

## **EMIR Refit: Financial counterparties legal liability for reporting on behalf of both itself and non-financial counterparties**

### **Operational considerations**

#### **Introduction**

EMIR Refit was published in the [Official Journal of the European Union](#) (OJ) on 28 May 2019 (and came into force on 18 June 2019), and introduced a requirement whereby financial counterparties (FC) will be responsible and legally liable for the timely and accurate reporting of over-the counter (OTC) derivative contracts on behalf of both themselves and their non-financial counterparties that are not subject to the clearing obligation (NFC-), (see item 18 within the OJ). EMIR Refit also states that in order for an FC to successfully and accurately report OTC contracts on behalf of its NFC- client, the NFC- must provide the data that FC “cannot be reasonably expected to possess”.

For the avoidance of doubt, this EMIR Refit requirement applies to OTC derivative contracts only, and an FC will not be legally liable for the reporting of exchange traded derivative (ETD) contracts on behalf of its NFC- clients. An NFC- entity will remain liable for the reporting of its ETD trades.<sup>1</sup>

ISDA members have identified a number of operational considerations and challenges as to how this legislation is to be implemented that the OJ does not necessarily fully address. Therefore, members of the ISDA Data and Reporting EMEA Working Group met with the intention of coming to a common understanding of the requirements and whether there can be a standard approach for how to implement them.

This document has been prepared as a record and summary of discussions held within the ISDA Data and Reporting EMEA Working Group on the interpretation, implementation and management of the EMIR Refit requirement for FCs to report on behalf of both themselves and their NFC- clients. This document does not constitute legal, regulatory or any other form of professional advice, nor does it constitute official guidance. As with all information that ISDA disseminates, parties are free to choose alternate means of addressing the specific facts of their situation. ISDA assumes no responsibility for any use of this document and undertakes no duty to update it to reflect future regulatory, market or other developments. This document reflects discussions held within the ISDA Data and Reporting EMEA Working Group and does not purport to be an exhaustive list of all the relevant issues that market participants should consider. Each

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<sup>1</sup> OTC derivatives are derivatives contracts which are not executed on an EU regulated market within the meaning of Article 4(1) (14) of MIFID II, or on a third-country market determined to be equivalent in accordance with Article 2 of EMIR (EU) No 648/2012.

user of this publication should consult with its own legal or other adviser prior to acting on or using any information included in or referred to by this publication, and should satisfy itself that following or not following any of the proposed guidelines set out herein is appropriate to their specific circumstances.

This document is not a substitute for market participants communicating with their clients as to how the EMIR Refit OTC derivative contact reporting requirements are to be implemented and managed.

In the event regulators publish additional guidance on these EMIR Refit reporting requirements, market participants should consider whether such guidance impacts upon or supersedes anything contained within this document.

## 1. Data to be provided by the NFC- client to the FC

The below EMIR fields were identified as those which relate to an NFC- client, where the client may be required to provide data in order for the FC to report the correct information. It is expected that the data provided by the NFC- for these fields is accurate. The NFC- is not required to validate the data being reported by the FC within these fields.

FCs may choose to perform their own validation of the EMIR fields for which they require data from their NFC- clients.

- i. Reporting Counterparty ID (field 2 of Table 1)
- ii. Corporate sector of the reporting counterparty (field 6 of Table 1)
- iii. Nature of the reporting counterparty (field 7 of Table 1)
- iv. Beneficiary ID (field 12 of Table 1)
- v. Trading Capacity (field 13 of Table 1)
- vi. Directly linked to commercial activity or treasury financing (field 15 of Table 1)
- vii. Clearing member ID (field 10 of Table 1) \*
- viii. Execution Agent or similar \* – Note. This is a field Trade Repositories may use and is not an EMIR field in its own right

\* = these fields may not be applicable to every NFC-

For ‘Beneficiary ID’, if a client does not provide details to an FC, the ISDA Data and Reporting EMEA Working Group proposed the default value would be the ID of the NFC-, i.e. the same LEI reported for the field ‘Reporting Counterparty ID’(field 2 of Table 1).

