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| Response Form to the Consultation Paper  |
| Draft technical advice on criteria for tiering under Article 25(2a) of EMIR2.2 |

**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\_TATC\_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\_TATC\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TATC\_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\_TATC\_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 paper on *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2* (“the Consultation Paper”).[[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 successfully 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 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 tiering based on systemic importance to the E.U. for non-E.U. CCPs be established — recognizing the long-standing principle of mutual regulatory deference.[[4]](#footnote-5) ESMA has consulted on its proposed approach to making the EMIR 2.2 required tiering decisions for non-E.U. CCPs. ESMA’s proposed approach conflicts with EMIR 2.2 and risks resulting in non-E.U. CCPs which have no systemic relevance to the E.U. being designated systemically important, subjecting them to substantially burdensome regulation and oversight under EMIR 2.2. Instead, the tiering indicators should limit the situations in which a non-E.U. CCP is designated as systemically important to those where the CCP has a direct and significant nexus to the E.U. or one of its Member States — i.e., to circumstances where a non-E.U. CCP clears a significant amount of financial instruments denominated in E.U. currencies and/or has a significant number of E.U.-domiciled clearing members.

As drafted, ESMA’s proposed indicators will impose a tiering framework where a non-E.U. CCP that clears only U.S. Dollar denominated financial instruments with only a few E.U.-domiciled clearing members and in turn, *de minimis* risk exposures to the E.U., could be designated systemically important to the E.U. We note that this approach is inconsistent not only with the agreed upon text of EMIR 2.2, but also with the stated rationale of the European Commission for the E.U.’s regulatory expansion — namely, to focus on “third-country CCP[s] that clear significant volumes of contracts denominated in a Union currency” and to “monitor and mitigate risk related to the EU’s exposure to third-country CCPs.”[[5]](#footnote-6) CME Group understands that this legislative rationale confirms the definition of systemic risk as being tied to exposures in E.U. currencies and to E.U. domiciled financial institutions. In line with this, EMIR 2.2 highlights a non-E.U. CCP’s clearing of “a significant amount of financial instruments denominated in the currencies of Member States” as implying “challenges for Union or Member State authorities in safeguarding financial stability”[[6]](#footnote-7) and capturing a non-E.U. CCP’s clearing activities that pose “risk to clearing members and trading venues in the Union.”[[7]](#footnote-8) The considerations of non-E.U. CCPs’ exposures in E.U. currencies and to E.U.-domiciled clearing members are particularly appropriate in light of the fact that a non-E.U. CCP’s provision of clearing services in the E.U. is the primary activity that triggers the requirement for recognition of that CCP under EMIR.[[8]](#footnote-9) While we assume that ESMA intended to limit its systemic risk analysis in this way to considerations that have an E.U. nexus, to the extent that they do not, the proposed indicators are fatally flawed.

Further, a non-E.U. CCP with a *de minimis* nexus to the E.U. that is designated as systemically important to the E.U. will be subject to numerous requirements 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[[9]](#footnote-10) and threaten to harm healthy, well-regulated global markets. We respectfully urge ESMA to reconsider its proposed tiering approach, and instead pursue an approach that is more clearly aligned with the legislative intent behind EMIR 2.2.

ESMA's cost-benefit analysis for its proposed approach to tiering suffers from the same flaws as the analysis done for the consultation report on *Technical Advice on Comparable Compliance under article 25a of EMIR*.[[10]](#footnote-11) 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 tiering 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 tiering proposal.

<ESMA\_COMMENT\_TATC\_1>

**Questions**

1. : Do you generally agree with the proposed indicators (Indicators 1, 2, 3, 4 and 5) to further assess the nature, size and complexity of the CCP's business? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_1>

CME Group does not agree with the proposed indicators to assess the nature, size, and complexity of a non-E.U. CCP’s business. The broad nature of Indicators 1, 2, 3, 4, and 5, and the underlying considerations, are inconsistent with EMIR 2.2’s objective of determining whether a non-E.U. CCP is systemically important based on the non-E.U. CCP’s relevance to the stability of the E.U. or one of its Member States. Although this may have been inadvertent, in many cases, these indicators fail to establish a clear nexus to the E.U., which directly contradicts EMIR 2.2’s requirements.

Additionally, when referring to the considerations outlined relative to Indicators 1, 2, 3, 4, and 5, the language “at least” is used, which implies that ESMA may take into account considerations beyond the ones proposed. This is particularly concerning given the already broad nature of these indicators and creates legal uncertainty as to the considerations that will be made when determining the systemic importance of a non-E.U. CCP to the E.U. While we do not believe this was ESMA’s intention, the language “at least” should be removed from Indicators 1, 2, 3, 4, and 5, as well as relative to all other proposed indicators, which for ease, we have noted relative to each question that is specific to a given indicator or given indicators.

Further, notwithstanding that Indicators 1, 2, 3, 4, and 5 appear to be inconsistent with the objective of EMIR 2.2, they also contradict EMIR 2.2 by failing to consider the specific features of agricultural derivatives contracts cleared by a non-E.U. CCP. In particular the Consultation Paper does not reflect EMIR 2.2’s recognition that “specific features concerning certain agricultural derivative contracts listed and executed on regulated markets in third-countries [(i.e., non-E.U. jurisdictions)]…may pose negligible risk to clearing members and trading venues in the Union.”[[11]](#footnote-12) The European Commission also specifically invited ESMA in its request for technical advice to consider this.[[12]](#footnote-13) ESMA not only fails to address the specific features of agricultural derivatives contracts in its draft technical advice, but also offers no consideration of the features of agricultural derivatives contracts in its whole Consultation Paper. Agricultural derivatives contracts are an integral risk management tool for local farmers, producers, and other end-users managing the costs at which consumer goods are provided. Given these contracts’ role in local agricultural markets, they do not contribute to the nature, size, and complexity of a non-E.U. CCP’s clearing activities in a manner that could have a systemic impact on the stability of the E.U. or one of its Member States. Consequently, a non-E.U. CCP’s clearing for agricultural derivatives contracts should be explicitly excluded from these indicators, as well as others, in determining a non-E.U. CCP’s systemic importance to the E.U.

