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AMG response to the European Commission EMIR Review Consultation

INTRODUCTION & EXECUTIVE SUMMARY

The Asset Management Group (the **AMG**)[1] of the Securities Industry and Financial Markets Association (**SIFMA**) welcomes this opportunity to respond to the consultation paper on the review of Regulation (EU) No 648/2012 (the **EMIR Review**).

The AMG has not responded to each of the European Commission's (the **EC**) questions. Instead, in this response, the AMG focuses on those questions and issues which are of greatest concern to the asset management industry and the funds and other entities under management. The AMG has set out the relevant EC question and its response to each such question. To the extent the EC requires further input on any particular question, the AMG would be happy to participate in discussions or consultations with the EC and provide further feedback.

[1] The AMG's members represent US asset management firms whose combined assets under management exceed $30 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds.

Question 2.1: Definitions and Scope

Title I of the Regulation contains Articles 1-2.

Article 1 determines the primary scope of the Regulation, in particular with regard to public and private entities.

Article 2 provides definitions in use throughout the Regulation which further determine the scope of application of certain of its provisions.

(a) Are there any provisions or definitions contained within Article 1 and 2 of EMIR that have created unintended consequences in terms of the scope of contracts or entities that are covered by the requirements?

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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

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1. Definition of "derivative" (Article 2(5) of EMIR)

"Derivative" is defined as "a financial instrument as set out in points (4) to (10) of Section C of Annex I to MiFID as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006. However, the interpretation of "derivative" under MiFID in different EU jurisdictions is inconsistent and has resulted in the EMIR applying to "financial instruments" in some jurisdictions and not in others.

The AMG advocates the need for greater clarity on the definition of "derivative" and, in particular, if certain foreign exchange transactions (**FX Transactions**) are within the scope of "derivative". The AMG welcomes the consultation and discussions in respect of FX Transactions in the context of MiFID II. As EMIR is already in force and counterparties to "derivative" transactions must already comply with certain EMIR requirements (with clearing and collateral obligations coming into force in the near future), it is crucial that the uncertainty and inconsistency in application is resolved.

2. Definition of "OTC derivative" or "OTC derivative contract" (Article 2(7) of EMIR)

"OTC derivative" or "OTC derivative contract" is defined as "a derivative contract the execution of which does not take place on a regulated market within the meaning of Article 4(1)(14) of MiFID or on a third-country market considered as equivalent to a regulated market in accordance with Article 19(6) of MiFID".

This definition is problematic in the context of exchange traded derivatives which are traded on a third country exchange. Under MiFID, no third country exchanges have been recognised as "equivalent" regulated markets meaning that all exchange traded derivatives executed on third country exchanges will be considered as "OTC derivatives" for the purposes of EMIR.

This is particularly problematic for non-financial counterparties as the clearing threshold under Article 10 of EMIR is calculated by reference to the OTC derivative contracts entered into by that entity or other entities in its group (excluding contracts which are objectively measurable as reducing risks relating to the commercial activity or treasury financing activity of the non-financial counterparty or that group). Therefore, to the extent the non-financial counterparty (or another non-financial counterparty in its group) enters into exchange traded derivatives on a third country

exchange (and assuming such contracts do not constitute hedging), such transactions will be counted towards the clearing threshold.

The AMG supports the amendments to the definition of "OTC derivative" under Article 27(b)(1) of the Proposal for a Regulation of the European Parliament and of the Council on reporting and transparency of securities financing transactions and amending Regulation (EU) No 648/2012 (the Securities Financing Transactions Regulation or **SFTR**) dated 26 June 2015. Under the SFTR proposal, the reference to equivalence decisions in respect of third country regulated markets under Article 19(6) is deleted. Instead, the Commission is empowered under EMIR (as amended by the SFTR) to determine that a third country regulated market is "equivalent", provided it complies with the requirements applicable to EU regulated markets under MiFID and it is subject to effective supervision and enforcement in that third country on an on-going basis.

However, the AMG considers it crucial that the Commission assesses and grants equivalence decisions in respect of third country exchanges as soon as it is practically able to do so. Without the Commission taking such steps, the definition of "OTC derivative" will continue to encompass exchange traded derivatives executed on third country exchanges and result in non-financial counterparties which would otherwise fall below the clearing threshold, to exceed it. In particular, the AMG urges the Commission to complete its equivalence assessment of third country exchanges before the mandatory clearing obligation and mandatory margin requirements come into force. Otherwise it is likely that non-financial counterparties which pose little systemic risk (and which the clearing threshold was intended to keep outside of the scope of mandatory clearing and margining obligations) will need to comply with such requirements, at least until such equivalence decisions are made.

3. Definition of "group" (Article 2(16) of EMIR)

"Group" is defined under EMIR as "a group of undertakings consisting of a parent undertaking and its subsidiaries within the meaning of Articles 1 and 2 of Directive 83/349/EEC or the group of undertakings referred to in Article 3(1) and Article 80(7) and (8) of Directive 2006/48/EC".

The application of the definition of "group" is extremely difficult in practice. In particular, where the entity is a third country entity which is brought within scope of EMIR due to it trading with an EU counterparty, such entity must refer to additional EU legislation, with which it is not familiar, in order to consider its "group".

In the AMG's view, a definitive legal test for "group" should be set out in EMIR. This could constitute, for example, an appropriate ownership percentage such that the "group" will be comprised of entities which have a sufficiently close ownership structure.

Clarifying "group" in this manner would remove both the practical difficulties in ascertaining what is meant by "group" in the context of EMIR and the ambiguities in applying the definition.

Question 2.2: Clearing Obligations

Under EMIR, OTC derivatives transactions that have been declared subject to a clearing obligation must be cleared centrally through a CCP authorised or recognised in the Union. ESMA has proposed a first set of mandatory clearing obligations for interest rate swaps which are yet to come into force. Counterparties are therefore in the process of preparing to meet the clearing obligation, to the extent that their OTC derivatives contracts are in scope of the requirements.

(a) With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?

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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

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(b) Are there any other significant ongoing impediments or unintended consequences with respect to preparing to meet clearing obligations generally in accordance with Article 4 of EMIR?

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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

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1. Application of the Pension Scheme Exemption to third country pension schemes

The AMG considers that there is a discrepancy over the treatment of EU pension scheme arrangements and third country pension schemes as the latter do not qualify for the Pension Scheme Exemption to the clearing obligation under Article 89(1) of EMIR. The AMG has set out the issues in respect of the application of the Pension Scheme Exemption to third country pension schemes in its response to Question 2.6 (under the heading "Application of the pension scheme exemption to the clearing obligation to third country entities"). As discussed in its response to Question 2.6, the AMG strongly urges the EC to extend the Pension Scheme Exemption to third country pension funds.

2. Calculation of the clearing category for an umbrella fund with multiple sub-funds

The AMG welcomes the clarification in Recital (6) of the RTS on the clearing obligation (adopted by the EC on 6 August 2015) that investment funds should be treated as a special case, and should not be considered as part of the same "group" where the funds are distinct segregated and ring-fenced pool of assets and are not collateralised, guaranteed or supported by other investment funds or the investment advisor itself.

The AMG requests confirmation that Recital (6) can be applied to an umbrella fund with multiple sub-funds. In other words, each sub-fund that constitutes the umbrella fund should be treated as separate funds for the purpose of the clearing categorisation, provided the conditions set out in Recital (6) of the RTS on the clearing obligation are satisfied. This clarification is important on the basis the clearing categorisation of a fund will impact the start date for the clearing obligation and if frontloading applies.

The AMG urges the EC to provide this clarification as soon as practicable on the basis funds will need to begin gathering data for the purpose of determining their clearing classification upon the publication of the final RTS on the clearing obligation in the Official Journal.

3. Removal of the frontloading requirement in respect of future classes of OTC derivative contracts declared subject to the clearing obligation

While the AMG acknowledges that the RTS on the clearing obligation (adopted by the EC on 6 August 2015) includes a frontloading obligation in respect of certain interest rate OTC derivative contracts, the AMG believes that the frontloading obligation should be removed for all future classes of OTC derivative contracts declared subject to the clearing obligation. The AMG endorses the comments and arguments on this issue made by ISDA in its response to the consultation paper on the review of EMIR.

4. Transactions resulting from systemically risk reducing processes

The AMG supports the comments made by ISDA in its response to the consultation paper on the review of EMIR in relation to the need to exclude from the EMIR clearing and margin requirements trades that result from systemically risk-reducing processes (such as multilateral compression cycles). The AMG endorses the comments and arguments on this issue made by ISDA in its response to the consultation paper on the review of EMIR.

Question 2.3: trade reporting

Mandatory reporting of all derivative transactions to trade repositories came into effect in February 2014. The Commission services are interested in understanding the experiences of reporting counterparties and trade repositories, as well as national competent authorities, in implementing these requirements. As noted above, ESMA recently conducted its own consultation on amended versions of these standards. This consultation does therefore not seek any views with respect to the content of either Regulation No. 148/2013 and Regulation No. 1247/2012 nor the proposed amended versions.

(a) Are there any other significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations in accordance with Article 9 of EMIR?

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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

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1. Single sided reporting

The AMG strongly advocates that the obligation to report all derivative transactions to trade repositories (the **Reporting Obligation**) should be amended so that it can be satisfied by obtaining comprehensive trade reports from *one* of the counterparties to a transaction. This approach will still achieve the main objective of the Reporting Obligation, to "allow for a comprehensive overview of the derivative market and to enable the identification, monitoring and assessment of systemic risk"[2].

