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31 March 2014

Swiss Federal Council
Eidgenössisches Finanzdepartement
Rechtsdienst Generalsekretariat
Bernhof
CH_3003 Bern

Submitted to regulierung@gs-efd.admin.ch

Re: **Consultation on the Federal Act on the Financial Market Infrastructure**

Dear Sir/Madam:

Markit¹ is pleased to submit the following comments to the Swiss Federal Council ("**Federal Council**") in response to its Consultation Paper on the Federal Act on the Financial Market Infrastructure (the "**Consultation Paper**" or the "**CP**").²

Introduction

Markit is a provider of financial information services to the global financial markets, offering independent data, valuations, risk analytics, and related services across regions, asset classes and financial instruments. Our products and services are used by a large number of market participants to reduce risk, increase transparency, and improve the operational efficiency in their financial markets activities.

Most of Markit's processing services are provided by MarkitSERV,³ a company that offers confirmation, connectivity, and reporting services to the global OTC derivatives

¹Markit is a financial information services company with over 3,000 employees in North America, Europe, and Asia Pacific. The company provides independent data and valuations for financial products across all asset classes in order to reduce risk and improve operational efficiency. Please see www.markit.com for additional information.

² Federal Act on the Financial Market Infrastructure. 13 December 2013.

³ MarkitSERV, a wholly owned subsidiary of Markit Group Limited, provides a single gateway for OTC derivatives trade processing. The company offers trade processing, confirmation, matching, and reconciliation services across regions and asset classes, including interest rate, credit, equity, and foreign

markets, making it easier for participants in these markets to interact with each other. Specifically, MarkitSERV provides trade processing, confirmation, and matching services for OTC derivatives across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting.

Such services, which are offered also by various other providers, are widely used by participants in these markets today and are recognized as tools to increase efficiency, reduce cost, and secure legal certainty. With globally over 1,500 firms using the various MarkitSERV platforms that process, on average, 80,000 OTC derivative transaction processing events every day, our legal, operational, and technological infrastructure plays an important role in supporting the OTC derivatives markets in Europe, North America, and the Asia-Pacific region.

A further service that is relevant in the context of the CP is Markit Portfolio Valuations, an industry validated, fully hosted service that provides independent valuations and risk measures for vanilla and exotic derivatives, private equity investments, structured notes and cash products. Our valuations are distributed via a single platform alongside clearing prices and counterparty marks.

Markit's comments

Markit has been actively and constructively engaged in the discussion related to regulatory reform of the financial markets. We regularly provide regulatory authorities with our insights on current market practice, for example in relation to valuation methodologies, liquidity measurement, the use of reliable and secure means to provide daily marks, or to performing pre-trade credit checks to achieve clearing certainty. We have also advised regulatory bodies on potential approaches to enable the timely and cost-effective implementation of newly established requirements, for example through the use of multi-layered phase-in or by providing participants with a choice of means for satisfying their regulatory obligations. Over the last several years, we have submitted over 100 comment letters to regulatory authorities around the world and participated in numerous stakeholder meetings.

We welcome the publication of the Consultation Paper and we appreciate the opportunity to provide the Federal Council with our comments. Our below recommendations reflect the extensive experience we have gathered in supporting market participants with the implementation of requirements for OTC derivatives

exchange derivatives. MarkitSERV also connects dealers and buy-side institutions to trade execution venues, CCPs, and trade repositories. Please see www.markitserv.com for additional information.

markets that were established on the back of the G20 Pittsburgh commitments⁴ in numerous jurisdictions around the globe.

Art. 2 Definitions

The Federal Council defines clearing as “the process between conclusion and settlement of a transaction, in particular establishing, reconciling and confirming of transaction data, the assumption of the exposures by a central counterparty or other risk mitigating measures; the set-off (netting) of transactions; the reconciliation and confirmation of payment and securities deliveries obligations to be settled.”⁵

Whilst the relevance of the definition of “clearing” is not entirely clear from the CP, we are concerned that the Federal Council, by using this definition, establishes a view on “clearing” that is much too wide and could, unintentionally, capture numerous services and their providers that are not related to the central clearing of derivatives through CCPs. We therefore recommend that the FC narrows the definition of “clearing” to only capture those activities that are related to the central clearing of derivatives via CCPs.

