

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

ESM Public  
Luxembourg, 06 August 2020

**RE: Reopening of Comment Period re 2016 Proposal (RIN 3038-AE46)**

Dear Mr. Kirkpatrick,

The European Stability Mechanism<sup>1</sup> (the “**ESM**”) appreciates that as part of the Commodity Futures Trading Commission’s (the “**Commission**” or the “**CFTC**”) recent notice of proposed rule identified by RIN 3038-AE46<sup>2</sup> (the “**2020 Proposal**”), the Commission also reopened the comment period in respect of its July 27, 2016 proposal to amend CFTC Rule 3.10(c) (the “**2016 Proposal**”).<sup>3</sup>

The ESM strongly supports the 2016 Proposal to codify the no-action relief provided for in CFTC Letter No. 15-37 (June 4, 2015) (“**No-Action Letter 15-37**”) as it relates to activities of foreign intermediaries with customers that are an international financial institution (“**IFI**”). The ESM, however, is not included in the list of IFIs provided for in No-Action Letter 15-37. In codifying the identified IFIs, the ESM believes this list should be updated to include the ESM.

The ESM is an IFI set up by euro area Member States to provide financial assistance to euro area Member States in severe financial distress. The ESM was created following the euro area debt crisis and was formally established by way of a treaty signed on February 2, 2012 by euro area Member States, and began operating only in October 2012. Thus, as many regulations were developing around the world immediately following the 2010 financial crisis, regulators often relied on existing lists of IFIs to maintain consistency with existing precedent.<sup>4</sup> Unfortunately for the ESM, as a newly created

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<sup>1</sup> 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.

<sup>2</sup> Specifically, the Commission’s proposed rule proposing amending the conditions under CFTC regulation 3.10(c) pursuant to which a person located outside of the United States engaged in the activity of a commodity pool operator qualifies for a registration exemption. See, Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools, 85 Fed. Reg. 35,820 (June 12, 2020).

<sup>3</sup> Exemption from Registration for Certain Foreign Persons, 81 Fed. Reg. 51,824 (Aug. 5, 2016).

<sup>4</sup> For example, the Commission considered “international financial institutions” within the context of the End-User Clearing Exemption as those institutions that are defined as “international financial institutions” in 22 U.S.C. 262r(c)(2)(Annual Report by Chairman of National Advisory Council on International Monetary and Financial Policies) and those institutions defined as “multilateral development banks” in the Proposal for the Regulation of the European Parliament and of the Council on OTC Derivative Transactions, Central Counterparties and Trade Repositories, Council of the European Union Final Compromise Text, Article 1(4a(a)) (Mar. 19, 2012) (published in final form on July 4, 2012 with no change to Article 1(4a(a))). The ESM, having been just established in February of 2012, was not included on either list. See, End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42,560 (July 19, 2012) (the “**End-User Clearing Exemption**”), at 42,561-42,562.

IFI, it was not included in various lists of IFIs created prior to 2012 – i.e., prior to the ESM’s existence. Within Europe, the ESM is exempt from the European Market Infrastructure Regulation (with the exception of the reporting obligation), along with other IFIs.

Including the ESM within the list of IFI’s in any final rule codifying No-Action Letter 15-37 would also be consistent with past actions by the Commission.

Following the Commission’s final rules and implementation of the clearing<sup>5</sup> and margin requirements,<sup>6</sup> the ESM engaged with the Commission to include the ESM on similar lists as those provided for in No-Action Letter 15-37. For example, on June 6, 2017 and July 10, 2017, the ESM submitted requests for no-action relief from certain margin and clearing requirements, respectively, based on the ESM’s status as an institution similar to IFIs already exempted from the margin and clearing requirements at issue.<sup>7</sup> No-Action relief was ultimately provided. More recently, the Commission extended the original relief in respect of the clearing requirement<sup>8</sup> and codified the ESM’s exclusion from the definition of “financial end user” from the Commission’s margin requirements for uncleared swaps.<sup>9</sup> Additionally, in the Commission’s recently finalized cross-border rule at 17 C.F.R. §23.23, the ESM is included in the list of IFIs excluded from the definition of “U.S. person”.<sup>10</sup>

The ESM, therefore, requests that the Commission include the ESM in the list of IFI’s in proposed CFTC Rule 3.10(c)(6) such that “Foreign Intermediaries” (as defined in the 2016 Proposal) may act as intermediaries with respect to the ESM and be eligible for exemption from registration with the Commission under CFTC Rule 3.10(c), as proposed in the 2016 Proposal.

