CITADEL

September 2, 2016

Via Electronic Submission: https://www.esma.europa.eu/press-news/consultations/consultation-clearing-obligation-financial-counterparties-limited-volume#registration-form_consultation

European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris, France

Re: Consultation Paper on the Clearing Obligation for Category 3 Entities

Dear Sir or Madam:

Citadel LLC[1] appreciates the opportunity to provide comments to the European Securities and Markets Authority ("ESMA") on the proposal to allow Category 3 entities an additional two years to implement mandatory clearing.[2]

The EU is at a critical juncture in the implementation of the G-20 reforms to the OTC derivatives markets. The phase-in of mandatory clearing by entity type for the first group of interest rate derivatives (those denominated in USD, EUR, GBP, or JPY) recently began, and its scope will be extended to additional interest rate derivatives and credit derivatives in 2017. Further, the MiFID II reforms designed to improve conditions for investors through increasing market transparency and competition are expected to be implemented in January 2018.

We are concerned that the proposed two-year clearing delay for Category 3 entities will disrupt the implementation of these critical reforms. ESMA preliminarily concludes in the Consultation Paper that only a small percentage of overall trading activity will be affected by the proposed two-year clearing delay. However, we believe that the proposed delay will affect a far larger segment of the market, and detail below why we believe that ESMA's preliminary analysis of EU trade repository data understates the magnitude of the proposed delay.

As a result, we strongly believe that this proposal may not only disrupt the market's transition to central clearing but may also impede the successful implementation of the MiFID II reforms in January 2018. Central clearing is a fundamental cornerstone to open, efficient and transparent markets. In addition to mitigating systemic risk and eliminating the interconnected web of bilateral counterparty credit exposures, central clearing transforms how OTC derivatives can be traded. Since market participants no longer face each other following the execution of a *cleared* OTC

[1] Citadel is a global financial firm built around world-class talent, sound risk management, and innovative market-leading technology. For more than a quarter of a century, Citadel's hedge funds and capital markets platforms have delivered meaningful and measurable results to top-tier investors and clients around the world. Citadel operates in all major asset classes and financial markets, with offices in the world's leading financial centers, including Chicago, New York, San Francisco, Boston, London, Hong Kong, and Shanghai.

[2] Consultation Paper on the Clearing Obligation for Financial Counterparties with a Limited Volume of Activity (July 13, 2016), available at: https://www.esma.europa.eu/press-news/consultations/consultation-clearing-obligation-financial-counterparties-limited-volume (the "**Consultation Paper**").

derivative, complex bilateral trading documentation can be eliminated and a wider range of trading counterparties can interact with each other. This transformation in how OTC derivatives can be traded is critical to successfully transitioning more trading activity onto transparent and fully regulated trading venues, as contemplated in the MiFID II reforms.

We urge ESMA to re-assess its preliminary findings in light of the limitations identified below and to consider all of the potential consequences of a two-year clearing delay for Category 3 entities. These consequences include the impact on both MiFID II implementation and the ongoing equivalence discussions with other jurisdictions regarding clearing, trading, and transparency requirements for OTC derivatives. As an alternative, and in light of the significant impact this proposal may have on the implementation of OTC derivatives reforms in the EU, we believe ESMA should propose a more targeted approach to address specific implementation challenges faced by certain market participants when transitioning to central clearing.

Below we detail (a) why the preliminary analysis of EU trade repository data understates the magnitude of the proposed delay, (b) additional costs of the proposed delay that should be taken into account, (c) how the proposed delay may not achieve the stated benefits, and (d) a proposed alternative approach.

I. The Analysis of EU Trade Repository Data Understates the Magnitude of the Proposed Delay[3]

In order to assess the potential impact of the proposed two-year clearing delay, ESMA conducted an analysis of EU trade repository data. Specifically, ESMA determined the outstanding notional amount of OTC derivatives in the interest rate asset class held by financial counterparties on three different dates over the last eighteen months.[4] ESMA then sought to estimate how this outstanding notional amount was distributed among Category 1, Category 2, and Category 3 entities.