In addition to information the FC requires in order to populate the above mentioned fields, FCs may also want to consider requesting the following information from their NFC- clients:

- i. Whether the NFC- intends to report for themselves. If the NFC- makes no statement either way, the assumption is that the FC will report on behalf of the NFC-.
- ii. Exchange traded derivative (ETD) contract reporting. As stated above, the EMIR Refit reporting requirement only applies to OTC trades. Therefore the assumption will be that an NFC- client will report ETD trades itself.
- iii. Whether the NFC- entity will be in scope for EU-EMIR reporting, or the onshored UK-EMIR reporting regime after the [transition period](#) ends following the UK’s withdrawal

from the EU. The implementation period is due to end on 31 December 2020, (subject to any extension).

iv. The Trade Repositories (TRs) used by the FC and NFC-.

If the FC and NFC- report to different TRs, existing positions initially reported by the NFC- would need to be removed from the TR used by the NFC- and entered into the TR used by the FC.

If the FC and NFC- use the same TR, there should be no need to move the positions, although there may be positions where the FC and NFC- have reported under different UTIs, in which case it may be necessary to exit and re-play such positions.

In the event positions do need to be moved between TRs, two potential ways to achieve this have been considered:

- 1) The TRs transfer the positions from one TR to the other, as per the '[Guidelines on transfer of data between Trade Repositories](#)'.
- 2) The FC and NFC- bilaterally agree to move the positions themselves, i.e. the NFC- exits the existing positions from the TR they use and the FC enters (or 're-plays') those positions into the TR they use.

The FC and NFC- will need to agree on which approach to take, and working group members identified a number of potential issues for consideration with both options. These include:

TRs transfer the positions – how to inform TRs of the positions to be transferred and when the transfer is to be done; the UTI of an existing position (reported by the NFC-) could differ from the UTI used by the FC, and if so the position may need to be exited and re-played (under the FCs UTI) in order for the FC to successfully report post-trade events; trade details reported by the NFC- could differ from the details reported by the FC, (e.g. existing matching breaks).

The two parties exit and re-play the positions themselves –would need to be agreed how existing positions are to be exited e.g. as action type “C” Early Termination (which will keep the same UTI), or “E” Error (which will require a new UTI); agree on which date the FC and NFC- will exit / re-play the positions to avoid under reporting or duplicative reporting.

There may be alternative methods of transferring position between TRs beyond the two options provided above that an FC and NFC- may want to consider. There may also be additional issues with these options an FC and NFC- will need to take into account. Any such transfers will need to be coordinated and agreed between the two parties, and potentially their TRs as well.

This is not necessarily an exhaustive list of data items that the FC may require from their NFC-client be required. Firms should consider all possibly information they may need.

## 2. LEI of the NFC-

Each entity is responsible for setting up and maintaining their own LEI. An FC cannot successfully report a trade on behalf of their NFC- client without a valid LEI. Therefore, the NFC- would be liable for the non-reporting of the trade if the cause of the failed submission were due to a lapsed LEI.

Essentially, a valid LEI could be considered as one of the data items an NFC- client must provide an FC.

## 3. Scope of impacted positions

The legal position of the EMIR Refit legislation for FCs reporting on behalf of NFC- clients is not clear-cut as to whether it only applies to transactions executed on or after 18 June 2020, or whether lifecycle events of trades executed prior to 18 June 2020, and which are still live as of 18 June 2020, are also in scope.

As the intention is to ‘reduce the burden of reporting OTC derivative contracts for non-financial counterparties’ (as per the OJ), the ISDA Data and Reporting EMEA Working Group came to the view that all reporting (both for new and lifecycle events) are to be carried out by the FC post 18 June 2020. That is to say, new contracts executed with an NFC- client *on or after* 18 June 2020 and lifecycle events of contracts executed with an NFC- client *prior* to 18 June 2020 are in scope for an FCs reporting requirements.

For example:

A trade is executed on 1 May 2020 between an FC and NFC-. The NFC- reports this trade to their TR accordingly.

On 1 July 2020, i.e. after the implementation of the EMIR Refit FC reporting requirement, a reportable post-trade event occurs, (e.g. a partial termination). Although the trade was originally reported by the NFC-, the responsibility to report this post-trade event would now be with the FC, (unless the NFC- client has opted out of this EMIR Refit legislation. See section 6 below).

The FC and NFC- parties to a contract should communicate and confirm between themselves whether lifecycle events will be reported by the FC and what actions (if any) the NFC- may need to take prior to 18 June 2020 in order for the FC to successfully report lifecycle events of live positions. For example, remediate any outstanding breaks on live contracts, or potentially for the FC to commence reporting on behalf of itself and its NFC- clients before 18 June 2020.