The ESM does note that the United States is not a member of the ESM, the United States has no obligations with respect to the ESM, and the ESM is based in Luxembourg. Therefore, the ESM would be considered a “person located outside the United States” as such term is used in existing CFTC Rule 3.10(c). However, the ESM requests to be included in the list of IFIs to (i) simplify any analysis our teams and counterparties may have with respect to CFTC Rule 3.10(c) by clearly identifying that the ESM should be treated in a manner similar to other Euro-focused IFIs<sup>11</sup> and (ii) mitigate the risks that

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<sup>5</sup> See, the End-User Clearing Exemption at 42,561-42,562.

<sup>6</sup> See, 17 CFR § 23.151 (until a recent final rule, paragraph (2) of the definition of Financial end user exempted sovereign entities and multilateral development banks from the margin requirements, but did not include the ESM).

<sup>7</sup> If the Commission would like copies of the letters requesting no-action relief, please email as at the addresses provided for at the end of this letter.

<sup>8</sup> CFTC No-Action Letter 20-13 (April 14, 2020).

<sup>9</sup> Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 Fed. Reg. 27,674 (May 11, 2020).

<sup>10</sup> See, 17 CFR § 23.23(a)(23)(iii) (and the related guidance, which expressly identifies the ESM as an IFI for purposes of this exclusion).

<sup>11</sup> For example, the list of IFIs does include the European Bank for Reconstruction and Development, Council of Europe Development Bank, Nordic Investment Bank, European Investment Bank, European Investment Fund and other institutions with limited or no nexus to the United States such that they too should qualify as “a person located outside the United States.” Thus, were the ESM not included in the list of IFIs in proposed CFTC Rule

in any future lists of IFIs, the ESM is not included (or if it is not included, such determination is intentional).

The ESM also notes that in the 2020 Proposal, the Commission has requested comment regarding “whether Commission regulation 3.10 should require commodity interest transactions of...International Financial Institutions that are required or intended to be cleared on a registered derivatives clearing organization (DCO) to be submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act, unless such person or International Financial Institution is itself a clearing member of such registered DCO?”

The ESM, like other IFIs, currently does not clear its swaps that are subject to the Commission’s clearing requirements.<sup>12</sup> As such, we are unsure what would be the intention behind adding this requirement and are concerned it could create confusion with our counterparties. Additionally, were the ESM or any other IFI to clear any swaps, the ESM and other IFIs would expect the terms and manner in which the financial product is executed, would be subject to the applicable IFI’s existing treaty’s terms (or other governing document) that focus on minimizing and mitigating financial/credit risks for the IFI. As such, we would hope that, based on considerations of public policy and international comity, the Commission would not add further conditions to such activity limiting who an IFI can engage to clear a trade.

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3.10(c)(6), a person may be concerned that the ESM’s non-inclusion reflects an intentional decision by the Commission to treat the ESM in a manner differently than these other IFIs.

<sup>12</sup> The ESM currently relies on the no-action relief provided for in CFTC No-Action Letter 20-13 (April 14, 2020), but also notes that the Commission has also recently proposed a rulemaking that would codify this relief as part of the End-User Clearing Exemption. *See*, Swap Clearing Requirement Exemptions, 85 Fed. Reg. 27,955 (May 12, 2020).



The ESM appreciates the opportunity to provide these comments on the 2016 Proposal. We would be pleased to further discuss and clarify the issues described herein with Commission staff. Should you have any comments or questions regarding this submission, please contact us by emailing Pedro Bizarro at [P.Bizarro@esm.europa.eu](mailto:P.Bizarro@esm.europa.eu) and Stefano Finesi at [S.Finesi@esm.europa.eu](mailto:S.Finesi@esm.europa.eu).

Sincerely,

A handwritten signature in black ink, appearing to be 'David Eatough', with a long horizontal line extending to the right.

**David Eatough**  
**Member of the Management Board**  
**General Counsel**

cc: Chairman Heath P. Tarbert  
Commissioner Brian D. Quintenz  
Commissioner Rostin Benham  
Commissioner Dawn DeBerry Stump  
Commissioner Dan M. Berkovitz  
Frank Fisanich, Chief Counsel, Division of Swap Dealer and Intermediary Oversight