Who should report?

Rather than imposing the Reporting Obligation on *both* counterparties to a transaction, EMIR should prescribe that only *one counterparty* needs to report (the **Reporting Party**). To discern which counterparty should report, the EC could consider specifying a hierarchy which sets out who will be the Reporting Party. The AMG acknowledges ISDA's and The Investment Association's responses to the consultation paper on the review of EMIR in respect of this issue. Moreover, the AMG is supportive of a hierarchy which provides that, in respect of uncleared derivatives, the Reporting Party should be the more sophisticated and best resourced counterparty. In particular, the AMG supports the views and analysis of ISDA and The Investment Association in respect of a hierarchy which ensures that a buy-side market participant, when trading with an EU financial counterparty such as a credit institution, would no longer have any obligation to report. This approach would reduce the burden on end-users (including corporates, investment and pension funds, UCITs and AIFs) as the Reporting Party will, primarily, be the broker/dealer (if such entity is an EU entity).

Due to the complexities in agreeing an appropriate hierarchy and any requisite tie-breaker logic (which would need to apply where both counterparties are of the same hierarchy), the AMG advocates a formal consultation on the topic so feedback from market participants can be gathered and options fully assessed.

Content of the Reporting Party's report

The Reporting Party's report would contain all information in respect of the derivative transaction (i.e. the Common Data) as well as the data in respect of each of the counterparties (i.e. both sets of Counterparty Data). The Reporting Party would obtain any relevant information from its

[2] p.3, Letter from the European Commission to the European Securities and Markets Authority dated 07.11.2013.

counterparty at the outset of the trading relationship to allow it to report its counterparty data. As the Reporting Party's report identifies and includes data in respect of both it and its counterparty, ESMA and any relevant regulators would be able to monitor the positions and portfolios of all market participants without the need for both counterparties to submit their own trade reports. The regulators would, therefore, still be provided with a comprehensive overview of the market and allow them to identify any systemic risk.

Benefits of single sided reporting

- <u>Data Matching and Data Quality</u>

  Amending the Reporting Obligation so that it only applies to one party to the derivative transaction would eliminate the considerable problems counterparties have experienced in relation to data matching. As only one counterparty needs to report, there would no longer be discrepancies in counterparties' reports caused by the use of different taxonomies, unique trade identifiers, legal entity identifiers (for example, the reporting Counterparty ID and the Broker ID) and the reporting timestamp,.

  Moreover, it would help eliminate the difficulties in matching data fields between counterparties due to the differences in the way data fields are interpreted by market participants. For example, asset Manager A may trade with Counterparty B and each interpret the Common Data Fields in a way that matches; however, when Asset Manager A trades a similar transaction with Counterparty C, Counterparty C may interpret the field differently leading to an unmatched report. These matching discrepancies and difficulties make the reporting obligation very difficult for market participants – particularly if they have multiple counterparties – and does nothing to enhance the quality of data available to the regulators.

  Moving to a single sided reporting regime would, create a better overview of the market as regulators can be confident in the data quality of the single report rather than trying to ascertain whether there have been duplicative or unmatched reports.

  It is important to note here that the purpose of the Reporting Obligation is not to act as another means of reconciliation of trade terms between the parties. EMIR already provides for a number of reconciliation or dispute avoidance mechanics such as: the timely confirmation of terms of the relevant OTC derivative contract (Article 11(1)(a) of EMIR); portfolio reconciliations (Article 11(1)(b) of EMIR); dispute resolution procedures (Article 11(1)(b) of EMIR); and the daily valuation of outstanding derivative transactions (Article 11(2) of EMIR). The AMG believes that using dual side reporting as another means to encourage reconciliation is inappropriate and instead, it would be better to concentrate efforts on achieving better quality data.

  For the avoidance of doubt, to the extent the Reporting Obligation is amended so that only one party needs to report, there should be no need for the other party to take any steps to verify the data reported or otherwise confirm the report.

- <u>Removing burden on buy-side market participants</u>

  Due to the operational and cost implications of setting up reporting access to a trade repository, many buy-side market participants satisfy their Reporting Obligation by delegating the act of making the report to their dealer counterparty.

  However, this process of delegated reporting creates additional and unnecessary costs and operational burden on buy-side firms. First, the buy-side market participant will need to negotiate and enter into the relevant delegated reporting agreement with their counterparties. Secondly, the buy-side market participant has an on-going obligation to ensure the data being

submitted to the trade repository on its behalf is correct. In the AMG's view, requiring the buy-side market participant to take these steps does not enhance the quality of data (and may actually decrease data quality due to data matching issues, as discussed above) or provide the regulators with greater transparency over the levels of risk in a market.

In a delegated reporting scenario, the dealer is, effectively, reporting the same data twice (but with the data being switched depending on whether the report relates to it or its client). Moving to single sided reporting would not constitute a significant departure from this approach, except that the dealer would report both sets of data in the same trade report. Single sided reporting therefore more accurately represents market practice (where one party provides the reports to the trade repository) but without the issues in respect of data quality and matching and the increased operational and cost burden of submitting and matching two reports.

- Cost of the Reporting Obligation

  The AMG believes that there will be considerable cost savings in the long-run if a single sided reporting regime is adopted. While the AMG acknowledges that establishing the means to satisfy the Reporting Obligation (for example, by investing in technology or by entering into delegated reporting arrangements) has already been a considerable cost to the market (both dealer and buy-side), there are on-going costs which will continue to apply in a dual sided reporting context. For example, if a delegated reporting model has been used, the delegating party still needs to maintain delegated reporting arrangements with each relevant counterparty, and, in particular, will have to incur the costs and operational burden of checking the data that has been reported on their behalf and reconciling such data if an inconsistency is found. As indicated above, the AMG does not think this process enhances the quality of data and, moreover, it is not appropriate to use the Reporting Obligation as an additional means of reconciliation between the parties.

Single sided reporting consultation

To the extent the EC were to consider adopting a single sided reporting regime, and, as indicated above, the AMG considers that it would be necessary for there to be a formal consultation on the topic. This would allow market participants, trade repositories and national regulators to discuss the merits and issues of single sided reporting and develop a reporting regime that works for all interested parties.

2. Existing data fields

While the AMG's preferred approach to the Reporting Obligation is to move to a single sided reporting regime (as detailed above), if the EC is not minded to adopt single sided reporting, the AMG would support certain amendments and clarifications to the existing reporting regime.

In general, the AMG is supportive of those amendments set out in ESMA's Consultation Paper: Review of the technical standards on reporting under Article 9 of EMIR (10 November 2014) (the **November Reporting Consultation**). In particular, the AMG supports the clarifications set out in the November Reporting Consultation in respect of valuation, notional amounts and new action types to indicate the type of report being submitted. The AMG notes that there have been considerable difficulties in reporting the collateral value. In addition to the clarifications set out in the November Reporting Consultation, the AMG would welcome guidance from the EC which provides for specific examples on how the collateral value should be reported. Such guidance would help to ensure the calculation is carried out and reported correctly and consistently across market participants. The AMG does have reservations about certain of the proposals set out in the November Reporting Consultation and which are set out in more detail in the response sent by the AMG to ESMA on 13 February 2015 (and annexed at Annex 1 to this response).

In addition, to the extent any amendments or clarifications are made to the reporting fields, the AMG thinks it is crucial to ensure:

- that there is an appropriate phase-in to permit trade repositories and entities subject to the reporting obligation to make necessary technology and operational changes and, to the extent necessary, to acquire any additional data from their counterparty; and
- the new data fields will only apply to future derivative transactions and there is no requirements to update the data in respect of existing transactions (including where there is a modification or termination of such existing transaction).

3. Backloaded Transactions

Under Article 5(4) of Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, all transactions which were entered into on or before 16 August 2012 which were outstanding on 16 August 2012 but were not outstanding on the reporting start date (**Backloaded Transactions**) will need to be reported to a trade repository within three years of the reporting start date (the **Backloading Deadline**). The AMG requests that the EC amends the Reporting Obligation so that Backloaded Transactions do not need to be reported. First, it is unclear what benefit the regulators will obtain by the reporting of Backloaded Transactions as these positions are purely historic and do not correlate to existing market positions and potential systemic risk. This is exacerbated by the issues in data quality and data matching which is widely acknowledged as prevalent in existing data reports. The AMG therefore considers it overly burdensome (from an operations and cost perspective) for market participants to report Backloaded Transactions when the benefit to the regulators of doing so, in terms of data and transparency in the derivatives markets, is negligible.

The AMG urges the EC to concentrate on an improvement in data quality (rather than focusing on data quantity) either by a move to single sided reporting or by clarifying the data fields (as discussed above).

The EC should also consider the difficulties with the obligation to report Backloaded Transactions in the context of any amendments which are made to the Reporting Obligation prior to the Backloading Deadline. As an entity could report data at any time before the Backloading Deadline, it may report data based on the dual sided reporting regime and the existing data fields. However, if the EC either moves to a single sided reporting regime or amends the data fields, this will undermine the utility of the initial report. For example, if single sided reporting is introduced, the fields will need to be amended to reflect the fact that only one report is submitted which contains all the data; the existing report would, therefore only contain half the data and would need to be re-reported under the new single sided reporting regime. Similarly, if dual sided reporting remains but the data fields are updated, if one counterparty to a transaction reports under the existing regime and the other counterparty reports using the new data fields it will not be possible for the reports to be matched, again, undermining the utility of the reports. Therefore, as stated above, the AMG would strongly encourage the EC to remove the requirement on counterparties to report Backloaded Transactions and instead ensure attention is focused on data quality going forwards.

