



EUROPEAN CENTRAL BANK

EUROSYSTEM

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Title VII of the Dodd-Frank Act and the European Central Bank

Dear Ms. Mesa,

The European Central Bank (the "ECB") commends the Commodity Futures Trading Commission (the "Commission" or "CFTC") on its work to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")¹. The ECB would like to raise certain key issues on the applicability of the Dodd-Frank Act and related regulations to the ECB. The annex attached to this letter contains suggested amendments to the text of the proposed regulations.

I. ECB's status, objectives and monetary and foreign exchange tasks

The ECB is established under the provisions of the Treaty on European Union (the "TEU") and the Treaty on the Functioning of the European Union (the "TFEU", together with the TEU, the "Treaties").² The High Contracting Parties to the Treaties are the 27 Member States of the European Union (the "EU" or the "Union").³ Under the TFEU the ECB, together with the

¹ Pub. L. 111-203, 124 Stat. 1376, 12 U.S.C. 5301 et seq. (2010)

² See TEU Article 13, TFEU Articles 127-132 and 282-284, and Protocol (No 4) to the Treaties on the Statute of the European System of Central Banks and of the European Central Bank (the "Statute of the ESCB").

³ The Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the Republic of France, the Republic of

national central banks of the 27 EU Member States, constitute the European System of Central Banks (the "ESCB"),⁴ and the ESCB is governed by the decision-making bodies of the ECB.⁵

The primary objective of the ESCB is to maintain price stability and, without prejudice to that objective, to support the general economic policies in the Union in order to contribute to the achievement of the Union's objectives.⁶ The basic tasks to be carried out through the ESCB include, inter alia, (1) to define and implement the monetary policy of the Union, (2) to conduct foreign exchange operations consistent with the provisions of the TFEU pertaining to the exchange-rate policy for the euro in relation to the currencies of third States (e.g., the United States dollar) and (3) to hold and manage the official foreign reserves of the Member States (including, e.g., U.S. dollar-denominated reserves).⁷ In addition, the ESCB has the task to contribute to the stability of the financial system.⁸

Under the Treaties, in order to achieve the objectives of the ESCB and to carry out its tasks, the ECB may, inter alia, operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals.⁹ Regarding its external operations, the ECB may establish relations with central banks and financial institutions in other countries and, where appropriate, with international organizations, acquire and sell spot and forward all types of foreign exchange assets and precious metals, hold and manage these assets and conduct all types of banking transactions in relations with third countries.¹⁰ In this respect, the ECB and the U.S. Federal Reserve System undertook concerted interventions in foreign exchange markets in September 2000 because of their shared concern about the potential implications of movements in exchange rates for the world economy,¹¹ and the ECB and the U.S. Federal Reserve System have entered into reciprocal currency arrangements (swap lines) in order

Italy, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

⁴ See TFEU Article 282(1), first sentence.

⁵ See TFEU Article 282(2), first sentence.

⁶ See TFEU Articles 127(1) and 282(2), second and third sentences.

⁷ See TFEU Article 127(2).

⁸ See TFEU Article 127(5).

⁹ See Statute of the ESCB, Article 18.1, first indent.

¹⁰ See Statute of the ESCB, Article 23.

¹¹ See ECB Press Release, 22 September 2000.

to address disruptions in U.S. dollar funding markets triggered by the financial market turmoil since 2007, and also in the aftermath of the terrorist attacks in the United States on 9/11/2001.¹²

In accordance with the Treaties, the ECB has been provided by the national central banks with foreign reserves in or denominated in U.S. dollars, Japanese yen and gold.¹³ The purpose of the ECB's foreign reserve portfolio is to ensure that, whenever needed, the Eurosystem has a sufficient amount of liquid resources for its foreign exchange policy operations involving non-EU currencies, such as the interventions that took place in September and November 2000. As at 31 December 2010 the ECB held balances with banks and loans denominated in foreign currency, and investments in securities denominated in U.S. dollars and Japanese yen, equivalent to €39,298,995,950 (claims on non-euro area residents) and €4,326,557,549 (claims on euro area residents), and gold and gold receivables equivalent to €17,015,600,109.¹⁴ Over-the-counter derivatives operations involving the foreign reserve assets of the ECB are documented using standard agreements, including the 1992 International Swaps and Derivatives Association Master Agreement (Multicurrency – cross-border version), which is used for operations with counterparties organized or incorporated under U.S. federal or state laws.¹⁵ These operations do not include any security-based swaps.

In 2002 the U.S. Congress amended the International Organizations Immunities Act (the "IOIA") to permit the provisions of this Act to be extended to the ECB in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international

¹² See ECB Annual Report 2010, pp. 99-100, 263-64; ECB Annual Report 2009, pp. 104-5, 250-52; ECB Annual Report 2008, pp. 100, 102; ECB Annual Report 2007, p. 100; ECB Annual Report 2001, p. 72.

