compliance assessment should be limited to the specific condition or conditions introduced by the European Commission in the implementing act adopted in accordance with Article 25(6) of EMIR (i.e., equivalence decision).

<ESMA\_QUESTION\_TACC\_5>

1. : Do you agree on the modalities and conditions proposed for conducting the assessment for comparable compliance? What other considerations should be included in such modalities and conditions?

<ESMA\_QUESTION\_TACC\_6>

To the extent that a comparable compliance assessment is conducted for provisions where conditions have been included in an equivalence decision for a jurisdiction, CME Group agrees with the conditions with respect to the timing of requesting an assessment outlined in Paragraph 34 of the Consultation Report.

Regarding the modalities of carrying out the assessment under Paragraph 33, CME Group addresses its comments on a given non-E.U. CCP’s request for comparable compliance in its responses to Q7 and Q8.

<ESMA\_QUESTION\_TACC\_6>

1. : Do you agree that the CCP reasoned request shall include (i) the mapping of the requirements under EMIR for which comparable compliance is requested against the requirements in the third country, whereby each relevant article of EMIR and related RTS (paragraph by paragraph) should be mapped with the corresponding requirement in the third country achieving the same regulatory objective, and (ii) per each mapped requirement, the reason why compliance with a requirement in the third country satisfies the corresponding requirement under EMIR?

<ESMA\_QUESTION\_TACC\_7>

In line with CME Group’s view that taking a requirement-by-requirement approach to comparable compliance is inappropriate and contrary to EMIR 2.2, CME Group does not agree that a non-E.U. CCP that has been designated systemically important to the E.U. should be required to include in its request for comparable compliance: i) “[t]he mapping of the requirements in the third country for which comparable compliance is requested against the EMIR requirements, i.e. each EMIR requirement (each relevant provision in EMIR Articles, paragraph by paragraph)…mapped with the corresponding requirement in the third country achieving the same regulatory objective”;[[26]](#footnote-27) or ii) “[p]er each mapped requirement, the reason why compliance with that requirement satisfies the corresponding EMIR requirement.”[[27]](#footnote-28)

To the extent that a comparable compliance assessment is conducted for provisions where conditions have been included in an equivalence decision for a jurisdiction, the comparable compliance framework should take into account prior recognition procedures on which market participants have successfully relied. The level of mapping of requirements proposed — not only requirement-by-requirement but paragraph-by-paragraph — does not yield a framework that is implemented on an outcomes-driven basis. For the reasons noted in CME Group’s response to Q1, the format of the request for comparable compliance should allow for requirements to be assessed holistically.

CME Group recommends that the format for a comparable compliance request instead be broken down by categories of regulatory objectives under EMIR (e.g., margining, liquidity risk management, default management, etc.) relative to applicable requirements of the requesting non-E.U. CCP. This would provide for comparable compliance on an outcomes-driven and factual basis in line with the legislative text of EMIR 2.2.[[28]](#footnote-29)

In Article 3 of the draft technical advice under the Consultation Report, ESMA proposes that a non-E.U. CCP requesting comparable compliance should submit its request within a deadline set by ESMA. This deadline must recognize the significant amount of work that the CCP will need to complete its request for a comparable compliance determination. Even if ESMA were to adopt the modified approach that CME Group suggests above, it would likely take more than 6 months for an application for comparable compliance to be compiled. The approach that ESMA currently proposes in its Consultation Report would require significantly longer, on the order of 12 to 18 months. It is imperative that ESMA does not prevent non-E.U. CCPs from applying for comparable compliance by setting the deadline too aggressively, such that no CCP could realistically have a chance of applying or a CCP is prevented from operating while a comparable compliance assessment is pending.

<ESMA\_QUESTION\_TACC\_7>

1. : Do you agree that ESMA may also request the CCP to include in its reasoned request (i) an opinion of the third country supervisory authority on the accuracy of the representation of the requirements applying in the third country, (ii) where necessary, a certified translation of relevant requirements in the third country, and (iii) a legal opinion confirming the accuracy of the mapping provided?