Article 16 Non-discriminatory and Open Access

We appreciate the proposal by the Federal Council that the financial market infrastructure “shall grant a non-discriminatory and open access to its services.”⁶ We believe that the provision of such access is the pre-condition for a competitive and thriving marketplace that has the potential to constantly innovate and provide real value to its users. That said, we believe that the FC should explicitly require for such non-discriminatory and open access to be provided not only to other regulated entities but also to third party service providers who request access, including providers of so called “middleware” services such as MarkitSERV.

In this context, the Federal Council should note that the CFTC last year caused some confusion amongst market participants in relation to the question whether SEFs must submit their transactions “directly” to the relevant CCP or they would be permitted to use third parties for this task. Significant uncertainty was caused in the marketplace based on market participants’ concerns that they might not be permitted to use third parties for the routing of transactions, even though the Commission had previously explicitly permitted delegation for this task. Further, some providers of financial market infrastructure have used this opportunity to impose requirements on their participants to only use their own routing mechanisms, herewith imposing a significant restraint on

⁴ The G20 Pittsburgh Summit Commitments. September 25, 2009.

⁵ Federal Act on the Financial Market Infrastructure, Art. 2, d.

⁶ Federal Act on the Financial Market Infrastructure, Art. 16, 1.

competition. To avoid causing similar uncertainty and opportunities for anti-competitive behavior, we recommend that the Federal Council explicitly allows market participants to use middleware providers for the efficient provision of routing services, whilst also requiring registered entities to provide open and non-discriminatory access to those.

In this context, we note that the Federal Council allows financial market infrastructures to restrict access if this "increases the safety or efficiency and this effect cannot be achieved by other means" or "the characteristics of the potential participant could harm the business activities of the FMI".⁷ As above examples have shown, providing registered market infrastructures with the right to impose such broad exemptions could easily be abused by them and result in anti-competitive practices. We therefore urge the FC to strengthen this language, for example by adding "significantly" and "to be demonstrated by the FMI to the FC". We also believe the FC should require FMIs to respond to a request for access by another party within a certain period of time.

Article 28 Market Transparency

The Federal Council proposes a pre-trade transparency requirement that "comprises the publication of the actual bid and offer prices and the depth of trading interests at these prices," whilst post-trade transparency "comprises the prompt disclosure of information on executed trades in securities at a trading venue, in particular the price, the volume and the time of the transactions."⁸

It is not clear from the CP whether such requirements would only apply to certain trading mechanisms, e.g. Central Limit Order Books, or to all types of execution venues. In this context, the FC should note the approach taken under MiFID to the calibration of transparency requirements where, depending on the liquidity of the product, different transparency requirements will apply.⁹

Article 71 Data transmission to individuals

The Federal Council proposes that the trade repository ("**TR**") "may transmit collected and administered data in aggregated and anonymized form to individuals" and that "the transmission of data to individuals regarding their own transactions is permissible without any limits."¹⁰

⁷ Federal Act on the Financial Market Infrastructure, Art. 16, 2.

⁸ Federal Act on the Financial Market Infrastructure, Art. 28, 1, 2.

⁹ "The...transparency requirements shall be calibrated for different types of trading systems, including order-book, quote-driven, hybrid, periodic auction trading and voice trading systems." Regulation of European Parliament and of the Council on markets in financial instruments (MiFIR), Chapter 2, Article 7.

¹⁰ Federal Act on the Financial Market Infrastructure, Art. 71,1, 2.

We believe this provision is confusing and question whether it would be relevant in practice. We recommend that the Federal Council clarify that TRs shall provide access to trade details to third party service providers as permitted by reporting parties, whilst TRs shall disseminate aggregate data to the public. The Federal Council should note that under EMIR “at least the breakdown of the aggregate open positions per asset class should be published”¹¹ by TRs. This information also includes a breakdown of aggregate transaction volumes and values per asset class.

Article 88 Exceptions

The Federal Council proposes that authorities can wholly or partially exempt certain entities “for reasons of proportionality reasons or in consideration of international standards” and that the Federal Council may “submit not adequately supervised Swiss branches of foreign financial market participants to this section.”¹²

In our experience the cross border aspects of regulatory reform in the global derivatives markets have been one of its most difficult aspects to address.¹³ Whilst a proportionate approach to the implementation of this regulation is very welcome, we urge the Federal Council to clarify the exact extraterritorial reach of its rules early on in the process. Only by doing so it will create a sufficient degree of certainty for market participants to allow them to prepare for compliance.