**Indicator 1**: “ESMA shall consider at least the following indicators: the ownership, business and corporate structure of the CCP including assessing in detail (i) the ownership structure specifying any qualifying holdings, (ii) other financial market infrastructures within the group to which the CCP belongs and (iii) whether the CCP acts in several capacities.”

CME Group Recommendation: Indicator 1 should be removed.

Indicator 1 evaluates “the ownership, business and corporate structure” of a non-E.U. CCP without any indication for how that information is relevant to whether the nature, size, and complexity of the CCP’s business in the E.U., or outside of the E.U., has a systemic impact on the stability of the E.U. or one of its Member States. A non-E.U. CCP’s corporate structure, including whether it is a stand-alone entity or part of a larger corporate group, is irrelevant to the determination of whether it is systemically important to the stability of the E.U. or one of its Member States. Similarly, the proposed evaluation under Indicator 1 of whether a non-E.U. CCP is affiliated with entities that are financial market infrastructures and the material and ultimate ownership(s) of the CCP is irrelevant to its systemic importance to the E.U. Notwithstanding its ownership and corporate structure, a non-E.U. CCP is expected to satisfy its regulatory obligations as a CCP in its local jurisdiction on an ongoing basis. Therefore, ownership and corporate structure do not contribute to the nature, size, and complexity of a non-E.U. CCP’s business in the E.U. or its business outside of the E.U.

Indicator 1 also evaluates the countries in which a non-E.U. CCP provides or intends to provide clearing services. However, the requirement under EMIR that a non-E.U. CCP be recognized by ESMA is triggered by the provision of its clearing services in the E.U.[[13]](#footnote-14) Therefore, the evaluation of whether a non-E.U. CCP is systemically important to the E.U. should focus on those E.U. services only. The provision of clearing services outside of the E.U. is irrelevant for determining whether that CCP could be systemically important to the stability of the E.U. or one of its Member States. Consistent with EMIR 2.2 and the European Commission’s views that a tiering determination should focus on a non-E.U. CCP’s clearing of financial instruments denominated in E.U. currencies, the only business of a non-E.U. CCP that could have a systemic impact on the E.U. or one of its Member States is the CCP’s clearing of financial instruments denominated in E.U. currencies and provision of clearing services to E.U.-domiciled clearing members.

There is no clear rationale as to why ownership structure, corporate structure, affiliated businesses, or clearing services outside of the E.U. are relevant for evaluating a non-E.U. CCP’s systemic importance to the stability of the E.U. or one of its Member States. Consequently, Indicator 1 should be removed.

**Indicator 2**: “ESMA shall consider at least the following indicators: the financial instruments cleared by the CCP including (i) whether they are subject to the clearing obligation in the Union, (ii) whether they are denominated in Union Currencies and (iii) their complexity, price volatility and average maturity.”

CME Group Recommendation: Indicator 2 should consider a non-E.U. CCP’s clearing of financial instruments denominated in E.U. currencies.

In determining whether a non-E.U. CCP is systemically important to the E.U. relative to “the financial instruments” it clears, these instruments should only be considered where they have a clear nexus to the stability of the E.U. or one of its Member States. That is, whether the financial instruments that are cleared by the CCP are denominated in E.U. currencies. Consistent with EMIR 2.2, such an approach would allow ESMA to evaluate the “nature, size and complexity” of the non-E.U. CCP’s clearing services that are relevant to the E.U. Further, this approach conforms with the European Commission’s views that a non-E.U. CCP’s clearing of financial instruments denominated in E.U. currencies could constitute a systemic risk to the E.U. Focusing on financial instruments denominated in E.U. currencies acknowledges the scenario where a CCP’s clearing services are being used by both E.U. and non-E.U. market participants to manage their risks with instruments that have an E.U. nexus. Notably though, even if a non-E.U. CCP clears financial instruments denominated in an E.U. currency, the exposures from such instruments still must be at a level of significance for a designation of the CCP as systemically important to the stability of the E.U. or one of its Member States to be warranted.

In contrast, the Consultation Paper would evaluate a non-E.U. CCP’s aggregate clearing of financial instruments denominated in non-E.U. currencies, which is not relevant in determining a CCP’s impact on, or importance to, the stability of the E.U. or one of its Member States. To evaluate a non-E.U. CCP’s clearing of financial instruments denominated in non-E.U. currencies without such evaluation being limited to E.U.-domiciled clearing members would capture a scenario where a financial instrument denominated in a non-E.U. currency is being cleared for a clearing member domiciled outside of the E.U., a situation with no nexus to the E.U. Therefore, Indicator 2 should focus solely on instruments denominated in E.U. currencies. Separately, CME Group notes that the domicile of market participants for which a CCP is clearing financial instruments, without reference to the currency denomination of such instruments, is appropriately captured under Indicator 3.