In using outstanding notional to measure the size of the market, it is important to note that (a) with respect to a trade between two EU financial counterparties, double-counting results as each counterparty is attributed the full outstanding notional amount of the trade, and (b) with respect to a trade between one EU financial counterparty and a third country entity, only the outstanding notional amount of the EU financial counterparty appears to be considered.

Based on this analysis, ESMA preliminarily concludes that no more than 2.2% of the trading activity in interest rate derivatives will be subject to the proposed two-year clearing delay.[5] ESMA also suggests that approximately 90% of all trading activity is actually among Category 1 entities (i.e. direct clearing members of CCPs trading with each other, whether on a cleared or uncleared

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[3] We focus on ESMA's analysis of the interest rate derivatives asset class, but the identified concerns apply equally to credit derivatives.

[4] Consultation Paper at 27. The data was collected for 20 February 2015, 3 August 2015, and 29 February 2016.

[5] Consultation Paper at 19.

basis).[6] These findings in turn inform ESMA's determination that the potential benefits of the proposed delay outweigh the associated costs.

Based on our significant experience in the OTC derivatives markets, we believe ESMA's preliminary conclusions result from an incomplete data analysis as well as limitations in available EU trade repository data. As a result, ESMA has yet to answer the central question: *With respect to those OTC derivatives subject to the clearing obligation, what is the percentage of current trading activity that will be afforded a two-year clearing delay?*

A. The Data Analysis Includes OTC Derivatives That Are Not Subject to the Clearing Obligation

In order to assess the potential impact of the proposed two-year clearing delay, ESMA should focus on those OTC derivatives that are subject to the EMIR clearing obligation and determine how much of the current trading activity in these instruments would be subject to the proposed delay. Although it is not entirely clear from ESMA's description of its dataset, it appears that ESMA has not limited its analysis to the classes of OTC derivatives actually subject to the EMIR clearing obligation. Instead, it appears that ESMA has included data covering the entire interest rate derivatives asset class. This asset class includes many instruments that are not subject to the clearing obligation, such as swaptions, cross-currency swaps, interest rate caps/floors, and inflation swaps.[7]

By including data on OTC derivatives that are not subject to the clearing obligation, and in many cases not even eligible for voluntary clearing, the analysis underestimates the impact of the proposed delay on the market for cleared OTC derivatives. In our experience, a broader and more diverse set of market participants are active in the highly standardized and liquid instruments that are subject to the clearing obligation, and therefore we would expect Category 3 entities to account for a larger percentage of the market in those instruments compared to more bespoke uncleared derivatives.[8] ESMA should limit its analysis to the classes of OTC derivatives actually subject to the EMIR clearing obligation in order to accurately assess the potential impact of the proposed two-year clearing delay on trading activity in those instruments.

B. The Data Analysis Does Not Measure Current Trading Activity

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[6] *See id*. ESMA estimates Category 1 accounts for 94.5% of market volume, Category 2 accounts for 4.4% of market volume, and Category 3 accounts for 1.1% of market volume. Even if the most conservative assumption is made that Category 2 and Category 3 entities only ever transact with Category 1 entities (thereby accounting for 5.5% of the trading activity of Category 1 entities), the remaining 89% of market volume is then solely among those Category 1 entities.

[7] *See*, *e.g.*, TR Question 1 in the ESMA Questions and Answers on EMIR (July 27, 2016), available at: https://www.esma.europa.eu/press-news/esma-news/esma-updates-its-emir-qa-2.

[8] *See*, *e.g.*, "In search of an edge: CTAs launch into swaps trading," Risk.net (Aug. 30, 2016), available at: http://www.risk.net/hedge-funds-review/feature/2468808/in-search-of-an-edge-ctas-launch-into-swaps-trading. ("The primary thing that has made trading interest rate swaps possible is the fact they are cleared. As a CTA, doing bilateral deals with banks is never easy. Nobody wants over-the-counter trades").

