esma European Securities and Markets Authority

The Chair

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Gary Gensler
Chairman
Commodity Futures
Trading Commission
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ESMA response to CFTC public consultation on interpretative statement regarding the confidentiality and indemnification provisions of Section 21(d) of the Commodity and Exchange Act

Dear Mr Gensler, DEAR GARY,

Following the ESMA response to the public consultation on rulemakings on registration of foreign swap data repositories and foreign boards of trade of 17 January 2011 (ESMA/2011/4) and our continued dialogue on this and related subjects, I am writing to you to respond to your public consultation on the interpretative statement regarding the confidentiality and indemnification provision of section 21(d) of the Commodity and Exchange Act.

ESMA appreciates the CFTC recognition of foreign regimes and the access to data requirements originating from them. We consider this to be a major step forward from our previous discussions. According to the CFTC and SEC letter to Commissioner Barnier mentioned in your public release, only the authority recognising the SDR would have been exempted from the indemnification provision. As previously discussed, such a limited exemption would have constituted a major impediment to the recognition of US trade repositories in Europe, given that according to the Regulation of the European Parliament and Council on OTC derivatives transactions, central counterparties and trade repositories (EMIR) the authorities listed in Article 81 of EMIR need to have direct and immediate access to the information in trade repositories. The new approach described in your proposed interpretative release would allow these authorities to get access to data in accordance with criteria determined by EMIR and relevant technical standards.

Having said this, we have concerns with respect to the legal nature of the CFTC interpretative statement and on its application in a US court of law. According to our understanding, this inter-

pretation might give guidance on the application of the indemnification provision, but considering that such provision is in the Dodd-Frank Act, it cannot overrule the Act itself. Therefore non-US competent authorities could still be eventually exposed to legal actions against them.

While recognizing the interpretative statement under consultation contains a step in the right direction, ESMA considers that, in line with the statements of Commissioners Scott D. O'Malia and Jill E. Sommers, the confidentiality and indemnification issue could only be fully addressed with a legislative amendment by repealing the original provision in the Dodd-Frank Act. We therefore respectfully invite the CFTC to support such repeal.

In addition, under the proposed interpretative statement, we have concerns on the application of the indemnification provision to data maintained by SDRs which are relevant for EU competent authorities for the exercise of their duties, but which are reported to the SDR under Dodd-Frank and not under EMIR. These could be, for instance, transactions between two US counterparties on a swap with European reference entities. As you know, this type of information is essential to supervise some markets like the one on CDS and it can be necessary to access these data in a direct and expeditious way by the relevant competent authority.

Under EMIR, and as highlighted in the ESMA discussion paper on draft technical standards (ESMA/2012/95 of 16 February 2012), we consider that for non-EU competent authorities meeting the conditions defined in EMIR, the same access criteria as for European authorities should apply. Therefore, non-EU competent authorities would have access also to information on transactions between European counterparties if such information is relevant for the exercise of their duties. It is important to achieve an equivalent treatment for European authorities under Dodd-Frank.

We understand that European authorities can always get such information indirectly from the CFTC. However, we believe that a more practical arrangement could be found that on the one hand, would alleviate the burden on you in dealing with a significant number of requests for assistance and, on the other hand, would grant direct access while still benefiting from the exemption from indemnification.

Against this background, we suggest to consider two options:

1) deleting the second condition of your rulemaking ("the data accessed by a foreign regulatory authority is reported to such registered SDR pursuant to the foreign regulatory regime"). In this case the sole condition that a SDR is registered, recognised or otherwise authorised in a foreign regulatory regime would be sufficient for the relevant authorities in such foreign regulatory regime not to be exposed to indemnification. This would apply even if the transactions are executed by counterparties not subject to such foreign regulatory regime, but on instruments which might have an impact on such regime.

2) Amend the second condition as follows: "*The data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime or the foreign regulatory authority is entitled to access such data pursuant to its regulatory regime to fulfil its respective responsibilities and mandates*". This will also allow the foreign regulatory authority to access data maintained by the SDR in view of their regulatory mandate.

Thank you again for your openness and consideration of the need to ensure adequate access by non-US regulators to SDR information. I look forward to continue our fruitful co-operation on this issue.

Yours sincerely,

Steven Maijoor
Chair ESMA