

MEMO# 31742

May 1, 2019

European Parliament and Council Adopt Legislation to Amend EMIR

[31742]

May 1, 2019 TO: Derivatives Markets Advisory Committee
Equity Markets Advisory Committee
ICI Global Trading & Markets Committee
Securities Operations Advisory Committee RE: European Parliament and Council Adopt Legislation to Amend EMIR

The European Parliament and Council recently adopted amendments to the European Market Infrastructure Regulation (EMIR) that are designed to simplify the regulation and eliminate disproportionate costs and burdens.[\[1\]](#) The amendments focus on the following aspects of EMIR: the clearing obligation, the reporting obligation, risk mitigation requirements for over-the-counter-derivatives, the registration and supervision of trade repositories, and access to data in trade repositories.[\[2\]](#)

This memorandum summarizes the amendments that could have the most direct effects on funds. ICI Global suggested or supported certain of these amendments during the public consultation process for this legislation.

I. Amendments to the Clearing Obligation

- **Removal of the frontloading requirement.** EMIR imposes a frontloading requirement (*i.e.*, a requirement to clear retroactively certain OTC derivatives that were entered into before the start date of the clearing obligation). In response to an ICI Global comment, the amendments remove this requirement.[\[3\]](#)
- **Clearing threshold for financial counterparties.** The amendments provide that small financial counterparties will not be subject to the clearing obligation if their aggregate month-end notional exposure to over-the-counter (OTC) derivatives contracts falls below the clearing threshold for non-financial counterparties. These thresholds presently range from €1 billion – €3 billion, depending on the class of derivatives.[\[4\]](#) A financial counterparty that exceeds the threshold for one class of derivatives must clear all transactions subject to the clearing obligation, regardless of asset class.

To use this exception, a small financial counterparty must need to calculate yearly its aggregate month-end average position in OTC derivatives and immediately notify the European Securities and Markets Authority (ESMA) if the annual calculation exceeds

any of the clearing thresholds.[\[5\]](#) The counterparty will become subject to the clearing obligation four months after sending this notification. The counterparty could rely on the exception again when it demonstrates to the relevant competent authority that its aggregate month-end average position in OTC derivatives for the previous 12 months does not exceed the clearing threshold.

Financial counterparties that elect not to calculate their aggregate month-end average position in OTC derivatives will be deemed subject to the clearing obligation. As noted below, the clearing exception for small financial counterparties will take effect 20 days after publication of the amendments in the Official Journal of the European Union, which is expected by June. This means that small financial counterparties that intend to use the exception from clearing provided by the amendments should calculate their aggregate month-end average position in OTC derivatives soon to demonstrate their eligibility for the exception by June or July.

- **Suspension of clearing obligation.** The amendments authorize the European Commission to suspend temporarily the clearing obligation for specific classes of OTC derivatives on the basis of a request by ESMA. ESMA also may request that the Commission suspend the trading obligation for any classes of OTC derivatives that are subject to the request to suspend the clearing obligation. The suspension would be valid for an initial period of no more than three months and could be extended for up to one year. These changes to EMIR generally are responsive to ICI Global advocacy on the suspension of the clearing and trading obligations.[\[6\]](#)
- **Access to clearing.** The amendments require clearing members and clearing member clients that provide indirect clearing services to do so under fair, reasonable, non-discriminatory, and transparent commercial terms and authorize the Commission to adopt delegated acts specifying when commercial terms meet this standard.
- **Protecting client assets in case of a CCP or clearing member bankruptcy.** The legislation provides that the insolvency laws of member states will not prevent a CCP from taking steps under EMIR to protect customer assets. ICI Global has consistently advocated for greater customer protections in the clearing context.

II. Amendments to the Reporting Obligation

- **Reporting historic transactions.** The amendments remove the requirement to report historic transactions (*i.e.*, those transactions that were not outstanding on the starting date of the reporting obligation on February 12, 2014). ICI Global advocated for this change.[\[7\]](#)
- **Reporting hierarchy.** The amendments clarify reporting obligations for the following types of transactions:
 - For transactions between a financial counterparty and a non-financial counterparty not subject to the clearing obligation, the financial counterparty will be responsible for reporting on behalf of both counterparties (unless the non-financial counterparty elects to report); and
 - The management company that manages a UCITS or AIF that is a counterparty to an OTC derivative contract will be responsible for reporting on behalf of that UCITS or AIF.[\[8\]](#)

EU policymakers declined to adopt ICI Global's recommendation that CCPs should

report all exchange-traded derivatives and counterparties should not have reporting obligations on these transactions. EU policymakers also declined to adopt ICI Global's suggestion that Europe replace the dual-sided reporting regime in EMIR with a single-sided regime. The amendments provide for a study of whether it is feasible to further streamline EMIR's reporting requirements for derivatives.