Current trading activity can be measured by looking at the transaction reports submitted to EU trade repositories each time an OTC derivative is executed. These transaction reports should enable ESMA to calculate the number of trades and notional amount traded by market participants each day. However, in the Consultation Paper, ESMA has measured trading activity by looking at the outstanding notional amount of interest rate derivatives held by financial counterparties on three different dates over the last eighteen months.[9] Outstanding notional amount is not an accurate indicator of current trading activity, and therefore, leads to inaccurate conclusions regarding the overall impact of the proposed two-year clearing delay.

First, outstanding notional amount figures include legacy transactions that were executed years ago and backloaded into EU trade repositories under EMIR reporting requirements. As a result, to the extent those legacy transactions have not been terminated, outstanding notional provides more of a historical perspective of trading activity instead of reflecting current market dynamics. This distinction is critically important given the significant changes to business models and trading activities that have recently occurred following the financial crisis. Outstanding notional amount figures may, therefore, overestimate the current trading activity of Category 1 entities given their significant legacy portfolios.

Second, outstanding notional amount figures underestimate trading activity in cleared OTC derivatives. A significant benefit of central clearing is the margin and capital efficiencies obtained through multilateral netting and compression, which reduce the outstanding notional amount of cleared OTC derivatives. For example, LCH SwapClear participants compressed USD 328 *trillion* in notional of cleared OTC derivatives during 2015 alone.[10] Furthermore, according to data provided by a compression service provider included in the most recent FSB Progress Report on the implementation of OTC derivatives market reforms, the vast majority of compression now occurs with respect to cleared OTC derivatives, disproportionally reducing their gross notional outstanding compared to uncleared OTC derivatives.[11] As a result, post-compression outstanding notional amount figures underestimate actual trading activity in cleared OTC derivatives.

Third, outstanding notional amount figures do not capture certain trading activity in the market. For example, buyside firms will frequently enter into an OTC derivative and then subsequently offset the position when re-balancing a portfolio. However, if looking solely at a firm's outstanding notional amount following the termination of a position, it would appear as though neither the original execution nor the subsequent offset took place, even though multiple trade executions in fact occurred.

In order to determine the percentage of trading activity that would be subject to the proposed two-year clearing delay, accurately measuring current trading activity in the market is essential. For the reasons above, outstanding notional amount is unrepresentative of current trading activity.

[9] *See* the Consultation Paper at page 27.

[10] "Compression with SwapClear", available at: http://www.lch.com/documents/731485/762472/LCH_Compression_Brochure_080216_READERclean.pdf/.

[11] *See* Figure 6, FSB Eleventh Progress Report on Implementation: OTC Derivatives Markets Reforms (Aug. 26, 2016), available at: http://www.fsb.org/2016/08/otc-derivatives-market-reforms-eleventh-progress-report-on-implementation/.

We urge ESMA to instead refer to the transaction reports submitted to EU trade repositories each time an OTC derivative is executed in order to accurately calculate the number of trades, notional amount, and risk transferred by market participants each day.

C. The Data Analysis Does Not Take Into Account the Trading Activity of Third Country Entities

Under Article 4(1)(a)(iv) of EMIR, a transaction between a third country entity and a EU financial counterparty is also subject to the clearing obligation as long as the third country entity would have been considered in-scope if established in the EU. As a result, third country entities that would be considered Category 3 entities if established in the EU ("Third Country Category 3 Entities") will also be able to take advantage of the proposed two-year clearing delay. However, the trading activity of these entities does not appear to be taken into account in ESMA's data analysis, significantly underestimating the percentage of trading activity that may be affected as a result.