¹³ See Statute of the ESCB, Article 30.1; Guideline of the European Central Bank of 3 November 1998, as amended by the Guideline of 16 November 2000, on the composition, valuation and modalities for the initial transfer of foreign-reserve assets, and the denomination and remuneration of equivalent claims (ECB/2000/15), O.J. L 336, 30.12.2000, p. 114; Decision of the European Central Bank of 16 November 2000 providing for the paying-up of capital and the contribution to the reserves and provisions of the ECB by the Bank of Greece, and for the initial transfer of foreign-reserve assets to the ECB by the Bank of Greece and related matters (ECB/2000/14), O.J. L 336, 30.12.2000, p. 110; Decision of the European Central Bank of 30 December 2006 on Banka Slovenije's paying-up of capital, transfer of foreign reserve assets and contribution to the European Central Bank's reserves and provisions (ECB/2006/30), O.J. L 24, 31.01.2007, p. 17; Decision of the European Central Bank of 31 December 2007 on the paying-up of capital, transfer of foreign reserve assets and contribution by the Central Bank of Cyprus and the Central Bank of Malta to the European Central Bank's reserves and provisions (ECB/2007/22), O.J. L 28, 01.02.2008, p. 36; Decision of the European Central Bank of 31 December 2008 on the paying-up of capital, transfer of foreign reserve assets and contribution by Národná banka Slovenska to the European Central Bank's reserves and provisions (ECB/2008/33), O.J. L 21, 24.01.2009, p. 83; Decision of the European Central Bank of 31 December 2010 on the paying-up of capital, transfer of foreign reserve assets and contributions by Eesti Pank to the European Central Bank's reserves and provisions (ECB/2010/34), O.J. L 11, 15.01.2011, p. 58.

¹⁴ See ECB Annual Report 2010, pp. 214 & 222 (notes 1 & 2.2).

¹⁵ See Article 3(3), Guideline of the European Central Bank of 20 June 2008 on the management of the foreign reserve assets of the European Central Bank by the national central banks and the legal documentation for operations involving such assets (recast) (ECB/2008/5), O.J. L 192, 19.07.2008, p. 63.

organization in which the United States participates.¹⁶ The Congressional record preceding this amendment notes that '[s]ignificant portions of the ECB's foreign reserves are held at the Federal Reserve Bank of New York as well as private banks in the United States', that this legislation was introduced 'to protect the legal security of the ECB's foreign reserves' and that '[t]he extension of immunity provided by the IOIA to the ECB would assure the protection of their foreign reserves equivalent to that enjoyed by other foreign central banks.'¹⁷ Following the signing of the amendment into law, the U.S. President extended to the ECB the privileges, exemptions, and immunities provided to public international organizations designated by the President under the IOIA.¹⁸

II. Swaps activity of the ECB should be exempt from regulation under the Dodd-Frank Act.

Title VII of the Dodd-Frank Act, which establishes a new regulatory framework for swaps, was enacted to reduce risk, increase transparency and promote market integrity.¹⁹ These objectives are not achieved by applying the requirements of Title VII to the ECB or transactions with its counterparties that are subject to the Dodd-Frank Act. The ECB's objectives and tasks are defined by the Treaties, and it must perform all its activities in accordance with the provisions of the Treaties, including when it enters into swaps as part of its foreign exchange or foreign reserve management operations, be it with U.S. parties or non-US parties. The ECB's primary objective is to maintain price stability, and the ECB also contributes to the stability of the overall financial system. Any regulations that constrain the ECB's activities in the U.S. or with U.S. parties will have the perverse consequence of making it more difficult for the ECB to reduce risk and maintain the integrity of the financial system. In addition, imposing transparency requirements on the ECB will not achieve greater transparency for the swap market: the ECB's trades are not ordinary commercial trades that are comparable with other transactions.

Further, imposing regulatory requirements on swaps entered into by the ECB is inconsistent with other U.S. legislation. As noted above, the ECB's status has been recognized by the President of the U.S. under Executive Order 13307 under the IOIA.²⁰ The ECB therefore benefits from immunities under the Foreign Sovereign Immunities Act (the "FSIA").²¹ This legislation grants immunity to the ECB, both with respect to property held for its own account and when carrying

¹⁶ 22 USC 288f-5.

¹⁷ 148 CONG. REC. H6484 at H6485 (daily ed. Sept. 24, 2002) (statement of Congressman Leach).

¹⁸ Exec. Order No. 13,307, 68 Fed. Reg. 33,338 (2003).

¹⁹ See, e.g. CFTC, *Swap Transaction Compliance and Implementation Schedule*, 76 FR 58176 (Sept. 20, 2011).

²⁰ 22 USC 288f-5.