<ESMA\_QUESTION\_TACC\_8>

CME Group does not agree that ESMA should be able to request that a non-E.U. CCP designated systemically important to the E.U. include in its request for comparable compliance an opinion of its supervisory authority on the accuracy of the representation of the requirements applying in its jurisdiction or a legal opinion confirming the accuracy of the mapping provided.

Consistent with CME Group’s remarks on the duplicative nature of the comparable compliance assessment in our response to Q1, requiring an opinion from a non-E.U. supervisory authority, or a legal opinion on the accuracy of the relevant CCP’s representation of the jurisdictional requirements duplicates the work done by the European Commission when adopting an equivalence decision. The European Commission will have already determined pursuant to adopting an equivalence decision that the legal and supervisory arrangements for the non-E.U. CCP are equivalent to the requirements under EMIR and that such CCP is subject to effective supervision and enforcement on an ongoing basis.

Even without taking into consideration previous equivalence decisions, it is our understanding that local supervisory authorities and policy-makers maintain regular dialogue on regulatory best practices and supervisory approaches in their local jurisdictions. To the extent that ESMA may have questions about the regulatory and supervisory framework applied in a jurisdiction outside the E.U., it can leverage this regular engagement on a bilateral or multi-lateral basis. Requiring a non-E.U. supervisory authority to provide an opinion on the accuracy of a CCP’s analysis of its own regulatory framework would duplicate the work being done by supervisory authorities and policy-makers globally as part of this engagement. It would also duplicate the work of the European Commission in issuing an equivalence decision. Further, such an opinion would place a significant resource burden on non-E.U. supervisory authorities; in particular, those who already conduct detailed assessments of their CCPs’ compliance with their regulatory regimes (e.g., as part of annual examinations). Instead, the positive opinion of a non-E.U. supervisory authority can be inferred from the fact that the relevant non-E.U. CCP maintains registration in its home jurisdiction. A non-E.U. CCP’s good standing with its home regulator is a reasonable proxy for the accuracy of a CCP’s understanding of its own regulatory framework.

<ESMA\_QUESTION\_TACC\_8>

1. : Do you agree on the cost benefit analysis annexed to the draft technical advice? Are there other considerations to be reflected in the cost benefit analysis?

<ESMA\_QUESTION\_TACC\_9>

CME Group does not agree with the cost-benefit analysis annexed to the draft technical advice. Due to the lack of information included in the cost-benefit analysis, CME Group has been unable to undertake a meaningful assessment of the analysis.

In its request for technical advice, the European Commission invited ESMA to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. ESMA is required to provide the European Commission with a description of the problem, the objectives of the technical advice, possible options for consideration, and a comparison of the main arguments for and against the considered options. The cost-benefit analysis is required to justify ESMA’s choices vis-à-vis the main considered options. The cost-benefit analysis presented in the Consultation Report fails to meet these requirements.

Rather than providing a robust assessment of the costs and benefits of ESMA’s proposals, the cost-benefit analysis presented in the Consultation Report appears to be a recitation of earlier parts of the Consultation Report and relies heavily on conclusory justifications given when introducing the proposals. While CME Group offers no opinion on the legal sufficiency of this approach, we are particularly surprised by the lack of any attempt to quantify the costs of compliance with the proposals, which is odd for an agency that regularly engages in economic analysis. The lack of robust analysis is particularly problematic where the costs would fall exclusively on CCPs outside of the E.U. and include the potential for a high level of duplication for many, if not most CCPs.

ESMA’s proposals are inconsistent with the needs of global financial markets and thus, could have significant global costs. They could lead to wider bid-ask spreads and greater volatility, while potentially imposing unnecessary costs on local farmers, producers, and other end-users seeking to use futures markets for hedging purposes. By preventing CCPs, in conjunction with their local regulators, from adopting practices that enable them to best manage the unique risks associated with their domestic markets, ESMA’s proposals may weaken the stability of the global financial system, especially in emergency or stressed circumstances.