We anticipate that a significant percentage of Category 1 trading activity is actually with Third Country Category 3 Entities. For example, new participants in cleared OTC derivatives have entered the market as a result of the implementation of clearing and trading reforms outside of the EU. These entities may transact significant volumes of *cleared* derivatives, but may not be a direct clearing member of a CCP or engage in significant volumes of *uncleared* derivatives. As a result, these entities may be considered Third Country Category 3 Entities despite transacting in significant volumes of cleared derivatives with Category 1 firms.

Under the current ESMA methodology, it appears that for trades between a third country entity and a EU financial counterparty, only the outstanding notional amount of the EU financial counterparty is considered. Therefore, given the number of trades between Category 1 entities and Third Country Category 3 Entities, this methodology would result in both overestimating Category 1 volume and underestimating Category 3 volume.

ESMA should instead use the "Counterparty ID" field provided on the transaction reports submitted to EU trade repositories to identify trading activity between Category 1 entities and third country entities in order to more accurately evaluate the impact of the proposed two-year clearing delay. Under the current methodology, ESMA's data analysis does not take into account a large segment of the market that may be able to take advantage of the proposed delay.

D. The Data Analysis Does Not Appear to Accurately Measure the Trading Activity of Investment Funds

In the draft technical standards annexed to the Consultation Paper, ESMA appears to propose a two-year clearing delay for all Category 3 entities, even non-financial counterparty alternative investment funds that are above the relevant clearing threshold ("AIF NFCs"). However, ESMA does not include the trading activity of these AIF NFCs in its data analysis, an omission that results in ESMA underestimating the trading activity that may be subject to the proposed delay.

In addition, it is our experience that many investment managers transact on behalf of both Category 2 and Category 3 funds (or funds that would be Category 3 if established in the EU). This is due to the fact that, for purposes of assessing whether a fund is a Category 2 or Category 3 entity, funds managed by the same investment manager are permitted to apply the EUR 8 billion threshold of uncleared OTC derivatives separately to each fund as long as it constitutes a segregated and ring-fenced pool of assets.[12] These Category 3 funds (and funds that would be Category 3 if established in the EU) represent a material segment of the market and it is important they are accurately identified when analyzing EU trade repository data. Given that EU trade repository data does not clearly identify which funds are Category 2 versus Category 3, we are concerned that ESMA may not have accurately allocated trading activity between these groups of funds.

E. A More Accurate Methodology

In order to accurately assess the potential impact of the proposed two-year clearing delay, ESMA should first answer the following question: *With respect to those OTC derivatives subject to the clearing obligation, what is the percentage of current trading activity that will be afforded a two-year clearing delay?*

The data analysis performed by ESMA in the Consultation Paper does not answer this question due to the shortcomings identified above. We urge ESMA to re-assess its data analysis and make the following modifications:

- Focus solely on trading activity in those OTC derivatives that are subject to the EMIR clearing obligation.

- Measure current trading activity by using the transaction reports that are submitted to EU trade repositories each time an OTC derivative is executed instead of relying on outstanding notional amount figures.

- Include all of the trading activity that may be subject to the proposed delay, including transactions by third country entities and AIF NFCs.

    - To better assess the percentage of trading activity that may be subject to the proposed delay, we suggest ESMA use the "Counterparty ID" field provided on the transaction reports submitted to EU trade repositories to first separate out trading activity between two Category 1 entities. ESMA should publish this figure, as it represents trading activity that will not be affected by the proposed delay.

    - The remaining trading activity of Category 1 entities is therefore entered into with Category 2 or Category 3 entities (including third country entities that would be Category 2 or Category 3 if established in the EU). ESMA should then estimate how this remaining trading activity would be divided between the two categories of entities and clearly explain these estimates.

[12] *See, e.g.*, Recital 6 of Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015.