²¹ 28 USC 1330, 1332(a), 1391(f), 1601-1611.

out its official functions, which includes operating in the financial markets when carrying out its monetary and foreign exchange tasks²². The purpose of this immunity will be defeated if the activities themselves are subject to extensive regulation. Moreover, imposing regulatory requirements on the ECB's swap activities will result in unequal treatment between the ECB and the Federal Reserve, which is exempted from swap regulation under the Dodd-Frank Act.²³ This would undermine Section 752 of the Dodd-Frank Act, which requires regulators to coordinate with foreign regulators to achieve "consistent international standards". It would also set a precedent for other jurisdictions that will adopt swap regulations in the future. If the U.S. gives preferential treatment to the Federal Reserve for purposes of swap regulation, then other jurisdictions are likely to exempt their home country central banks but not foreign central banks. Such unequal treatment would significantly hamper international cooperation and restrict the ability of central banks to manage global markets.

Further, if regulatory requirements are imposed on foreign central banks, the ECB and other foreign central banks may shift swaps activity away from the U.S. markets or U.S. counterparties. This would reduce the liquidity of U.S. markets, constrain the competitiveness of U.S. parties, and reduce the effectiveness of central bank actions.

As a result, we request that the Commission confirm in writing that "swaps" do not include any agreement, contract or transaction to which the ECB or any other Eurosystem central bank is a party.

We recognize that certain other non-U.S. central banks may have similar concerns about the application of the Dodd-Frank Act. Therefore, we propose, as set out in the annex, language to be included in the definition of swap to exclude swaps entered into by foreign central banks designated by the Commission.

III. If the Commission does not grant the ECB general exemption from swap regulation, we request relief for specific rules, including as set out below.

A. The ECB is not a Swap Dealer ("SD") under the proposed definition and we ask the Commission to confirm this.

The Commission has proposed to define "swap dealer" as "any person who: (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any

²² Article 18.1 of the ESCB/ECB Statute.

²³ The Dodd-Frank Act, §§721(a)(21), Commodity Exchange Act ("CEA") §1(47)(B)(ix), which excludes from the definition of "swap" any agreement, contract, or transaction a counterparty which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States."

activity causing it to be commonly known in the trade as a dealer or market maker in swaps."²⁴ The ECB does not hold itself out as a dealer; it does not make a market in swaps and it does not engage in any activity causing it to be known as a dealer or market maker. With respect to clause (iii) ("regularly enters into swaps with counterparties as an ordinary part of business for its own account"), the Commission issued the following explanation in the release accompanying the proposed regulations:

We believe that persons who enter into swaps as part of a "regular business" are those persons whose function is to accommodate demand for swaps in response to interest expressed by other parties. Conversely, persons who do not fulfill this function should not be deemed to enter into swaps as part of a "regular business" and are not likely to be swap dealers.²⁵

The ECB does not enter into swaps to accommodate demand for others.

Based on the discussion above, we believe the ECB is not a swap dealer under Title VII of the Dodd-Frank Act. We ask the Commission to confirm this view in writing and propose regulatory text as set out in the annex.

B. The ECB is not a Major Swap Participant ("MSP") under the proposed rules and we ask the Commission to confirm this.

The definition of MSP proposed by the Commission adopts the three-pronged test set forth in the Dodd-Frank Act and reflects Congress's intent that the definition of MSP be focused on "entities that pose a high degree of risk through their swap and security-based swap activities".²⁶ Commission Chairman Gensler stated that the category of MSP is "very clearly limited to encompass only those entities that have risk large enough to pose a threat to the U.S. financial system" and that it is expected that MSPs will include "only a handful of entities".²⁷ The ECB clearly does not pose a "high degree of risk" to the U.S. markets nor does the ECB pose a "threat to the U.S. financial system" through its swaps activity. All of the ECB's swap transactions are fully consistent with the monetary and foreign exchange tasks conferred upon the ECB under the

²⁴ CTFC proposed rule, *Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", "Major Security-Based Swap Participant" and "Eligible Contract Participant"* 75 FR 80174 at 80212.

²⁵ CTFC proposed rule, *Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", "Major Security-Based Swap Participant" and "Eligible Contract Participant"* 75 FR 80174 at 80177.

²⁶ *Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", "Major Security-Based Swap Participant" and "Eligible Contract Participant"*, footnote 69, 75 FR 80174 at 80185.

²⁷ Testimony of Gary Gensler, Chairman, Commodity Futures Trading Commission before the U.S. House Committee on Financial Services on February 15, 2011. Transcript of the testimony available at <http://financialservices.house.gov/media/pdf/021511gensler.pdf>

Treaties, and the competence to review these activities lies with the authorities so empowered by the Treaties. Such transactions will not have an adverse effect on the financial stability of the U.S. These activities should be distinguished from the activity of market participants who engage in swaps to maximize their returns.

While the ECB currently does not meet the proposed definition of MSP (as described below), we are concerned that in the future, perhaps because the criteria used to define MSP are changed, the ECB might come under the definition of MSP and become subject to the related regulation. The consequences of the ECB becoming subject to the requirements applicable to an MSP - including registration, reporting, capital, margin and business conduct – would have significant deleterious effects on the bank's ability to carry out its tasks. In its release accompanying the proposed rule on the MSP definition, the Commission specifically asked for comments on whether entities linked to foreign governments should be excluded from the major swap participant definitions.²⁸ We strongly urge the Commission to provide that the ECB is expressly excluded from the designation of MSP in the final rule. We suggest amending the definition of MSP with the language set out in the annex.