Article 93 Derivatives subject to the Clearing Obligation

The Federal Council lists several factors that FINMA will need to consider when designating certain categories of derivative transactions for clearing through a central counterparty.¹⁴

¹¹ Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories. 27 September 2012.

¹² Federal Act on the Financial Market Infrastructure, Art. 88,1, 2.

¹³ For example, see CFTC No Action Relief letters 14-15, and 14-16. Time-Limited No-Action Relief with respect to Swaps Trading on Certain Multilateral Trading Facilities Overseen by Competent Authorities Designated by European Union member States. CFTC Letter No. 14-15. February 12, 2014. Conditional No-Action Relief with respect to Swaps Trading on Certain Multilateral Trading Facilities Overseen by Competent Authorities Designated by European Union Member States. CFTC Letter 14-16. February 12, 2014.

¹⁴ These factors include: the degree of their legal and operational standardization; their liquidity; their trading volume; the availability of price data sources in the relevant class; the related counterparty risks. Federal Act on the Financial Market Infrastructure, Art. 93.

We believe that the use of such factors when making a clearing determination is a very sensible approach that would be consistent with other jurisdictions. However, we recommend for the list of factors to also include the “impact on competition” that such clearing requirement is expected to have. Given the limited number of CCPs that clear certain products at the moment, we believe that this will be an important factor to be considered in order to foster competition in the marketplace. The FC should note that, under EMIR, ESMA shall take such factors into consideration when drafting the RTS related to the clearing obligation.¹⁵

Article 96 Reporting Obligation

The Federal Council proposes that both “financial and non-financial counterparties as well as central counterparties shall ensure that the material characteristics of their derivative transactions are reported to a trade repository authorized and recognized by FINMA.”¹⁶

Such requirement that imposes the reporting obligation on “counterparties” would result in a “double-sided” reporting regime similar to the reporting obligation requirements under EMIR. However, our experience with the implementation of the reporting requirements in a multitude of jurisdictions has shown that a double-sided reporting regime creates significant burden on the market place, in particular for the many end users, corporates and infrequent derivatives users that would have a reporting obligation that they are often insufficiently prepared for. The FC should note that this challenge will not be resolved by allowing these users to delegate the reporting to a third party or to the counterparty as they will remain responsible for the accurate and timely reporting to the TR. We therefore recommend for the Federal Council to consider establishing a “Reporting Counterparty” (or “**RCP**”) approach instead. Such approach, where in most cases only one party to the transaction is responsible for the reporting of the transaction to the TR, has also been established in several other jurisdictions.¹⁷

¹⁵ “EMIR foresees a number of criteria of different nature, which ESMA may take into account when drafting the RTS related to the clearing obligation. Specifically, in accordance with Article 5(4), in preparing the draft RTS, ESMA may take into consideration the interconnectedness between counterparties using the relevant classes of OTC derivatives, the anticipated impact on the levels of counterparty credit risk between counterparties as well as the impact on competition across the Union.” ESMA Discussion Paper: The Clearing Obligation under EMIR. 12 July 2013.

¹⁶ Federal Act on the Financial Market Infrastructure, Art. 96.

¹⁷ For example, the United States uses a reporting counterparty approach for reporting transactions to the TR. Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012). Additionally, the Canadian Securities Administrators proposed for the reporting to the TR to be performed by the Reporting Counterparty. CSA Consultation Paper 91-201 – Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting. (December 6, 2012).

Our view is based on the experience that we have gathered in supporting reporting firms both in the United States, where an RCP or “one-sided reporting” approach has been established,¹⁸ and in Europe, where both counterparties to the transaction are required to report to the TR.¹⁹ Our experience has shown that the reporting of a *single, verified* record of the transaction data *by one party* to the transaction provides the advantages of creating clarity, avoiding duplication, reducing the potential for error, and simplifying the workflow. It also leads to a significant reduction in the cost of reporting and minimizes the burden for end users. On the other hand, it will not result in any reduction in the quality of the data that is reported to the TR as long as the reported record has been verified and confirmed by both parties to the transaction.