We believe the resulting data analysis would demonstrate that a far larger segment of the market may be able to take advantage of the proposed delay than is currently estimated by ESMA. Category 3 entities (and Third Country Category 3 Entities) do not necessarily engage in a limited volume of activity, and may be highly active in *cleared* OTC derivatives without surpassing the Category 2 threshold (which is measured only by reference to activity in *uncleared* OTC derivatives). This trading activity in cleared OTC derivatives may also benefit from the netting and compression solutions offered by clearinghouses in order to reduce outstanding notional amounts. We urge ESMA to re-assess its data analysis and its preliminary conclusion that no more than 2.2% of the volume in interest rate derivatives will be subject to the proposed two-year clearing delay.

II. ESMA Does Not Adequately Consider the Costs of the Proposed Two-Year Clearing Delay

Irrespective of the percentage of trading activity that may be subject to the proposed delay, there are specific costs associated with the proposal that ESMA has not adequately considered. We believe that, in light of the limitations in the data analysis performed by ESMA, these costs increase in significance and outweigh any potential benefits associated with the current proposal.

A. Impact on Clearing Member Competition

ESMA's proposed two-year clearing delay attempts to respond to challenges certain market participants are experiencing in obtaining access to central clearing. However, delaying the clearing obligation may further exacerbate these challenges by inhibiting competition among clearing members.

The imposition of a clearing mandate may create the commercial rationale for a clearing member to launch or expand its clearing offering given the expected increase in overall cleared volumes. In addition, clearing members with existing offerings may be counting on the expected volumes resulting from the full implementation of the clearing mandate in order to maintain commercial viability. Modifications to the clearing mandate that have the effect of reducing anticipated cleared volumes may inhibit the launch of new clearing offerings and adversely impact existing clearing offerings to the detriment of market participants.

B. Impact on MiFID II Implementation

Central clearing not only mitigates systemic risk by eliminating the interconnected web of bilateral counterparty credit exposures, but also transforms how OTC derivatives can be traded. Since market participants no longer face each other following the execution of a cleared OTC derivative, complex bilateral trading documentation can be eliminated and a wider range of trading counterparties can be accessed. This leveling of the playing field with respect to execution spurs price competition and yields a number of benefits to market participants, including narrower bid-ask spreads, improved access to best execution, and increased market depth and liquidity. In addition, the elimination of bilateral counterparty credit exposure and complex bilateral trading documentation can spur further market structure innovations, such as trading solutions that allow investors to transact directly with other investors without the use of intermediaries.

We have already witnessed these benefits start to accrue to investors in those OTC derivatives that are subject to mandatory clearing in the U.S. New liquidity providers have entered both the index credit default swap and interest rate swap markets directly as a result of clearing mandates, bringing innovations such as firm pricing and faster response times.[13] In addition, market research confirms the link between central clearing and improved liquidity. A recent study of the index credit default swap market found that "the reduced counterparty risk and increased post-trade transparency associated with central clearing have beneficial effects on liquidity."[14] Separately, recent Bank of England research found that the implementation of the U.S. clearing and trading reforms in the USD interest rate swap market led to a significant improvement in liquidity and a significant reduction in execution costs, with market participants saving as much as $20 million - $40 million per day, of which $7 million - $13 million was being saved by market end-users alone per day.[15]

In the EU, successfully implementing the clearing obligation and the MiFID II reforms is critical to unlocking the same benefits of increased market transparency, greater competition, and improved liquidity for EU market participants. However, delaying the clearing obligation for a material segment of the market directly undermines these reforms to the detriment of all market participants. Instead of transitioning trading activity in highly standardized and liquid OTC derivatives subject to the clearing obligation onto transparent and fully regulated trading venues as envisioned in the MiFID II reforms, market participants that take advantage of the proposed two-year clearing delay can continue to execute bilateral uncleared derivatives.

The resulting bifurcation between the cleared and uncleared iterations of these OTC derivatives will impact the implementation of the MiFID II transparency and trading reforms. Liquidity will be fragmented between the cleared and uncleared contracts, and trading activity in the uncleared contracts will likely occur off-venue, reducing the available liquidity on trading venues. In addition, since the uncleared contracts will likely be traded off-venue, they may not be subject to the same transparency requirements as the cleared contracts.