Question 2.4: Risk Mitigation Techniques

Risk mitigation techniques are provided for under Articles 11(1) and 11(2) of EMIR and further defined in Commission Delegated Regulation (EU) No 149/2013. Risk mitigation techniques began entering into force in March 2013 and apply to OTC derivative transactions that are not centrally cleared. They include obligations with respect to transaction confirmation, transaction valuation, portfolio reconciliation, portfolio compression and dispute resolution.

(a) Are there any significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations in accordance with Articles 11(1) and (2) of EMIR?

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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

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Portfolio compression

Article 14 of Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivative contracts not cleared by a CCP requires counterparties with 500 or more uncleared OTC derivative contracts outstanding with a counterparty to have in place procedures to regularly, and at least twice a year, analyse the possibility of conducting a portfolio compression exercise. In the context of the asset management industry, there are difficulties with this obligation. It is common for an asset manager to manage only a portion of its client's portfolio. It is highly unlikely that the asset manager will have any knowledge of the uncleared OTC derivative transactions entered into by other asset managers in respect of the remainder of the client's portfolio. As a result, it is very difficult – if not impossible – (a) to ascertain whether the client has 500 or more uncleared OTC derivative transactions with any counterparty; and (b) to undertake a portfolio compression in respect of all of the client's uncleared OTC derivative transactions. The AMG requests that the EC amends the obligation so that the threshold test and the obligation to compress portfolios is undertaken in respect of only those uncleared OTC derivative contracts managed by that asset manager.

Question 2.5: Exchange of Collateral

Article 11(3) of EMIR mandates the bilateral exchange of collateral for OTC derivative contracts that are not centrally cleared. Article 11(15) mandates the ESAs to further define this requirement, including the levels and type of collateral and segregation arrangements required. The ESAs consulted publically on their draft proposals in the summer of 2014.

The ESA are now in the process of finalising these draft Regulatory Technical Standards. It is therefore recognised that the final requirements are not fully certain at this stage. The Commission services are not seeking comment on the content on the proposed rules published by the ESAs. Nonetheless the Commission services welcome any views from stakeholders on implementation issues experienced to date.

(a) Are there any significant ongoing impediments or unintended consequences anticipated with respect to meeting obligations to exchange collateral in accordance with Article 11(3) under EMIR?

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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

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For the reasons detailed below, the AMG believes:

(1) equivalence decisions need to be made in good time prior to the implementation of the risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of EMIR as proposed in the draft regulatory technical standards (the **Draft RTS**) set out in the Consultation Paper[3] (the **Margin Requirements**) so as to avoid the dual application of the Margin Requirements and the potentially conflicting rules of another jurisdiction and to achieve legal certainty for the market;

(2) in respect of clients managed by multiple asset managers, the initial margin (**IM**) threshold should be calculated in respect of those uncleared derivative transactions managed by each asset manager without aggregation, rather than on a legal entity (or legal entity group) basis;

(3) the EC and European Supervisory Authorities (**ESAs**) should provide clarification that third-party custody arrangements in respect of cash posted as IM are acceptable by removing the requirement to protect against third-party custodian risk; and

(4) the exemption under Article 5 GEN of the Draft RTS in respect of FX Transactions (as defined below) from the IM requirement should be extended: (i) to exclude FX Transactions from the calculation of the IM threshold; and (ii) to exempt FX Transactions from the variation margin (**VM**) requirement.

1. Dual application of Margin Requirements

There are circumstances where a counterparty pair[4] may be subject to the Margin Requirements and the margin rules of a non-EU jurisdiction.[5] For example, where an uncleared OTC derivative contract is entered into between:

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[3] Second Consultation Paper: Draft Regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012 (the **Consultation Paper**).

[4] For the purpose of this paragraph 1, we have assumed that each counterparty has exceeded the relevant thresholds for the IM and VM requirements to apply under the Margin Requirements and the rules of the relevant non-EU jurisdiction.

[5] For the purposes of this response we have considered certain aspects of the PR Rules (as defined below) and CFTC Rules (as defined below) but there will be other jurisdictions where similar conflicts apply.

(a) *an EU FC which is also a Covered Swap Entity*[6] *under the PR Rules*[7] *and any other entity (which is an EU financial counterparty (**FC**), a non-financial counterparty which has exceeded the clearing threshold (**NFC+**) or a non-EU entity which would be a FC or NFC+ if it were established in the EU (a **TCE FC** or **TCE NFC+**, respectively)*: the Margin Requirements would apply (either under Article 1(3) GEN of the Draft RTS, where both counterparties are EU entities or Article 3 GEN of the Draft RTS where the other counterparty is a non-EU entity) and the Covered Swap Entity may[8] also be subject to margin requirements under the PR Rules;

(b) *an EU entity which is an FC or an NFC+ and a TCE FC or TCE NFC+*: the Margin Requirements would apply such that the counterparties must exchange IM and VM (see Article 3 GEN of the Draft RTS) and, to the extent the TCE FC or TCE NFC+ is subject to any margin rules under its jurisdiction, these rules would also apply; and

(c) *(i) two TCE FCs through their EU branches or (ii) two third country entities where one entity has a guarantee which meets the requirements of Article 2 of the DSFE RTS*[9] *from an EU FC*: the Margin Requirements would apply due to the application of the DSFE RTS and, to the extent one or both of the counterparties are subject to the rules of their jurisdiction, these rules would also apply.

If the CFTC Rules[10] are applicable, the definition of U.S. person is broad enough to capture certain entities subject to the Margin Requirements: for example, a fund may be domiciled within the EU but be deemed to have its principal place of business in the United States under the CFTC rules. Such fund might therefore constitute an FC or an NFC+, while its principal place of business determination would simultaneously establish it as a U.S. person. It could therefore be equally subject to the mandatory margin requirements under both the CFTC Rules and EMIR.

Moreover, to the extent the CFTC Rules apply and the transaction is conducted on a cross border basis, the problems highlighted above will be exacerbated. Indeed, the CFTC Rules' recently proposed cross border standards limit substituted compliance and contemplate having multiple jurisdictions' margin requirements apply to the same transaction.[11]

Based on the above examples, it is clear that a variety of entities could be subject to the Margin Requirements and the margin rules of another jurisdiction. In the absence of an equivalence decision under Article 13(2) of EMIR (or such similar decision under the rules of the other jurisdiction), it is not clear how the counterparty pair should comply with these parallel and potentially conflicting obligations. Overlapping or conflicting requirements may lead to significant regulatory uncertainty

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6 **Covered Swap Entity** means a Swap Entity that is prudentially regulated by one of the Prudential Regulators.
Prudential Regulators means the Department of the Treasury, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration or the Federal Housing Finance Agency.
Swap Entity means a security-based swap dealer (as defined in the Securities Exchange Act of 1934 (the **Exchange Act**)), a major security based swap participant (as defined in the Exchange Act), a swap dealer (as defined in the Commodity Exchange Act of 1934 (the **CEA**)) or a major swap participant (as defined in the CEA).

7 The Prudential Regulators' Proposed Margin and Capital Requirements for Covered Swap Entities, 79 Fed. Reg. 57348 (Sept. 24, 2014) (the **PR Rules**).

8 Whether the Covered Swap Entity will ultimately have to comply with the PR Rules will depend on its classification and the classification of its counterparty under the PR Rules (which may cause it to benefit from a total exclusion when trading with that counterparty) or, to the extent substituted compliance is available to the counterparty pair, if a substituted compliance determination has been made by the Prudential Regulators in respect of the Margin Requirements.

9 Commission Delegated Regulation (EU) No 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations (the **DSFE RTS**).

10 The Commodity Futures Trading Commission's (**CFTC**) proposed rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (79 Fed. Reg. 59898 (Oct. 3, 2014), available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2014-22962a.pdf, and the CFTC's proposed rule on Cross-Border Application of the Margin Requirements, to be published, available at http://www.cftc.gov/PressRoom/PressReleases/pr7192-15 (the **CFTC Rules**).

11 CFTC's proposed rule on Cross-Border Application of the Margin Requirements, to be published, available at http://www.cftc.gov/PressRoom/PressReleases/pr7192-15.

as market participants will be required to assess how to comply with duplicative and/or inconsistent provisions in a manner that avoids confusion and mitigates economic impact.