For the avoidance of doubt, the working group agreed that where an NFC entity is an NFC+ in at least one asset class, they are considered to be an NFC+ for the purposes of determining whether FCs are required to report on behalf of themselves and the NFC- client. Therefore, the EMIR Refit reporting obligation would not apply to any trades where the FC’s client is an NFC+ in at least one asset class.

#### **4. NFC classification change and assumption of reporting liability by FC / NFC+**

When the classification of an NFC client changes from being NFC+ to NFC-, it is understood the FC is immediately liable to report on behalf of the NFC- client, (for both new and lifecycle events, as per item 3 above). That is to say, an FC is to report on behalf of its NFC- client as of the date when the NFC calculates their classification has changed from NFC+ to NFC-. To facilitate the transfer or reporting liability from the NFC- to the FC, the FC is reliant on being informed by its NFC- client of the classification change. EMIR Refit is unclear as to whether an FC is liable for any non-reporting of an NFC- client's OTC derivative contracts if the FC has not been made aware of its client's classification change and so additional regulator clarification has been requested on this point.

Similarly, if an NFC- entity were to be reclassified as an NFC+, it would be liable for its own reporting as of the calculation date, and should inform the FC immediately to avoid duplicate reporting.

In order to assist with the transition either from or to an FC reporting on behalf of its NFC- client following a change in an NFCs classification, it may be beneficial for the NFC and/or FC to consider and communicate some of the below points. This is not an exhaustive list of items to agree upon, and FCs and NFCs should verify the full scope of information required when moving over to, or away from, an FC reporting on behalf of itself and its NFC- client.

- The NFC should advise its FC counterparties in advance (if possible) of an upcoming classification change, whether that is from an NFC+ to an NFC-, or vice versa.
- The NFC should advise the date on which the classification change to an NFC- / NFC+ will apply.
- FC and NFC to agree on whether voluntary delegated reporting is to be in place, (in the event the classification change is from NFC- to NFC+).
- FC and NFC to clarify which TR holds the NFCs existing live positions, and the UTIs of those positions.

#### **5. AIF / UCITS as an NFC-**

AIFs and UCITS are generally classified as a Financial Counterparty, however paragraph 6 of EMIR Refit provides a scenario where an AIF / UCITS would not be an FC and where such entities could therefore potentially be classified as an NFC+ or NFC-.

EMIR Refit also inserts a new paragraph into Article 9 (1.b), (paragraph 19 of EMIR Refit in the OJ), where the fund manager is responsible and legally liable for reporting on behalf of an AIF / UCITS.

ISDA members identified that these two items conflict with one another as to who has the responsibility to mandatorily report on behalf of an AIF / UCITS, when such entities are classified as an NFC-, i.e. it is unclear whether the responsibility to report is with the FC or with the fund manager (which would either be the UCITS Management Company –an FC itself – or the AIFM).

The view of the ISDA Data and Reporting EMEA Working Group is that the fund manager would be responsible for the reporting on behalf of the AIF/UCITS when the AIF / UCITS is an NFC-. However, as this is not clear within EMIR Refit, ESMA have been approached to provide clarification as to which party is liable for the reporting in order to resolve this conflict. In the absence of any such regulatory clarification, it may be necessary for FCs and fund managers to identify whether they have any positions with AIFs / UCITS that are classified as an NFC-, and bilaterally agree who will report those trades.

## **6. Opting out of the EMIR Refit FC / NFC- reporting liability**

Some NFC- parties may choose to report and be legally liable for the reporting of their own OTC derivative contracts, thereby opting out of this piece of EMIR Refit legislation. In such cases, the terms for opting out should be agreed bilaterally between the FC and NFC-.

It is generally accepted within the ISDA Data and Reporting EMEA Working Group that it will not be possible to opt out at a product level or at a trade-by-trade level.

It is the responsibility of the NFC- to provide the FC with any intention to opt out.

## **7. Third Country FCs**

For the avoidance of doubt, the EMIR Refit requirement for an FC to report on behalf of itself and its NFC- clients does not apply to third country FCs. Therefore, if an NFC- entity trades with an FC established in a third country, the NFC- is responsible for reporting the trade itself. This does not preclude third country FCs and NFC- entities bilaterally agreeing to enter into a delegated reporting agreement.

Should there be future decisions whereby the reporting regime in a third country is deemed to be “equivalent” to EMIR, then reporting by the third country FC under that regime would relieve the EU NFC- from its obligation to report under EMIR.