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Guidance Notes

to the

EMIR Risk Mitigation Techniques Agreement

(version 1.1 / September 2013)

I. Introduction: EFET's form of EMIR Risk Mitigation Techniques Agreement (version 1.1/September 2013), as published on the EFET web page on 9 September 2013 (the "ERMTA"), was developed by a working group comprised of EFET member company representatives and EFET's counsel.

The ERMTA was developed in response to the implementation of regulatory requirements imposed by Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("EMIR"). The ERMTA aims to facilitate compliance with certain EMIR-related requirements and obligations and its terms act to supplement any agreed terms or Covered Agreement governing EMIR Relevant Transactions whether entered into on, before or after the Effective Date.

Unless otherwise expressly set forth in these Guidance Notes, capitalised terms used throughout these Guidance Notes shall have the meanings attributed to those terms in the ERMTA.

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PLEASE NOTE: These Guidance Notes were prepared by EFET exercising all reasonable care and as a general guide only for the purposes of assisting users of the ERMTA. EFET, the EFET members, representatives and counsel involved in the preparation of these Guidance Notes shall not be liable or otherwise responsible for their use and any damages or losses resulting out of their use and in whatever jurisdiction. It is the responsibility of each Party wishing to use the ERMTA to ensure that the terms and conditions set forth therein are legally binding, valid and enforceable and best serve to protect the user's legal interest, and are suitably brought to the attention of a counterparty. Users of the ERMTA and/or these Guidance Notes are urged to consult their own legal counsel.

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II. Scope & Purpose: In response to requirements imposed by EU regulators aimed at increasing market transparency and monitoring systemic risk, which involve the implementation of certain risk mitigation techniques and trade data reporting procedures, the ERMTA is designed to:

(i) facilitate compliance with the regulatory requirements and obligations imposed by EMIR that relate, amongst other matters, to Portfolio Reconciliation, Dispute Identification and Resolution Procedures and Timely Confirmation (please see further details in the relevant sections below); and

(ii) act as a supplementary set of terms which the Parties agree are incorporated into and form part of any agreed terms or Covered Agreement that govern EMIR Relevant Transactions entered into on or before the Effective Date; and are also deemed incorporated into any agreements in respect of transactions which are EMIR Relevant Transactions entered into after the Effective Date of the ERMTA, and, may be applied to non-EMIR Relevant Transactions, in accordance with §1.3 (*Applicability to non-EMIR Relevant Transactions*), below.

Note that the ERMTA is intended to be used in connection with transactions subject to EMIR irrespective of whether those transactions are subject to any other EFET documentation. For this reason, the ERMTA was drafted as a separate agreement rather than as an Annex to an EFET General Agreement or EFET Master Netting Agreement, for example.

Further, please note that this Guidance Note only addresses the obligations under EMIR, and not any other third country legislation, other than at §8 (*Confidentiality Waiver*) for which the scope of disclosure is broader than EMIR only.

III. Comparison of the ERMTA and the ISDA Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol

1. Overview

The ISDA 2013 Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol published by the International Swaps and Derivatives Association, Inc. (the “**ISDA Protocol**”) and the ERMTA contain similar core obligations relating to Portfolio Reconciliation, Dispute Resolution and Confidentiality. It is intended that the core obligations under both the ISDA Protocol and the ERMTA are to apply to transactions that are subject to the applicable EMIR obligations, including where those transactions are not documented under an ISDA Master Agreement (in the case of the ISDA Protocol) or an EFET General Agreement (in the case of the ERMTA).

It is important to note that the ISDA Protocol will not apply to fully executed ISDA Master Agreements entered into after both Parties have acceded to the ISDA Protocol. This is in contrast to the position under the ERMTA, as set out under §1.2 (*Amendments to Covered Agreements*). The expectation is that the ERMTA will most likely be used in situations where one or both Parties have not acceded to the ISDA Protocol.

2. Key Differences

- **Form**

ISDA Protocol: A party may adhere to the ISDA Protocol and be bound by its terms by delivering a letter in the form attached to the ISDA Protocol, to ISDA (an “**Adherence Letter**”).

ISDA has also published a bilateral amendment agreement covering the same points as the ISDA Protocol.

