

12 November 2019

**Mr. Christopher Kirkpatrick**  
**Secretary of the Commission**  
**Commodity Futures Trading Commission**  
**Three Lafayette Centre**  
**1155 21st Street, NW**  
**Washington, DC 20581**

**Re: Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations (RIN 3038-AE87)**

**Dear Mr. Kirkpatrick,**

**I. Introduction**

CCP12 appreciates the opportunity to provide the Commodity Futures Trading Commission (“**Commission**” or “**CFTC**”) with comments on its notice of proposed rulemaking (“**NPR**”) regarding Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations. CCP12 supports the CFTC’s efforts to codify the supervisory approach outlined in the CFTC’s White Paper for cross-border swaps regulation version 2.0.<sup>1</sup>

CCP12 welcomes the CFTC’s alternative compliance approach for non-U.S. derivatives clearing organizations (“**DCOs**”) which do not pose a substantial risk to the U.S. financial system. This approach recognizes the importance of regulatory deference that rightfully allows local policy-makers to adopt legal and regulatory requirements that are appropriate for the markets they oversee, while increasing cross-border cooperation in an increasingly multi-polar world. Further, this approach duly takes into account the responsibilities and obligations of local policy-makers towards their financial stability mandates.

By allowing non-U.S. DCOs to comply with the core principles for DCOs (“**DCO Core Principles**”) set forth in the Commodity Exchange Act (“**CEA**”) through compliance with their home country regulatory regime, the NPR would add another stage to the CFTC’s approach permitting a gradual, risk-based review of individual DCOs which wish to clear swaps for U.S. customers of future commission merchants (“**FCM**”).

More generally, CCP12 supports the approaches that facilitate cross-border cooperation based on the Committee on Payments and Market Infrastructures and International Organization of Securities Commissions’ *Principles for financial market infrastructures* (“**PFMIs**”), which fosters trust among supervisors to uphold the Group of Twenty commitments to regulatory deference.<sup>2</sup>

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<sup>1</sup> CFTC White Paper: CROSS-BORDER SWAPS REGULATION VERSION 2.0, A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation (Oct. 2018).

<sup>2</sup> Committee on Payment and Settlement Systems (later renamed the Committee on Payments and Market Infrastructures) and Technical Committee of the International Organization of Securities Commissions, *Principles for Financial Market Infrastructures* (Apr. 2012).

II. **CCP12 comments on the section “IV. Request for Comments” in the notice of proposed rulemaking**

1. **Does the proposed alternative compliance regime, including both the application process and the ongoing requirements, strike the right balance between the Commission’s regulatory interests and the regulatory interests of non-U.S. DCOs’ home country regulators?**

CCP12 Response

CCP12 welcomes the CFTC’s alternative compliance approach for non-U.S. DCOs which do not pose a substantial risk to the U.S. financial system. This approach recognizes the importance of regulatory deference that rightfully allows local policy-makers to adopt legal and regulatory requirements that are appropriate for the markets they oversee, while increasing cross-border cooperation and avoiding market fragmentation. Further, this approach duly takes into account the responsibilities and obligations of local policy-makers towards their financial stability mandates.

The proposed alternative compliance framework provides appropriate deference in terms of compliance for non-U.S. DCOs that do not pose a substantial risk to the U.S. financial system and are subject to comparable, comprehensive supervision and regulation in their home country. CCP12 welcomes that certain requirements that U.S. DCOs are subject to would be deferred to a non-U.S. DCO’s home regulatory framework where similar outcomes are achieved to the CFTC’s approach.

However, in order to fully deliver on the intended outcomes of the NPR in terms of cross-border supervisory cooperation, CCP12 would recommend alleviating further a subset of the requirements laid down in the NPR to align with the fundamental objective of alternative compliance.

2. **Are there additional regulatory requirements under the CEA or Commission regulations that should not apply to non-U.S. DCOs with alternative compliance in the interest of deference and allowing such DCOs to satisfy the DCO Core Principles through compliance with their home country regulatory regimes while still protecting the Commission’s regulatory interests?**

CCP12 Response

CCP12 understands the careful balancing act conducted by the CFTC to meet its regulatory objectives between directly supervising compliance with U.S. regulations and deferring to a non-U.S. DCO’s home country regulators to supervise compliance with comparable rules.

However, CCP12 finds that in some cases the reporting requirements and particularly the customer protection requirements to be costly and substantially overlap with existing requirements imposed by a non-U.S. DCO’s home regulator.

