

The Chair

Date: 27 August 2012  
ESMA/2012/535

Gary Gensler  
Chairman  
Commodity Futures  
Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
USA

**Ref: Answer to the Proposed Interpretative Guidance and Policy Statement on  
Cross-Border application of Certain Swaps provisions of the Commodity Exchange  
Act – RIN number 3038-AD57**

Dear Chairman Gensler,

DEAR GARY,

On 12 July - 2012, the Commodity Futures Trading Commission (CFTC) published a proposed interpretative guidance and policy statement regarding the Cross-Border application of Certain Swaps provisions of the Commodity Exchange Act.

This consultation is of particular relevance to ESMA which is tasked with drafting technical standards under EMIR, including determining derivative contracts that are considered to have a direct, substantial and foreseeable effect within the European Union, as well as assisting the European Commission in its own task of adopting decisions on equivalence of the legal, supervisory and enforcement framework in third countries. We have maintained an open and fruitful dialogue with the CFTC in the past on these matters and we will continue to do so, in the interest of regulatory convergence at international level.

In a market which is global in nature, it is particularly important that regulations in the different jurisdictions converge. Convergence and, consequently, avoidance of gaps and overlaps, will contribute to a safe and efficient global derivatives market.

In order to prevent overlaps, it is important that regulators in different jurisdictions rely on each other especially when an equivalent regulation is implemented in the relevant jurisdiction. Indeed it is of paramount importance to strictly limit, if not eliminate, any overlap that could jeopardise both safety and efficiency of the derivatives market and that could negatively impact on the implementation of the G20 commitments.

We would like to comment as follows:

## US person and registration

The proposed interpretation of the scope of what has a “*direct and significant connection with activities in, or effect on, commerce of the United States*” is broad.

The CFTC proposes that non-US persons who engage in more than a de minimis level of swap dealing with a US person are required to register as a swap dealer (SD). In addition, non-US persons who hold swap positions above the Major Swap Participants (MSP) specified thresholds with a US counterparty are required to register as MSP.

In practice, this would mean that European entities (whether or not affiliates or subsidiaries of US entities) would be subject to CFTC registration requirements if they enter into transactions (above the SD or MSP thresholds) with US persons. This means that these European entities will be subject at the same time to Dodd Frank and EMIR requirements.

We believe that the scope of the derivative transactions to be considered for the purpose of determining the registration requirement of SD or MSP should be limited to relevant transactions and to those other activities which could be carried out with the purpose of circumventing any relevant obligation. Indeed, it would be appropriate to consider that only transactions that might result in a significant exposure for a US person should be deemed to have a direct and significant impact in the US.

Far-reaching entity level registration requirements imposed on European entities as well as a limited scope for substituted compliance (as discussed below), contributes to dual regulatory compliance requirements. This is why we ask the CFTC to reconsider the need for European entities to register as SD or MSP to the extent they are fully subject to EU legislation on OTC derivatives.

In addition, CFTC registration requirements would apply to European entities irrespective of whether they would solicit the counterparty in the US or whether the transaction would be concluded at the initiative of the US person. Moreover, in the case of US branches, registration of the European head office is required even though the transactions would be legally entered into by the parent entity outside the US, with no additional risk for the US compared to similar entities operating without US branches.

In Europe, under the MiFID proposal, the EU regime would be applicable to third country investment firms only if the latter promote their services or solicit clients in the EU. Such regime would not apply in the case of the provision of services by the third country investment firm at the exclusive initiative of the EU clients. Under the MiFID proposal, third country entities would also remain subject to their home country legislation if deemed equivalent by the European Commission.

The broad scope of the definitions of a US person, SD and MSP, and the resulting registration requirements could have a serious impact on the current business model of European and US firms which may not be proportionate to the benefits being sought. Alternative approaches should be envisaged to ensure that the objectives of US regulations are satisfied.

