

16 February 2021

To the attention of
DG FISMA
European Commission

Via the [European Commission Portal](#)

RE: Feed-back regarding the (Draft) Commission implementing decision¹

on the recognition of the legal, supervisory and enforcement arrangements of the United States of America for derivatives transactions supervised by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency as equivalent to certain requirements of Article 11 of Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories

Size limit: 4000 characters

We thank the European Commission for the opportunity to provide feed-back regarding this draft implementing decision (**draft** hereafter).

ALFI has been active in the field of collateral exchange for OTC Derivatives contracts over the course of the last three years. In particular, ALFI has issued industry best practices guidelines on the implementation of EMIR Refit and UMR.

ALFI has also advocated for a proportionate calibration of EU rules and their alignment on US rules, for efficiency and level playing field reasons.

Our understanding of the scope of the equivalence is the following.

According to §7, 8 of the draft and as set in Article 1, the project of equivalence concerns the obligations covered by Article 11(3) of EMIR, ie. the existence of risk-management procedures for counterparties eligible to the exchange of collateral with respect to OTC derivative contracts.

Moreover, according to §9, 10, 11 of the draft, the project of equivalence is aimed at including the implementation of the Uncleared Margin Rules (UMR) Global framework, covering the exchange of initial and variation margin.

General comment

An initiative of mutual recognition in the field of collateral exchange - where one of the counterparties is established in the USA- represents obvious advantages to facilitate the treatments of transactions and the associated risk mitigation.

¹ Ares(2021)445878

Reservations

Nevertheless, we would like to share the following reservations regarding provisions of EU regulation representing an unlevelled playing field with the US regulation at issue.

- **Re. Article 11(15) of Regulation 648/2012 (EMIR) amended by Regulation 2019/834 (EMIR Refit)**

According to Article 11(15)(a) EMIR, ESAs are obliged to develop RTS specifying the arrangements referred to in Article 11(3).

According to Article 11(15)(aa) EMIR Refit, the ESAs should have submitted draft RTS on the supervisory procedures to ensure initial and ongoing validation of those risk-management procedures, by 18 June 2020. Unfortunately we have not observed such RTS from the ESAs, nor a related communication, in particular in their latest reports (2020 09 and 2020 20).

- **Re. Articles 14 and 18 CDR 2016/2251 respectively relating to internal back-testing requirements, and internal governance for IM models**

In the US, these three prudential-style model-related requirements generally apply only to registered swap dealers, while in the EU they apply to any counterparty.

These reservations have already been conveyed in May 2019 to the ESAs, through a joint ALFI/ISDA letter (attached).

Conclusion

1. The three above mentioned points create an unlevelled playing field between the EU and the US. They also imply the implementation of burdensome and unjustified procedures for the investment fund industry (eligible only to the last and less risky phases of UMR), and in particular for the small sized funds. The corresponding provisions increase the cost of collateral in the EU and thus preclude an effective equivalence with the US regime.
2. Because the RTS corresponding to the Article 11(15)(aa) of EMIR Refit have finally not been issued, the financial industry does not benefit from a fair and complete information to assess the actual extent of the equivalence project. The equivalence is dependent on the actual endorsement of the different RTS. Consequently, in our view, the equivalence project should be postponed to at least 1 month after the official publication of the last RTS.
3. The extent of the provisions of Article 11(3) appears too narrow to reach, on a standalone basis, the presented objective of an equivalence of collateral exchange. We are of the view that article 1 of the draft should explicitly enlarge the scope of the equivalence to the provisions in relation to the definition of the assessment and practical conditions of collateral exchange, thus to the entire Article 11(15) EMIR, and with references to the corresponding provisions of CDRs 2016/2251 and ESAs RTS.