Regarding the proposed reporting requirements under § 39.51(c), CCP12 understands the desire of the CFTC to be able to monitor on a regular basis the activities of a non-U.S. DCO and ensure continued compliance with the CFTC's alternative compliance regime. However, CCP12 believes this oversight exercise of U.S. customers' swaps clearing activity could be fulfilled with less regular and more relevant data information. CCP12 would therefore suggest that the requirements related to daily reports as per proposed § 39.51(c)(2)(i) be strictly limited to FCMs. For example, under this recommendation, daily variation margin and initial margin reporting would be limited to FCMs only. CCP12 would also encourage the international standard setting bodies to make further progress with regards to data field standardization and cooperation of repositories to avoid duplicative reporting requirements.

Additionally, regarding the CFTC's customer protection requirements (set forth in Section 4d(f) of the CEA, Parts 1 and 22 of CFTC Regulations, and § 39.15), CCP12 believes that compliance with such requirements could pose significant challenges to non-U.S. DCOs, particularly those that do not pose a substantial risk to the U.S. financial system. This is mainly because these regulations apply customer protections consistent with the U.S. Bankruptcy Code and Part 190 of CFTC Regulations irrespective of the jurisdiction of a non-U.S. DCO and its registered FCM clearing members. Therefore, to address these potential challenges, we believe that both proposals for allowing non-U.S. DCOs to provide clearing for U.S. customers' swaps transactions should be finalized – i.e., this NPR and Exemption from Derivatives Clearing Organization Registration (RIN 3038-AE65). If the latter is not finalized, CCP12 believes U.S. customers would find that their access to non-U.S. swap markets would continue to be restricted, as is currently the case.

**3. Should the Commission take into account regulations in Part 39, in addition to the DCO Core Principles, in determining whether alternative compliance is appropriate for a non-U.S. clearing organization?**

CCP12 Response

CCP12 has no specific comment on this question.

**4. Should the Commission require additional, or less, information from an applicant for alternative compliance as part of its application under proposed §39.3(a)(3)?**

CCP12 Response

CCP12 believes that the proposed application process for alternative compliance non-U.S. DCO status remains substantial and therefore burdensome in terms of processes and administrative filing.

CCP12 also notes that the “re-application process” should a non-U.S. DCO wish to requalify from its current status to one of the other three available statuses for non-U.S. clearinghouses clearing swaps for U.S. persons (i.e., exempt, alternative compliance, and full DCO registration) is not addressed in the NPR and we would welcome further clarity on such process.

**5. Is the proposed test for “substantial risk to the U.S. financial system” the best measure of such risk? If not, please explain why, and if there is a better measure/metric that the Commission should use, please provide a rationale and supporting data, if available.**

CCP12 Response

Under the NPR, an alternative compliance non-U.S. DCO would only be able to clear swaps of U.S. customers if a non-U.S. clearinghouse does not pose a “substantial risk to the U.S. financial system.” Under the NPR, a non-U.S. clearinghouse organized outside of the U.S. poses a “substantial risk to the U.S. financial system” if: (1) the non-U.S. clearinghouse holds 20% or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (2) 20% or more of the required initial margin for swaps at the non-U.S. clearinghouse is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are close to 20%, the CFTC may exercise discretion in determining whether the non-U.S. clearinghouse poses substantial risk to the U.S. financial system.<sup>3</sup>

Due to the large global presence of non-U.S. entities affiliated with U.S. banking groups in swaps markets, CCP12 believes that the second threshold (i.e., 20% or more of the required initial margin for swaps at the non-U.S. clearinghouse is attributable to U.S. clearing members) could easily be breached by alternative compliance DCOs. This is mainly due to the inclusion of non-U.S. subsidiaries whose parent companies are organized in the U.S. that are clearing members of the non-U.S. clearinghouse in the definition of “U.S. clearing member” for which the ultimate risks to the U.S. financial system would be negligible. Further, pursuant to Section 2(i) of the Commodity Exchange Act (“CEA”), the DCO registration requirement under Section 5b(a) extends to any clearinghouse whose clearing activities outside of the U.S. have a direct and significant connection with activities in, or effect on, commerce of the U.S.; except for clearinghouses exempt from DCO registration in cases where the Commission has determined that the clearinghouse is subject to “comparable, comprehensive supervision and regulation” by its home country regulator. The Commission’s current DCO registration and exemption regime is triggered based on the definition of U.S. person as defined in the CFTC’s guidance where essentially DCO registration or exemption is required to clear swaps for a U.S. person. This approach, like other jurisdictions’ regimes, defines the trigger for a foreign clearinghouse’s registration to be rightfully based on its clearing for local market participants. We believe the Commission’s current approach is the right approach for measuring “direct and significant” connection with the U.S. under Section 2(i) of the CEA and is also the appropriate approach in measuring substantial risk to the U.S. financial system. In other words, to be aligned with the current regime, under the NPR a non-U.S. clearinghouse’s non-U.S. clearing member that are subsidiaries of U.S. parent organizations should not impact the Commission’s determination if the clearinghouse poses a substantial risk to the U.S. financial system. Consequently, CCP12 requests the Commission revise the definition of “U.S. clearing member” to mean a clearing member that is organized in the U.S. or a U.S. FCM, and not to include any non-U.S. clearing members simply because their parents are organized in the U.S. In line with this, CCP12 believes that other jurisdictions should also adopt a similar approach to determining the appropriate supervisory oversight framework for foreign clearinghouses providing clearing services locally.

