

**Supplemental Arrangement to 2016 Memorandum of Understanding
Related to ESMA’s Assessment of Compliance and Monitoring of the Ongoing
Compliance with Recognition Conditions by Derivatives Clearing Organizations
Established in the United States**

This arrangement (“Arrangement”) between the Commodity Futures Trading Commission (“CFTC”) and the European Securities and Markets Authority (“ESMA”) supplements and complements the *Memorandum of Understanding Related to ESMA’s Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Derivatives Clearing Organizations Established in the United States (2 June 2016)* (“2016 MoU”) in order to reflect *Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories* as amended (“EMIR”). This Arrangement does not alter the terms and provisions of the 2016 MoU except as set forth below.

This Arrangement recognizes that *Regulation (EU) No 2019/2099* (“EMIR 2.2”) amended EMIR, enhanced the European Union (“EU”) framework for recognition and supervision of third-country central counterparties (“CCPs”), and expanded the role and powers of ESMA. Under Article 25(2a) of EMIR and *Commission Delegated Regulation (EU) 2020/1303 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States*, ESMA considers the systemic importance of a third-country CCP applying or having applied for recognition based upon specified criteria, elements and indicators. Based upon an assessment of the elements of the criteria and the indicators, ESMA determines whether the CCP is not or is not likely to become systemically important (a Tier 1 CCP) or is or is likely to become systemically important (a Tier 2 CCP) and this determination is reviewed periodically as per Article 25(5) of EMIR.

With respect to CCPs defined as “Covered CCPs” within the scope of the 2016 MoU,¹ cooperation under the 2016 MoU between ESMA and the CFTC (each an “Authority” under the 2016 MoU and, together, the “Authorities”) includes ESMA’s assessment of compliance and monitoring of the ongoing compliance by the Covered CCPs with the recognition conditions set out in Article 25 of EMIR and with the conditions in paragraphs 2 and 3 of Article 1 (“Equivalence Conditions”) in the *European Commission Implementing Decision (EU) 2016/377 of 15 March 2016*, except for agricultural commodity derivative contracts fulfilling the conditions set out in Article 2 of that Commission Implementing Decision (“Exemption Conditions”) (collectively, “Recognition Conditions”). This Arrangement recognises that cooperation under the 2016 MoU, which may be understood to include certain requests by ESMA consistent with Article 25(7)(a) of EMIR for information concerning a Covered CCP, also includes ESMA’s periodic reviews of a Covered CCP’s recognition and tiering pursuant to Article 25(5) of EMIR and monitoring of regulatory and supervisory developments pursuant to

¹ Such Covered CCPs do not include CCPs falling within the scope of the *Enhanced Memorandum of Understanding Related to ESMA’s Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Certain Derivatives Clearing Organizations Established in the United States* (6 January 2021).

Articles 25(6b) and 25(7)(e) of EMIR. Article 25(7) of EMIR provides for ESMA confidentially to inform the European Commission of any failure by any third-country authority to apply provisions of a cooperation arrangement (such as the 2016 MoU as supplemented and complemented by this Arrangement), and the European Commission may decide to review its implementing act on equivalence for that third country.

This Arrangement supplements and complements the 2016 MoU as follows:

1. **Article 1:**

- a) The definition of “Emergency Situation” in Article 1(d) of the 2016 MoU means the occurrence of an event that could materially impair the financial or operational condition of a Covered CCP, including developments in financial markets which may have an adverse effect on market liquidity and the stability of the financial system in the EU or one of its Member States.
- b) The definition of “Governmental Entity” in Article 1(e)(ii) of the 2016 MoU also includes, if the Requesting Authority is ESMA:
 - i. the central bank(s) of issue of any of the EU currencies of the financial instruments cleared or to be cleared by the Covered CCP (“CBI”); or
 - ii. each of the members, except for the chair and the two independent members who are staff of ESMA, of the third-country CCP college described in Article 25c of EMIR in their legal capacity as members of the college and for purposes of their college responsibilities with regard to a Covered CCP.