ERMTA: The ERMTA is a bilateral agreement which amends and supplements, through a series of elections, the terms of Covered Agreements.

- **Negative Affirmation and Counterparty Status.**

ISDA Protocol: Timely Confirmation and counterparty status are not addressed in the ISDA Protocol but are the subject of other ISDA documentation.

ERMTA: The ERMTA contains an elective provision providing for negative affirmation for confirmations and an election enabling Parties to designate their respective counterparty status under EMIR.

- **Portfolio Reconciliation**

ISDA Protocol: The ISDA Protocol permits both Parties to be Portfolio Data Receiving Entities, and should this be the case, provides that the Parties will agree a suitable process for reconciling Portfolio Data.

ERMTA: As the ERMTA is a bilateral agreement as opposed to a protocol, it places a prohibition on allowing both Parties being Portfolio Data Receiving Entities. If neither Party is content to send Portfolio Data, the Parties will need to agree a suitable alternative process for reconciling Portfolio Data that meets their needs.

- **Governing Law**

ISDA Protocol: The ISDA Protocol and all Adherence Letters will be governed by and construed in accordance with the laws of England and Wales.

ERMTA: The ERMTA governing law clause is the subject of an election that the Parties must make. English law or German law are the standard elections, but the Parties may also specify an alternative governing law.

IV. Notes on Selected ERMTA Provisions & Sections of the Election Sheet

§1. Subject of Agreement

- **§1.1 of the ERMTA: (*Subject of Agreement*).**

§1.1 explains the background to and rationale for the ERMTA, the scope of transactions it covers, and explains the broad application of the ERMTA so that once it is entered into, the terms of the ERMTA are deemed incorporated into any agreed terms or Covered Agreements that govern EMIR Relevant Transactions entered into on, before or after the Effective Date. Note that the ERMTA is intended to be used with any agreement between the Parties which governs EMIR Relevant Transactions. See further the definition of Covered Agreement in the ERMTA. Thus the ERMTA is not limited to documentation based on agreements published by EFET. It is the intention that the ERMTA will be deemed to be incorporated in any Covered Agreement and any agreed terms entered into after the Effective Date, as explained in greater detail in the following paragraph.

§1.1 provides that the ERMTA applies to any agreed terms or Covered Agreement entered into after the Effective Date (each such agreement being a “**Future Agreement**”). Despite this, **it is advised that where the Parties have entered into the ERMTA, the Parties should also reaffirm the application of its terms to a Future Agreement by expressly providing for the terms of the ERMTA to apply to such Future Agreement.** Taking this step is likely to assist in preventing a court or arbitral tribunal finding that a Future Agreement entered into between the Parties is not subject to the terms of the ERMTA (as previously entered into by the Parties) because the Future Agreement, entered into after the Effective Date of the ERMTA, fails to validly incorporate the terms of the ERMTA. **The following is an example of text the Parties may wish to insert into a Future Agreement to incorporate into a Future Agreement the terms of the ERMTA (as previously entered into between the Parties):**

“The terms set forth in the EMIR Risk Mitigation Techniques Agreement Version 1.1/September 2013, as entered into between [the Parties] **OR** [insert full name of party and insert full name of party] on [insert date], shall be incorporated into, and apply in respect of, transactions contemplated under this [Agreement][Contract][Confirmation] **OR** [insert as appropriate].”

- **§ 1.2 of the ERMTA and Election Sheet: (*Amendments to Covered Agreements*).**

The effect of the ERMTA in relation to each Covered Agreement is set out in §1.2, which provides that the terms of the ERMTA will amend and supplement the terms of any Covered Agreement entered into between the Parties on, before or after the Effective Date. The Parties may, however, elect in the Election Sheet to designate that §4 (***Portfolio Reconciliation***), §5 (***Dispute Identification and Resolution Procedure***) and §8 (***Confidentiality Waiver***) of the ERMTA shall not apply to each Covered Agreement in circumstances where the Parties have entered into an Alternative Documentary Solution. Under the definition set forth in the ERMTA, an Alternative Documentary Solution is intended to include other documentation addressing portfolio reconciliation, dispute resolution and waiver of confidentiality for trade reporting and other disclosure, such as, for example, the ISDA Protocol. If the Parties have entered into an Alternative Documentary Solution and make this election, §4, §5 and §8, collectively, of the ERMTA shall not apply to each Covered Agreement. If they do not make this election then, subject to any other amendments the Parties may make to the ERMTA, §4, §5 and §8 of the ERMTA shall apply.