## Substituted Compliance

We appreciate the introduction of the concept of substituted compliance in the CFTC's proposal. However, we see two limitations in the concept, apart from its application (commented below):

- We have always been of the view that when equivalence or substituted compliance is granted for an entire jurisdiction, registration of entities located in that jurisdiction, including affiliates or subsidiaries of US entities, should not be required. However, in the US proposed regime, registration is a pre-requisite before substituted compliance could apply.
- We believe that the proposed use of substituted compliance is still very limited. It would apply on a chapter by chapter basis, and in some instances, on a case by case basis. It would also only apply to transactions between non-US persons and not to cross border transactions. If applied in this form, such an approach would be far away from the concepts of equivalence, mutual recognition and avoidance of duplicative or conflicting rules included in EMIR.

We understand that substituted compliance would apply for entity level requirements on a firm by firm basis but with provisions for applications by groups or by whole jurisdictions. It is important to note that EMIR is a regulation directly applicable in the 27 EU Members States. This will also be the case for the technical standards developed by ESMA that will take the form of a European Commission Regulation. Other entity-level requirements have already been introduced in Europe through either MiFID or the Capital Requirements Directive (CRD). Under this EU regime, firms established in European countries will apply these rules without any option to apply different rules. Because there is one set of rules that applies across the EU, and in order to facilitate the assessment and to limit the burden on European firms, substituted compliance should apply to all EU firms rather than at firm specific level. This is also the case for ensuring a consistent application of enforcement and supervision across EU firms. In this respect, there are several ESMA mechanisms to ensure that supervision and enforcement are convergent and comparable across the EU. Against this background, the European approach on equivalence is based on an overall assessment of the regulatory and supervisory regime in a particular jurisdiction and we encourage the CFTC to adopt a similar approach for substituted compliance for the entire EU.

Concerning the application of substituted compliance to transaction level requirements, we believe that its application is too narrow. We understand that substituted compliance would apply to transactions between two non-US counterparties but, for cross-border transactions (e.g. between a US and a European counterparty) substituted compliance is not allowed. This would mean that both the European and US regulations would apply to a transaction. We believe it would be essential to consider the application of substituted compliance for transactions between European and US firms.

Under Article 13 of EMIR, the European Commission, assisted by ESMA, will monitor the international application of requirements for OTC derivatives in particular with regard to potential,



duplicative or conflicting requirements. In addition, the European Commission may take an equivalence decision to allow for the application of an equivalent third country regime for transactions between European and third country firms. Therefore, in order to allow for an equivalence decision and positive monitoring, it is important that the third country rules do not duplicate or conflict with the European regime. We urge the CFTC to extend the scope of substituted compliance to ensure a smooth adoption of a mutual recognition approach, to avoid an unacceptable situation for both market participants and regulators.

In addition to Article 13 of EMIR, ESMA (under Articles 4 and 11) has to draft regulatory technical standards specifying the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provisions in EMIR. We are working on the development of this draft technical standard. In that context, the broad scope of a US person definition and the limited use of substituted compliance might make this work complex in view of the objective to avoid duplications and potentially conflicting provisions which could have serious consequences for both US and European firms.

We believe that we will succeed in building a sound and coherent global framework leading to improved transparency, efficiency and robustness of the OTC derivatives market, in accordance with the G20 commitments. To that end, although we welcome the introduction of the concept of substituted compliance, we are convinced that it will not be possible to achieve our common objective without changing significantly its scope to a regime where true reliance on the EU regulatory and supervisory regime is achieved. This could be done by expanding the number of cases where it can be applied (especially transaction level requirements) and by applying it EU-wide, instead of firm by firm or country by country.

ESMA stands ready to assist the CFTC in assessing the conditions for substituted compliance in a EU-wide approach.

I hope that these comments will help and look forward to continued cooperation with the CFTC with the aim to deliver convergent regulation for a safe and efficient OTC derivatives market.

Yours sincerely,

A handwritten signature in black ink, appearing to read "S. Maijoor". The signature is stylized and somewhat abstract, with a large initial 'S' and a horizontal line extending to the right.

Steven Maijoor  
Chair ESMA