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<sup>3</sup> Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 Fed. Reg. 34819, 34833 (Jul. 19, 2019).

Where a non-U.S. clearinghouse is deemed to be a “substantial risk to the U.S. financial system” under the NPR because the clearinghouse is close to one of the two defined thresholds, the non-U.S. clearinghouse must fully register as a DCO with the CFTC and would not be able to rely on the alternative compliance framework for DCO registration contemplated by the NPR or exemption from DCO registration, which has been proposed separately. Due to potentially conflicting laws and regulations between the U.S. and the alternative compliance non-U.S. DCO’s home country, an alternative compliance non-U.S. DCO may not be able to fully register as a DCO, and may then have to cease providing swaps clearing services to any U.S. persons, including U.S. customers. This could potentially result in the termination of existing cleared swaps positions of these U.S. persons. In order to avoid significant uncertainty and potential systemic risks presenting themselves in local swaps markets, CCP12 strongly requests that the CFTC clarify the criteria for the assessment of “substantial risk to the U.S. financial system” as defined in proposed §39.2, such that the test should permit the CFTC to exercise its discretion only if both of the two thresholds are close to 20% on the alternative compliance DCO. This would more accurately capture the potential risks to the U.S. financial system. CCP12 would recommend that the observation period be long enough to verify whether the breach is a structural trend or a temporary phenomenon, and that the CFTC grant sufficient notice periods for the DCO to duly adjust.

**6. What is the frequency with which the Commission should reassess a DCO’s “risk to the U.S. financial system” for purposes of the test, and across what time period, after it is registered under the alternative compliance regime?**

CCP12 Response

CCP12 believes that the status of each alternative compliance non-U.S. DCO should be reassessed at least every two years or following a material change to its clearing services and/or home country regulatory framework. This should be sufficient, as it would provide for a regular review of each alternative compliance DCO. CCP12 would suggest that the reassessment be regarded more as a check-up rather than an entire re-application process where the DCO would have to submit again already available data, since the CFTC would receive regular reports from the DCO. CCP12 would also suggest that the reassessment of each threshold test looks at the averages over the previous 12 months to ensure that the results are not overly influenced by any specific event, such as quarter-end or year-end.

**7. Does the proposed exemption from self-certification of rules in §39.4(c) meet the standards for exemptive relief set out in section 4(c) of the CEA?**

- a. In addition to rules that relate to the DCO’s compliance with the requirements of section 4d(f) of the CEA, parts 1, 22, or 45 of the Commission’s regulations, or §39.15, should the Commission require other rules to be filed pursuant to section 5c(c) of the CEA? If so, should the Commission retain discretion in determining which other rules must be filed based on, for example, the particular facts and circumstances? Or should the Commission enumerate the types of rules that must be filed (e.g., rules related to certain products cleared by the DCO)?

CCP12 Response

CCP12 has no specific comment on this question.

8. **Should non-U.S. DCOs with alternative compliance be excused from reporting any particular data streams in order to limit duplicative reporting obligations in the cross-border context without jeopardizing U.S. customer protections, particularly given the existence of an MOU between the Commission and the DCO's home country regulator as a requirement for eligibility for alternative compliance?**

CCP12 Response

See response to Q.2.

### III. Conclusion

CCP12 strongly recommends that the CFTC finalize its current proposals under the NPR.

### IV. About CCP12

CCP12 is a global association of 37 members who operate more than 60 individual CCPs globally across Europe/Middle East/Africa (EMEA), the Americas, and the Asia-Pacific (APAC) regions. CCP12 aims to promote effective, practical and appropriate risk management and operational standards for CCPs to ensure the safety and efficiency of the financial markets it represents. CCP12 leads and assesses global regulatory and industry initiatives that concern CCPs to form consensus views of its members and seeks to actively engage with regulatory agencies and industry constituents through consultation responses, forum discussions and position papers.

### V. CCP12 Members

