

EMIR Classification Outreach Letter

The Asset Management Group of the Securities Industry and Financial Markets Association (“SIFMA AMG” or “AMG”)* has prepared the following client classification outreach letter in order to assist asset managers helping their clients navigate clearing requirements in Europe pursuant to the European Market Infrastructure Regulation (Regulation (EU) 648/2012) (“EMIR”).

The following materials **are not legal advice** nor do they create any attorney-client relationship. Please seek the advice of qualified counsel should you believe such advice is required.

If you have questions concerning SIFMA AMG or this outreach letter, please contact:

Timothy W. Cameron, Esq.
Managing Director
Asset Management Group – Head
Securities Industry and Financial Markets
Association

202-962-7447
tcameron@sifma.org

Laura Martin, Esq.
Managing Director and Associate General
Counsel
Asset Management Group
Securities Industry and Financial Markets
Association

212-313-1176
lmartin@sifma.org

- * SIFMA AMG’s members represent U.S. asset management firms whose combined global assets under management exceed \$34 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

TO: *[Insert name [and address] of client.]*

DATE: []

1. REQUEST FOR CONFIRMATION OF EMIR CLASSIFICATION

Due to the introduction this year of mandatory clearing and collateralisation of derivative transactions under EMIR¹, we are writing to request that you confirm to us your EMIR classification as this: (i) will determine whether (and when) you have to enter into clearing agreements to allow for mandatory clearing; (ii) will determine whether (and when) you have to enter into new collateral arrangements to allow for mandatory margin; and (iii) may affect whether your counterparties request new termination rights in certain transactions. Mandatory clearing and collateral each include specific costs, so the pricing you receive for certain transactions may also be affected.

If you are not an EU entity, we still need you to respond to this letter. EMIR *can* require clearing or collateralisation where you trade with an EU entity and, in some cases, even where you trade with another third country entity.

With mandatory clearing and collateralisation fast approaching, we would greatly appreciate a prompt response so that we can, in turn, communicate this information to the firms with which we transact on your behalf. You may well find that you need to provide similar information to other parties you deal with in the near future, if you have not already been contacted. Also, some asset managers may approach classification differently and may find that they are able to make this determination on your behalf. *[The investment manager may wish to include language here to indicate why the manager is not able to classify the client by itself, which could arise in a variety of scenarios including the client uses multiple managers so the figures needed for threshold tests are not available to the investment manager, or particular reasons relating to the fund itself, the manager or the information flow between them.]*

If we do not hear from you, we may have to take a conservative approach to your categorisation which may mean you are categorised such that you comply with more stringent regulatory requirements than may be necessary.

2. THE INFORMATION WE NEED FROM ALL CLIENTS

The terms used herein are explained in the attached SIFMA AMG EMIR Classification Guidance.

Please let us know if you are a:

- financial counterparty (FC);
- non-financial counterparty above the clearing threshold (NFC+); or
- non-financial counterparty below the clearing threshold (NFC-).

For non-EU clients (i.e. a third country entity), please let us know if you are a:

- third country entity which would be a FC if it was established in the EU;
- third country entity which would be a NFC+ if it was established in the EU; or

¹ The European Market Infrastructure Regulation (Regulation (EU) 648/2012).

- third country entity which would be a NFC- if it was established in the EU.

There are a few, narrow exemptions from EMIR applying to a narrow set of central banks, development banks and government owned and backed public entities. If you believe an exemption may apply to you, please let us know.

3. THE INFORMATION WE NEED FROM FCS, NFC+S AND THEIR THIRD COUNTRY EQUIVALENTS

If you are a FC, NFC+ or a third country entity equivalent to a FC or NFC+, we also need the following information.