Implementation of the MiFID II trading obligation is also closely linked to the EMIR clearing obligation. Under Article 32(1) of MiFIR, phase-in periods specified by ESMA for purposes of the clearing obligation must be taken into account when implementing the trading obligation. As

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[13] *See, e.g.,* "New players break into credit derivatives," FT (Nov. 17, 2015), available at: http://www.ft.com/intl/cms/s/0/22b83fa4-8c6e-11e5-8be4-3506bf20cc2b.html#axzz3rj5MtwiI; and "Dealer algos strike back in swaps market showdown," Risk.net (Feb. 24, 2016), available at: http://www.risk.net/risk-magazine/feature/2446836/dealer-algos-strike-back-in-swaps-market-showdown.

[14] *See* Loon, Y. C., Zhong, Z. K. Does Dodd-Frank affect OTC transaction costs and liquidity? Evidence from real-time CDS trade reports. Journal of Financial Economics, 119 (3), 645–672 (2016) at page 4, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443654.

[15] *See* Staff Working Paper No. 580 "Centralized trading, transparency and interest rate swap market liquidity: evidence from the implementation of the Dodd-Frank Act", Bank of England (January 2016), available at: http://www.bankofengland.co.uk/research/Documents/workingpapers/2016/swp580.pdf.

a result, the proposed two-year clearing delay would also significantly delay the full implementation of the trading obligation for EU market participants.

Many OTC derivatives that have been deemed appropriate for the clearing obligation are highly liquid and suitable for trading on transparent and fully regulated trading venues. However, by delaying the clearing obligation for a material segment of the market, ESMA risks fragmenting liquidity in these instruments and impeding the successful implementation of the MiFID II transparency and trading reforms.

C. Impact on Cross-Border Harmonization

ESMA's proposed two-year clearing delay for Category 3 entities will undermine efforts to harmonize the U.S. and EU clearing obligations. Even though the two regimes are materially similar with respect to the instruments subject to the clearing obligation, implementation timelines have significantly diverged. Many U.S. market participants that would fall within Category 3 if they were established in the EU have been required to comply with mandatory clearing since 2013. However, similar entities in the EU are already able to benefit from a significantly longer phase-in period, with the first EMIR clearing obligation not due to start for Category 3 entities until June 2017. The additional two-year delay that is proposed will only increase the divergence between the two regimes, leading to the possibility of regulatory arbitrage and a resulting fragmentation of liquidity between jurisdictions.

The proposed delay may also impact ongoing equivalence discussions between the EU and other jurisdictions regarding trading and transparency requirements for OTC derivatives. As noted above, the proposed delay will not only impact the market's transition to central clearing but will also impede the implementation of the MiFID II reforms. As a result, EU transparency requirements and the trading obligation may be applied in a more limited manner than in other jurisdictions where the clearing obligation has been fully implemented. This may negatively impact the ability of the EU to obtain equivalence with the regulatory regimes of other jurisdictions, and thereby impact the ability of EU market participants to transact on a cross-border basis.

III. The Proposed Two-Year Clearing Delay May Not Achieve the Stated Benefits

In the Consultation Paper, ESMA offers two main benefits of the proposed two-year clearing delay. First, ESMA suggests that the proposed delay will provide time for indirect client clearing arrangements to be implemented in the market. Although ESMA has developed draft regulatory technical standards on indirect client clearing, significant challenges remain, including from a legal, regulatory, and commercial perspective.[16] Indirect client clearing has historically been used for listed futures, but has not been leveraged thus far by market participants clearing OTC derivatives. End investors, including EU market participants, have already cleared trillions of dollars of outstanding OTC derivatives using direct client clearing arrangements.[17] Introducing

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[16] "Esma buys times to fix broken client clearing chains," Risk.net (Aug. 11, 2016), available at: http://www.risk.net/risk-magazine/news/2467425/esma-buys-time-to-fix-broken-client-clearing-chains.

