

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
USA

ESM Public
Luxembourg, 13 July 2020

RE: Swap Clearing Requirement Exemptions (RIN 3038-AE33)

Dear Mr. Kirkpatrick,

The European Stability Mechanism¹ (the “**ESM**”) appreciates the opportunity to provide the Commodity Futures Trading Commission (the “**CFTC**”) with comments on the Commission's proposed rules regarding exemptions from the swap clearing requirement (the “**Proposed Exemption**”)².

The ESM welcomes the CFTC's decisions:

- to codify in rule text the exemption from the clearing requirement for swaps entered into with central banks, foreign governments and international financial institutions set out in the preamble to the end-user exception final rule (the “**2012 End-User Exception**”)³; and
- to include the ESM in the list of international financial institutions mentioned as exempt from the clearing requirement for swaps, following on CFTC Letter No. 17-58, of 7 November 2017 (“**No-action**”) as revised by CFTC Letter No. 19-23, of 16 October 2019.

However, the ESM is concerned that the Proposed Exemption is contingent on the swaps having been reported to a swap data repository pursuant to CFTC Rules §§ 45.3 and 45.4 (the “**Reporting Condition**”). In that respect, we support the arguments and conclusions set out by the Bank for International Settlements (the “**BIS**”) in its letter to the CFTC dated 8 July 2020⁴, regarding the inclusion of the Reporting Condition and its impact on the operations of institutions who are both covered by the Proposed Exemption and not subject to CFTC Rules §§ 45.3 and 45.4.

Like the BIS, the ESM is not a “U.S. person” under the CFTC’s July 2013 cross-border guidance⁵ and is not a swap dealer or major swap participant, and consistent with the BIS’ analysis, the ESM would not be able to satisfy the Reporting Condition. In fact, the ESM counterparties that may trigger reporting obligations under the CFTC’s Part 43 and Part 45 Rules are limited, such that the ESM is not the “reporting counterparty” under such rules.⁶ As such, our concerns with the Reporting Condition are

¹ The European Stability Mechanism is an intergovernmental organisation established by the Treaty Establishing the European Stability Mechanism entered into between and by the euro area Member States. The European Stability Mechanism is based in Luxembourg.

² Swap Clearing Requirement Exemptions, 85 Fed. Reg. 27955 (May 12, 2020).

³ End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (Jul. 19, 2012).

⁴ “Re: Swap Clearing Requirement Exemptions, RIN 3038-AE33”, published on the consultation website as comment No. 62666 on Proposed Rule 85 FR 27955.

⁵ Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (Jul. 26, 2013). The ESM does not appear to meet any of the prongs of “U.S. person” set out in the CFTC’s July 2013 cross-border guidance.

⁶ All our counterparties that may trigger reporting obligations under the CFTC’s Part 43 and Part 45 Rules are currently provisionally registered swap dealers.

twofold: (1) the ESM cannot satisfy the Reporting Condition and (2) the ESM would be unaware of our counterparty's failure.⁷ Thus, if there is a failure of the Reporting Condition, such failure is the fault of the ESM's counterparty. However, although the compliance failure here lies with the ESM's counterparty, as drafted in the Proposed Exemption, the ESM risks being subject to a CFTC enforcement action for failure to comply with the clearing requirement solely due to the actions or inaction of its counterparty.

The ESM, therefore, would like to join the BIS in requesting that the CFTC remove the Reporting condition when finalising the Proposed Exemption.

Sincerely,



David Eatough
Member of the Management Board
General Counsel

⁷ In addition to the ESM's scope of counterparties being limited as noted in Footnote 6, and as noted by the BIS, whether a swap has been reported under CFTC Rules §§ 45.3 and 45.4 is not made public, so the ESM (like the BIS) would not be able to verify whether a swap had been reported in satisfaction of the Reporting Condition.