European Securities and Markets Authority

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Mr Gary Gensler
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
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Rulemakings on Registration of foreign Swap Data Repositories and Foreign Boards of Trade

Dear Chairman,

I take the opportunity of the public consultations on your proposed rulemakings to raise some concerns ESMA has on the proposed rules applicable to foreign Swap Data Repositories (SDRs) and Foreign Boards of Trade (FBOTs).

Although this is not a formal contribution to your consultations and contacts between our authorities are taking place to analyse technical issues related to regulatory or implementing measures of OTC derivatives legislations in our respective jurisdictions, I would like to raise your attention to those issues that have a direct impact on our co-operation in this field.

Registration of foreign Swap Data Repositories

In the case of foreign SDRs, our concerns stem from the fact that in the proposed rulemakings on SDRs we have not identified any reference to equivalency of regulatory regimes or cooperation with the authorities of the country of establishment of the foreign SDRs.

According to our reading, foreign SDRs are actually subject to a stricter regime than the resident ones, as they need to provide a legal opinion certifying that they can provide the CFTC with prompt access to their books and records and that they can be subject to onsite inspections and examinations by the CFTC.

We understand that, as such, according to Sections 728 and 763 of the Dodd-Frank Act on Swap Data Repositories no exemption or special regime can be applied to foreign SDRs that are registered with a foreign competent authority and that once they are registered with the CFTC they become subject to your authority and your on-site inspections and examinations. However, we are aware of the fact that you are currently considering the ways to structure these requirements to take into account the supervision exercised by the foreign competent authorities. In our view, if the foreign supervision were not taken into

account, your rulemakings would seem to force a foreign SDR to be subject to multiple regimes and to the jurisdiction of several authorities. This would in practice be very challenging for regulated entities and would significantly raise the costs for both the industry and supervisors. Moreover, this system would raise concerns about the possibility for the CFTC to carry out on-site inspections on entities based in Europe that are supervised by European authorities.

We believe that it would be preferable to aim at cooperating with foreign authorities to ensure the application and enforcement of equivalent rules and to guarantee access to the information needed for regulatory purposes and not necessarily to all data and records held by a foreign SDR. A regime of this kind is delineated in the European Commission's proposal for a Regulation on OTC derivatives, central counterparties and trade repositories, according to which trade repositories (EU terminology for SDRs) from a third country can be recognised as equivalent by ESMA if the following conditions are met: i) the trade repository is authorised and subject to effective supervision in a third country; ii) the European Commission has determined the third country regime as equivalent; iii) the European Union has entered into an international agreement with that third country regarding the mutual access and exchange of information that is relevant for the exercise of the duties of competent authorities; iv) cooperation arrangements between ESMA and the relevant competent authorities in the third countries have been established to ensure immediate and continuous access to the relevant information and to specify the mechanism for exchanging information and the procedure for coordinating the supervisory activities.

Against this background, we strongly encourage you to consider a different regime than the one described in your proposed rulemakings. Accordingly, you may want to contemplate a regime where foreign SDRs can register with the CFTC if the laws and regulations in a foreign jurisdiction are equivalent to the US ones and if a Memorandum of Understanding (MoU) between the CFTC and the relevant foreign authorities has been signed. That MoU would ensure access to all the information you would need for exercising your duties and would define the supervisory activities conducted on the foreign SDRs, e.g. with common on-site inspections. This regime would have the following advantages: i) facilitating cooperation among authorities from different jurisdictions; ii) ensuring the mutual recognition of swap data repositories; iii) establishing convergent regulatory and supervisory regimes which is necessary in a global market such as the OTC derivatives one.

We would also like to raise your attention to the provision on confidentiality and indemnification agreement in the Dodd-Frank Act. According to this provision, a foreign regulator would need to agree to indemnify an SDR and the CFTC for any expenses arising from a litigation related to the sharing of information held by the SDR that is necessary for the exercise of the duties of the foreign regulator. We believe that ensuring confidentiality is essential for exchanging information among regulators and such indemnification agreement undermines the key principle of trust according to which exchange of information should occur. We would, therefore, recommend that your rulemakings help streamlining this principle for an efficient exchange of information between our authorities.

Registration of Foreign Boards of Trade

Regarding the new rules on registration of FBOTs, we would like to suggest a similar approach as for SDRs to avoid that a FBOT that conducts cross-border activity is unnecessarily subject to multiple jurisdiction, on-site inspections and regulatory requirements.

It seems to us that there is no legal provision that would require the CFTC to depart from the present practice of issuing no-action relief letters. On the contrary, requesting FBOTs to register and become to a large extent subject to the direct jurisdiction of the CFTC (in addition to that of the foreign authority of their country of establishment) seems to be a purely regulatory initiative. This understanding is based on Section 738 of the Dodd-Frank Act that states that "*the Commission may adopt rules and regulation requiring registration with the Commission for a FBOT that provides the members of the FBOT or other participants located in the United States with direct access to the electronic trading and order matching system of the FBOT*". It therefore seems to us that you have full flexibility on whether and how to implement these rules.

We do not dispute that a formal registration procedure may provide more legal certainty for FBOTs which exclusively provide direct access to their electronic trading and order matching systems regarding non-equity based swaps, futures and options and which do not yet benefit from a no-action letter by the CFTC's staff. However, the new registration procedure and the mandatory application of very comprehensive, ongoing requirements to all FBOTs would be burdensome and costly without any apparent improvements for the safeguard of public interests such as the maintenance of fair and orderly markets, investor protection and the resilience of the market.

Since the CFTC has also verified in the past that a FBOT and its clearing organisation are subject to comprehensive regulation and comparable oversight by the home regulatory authority, we consider that the creation of new US regulatory measures with extra-territorial application should be avoided as far as possible and replaced by effective co-operation between the home and host regulatory authorities. Jurisdiction should indeed generally be exercised by the home authority alone. The necessary co-operation could be ensured by an MoU determining how the home and the host authority should collaborate, exchange information and conduct common reviews and inspections. This approach would allow for a flexible and tailored approach with a view to the FBOT in question and could work alongside the no-action process.

Finally, we have not identified any similar new requirements with regards to the recognition of foreign derivatives clearing organisations (DCOs). We therefore expect that the recognition of those will be based on equivalence with internationally adopted standards and that the practical implementation of the recognition process will avoid double regulation and supervision of DCOs, also to ensure that the contracts cleared by them would be considered for the mandatory clearing of swaps.

I look forward to our continued co-operation in this field.

With my best regards,

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Vice-Chairman of ESMA

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