3.1 Mandatory Clearing

In respect of EMIR mandatory clearing:

- (a) please specify your category under the G4 Rates RTS:
 - Category 1, Category 2, Category 3 or Category 4,
- (b) please indicate your expected category under each of the following two regulatory technical standards (**RTS**) and reconfirm your categorisation promptly after these RTS enter force:
 - Second Rates RTS: Category 1, Category 2, Category 3 or Category 4; and
 - CDS RTS: Category 1, Category 2, Category 3 or Category 4, and
- (c) please let us know if you are a “pension scheme arrangement” as defined in EMIR and, if so, which of the four limbs of that definition you fall under: (a), (b), (c) or (d). Note that, as set out in the SIFMA AMG EMIR Classification Guidance, the term “pension scheme arrangement” only applies to EU established entities. [Also, please confirm if we should assume that the pension scheme arrangement exemption applies in all cases, unless you notify us differently in writing.] *[The square bracketed language is optional, for use where suitable only, where the manager is not able to assess if each trade is risk reducing and/or that the pension scheme arrangement qualifies for the exemption.]*

3.2 Mandatory Margin

In respect of EMIR mandatory margin, do you expect to be above the first margin threshold and therefore subject to mandatory margin (both variation margin and initial margin) from September 2016?

4. HOW TO ASSESS YOUR CLASSIFICATION

To help you with your own assessment, we have attached the SIFMA AMG EMIR Classification Guidance. This was written specifically for clients of investment managers, in the EU and elsewhere in the world, and provides a step-by-step outline of how to approach the key classification questions.

5. HOW TO RESPOND TO THIS LETTER

[Drafting note: the following text is optional, the investment manager can keep or delete the whole of section 5 or just keep the title and indicate any preferred method of response, before completing and sending this letter to clients. The suggested text below is for where the investment manager is asking the client to respond using the ISDA EMIR Classification Letter, with the aim of ensuring consistency and therefore efficiency where the investment manager will trade with sell-side entities that use the ISDA EMIR Classification Letter and/or the parallel ISDA Amend tools.]

[Please respond by completing the ISDA EMIR Classification Letter [attached]/[available at <http://www2.isda.org/emir/>]. (If needed, ISDA's guidance for this letter is available on the same webpage.) We are asking you to use the ISDA EMIR Classification Letter as it is a standard form used in the market and the statements it contains are identical to those used by the ISDA Amend classification tools, which are already used by many market participants.]

Best regards

[INVESTMENT MANAGER]

By: _____

Name: _____

Title: _____

Date: _____

SIFMA AMG

EMIR² Classification Guidance

This guidance is intended to help clients of investment managers assess their EMIR classification. **However, this guidance does not purport to be and should not be considered a guide to or an explanation of all relevant issues or considerations in connection with EMIR classification or compliance with EMIR. This guide is not legal advice. Parties should consult with their legal advisers and any other adviser they deem appropriate prior to providing classification information. SIFMA Asset Management Group (“SIFMA AMG”) assumes no responsibility for any use to which this guidance may be put.**

1. SUGGESTED APPROACH FOR DETERMINING EMIR CLASSIFICATION

The determination of EMIR classification is best approached as a series of steps, as outlined here. For fuller descriptions, please see Sections 3 (*The Basic EMIR Classifications*) and 4 (*EMIR Classification for Clearing and Collateral*) of this guidance.

Step 1 – Exclude out of scope entities. The exemptions from EMIR are very narrow so this step should be easily applied, with very few if any clients being exempt.

Step 2 – Determine status as a financial counterparty (“FC”), non-financial counterparty (“NFC”) or third country entity equivalent to FC or NFC. This is the most important step and is made more complicated under EMIR by the extraterritorial effect of the regulation (for example, an alternative investment fund (AIF) established outside the EU can be a FC under EMIR). Due to this complexity, the step is broken down as:

(a) **Is the client a FC?** As FC status is based on pre-existing EU regulatory authorisation or recognition, all or almost all clients which are FC should know immediately, when shown the definition, if they have such authorisation or recognition, making this a relatively easy test to confirm.

(b) **If the client is not a FC, is it established in the EU or not?** Again, place of establishment should be obvious to most clients. If a client is not a FC and is established in the EU, it is a NFC. If it is not a FC and is established outside the EU, it is a third country entity.