1.2 Impossibility / impracticality of dual compliance

Although the Margin Requirements and the margin rules of other non-EU jurisdictions have been largely based on international standards[12], there are variances in the detail between rules of different jurisdictions. This will make compliance with the rules of both jurisdictions impracticable, if not impossible. For example:

- ***IM thresholds***: under the Margin Requirements the threshold for the collection of IM is an aggregate month-end average notional amount of non-centrally cleared derivatives for the months June, July and August of the relevant year of EUR 8 billion.[13] In contrast, both the CFTC and the Prudential Regulators have proposed a USD 3 billion IM threshold. By way of example on how this is problematic:
  - *EU FC which is also a Covered Swap Entity under the PR Rules*: in these circumstances *both* the Margin Requirements and the PR Rules will apply to the EU FC / Covered Swap Entity. This leaves the EU FC / Covered Swap Entity in the conflicted position where it is subject to both the EUR 8 billion IM threshold (under the Margin Requirements) and the USD 3 billion IM threshold (under the PR Rules).
  - *EU counterparty (which is subject to the Margin Requirements) trades with US counterparty (which is subject to the PR Rules)*: the counterparty pair will have to satisfy *both* the Margin Requirements and the requirements of the PR Rules as otherwise one entity will be non-compliant with its applicable rules. It is unclear how the IM threshold could be applied in these circumstances as each counterparty is required to exchange IM based on a different threshold amount.
- ***Eligible collateral for VM***: under the Margin Requirements eligible collateral is cash in any currency and any of the assets listed in Article 1 LEC of the Draft RTS. In contrast, the PR Rules are much narrower, only permitting USD cash or cash in the currency in which payment obligations under the swap are required to be settled as eligible collateral for VM. Similar to the examples in respect of the IM thresholds above, this is problematic both for any entity which is subject to *both* the Margin Requirements and the PR Rules and any counterparty pair which is subject to *both* the Margin Requirements and the PR Rules.
- ***Application of margin requirements to FX Transactions***: as discussed in more detail in paragraph 4 below, under the Margin Requirements, FX Transactions are only exempted from the IM requirement. In contrast, the PR Rules and CFTC Rules exempt physically settled foreign exchange forwards and foreign exchange swaps from both the VM and IM requirements. Where transactions are subject to the Margin Requirements and the PR Rules or CFTC Rules, there is a conflict between the exemption from the VM requirement under the PR Rules or CFTC Rules and the requirement to exchange VM under the Margin Requirements.

In any of the above examples, the relevant entity or counterparty pair (as applicable) is left in the impossible position where it is subject to conflicting obligations under the Margin Requirements and the PR Rules or CFTC Rules (as applicable). It is highly likely that this type of conflict will also arise in relation to the margin rules of other jurisdictions.

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[12] Basel Committee on Banking Supervision and Board of International Organization of Securities Commissions's (**BCBS-IOSCO**) report "Margin requirements for non-centrally cleared derivatives" dated September 2013 (http://www.bis.org/publ/bcbs261.pdf) and March 2015 (http://www.bis.org/bcbs/publ/d317.pdf).

[13] Article 7(1) GEN of the Draft RTS.

Given the irreconcilable nature of these conflicting requirements, the only feasible solution is for the parties to revert to the "lowest common denominator"; in other words, the strictest rules will need to be applied (causing over-compliance with the rules of the other jurisdiction). In the examples above, this will mean that: the USD 3 billion IM threshold will be used (i.e. the PR Rules apply); cash will be the only eligible asset exchanged as VM (i.e. the PR Rules apply); and the counterparties will need to exchange VM in relation to their FX Transactions (i.e. the Margin Requirements apply). This will cause an un-level playing field and create regulatory arbitrage. Entities may cease trading with counterparties in "problematic" jurisdictions causing sections of the global market to be cut off, decreasing competition, increasing risk of concentration, unattractive pricing/additional expense and enhancing the risk of leaving exposures unhedged. At a market level, the consequences could include market fragmentation and loss of liquidity.

1.3 Legal certainty

The AMG believes that it is critical that market participants have complete legal certainty as to which margin regime they will face in a particular transaction with a particular counterparty. While one of the goals of the Margin Requirements is to reduce systemic risk, we note that legal uncertainty itself can give rise to an increase in systemic risk. As discussed in paragraphs 1.1 and 1.2 above, the dual application of different margin regimes may create serious problems for counterparties. The AMG believes that the best way to achieve legal certainty and eliminate these risks is to ensure that both counterparties are subject to the same margin requirements.

1.4 Equivalence

In the AMG's view, as long as both counterparties' jurisdictions' margin requirements are consistent with international standards and each recognizes the other as sufficiently equivalent, the two counterparties should be able jointly to choose at the outset of the transaction which of their jurisdictions' law applies for margin purposes.

For this reason, it is crucial that equivalence decisions under Article 13(2) of EMIR in respect of the mandatory exchange of margin for uncleared derivatives of third countries are made in good time before the application of the Margin Requirements to any counterparty pair. This will give entities certainty as to what margin requirements and which regimes will apply (essential for all entities but particularly so for entities such as certain asset managers which need to determine the scope of impacted clients, client documentation and process changes and any related client outreach) and should help prevent certain entities becoming subject to potentially conflicting margin requirements in multiple jurisdictions.

The AMG notes that the phase-in for the implementation of the Margin Requirements[14] is set to correspond with the recommendations of BCBS-IOSCO in the March 2015 report. Other jurisdictions have also adopted the same schedule to implementation. However, as highlighted above, the considerable difficulties in complying with margin requirements under multiple jurisdictions and the legal uncertainty that would ensue means equivalence should be established in good time prior to implementation.

To the extent it will not be possible to make such equivalence decisions in good time prior to implementation of the Margin Requirements, the AMG encourages international regulators to keep in mind practical considerations, as well as principles of comity.

[14] See Article 1(3) FP of the Draft RTS in respect of IM and Article 1(6) FP of the Draft RTS in respect of VM.

1.5 Further considerations in respect of equivalence

As discussed in paragraph 1.2 above, there are divergences between the margin requirements under different jurisdictions. The AMG is concerned that there is a real risk that equivalence decisions in respect of certain jurisdictions will inadvertently lead to the application of a stricter regime than that proposed under EMIR. Article 13(3) of EMIR implies that where a counterparty pair can rely on an equivalence decision, that counterparty pair will be deemed to have satisfied their EMIR obligations through their compliance with the rules of that third country jurisdiction. For example, if a positive equivalence decision was made in respect of the PR Rules (provided one of the counterparties is established in the US), a counterparty pair subject to both the Margin Requirements and PR Rules would need to comply with the PR Rules in order to satisfy its obligations under the Margin Requirements.[15]

Considering certain examples discussed at paragraph 1.2 above, this would mean:

- *in respect of the IM threshold*: the threshold of USD 3 billion would apply; and
- *in respect of VM eligible collateral*: only USD cash or cash in the currency in which payment obligations under the swap are required to be settled would constitute VM eligible collateral. This is of particular concern for the AMG as it is likely that clients will want to be able to post securities (and other assets) rather than cash as VM as these are the assets they already own.

The AMG therefore strongly encourages the EC and ESAs to continue dialogue with the Prudential Regulators and regulators of other jurisdictions implementing margin rules to ensure global harmony and consistency in approach with the BCBS-IOSCO framework. In relation to the IM threshold and VM eligible collateral, in particular, the AMG's view is that the EU approach is the correct approach and counterparties should not be forced to comply with more onerous requirements of other jurisdictions as a result of equivalence decisions.

In addition, the AMG wishes to highlight that equivalence decisions may not provide a full solution to the problem of duplicative and conflicting obligations under the Margin Requirements and the rules of another jurisdiction. For example, as discussed, where an EU FC which is also a Covered Swap Entity transacts with a third country entity not established in the US, the Margin Requirements and the PR Rules will apply. However, a positive equivalence decision will not help in these circumstances as neither counterparty is *established in that third country* (i.e. the US). While we assume that a substituted compliance determination (or similar "equivalence" decision) by the Prudential Regulators would permit the Margin Requirements to apply in these circumstances, the AMG encourages the EC and ESAs to continue dialogue with the Prudential Regulators and other regulators to ensure these issues are overcome.

2. Calculating the IM threshold in the context of the asset management industry

2.1 IM threshold

Article 1(3) FP provides for a phased implementation of the IM requirement. If and when counterparties become subject to the IM requirements depends on whether both counterparties have or belong to groups, each of which has, an aggregate average notional amount of non-centrally cleared derivatives which exceeds a certain IM threshold.

The "aggregate average notional amount" shall be calculated as the average of the total gross notional amount: (a) recorded in the last business day of the relevant months; (b) including all

[15] We assume that there is no substituted compliance (or other similar "equivalence" decision) in respect of the Margin Requirements by the third country jurisdiction.

entities of the group; and (c) including all the non-centrally cleared OTC derivative contracts of the group.

There is a discrepancy between the months listed for the purpose of determining the IM threshold in Article 7 GEN of the Draft RTS (June, July and August) and Article 1(3) FP of the Draft RTS (March, April and May). To avoid: (i) the inconsistent application of the IM threshold in the year where the provisions of Article 1(3) FP of the Draft RTS are overtaken by Article 7 GEN of the Draft RTS; and (ii) the need to conduct two assessments in one year, the AMG believes the months should be aligned so that Article 7 GEN of the Draft RTS refers to "March, April and May".

2.2 Application of IM threshold to clients[16] under management

The AMG welcomes the clarification in Recital (13) of the Draft RTS that investment funds should be treated as a special case, and should not be considered as part of the same "group" where the funds are distinct segregated pool of assets and are not collateralised, guaranteed or supported by other investment funds or the investment advisor itself.

However, there will still be considerable difficulties in determining the classification of funds for the purpose of determining the relevant IM phase-in date where the fund has multiple asset managers. More widely, the difficulties regarding classification of funds will apply across the majority of clients under management.

First, it can be problematic for clients to ascertain the parameters of the IM threshold calculation. There are still difficulties in applying the "group" definition and an entity in a "group" may not have access to the relevant data of other "group" members to feed in to its IM threshold calculation.