In addition, we do not believe that the ECB's current level of derivatives activity with U.S. counterparties could in any event qualify the ECB as an MSP. The definition of MSP in the Dodd-Frank Act and the Commission's proposed rules measures risk related to swaps activity in terms of "substantial position" and "substantial counterparty exposure".²⁹ The proposed rules provide specific thresholds of swaps exposure above which the risk exposure is "substantial".³⁰ The rules are not explicit as to whether the thresholds would include all of the ECB's swaps or

²⁸ CFTC proposed rule, *Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", "Major Security-Based Swap Participant" and "Eligible Contract Participant"*. 75 FR 80174 at 80203.

²⁹ Definition of "major swap participant", the Dodd-Frank Act, §721(a)(33), definition of "major swap participant" and CFTC proposed rule, *Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", "Major Security-Based Swap Participant" and "Eligible Contract Participant"*. 75 FR 80174 at 80212.

³⁰ The Dodd-Frank Act, §721(a)(33), definition of "major swap participant" and CFTC proposed rule, *Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", "Major Security-Based Swap Participant" and "Eligible Contract Participant"* - §1.3(uuu) - "Substantial counterparty exposure. (1) In general. For purposes of Section 1a(33) of the Act and § 1.3(qqq), the phrase substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets means a swap position that satisfies either of the following thresholds: (i) \$5 billion in daily average aggregate uncollateralized outward exposure; or (ii) \$8 billion in: (A) Daily average aggregate uncollateralized outward exposure plus (B) Daily average aggregate potential outward exposure." 75 FR 80174 at 80215.

§1.3(sss) "Substantial position" is defined by major swap category. (i) For rate swaps: (A) \$3 billion in daily average aggregate uncollateralized outward exposure; or (B) \$6 billion in: (1) Daily average aggregate uncollateralized outward exposure plus (2) Daily average aggregate potential outward exposure. (ii) For credit swaps: (A) \$1 billion in daily average aggregate uncollateralized outward exposure; or (B) \$2 billion in: (1) Daily average aggregate uncollateralized outward exposure plus (2) Daily average aggregate potential outward exposure. (iii) For equity swaps: (A) \$1 billion in daily average aggregate uncollateralized outward exposure; or (B) \$2 billion in: (1) Daily average aggregate uncollateralized outward exposure plus (2) Daily average aggregate potential outward exposure. (iv) For other commodity swaps: (A) \$1 billion in daily average aggregate uncollateralized outward exposure; or (B) \$2 billion in: (1) Daily average aggregate uncollateralized outward exposure plus (2) Daily average aggregate potential outward exposure. 75 FR 80174 at 80213.

just those with a U.S. counterparty or those that are otherwise subject to the Dodd-Frank Act. However, the commentary to the proposed rule on registration of SDs and MSPs suggest that the relevant swaps should be limited to those involving U.S. parties.³¹ In addition, because the MSP definition is intended to protect U.S. financial markets, there is no policy reason to include swaps with counterparties not subject to the Dodd-Frank Act in the determination of MSP. Any non-U.S. market participant with limited swaps with U.S. parties poses only limited risk to the U.S. markets, regardless of how active that non-U.S. participant is outside the U.S. A central bank, in particular, may at times be very active in its home market acting in its official function and, for policy reasons, it is beyond the regulatory scope and competence of the CFTC to assess and evaluate that activity. We therefore urge the Commission to clarify in the final rule that the tests for "substantial position" and "substantial counterparty exposure" are based only on transactions involving U.S. parties. We suggest amending the definition of MSP with the language set out in the annex.

C. Real-time public reporting

1. The ECB and all swaps transactions to which the ECB is a party should be exempt from real-time reporting requirements.

It is vital to the effectiveness of the ECB's policy actions that its transactions in the markets – which, under any circumstances, do not present any systemic risk to the U.S. financial system – not become public on a real-time basis. Although the identities of the participants will not be reported, public reporting of specific types of trades and the size of those trades at specific times may effectively inform the market of the ECB's activity. This would significantly undermine the ability of the ECB to act in the U.S. swaps markets. In particular, the information made publicly available by real-time reporting could effectively frustrate any attempt by the ECB to use swaps to manage currency prices and liquidity by providing unexpected supply or unexpected demand.