However, if the Federal Council decided for the reporting obligation to remain with both counterparties, it would be useful to establish requirements to ensure that this reporting happens without duplication. This objective could be achieved most effectively if the counterparties were to agree on the use of a common unique transaction identifier for the transaction, which is a requirement in other jurisdictions.²⁰

We support the Federal Council’s proposal that explicitly allows for the delegation of reporting.²¹ Experience in the various jurisdictions where obligations to report derivatives transactions to TRs have already been established has shown that a large number of reporting parties find it most effective to delegate the reporting to TRs to third parties. It will therefore be important that such option is also available to market participants in Switzerland and the FC ensures that there are no unnecessary restrictions on the reporting parties’ ability to delegate.

Article 97 Point in time and content of reporting

The Federal Council proposes that “the reporting shall be made at the latest on the day following the day on which the derivative transaction has been concluded, altered

¹⁸ Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

¹⁹ ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories. 27 September 2012.

²⁰ The CFTC’s Unique Swap Identifier (“USI”), for example, is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its life time. The creation and use of the USI has been mandated by the CFTC and SEC as part of the Dodd-Frank Act. CFTC: Unique Swap Identifier Data Standard. October 2012.

²¹ Federal Act on the Financial Market Infrastructure, Art. 96.

or terminated.”²² The Federal Council also proposes a list of datafields that should be reported for each transaction.²³

We appreciate the fact that the FC proposed to require the reporting to TRs in a T+1 time frame. We believe that such timing is generally achievable for the more standardized products and consistent with the requirements that have been established in other jurisdictions.²⁴ Regarding the datafields to be reported, we recommend that the FC enter into an intense and comprehensive dialogue with the industry on this issue in order to benefit from the experiences that have been made in other jurisdictions. Specifically, experience has shown that the addition of some datafields that might not be readily available can create major compliance issues and significant cost for market participants whilst adding little benefit to regulatory authorities.

Risk Mitigation - Article 99 Duties

The Federal Council proposes that “derivative transactions which are not cleared over a central counterparty authorized and recognized by FINMA shall be subject to the obligations laid down in this chapter.”²⁵

The Federal Council should clarify what it means by “derivative transactions which are not cleared.” Similar to challenges that have arisen in the context of similar EMIR requirements²⁶ it is not clear, for example, how transactions shall be treated that are intended to be cleared but have not been cleared yet.²⁷

Article 100 Mitigation of the Operational Risk

²² Federal Act on the Financial Market Infrastructure, Art. 97, 1.

²³ “For each trade the report shall specify at least: the identity of the parties to the derivative transaction (name, place of incorporation); type; maturity; notional value; settlement date; currency.” Federal Act on the Financial Market Infrastructure, Art. 97, 2.

²⁴ ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories. 27 September 2012.

²⁵ Federal Act on the Financial Market Infrastructure, Art. 99.

²⁶ “Risk mitigation for OTC derivative contracts not cleared by a CCP” ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories. 27 September 2012.

²⁷ Transactions that are ultimately cleared will typically originate from an uncleared transaction between the two counterparties (the so-called “alpha trade”) which is then replaced (through novation) with two uncleared transactions where these counterparties are facing the CCP (the so-called “beta” and “gamma” trades). The FC should note that any delegation of the reporting obligation for a “cleared” transaction to a CCP can only cover the beta/gamma trades.

The Federal Council proposes that financial and non-financial counterparties shall “timely confirm the terms of the derivative transactions.”²⁸

We appreciate the fact that the FC does not require a specific format for confirming derivative transactions.²⁹ We believe that the choice of the appropriate means of confirmation should be left with market participants as they see fit, which would allow them to reflect the frequency of their trading activity and the availability of relevant resources. In relation to the timeliness of confirmation, we encourage the FC to establish several categories and timelines. Such categories could be based on the standardization of the derivative product, the nature of the counterparties to the transaction, and the form of execution. In this context, we recommend the FC take note of the approaches established by the CFTC³⁰ and in Europe³¹ respectively.