Secondly, as the calculation of the IM threshold is carried out at an entity and entity-group level, asset managers will need to rely on their clients to confirm whether or not the relevant IM threshold has been exceeded. From a practical perspective, where a single client has a number of separate accounts with different asset managers, the multiple asset managers may not know of each other's existence and would not have the ability to act in concert or manage the derivatives positions of the client on a group basis. Any concerted effort or shared communications would likely violate the managers' contractual or fiduciary obligations. Therefore, in order to carry out the IM threshold calculation, clients will need to collect data, taking into account their positions relating to each asset manager, and consider their position on a group basis (although see above for the difficulties regarding "group"). In addition, each asset manager will need to undertake a client outreach (of an asset manager's own clients) to obtain the relevant data. The difficulty of this process will be exacerbated where the clients are non-EU entities and are not themselves directly subject to EMIR or the Margin Requirements.

The AMG believes that the issues highlighted above could be easily addressed by amending the calculation of the IM threshold in respect of clients under management. Rather than looking to the client on an entity (or entity-group basis), the test should be applied to a client based on the aggregate average notional amount of non-centrally cleared derivatives for the relevant months entered into and managed by each asset manager.

By way of context, the use of separate asset managers and the separation of portfolios are part of long-standing business practices in the asset management industry. These long-standing business practices are often memorialized in client and trading documentation. The client and an asset manager enter into an investment management agreement (**IMA**) under which the asset manager is given sole responsibility and authority for the management of the specified portfolio, including

[16] Note that clients may include a diverse range of entities, including: registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds

investments in uncleared swaps. Such IMAs often contain limited recourse provisions, which provide that the asset manager will limit any liability arising from its investments to the assets in that portfolio. The purpose of such provisions is to protect the beneficial owners and, ultimately, the investors as applicable (e.g., investors in a fund or beneficiaries in a pension plan), by allowing the asset manager to manage risk exposure through use of separate pools of assets for different strategies.

While those portfolios relate to the same "beneficial owner," which is the fund or pension fund itself, the portfolios are separate and distinct pools of assets with limited liability in these cases. As the assets and liabilities of these portfolios are contractually and legally separate, the portfolios are also separately margined without netting across portfolios. Such contractual agreements should be recognized and respected in the calculation of the IM threshold for particular investments managed by asset managers where there is separate recourse. For example, where positions in different portfolios within the same series trust are subject to limited recourse and are managed separately, in accordance with well-established market practice, there is generally no risk of evasion of margin requirements. As a result, the AMG believes that the limited recourse provisions which have been negotiated with counterparties should be respected and therefore the positions in these separate portfolios should not be aggregated together in determining whether the IM threshold has been exceeded.

For example, to the extent client X has three investment managers with the following aggregate average notional amount of non-centrally cleared derivatives for the relevant months:

- Asset manager 1: EUR 1 billion;
- Asset manager 2: EUR 9 billion; and
- Asset manager 3: EUR 3 billion,

so long as there is adequate separation and limited recourse in respect of the assets managed by each asset manager (as described above), the amounts should not be aggregated across asset managers. Instead, the uncleared OTC derivative contracts entered into by asset managers 1 and 3 would not be subject to the IM requirements as the value of the uncleared derivatives they have entered into in respect of client X have not exceeded the IM threshold. Conversely, as the value of uncleared derivatives entered into by asset manager 2 in respect of client X have exceeded the IM threshold, IM would need to be posted from 1 September 2020.

The calculation of the VM threshold under Article 1(6) FP of the Draft RTS should also be carried out by reference to value of a client's assets under management in accordance with the considerations set out regarding the IM threshold above.

The AMG would also welcome the assessment of the clearing categories for the purposes of the clearing obligation under Article 4 of EMIR to be done by reference to a client's assets under management in accordance with the considerations set out regarding the IM threshold above. However, the AMG considers the consequences of applying this calculation method for clients under management in the context of the Margin Requirements to be much greater. Under the Clearing Proposal[17], the calculation in respect of each client only needs to occur if the entity is either classified as an FC or alternative investment fund (as defined in Article 4(1)(a) of Directive 2011/61/EU) that is an NFC and must only be assessed once (to determine if the entity is a Category 2 or Category 3 entity).[18] In contrast, under the Margin Requirements, the calculation would need to

[17] Draft clearing obligation regulatory technical standards set out in ESMA's Consultation Paper: Clearing Obligation under EMIR (no. 4) (11 May 2015) (the **Clearing Proposal**).

[18] Article 2 of the Clearing Proposal.

occur each year. This would amount to a considerable compliance burden both for the clients and their asset managers.

3. Treatment of cash

The AMG has concerns that the treatment of cash accounts under the Draft RTS may inadvertently prohibit counterparties from availing themselves of the protections offered by third-party custody arrangements. The combined effect of the proposed segregation and reuse provision[19] appears to essentially prohibit placing cash on deposit with the custody bank, which is the standard practice for all custody arrangements, both for cash collateral posted and for any cash flows related to the holding of securities (such as dividends, distributions, redemption/maturity proceeds, cash generated from reinvestment, etc.). Without the ability to place such cash on deposit with the custodian, the use of third-party custody arrangements will be impossible under the Margin Requirements.

Cash on deposit with a custodian (or any bank) necessarily creates credit risk to the custodian, which should, of course, be monitored and managed. Bank custodians are, of course, subject to a wide range of prudential standards, including leverage and risk based capital, liquidity, resolution planning, stress testing, and large exposures/credit concentration requirements which are specifically designed to protect the solvency of the bank and protect depositors. In addition, the cash reinvestment provision added in the draft RTS under Article 1(2) REU will provide an effective tool for counterparties to manage such credit exposure.

The ability to place cash on deposit with the custodian is an essential element of a third-party custody arrangement, and will only be feasible under the Margin Requirements if the EC and ESAs provide additional clarification that such deposits arrangements are permissible.

4. Exemption for FX contracts

The AMG welcomes the provisions of Article 5 GEN of the Draft RTS in relation to the exemption of physically settled foreign exchange forwards, foreign exchange swaps and currency swaps (together, **FX Transactions**) from the IM requirements under the Margin Requirements. However, the AMG's view is that this exemption does not go far enough, and, as a result, could lead to regulatory arbitrage.

First, FX Transactions should be excluded from the calculation of the IM threshold (under Article 7 GEN of the Draft RTS and Article 1(3) FP of the Draft RTS). The AMG believes that there is no benefit to including FX Transactions in the calculation of IM threshold as their inclusion would have adverse consequences to certain market participants. For example, funds and other end users that are heavy users of such products but otherwise use few derivatives would face increased IM obligations for transactions other than FX Transactions. As a result, such funds would incur additional costs with respect to their limited swaps activities with no corollary benefit in terms of reduction of systemic risk.

Secondly, the AMG advocates that FX Transactions should also be excluded from the VM requirements. This is consistent with the PR Rules and CFTC Rules which exempt physically settled foreign exchange forwards and foreign exchange swaps from both the IM and VM requirements. Therefore, in order to achieve a level playing field across jurisdictions, both to maintain the competitiveness of entities subject to the Margin Requirements and to avoid the jurisdictional conflicts highlighted in paragraph 1 above, the AMG proposes that FX Transactions should be exempt from both IM and VM requirements under the Margin Requirements.

5. Non-Netting Jurisdictions

[19] Article 1 SEG and Article 1 REU of the Draft RTS.

In addition to the points discussed above in relation to the application of margin rules in a global context, the AMG is concerned about the application of the Margin Requirements where at least one of the counterparties to a transaction is located in a jurisdiction which does not recognise the enforceability of contractual netting (**Non-Netting Jurisdictions**). Article 3 GEN of the Draft RTS confirms that collateral with third country jurisdictions must be "exchanged" by the counterparties. This means that where an EU entity trades with a counterparty in a Non-Netting Jurisdiction, it will have to post IM and VM to that counterparty (assuming the relevant thresholds have been exceeded).

Where a counterparty transacts with an entity in a Non-Netting Jurisdiction, the legal risk of the transaction is greatly increased. This could have considerable negative consequences including a decline of trade with entities in Non-Netting Jurisdictions and enhancing the risk of unhedged exposures and a loss of liquidity.

The AMG strongly urges the EC and the ESAs to exclude transactions involving a counterparty from a Non-Netting Jurisdiction from the EMIR margin requirements. The AMG considers that this approach is compatible with the level 1 requirements under EMIR that financial counterparties should have procedures in place to facilitate the timely, accurate and appropriately segregated exchange of collateral and, where such collateral is not exchanged, hold "appropriate and proportionate" capital (see Articles 11(3) and 11(4) of EMIR). Moreover, as "appropriate and proportionate capital" must be held in respect of exposures with entities in Non-Netting Jurisdictions, systemic risk would be managed while avoiding the legal risk involved in posting collateral to the entity in the Non-Netting Jurisdiction. To the extent the EC and ESAs disagree with the AMG's interpretation of Articles 11(3) and 11(4) of EMIR, the level 1 text should be amended to confirm that if exposures are not covered by collateral (for example, because the counterparty is located in a Non-Netting Jurisdiction) then it is sufficient to hold appropriate levels of capital in respect of such exposures.

The suggestion to permit counterparties to hold capital in respect of exposures of counterparties located in Non-Netting Jurisdictions (rather than requiring such counterparties to exchange collateral) also reflects current market practice. This approach would, therefore, minimise the risk of any market disruption or decline in trade with entities in Non-Netting Jurisdictions.

To the extent the EC and ESAs are not minded to clarify the application of Articles 11(3) and 11(4) of EMIR so as to exclude transactions involving an entity from a Non-Netting Jurisdiction from the Margin Requirements, the EC and ESAs could consider applying the exclusion for a transitional period only. For example, the exclusion could apply for up to five years following the implementation of the Margin Requirements. This would: (i) give Non-Netting Jurisdictions time to implement netting legislation; and (ii) provide counterparties trading with entities in Non-Netting Jurisdictions opportunity to put in place structures to appropriately manage their legal risk (assuming the jurisdiction remains a Non-Netting Jurisdiction).

Alternatively, the EC and ESAs could consider: (i) excluding the obligation to *post* margin to the counterparty in the Non-Netting Jurisdiction; and/or (ii) introducing an "exclusion threshold" test.

In respect of (i), the party other than the party located in the Non-Netting Jurisdiction would still have an obligation to *collect* collateral from the party in the Non-Netting Jurisdiction but would no longer be subject to the legal risks of *posting* collateral to a party in a Non-Netting Jurisdiction. This would facilitate partial compliance with the Margin Requirements but without introducing the unintended legal risks and negative consequences of requiring collateral to be posted to a party in a Non-Netting Jurisdiction. This approach is not, however, without some limitations: it is likely that the counterparty in the Non-Netting Jurisdiction would need to post margin on a gross basis (as netting cannot be applied). This will make it more expensive for entities in Non-Netting

Jurisdictions to trade with counterparties subject to the Margin Requirements and would create an un-level playing field for EU entities.

In respect of (ii), this would permit counterparties subject to the Margin Requirements to exclude up to a certain percentage of transactions (for example, 5%) from the Margin Requirements. The "exclusion threshold" test would mean that an entity would exchange margin in accordance with the Margin Requirements for 95% of its transactions (that are subject to the Margin Requirements). However, it would also have the scope to choose not to apply the Margin Requirements with a small number of counterparties – for example, those in Non-Netting Jurisdictions. The "exclusion threshold" test would not undermine the intention of the Margin Requirements to reduce systemic risk as the exclusion would only apply to a very small proportion of transactions and capital would need to be held against any uncollateralised exposures.

Question 2.6: Cross-Border Activity in the OTC derivatives markets

OTC derivatives markets are global in nature, with many transactions involving Union counterparties undertaken on a cross-border basis or using third country infrastructures. EMIR provides a framework to enable cross-border activity to continue whilst ensuring, on the one hand, that the objectives of EMIR are safeguarded and on the other hand that duplicative and conflicting requirements are minimised.

(a) With respect to activities involving counterparties established in third country jurisdictions; are there any provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis?

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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

5000 character(s) maximum (5000 characters left)

(b) Are there any provisions within EMIR that create a disadvantage for EU counterparties over non-EU entities?

5000 character(s) maximum (5000 characters left)

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

5000 character(s) maximum (5000 characters left)

1. Conflicting or duplicative application of EMIR and the rules of another jurisdiction

As described in our response to Question 2.5 (*Exchange of Collateral*) under the title "Dual application of Margin Requirements", the AMG considers that there is a real risk that counterparties may be subject to two separate legal regimes in respect of their derivatives transactions which may conflict or be duplicative in nature. We have set out in some detail how we think the dual application of margin rules will create considerable difficulties in the market, jeopardise market access for certain counterparties and increase systemic risk. This is not only true for the margin rules, but also applies to the other obligations under EMIR.

In particular, the AMG believes that the application of dual clearing obligations (under EMIR and another third country jurisdiction) could lead to a scenario where the counterparty pair is required to clear a trade through different central counterparties (for example, because the counterparty subject to EMIR must clear through an authorised or recognised central counterparty and the other counterparty is required to clear through a counterparty authorised in its jurisdiction which is not also a recognised central counterparty for the purposes of EMIR). If such circumstances exist, cross-border transactions between these entities would be impossible to perform (or one of the counterparties would have to accept that it will not be compliant with its regulatory obligations). This would cause trading to cease, decrease competition (and thereby lead to worse pricing) and enhance the risk that exposures would be left unhedged.

Therefore, as indicated in respect of our response to Question 2.5 (*Exchange of Collateral*) under the title "Dual application of Margin Requirements", the AMG thinks it is of fundamental importance that the Commission makes equivalence decisions in respect of third country jurisdictions as soon as practicable. In particular, the Commission should prioritise equivalence decisions in respect of those obligations (such as the Margin Requirements or the mandatory clearing obligation) where it may be impossible for a counterparty pair to comply with *both* applicable regimes. Once these equivalence

decisions have been made, the Commission should then concentrate on the other EMIR obligations (for example, the reporting obligation and the risk mitigation techniques other than the Margin Requirements) to reduce the regulatory burden placed on counterparties and the connected operational and cost implications associated with complying with multiple regimes.

2. Equivalence

As indicated above, the AMG considers equivalence decisions in respect of third country jurisdictions to be of fundamental importance. However, the AMG requests further clarification from the EC on which rules will apply following an "equivalence" determination. To the extent a transaction is subject to EMIR and the rules of an "equivalent" jurisdiction (and assuming the "equivalent" jurisdiction considers EMIR to be "equivalent"), the AMG believes that the counterparties should be permitted to choose which regime to apply. There is uncertainty over the interpretation of Article 13(3) of EMIR and whether it could cause the parties to be subject to the rules of the "equivalent" third country jurisdiction. However, if this approach were adopted, it would deprive counterparties of their choice regarding the management of regulatory affairs. For example, the majority of an entity's transactions may be subject to EMIR with only a small number of transactions also subject to an "equivalent" jurisdiction. That entity may, therefore, want those transactions to be subject to EMIR (rather than the third country "equivalent" jurisdiction) so that its transactions are all subject to the same regime and its operational and legal compliance efforts only need to reflect EMIR. The AMG does not think there is good reason to require counterparties to comply with the third country "equivalent" jurisdiction rather than EMIR and therefore this should be clarified.

3. Application of the pension scheme exemption to the clearing obligation to third country entities

Under Article 89(1) of EMIR, pension scheme arrangements (or entities that are established for the purpose of providing compensation to members of pensions scheme arrangements in the case of default) are exempt from the mandatory clearing obligation in respect of OTC derivative contracts that are objectively measureable as reducing investment risks directly relating to the financial solvency of the pension scheme arrangement (the **Pension Scheme Exemption**). The Pension Scheme Exemption is being extended to apply until 16 August 2017 and the Commission has the power under Article 85(2) of EMIR to extend the exemption for a further period of one year.

Scope of Pension Scheme Exemption

The Pension Scheme Exemption applies to "pension scheme arrangements" and entities that are established for the purpose of providing compensation to members of pension scheme arrangements in the case of default. "Pension scheme arrangement" is defined in Article 2(10) of EMIR as:

(a) institutions for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC, including any authorised entity responsible for managing such an institution and acting on its behalf as referred to in Article 2(1) of that Directive as well as any legal entity set up for the purpose of investment of such institutions, acting solely and exclusively in their interest;

(b) occupational retirement provision businesses of institutions referred to in Article 3 of Directive 2003/41/EC;

(c) occupational retirement provision businesses of life insurance undertakings covered by Directive 2002/83/EC, provided that all assets and liabilities corresponding to the business are ring-fenced, managed and organised separately from the other activities of the insurance undertaking, without any possibility of transfer;

(d) any other authorised and supervised entities, or arrangements, operating on a national basis, provided that:

  (i) they are recognised under national law; and

  (ii) their primary purpose is to provide retirement benefits.

The definition of pension scheme arrangement, therefore, relies on other EU legislation aimed at the regulation of such arrangements within the EU. Therefore, while not express from the definition, it is unlikely that the definition of pension scheme arrangement is wide enough to capture pension schemes located in third countries. This interpretation is confirmed in OTC Question and Answer 13(c) of ESMA's Questions and Answers (last updated 27 April 2015) which states that "the exemption from the clearing obligation does not apply to a pension scheme established in a third country".

The exclusion of third country pension schemes from the definition of pension scheme arrangement is problematic in the context of the clearing obligation. Although such third country pension schemes are unlikely to be directly subject to the clearing obligation, it is likely that they will be categorised as "an entity established in a third country that would be subject to the clearing obligation if it were established in the EU" (Article 4(1)(iv) of EMIR). In other words, the third country pension scheme is not a "pension scheme arrangement" as defined in EMIR as it is located outside of the EU but, if it was established in the EU it would constitute a "pension scheme arrangement", thereby making it a third country entity equivalent to an FC. This means that if a third country pension scheme enters into a transaction of a type which has been declared subject to the clearing obligation with an EU entity which is an FC or an NFC+, that transaction will have to be cleared. It will not be possible for the third country pension scheme to utilise the Pension Scheme Exemption as the exemption is expressed to be applicable to only "pension scheme arrangements" and not a third country equivalent.

The AMG's view is that this is not the intention of the Pension Scheme Exemption to exclude third country pension schemes and that such entities should be able to benefit from the Pension Scheme Exemption in the same manner as EU pension scheme arrangements. The AMG urges this to be clarified by Article 89(1) to refer to extend it to cover third country pension scheme arrangements.

Further extension of the Pension Scheme Exemption

The AMG also requests that the EC utilises its powers under Article 85(2) of EMIR to extend the Pension Scheme Exemption by a further period of one year to give pension schemes arrangements (including third country pensions scheme arrangements) sufficient time to prepare for the clearing obligation. The AMG also urges the EC to consider whether further extensions to the Pension Scheme Exemption may be required and would encourage the EC to adopt legislation giving it the power to make further extensions, depending on market conditions, if considered necessary.

ANNEX 1

AMG RESPONSE TO CONSULTATION PAPER – REVIEW OF TECHNICAL STANDARDS ON REPORTING UNDER ARTICLE 9 OF EMIR DATED 13 FEBRUARY 2015

sifma® | asset management group

Invested in America

European Securities and Markets Authority (ESMA)
CS 60747 – 103 rue de Grenelle
75345 Paris Cedex 07
France

Re: Response to Consultation Paper – Review of technical standards on reporting under Article 9 of EMIR[1] (the Consultation Paper)[2]

1. Introduction and summary

The Asset Management Group (the **AMG**)[3] of the Securities Industry and Financial Markets Association (**SIFMA**) welcomes this opportunity to contribute to your consideration of the improvements that could be made to the RTS[4] and ITS[5] so as to ensure the consistent application of the reporting obligation for counterparties and CCPs under Article 9 of EMIR (the **Reporting Obligation**).

In this response, the AMG first sets out some general considerations which it believes ESMA should take into account when implementing any amendments to the RTS or ITS. In this section, the AMG does not respond to any particular questions in the Consultation Paper. Secondly, the AMG provides its responses to particular questions raised by ESMA in the Consultation Paper. Finally, the AMG comments on the nature of the Reporting Obligation under EMIR and suggests an alternative method to reporting transactions which would eliminate issues over data matching, make implementation easier from an operations perspective and improve the quality of data available to ESMA and any relevant regulators.

2. Implementation of amendments to the Reporting Obligation

The AMG is supportive of ESMA's aim of improving the Reporting Obligation so that reports can better fulfill their objective. However, the AMG has serious concerns in relation to the manner in which any amendments to the Reporting Obligation are made. The AMG believes that ESMA should fully consider the following issues.

2.1 Phase-in

The AMG has substantial reservations in relation to the timing for implementing an amended Reporting Obligation. Market participants should be given sufficient time to prepare for any changes to the existing Reporting Obligation as otherwise there is a serious risk that reports will be inaccurate and report matching levels will be low. The following steps will need to be taken by

[1] 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**).

[2] ESMA Consultation Paper: Review of the technical standards on reporting under Article 9 of EMIR published on 10 November 2014 with a draft of the proposed regulatory technical standards at Annex IV (the **Proposed RTS**) and a draft of the proposed implementing technical standards at Annex V (the **Proposed ITS**). A reference to **Table 1** or **Table 2** in this response is a reference to the relevant table in the Proposed RTS and/or the Proposed ITS.

[3] The AMG's members represent US asset management firms whose combined assets under management exceed $30 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds.

[4] Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories (the **RTS**).

[5] Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (the **ITS**).

AMG members (and other market participants) in order to implement an amended Reporting Obligation:

(a) data collection with counterparties in respect of new or amended data fields;

(b) client outreach (of an asset manager's own clients) to obtain data with respect to new or amended data fields;

(c) adoption of operational procedures to reflect new or amended data fields; and

(d) technology build / update to reflect new or amended data fields (including coordinating with the reporting hardware providers).

These steps will need to be taken in relation to at least the following amended data fields: Field 4 of Table 1 (country of the other counterparty); Field 7 of Table 1 (corporate sector of counterparty); Field 8 of Table 1 (nature of reporting counterparty); Fields 17 and 18 of Table 1 (mark-to-market fields); Fields 25 to 32 of Table 1 (collateral valuation); Fields 5 to 8 of Table 2 (product and underlying identification); Fields 19 and 20 of Table 2 (notional amounts); Fields 36 and 37 of Table 2 (formatting of time periods); and Field 73 of Table 2 (actions).[6]

ESMA should also note that trade repositories will need sufficient time to ensure they are able to properly record data in relation to the amended date fields.

To give market participants sufficient time to complete the above steps, the AMG suggests a minimum timeframe for implementation of at least 9 months from the date the amended RTS and ITS enter into force.

When considering the timeframe for implementation, ESMA should also consider that market participants may need to obtain information from third country entities. As third country entities have no obligation to report under EMIR (and may have no obligation to report derivatives transactions in their own jurisdiction) it may take longer to obtain and agree on the relevant data. Unless market participants have sufficient time to agree and collect the relevant data from their third country entity clients, it is likely reports will contain errors and a full understanding of the market will be obscured.

2.2 Application

The AMG feels strongly that ESMA should clarify the scope of the application of the amended Reporting Obligation. In particular, ESMA should confirm that the amended Reporting Obligation should only apply to transactions that are entered into on or after the date the amended RTS and ITS enter into force. It will be extremely difficult, if not impossible, from an operational perspective, and very costly, for counterparties to re-report transactions which have already been reported to a trade repository before the amended Reporting Obligation takes effect.

In particular, ESMA should clarify that the following transactions are out of scope of the amended Reporting Obligation:

(a) any transaction which is entered into before the amended Reporting Obligation takes effect; and

(b) any transaction which is (or which will be) reported under the existing Reporting Obligation which is modified after the amended Reporting Obligation takes effect.

6 This list is for illustrative purposes and should not be considered to be an exhaustive list.

The following transactions should be excluded by operation of limb (a): (i) all transactions which are reported to a trade repository before the amended Reporting Obligation takes effect; and (ii) any transactions which were entered into before the amended Reporting Obligation takes effect but have not yet been reported to a trade repository (e.g. because we have not yet reached the start date for reporting such transactions (for example, transactions which were outstanding on, or entered into on or after, 16 August 2012 but were not outstanding on 12 February 2014, which must be reported by 12 February 2017)). In relation to (i), and as discussed above, it will be very difficult operationally (if not impossible) and extremely costly for market participants to re-report all trades already reported to a trade repository. In relation to (ii), and, in addition to the points applicable to (i) above, market participants may be at different stages in reporting such transactions. This means that market participants which have already reported an existing transaction (e.g. prior to the deadline to reporting such transactions) will have reported under the taxonomy of the existing Reporting Obligation, while their counterparty (which has not yet reported) may report under the taxonomy of the amended Reporting Obligation. This would create considerable issues in relation to matching and data quality and as a result, all transactions entered into before the amended Reporting Obligation takes effect should be excluded from the amended Reporting Obligation.

In relation to limb (b), any life cycle events which need to be reported in respect of a transaction which has (or which will be) reported under the existing Reporting Obligation should be reported using the taxonomy of the original Reporting Obligation (i.e. using the taxonomy under which they were first reported). It would be very difficult and overly burdensome on market participants to require modifications to be reported under a new taxonomy.

The AMG also requests that ESMA clarifies how novations[7] are reported after the amended Reporting Obligation takes effect.

3. Responses to ESMA Questions

The AMG has not responded to each of the questions set out in the Consultation Paper. Instead, the AMG has set out the relevant questions and its responses below.

Q1: Do you envisage any difficulties with removing the 'other' category from derivative class and type descriptions in Articles 4(3)(a) and 4(3)(b) of ITS 1247/2012? If so, what additional derivative class(es) and type(s) would need to be included? Please elaborate.

The AMG is concerned that by removing "Other" as a category from derivative class and type descriptions, counterparties will increasingly use "Swap" as the default position. Many derivative transactions can be described as a swap so it is possible that by removing "Other", the problem identified by ESMA in the Consultation Paper is merely shifted as more "Swaps" are reported. As there may be limited benefit to removing the "Other" category, the AMG suggests that the operational burden created by its removal will be disproportionate and, as a result, would suggest that this option is retained. ESMA could also consider expanding the product categories thereby reducing the need for counterparties to use the "Other" option.

Q3: What difficulties do you anticipate with the approaches for the population of the mark to market valuation described in paragraphs 21 or [19][8] respectively? Please elaborate and specify for each

[7] The AMG notes that as a novation is technically the early termination of the existing transaction and a new transaction coming into existence, the following should apply:
(a) in respect of the terminating transaction, this should be reported in accordance with the taxonomy under the existing Reporting Obligation as "C" (cancel); and
(b) in respect of the new transaction, this should be reported in accordance with the taxonomy under the amended Reporting Obligation.

[8] We note that this should refer to paragraph 23.

type of contract what would be the most practical and industry consistent way to populate this field in line with either of the approaches set out in paragraphs 21 and 23.

The AMG is supportive of ESMA's intention to obtain better data in respect of valuation. The AMG also supports the exclusion of variation margin (and initial margin) from the valuation calculation. However, the AMG has reservations over the requirement in respect of valuation becoming overly prescriptive, leading to an outcome where: (a) counterparties are being required to make multiple valuation calculations in respect of their obligations under EMIR (e.g. in respect of the reporting obligation, daily valuation, portfolio reconciliation and, when implemented, margin obligations (if applicable)); and (b) the regulatory valuation requirements are different to market practice or valuation mechanism included in the relevant agreement in respect of that transaction. These outcomes are undesirable from an operations and cost perspective and will make compliance with the relevant regulation difficult.

To the extent ESMA wishes to proceed with their proposal in the current form, the AMG thinks it would be helpful for ESMA to provide examples of valuations for the different product types which market participants can comment upon. These examples would act as helpful guidelines for market participants when considering valuations for the purpose of the Reporting Obligation.

Q4: Do you think the adaptations illustrated in this section [Adaptations] adequately reflect the derivatives market and will help improve the data quality of reports? Will the proposed changes cause significant new difficulties? Please elaborate.

(a) "Country of the other counterparty"

The AMG questions the necessity of field 4 of Table 1. ESMA and other applicable regulators will be able to obtain this information from the counterparty's LEI number (which is reported in field 3 of Table 1) meaning this field is unnecessary.[9]

Moreover, the Proposed RTS refers to the "domicile" of the other counterparty. This differs from the use of "established" which is otherwise used throughout EMIR and could lead to difficulties and/or discrepancies over how to populate this field.

The AMG therefore would suggest that this field is not included in any amended Reporting Obligation and instead regulators should utilise information linked to the counterparty's LEI number. To the extent ESMA considers it necessary to include this field, the AMG recommends that the field should refer to the place in which the counterparty is "established" so as to ensure consistency with EMIR.

(b) "Notional"

The AMG welcomes the proposed amendments by ESMA to split the field "Notional Amount" into "Original notional and "Actual notional" (fields 19 and 20 of Table 2). For example, the AMG believes that this will be helpful in the context of trades which are re-set as the "Original notional" will remain the notional value of the derivative contract before any re-sets and the "Actual notional" will be the re-set value of the derivative contract.

The AMG wishes to highlight that for this amendment to be implemented in practice, the trade repositories must be capable of recording both the "Original notional" and "Actual

[9] To the extent an LEI is not used in the trade report (for example, if the counterparty is not eligible for an LEI), either an identifier code which allows the unique identification of the counterparty at a national level or a client code must be used. Regulators should be able to obtain information in relation to the country of incorporation using these codes, if necessary.

notional" as many market participants' systems do not track both values (i.e. only the "Actual value" is tracked).

(c) "Report Tracking Number"

The AMG suggests that it would be better to re-name the field "External trade reference" which would contain the information suggested in field 13 of Table 2. This should be an optional field. ESMA should clarify that a firm's internal ID can be used to populate this field.

(d) Actions

The AMG welcomes EMSA's proposed amendments in respect of including the additional action types (correction code "R" and new trade / compression code "P") and clarifications on when the relevant action types should be used.

The AMG would welcome any examples of using action types that ESMA could provide.

Q5: Do you think the introduction of new values and fields [in the Introductions section] adequately reflect the derivatives market and will help improve the data quality of reports? Will the proposed changes cause significant new difficulties? Please elaborate.

(a) Underlying identification

It would be helpful for ESMA to provide a list of acceptable UPIs (at the appropriate time) for the purpose of populating field 8 of Table 2 (for where UPI is the relevant underlying identification type).

(b) Collateral Valuation

In general, the AMG welcomes EMSA's proposals to report data in relation to initial margin posted and collected and variation margin posted and collected separately in fields 25 to 32 of Table 1. However, the AMG questions whether, if both counterparties to a transaction are required to report, it is necessary for the counterparties to report both collateral posted and collected. ESMA and the relevant regulators will have the data in respect of the amount of collateral collected by a counterparty by looking at the other entity's report which will state the amount of collateral it has posted. It should not, therefore, be necessary to include data on what a counterparty has collected where both counterparties have submitted (or are required to submit) a report. To the extent ESMA agrees with the AMG's proposals in relation to single-sided reporting (see paragraph 4 below), the AMG agrees that it would necessary for the reporting party to report collateral posted and collected.

The current proposal in respect of reporting collateral creates considerable difficulties for counterparties (which are not subject to all or part of the margin requirements under Article 11 of EMIR and) which net initial margin and variation margin amounts and post and/or collect a single sum in respect of initial margin and variation margin. Even when the margin requirements are fully introduced, this problem will remain and be exacerbated by a distinction needing to be made between legacy and non-legacy transactions for margin purposes. To eliminate this issue, the AMG proposes that ESMA includes additional reporting fields which allow parties to report a net amount of initial margin and variation margin posted and received as an alternative to completing fields 25 to 32 (the **Net Margin Fields**). The Net Margin Fields would be left blank by counterparties which post and collect initial margin and variation margin on a gross basis and can complete fields 25 to 32 instead.

Q6: In your view, which of the reportable fields should permit for negative values as per paragraph 40? Please explain.

The AMG is supportive of ESMA's proposal to permit negative values. Wherever it is possible for a loss to be reported, a negative value should be permitted. This would include: field 17 of Table 1 (Value of contract); fields 25, 27, 29 and 31 of Table 1 (initial margin and variation margin posted and received)[10]; and field 23 of Table 2 (Up-front payment).

Q7: Do you anticipate any difficulties with populating the corporate sector of the reporting counterparty field for non-financials as described in paragraph [42][11]? Please elaborate.

The AMG does not think that it is necessary to include a field which requires a non-financial counterparty to specify its area of commercial activity in field 7 of Table 1 and suggests that the taxonomy in respect of non-financial counterparties is deleted. It will be time consuming and costly for market participants to perform a client outreach programme to obtain this data and reporting counterparties will be unable accurately to complete the reports if their counterparty does not provide the relevant information. Moreover, the AMG questions the purpose for which ESMA and any applicable regulators need this information in respect of non-financial counterparties as it is difficult to see how this contributes to the effective identification, monitoring and assessment of systemic risk. Rather than obtaining more information (potentially with limited value), the AMG's view is that the industry and regulators should concentrate on improving the quality of essential data.

Q8: Do you envisage any difficulties with the approach described in paragraph [45][12] for the identification of indices and baskets? Please elaborate and specify what would be the most practical and industry consistent way to identify indices and baskets.

Where a basket ("B") has been identified as the "Underlying identification type" in field 7 of Table 2, it is proposed that the "Underlying identifier" in field 8 is populated with "all individual components identified through ISO 61666 ISIN or complete AII" (see the Proposed ITS) and, if the basket is composed of, among other things, financial instruments traded on a trading venue, only the financial instruments need to be specified (see the Proposed RTS).

The AMG understands that ESMA's intention is for the trade report to specify the individual components of the relevant underlying (i.e. the basket). However, the AMG would like greater clarity on this. In particular, ESMA should confirm: (a) that there is no need to submit a separate trade report for each underlying in the basket; and (b) how a basket with different sub-components which have lots of different underlying assets should be reported in the trade report.

In addition, ESMA should confirm (a) what information is required to be reported where the basket is composed of only non-financial instruments or financial instruments that are not traded on a trading venue; and (b) where the basket is composed partly of financial instruments traded on a trading venue and partly of other instruments, how the trade report should indicate these other instruments comprise part of the basket.

Q9: Do you think the introduction of the dedicated section on Credit Derivatives will allow to adequately reflect details of the relevant contracts? Please elaborate.

The AMG considers that the proposals in relation to credit derivatives (section 2i of Table 2) are too detailed. The trade report should only contain the necessary information and as such the AMG

[10] Note that to the extent ESMA agrees with the AMG's proposal to only require a report to specify collateral posted, there would be no need for negative values in respect of collateral.
[11] We note that this should refer to paragraph 46.
[12] We note that this should refer to paragraph 49.

proposes that "Seniority" (field 68 of Table 2), "Series" (field 71 of Table 2) and "Index factor" (field 72 of Table 2) are not required. The AMG would also like to highlight that when a common identifier for these types of products has been agreed, all information in the proposed section 2i of Table 2 will be included in the common identifier. It would be better to report credit derivatives using the common identifier (when agreed) rather than introducing these additional data fields in section 2i of Table 2.

4. Nature of Reporting Obligation

The AMG would like to use this opportunity to re-affirm its belief that the main objective of the Reporting Obligation, to "allow for a comprehensive overview of the derivative market and to enable the identification, monitoring and assessment of systemic risk"[13], can be satisfied by obtaining comprehensive trade reports from *one* of the counterparties to the transaction. Rather than imposing the Reporting Obligation on *both* counterparties to a transaction, ESMA should consider requiring only one counterparty to report (the **Reporting Party**). ESMA could consider specifying a hierarchy which sets out which counterparty would report. For example, where the transaction involves an FC, the FC would be the Reporting Party (unless the transaction is between two FCs, in which case the counterparties should be required to agree which would report). Equally, where the transaction is between an NFC+ and an NFC-, the NFC+ would be the Reporting Party. If an EU entity is trading with a third country entity, only the EU entity would report (as is the case currently).

The Reporting Party's report would contain all information in respect of the derivative transaction for ESMA and any relevant regulators to obtain a comprehensive overview of the market and identify systemic risk. As the Reporting Party's report would identify the counterparty to the derivative transaction, ESMA and any relevant regulators would be able to monitor the positions and portfolios of all market participants without the need for both counterparties to submit their own trade reports. Amending the Reporting Obligation so that it only applies to one party to the derivative transaction would also eliminate issues over data matching and would, therefore, improve the data available to ESMA and any relevant regulators.

[13] p.3, Letter to Steven Maijoor dated 07.11.2013.

We appreciate your consideration of our response and stand ready to provide any additional information or assistance that you might find useful. Should you have any questions, please do not hesitate to contact Lindsey Weber Keljo at +1-202-962-7312.

Sincerely,

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