



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and Risk

CFTC Letter No. 18-32  
No-Action  
December 20, 2018  
Division of Clearing and Risk

Heike Eckert, Chief Operating Officer  
Oliver Haderup, Chief Compliance Officer  
Eurex Clearing AG  
Mergenthalerallee 61  
65760 Eschborn, Germany

December 20, 2018

RE: Request of Eurex Clearing AG for modification of relief granted under CFTC Letter No. 16-05

Dear Ms. Eckert and Mr. Haderup:

This is in response to your letter dated June 27, 2018 (“Letter”), to the Division of Clearing and Risk (“Division”) of the Commodity Futures Trading Commission (the “Commission”). In the Letter, you request that the Division modify the conditions of relief granted in CFTC Letter No. 16-05.<sup>1</sup> Letter No. 16-05 granted relief to Eurex Clearing AG (“Eurex Clearing”) permitting it to obtain from Deutsche Bundesbank (“Bundesbank”), and provide the Commission with, an executed version of the acknowledgment letter as required under Regulation 22.5, in a form other than the standard form (“Template Acknowledgment Letter”) set forth in Appendix B to Regulation 1.20. You have represented that the Bundesbank has requested further modifications to the acknowledgment letter, and have requested that the Division modify the conditions of relief granted in Letter No. 16-05 accordingly.

### I. Background

Regulation 22.5 requires, among other things, that a derivatives clearing organization (“DCO”) obtain an acknowledgment letter from each depository with which the DCO deposits cleared swaps customer funds.<sup>2</sup> Specifically, Regulation 22.5(a) provides that, before depositing cleared swaps customer funds with a depository, a DCO must obtain and retain in its files a

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<sup>1</sup> CFTC Letter No. 16-05 (Feb. 1, 2016).

<sup>2</sup> See Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 Fed. Reg. 68,506 (Nov. 14, 2013).

written acknowledgment letter from the depository “in accordance with [Regulation] 1.20 . . . , with all references to ‘Futures Customer Funds’ modified to apply to Cleared Swaps Customer Collateral, and with all references to section 4d(a) or 4d(b) of the [Commodity Exchange] Act [“CEA”] and the regulations thereunder modified to apply to section 4d(f) of the [CEA] and the regulations thereunder.”

Eurex Clearing had requested that the Bundesbank provide an acknowledgment letter for customer funds that Eurex Clearing will deposit with the Bundesbank. However, the Bundesbank, as the central bank of the Federal Republic of Germany, proposed to execute with Eurex Clearing the Template Acknowledgment Letter modified in certain respects relative to the operations of a central bank (“Original Bundesbank Acknowledgment Letter”). For the reasons discussed in Letter No. 16-05, the Division agreed that, as a central bank, the Bundesbank’s provision of account services to Eurex Clearing is distinguishable from the provision of account services by a commercial bank. Thus, the Division determined that granting the relief requested was appropriate to permit Eurex Clearing to maintain customer accounts at the Bundesbank.

## **II. 2016 European Commission-CFTC Agreement**

In February 2016, the CFTC and the European Commission (“EC”) reached an agreement regarding requirements for cross-border central counterparties (“CCPs”). Based on this agreement (referred to as “the 2016 EC-CFTC Agreement”), in March 2016, the CFTC issued a comparability determination for dually-registered CCPs located in the European Union (“EU”) with respect to certain EU rules. At the same time, CFTC staff issued CFTC Staff Letter No. 16-26, which provided no-action relief from certain Commission requirements for EU-based CCPs that are registered with the CFTC as DCOs in order to facilitate cross border regulatory cooperation.<sup>3</sup>

Further as set forth in the 2016 EC-CFTC Agreement, also in March 2016, the EC adopted an equivalence decision with respect to the CFTC’s regulatory regime for DCOs. The equivalence decision allows U.S.-based DCOs to obtain recognition by the European Securities and Markets Authority (“ESMA”) and to operate within the EU provided that the U.S.-based DCOs have rules and procedures consistent with three specific EMIR requirements (known as the “Recognition Conditions”). To date, ESMA has granted recognition to five U.S.-based DCOs consistent with the terms laid out in the 2016 EC-CFTC Agreement.