In addition, required real-time public reporting of ECB transactions conflicts with the principles of the IOIA. The IOIA provides that "property and assets of international organizations...shall be immune from search...and from confiscation. The archives of international organizations shall be inviolable."³² Requiring the public reporting of the ECB's transactions will effectively circumvent these provisions. If the ECB's swaps are subject to real-time public reporting, then the records maintained by the ECB of these swaps (and by the ECB's counterparties of those transactions) will effectively become available to the public immediately. This would have the same effect as requiring disclosure of part of the ECB's records, which would clearly violate the

³¹ See CFTC proposed rule, *Registration of Swap Dealers and Major Swap Participants*, 75 Fr 71379 at 71382. "Thus, the analysis of whether a non-U.S. entity should register as an MSP would turn upon, among other things, swap positions with U.S. counterparties (including the use of a U.S. clearing agency or swap execution facility) or that involve U.S. mails or any means or instrumentality of interstate commerce."

³² 7 USC 288A(c).

statutory provision that the ECB's archives are inviolable. In addition, exempting the ECB from any requirement to report swaps will be insufficient to protect the ECB's records: in virtually all cases, swaps between the ECB and a U.S. party will be reported by the U.S. party. In order to protect the ECB's records, all parties will need to be expressly exempted from real-time reporting of transactions with the ECB. In addition, because of the importance of protecting such information, we request that the Commission prohibit public reporting of information related to the ECB's swaps.

Thus, we urge the Commission to exempt swaps to which the ECB is a party from real-time public reporting, and prohibit the reporting of such swaps. We suggest amending the proposed rules with the language set out in the annex.

- 2. If the Commission does not generally exempt the ECB's swaps, as requested above, the Commission should confirm that foreign exchange swaps and forwards are not subject to the real-time reporting requirements.**

As specifically provided for under the Dodd-Frank Act, the Treasury has issued a proposed determination that foreign exchange ("FX") swaps and forwards should not be regulated as swaps under the Dodd-Frank Act.³³ Assuming that the proposed determination is adopted, FX swaps and forwards transacted by the ECB would not be subject to the real-time reporting requirements under Section 721 of the Dodd-Frank Act – neither by the ECB nor by its counterparties. Section 721 provides that FX swaps and forwards must be reported to a swap data repository ("SDR") (or to the Commission if no SDR is available). However, Section 721 has no requirement for real-time public reporting of FX swaps and forwards. Because FX swaps and forwards are not regulated as swaps under the Dodd-Frank Act (assuming the Treasury adopts its proposal), the real-time public reporting requirements of Section 2(a)(13) of the CEA are not applicable to FX swaps and forwards.³⁴

We ask the Commission to confirm in writing the ECB's understanding that the real-time public reporting requirements do not apply to the ECB's FX swaps and forwards transactions, assuming that the Treasury adopts its determination as proposed, and that accordingly the ECB's FX swaps

³³ The Dodd-Frank Act §721(a)(21), CEA §1a(47)(E) - definition of "swap" and treatment of foreign exchange swaps and forwards. Proposed determination, Department of the Treasury, *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act*; 76 FR 25774.

³⁴ See the Dodd-Frank Act §721(a)(21), CEA §1a(47)(E), definition of "swap" and treatment of foreign exchange swaps and forwards which provides that "[n]otwithstanding a written determination by the Secretary under clause (i), all foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the Commission pursuant to section 4r within such time period as the Commission may by rule or regulation prescribe", where "section 4r" refers to Section 4r of the CEA (7 USC §6r), Reporting and Recordkeeping for Uncleared Swaps. By contrast, the proposed rules on real-time reporting are promulgated under §2(a)(13) of the CEA.

and forwards would not be subject to real-time reporting requirements. We suggest amending the proposed regulations with the language set out in the annex.

D. The ECB's swap transactions should not be required to be reported to SDRs nor should the ECB be required to keep records of such swaps.

The ECB does not present systemic risk to the U.S. financial system and its activities are limited by the Treaty provisions governing the ECB, including with respect to recordkeeping. There is therefore no need for detailed information about the ECB's market activity to be collected and retained by an SDR and made available to U.S. and, potentially, foreign regulators or to impose recordkeeping requirements on the ECB or the ECB's counterparties with respect to their trades with the ECB.

Further, as discussed above, under the protections of the IOIA, the ECB's records are "inviolable" and the ECB's property, "wherever located and by whomsoever held, shall be immune from search....and from confiscation".³⁵ Regulation that requires reporting of information about ECB trades and access for other parties to that information or that imposes recordkeeping requirements breaches the protections specifically accorded to the ECB.

We therefore ask that the Commission expressly exclude the ECB and its counterparties from the reporting requirements applicable to swaps involving the ECB and exempt the ECB from the relevant recordkeeping requirements. We suggest amending the proposed rules with the language set out in the annex.

E. Business conduct standards;

Counterparties of the ECB should be exempt from requirements under the business conduct rules in regard to the ECB and trades in which the ECB is a counterparty or prospective counterparty.

As the ECB is not an SD or MSP (see discussion above), the business conduct standards as proposed for SDs and MSPs do not impose requirements on the ECB directly. However, requirements that are imposed on the ECB's counterparties will affect the ECB. Under the rules, SDs and MSPs are required to obtain and retain detailed information about the financial status and trading activities of their counterparties.³⁶ This information is to be disclosed to the

³⁵ 22 USC 288A(c).