2. **Article 3:**

- a) *Periodic Reviews and Monitoring of Regulatory and Supervisory Developments:* Circumstances where cooperation between the Authorities will be most useful, as contemplated under Article 3(3) of the 2016 MoU, include:
 - i. the periodic review by ESMA of a Covered CCP’s recognition and tiering pursuant to Article 25(5) of EMIR; and
 - ii. the monitoring by ESMA, pursuant to Articles 25(6b) and 25(7)(e) of EMIR, and by the CFTC of relevant Laws and Regulations (as defined in Article 1(f) of the 2016 MoU), including proposals to materially change regulatory requirements applicable to Covered CCPs, and changes to regulatory status or requirements that could result in a change in the regulatory status of, relief granted to, or supervisory treatment of a Covered CCP.
- b) *Emergency Situations:* Under Article 3(2) of the 2016 MoU, the Authorities recognise in particular the importance of close cooperation in the event that a Covered CCP experiences, or is threatened by, a potential financial crisis or other Emergency Situation (as defined in Article 1(d) of the 2016 MoU, as supplemented in Paragraph 1(a) above). An Authority should provide notification to the other Authority consistent with Article 3(4) of the 2016 MoU, as supplemented by Paragraph 2(c) below, and

should keep the other Authority appropriately informed throughout an Emergency Situation. The CFTC should lead in such an Emergency Situation and should consult with and take account of the views of ESMA to the greatest extent possible. As necessary, ESMA should coordinate with the relevant CBI(s) regarding such Emergency Situation of a Covered CCP and any emergency measures that the CBI may consider appropriate.

- c) *Notification:* Under Article 3(4)(a) of the 2016 MoU, any known material event that could adversely impact the financial or operational stability of a Covered CCP includes, in an Emergency Situation, general information on the nature of the Emergency Situation and any action taken or likely to be taken as far as known to the Authority including, *e.g.*, actual or prospective use of the Covered CCP's default protections or recovery plans, or measures taken or plans to address the default or potential default of a clearing member or clearing participant.
- d) *Annual Information Provision:* Cooperation under Article 3(1) of the 2016 MoU includes cooperation regarding the provision of information concerning Covered CCPs to ESMA on an annual basis as set out in relevant arrangements signed by duly authorised officials of the Authorities which are intended to complement the 2016 MoU as supplemented by this Arrangement regarding the scope of such information.

3. **Article 4:**

- a) Under Article 4(1) of the 2016 MoU, a request for written information pursuant to Article 3(5) of the 2016 MoU generally should include to whom, if anyone, including any Governmental Entity (as defined in Article 1(e) of the 2016 MoU, as supplemented) onward disclosure of information is likely to be necessary and the reason for any such disclosure. Any request for information pursuant to Article 3(5) of the 2016 MoU will be assessed on a case-by-case basis by the Requested Authority (as defined in Article 1(i) of the 2016 MoU) to determine whether the information can be provided (either in part or in whole) under the terms of the 2016 MoU (as supplemented and complemented by this Arrangement) and in accordance with applicable Laws and Regulations (as defined in Article 1(f) of the 2016 MoU). Such Requested Authority will consult with the Requesting Authority (as defined in Article 1(j) of the 2016 MoU) in responding to a request.
- b) The Administrative Arrangement for the transfer of personal data (AA) between authorities in the European Economic Area (EEA) and non-EEA authorities sets forth certain safeguards for the transfer of personal data as defined therein. As signatories to the AA, the Authorities acknowledge that they will act consistent with the AA with respect to the transfer of personal data between them.
- c) The 2016 MoU, as supplemented by this Arrangement, recognises the role of the European Central Bank and other CBIs (as defined in Paragraph 1(b)(i) above) under EMIR. Any request for information submitted by ESMA to the CFTC on behalf of a CBI will be submitted in a manner consistent with Appendix A.