Consistent with this point, the mere existence of a clearing obligation in the E.U. for a financial instrument denominated in a non-E.U. currency should have no bearing on whether ESMA deems the CCP systemically important to the E.U. Rather, ESMA’s analysis should focus on: i) financial instruments denominated in an E.U. currency subject to a clearing obligation in the E.U.; and ii) financial instruments denominated in a non-E.U. currency subject to a clearing obligation in the E.U. cleared through E.U.-domiciled clearing members. CME Group captures both points under its recommendations for Indicators 2 and 3, respectively. Similarly, the “complexity, price volatility and average maturity” of financial instruments cleared by a non-E.U. CCP, including the manner in which they are traded (e.g., over-the-counter) and their standardization, is relevant only where those instruments are denominated in an E.U. currency. Therefore, ESMA should revise Indicator 2 to:

“ESMA shall consider ~~at least~~ the following indicators: the financial instruments cleared by the CCP **that are denominated in Union currencies** including (i) whether they are subject to the clearing obligation in the Union~~(ii) whether they are denominated in Union Currencies~~ and (ii~~i~~) their complexity, price volatility and average maturity.”

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

Additionally, ESMA should reevaluate the use of volume and notional based metrics for evaluating Indicator 2. Given EMIR 2.2’s focus on determining whether a non-E.U. CCP is systemically important to the stability of the E.U. or one of its Member States, which is a risk-based determination, a risk-based measure should be used to evaluate Indicator 2. Therefore, ESMA should evaluate a non-E.U. CCP’s initial margin required for its clearing of financial instruments denominated in E.U. currencies.[[14]](#footnote-15) Notably, Article 25(2a)(a) of EMIR 2.2 does not specify the metric by which the “value” of financial instruments should be determined. Since EMIR 2.2 places an emphasis on risk in justifying the expansion of the E.U. regulatory framework to non-E.U. CCPs, an appropriate reading of EMIR 2.2 is to assume that “value” should focus on the risk cleared by a non-E.U. CCP, which is appropriately captured by initial margin required. Volume and notional do not reflect the actual risk managed by a CCP.

**Indicator 3**: “ESMA shall consider at least the following indicators: the value and volume cleared by the CCP at the level of the CCP, at the level of each EU CM and at the level of non-EU CMs where they clear on behalf of EU clients and EU indirect clients.”

CME Group Recommendation: Indicator 3 should consider a non-E.U. CCP’s clearing for clearing members domiciled in the E.U.

Indicator 3’s evaluation should be based solely on a non-E.U. CCP’s exposures to clearing members domiciled in the E.U. Consistent with EMIR 2.2, such an approach would allow ESMA to evaluate the “nature, size and complexity” of the non-E.U. CCP’s clearing services that are relevant to the E.U. Further, this approach also conforms to EMIR 2.2, which recognizes that the focus on a non-E.U. CCP’s clearing activities should be on those that could constitute a systemic risk to E.U.-domiciled clearing members. An approach that focuses on E.U. domiciled clearing members under Indicator 3, in conjunction with the evaluation of a non-E.U. CCP’s clearing of financial instruments denominated in E.U. currencies regardless of the domicile of the clearing member under Indicator 2, would allow ESMA to evaluate appropriately the “nature, size and complexity” of the non-E.U. CCP’s clearing activities that have a clear nexus to the E.U. Notably though, even if a non-E.U. CCP has E.U.-domiciled clearing members, the exposures from such clearing members still must be at a level of significance that a designation of the CCP as systemically important to the stability of the E.U. or one of its Member States is warranted. However, ESMA’s proposal unfortunately appears to capture the total value and volume cleared by the CCP, which is immaterial to a non-E.U. CCP’s systemic importance to the stability of the E.U. or one of its Members States.

For the same reasons CME Group outlined relative to Indicator 2, Indicator 3 should use a risk-based measure, such as initial margin required, to evaluate a non-E.U. CCP’s exposures to clearing members domiciled in the E.U. Notably, Article 25(2a)(a) of EMIR 2.2 does not specify the metric by which ESMA should determine the “exposure” of a non-E.U. CCP’s clearing activities. Neither volume nor open interest reflect the actual risk managed by a CCP.

**Indicator 4**: “ESMA shall consider at least the following indicators: the transparency and liquidity of the relevant markets.”

CME Group Recommendation: Indicator 4 should be removed.

Indicators 2 and 3, as amended, would appropriately capture the “nature, size and complexity” of a non-E.U. CCP’s clearing activities that have a nexus to the E.U. Broadly looking at the transparency and liquidity of a non-E.U. CCP’s markets therefore is unnecessary to determining its systemic importance to the stability of the E.U. or one of its Member States. Transparency and liquidity are not representative of a CCP’s risk exposures and therefore, could lead to an inaccurate determination of a non-E.U. CCP’s systemic importance to the E.U. Further, the Consultation Paper does not indicate how such characteristics would be considered to determine whether a non-E.U. CCP is systemically important to the stability of the E.U. The Consultation Paper does not state whether higher or lower levels of liquidity or transparency are indicative of systemic importance. Consequently, Indicator 4 should be removed.

Notwithstanding the above, if initial margin required for financial instruments denominated in E.U. currencies and for E.U.-domiciled clearing members is used as the basis for evaluating Indicators 2 and 3, then the liquidity of a non-E.U. CCP’s markets would already be captured, because liquidity risk is one of the primary risks a CCP addresses in setting its initial margin requirements. The level of liquidity for a given financial instrument that a non-E.U. CCP clears is not a pertinent factor to whether the CCP is systemically important to the E.U., and in any event the CCP addresses the varying levels of liquidity across the instruments it clears by applying variable levels of initial margin.

Alternatively, if Indicator 4 is not removed, then Indicator 4 should, at a minimum, require a direct nexus to the E.U. The liquidity and transparency of non-E.U. markets cleared by a non-E.U. CCP do not have a nexus to the E.U. Therefore, to the extent this indicator is not removed, Indicator 4 should be revised to:

“ESMA shall consider ~~at least~~ the following indicators: the transparency and liquidity of the ~~relevant~~ markets **denominated in Union currencies**.”

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

**Indicator 5**: “ESMA shall consider at least the following indicators: the risk profile of the CCP.”

CME Group Recommendation: Indicator 5 should be removed.

Indicators 2 and 3 appropriately capture the “nature, size and complexity” of the risk profile of a non-E.U. CCP’s clearing activities that have a direct nexus to the E.U. Broadly looking at the risk profile of a non-E.U. CCP is therefore unnecessary to determining its systemic importance to the stability of the E.U. or one of its Member States. Consequently, Indicator 5 should be removed.

Further, in line with CME Group’s recommendations, Indicators 2 and 3 would rely on initial margin, which represents the potential future exposures of a CCP’s clearing members. Using initial margin required for financial instruments denominated in E.U. currencies and for E.U.-domiciled clearing members would accurately capture the risk profile of a non-E.U. CCP that has a direct nexus to the E.U.

Alternatively, if Indicator 5 is not removed, then Indicator 5 should, at a minimum, require a direct nexus to the E.U. A non-E.U. CCP’s broader risk profile should have a bearing on ESMA’s tiering determination only where a non-E.U. CCP’s nexus to the E.U. has been established based on its clearing of financial instruments denominated in E.U. currencies (regardless of the domicile of the clearing member) and for clearing members domiciled in the E.U. (regardless of the currency denomination of the financial instrument). Where this has been established, a determination that the CCP adheres to the Committee on Payments and Market Infrastructures (“CPMI”) and the International Organization of Securities Commissions’ (“IOSCO”) *Principles for financial market infrastructures* (“PFMIs”)[[15]](#footnote-16) as adopted by its local regulator would be sufficient for ESMA’s evaluation. To the extent that Indicator 5 is not removed, it is critical that Indicator 5, and related considerations, recognize local jurisdictions’ adoptions of the PFMIs.

<ESMA\_QUESTION\_TATC\_1>

1. : How would you envisage ESMA to consider risks and in particular cyber-risks in relation to the evaluation of systemic importance?

<ESMA\_QUESTION\_TATC\_2>

CME Group Recommendation: The risks of a non-E.U. CCP in relation to the evaluation of its systemic importance should focus on its clearing of financial instruments denominated in E.U. currencies and for clearing members domiciled in the E.U.

In line with CME Group’s previous comments, ESMA’s determination of a non-E.U. CCP’s systemic importance to the stability of the E.U. or one of its Member States should focus solely on its risks relative to financial instruments denominated in E.U. currencies (i.e., Indicator 2) and clearing members domiciled in the E.U. (i.e., Indicator 3).

The analysis of a non-E.U. CCP’s broader risks, including cyber-risks, should not have a bearing on ESMA’s tiering determination. However, CME Group understands that the mandate under EMIR 2.2 is for the tiering analysis to evaluate “the nature, size and complexity of the CCP’s business in the Union, and outside of the Union to the extent its business may have a systemic impact on the Union or one of its Member States, including…the risk profile of the CCP, in terms of, amongst others, legal, operational and business risk.”[[16]](#footnote-17) Since evaluating a non-E.U. CCP’s risk profile is predicated on its business having a systemic impact on the E.U. or one of its Member States, the evaluation should be triggered by a determination that the CCP has significant exposures to the E.U. through its clearing of financial instruments denominated in E.U. currencies and for clearing members domiciled in the E.U. Until ESMA determines that this level of exposure exists, the risk analysis of a non-E.U. CCP alone, no matter the result, should not be a factor in ESMA’s conclusion as to whether the CCP is of systemic importance to the stability of the E.U. or one of its Member States.

Where ESMA conducts a broader risk analysis for a non-E.U. CCP, a determination that the CCP adheres to the PFMIs as adopted by its local regulator should be sufficient, since the PFMIs address the risks to which a CCP is subject, including cyber risk. The determination should be based on: i) a non-EU CCP’s publication of a disclosure document consistent with the PFMIs; and ii) whether the CCP is based and prudentially supervised in a jurisdiction where the relevant regulator has established, and publicly indicated, that it applies to the CCP on an ongoing basis domestic rules and regulations that are consistent with the PFMIs.[[17]](#footnote-18)

The PFMIs set out globally agreed upon standards[[18]](#footnote-19) for CCP risk management practices across a variety of areas, including legal, operational, and business risks.[[19]](#footnote-20) Further, the PFMIs address practices relating to managing cyber risks under Principle 17. The PFMIs correctly allow local regulators to adopt regulatory requirements that are appropriate for the markets and CCPs they oversee and where appropriate, “incorporate a specific minimum requirement…to ensure a common base level of risk management.”[[20]](#footnote-21) Consistent with commitments made by E.U. Member States as part of the Group of Twenty (“G20”), ESMA, along with other regulators across the globe, should defer to a policy-maker’s local adoption of the PFMIs, which they participated in drafting.[[21]](#footnote-22) A non-E.U. CCP’s adherence to the PFMIs, as adopted by its local regulator, provides a sufficient and strong basis to evaluate a CCP’s risks, assuming such evaluation is necessary.

Consistent with the above, the information requirements outlined in Annex V of the Consultation Paper with respect to evaluating a CCP’s risks are unnecessary. In many cases, the information required is not focused on determining a clear nexus to the E.U., and it does not assist ESMA, consistent with EMIR 2.2, in determining the “nature, size and complexity” of the non-E.U. CCP’s clearing activities that could have a systemic impact on the E.U. Thus, the information included in Annex V should not be part of a determination of whether a non-E.U. CCP is systemically important to the stability of the E.U. or one of its Member States.