Respondents to the Consultation Report are unable to appropriately consider the costs and benefits of the proposals under the Consultation Report, as ESMA has made no attempt to accurately quantify the attendant costs and benefits. Before finalizing its technical advice to the European Commission, it is imperative that ESMA provide a detailed assessment of the costs and benefits to the public so that interested parties may submit comments that challenge, defend, or provide additional support for the assessment.

<ESMA\_QUESTION\_TACC\_9>

1. European Securities and Markets Authority, *Consultation Report*, *Technical Advice on Comparable Compliance under article 25a of EMIR* [hereafter, “*Consultation Report*”] (May 2019), *available at* <https://www.esma.europa.eu/sites/default/files/library/esma70-151-2179_cp_ta_on_comparable_compliance.pdf>. [↑](#footnote-ref-2)
2. CME Group Inc., Letter in response to a *Proposal for Amending Regulations Regarding the Recognition of Third-Country Central Counterparties* (Oct. 2017), available at <https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-331/feedback/F7443_en?p_id=30988>. [↑](#footnote-ref-3)
3. In this letter, for ease of reference, CME Group has adopted the nomenclature used in the E.U. of exchange-traded derivatives (or “ETD”) to describe the different kinds of products that may be cleared. These terms do not translate perfectly under U.S. law which, as a matter of statute enacted by Congress, treats futures and swaps separately and differently for many important regulatory purposes. For example, under U.S. law all futures must be ETD but only some swaps must be ETD. In addition, the same broad and longstanding mutual regulatory deference approach for cross-border clearing of futures that the CFTC has taken has not yet been adopted for swaps clearing, although the CFTC is considering new proposals to move more in this salutary direction. These considerations illustrate that each jurisdiction has differing approaches to these regulatory matters which often make it difficult, if not impossible, to achieve identical regulatory treatment. For that reason, regulators world-wide have long recognized that comparable and equivalent outcomes must be the touchstone of effective cross-border deference. [↑](#footnote-ref-4)
4. Council of the European Union, Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for authorisation of CCPs and requirements for recognition of third-country CCPs – Confirmation of the final compromise text with a view to agreement [hereafter, “EMIR 2.2”] (March 2019), at Recital 41 and Article 25a(1), *available at* <https://data.consilium.europa.eu/doc/document/ST-7621-2019-ADD-1/en/pdf>. [↑](#footnote-ref-5)
5. Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories [hereafter, “EMIR”] (July 2012). [↑](#footnote-ref-6)
6. European Securities and Markets Authority, *Consultation Paper*, *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2* (May 2019), *available at* [https://www.esma.europa.eu/sites/default/files/ library/esma70-151-2138\_cp\_ta\_on\_tiering\_criteria.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-151-2138_cp_ta_on_tiering_criteria.pdf). [↑](#footnote-ref-7)
7. *See* Joint Statement, Brussels U.S.-E.U. Joint Financial Regulatory Forum (July 2019) (noting, “[g]iven the global nature of financial markets, participants acknowledged the importance of the Forum in fostering ongoing dialogue between the United States and European Union. A cooperative approach to the supervision and regulation of financial services should foster financial stability, investor protection, market integrity, and a level playing field.”), *available at* <https://home.treasury.gov/news/press-releases/sm723>. [↑](#footnote-ref-8)
8. EMIR 2.2 at Recital 41 and Article 25a(1). [↑](#footnote-ref-9)
9. EMIR 2.2 at Article 25a. [↑](#footnote-ref-10)
10. *Consultation Report* at Article 3 (noting, the core provisions are identified in Annex I). [↑](#footnote-ref-11)
11. *See* *Consultation Report* at ¶ 12 (noting, “With respect to the comparability analysis (Step 3 above), where a third country requirement can be similar, being on average, but not always, equal or at least as strict as (for quantitative requirements), or at least as conservative as (for qualitative requirements) the core provisions, it could still be considered to be “comparable” provided that the Tier 2 CCP adopts the corresponding EMIR requirement as a floor or minimum, through adequate rules, policies and procedures”). *See also*, Consultation Report at Article 3(3). [↑](#footnote-ref-12)
12. *Definition of comparable*, Lexico Powered by Oxford, <https://www.lexico.com/en/definition/comparable> (last visited July 29, 2019). *See also*, *Wheeler v. Barrera*, 417 U.S. 402, 420-22 (1974), *modified*, 422 U.S. 1004 (1975) (explaining that “comparable” does not mean “identical”); *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 575-76 (6th Cir. 2003) (explaining that the “obviously intended . . . meaning of ‘comparable’ is ‘similar’”). [↑](#footnote-ref-13)
13. EMIR 2.2 at Article 25a(3). [↑](#footnote-ref-14)
14. Group of 20, Leaders’ Statement, Pittsburgh Summit, pg. 7 (Sept. 2009), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_pittsburgh_2009.pdf>; Group of 20, Leaders’ Declaration, Saint Petersburg Summit, pg. 17 (Sept. 2013), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_saint_petersburg_2013.pdf>. [↑](#footnote-ref-15)
15. Committee on Payment and Settlement Systems (later renamed the Committee on Payments and Market Infrastructures) and Technical Committee of the International Organization of Securities Commissions, Principles for Financial Market Infrastructures (Apr. 2012). [↑](#footnote-ref-16)
16. *Consultation Report* at Articles 1(6), 3(2), and 4(2). [↑](#footnote-ref-17)
17. *See* EMIR 2.2 at Recital 41 (noting, “ESMA should take into account the implementing act adopted by the Commission determining that the legal and supervisory arrangements of the third country where the CCP is established are equivalent to those of this Regulation and any conditions to which the application of that implementing act may be subject.”) and Article 25a(1). [↑](#footnote-ref-18)
18. *See Sullivan v. Zebley*, 493 U.S. 521, 535-36 (1990) (indicating that “equivalence” implies an even higher bar of similarity than “comparability”). [↑](#footnote-ref-19)
19. *See* *Definition of comparable*, Lexico Powered by Oxford, <https://www.lexico.com/en/definition/comparable> (last visited July 29, 2019) (noting, the definition of comparable is defined as “similar” and “of equivalent quality.”). *See also*, *Wheeler v. Barrera*, 417 U.S. 402, 420-22 (1974), *modified*, 422 U.S. 1004 (1975) (explaining that “comparable” does not mean “identical”); *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 575-76 (6th Cir. 2003) (explaining that the “obviously intended . . . meaning of ‘comparable’ is ‘similar’”). [↑](#footnote-ref-20)
20. Consultation Report at ¶ 10. [↑](#footnote-ref-21)
21. EMIR at Article 25(6). [↑](#footnote-ref-22)
22. EMIR 2.2 at Recital 41 [↑](#footnote-ref-23)
23. Consultation Report at pg. 41. [↑](#footnote-ref-24)
24. *Consultation Report* at Article 3(3). [↑](#footnote-ref-25)
25. Group of 20, Leaders’ Statement, Pittsburgh Summit, pg. 7 (Sept. 2009), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_pittsburgh_2009.pdf>; Group of 20, Leaders’ Declaration, Saint Petersburg Summit, pg. 17 (Sept. 2013), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_saint_petersburg_2013.pdf>. [↑](#footnote-ref-26)
26. Consultation Report at ¶ 38. [↑](#footnote-ref-27)
27. Consultation Report at ¶ 38. [↑](#footnote-ref-28)
28. EMIR 2.2 at Article 25a(2). [↑](#footnote-ref-29)