(c) **If the client is a third country entity, would it be a FC or NFC if it was established in the EU?**

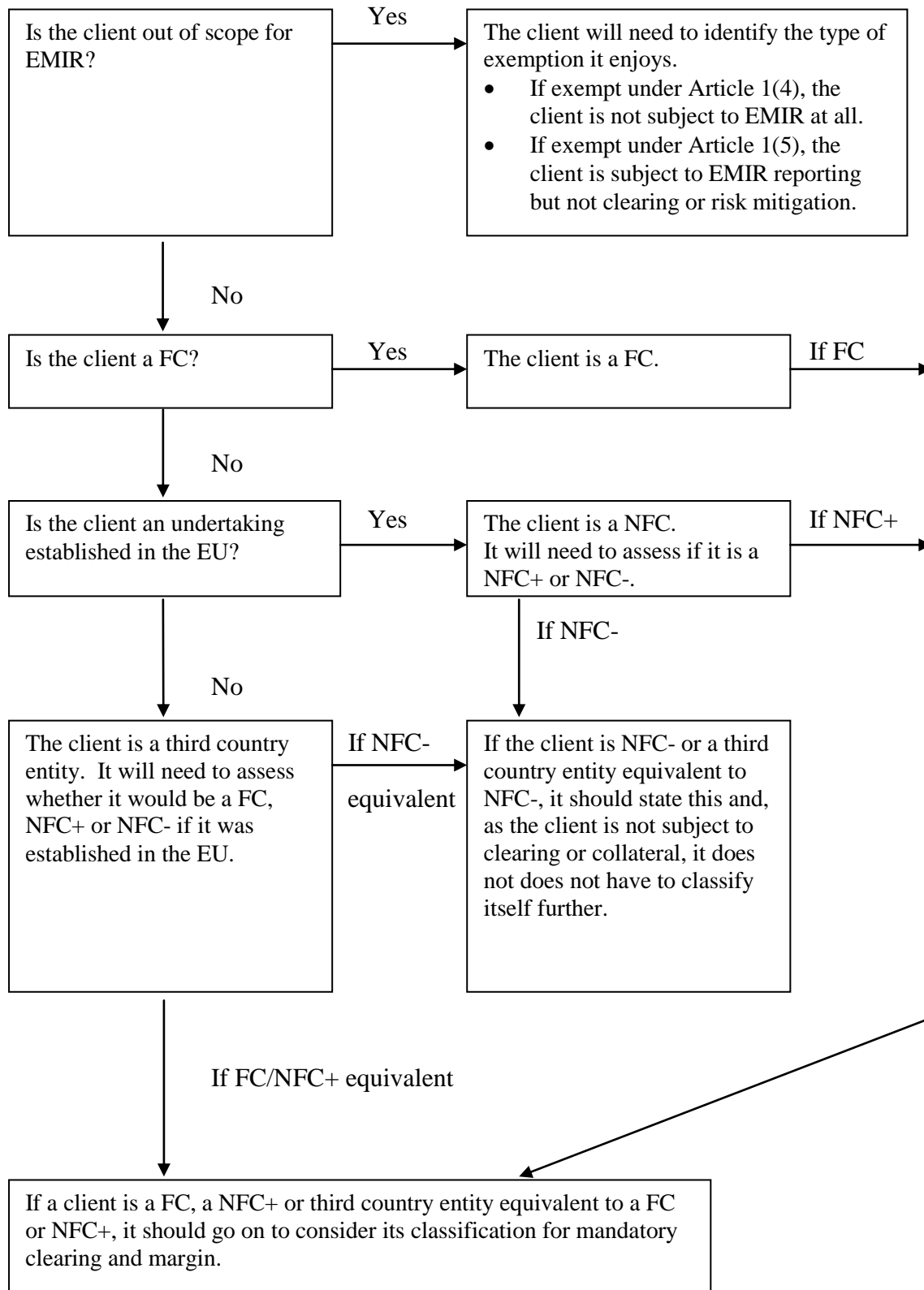
Step 3 – If the client is a NFC (or third country entity equivalent to NFC), determine NFC+ / NFC- status.

Step 4 – If the client is a FC, NFC+ or third country entity equivalent to a FC or NFC+, determine categorisation for clearing and collateral.

² Regulation (EU) 648/2012.

2. EMIR CLASSIFICATION FLOW CHART

The flow chart shows how the suggested approach helps a client seeking to confirm its EMIR classification.



3. THE BASIC EMIR CLASSIFICATIONS

3.1 Is the client out of scope for EMIR?

EMIR expressly excludes a narrow set of central banks, development banks and government owned and backed public entities either completely (under Article 1(4) of EMIR) or partially (under Article 1(5)). In addition, non-undertakings (such as private individuals not acting for commercial purpose) are seen as being out of scope of EMIR.