³⁶ See §23.402(c) which requires SDs and MSPs to "know your counterparty". For each counterparty, SDs and MSPs shall conduct due diligence in order to evaluate "previous swaps experience, financial wherewithal and flexibility, trading objectives and purposes of the counterparty". See also §23.430(a), for trades not executed on a swap execution facility ("SEF"), SDs and MSPs are required to verify that their counterparties are eligible contract participants before offering or entering into a trade. See also §23.434 which requires SDs and MSPs to obtain information on the counterparty's "financial situation and needs, objectives, tax status, ability to evaluate the recommendation, liquidity needs, risk tolerance, ability to absorb potential losses" to determine suitability of the trade or strategy. 75 FR 80637 at 80657 – 59.

Commission, Department of Justice or an applicable prudential regulator upon request.³⁷ These requirements apply not only to counterparties but to prospective counterparties as well.³⁸

Requirements that call for SDs and MSPs to delve into the financial and strategic details of their counterparties and potential counterparties should not apply if the ECB is an actual or potential counterparty. First, the ECB should not be required to provide detailed information about its "trading objectives and purposes" to its SD and MSP counterparties. Second, SDs and MSPs are not in a position to assess the "financial wherewithal" and strategic plans of the ECB. Third, the information sought under the proposed rule provides little added value in terms of risk mitigation where the ECB is the counterparty. As discussed above, the ECB's objectives and tasks are defined by the Treaties and it is unnecessary to require additional due diligence by SDs and MSPs in regard to the ECB as a counterparty.

Therefore, we request that the Commission expressly provide in writing that the due diligence requirements under the business conduct rules to not apply if the counterparty or prospective counterparty is a foreign central bank designated by the Commission. We suggest amending the proposed rules with the language set out in the annex.

F. The ECB should be exempt from requirements imposed on registered market, clearing and data entities.

The ECB should be exempt from the indirect effects of regulation imposed on the various entities that serve the overall swap markets. Rules imposed on regulated entities such as designated contract markets ("DCMs"), SEFs, designated clearing organizations ("DCOs") and SDRs, should not result in the imposition of requirements on the ECB. For example, the proposed rules require DCOs to require clearing members to file financial reports with the DCO and maintain risk management policies and procedures to be reviewed by the DCO.³⁹ Thus, if

³⁷ §23.410(b) 75 FR 80637 at 80658.

³⁸ See §23.400, which states that the rule applies to "transactions in swaps as well as in connection with swaps that are offered but not entered into". 75 FR 80637 at 80657.

³⁹ CFTC proposed rule, *Risk Management Requirements for Derivatives Clearing Organizations*, §§39.12 and 39.13, 76 FR 3698 at 3719-20.

See also CFTC proposed rule, *Core Principles and Other Requirements for Swap Execution Facilities*, 76 FR 1214; §37.401 requires SEFs to collect and evaluate data on individual traders' market activity, §37.404 requires SEFs to have rules that require traders to keep records of trading and to make these records available to the SEF and CFTC upon request, §37.502 requires SEFs to have rules that allow the SEF to collect non-routine data from its participants and to allow the SEF to examine the books and records of traders, §37.900 requires SEFs to make swap trading information available to the public on a timely basis.

See also CFTC proposed rule, *Core Principles and Other Requirements for Designated Contract Markets*, 75 FR 80572; , §38.10 requires DCMs to report swap data as required under parts 43 and 45, §38.254 requires DCMs to have rules that require traders to keep records of trading and to make these records available to the DCM upon request.

the ECB were to be a clearing member of a DCO, the DCO would require the ECB to file periodic financial reports with the DCO and the DCO would be required to review the risk management policies and procedures of the ECB. The ECB should not be subject to such demands. As discussed above, the ECB acts under the authority of the Treaties and is not a commercial market participant seeking to maximize its returns. In addition, the immunities granted to the ECB protect the ECB from having to provide its policies and records to outside entities. The annex includes a list of rules (proposed and final) imposed on utility entities that may indirectly impact the ECB. We request that the Commission revise or correct each rule to exclude the ECB and swap transactions involving the ECB from the scope of each of these rules. We suggest amending the proposed rules with the language set out in the annex.

G. The Commission should state that transactions conducted by the ECB are not manipulative.

Section 6(c)(1) of the CEA, as amended by the Dodd-Frank Act, prohibits the use of any "manipulative or deceptive device or contrivance" in connection with swaps, and Section 6(c)(3) further prohibits any person from manipulating any swap. We are not aware of any case interpreting the phrase in the context of central bank activities. The ECB does not seek to maximize profit from its activities. Instead it is carrying out an independent, public task. In order to facilitate the performance of such task, we request that the Commission state that the activities of a central bank are not manipulative. We suggest amending the proposed rules with the language set out in the annex.

