

Mr. Steven Maijoor  
Chair  
European Securities and Markets Authority (ESMA)  
103 Rue de Grenelle  
75345 Paris Cedex 07  
France

Brussels, 3 August 2012

**Re: Consultation Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories**

Dear Mr. Maijoor,

CFA Institute appreciates the opportunity to comment on ESMA's Consultation Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories."

We are a global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behaviour in investment markets and a respected source of knowledge in the global financial community. Our objective is to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 110,000 members in 139 countries and territories, including more than 101,000 Chartered Financial Analyst® charterholders, and 136 member societies. For more information, visit [www.cfainstitute.org](http://www.cfainstitute.org).

As a general comment, CFA Institute wishes to stress the importance to investors of the global harmonisation of regulation covering derivatives, CCPs and Trade Repositories. We therefore strongly encourage ESMA to pursue this goal as far as possible in the current and future Draft Technical Standards (TS), while conscious of potential limitations imposed by the Level 1 Regulation.

We also emphasize the importance of clearly defining the classes of derivatives subject to the clearing obligation, and of informing market participants as soon as possible of a CCP notification, in order to allow them as much time as possible to prepare for potential central clearing requirements.

We largely agree with ESMA's proposed Draft, but we offer below comments and suggestions for modifications on a few issues.

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## **Annex II**

### **Indirect Clearing Arrangements (Recital 3 and Chapter 2 – Articles 1-4 ICA)**

CFA Institute agrees with ESMA on the importance of introducing measures in the Draft TS to provide protection for indirect clients (those clients that will use a counterparty that is not a Clearing Member). We believe that indirect clients are likely to be numerous in the European Union, and smaller in size. We are concerned, however, that the definition of “indirect client” as currently drafted in Article 2 of Chapter I<sup>1</sup> might exclude from the provisions in the Draft TS clients further down the contractual chain, for example a client using Bank A as a counterparty, which in turn is a client of Bank B, which in turn uses Bank X as a Clearing Member. Such chains are likely in some Member States due to the complex structures of some banking groups in Europe. Even in this case, the final client should have the right to a segregated account at Clearing Member level (Bank X), with the same level of protection as an account held at the CCP.

It is crucial that the achievements in Regulation 648/2012 on OTC Derivatives, central counterparties and trade repositories (EMIR)<sup>2</sup> regarding segregation and protection of client assets are maintained for indirect clients. We therefore support ESMA’s conclusions in Point 23 of the Executive Summary and the implementing proposals in Article 4 ICA. We also welcome the statement in Recital 4 that “the requirements set out in this Regulation on the segregation and portability of positions and assets of indirect clients should prevail over any conflicting laws, regulation and administrative provisions of the Member State that prevents the parties from fulfilling them.” We would, however, encourage ESMA to clarify in the Draft TS the meaning of “equivalent protection” mentioned in Recital 3, which is only discussed in some detail on Page 9.

### **Criteria for the determination of the classes of OTC derivative contracts subject to the clearing obligation (Chapter IV - Article 1 CRI)**

CFA Institute is concerned by the fact that the readiness of all counterparties is not among the criteria, although a phase-in of the central clearing obligation may be necessary for buy-side investors. ESMA stated at the Open Hearing on 12 July that the issue of phase-in would be covered during the consultations for each individual class of contracts before declaring each class of OTC derivatives subject to clearing obligation (Art. 5 Level 1 EMIR). Such consultations shall be more detailed than the Draft TS, including “the date or dates from which the clearing obligation takes effect, including any phase-in and the categories of counterparties to which the obligation applies.”<sup>3</sup> We trust therefore that appropriate attention

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<sup>1</sup> ‘indirect client’ means the client of a client of a clearing member

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF>

<sup>3</sup> Article 5 (2) (b) of Level 1 EMIR Regulation.

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will be paid by ESMA to the readiness level of different counterparties in such future consultations.

### **Liquidity Fragmentation (Chapter VI – Article 1 LF)**

In general, we support ESMA's proposals for implementation of the provisions of Article 8 of the EMIR Level 1 Regulation which introduce the obligation of a trading venue to grant access to a CCP, whether or not the CCP is affiliated with the venue. However, Paragraph 4 of Article 8 also states that "access of the CCP to the trading venue shall be granted only where such access would not require interoperability or threaten the smooth and orderly functioning of markets in particular due to liquidity fragmentation and the trading venue has put in place adequate mechanisms to prevent such fragmentation."<sup>4</sup> To ensure that trading venues do not subjectively and unnecessarily reject access from unaffiliated CCPs, we urge ESMA to carefully define the notion of liquidity fragmentation in the Draft TS.

As a representative of investors, CFA Institute is generally in favor of regulatory measures facilitating access by CCPs to trading venues, which should foster competition and reduce clearing costs. Although the risk of liquidity fragmentation exists, it is unlikely that a high number of CCPs will be set up for each derivative class. On the contrary, monopolistic CCPs are more likely for certain classes of derivatives.

### **Annex III**

#### **CCP Organizational requirements - Disclosure (Chapter IV - Article 7 ORG)**

Clients have an interest in a maximum of transparency and disclosure, in order to be able to make informed selections among CCPs. It is for this reason that CFA Institute supports ESMA's proposals, in general. However, we consider that two additions should be made to the Draft TS in Paragraph 1 to aid clients with their selections (information to be made available to the public free of charge):

- 1) Article 7 ORG does not seem to satisfy the provisions of Art. 39 (7) of Level 1 EMIR, which requires that "CCPs and clearing members shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that they provide and shall offer those services on reasonable commercial terms. Details of the different levels of segregation shall include a description of the main legal implications of the respective levels of segregation offered including information on the insolvency law applicable in the relevant jurisdictions." Information about levels of segregation, their legal implications and costs are important details that clients need to make informed decisions, and should be included in the Draft TS.

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<sup>4</sup> Article 8 (4) of Level 1 EMIR Regulation

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- 2) Information on the CCP's mechanism to determine the eligibility of assets as collateral. As the final choice on the eligibility of collateral is left to the CCP, it is important that the mechanism for selection be fair and transparent, and that information both on the mechanism and on the collateral deemed eligible be available to potential clients. This is also crucial information in the CCP selection process for clients.

Please do not hesitate to contact us should you wish to discuss any of the points raised.

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Kind regards,



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