4. **Article 7:** Notification under Article 7(2)(a) of the 2016 MoU by a Requesting Authority (as defined in Article 1(j) of the 2016 MoU) to a Requested Authority (as defined in Article 1(i)

Appendix A

Requests from a Central Bank of Issue for Information on a Covered CCP

1. Pursuant to the terms and conditions of the 2016 MoU, as supplemented by this Arrangement, ESMA may share, as set out in Article 7(2) of the 2016 MoU, as supplemented, non-public information obtained from the CFTC under the 2016 MoU with certain Governmental Entities (as defined in Article 1(e) of the 2016 MoU, as supplemented). Where a CBI (as defined in Paragraph 1(b)(i) of this Arrangement) seeks information on a Covered CCP not otherwise provided to ESMA in connection with Paragraph 2(d) of this Arrangement, the CBI may request such information through consultation with ESMA and submission of a written request by ESMA to the CFTC pursuant to Article 4(1) of the 2016 MoU, as supplemented by Paragraph 3 of this Arrangement. A request form is annexed to this Appendix A (Annex A.1).
2. The information that may be requested by a CBI includes:
 - a) information concerning financial instruments denominated in the EU currency of the CBI that are cleared or to be cleared by the Covered CCP; and
 - b) information in connection with the CBI addressing an Emergency Situation (as defined in Article 1(d) of the 2016 MoU, as supplemented by Paragraph 1(a) of this Arrangement), in coordination with ESMA as contemplated by Article 3(2) of the 2016 MoU, as supplemented by Paragraph 2(b) of this Arrangement.
3. Pursuant to Article 7(2)(b) of the 2016 MoU and prior to sharing any non-public information with a CBI, ESMA will provide the CFTC with adequate assurances by the CBI concerning the CBI's use and confidential treatment of the information. The necessary assurances are included in Annex A.1.
4. In a manner consistent with Article 3(5) of the 2016 MoU, requests will be made with the goal of minimizing administrative burdens. The CFTC will assess any request on a case-by-case basis to determine whether the information can be provided (either in part or in whole) under the terms of the 2016 MoU, as supplemented by this Arrangement, and in accordance with applicable Laws and Regulations (as defined in relation to the CFTC in Article 1(f) of the 2016 MoU).

Annex A.1

ESMA Request Form	
<p>This confidential request to the CFTC is being made pursuant to Article 4(1) and under the provisions of the <i>Memorandum of Understanding Related to ESMA's Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Derivatives Clearing Organizations Established in the United States</i> (the "2016 MoU"). ESMA and the CBI recognise that the 2016 MoU is supplemented by the terms and provisions of the <i>Supplemental Arrangement to 2016 Memorandum of Understanding Related to ESMA's Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Derivatives Clearing Organizations Established in the United States</i> (the "Supplemental Arrangement").</p>	
Name of the CBI	
Legal basis for onward disclosure by ESMA to the CBI	
Information sought by the CBI	
Description of the matter that is the subject of the request and purpose for which the information is sought, including applicable laws and regulations	
Desired time period for reply and, where appropriate, the urgency thereof	
<p>Personal data: The CBI represents that it will protect any personal data transferred by the CFTC to ESMA and subsequently onward shared by ESMA to the CBI to the full extent of the safeguards provided under applicable European and national laws and regulations on the treatment of personal data.</p>	
<p>Permissible use: The CBI confirms that it will use any non-public information obtained from ESMA in connection with this request under the 2016 MoU, as supplemented by the terms and provisions of the Supplemental Arrangement, solely for the purpose set forth in this form and in a manner consistent with applicable laws and regulations. Before using the non-public information for any other purpose, the CBI first must obtain the written consent of the CFTC for the intended use.</p>	

Confidentiality: The CBI will keep confidential, to the extent permitted by law, this request, the contents of this request, and all non-public information obtained from ESMA in connection with this request under the 2016 MoU, as supplemented by the terms and provisions of the Supplemental Arrangement. To the extent possible, the CBI intends to notify the CFTC of any legally enforceable demand for the non-public information prior to complying with the demand and intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.

Written Assurances under Article 7(2)(b) of the 2016 MoU: The CBI confirms that:

- i. The CBI requires the requested information for a purpose within the scope of the CBI's jurisdiction; and
- ii. The requested information will not be shared by the CBI with other parties without getting the prior written consent of the CFTC.

For ESMA

Signature:

Name:

Title:

Phone Number:

Email Address:

Date:

For the CBI

Signature:

Name:

Title:

Phone Number:

Email Address:

Date: