

EMIR Reporting – Further Reporting Obligations Apply in August 2014

Our clients are already complying with the requirement in the European Regulation on Derivative Transactions, Central Counterparties and Trade Repositories (known as the European Market Infrastructure Regulation (“EMIR”)) that all European Union (“EU”) counterparties to over-the-counter (“OTC”) and exchange-traded derivatives report details of their derivatives transactions to a trade repository.¹ From 11 August 2014, EU established financial counterparties² (“FCs”) and non-financial counterparties that exceed the clearing threshold³ (“NFC+s”) must report the mark-to-market (or mark-to-model) value of any OTC or exchange-traded derivative, whether a trade is collateralized, and the value of the collateral posted. This information must be reported following execution of a trade and, thereafter, following any changes to the previously reported values. Thus, if the value of a trade changes daily, this information must be reported daily. FCs, NFC+s and non-financial counterparties that do not exceed the clearing threshold (“NFC-s”) must continue to report basic details of their derivatives trades.

This Alert gives an overview of the additional reporting obligation and gives guidance on how to address the various reporting fields. Some of these obligations may be subject to further regulatory guidance (in particular, by means of ESMA’s EMIR Questions & Answers).

Which entities are subject to the reporting obligation?

The reporting obligation applies to the entity which is the counterparty to the trade. Only EU established counterparties (for instance, a UCITS fund or pension fund) are subject to the reporting obligation. In practice, many counterparties rely on their investment manager to report on their behalf. Note that, unlike the approach under Dodd-Frank, both counterparties (if established in the EU) are responsible for making a report to a trade repository.

What types of derivatives trades are subject to the additional reporting obligation?

The EMIR reporting obligation applies to both OTC and exchange-traded derivatives (e.g. futures and listed options), meaning that valuation and collateral details will need to be reported for both types of trades. This is not in line with the reporting obligations under Dodd-Frank. Also, unlike under Dodd-Frank, the EMIR reporting obligation applies to all product types (other than, prospectively, some types of FX forwards – see below). We give some guidance on the completion of the relevant fields in the annex to this Alert.

Whether or not valuation and collateral information must be reported for these trades as of 11 August 2014 depends on when the trade was entered into:

- For trades entered into on or after 16 August 2012 that are outstanding on 11 August 2014, valuation and collateral information must be reported by 12 August 2014.
- For trades entered into before 16 August 2012 that are outstanding on 11 August 2014, valuation and collateral information must be reported within 90 days after 11 August 2014.
- For (i) trades entered into before 16 August 2012 that were outstanding on 16 August 2012 and are not outstanding on 11 August 2014 and (ii) trades entered into on or after 16 August 2012 that are

¹ This obligation started on 12 February 2014. See our previous [Alert](#) for more details.

² Financial counterparties include banks, brokers, pension funds, UCITS funds and investment funds managed by EU managers.

³ Non-financial counterparties are EU undertakings other than financial counterparties. An NFC will exceed the clearing threshold if it executes uncleared OTC derivatives (other than hedging derivatives) above a threshold.

not outstanding on 11 August 2014, valuation and collateral information must be reported within three years after 11 August 2014.

What is the actual start date for these expanded reporting obligations?

The UK Financial Conduct Authority (“FCA”) has indicated that the date the reporting obligation arises is 11 August 2014, meaning that an FC or NFC+’s first report will be due no later than close of business on the following day, 12 August 2014. This may be subject to confirmation from ESMA, but clients should plan for the obligation to apply on 11 August 2014.

Is the data in these fields subject to “matching” with the counterparty before it is reported?

No. EMIR envisages that only the “Common Data” in the report is agreed between both parties to the trade before it is reported. As these additional fields are part of the “Counterparty Data,” there is no requirement to match the data with the counterparty before it is reported.

What is the treatment of FX forwards?

The European Commission is currently consulting on the treatment of FX forwards under EMIR. The Commission’s consultation indicates a willingness to exclude FX forwards with a short settlement date (at least those settling within T+2, and potentially those settling within T+7) from the scope of EMIR. Until the position is clarified at European level, counterparties must follow the approach set by their local regulator. In this regard, the FCA and the Luxembourg CSSF have excluded all FX forwards settling within T+7 from the scope of EMIR, whilst the Irish CBI has stated that all FX forwards settling beyond T+3 are within the scope of EMIR. EMIR draws in a much broader range of FX trading than Dodd-Frank, and currently includes (subject to the position outlined by the FCA, CSSF and CBI) FX forward trades which are used purely for settlement, not investment, purposes.

Can valuation and collateral reporting be delegated to dealers?

A party may delegate some or all of its reporting obligations to another party, including the other counterparty, the exchange or clearing house (if the trade is executed on exchange or cleared) or a third party service provider such as a fund administrator. As noted above, both counterparties are responsible for making a report. For this reason, a counterparty that delegates reporting obligations 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.