These exclusions are narrow and it is unlikely that they will apply to a typical client so they have not been considered further here. If a client states it is out of scope for EMIR, it should expect to state the nature of its exemption.

3.2 Is the client a FC or NFC or a third country entity equivalent to a FC or NFC?

This question is made more complicated by the fact that the definition of FC can include AIFs established outside the EU. As indicated in the flow chart above, the simplest way to approach this question is to break the question into the following parts.

(a) Is the client a FC?

EMIR defines FC as “an investment firm authorised in accordance with Directive 2004/39/EC, a credit institution authorised in accordance with Directive 2006/48/EC, an insurance undertaking authorised in accordance with Directive 73/239/EEC, an assurance undertaking authorised in accordance with Directive 2002/83/EC, a reinsurance undertaking authorised in accordance with Directive 2005/68/EC, a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC, an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC and an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU”. Further detail on the terms used in this definition is available in Appendix 1 to this guidance.

Entities within the definition of FC are ones which are already regulated under existing legislation and, in almost all cases, are entities which will have had to apply for relevant authorisations. The result should be that an entity which is within the definition of FC should recognise this quickly upon seeing the definition. Similarly, if an entity is unregulated, that entity will not be a FC.

Amongst the entity types comprising FC, the types likeliest to apply to a typical client are:

- (i) a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC;
- (ii) an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC; and
- (iii) an AIF managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU.

Please note that the last of these three can apply to funds established anywhere in the world: the fund is categorised as FC if its manager is authorised or registered in accordance with

Directive 2011/61/EU (an **AFIM**). As authorisation or registration takes action by the manager, the manager should know immediately whether it is an AIFM and therefore whether the AIF(s) it manages should be classified as FC.

As stated in the flow chart above (and assuming the client is not an out of scope entity), if the client is a FC, then it should state its classification as a FC. It is not a third country entity.

(b) Is the client an undertaking established in the EU?

EMIR does not define “undertaking” or “established”, so there is some scope for debate as to the meaning of these terms³. However, it is likely that most clients will feel the question can be answered simply, based on where they were incorporated or otherwise constituted. For example, if the client is primarily operating in the EU and is an English partnership or limited company or a French *société anonyme* or *société par actions simplifiée*, then it is an undertaking established in the EU. Alternatively, if the client is primarily operating outside the EU and is constituted as, for example, a U.S. mutual fund or a fund incorporated in Cayman or Switzerland then it is not an undertaking established in the EU.

As stated in the flow chart above, assuming the client is not an out of scope entity:

- (i) if the client is not a FC and is established in the EU, then it should state its classification as a NFC; or
- (ii) if the client is not a FC and is not established in the EU, then it is a third country entity. It should state this and then go on to consider whether it would be a FC, NFC+ or NFC- if it was established in the EU.

(c) If the client is a third country entity, what would its classification be if it were established in the EU?

Unfortunately, there is little guidance on this point available from the European institutions (ESMA and the European Commission). While equivalence is easy to determine for some classes of financial entity (such as credit institutions), third country funds in particular may find it harder to determine whether they should be seen as equivalent to a FC or equivalent to a NFC. Some funds may wish to take a conservative approach, stating they are equivalent FC, and accept the higher level of compliance requirements that this will bring. Others may determine that they are equivalent to NFC, given (i) that EU established funds can be NFC; and (ii) ESMA’s comments in OTC Answer 13 in its EMIR Q&A⁴ on whether a third country sovereign wealth fund should be considered to be a FC or equivalent to a NFC.

³ ESMA has recognised this uncertainty and it may be that ESMA produces guidance in due course. The EC has discussed the meaning of undertaking in its Q&A document available at: http://ec.europa.eu/finance/financial-markets/docs/derivatives/emir-faqs_en.pdf

⁴ In particular, ESMA states that “A sovereign wealth fund will qualify as financial counterparty under EMIR where it meets the definition of an AIF and it would be subject to Directive 2011/61/EU (AIFMD) if it was established in the Union. However, where a sovereign wealth fund does not meet the definition of an AIF and is out of scope of the AIFMD, such a sovereign wealth fund shall be treated as non-financial counterparty in accordance with Article 10 of EMIR”. ESMA’s Q&A document is available at: https://www.esma.europa.eu/sites/default/files/library/2016-539_qa_xvii_on_emir_implementation.pdf

3.3 If the client is a NFC or equivalent, is it a NFC+ or a NFC-?

If a NFC is seeking to determine if it is a NFC+ or a NFC-, it needs to assess whether:

- (i) the rolling average position over 30 working days;
- (ii) of OTC derivative contracts (cleared and uncleared but excluding all hedging contracts);
- (iii) to which it is party and to which any non-financial entity in its group is party;
- (iv) in any of five category types exceeds the threshold for that type.

If at least one threshold is exceeded, the NFC is a NFC+ (for all categories).

(a) Exclusion of hedging contracts

The clearing threshold calculations allow for a hedging exemption such that OTC derivative positions that are “objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or that group” are excluded from the calculations.

The risk-mitigation RTS⁵ explains that an OTC derivative contract meets this test when, whether by itself or in combination with other derivative contracts, and whether directly or through closely correlated instruments, it meets one of the following conditions:

- (i) it covers the risks arising from the potential change in the value of assets, services, inputs, products, commodities or liabilities that the non-financial counterparty or its group owns, produces, manufactures, processes, provides, purchases, leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;
- (ii) it covers the risks arising from the potential indirect impact on the value of assets, services, inputs, products, commodities or liabilities referred to in (i) above, resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk; or
- (iii) it qualifies as a hedging contract pursuant to International Financial Reporting Standards (IFRS) adopted in accordance with Article 3 of Regulation (EC) No 1606/2002.

(b) All non-financial entities in the group

Although hedging contracts are excluded, all non-hedging OTC derivatives entered into by the NFC or other non-financial entities⁶ within its group are included in the threshold

⁵ The relevant RTS is

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0011:0024:EN:PDF>.

⁶ “Non-financial entity” means NFCs (in Europe) and third country entities equivalent to NFCs (outside Europe).

calculation. Trades subject to the intra-group exemption are also included in the threshold calculation.

For the purposes of EMIR, a group is a group of undertakings consisting of the ultimate parent undertaking and all of its subsidiaries (direct and indirect). This means that an individual entity will need to look at its entire ownership structure, any holding companies and all subsidiaries of the ultimate parent. For an EU non-bank entity, the group it is in for EMIR purposes will most likely be its consolidated accounting group. The detailed definition of group in EMIR cross-refers to a number of other European directives (including 83/349/EEC⁷) for definitions of parent undertakings and subsidiaries.

ESMA has stated in its EMIR FAQs⁸ that funds should assess this threshold at the level of the fund (or, in case of umbrella funds, at the level of the sub-fund) and not at the level of the fund manager.

(c) Exceeds one of the five thresholds

The “clearing threshold” is calculated by reference to the gross notional value of outstanding OTC positions within five defined asset classes: interest rates; credit; FX; equity; commodities/other. If the clearing threshold for one class is exceeded (i.e. the rolling average of positions over a 30 working day period exceeds that threshold) then the entity is a NFC+ in respect of all five classes, not just the class in which the clearing threshold has been exceeded.

The clearing thresholds are as follows⁹:

Class of OTC derivative	Clearing Thresholds (gross notional value)
Credit derivatives	EUR 1bn
Equity derivatives	EUR 1bn
Interest rate derivatives	EUR 3bn
Foreign exchange derivatives	EUR 3bn
Commodity derivatives and other OTC derivative trades not captured in the categories above	EUR 3bn (combined limit)

Non-Euro notional values should be converted to Euro for the purpose of the threshold test at the relevant spot rate for the day of calculation.

⁷ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1983L0349:20070101:EN:PDF>.

⁸ See General Answer 1(a)(1) in the 4 April 2016 FAQ document (the most recent version currently), which is available at: https://www.esma.europa.eu/sites/default/files/library/2016-539_qa_xvii_on_emir_implementation.pdf

⁹ The relevant RTS is <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0011:0024:EN:PDF>.