It is expected that where an Alternative Documentary Solution is in place, the Parties would not need to enter into the ERMTA. However, if the Parties have entered into both the ERMTA and an Alternative Documentary Solution, they should refer to §1.2 and make the appropriate election in order to prevent a conflict of terms between the ERMTA and the Alternative Documentary Solution, arising.

Parties should consider carefully the appropriateness of this election including whether any Alternative Documentary Solution they wish to rely on is applicable as a matter of contract to the transactions they wish to apply it to and whether it is appropriate to those transactions.

- **§1.3 of the ERMTA: (*Applicability to non-EMIR Relevant Transactions*).**

This provision reflects that Parties may choose to apply the terms of the ERMTA to transactions that are not EMIR Relevant Transactions and to transactions in respect of which there is some doubt as to whether or not they are EMIR Relevant Transactions. This provision states that if the terms of the ERMTA are applied to any transaction that is without prejudice to

either Party's assessment as to whether that transaction is an EMIR Relevant Transaction and no inference should be drawn by virtue thereof.

§2. Definitions and Construction

- **§2.2 of the ERMTA: (*Inconsistencies*).**

The ERMTA was drafted to reflect detailed discussions of the relevant Task Force relating the preferred prevalence as to inconsistencies between the ERMTA and other documentation.

As with other EFET agreements, those provisions that the Parties agree between themselves in Part II will prevail over the pre-printed provisions in Part I.

Subject to the exception discussed below, in the event of any inconsistency between the ERMTA and any Agreed Process or Covered Agreement, the Agreed Process or Covered Agreement will prevail. In the case of Agreed Processes, this reflects that the Dispute Resolution Process is intended to apply an additional mechanism for dispute resolution and is not intended to replace existing approaches to dispute resolution contained in Covered Agreements or applying to EMIR Relevant Transactions. In the case of Covered Agreements, this reflects that, except in certain specific cases discussed below, the expectation is that the ERMTA will supplement Covered Agreements and is not intended to override their provisions.

The ERMTA goes on to provide that the general rule about the prevalence of the Covered Agreement will not apply to the extent that the ERMTA specifically provides that a provision of the ERMTA will apply notwithstanding anything to the contrary in any Covered Agreement. The pre-printed ERMTA states that §7 (*Timely Confirmation*) and §8 (*Confidentiality Waiver*) apply notwithstanding anything to the contrary in any Covered Agreement. Thus, in relation to those provisions, the ERMTA is intended to prevail.

In considering §2.2 (*Inconsistencies*), Parties should also consider §1.2 (*Amendments to Covered Agreements*) and the election referred to therein. Where the Parties have made the election referred to §1.2 (*Amendments to Covered Agreements*), §4, §5 and §8 of the ERMTA shall not apply. As this election is made in Part II of the ERMTA, it will prevail over the provisions of §8 (*Confidentiality Waiver*) even though §8 is expressed to apply notwithstanding anything to the contrary in this Agreement or any Covered Agreement.

§3. Election of Counterparty Status

- **§3.1 of the ERMTA and Election Sheet: (*Election of Counterparty Status*).**

In certain circumstances, the obligations under EMIR and Supporting Regulation which a Party is required to comply with will depend on its status to an EMIR Relevant Transaction. §3.1 allows the Parties to designate their status for these purposes in the corresponding section of the Election Sheet. In the applicable section in the Election Sheet, the Parties can therefore either jointly make 'no' designation as to their status, or may designate their status by marking each statement in the Election Sheet that will apply. The status which has been designated in the Election Sheet is deemed to be correct as of the Effective Date and each time the Parties enter into an EMIR Relevant Transaction; and the status designations as selected on the Election Sheet are deemed to be repeated on each day that an EMIR Relevant Transaction is outstanding.

- **§3.2 of the ERMTA and Election Sheet: (*Change of Status Notice*).**

Where a Party has made an election as to its counterparty status in accordance with §3.1 (*Election of Counterparty Status*), and thereafter the counterparty status changes, that Party must promptly inform the other Party of such a change, by written notice. Further, where the change affects the obligations of one or both Parties under EMIR and the Supporting Regulation, the affected Party must promptly ensure compliance with all such obligations.

- **§3.3 of the ERMTA and Election Sheet: (*Effect of Non Compliance with Change of Status Notice*).**

Where a Party has made an election as to its counterparty status in accordance with §3.1 (*Election of Counterparty Status*), and such designation is incorrect or misleading, or where a Party fails to send a Change of Status Notice in accordance with §3.2 (*Change of Status Notice*), the Parties must use commercially reasonable efforts in order to amend the terms of any EMIR Relevant Transaction or Covered Agreement in order for each Party to fulfil its respective obligations under EMIR and the Supporting Regulation. But such failure is not intended to give rise to termination rights in respect of any transactions (see §10 (*Remedies for Breach*)).

§4. Portfolio Reconciliation

- **§4.1 of the ERMTA and Election Sheet: (*Portfolio Reconciliation*).**

In accordance with EMIR and the RTS, both Parties to an outstanding EMIR Relevant Transaction agree to reconcile their portfolios and the procedure for executing portfolio reconciliation, as required by the Portfolio Reconciliation Risk Mitigation Techniques. §4 sets out the obligations imposed on each Party which are dependent upon first determining whether a particular Party is sending Portfolio Data or receiving Portfolio Data. Each Party to an outstanding EMIR Relevant Transaction must designate in the corresponding section of the Election Sheet whether it is a Portfolio Data Sending Entity or a Portfolio Data Receiving Entity.

- **§4.2 of the ERMTA: (*One-Way Delivery of Portfolio Data*).**

If only one Party is a Portfolio Data Sending Entity, the Parties must comply with the procedure for reconciling portfolios set forth in §4.2. Alternatively, if both Parties are Portfolio Data Sending Entities, the Parties must comply with the procedure for reconciling portfolios set forth in §4.3 (*Exchange of Portfolio Data*).

- **§4.4 of the ERMTA: (*Change of Designation*).**

Each Party may change its designation as either a Portfolio Data Sending Entity or Portfolio Data Receiving Entity, as originally selected in the Election Sheet, provided written agreement of the other Party has been obtained in accordance with §4.4. Irrespective of this limited right to change a designation, a change of a Party's designation is not permitted if the result would be that both Parties are Portfolio Data Receiving Entities.

- **§4.5 of the ERMTA: (*Frequency of Data Collection*).**

The frequency with which Data Reconciliation is performed by the Parties may be changed to a greater or lesser frequency by one Party sending a notice to the other Party, in writing, with supporting evidence as to why that Party considers the frequency of Data Reconciliation should be changed. The required frequency is set out at Article 13.3 of the RTS.

The Parties are free to agree, at Section B of Part II of the ERTMA, explicit dates for each frequency, for example, the day of the week in the case of a weekly Date Reconciliation, or a specific date in the case of quarterly or yearly Data Reconciliation.

- **§4.6 of the ERMTA and Election Sheet: (*Agents and Third Party Service Providers*).**

For the purposes of fulfilling the obligations imposed by §4 on Portfolio Data Sending Entities and Portfolio Data Receiving Entities, each Party may appoint an Affiliate to act as its agent immediately upon giving written notice to the other Party. The notice must include making the relevant election set forth in the Election Sheet, specifying the name of the Affiliate and whether such affiliate will act as agent for the purpose of performing all or some obligations set out at §4 of the ERMTA. If the Affiliate is appointed to perform only some of a Party's obligations, these obligations must be listed in the Election Sheet. Alternatively, provided consent is received from the other Party in accordance with §4.6(b) (*Agents and Third Party Service Providers*), each Party may appoint either a qualified and duly mandated Third Party Service Provider or an entity other than an Affiliate, to act as its agent.

Please note that the provisions of §4 shall not apply to a Covered Agreement that is also an outstanding EMIR Relevant Transaction, if the Parties have: (i) entered into an Alternative Documentary Solution; and (ii) have elected in §1.2 (*Amendments to Covered Agreements*) in the Election Sheet that §4 shall not apply.