A counterparty that has delegated its reporting obligations to its dealer counterparty may want to ask its dealer to report the valuation information on the basis of the dealer’s own valuations, rather than the counterparty’s valuations. This may leave a counterparty in the position of using its own (or its administrator’s) valuations to satisfy the requirement in EMIR to perform daily mark-to-market valuations and relying on a dealer’s valuations (which may produce a different valuation on the basis of a different model, or even may be subject to dispute between the counterparty and the dealer) to satisfy the reporting requirement. The industry view appears to be that this is acceptable at least in the short term and to the extent that the respective valuations are reconciled and there are no material discrepancies between them, but managers may wish to consider consistency between their own valuations and the reported valuations in the longer term.

How often will these additional reports need to be made?

EMIR requires, as part of the separate risk mitigation obligations, that each FC and NFC+ performs a daily mark-to-market valuation of its outstanding contracts. Any changes in the valuation will need to be reported as a “modification to the report” in field 58 of the “Common Data” section of the form. Changes in the mark-to-market value may adjust the amount of collateral that is posted, and any such changes also need to be reported.

How should valuations be reported for trades executed on exchanges or clearing houses?

For OTC trades that are cleared by a clearing house, EMIR requires that counterparties report the mark-to-market valuations provided by the clearing house. It follows that the values for exchange-traded trades should also be reported at the exchange value. Some clearing houses and exchanges will agree to report this data on behalf of counterparties in respect of the trades cleared on the clearing house or exchange. Otherwise, counterparties (or their reporting agents) will need to obtain this data from clearing houses and report it to the trade repository.

What means can asset managers use to report trades?

For cleared or on-exchange trades, managers can delegate the reporting obligation to the clearing house or exchange (although this requires the clearing house or exchange to look to the intermediary dealer to receive various pieces of “counterparty data” relating to the counterparty to complete the report). Other possible providers are the fund’s clearing member or broker, its administrator or service providers such as affirmation vendors. For OTC trades, managers will typically look to their dealer counterparty or fund administrator.

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Annex

The following table lists the new data points that must be reported, namely fields 17 to 26 of Table 1 – Counterparty Data of the reporting form.

Field number	Field	Details to be reported	Comments
17	Mark-to-market or mark-to-model value of contract	Mark-to-market valuation of the contract, or mark-to-model valuation where applicable under Article 11(2) of Regulation (EU) No. 648/2012.	<p>FCs and NFC+s must report the mark-to-market (or mark-to-model, if used in accordance with the conditions set out in EMIR) value of outstanding contracts. This must be reported following execution of the trade (at the end of the business day following the date of execution) and following any change to the valuation (at the end of the business day following the day in which the value changed – so on every business day in most cases).</p> <p>ESMA has confirmed in its Q&As that (i) it is not possible to report “zero” in this field on the basis that there is no market risk because variation margin is paid and (ii) the mark-to-market value should be based on the mid-price of the market from which the prices are taken as reference.</p>
18	Currency of mark-to-market value of the contract	The currency used for the mark-to-market valuation of the contract, or mark-to-model valuation where applicable.	N/A
19	Valuation date	Date of the last mark-to-market or mark-to-model valuation.	N/A
20	Valuation time	Time of the last mark-to-market or mark-to-model valuation.	N/A
21	Valuation type	Indicate whether valuation was performed mark-to-market or mark-to-model.	N/A
22	Collateralisation	Whether collateralisation was performed.	This requires a “Y” or “N” response.

23	Collateral portfolio	Whether the collateralisation was performed on a portfolio basis (i.e., whether the collateral amount was calculated on the basis of net positions resulting from a set of contracts, rather than per trade).	This requires a “Y” or “N” response. If collateral is calculated on a “portfolio” basis (i.e., on a net basis across a portfolio), current industry understanding is that details of the collateral need only be provided in the report for one transaction that is within the portfolio that is subject to the net calculation. Each transaction within the portfolio will then be linked to details of the collateral reported by virtue of bearing the same “collateral portfolio code” (see below).
24	Collateral portfolio code	If collateral is reported on a portfolio basis, the portfolio should be identified by a unique code determined by the reporting counterparty.	There is as yet no methodology for producing the collateral portfolio code, so the counterparty must determine the code. There is also not (as yet) any requirement for both counterparties to share the same code.
25	Value of the collateral	Value of the collateral posted by the reporting counterparty to the other counterparty. Where collateral is posted on a portfolio basis, this field should include the value of all collateral posted for the portfolio.	Current industry understanding is that collateral only needs to be reported where the netted amount results in a delivery by the counterparty. Therefore, no reporting is required where there is a net posting of collateral to the counterparty. Also, current industry understanding is that this is the full value of the collateral posted, not any “haircutted” value and that this is the aggregate value of all cash and non-cash collateral posted. The amount reported should be net of payments such as fees, interest and swap coupons.
26	Currency of the collateral value	Specify the value of the collateral for field 25.	The form does not mandate a given currency for the value of the collateral reported. Industry understanding is that the collateral value should be reported as an aggregate value in any appropriate currency.
58	Action type	Any change in fields 17 to 26 must be reported in this field.	Among other things, each change in the mark-to-market or mark-to-model valuation (field 17) and change in the value of collateral posted (field 25) must be reported in this field.