<ESMA\_QUESTION\_TATC\_2>

1. : Do you generally agree with the proposed indicators (Indicators 6, 7, 8 and 9) to further assess the effect of a failure or disruption of the CCP? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_3>

CME Group does not agree with the proposed indicators to assess the failure or disruption of a non-E.U. CCP. The broad nature of Indicators 6, 7, 8, and 9, and the underlying considerations, are inconsistent with EMIR 2.2’s objective of determining whether a non-E.U. CCP is systemically important based on the non-E.U. CCP’s relevance to the stability of the E.U. or one of its Member States. EMIR 2.2 requires the effects of a non-E.U. CCP’s failure or disruption to be evaluated relative to the financial markets of the E.U. or one of its Member States, financial institutions of the E.U. or one of its Member States, the broader financial system of the E.U. or one of its Members States, and the stability of the E.U. or one of its Members States.[[22]](#footnote-23) Although this may have been inadvertent, in many cases, these indicators fail to establish a clear nexus to the E.U., which directly contradicts EMIR 2.2’s requirements.

Generally, the failure of Indicators 6, 7, 8, and 9 to establish a non-E.U. CCP’s nexus to the E.U. suggest these indicators are not relevant to determining whether a non-E.U. CCP is systemically important to the E.U. Further, it is opaque as to how ESMA will use these indicators to evaluate if a non-E.U. CCP is systemically important to the E.U. Consequently, these indicators should be removed or revised, in accordance with CME Group’s recommendations below, to provide a basis for how the information the indicators would require could be determinative of a non-E.U. CCP being systemically important to the stability of the E.U. Additionally, for the avoidance of doubt, for the reasons outlined in CME Group’s response to Q1, the language “at least” relative to the considerations outlined under Indicators 6, 7, 8, and 9 should be removed.

**Indicator 6**: “ESMA shall consider at least the following indicators: the margins, default fund contributions and eligible collateral.”

CME Group Recommendation: Indicator 6 should consider a non-E.U. CCP’s: i) collateral held and required for clearing members domiciled in the E.U.; ii) collateral held and required denominated in E.U. currencies; and
iii) the protections to which such collateral is subject.

Indicator 6’s evaluation should be based primarily on the collateral held and required at the CCP-level for margin and default fund contributions of clearing members domiciled in the E.U. and the protections to which such collateral is subject. Consistent with EMIR 2.2, such an approach would allow ESMA to evaluate the “effect that the failure of or a disruption to” a non-E.U. CCP could have on the E.U.

The initial consideration for Indicator 6 should be whether the collateral held by a non-E.U. CCP is bankruptcy remote. Many CCPs have successfully structured their margin acceptance practices in a manner that provides their clearing members with comfort that their margin is bankruptcy remote from the failure of the CCP. Under this structure, the margin on deposit at the CCP is not at risk, even where the CCP fails. Therefore, a non-E.U. CCP’s collateral for margin and default fund contributions should only be evaluated where the collateral is not bankruptcy remote from the failure of the non-E.U. CCP.

Further, any consideration of collateral held and required where determined not to be bankruptcy remote should be limited to collateral that has a direct nexus to the E.U. Therefore, to accomplish EMIR 2.2’s objectives, Indicator 6 should assess a non-E.U. CCP’s collateral that is held and required that is not-bankruptcy remote in two scenarios: i) for E.U.-domiciled clearing members, regardless of the currency denomination of the collateral (i.e., E.U. and non-E.U.); and ii) denominated in E.U. currencies, regardless of the domicile of the entity (i.e., E.U. and non-E.U.). This focus captures the permutations under which a non-E.U. CCP’s collateral could have a direct nexus to the E.U. to identify the effects a non-E.U. CCP’s failure or disruption could have on the stability of the E.U. or one of its Member States. Notably though, even if a non-E.U. CCP has non-bankruptcy remote collateral related to E.U. domiciled clearing members and/or denominated in E.U. currencies, the amount of such collateral still must be at a level of significance for a designation of the CCP as systemically important to the stability of the E.U. or one of its Member States to be warranted.

In contrast, ESMA’s proposal appears to focus on the total amount of collateral held and required for margin and default fund contributions at a non-E.U. CCP, which is immaterial to determining a non-E.U. CCP’s systemic importance to the stability of the E.U. or one of its Member States. Using a broad consideration that includes total margin, default fund contributions, and eligible collateral creates the possibility that a non-E.U. CCP with a limited nexus to the E.U. could be mis-identified as systemically important to the E.U. For example, a non-E.U. CCP with large amounts of margin and default fund contributions not posted by E.U.-domiciled clearing members and not denominated in E.U. currencies could be inappropriately designated systemically important to the E.U.

Additionally, the requirement to evaluate variation margin under this indicator overlaps significantly with the analysis required under Indicator 7 to consider a non-E.U. CCP’s payment obligations. The considerations evaluated under Indicator 7, as explained below, more appropriately capture how a non-E.U. CCP’s variation margin flows could impact the stability of the E.U. or one of its Member States in the event of the CCP’s failure or disruption. Consequently, consideration (v) of this indicator, which references variation margin, should be removed. Variation margin, or settlement variation as it is referred to under some legal frameworks, does not serve the same purpose and is not treated in the same manner as initial margin or collateral more generally. Initial margin, settlement variation, and default fund contributions are all risk management tools, but only initial margin and default fund contributions are posted to and held by the CCP to cover potential future exposures in the event that a clearing member fails.[[23]](#footnote-24) In contrast, a CCP facilitates the exchange of settlement variation obligations between its clearing members to eliminate their current exposures. Considering these differences, it is not clear why settlement variation, particularly total settlement variation exchanged across the CCP, should be analyzed in the same light as initial margin and default fund contributions. In particular, taking into account non-E.U. currencies exchanged as settlement variation between non-E.U.-domiciled clearing members is clearly irrelevant to whether a non-E.U. CCP is systemically important to the stability of the E.U. or one of its Member States, since neither the variation margin flows nor the exchange of non-E.U. currencies has any nexus to the E.U.