H. For purposes of the margin requirements for uncleared swaps, the ECB should not be treated as a financial entity.

In its proposed rules on margin for uncleared swaps, the Commission includes any agency or instrumentality of a foreign government in the definition of "financial entity."⁴⁰ Financial entities are subject to greater margin requirements than those applicable to other entities. In the release accompanying the proposed rules, the Commission comments that these types of sovereign entities do not fit easily into the proposed rule's categories of financial and nonfinancial entities. However, the release explains that the financial condition of a sovereign is linked to the financial condition of its domestic banking system and by extension with the broader global financial system. As a result, the release further explains, a sovereign is similar to

See also CFTC proposed rule, *Information Management Requirements for Derivatives Clearing Organizations*, 75 FR 78185, §39.19 requires DCOs to provide daily reports to the CFTC on initial margin requirements and deposits, and variation margin collected from or paid by each clearing member. The DCO must also report intraday initial margin calls to the CFTC within one hour of the margin call.

⁴⁰ CFTC proposed rule, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants* § 23.150, 76 FR 23732 at 23743.

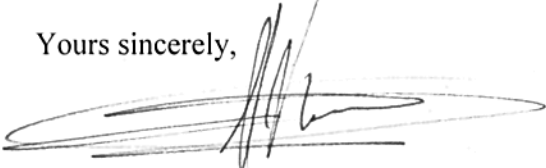
a financial entity in the nature of the systemic risk and in the risk to the covered swap entity (i.e., the dealer or MSP counterparty.)⁴¹

We disagree that the risk posed by the ECB, as a central bank, merits treatment as a financial counterparty. We therefore request that the ECB be characterized as a nonfinancial entity for purposes of the rules on margin for uncleared swaps. We suggest amending the proposed rules with the language set out in the annex.

* * *

Your consideration and assistance in regard to the issues discussed herein is appreciated. If you require further information or clarification please contact myself or Mr. Niall Lenihan, Assistant General Counsel, 00-49-69-13447964, niall.lenihan@ecb.int.

Yours sincerely,



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⁴¹ CFTC proposed rule, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants* § 23.150, 76 FR 23732 at 23735.

ANNEX

<u>Rule</u>	<u>Reference</u>	<u>Proposed text</u>
<i>Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping</i>	17 CFR Part 1 76 FR 29818	§1.3 (<u>Definitions</u>) – add subsection 1.3(xxx)(7) – " <i>Foreign Central Banks</i> – "Swap" does not include any agreement, contract or transaction a counterparty of which is a foreign central bank designated by the Commission."
<i>Further Definition of "Swap Dealer", "Security-Based Swap Dealer", "Major Swap Participant", "Major Security-Based Swap Participant" and "Eligible Contract Participant"</i>	17 CFR Parts 1 and 240 75 FR 80174	<p>1. Written confirmation that the ECB is not a "swap dealer" or "major swap participant".</p> <p>2. §1.3 (<u>Definitions: Swap dealer</u>) – add subsection (ppp)(6) - "The term "swap dealer" shall not include a foreign central bank designated by the Commission."</p> <p>3. §1.3 (<u>Definitions: Major swap participant</u>) - add subsection (qqq)(6) – "The term "major swap participant" shall not include a foreign central bank designated by the Commission."</p> <p>4. §1.3 (<u>Definitions: Category of swaps</u>) – add subsection (rrr)(5) – "The term "swap" does not include swaps that do not involve a U.S. party."</p>
<i>Real-Time Public Reporting of Swap Transactions Data</i>	17 CFR Part 43 75 FR 76139	§43.1 (<u>Purpose, scope and rules of construction</u>) – add subsection (b)(3) – "This part does not apply to (i) swaps to which foreign central banks designated by the Commission as exempt are a counterparty and (ii) foreign exchange swaps and forwards exempt from swap regulation under Section 1a(47)(E) of the Commodity Exchange Act."
<i>Swap Data Recordkeeping and Reporting Requirements</i>	17 CFR Part 45 75 FR 76573	1. §45.2 (<u>Swap recordkeeping</u>) – insert subsection (c) ahead of proposed subsection (c) – "Foreign central banks designated by the Commission shall be exempt from the recordkeeping requirements under part 45 of this chapter."

		<p>2. §45.3 (Swap data reporting) – Insert new subsection (c) - "Swaps involving foreign central banks designated by the Commission shall not be subject to the reporting requirements under part 45 of this chapter."</p>
<p><i>Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps</i></p>	<p>17 CFR Part 46 76 FR 22833</p>	<p>1. §46.2 (<u>Recordkeeping for pre-enactment swaps and transition swaps</u>) – add subsection (f) "<i>Swaps of foreign central banks designated by the Commission</i> – The recordkeeping requirements of part 46 of this chapter shall not apply to swaps to which foreign central banks designated by the Commission are a counterparty."</p> <p>2. §46.3 (Swap data reporting for pre-enactment swaps and transition swaps) – add subsection (c) "<i>Swaps of foreign central banks designated by the Commission</i> – The reporting requirements of part 46 of this chapter shall not apply to swaps to which foreign central banks designated by the Commission are a counterparty."</p>
<p><i>Interim Final Rule for Reporting Pre-Enactment Swap Transactions</i> Effective October 14, 2010</p>	<p>17 CFR Part 44 75 FR 63080</p>	<p>Amend or correct interim final rule – §44.02 (<u>Reporting pre-enactment swaps to a swap data repository or the Commission</u>) – Add subsection (a)(3) – "Swaps involving foreign central banks designated by the Commission shall not be subject to the reporting requirements under part 44 of this chapter."</p>
<p><i>Reporting Certain Post-Enactment Swaps Transactions</i></p>	<p>17 CFR Part 44 75 FR 78892</p>	<p>§44.03 (<u>Reporting transition swaps to a swap data repository or to the Commission</u>) – add subsection (c) – "Swaps involving foreign central banks designated by the Commission shall not be subject to the reporting requirements under part 44 of this chapter."</p>
<p><i>Swap Data Repositories: Registration Standards, Duties and Core Principles Regarding Rulemaking</i> <u>Final Rule</u>, effective October 31, 2011</p>	<p>17 CFR Part 49 76 FR 54538</p>	<p>§49.9 (<u>Duties of registered swap data repositories</u>) – revise/correct by inserting a new subsection (c): "A registered swap data repository shall not accept swap data from a swap if a foreign central bank designated by the Commission is a counterparty to such swap."</p>
<p><i>Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants</i></p>	<p>17 CFR Part 23 76 FR 23732</p>	<p>§23.150 (<u>Definitions applicable to margin requirements</u>) – revise definition of "non-financial entity" to read: "Non-financial entity means a counterparty that is not a swap dealer, a major swap participant, or a financial entity; or is a foreign central</p>

<p><i>Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties</i></p>	<p>17 CFR Parts 23, 255 75 FR 80638</p>	<p>bank that is designated by the Commission." 1. §23.400 (<u>Scope</u>) – add a new subsection (b) - "The provisions of this subsection shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with or offered to a counterparty that is a foreign central bank so designated." 2. §23.401 (<u>Definitions: Special Entity</u>) – add subsection (6) to the definition of special entity: - "The term "Special Entity" shall not include a foreign central bank designated by the Commission."</p>
<p><i>Prohibition on the Employment, or Attempted Employment, of Manipulative and deceptive Devices – Prohibition on Price Manipulation</i> <u>Final Rule</u>, effective August 15, 2011</p>	<p>17 CFR Part 180 76 FR 41398</p>	<p>1. §180.2 (<u>Prohibition on price manipulation</u>) – add subsection (d) - "Activities of foreign central banks designated by the Commission shall not constitute manipulation."</p>
<p><u>"Utilities" Rules</u></p>		
<p><i>Risk Management Requirements for Derivatives Clearing Organizations</i></p>	<p>17 CFR Part 39 76 FR 3698</p>	<p>§39.9 (<u>Scope</u>) – add to the end – "Provided that the requirements under this part shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with a counterparty that is a foreign central bank so designated."</p>
<p><i>Core Principles and Other Requirements for Swap Execution Facilities</i></p>	<p>17 CFR Part 37 76 FR 1214</p>	<p>§37.1 (<u>Scope</u>) - add to the end – "Also provided that requirements under this part shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with a counterparty that is a foreign central bank so designated."</p>
<p><i>Core Principles and Other Requirements for Designated Contract Markets</i></p>	<p>17 CFR Parts 1, 16 and 38 75 FR 80572</p>	<p>§1.52 (<u>Self-regulatory organization adoption and surveillance of minimum financial requirements</u>) – add subsection (m) – " Requirements under this section 1.52 shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with a counterparty that is a foreign central bank so</p>

<p><i>Information Management Requirements for Derivatives Clearing Organizations</i></p>	<p>17 CFR Parts 1, 21 and 39 75 FR 78185</p>	<p>designated." §16.01 (<u>Publication of market data on futures, swaps and options</u> thereon; <u>trading volume, open contracts, prices and critical dates</u>) – add subsection (f) - "Requirements under this part shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with a counterparty that is a foreign central bank so designated." §38.2 (<u>Applicable provisions</u>) - following "including any related definitions and cross-referenced sections", add "provided that requirements under this part shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with a counterparty that is a foreign central bank so designated."</p>
<p><i>General Regulations and Derivatives Clearing Organizations</i></p>	<p>17 CFR Parts 1 and 39 75 FR 77576</p>	<p>§39.19 (<u>Reporting</u>) – add new section (d) - "Requirements under this part shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with a counterparty that is a foreign central bank so designated." §39.1 (<u>Scope and definitions</u>) – add to the end of subsection (a) - "The requirements under this part shall not apply to foreign central banks designated by the Commission nor to any transactions that are executed with a counterparty that is a foreign central bank so designated."</p>