§5. Dispute Identification and Resolution Procedure

- **§5.1 of the ERMTA: (*Dispute Identification and Resolution Procedure*).**

In accordance with the requirements of EMIR, §5.1 sets forth a procedure that the Parties agree to follow and apply when identifying and resolving a Dispute. The process commences when one Party sends a Dispute Notice to the other Party, in the belief that the Dispute should be determined in accordance with dispute resolution and risk mitigation techniques for OTC derivative transactions pursuant to Article 11(1)(b) of EMIR.

Please note that this dispute identification and resolution procedure is distinct from, and does not apply in relation to, a 'dispute' which may arise out of or in relation to the ERMTA in general and which is unrelated to the specific requirements emanating as a result of the implementation of EMIR. Therefore, any 'dispute' other than a Dispute shall be governed by the relevant procedure which has been elected by the Parties in accordance with §12 (*Governing Law and Dispute Resolution*), below.

§6. Representations and Undertakings

- **§6.2 of the ERMTA: (*Covered Agreements and Third Party Credit Support Provider's consent, approval etc.*).**

§6.2 seeks to ensure that any necessary consents, approvals, agreements and authorizations which are required to be obtained from a third party which is securing, guaranteeing or securing a Party's obligations under a Covered Agreement have been obtained

and, if requested by a Party, that the relevant Party can provide evidence of such consent, approval, agreement, authorization or other action etc.

§7. Timely Confirmation

- **§7.1 of the ERMTA and Election Sheet: (*Timely Confirmation*).**

§7 sets forth an elective provision whereby a Confirmation is deemed to have been accepted by a Party receiving the Confirmation in circumstances where the Party receiving the Confirmation fails to either confirm or dispute the Confirmation by a certain date. If the Parties elect in the relevant section in the Election Sheet for Timely Confirmation to apply in respect of EMIR Relevant Transactions, then irrespective of any conflicting terms in a Covered Agreement, the Confirmation in respect of an EMIR Relevant Transaction is deemed accepted based on the following: if only one Party sends a Confirmation in accordance with §7 and the receiving Party does not confirm such Confirmation or give notice disputing the accuracy of such Confirmation on or before the Timely Confirmation Deadline, the receiving Party shall be deemed to have agreed to the terms of the Confirmation and to have confirmed the Confirmation as soon as the Timely Confirmation Deadline has expired.

§8. Confidentiality Waiver

- **§8.1 of the ERMTA: (*Confidentiality Waiver*)**

§8.1 sets out a broad list of circumstances pursuant to which a disclosure by a Party is permitted and thus deemed waived by the other Party. The list includes a category of circumstances where disclosure is permitted pursuant to the Reporting Requirements; and permits disclosure made between the Parties' head offices, branches or Affiliates i.e. disclosures necessary for operational reasons. Note that the confidentiality waiver extends beyond EMIR to disclosure that is required under transaction reporting requirements of authorities in the EU, EEA, Switzerland and any other jurisdictions recognised by ESMA as propagating EMIR-equivalent regulations.

- **§8.2 of the ERMTA: (*Scope of Permitted Disclosure*)**

Both Parties acknowledge the scope and extent of the disclosures that are permitted and provide the detail of the type of information which may be disclosed and to whom (such as trade repositories and regulators), despite the fact that certain information may become available to the public.

§10. Remedies for Breach

- **§10.1 of the ERMTA: (*Remedies for Breach*)**

§10.1 provides that a failure by a Party to comply with the obligations set forth in the ERMTA does not amount to a circumstance that permits termination of the EMIR Relevant Transaction; and neither will such a failure amount to an event of default, termination event, material reason, or any similar such term, which may permit the termination of the EMIR Relevant Transaction or any other transactions.

§11. Form of Notifications

- **§11.1 of the ERMTA and Election Sheet: (*Form of Notifications*)**

All notices under the ERMTA must be made in writing and the Parties must specify the address to which notices should be delivered in the relevant section in the Election Sheet. Notices may also be delivered by email provided that each Party has made the necessary election in the corresponding section in the Election Sheet.

§12. Governing Law and Dispute Resolution

- **§12 of the ERMTA and Election Sheet: (*Governing Law and Dispute Resolution*)**

§12 provides two substantive options (Option A and Option B) which the Parties may elect in the Election Sheet to apply as the governing law and dispute resolution provisions. Option A and Option B are consistent with the standard EFET approach, however the Parties have a further option in the Election Sheet where they may elect to, and insert, alternative governing law and/or dispute resolution provisions. The election made by the Parties with respect to the governing law and dispute resolution clause is subject to the provision that any amendment, made by the ERMTA, to a Covered Agreement shall be governed and construed in accordance with the law specified to govern that Covered Agreement and in accordance with the applicable choice of law doctrine.

Parties should carefully consider the governing law and dispute resolution procedure that they choose and should take into account the governing law and dispute resolution procedures applying to any Covered Agreements. For example, parties using the ERMTA where the most significant Covered Agreement is an ISDA Master Agreement may wish to consider the dispute resolution procedure chosen in that ISDA Master Agreement.

OPTION A

§12 Option A sets out that, subject to §12.3 (*Covered Agreements*), the ERMTA is subject to English Law; and that any dispute shall be determined by arbitration under the LCIA Rules. If the Parties wish to elect Option A, the Option A box must be marked on the relevant section in the Election Sheet.

OPTION B

§12 Option B sets out that, subject to §12.3 (*Covered Agreements*), the ERMTA is subject to laws of the Federal Republic of Germany; and that any dispute shall be referred for resolution to the German Institute of Arbitration (DIS). If the Parties wish to elect Option B, the Option B box must be marked in the relevant section in the Election Sheet, together with specifying a language in which the Parties wish the arbitration to be conducted.

If the Parties wish to specify an alternative governing law and dispute resolution provision, the appropriate box must be marked in the relevant part in the Election Sheet, and the Parties should insert such alternative provision in the relevant section. **Parties must elect Option A or Option B or insert an alternative provision. There is no fall-back governing law or dispute resolution mechanism if the Parties fail to make such election or insertion.**

- **§12.3 of the ERMTA: (*Covered Agreements*)**

Despite the Parties' election of either Option A, Option B or neither Option A nor Option B, the terms so incorporated are all nevertheless subject to §12.3, which provides that any amendment to a Covered Agreement shall be governed and construed in accordance with the law

specified to govern that Covered Agreement and the applicable choice of law doctrine. §12.3 is aimed at ensuring (i) the Parties are clear as to the effect of their election upon a Covered Agreement and (ii) the Parties' election made in the ERMTA in respect of the applicable governing law and dispute resolution provisions will not affect, modify or amend, in any way, the governing law and dispute resolution terms already set out and applicable in respect of the Covered Agreement.

Annex 1. Defined Terms

- **Annex 1 of the ERMTA and Election Sheet: (*Business Day Location*)**

In order to ensure each Party is only required to perform its contractual obligations on a business day, as that business day is determined in that performing Party's own / home jurisdiction, each Party must specify their home jurisdiction. By making this election, the Parties will avoid being required to perform an obligation which falls on a non-business day in their home jurisdiction.

A "Party A Business Day" is defined as a day (other than a Saturday or Sunday) on which commercial banks are open for general business in the Party A Location. Party A must therefore specify on the relevant section in the Election Sheet the city upon which the Party A Business Day Location should be based.

A "Party B Business Day" is defined as a day (other than a Saturday or Sunday) on which commercial banks are open for general business in the Party B Location. Party B must therefore specify on the relevant section in the Election Sheet the city upon which the Party B Business Day Location should be based.

- **Annex 1 of the ERMTA: (*CCP*)**

Under the ERMTA, EMIR Relevant Transactions are not cleared by a CCP. A CCP is defined in the ERMTA as a clearing house authorised under Article 14 of EMIR or recognized under Article 25 of EMIR. Parties may not want to apply the ERMTA to transactions which are cleared by a central counterparty that is not so authorised or recognized. For transactions to be excluded from Article 11(1) of EMIR on the basis that they are cleared they must be cleared by a central counterparty but there is no requirement that the transactions be cleared by a CCP that is authorised or recognized under EMIR. If Parties do not want the ERMTA to be expressed to apply to transactions cleared by a central counterparty that is not so authorised or recognized, they can amend the ERMTA in Part II by replacing the definition of CCP with the following:

““**CCP**” means a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer.”