**Indicator 7**: “ESMA shall consider at least the following indicators: the committed/ uncommitted resources and liquidity resources.”

CME Group Recommendation: Indicator 7 should consider a non-E.U. CCP’s potential payment obligations denominated in E.U. currencies and related liquidity resources, as well as where liquidity providers are domiciled in the E.U.

Indicator 7’s evaluation should be based primarily on a non-E.U. CCP’s potential payment obligations in E.U. currencies and related liquidity resources. Consistent with EMIR 2.2, such an approach would allow ESMA to evaluate the “effect that the failure of or a disruption to” a non-E.U. CCP could have on the E.U.

Assessing a non-E.U. CCP’s potential payment obligations denominated in E.U. currencies and related liquidity resources that support such payment obligations, regardless of the domicile of the liquidity provider (i.e., E.U. and non-E.U.), provides ESMA with information on the CCP’s payment obligations that have a direct nexus to the E.U.[[24]](#footnote-25) This, in combination with evaluating the obligations of the CCP’s E.U.-domiciled liquidity providers, regardless of denomination of the potential liquidity resource provided (i.e., E.U. and non-E.U.), fully captures the effects that a non-E.U. CCP’s failure or disruption could have on the stability of the E.U. or one of its Member States. Notably though, even if a non-E.U. CCP has potential payment obligations denominated in E.U. currencies (and related liquidity resources) and/or E.U. domiciled liquidity providers, the size of such payment obligations and/or use of such liquidity providers still must be at a level of significance for a designation of the CCP as systemically important to the stability of the E.U. or one of its Member States to be warranted.

In contrast, ESMA’s proposal appears to consider total payment obligations and related liquidity resources for a non-E.U. CCP, which are immaterial to determining a non-E.U. CCP’s systemic importance to the stability of the E.U. or one of its Member States. The size of a non-E.U. jurisdiction’s economic and financial markets — which can impact the size of a CCP’s potential payment obligations and related liquidity resources — where those markets do not have a nexus to the E.U. should not determine a non-E.U. CCP’s systemic importance to the E.U. To avoid an incongruous result where non-E.U. CCPs are inappropriately captured as systemically important to the E.U. without a nexus to the E.U., Indicator 7 should be revised to:

“ESMA shall consider ~~at least~~ the following indicators: the committed/ uncommitted resources and liquidity resources: **(i) related to payment obligations denominated in Union currencies, and (ii) provided by entities domiciled in the Union.**”

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

**Indicator 8**: “ESMA shall consider at least the following indicators: settlement and payments, including the use of central bank money for settlement.”

CME Group Recommendation: Indicator 8 should be removed.

Indicator 7 appropriately captures the “effect that the failure of or a disruption to” a non-E.U. CCP could have on the E.U. In particular, if Indicator 7 is amended as we recommend, it would capture a non-E.U. CCP’s payment obligations that have an E.U. nexus. Broadly looking at a non-E.U. CCP’s practices for settlements and payments, including the manner in which settlements occur and the technologies that are used, does not establish a direct nexus to the E.U. or provide a clear indicator of how a non-E.U. CCP’s failure or disruption would impact the stability of the E.U. Consequently, Indicator 8 should be removed.

Alternatively, if Indicator 8 is not removed, then Indicator 8 should, at a minimum, require a direct nexus to the E.U. Therefore, to the extent this indicator is not removed, Indicator 8 should be revised to:

“ESMA shall consider ~~at least~~ the following indicators: settlement and payments, including the use of central bank money for settlement**, where settlement and payments are made in Union currencies or where entities domiciled in the Union are used**.”

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

Even where a nexus to the E.U. exists, a determination that the CCP adheres to the PFMIs as adopted by its local regulator would be sufficient to evaluate the non-E.U. CCP’s settlement and payments practices. In addition to the reasons outlined in CME Group’s response to Q2, further evaluation is unnecessary since the PFMIs specifically address settlement and payment practices.[[25]](#footnote-26) Additionally, a CCP’s local regulator would consider technology related risks in its local adoption and application of the PFMIs; as such, it would be redundant for ESMA to consider them so long as the local regulator has adopted the PFMIs. To the extent that Indicator 8 is not removed, it is critical that Indicator 8, and related considerations, recognize local jurisdictions’ adoptions of the PFMIs.

**Indicator 9**: “ESMA shall consider at least the following indicators: framework for recovery and resolution.”

CME Group Recommendation: Indicator 9 should be removed.

If amended as we recommend, Indicators 6 and 7 would appropriately capture the “effect that the failure of or a disruption to” a non-E.U. CCP could have on the E.U. As noted above, Indicators 6 and 7 would capture a non-E.U. CCP’s collateral and potential payment obligations that have a direct nexus to the E.U. that are relevant in the event of the CCP’s failure or disruption. Broadly looking at the framework for a non-E.U. CCP’s recovery and resolution is therefore unnecessary to determining its systemic importance to the E.U. Consequently, Indicator 9 should be removed.

Alternatively, if Indicator 9 is not removed, then Indicator 9 should, at a minimum, require a direct nexus to the E.U. A non-E.U. CCP’s recovery and resolution framework should have a bearing on ESMA’s tiering determination only where a non-E.U. CCP’s nexus to the E.U. has been established based on its clearing of financial instruments denominated in E.U. currencies (regardless of the domicile of the clearing member) and for clearing members domiciled in the E.U. (regardless of the currency denomination of the financial instrument). Where this has been established, a determination that the CCP adheres to the PFMIs as adopted by its local regulator should be sufficient for ESMA’s evaluation.

In addition to the reasons outlined in CME Group’s response to Q2, further evaluation is unnecessary, since the PFMIs specifically address the requirement for a CCP to have practices in place to address recovery and orderly wind-down (i.e., resolution) scenarios, including that a CCP has appropriate plans to address scenarios that could potentially prevent it from being able to provide its critical services.[[26]](#footnote-27) Per the PFMIs, the relevant scenarios include those related to uncovered credit and liquidity shortfalls, among others, and the PFMIs require that a CCP should have explicit rules and procedures to address these scenarios.[[27]](#footnote-28) To the extent that Indicator 9 is not removed, it is critical that Indicator 9, and related considerations, recognize local jurisdictions’ adoptions of the PFMIs.

<ESMA\_QUESTION\_TATC\_3>

1. : Do you generally agree with the proposed indicators (Indicators 10 and 11) to further assess the CCP’s clearing membership structure? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_4>

CME Group does not agree with proposed indicators to assess a non-E.U. CCP’s clearing membership structure. The lack of E.U. nexus under Indicators 10 and 11, and the underlying considerations, is inconsistent with EMIR 2.2’s objective of determining that a non-E.U. CCP is systemically important based on its systemic importance to the stability of the E.U. Additionally, for avoidance of doubt, as outlined in CME Group’s response to Q1, the language “at least” relative to the considerations outlined under Indicators 10 and 11 should be removed.

**Indicator 10**: “ESMA shall consider at least the following indicators: the identification of CMs and in particular EU CM, EU clients or EU indirect clients.”

CME Group Recommendation: Indicator 10 should consider a non-E.U. CCP’s clearing for clearing members domiciled in the E.U.

Indicator 10’s evaluation should be based solely on a non-E.U. CCP’s clearing members domiciled in the E.U. These clearing members have direct exposures to the CCP via their default fund contributions, which unlike the initial margin deposited by clearing members, are unlikely to be bankruptcy remote in the event that the CCP fails. Further, this approach also conforms to EMIR 2.2, which recognizes that the focus on a non-E.U. CCP’s clearing activities should be on those that could constitute a systemic risk to the E.U domiciled clearing members. The “identities and memberships” of clearing members of a non-E.U. CCP not domiciled in the E.U. are immaterial to the stability of the E.U. since they are located outside of the E.U. economic and financial bloc. Notably though, even if a non-E.U. CCP has E.U.-domiciled clearing members, the exposures from such clearing members still must be at a level of significance that a designation of the CCP as systemically important to the stability of the E.U. or one of its Member States is warranted.

**Indicator 11**: “ESMA shall consider at least the following indicators: access to the CCP and to the clearing services provided by the CCP.”

CME Group Recommendation: Indicator 11 should be removed.

Indicator 10 appropriately captures the “clearing membership structure” of a non-E.U. CCP that has a nexus to the E.U. In particular, Indicator 10 captures a non-E.U. CCP’s clearing for E.U.-domiciled clearing members. It is unclear why broadly looking at the access to a CCP and its clearing services should be considered in evaluating a non-E.U. CCP’s systemic importance to the E.U. Indicator 11, and related considerations, make no references to the E.U. or one of its Member States and thus, do not themselves establish any clear nexus to the E.U. relative to a non-E.U. CCP’s clearing membership structure. Consequently, Indicator 11 should be removed.

<ESMA\_QUESTION\_TATC\_4>

1. : Do you generally agree with the proposed indicator (Indicator 12) to further assess alternative clearing services? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_5>

**Indicator 12**: “ESMA shall consider at least the following indicators: substitutes to the CCP clearing service.”

**CME Group Recommendation: Indicator 12 should consider a non-E.U. CCP’s clearing for financial instruments denominated in E.U. currencies that are cleared for market participants domiciled in the E.U.**

In the case of Indicator 12, EMIR 2.2 specifically requires the substitutability evaluation be performed solely relative to “financial instruments denominated in Union currencies.”[[28]](#footnote-29) Therefore, at a minimum, Indicator 12’s evaluation should be explicitly limited to financial instruments denominated in E.U. currencies. In addition, for avoidance of doubt, for the reasons outlined in CME Group’s response to Q1, the language “at least” relative to the considerations outlined under this indicator should be removed.

While CME Group appreciates EMIR 2.2’s focus on financial instruments denominated in E.U. currencies, all financial instruments denominated in E.U. currencies cleared by a non-E.U. CCP may not have any importance to the stability of the E.U. or one of its Members States. For example, a financial instrument denominated in an E.U. currency may be cleared by one or two CCPs but still have limited open interest or volume across those CCPs. This suggests that market participants, including E.U. market participants, do not rely on the financial instrument for material risk management purposes and, in turn, the financial instrument is inconsequential to the stability of the E.U. or one of its Member States. The availability of alternative clearing services for a non-E.U. CCP’s clearing of financial instruments denominated in E.U. currencies should focus on where such instruments are being used to manage material amounts of risk by E.U. market participants. If such instruments are not cleared by E.U. market participants, the availability of alternative clearing services is immaterial to determining a non-E.U. CCP’s systemic importance to the stability of the E.U. or one of its Member States. Consequently, Indicator 12 should be revised to:

*“ESMA shall consider ~~at least~~ the following indicators: substitutes to the CCP clearing service* ***for financial instruments denominated in Union currencies that have been identified as having a systemic importance to the stability of the Union or one of its Member States based on their exposures for Union market participants****.”*

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

Additionally, when considering whether alternatives are available, ESMA should consider all alternatives, including those that have similar economic characteristics, even those that are not necessarily cleared derivatives. Examples of these alternatives could include uncleared swaps, cash market instruments such as spot FX, and any other financial instrument that provides similar economic exposure to a financial instrument cleared by the non-E.U. CCP.

<ESMA\_QUESTION\_TATC\_5>

1. : Do you generally agree with the proposed indicators (Indicators 13 and 14) to further assess relationships, interdependencies, or other interactions? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_6>

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<ESMA\_QUESTION\_TATC\_6>

1. : Do you identify other benefits and costs not mentioned above associated to the proposed approach (option 3)? If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.

<ESMA\_QUESTION\_TATC\_7>

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 Paper 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 Paper appears to be a recitation of earlier parts of the Consultation Paper 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 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 Paper are unable to appropriately consider the costs and benefits of the proposals under the Consultation Paper, 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 present 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\_TATC\_7>

1. European Securities and Markets Authority, *Consultation Paper*, *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2* [hereafter, “*Consultation Paper*”] (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-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](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”) and over-the-counter 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), *available at* <https://data.consilium.europa.eu/doc/document/ST-7621-2019-ADD-1/en/pdf>. [↑](#footnote-ref-5)
5. European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (June 2017), at pgs. 15 and 24, *available at*: [http://www.europarl.europa.eu/RegData/docs\_autres\_institutions/commission\_europeenne/com/2017/0331/COM\_COM(2017)0331\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0331/COM_COM%282017%290331_EN.pdf). [↑](#footnote-ref-6)
6. EMIR 2.2 at Recital 29. [↑](#footnote-ref-7)
7. EMIR 2.2 at Recital 31. [↑](#footnote-ref-8)
8. 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), at Article 25(1). [↑](#footnote-ref-9)
9. *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-10)
10. European Securities and Markets Authority, *Consultation Report*, *Technical Advice on Comparable Compliance under article 25a of EMIR* (May 2019), *available at* <https://www.esma.europa.eu/sites/default/files/library/esma70-151-2179_cp_ta_on_comparable_compliance.pdf>. [↑](#footnote-ref-11)
11. EMIR 2.2 at Recital 31. [↑](#footnote-ref-12)
12. Consultation Paper at pg. 24. [↑](#footnote-ref-13)
13. EMIR at Article 25(1). [↑](#footnote-ref-14)
14. *See* Commodity Futures Trading Commission, Notice of Proposed Rulemaking, Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations (July 2019) (noting, one of example of using a risk-based measure, is the proposed rulemaking’s use of initial margin as a measure for clearing activity of a non-U.S. DCO in determining the level of risk a non-U.S. DCO presents to the U.S. financial system), *available at* <https://www.cftc.gov/sites/default/files/2019/07/2019-15262a.pdf?utm_source=govdelivery>. [↑](#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 [hereafter, “*PFMI*”] (Apr. 2012). [↑](#footnote-ref-16)
16. EMIR 2.2 at Article 25(2a)(a). [↑](#footnote-ref-17)
17. *See* Basel Committee on Banking Supervision, *Capital requirements for bank exposures to central counterparties* (July 2012), at pg. 1, *available* *at* <https://www.bis.org/publ/bcbs227.pdf>. [↑](#footnote-ref-18)
18. *See* *PFMI* at pg. 180-82, (noting, that a number of regulatory authorities from E.U. Member States were involved in the Steering Group that coordinated the review of the PFMI, as well as in some instances, the Editorial Team that implemented the review and/or a sub-group looking at a specific review issue). [↑](#footnote-ref-19)
19. *See e.g.*, *PFMI* at Principles 1, 3, 15, and 17. [↑](#footnote-ref-20)
20. *PFMI* at Introduction ¶ 1.2. [↑](#footnote-ref-21)
21. *See* Group of 20, Leaders’ Statement, Pittsburgh Sumit, pg. 7 (Sept. 2009), *available at* [https://www.fsb.org/wp-content/uploads/g20\_leaders\_declaration\_pittsburgh\_2009.pdf](https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_pittsburgh_2009.pdfG); Group of 20, Leaders’ Declaration, Saint Petersburg Sumit, pg. 17 (Sept. 2013) (noting, “[w]e agree 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, in a non-discriminatory way, paying due respect to home country regulation regimes.”), *available at* [https://www.fsb.org/wp-content/uploads/ g20\_leaders\_declaration\_saint\_petersburg\_2013.pdf](https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_saint_petersburg_2013.pdf). [↑](#footnote-ref-22)
22. EMIR 2.2 at Article 25(2a)(b). [↑](#footnote-ref-23)
23. Notably, initial margin is only at risk where the clearing member posting that margin fails while default fund contributions are subject to mutualized risk. [↑](#footnote-ref-24)
24. For avoidance of doubt, CME Group notes that it understands that the Consultation Paper’s uses of the term “liquidity providers” are references to entities that would primarily provide liquidity to a CCP in the event that a clearing member defaults and a liquidity need arises in a given currency. For example, these entities may be participants of a committed line of credit the CCP maintains to address such an event. [↑](#footnote-ref-25)
25. *See e.g.*, *PFMI* at Principles 8 and 10. [↑](#footnote-ref-26)
26. *See e.g.*, *PFMI* at Principles 3, 4, 7, and 15. [↑](#footnote-ref-27)
27. *Id* (noting, Principle 4, Key Consideration 7 and Principle 7, Key Consideration 10). [↑](#footnote-ref-28)
28. EMIR 2.2 at Article 25(2a)(d). [↑](#footnote-ref-29)