

Two Months to Comply With European Reporting Rules for Derivatives – What Buy-Side Entities Need To Know

Many of the provisions of the Regulation on Derivative Transactions, Central Counterparties and Trade Repositories, known as the European Market Infrastructure Regulation 648/2012 (“**EMIR**”), are now in effect throughout the European Union (“**EU**”). Like Dodd-Frank, EMIR seeks to fulfill the G20 commitment that all standardized over-the-counter (“**OTC**”) derivatives (“**Contracts**”) should be cleared through a central counterparty (“**CCP**”) and details of Contracts should be reported to a registered trade repository (“**TR**”). With the bulk of the rules for uncleared OTC Contracts now in place, attention has turned to the EMIR reporting obligation. We have set out below some of the typical questions, particularly those asked by funds and fund managers (“**Buy-Side Entities**”), on the reporting obligation which we continue to encounter in the run-up to the next EMIR milestone. These questions are potentially of interest to any Buy-Side Entity organized in the EU, managed by an EU-regulated entity, providing investment advice to any EU-based fund or client, participating in OTC derivatives transactions with a counterparty organized in the EU, or entering into exchange-traded derivatives in the EU.

What does the reporting obligation require?

EMIR requires counterparties and CCPs to ensure that the details of any Contract concluded, modified or terminated are reported to a TR that is registered with or recognized by the European Securities and Markets Authority (“**ESMA**”).

What types of Contracts will be subject to the reporting obligation?

The types of Contracts identified in the Markets in Financial Instruments Directive 2004/31/EC are subject to EMIR. These Contracts include credit, equity, interest rate, foreign exchange, commodity and other swaps and derivatives. Unlike the reporting obligations under Dodd-Frank, the EMIR reporting obligation applies to both OTC Contracts and exchange-traded Contracts (“**ETCs**”).

Does the reporting obligation apply to non-EU counterparties?

No. The ESMA confirmed in its Q&A on the implementation of EMIR that the reporting obligation ordinarily does not apply to counterparties established outside the EU, e.g., U.S. funds. However:

- when a non-EU counterparty enters into a Contract with an EU counterparty, e.g., a Cayman fund with a UK bank, the EU counterparty will need to identify the non-EU counterparty in the report it makes to a TR in discharge of the reporting obligation.
- where a non-EU fund is managed by an entity authorized or registered under the Alternative Investment Fund Managers Directive 2001/61/EU, the non-EU fund will be subject to the reporting obligation.
- if a non-EU counterparty accepts a delegation of some or all of the duties under the reporting obligation of an EU counterparty, e.g., when a US manager performing management functions for a UCITS fund agrees to assume responsibility for the fund’s reporting obligations, the non-EU counterparty will need to comply with EMIR reporting rules. The EU counterparty making the delegation will remain legally responsible for the reporting obligation.

When is the reporting obligation due to take effect?

- For OTC Contracts, the obligation is due to take effect on **February 12, 2014** (the “**OTC Reporting Date**”). The details of each Contract entered into after that date will need to be reported no later than one working day after the conclusion, modification or termination of that Contract.
- For ETCs, the obligation is currently due to take effect on February 12, 2014, although it may be delayed to January 1, 2015.¹

What about Contracts entered into before the OTC Reporting Date?

OTC Contracts entered into on or after August 16, 2012, and which are outstanding on the OTC Reporting Date, will have to be reported by **May 13, 2014**. OTC Contracts entered into on or after August 16, 2012, and which are no longer outstanding on the OTC Reporting Date, will need to be reported to a TR by **February 11, 2017**.

Can compliance with the reporting obligation be delegated?

A counterparty may delegate some or all of its reporting obligation duties to someone else, including the other counterparty, the CCP or another third party. Unlike the approach under the Dodd-Frank reporting obligations, both counterparties (if organized in the EU) are responsible for making a report to a TR. For this reason, a counterparty that makes a delegation will still be legally responsible for the reporting obligation and will be expected to agree to the contents of any report with the entity that makes the report on its behalf.

What will have to be reported to a TR?

EMIR requires reporting of information about the reporting counterparty and information about the Contract. Details of the information are contained in Annex A to the Implementing Regulatory Technical Standards 1247/2012 on reporting (the “**Reporting Template**”). A link to the Reporting Template is below.

Will the use of a Legal Entity Identifier (“LEI”) be required?

The reporting fields in the Reporting Template require an LEI for the reporting counterparty and the other counterparty. In its EMIR Q&A, ESMA has indicated that a “Pre-LEI” issued by a Pre-Local Operating Unit of the GLEI System (“**LOU**”) is required. US entities should note that the list of permissible Pre-LEIs includes the CFTC Interim Compliant Identifier (CICI). Therefore, CICIs can be used for EMIR reporting purposes.

To which TRs must reports be made?

EMIR trade reports may only be submitted to TRs which are registered with or recognized by ESMA. According to the UK Financial Conduct Authority (“**FCA**”), four TRs have been registered with ESMA as of December 12, 2013. The details of those TRs can be found on the FCA’s EMIR webpage.

¹ ESMA had proposed that the reporting date for ETCs be delayed to January 1, 2015. The European Commission rejected this suggestion. There is still some uncertainty as to whether ETCs will have to be reported on February 12, 2014 or if the reporting date will be delayed.

What will happen to the information which is reported to a TR?

A TR will be required to publish regularly and in an easily accessible way the aggregate positions by class of Contracts reported to it. The TR will also have to make the information reported to it available to ESMA, other EU regulatory authorities, EU Member State regulators, and any third country regulator with whom ESMA has entered into a cooperation agreement.

What steps should Buy-Side Entities be taking with respect to the reporting obligation?

1. Determine whether you are subject to an EMIR reporting obligation (either directly or through delegation from a fund/client organized in the EU), or if your transaction information will be reported by your counterparty.
2. If information regarding any transactions entered into by your funds or clients is required to be reported under EMIR, your funds/clients need to obtain a pre-LEI issued by an LOU (if they do not already have a CICI or another pre-LEI).
3. If you are subject to an EMIR reporting obligation, identify and register with a TR.

Where can the materials referred to in this briefing be found?

- The text of EMIR can be found [here](#).
- The text of the ESMA EMIR Q&A can be found [here](#).
- The text of the Reporting Template can be found [here](#).
- A list of LOUs and recognized pre-LEIs can be found [here](#).
- The FCA's EMIR webpage can be found [here](#).

If you have any additional questions about EMIR or related laws or regulations, please contact [Andrew Henderson](#) at andrew.henderson@ropesgray.com, [Leigh Fraser](#) at leigh.fraser@ropesgray.com, [Michelle Moran](#) at michelle.moran@ropesgray.com or [Katerina Sandford](#) at katerina.sandford@ropesgray.com.