



CLS Bank International

Financial Square
32 Old Slip, 23rd Floor
New York, NY 10005

Tel: +1 212 943 2290

Fax: +1 212 363 6998

August 8, 2013

Via email

European Central Bank
Secretariat Division
Kaiserstrasse 29
D-60311 Frankfurt am Main
Germany
email: ecb.secretariat@ecb.europa.eu

Re: **Draft Regulation of the European Central Bank on Oversight Requirements for Systemically Important Payment Systems (the “Draft Regulation”)**

Dear Sirs/Mesdames,

We are writing on behalf of CLS Bank International (“CLS Bank”) with respect to the Draft Regulation. Thank you for the opportunity to submit these comments.

Background

CLS Bank is a special purpose corporation organized under the laws of the United States of America as well as a designated financial market utility under the Dodd-Frank Wall Street Reform and Consumer Protection Act. CLS Bank is the operator of the CLS settlement system (the “CLS System”), which offers its Settlement Members and their customers the ability to mitigate settlement risk in the settlement of their foreign exchange transactions. CLS Bank currently has 63 Settlement Members and settles payment instructions in 17 currencies. The rules of the CLS System are governed by English law and the CLS System was designated in the United Kingdom in 2002 by the Bank of England under the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, as amended, for the purposes of the Settlement Finality Directive 98/26/EC, as amended (the “SFD”).

CLS Bank currently complies with the CPSS-IOSCO Core Principles for Systemically Important Payment Systems, and looks forward to complying with the CPSS-IOSCO Principles for Financial Market Infrastructures (the “Principles”) in due course, after the Principles have been adopted and implemented in the United States.



General Comments

CLS Bank fully supports the implementation of the Principles in all jurisdictions, and recognizes the need for oversight of systemically important payment systems. As the European Central Bank (the “ECB”) is aware, in light of the importance of the CLS System to the international financial community, pursuant to a “Protocol for the Cooperative Oversight Arrangement of CLS,” CLS Bank is subject to cooperative oversight and regularly provides detailed information regarding the CLS System to participating central banks, including the ECB.

CLS Bank also supports the apparent intent of the ECB, reflected in the Draft Regulation, to limit the application of the Draft Regulation to certain systemically important payment systems that are subject to primary oversight by the Eurosystem central banks. CLS Bank notes that the Draft Regulation only applies to a systemically important payment system if (a) it is eligible to be notified as a system pursuant to the SFD¹ by a Member State whose currency is the euro *or its operator is established in the euro area* (emphasis added) and (b) at least two of the four factors listed in Article 1(3) of the Draft Regulation occur over a calendar year. However, for the sake of clarity, CLS Bank proposes certain technical amendments, described in greater detail below.

Proposed Technical Amendment to “established in the euro area”

CLS Bank acknowledges that each systemically important payment system, such as the CLS System, must comply with the Principles, as implemented by the applicable regulatory authority in the system's primary jurisdiction (e.g., as stated above, CLS Bank will comply with the Principles when they are implemented in the United States, subject to oversight by its primary regulator, in addition to agreed upon cooperative oversight).

As a result of specific policy considerations in various jurisdictions, the actual implementation of the Principles in these jurisdictions may vary significantly (in the same manner that the implementation of EU Directives often varies). While this is generally not an issue, for the sake of efficiency and clarity, it must be clear that each systemically important payment system need only comply with the Principles as implemented in its head or home office jurisdiction, and must not be subject to potentially varying or even conflicting requirements.

While the use of the phrase “established in” is commonly used in recent EU legislation as the basis for the application of requirements², it is not clearly defined, potentially resulting in confusion with respect to the applicability of such requirements. For example, if at some point in

¹ We note that Article 2(a) of the SFD currently provides that a system must be “notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.” However, Article 10(1) of the SFD, which has been amended in this respect, requires Member States to notify systems to ESMA, and not to the Commission. We believe that a corresponding amendment should have been made to Article 2(a) of the SFD and CLS Bank will submit this comment to the European Commission later this year, in addition to other comments it plans to submit relating to the SFD.

² See, for example, Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”), where this phrase is used to define “non-financial counterparties” and also to reference the application of EMIR obligations to central counterparties.



the future the operator of a systemically important payment system were to establish a branch in the euro area (perhaps in order to comply with the July 19, 2007 “Eurosysteem policy principles on the location and operation of infrastructures settling euro-denominated payment transactions”³), it is possible, based upon the current language set forth in the Draft Regulation, that such system might be found to be “established” in the euro area, and therefore required to comply with the Draft Regulation, which would impose an undue burden on such system.

CLS Bank believes that this ambiguity should be eliminated, and therefore proposes that Article 1(3) of the Draft Regulation be amended to replace the phrase “established in” with a requirement that the operator have its head office in or be incorporated in the euro area.⁴

CLS Bank would welcome the opportunity to discuss these issues with you. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dino Kos', written over a horizontal line.

Dino Kos
Head of Global Regulatory Affairs

A handwritten signature in black ink, appearing to read 'Lauren Alter-Baumann', written over a horizontal line.

Lauren Alter-Baumann
Managing Director
Legal and Regulatory Strategic Affairs

³ We note that this policy, as endorsed in the July 2011 ECB “Eurosysteem Oversight Policy Framework”, contemplates incorporation of systems in the euro area but also provides for exceptions in very specific circumstances on a case-by-case basis.

⁴ While we strongly support this amendment for the sake of clarity as well as efficiency, an alternative (but more complicated) approach might be to amend the Draft Regulation to provide that the Draft Regulation would not apply to a system that is found to be established in the euro area if the system complies with an “equivalent” home state regime (for example, the ECB may wish to consider adopting an equivalence regime similar to that contemplated in Article 13 and 25 EMIR for third country legal and supervisory regimes).