The 2016 EC-CFTC Agreement has fostered cooperation and mutual respect between EU and the CFTC in regards to the regulation of cross-border CCPs. The no-action relief described in this letter is, in part, issued based upon this agreement as well as continued cooperation and mutual respect between the jurisdictions.

## **III. Statement of Facts**

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<sup>3</sup> See CFTC Staff Letter No. 16-26 (Mar. 16, 2016), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/16-26.pdf>.

You have represented that the Bundesbank has, upon further reflection, requested additional modifications to paragraph 5 of the Original Bundesbank Acknowledgment Letter as provided in Letter No. 16-05. Specifically, the Bundesbank has requested changes that would provide greater specificity with respect to the information that certain Commission personnel may request regarding the applicable accounts held at the Bundesbank. Paragraph 5 of the Bundesbank's proposed acknowledgment letter (the "Modified Bundesbank Acknowledgment Letter") would read as follows (insertions to the Original Bundesbank Acknowledgment Letter are underlined, and deletions are struck through):

5. You agree to reply as soon as reasonably practicable and directly to any request for confirmation of the existence of the Account, account balances, or ~~provision of any other Information regarding or related to the Account~~ the applicable account numbers, transactions in such Account, and to reply as soon as reasonably practicable and directly to questions regarding account balances, the applicable account numbers, and the transactions in such Account (including but not limited to transaction information such as the amount, the date and time, who authorized the transaction) from the director of the Division of Clearing and Risk of the CFTC or the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees, and this letter constitutes the authorization and direction of the undersigned on our behalf to release the requested information without further notice to or consent from us. The requests have to be addressed to your contact information provided below.

The Division agrees that, although the proposed modifications provide for language that is more specific than the Original Bundesbank Acknowledgment Letter, the proposed new language is sufficiently broad in scope to take into account all of the types of information contemplated by the more general language proposed to be replaced. Accordingly, for the same reasons discussed in Letter No. 16-05, the Division agrees that the above proposed changes to the Original Bundesbank Acknowledgment Letter are appropriate in this case.

Therefore, based on the facts presented and the representations Eurex Clearing has made, the Division will not recommend that the Commission take enforcement action against Eurex Clearing for executing, and submitting to the Commission, the Modified Bundesbank Acknowledgment Letter, in place of the Template Acknowledgment Letter or the Original Bundesbank Acknowledgment Letter.

Moreover, where relevant developments make it necessary for the Division to reconsider the no-action relief issued in CFTC Staff Letter No. 16-26 such as a material increase in the EU legal and supervisory requirements that U.S. DCOs currently recognized in the EU must adhere to in order to maintain recognition status (*e.g.*, the Recognition Conditions), the Division will, if appropriate, take action to rescind such relief with adequate notice to allow for an orderly transition. The Division will review regulatory developments in the EU affecting U.S. DCOs on a regular basis to determine whether such relief will be rescinded. Further, a repeal of the relief under CFTC Staff Letter No. 16-26, will lead to a reconsideration of the no-action relief

December 20, 2018

Page 4

provided herein, as this relief has been granted, in relevant part, based on the interests of comity and cross-border coordination set forth in the 2016 EC-CFTC Agreement.

The position taken herein concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of any provision of the CEA or the Commission's regulations. As with all no-action relief, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

### **III. Conclusion**

This letter is based upon the representations of Eurex Clearing and applicable laws and regulations in their current form; any new, different, or changed material facts or circumstances might render this letter void. Moreover, this letter represents the position of the Division only and does not necessarily represent the views of the Commission or those of any other division or office of the Commission. Should you have any questions, please do not hesitate to contact Brian Baum, Special Counsel, at (202) 418-5654.

Sincerely,

Brian A. Bussey  
Director