[17] *See* LCH Daily Volumes – SwapClear Global, available at: http://www.lch.com/en/asset-classes/otc-interest-rate-derivatives/volumes/daily-volumes-swapclear-global; CME Open Volume Tracker, available at:

indirect client clearing would involve modifying these operational workflows, amending clearinghouse rules, and obtaining comfort with disparate bankruptcy regimes across the EU. We believe that ESMA would be better served to focus on market participant access to direct client clearing arrangements in response to any implementation challenges associated with the EMIR clearing obligation.

ESMA also suggests that the proposed delay will provide time to finalize the global leverage framework and its application to client clearing. Although we support modifying the leverage ratio to allow clearing members to offset derivatives exposures with client clearing collateral, there remains significant uncertainty as to whether such an amendment will be made.[18] In addition, clearing obligations for OTC derivatives have been implemented in jurisdictions around the world under the current regulatory framework.[19] The possibility that subsequent amendments will continue to be made to the regulatory framework as global regulators and policymakers evaluate the impact of implemented reforms does not provide, in our view, sufficient grounds to delay full implementation of central clearing for highly standardized and liquid OTC derivatives, which was a critical component of the G-20 reforms agreed in 2009.

IV. A More Targeted Alternative

As detailed above, we believe that a far larger segment of the market than originally contemplated may be impacted by the proposed two-year clearing delay. As a result, the proposed delay will disrupt the market's transition to central clearing, and has the potential to result in significant additional costs to market participants through inhibiting clearing member competition, impeding the implementation of MiFID II reforms, and increasing cross-border regulatory divergence.

However, despite our significant concerns with the proposal, we agree that the transition to central clearing can result in implementation challenges. As a result, we believe ESMA should leverage market experience in other jurisdictions and adopt a more targeted approach to address these specific implementation challenges by more narrowly defining the scope of entities that would subject to a clearing delay. Specifically, the U.S. clearing regime provides an end-user exception to mandatory clearing for counterparties that (a) are not considered to be a financial entity, and (b) are entering into an OTC derivative to hedge or mitigate commercial risk.[20] As part of this exception, the Commodity Futures Trading Commission determined that banks with less than or equal to $10 billion in total assets should not be considered financial entities.[21]

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http://www.cmegroup.com/education/cme-volume-oi-records.html; ICE Clear Credit, available at: https://www.theice.com/clear-credit

[18] "US-European rift deepens on leverage ratio," Risk.net (July 26, 2016), available at: http://www.risk.net/risk-magazine/feature/2465294/us-european-rift-deepens-on-leverage-ratio.

[19] *See* the IOSCO Repository for Central Clearing Requirements for OTC Derivatives, available at: https://www.iosco.org/publications/?subsection=information_repositories.

[20] End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (July 19, 2012) at 42590, available at: http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2012-17291a.pdf.

[21] *Id.* at 42591.

We would support ESMA similarly applying a delay to these smaller credit institutions in order to alleviate implementation challenges and increase cross-border harmonization between the two regulatory regimes. This would enable ESMA to postpone application of the clearing obligation for a clearly defined set of market participants in a manner that is consistent with prior actions taken by regulators in other jurisdictions without impacting the entire universe of Category 3 entities (and entities that would be Category 3 if established in the EU). Such a targeted approach would significantly reduce the associated costs of the proposal and would enable the EU to continue to proceed with successfully implementing the G-20 reforms to the OTC derivatives markets, bringing the benefits of increased market transparency and competition to investors.

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Please feel free to call the undersigned at +1 (646) 403-8235 with any questions regarding these comments.

Respectfully,

/s/ Stephen John Berger
Head of Government & Regulatory Policy