- **Standardizing reporting requirements.** To ensure uniform application of reporting requirements, the amendments direct ESMA to develop draft implementing technical standards that require the use of global legal entity identifiers, international securities identification numbers, and unique trade identifiers in reports to trade repositories.

III. Trade Repository Data

- **Improving data quality in trade repositories.** The amendments require a trade repository to: (1) establish adequate procedures for the reconciliation of data between trade repositories; (2) adopt procedures to verify the completeness and correctness of reported data; and (3) establish policies for the orderly transfer of data to other trade repositories. A trade repository also must grant counterparties access to all data reported on their behalf.
- **Third-country access to trade repository data.** The amendments grant authorities in third countries direct access to data held in the European Union under certain circumstances.

IV. Other Important Amendments for Funds

- **Expanded definition of financial counterparty.** The amendments modify the definition of "financial counterparty" in Article 2 of EMIR to include AIFs that are either established in the Union or managed by an AIFM authorized or registered in accordance with AIFMD, subject to limited exceptions. The proposed legislation would have included a much broader provision that ICI Global opposed because it would have caused non-EU AIFs to become "financial counterparties" for purposes of EMIR.[\[9\]](#)
- **Variation margin for physically-settled foreign exchange contracts.** A recital to the final legislation states that it is appropriate to limit the obligation to exchange margin on physically-settled foreign exchange contracts to transactions between the most systemic counterparties. This amendment is a response to advocacy for globally harmonized margin standards for these contracts by ICI Global and other trade associations.[\[10\]](#)
- **Reports.** The amendments require several reports, including:
 - Within 11 months, ESMA must submit a report to the Commission assessing the consistency of reporting requirements for non-OTC derivatives and the feasibility of further simplifying the reporting chains for all counterparties.
 - Within one year, ESMA must submit a report to the European Commission assessing the effects of the amendments on clearing by financial and non-financial counterparties, the quality and accessibility of trade repository data, changes to the reporting framework, and the accessibility of clearing services.
 - Within 18 months, the European Commission must prepare a report assessing whether EMIR imposes duplicative reporting requirements for non-OTC derivatives and whether reporting workflows for such transactions could be simplified.
 - Within five years, the European Commission must prepare a report assessing the

application of EMIR.

- **Application dates.** The amendments are expected to be published in the Official Journal of the European Union by June 2019. The amendments will apply 20 days after Official Journal publication, subject to the following exceptions:
 - A requirement for CCPs to make a margin simulation tool available to clearing members will apply *six months* after the amendments enter into force.
 - The new reporting regime for financial counterparties and UCITS will apply *12 months* after the amendments enter into force.
 - New trade repository procedures and policies for verification and correctness and accuracy of data will apply *24 months* after the amendments enter into force.

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endnotes

[1] Regulation (EU) 2019/... a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, dated April 10, 2019, *available at*

http://www.europarl.europa.eu/doceo/document/A-8-2018-0181-AM-002-002_EN.pdf.

[2] The European Parliament and Council also recently adopted legislation focused on the authorization and supervision of central counterparties (CCPs). That legislation will be summarized in a subsequent member memorandum.

[3] See Letter from Dan Waters, Managing Director, ICI Global, to European Commission, dated August 12, 2015, *available at* <https://www.ici.org/pdf/29246.pdf> (ICI Global 2015 Letter).

[4] See ESMA's description of EMIR rules applicable to non-financial counterparties, *available at*

<https://www.esma.europa.eu/regulation/post-trading/non-financial-counterparties-nfcs>.

[5] The calculation of aggregate month-end average position in OTC derivatives must be performed at the group level. The amendments specify that for UCITS and alternative investment funds (AIFs), the calculation occurs at the fund level.

[6] See e.g., Letter from Dan Waters, Managing Director, ICI Global, to Directorate-General for Financial Stability, Financial Services and Capital Markets Union, European Commission, dated July 18, 2017, *available at* <https://www.ici.org/pdf/30783a.pdf> (ICI Global 2017 Letter).

[7] See e.g., ICI Global 2017 Letter at 5-6.

[8] In addition, the authorized entity that is responsible for managing and acting on behalf of an institutions for occupational retirement provision (IORP) that does not have a legal personality is responsible for reporting on behalf of the IORP.

[9] See 2017 ICI Global Letter at 7.

[10] See Letter from Jennifer Choi, Associate General Counsel, ICI, and officials from other trade associations to Steven Maijoor, Chair, ESMA, and officials from other EU regulatory and legislative bodies, dated October 3, 2017, *available at* <https://www.iciglobal.org/pdf/30894a.pdf>.

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