Article 101 Validation of Outstanding Transactions³²

The Federal Council proposes that financial counterparties “shall mark-to-market the value of outstanding transactions on a daily basis,” with some limited exceptions.³³

Such requirement seems generally consistent with other markets and current market practice. As to the details of such requirements, the FC might want to take into account the EMIR RTS that require counterparties, when generating their derivative valuations, to make use of all available data sources and embed sufficient independence in the process in order to minimize conflicts of interest and the potential for manipulation.³⁴

²⁸ Federal Act on the Financial Market Infrastructure, Art. 100.

²⁹ The FC should note that this contrasts with the approach taken under EMIR where it is specified that “An OTC derivative contract concluded between financial counterparties or non-financial counterparties...shall be confirmed, where available via electronic means.” ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories. 27 September 2012.

³⁰ Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants. 77 Fed. Reg. 55904. (Sept. 11, 2012).

³¹ Article 11: Timely confirmation. ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories. 27 September 2012.

³² As an initial point, we recommend that the Federal Council should rename this section to “Valuation of Outstanding Transactions” instead of “validation” given the nature of the proposed requirements and to achieve consistency with requirements established in other jurisdictions. ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories.

³³ Federal Act on the Financial Market Infrastructure, Art. 101.

³⁴ ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories.

Article 105 Derivatives on Target

The Federal Council proposes that “FINMA shall take into account international standards and may implement the trading platform obligation time wise in individual steps for each class of derivatives.”³⁵

We strongly welcome the FC’s proposal to establish a phased-in implementation for any trading requirement. Based on our experience in assisting market participants with the compliance of new regulatory regimes, we know about the significant burden that the introduction of the various requirements imposes.³⁶ We believe that the provision of sufficient time to allow market participants to prepare for the introduction of such new requirements will ultimately enable a timely and cost-efficient implementation. We therefore recommend for the FC to establish both transitional periods and a phased-in implementation for the whole variety of requirements that are discussed in the CP.

Firstly, we urge the Federal Council to provide firms with an extended period following the finalization and publication of any requirements as appropriate, to allow them to analyse the requirements, implement the relevant policies and procedures, establish the necessary connectivity and legal agreements, and perform sufficient testing ahead of the compliance dates.

Further, we recommend that the Federal Council establishes a multi-layered phase-in that reflects factors such as the standardization of the asset class and the nature of the counterparties to the transaction. Specifically, any initial start date for the reporting of derivatives to TRs should apply only in the more standardized asset classes of interest rates and credit whilst reporting in other asset classes would be required, for example, 6 months thereafter.

Finally, in terms of setting the specific compliance dates, we encourage the FC to consider factors such as a) the timing of implementation of reporting requirements in other jurisdictions;³⁷ b) the time of the year;³⁸ and c) the specific day of the week when compliance shall kick in.³⁹

³⁵ Federal Act on the Financial Market Infrastructure, Art. 105.

³⁶ This is particularly true for reporting requirements as many are being introduced in numerous jurisdictions at almost the same time.

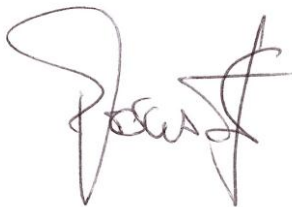
³⁷ Requirements to report derivatives transactions to TRs are scheduled to become effective over the coming months in several other major jurisdictions, including Hong Kong, Australia, and Europe. On that basis, the relevant dedicated resources that would also be required to prepare for the introduction of the reporting requirements in Malaysia will already be tied up at many of the major, internationally active firms.

Our experience has shown that reflecting the combination of these factors when deciding on compliance dates is instrumental in allowing for an implementation that is both timely and cost effective.

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Markit appreciates the opportunity to provide the Federal Council with our comments on its Consultation Paper on the Federal Act on the Financial Market Infrastructure. We would be happy to elaborate or further discuss any of the points addressed above. In the event you may have any questions, please do not hesitate to contact us.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Schuler', with a stylized flourish extending to the right.

Marcus Schuler
Head of Regulatory Affairs
Markit
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³⁸ For example, firms will typically experience a development freeze in December and will also be short staffed. This time of the year thus does not seem ideal for the implementation of any new requirement.

³⁹ Specifically, implementation of new requirements on a Monday will allow for deployment, configuration and smoke testing over the weekend, outside of business hours.