## Public Statements & Remarks

# Statement of Commissioner Dan M. Berkovitz Regarding Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations

**September 17, 2020**

I support today's final rule permitting derivatives clearing organizations (DCOs) organized outside of the United States (non-U.S. DCOs) to register with the Commission and provide clearing to U.S. customers, yet comply with certain DCO Core Principles through their home country regulatory regime. This final rule maintains the Commission's authority to protect U.S. customers and markets, while also recognizing the interests of foreign regulators in supervising DCOs located in their home jurisdictions. It will foster U.S. market participants' access to foreign clearing organizations while maintaining key customer protections.

This rule is being adopted in furtherance of the Commission's work with our international colleagues to, where appropriate, mutually recognize third-country central counterparties. International comity was a key pillar of the 2009 G20 Pittsburgh Summit and effective cooperation among financial regulators bolsters the safety and utility of our global derivatives markets. Central clearing is critical to managing risk throughout our financial markets, but can only be fully achieved where international regulators work together toward a common goal. This rule is consistent with the spirit of the CFTC-EU Common Approach[1] regarding requirements for central counterparties, and builds upon the EU equivalence determination[2] and the CFTC comparability determination, [3] issued in connection with the Common Approach.

For a non-U.S. DCO that would like to clear only swaps for U.S. persons and does not pose "substantial risk to the U.S. financial system," the final rule would provide two options for CFTC registration. The non-U.S. DCO may apply for DCO registration through the normal course and be subject to all Commission regulations applicable to DCOs. In the alternative, if the non-U.S. DCO is in good regulatory standing with its home country, it may apply for registration by relying in large part on its home country regime, provided it can demonstrate that the regime satisfies certain DCO Core Principles. The non-U.S. DCO will still be required to comply with CFTC regulations that provide critical protections to U.S. customers and markets. The home country regulator must have a memorandum of understanding with the Commission that includes provisions for information sharing and cooperation, so that the Commission may evaluate initial and continued eligibility for registration. The goal is to encourage registration with the Commission, which enhances our oversight and maintains certain important safeguards, while providing greater clearing options for U.S. market participants.

Non-U.S. DCOs subject to registration under this alternative path will still need to clear swaps for U.S. customers through registered futures commission merchants. Accordingly, they will be required to fully comply with the requirements under Commission Regulation 39.15 covering treatment of funds, swap data reporting requirements in part 45 of the Commission's regulations, certain ongoing and event-specific reporting requirements, and the segregation requirements of Commodity Exchange Act (CEA) section 4d(f)(2) and related regulations. In addition, a non-U.S. DCO is required to comply with CEA section 39.51(c)(2), which requires it to provide notice to the Commission upon the occurrence of certain important regulatory events. These events include any change in its home country regime or registration status, an examination report or notice of enforcement action issued by a home country regulator, the default of a clearing member, or any action taken by the non-U.S. DCO against any U.S. clearing member.

Only non-U.S. DCOs that do not pose substantial risk to the U.S. financial system will be eligible for registration with alternative compliance. A non-U.S. DCO that poses substantial risk to the U.S. financial system will still be required to comply with the CEA and all Commission regulations applicable to DCOs, including all of subparts A and B of Part 39, in the same manner as a domestic DCO.

The final rule defines "substantial risk" to mean that (i) the non-U.S. DCO holds 20 percent or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt DCOs; and (ii) 20 percent or more of the initial margin requirements for swaps at the non-U.S. DCO is attributable to U.S. clearing members. Despite being characterized as a risk-based test, this is in fact more in the nature of an activity-based test. I believe an activity-based test is appropriate as a proxy in this instance, as it represents a transparent, objective, and relatively easy-to-measure benchmark. The 20/20 test, however, may not always accurately measure when the risk to the U.S. financial system presented by the non-U.S. DCO becomes "substantial." Accordingly, the Commission will retain the discretion to evaluate other factors in determining whether a non-U.S. DCO poses substantial risk to the U.S. financial system.

I thank the staff of the Division of Clearing and Risk for their work in finalizing this rule. I also would like to recognize the staff in the Office of International Affairs, the Chairman's office, and the New York regional office for their hard and productive work over the past few years with our international counterparts. These efforts to promote harmonization and mutual recognition have provided the foundation for today's rulemaking.

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[1] The U.S. Commodity Futures Trading Commission and the European Commission: Common Approach for Transatlantic CCPs (Feb. 10, 2016), at https://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016.

[2] *See* European Commission adopts equivalence decision for CCPs in USA (Mar. 15, 2016), at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_807.

[3] Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 Fed. Reg. 15260 (Mar. 22, 2016).

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