Comments of the European Commission in respect of CFTC Staff Advisory No. 13-69 regarding the applicability of certain CFTC regulations to the activity in the United States of swap dealers and major swap participants established in jurisdictions other than the United States.

The European Commission welcomes the opportunity to provide comment on the subject CFTC Staff Advisory (the Advisory).

The need for legal certainty around the requirements that will apply to cross-border derivatives activity is essential in a market where the majority of transactions take place between counterparties incorporated in different jurisdictions. The European Commission is therefore fully supportive of the CFTC's endeavour to provide guidance as to how cross-border activity will be regulated.

In order to ensure that cross-border activity is not inhibited by the application of inconsistent, conflicting or duplicative rules, regulators must work together to provide for the application of one set of comparable rules, where our rules achieve the same outcomes. Rules should therefore include the possibility to defer to those of the host regulator in most cases.

The CFTC and the European Commission have enjoyed a close and collaborative relationship during the development of our respective regulatory reforms in the derivatives (or "swaps and futures") markets over the past five years. The result has been the output of rules which are largely comparable in content and scope and, in some cases, essentially identical. Where differences in the details of our rules have emerged, we have worked together to provide solutions to minimise inconsistencies, duplications and conflicts, notably those documented in the Path Forward agreed between the two Commissions. Under the path forward, we agreed:

- That [relevant definitions] as a matter of principle, will be construed on a territorial basis, to the extent appropriate;
- That we will not seek to apply our rules (unreasonably) in the other jurisdiction; and
- That it is important we should be able to defer to each other when it is justified by the quality of our respective regulation and enforcement regimes.

In this spirit, the European Commission is requesting that the CFTC takes account of the following concerns that we have regarding the Advisory and its potential to result in the dual application of rules.

I. Extraterritorial Application of CFTC Rules

Under the Advisory, a non-U.S. SD (whether an affiliate or not of a U.S. person) regularly using personnel or agents located in the U.S. to arrange, negotiate, or execute a swap with a non-U.S. person generally would be required to comply with the Transaction-Level Requirements. It is our understanding that CFTC transaction level requirements would therefore, potentially, apply to transactions between a European Bank and its non-US clients.

For example;

- A European client of the EU Bank wishes to execute a transaction for a product for which staff of the EU Bank located in New York has expertise beyond the EU Bank's London staff.

  The New York staff therefore organises the terms of the transaction with the client. The transaction is immediately and directly entered onto the EU Bank's books. The EU Bank is the counterparty to the transaction.

- A Latin American client of the EU Bank wishes to execute a transaction outside of European market hours.

  It therefore agrees the deal with the EU Bank's staff in New York – because they still happen to be at their desks. The transaction is immediately and directly entered onto the EU Bank's books. The EU Bank is the counterparty to the transaction.

It is the European Commission's understanding that the execution of transactions under such circumstances may result in the EU Bank having to:

- Clear the trade in a Designated Clearing Organisation.

  This is in spite of the fact that there is no counterparty risk for U.S. entities, and the transaction may be subject to clearing or margin requirements in the EU.

- Apply risk mitigation techniques, such as confirmation and valuation of the transaction.

  This is in spite of the fact that there is no counterparty risk for U.S. entities, and the transaction is subject to essentially identical requirements in the EU.

The European Commission does not believe that the Advisory makes a case for expanding U.S. regulation to non-US market participants in this way. No explanation is provided as to the basis on which the CFTC believes that the limitation under Section 2(i)(1) of the CEA of the Dodd-Frank Act[1] does not apply in respect of the transactions that the CFTC is seeking to regulate.

[1] "The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—

The European Commission therefore urges the CFTC to consider withdrawing the Advisory.

II. Absence of Scope for Deference

Further to the extraterritorial expansion of requirements to transactions between non- U.S. counterparties, the Advisory does not provide for substituted compliance in respect of the affected transactions.

In September 2013, the G20 leaders committed to defer to each other when justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes[2]. The unavailability of substituted compliance in this instance would therefore seem to depart from that commitment.

Following its analysis of comments on the Advisory, if the CFTC nonetheless elects to maintain the Advisory, in its current or an amended form, it must at least provide for such deference in order to meet the G20 commitment and to minimise the burdens caused by dual regulation.

III. Lack of Clarity of the Scope of Application

The test to be applied in determining which transactions are in scope of CFTC requirements is not sufficiently clear.

- What does it mean to 'regularly (use) personnel or agents located in the U.S.'?

  Following its analysis of comments on the Advisory, if the CFTC nonetheless elects to maintain the Advisory, in its current or an amended form, it should consider providing guidance as to the level and frequency of activity that would be deemed to result in such regular use, applying de minimis thresholds.

- What does it mean to 'arrange, negotiate, or execute a swap'?

  This terminology is open to a broad interpretation. Would, for example, the negotiation of a Master Agreement by U.S. middle office staff bring all transactions thereunder into scope?

  If the CFTC elects to maintain the Advisory it should consider providing detailed definitions of what it means to arrange, negotiate or execute a swap.

''(1) have a direct and significant connection with activities in, or effect on, commerce of the United States."

[2] G20 Russia Leaders' Declaration
https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG.pdf

The European Commission appeals to the CFTC to review the Advisory with these concerns in mind.

European Commission staff is at your disposal to discuss this comment submission further with CFTC staff.

The matter is being handled by Ms. Hannah Pinkarchevski, Tel. +32 2 292-1009, e mail address hannah.rayner@ec.europa.eu.