4. EMIR CLASSIFICATION FOR CLEARING AND COLLATERAL

If the client is a FC or NFC+ (or a third country entity equivalent to a FC or NFC+), it will need to determine its categorisation for mandatory clearing and collateral so that it and its counterparties can identify the starting date from which each of these EMIR requirements apply.

4.1 EMIR Classifications for mandatory clearing

(a) Mandatory Clearing Classifications

EMIR mandatory clearing of OTC derivative contracts is being phased in, through the entry into force of regulatory technical standards (**RTS**). The deadline for clearing depends on the class of derivative contract and the category of the parties to such contract.

The first classes of OTC derivative contracts subject to mandatory clearing are (i) certain interest rate swaps in USD, EUR, GBP and JPY, as set out in the **G4 Rates RTS**¹⁰; (ii) additional interest rate swaps in NOK, SEK and PLN, as set out in the draft **Second Rates RTS**¹¹; and (iii) 5 year iTraxx Europe Main and Crossover index CDS settled in EUR, as set out in the draft **CDS RTS**¹², with additional classification parameters (maturity/tenor, reference index, settlement currency etc) as set out in annexes to each RTS.

All three RTS categorise counterparties in essentially the same way. The categories are:

Category 1 consists of counterparties which, on the date of entry into force of the relevant RTS:

- (i) are clearing members (as defined in Article 2(14) of EMIR),
- (ii) for at least one of the classes of OTC derivatives set out in the annex to such RTS¹³,
- (iii) of at least one CCP that was EMIR authorised or recognised before such date to clear at least one of those classes of OTC derivatives.

Category 2 consists of counterparties not included in Category 1 which are:

- (i) FCs; or
- (ii) NFC+s AIFs (i.e. alternative investment funds which are classified as NFC+),

in each case, which belong to a group¹⁴ whose aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives¹⁵ for January, February and March 2016 is above EUR 8 billion¹⁶.

¹⁰ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015, published in the Official Journal on 1 December 2015.

¹¹ As contained in the Additional Rates Final Report published by ESMA and dated 10 November 2015. Please see: [https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1629 - final report clearing obligation irs other currencies.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1629_-_final_report_clearing_obligation_irs_other_currencies.pdf).

¹² As adopted by the EC on 1 March 2016. Please see: http://ec.europa.eu/finance/financial-markets/derivatives/index_en.htm#160301.

¹³ The Second Rates RTS varies this line slightly, extending it to include the classes of OTC derivatives set out in the annex to the G4 Rates RTS as well as the Second Rates RTS.

Category 3 consists of FCs and NFC+ AIFs that are not included in Categories 1 or 2.

Category 4 consists of NFC+s and that are not included in Categories 1 to 3.

Article 2(3) of each RTS states that, for AIFs and UCITS¹⁷, the Category 2/3 threshold should be applied individually at fund level. In addition, Recital 6 states “Thus, the threshold should be applied separately to each fund as long as, in the event of fund insolvency or bankruptcy, each investment fund constitutes a completely segregated and ring-fenced pool of assets that is not collateralised, guaranteed or supported by other investment funds or the investment manager itself”. It may be that ESMA provides guidance on the meaning of this language in due course, though not in time for the start of the currently scheduled testing period.

While the three RTS use the same language as each other to define Categories 1-4, please note:

- (i) the *draft* Second Rates RTS and *draft* CDS RTS apply the Category 2/3 threshold test to the same three months as are tested under the G4 Rates RTS (January to March 2016). These dates might change when the RTS are finalised; and
- (ii) as Category 1 is determined by reference to the derivatives classes *set out in the annex to the relevant RTS*¹⁸, the same entity might be Category 1 in respect of certain interest rates derivative classes but a different category for CDS derivatives classes.

(b) The Pension Scheme Arrangement Exemption¹⁹

Pension scheme arrangements that wish to use the pension scheme arrangement exemption from mandatory clearing should note the following.

- (i) The definition of “pension scheme arrangement” set out in Article 2(10) of EMIR applies only to EU established entities. A third country entity is not a pension scheme arrangement. Also ESMA has clarified in OTC Answer 13(c) in its EMIR FAQs²⁰ that third country pension schemes do not benefit from this exemption.
- (ii) The pension scheme arrangement exemption includes that the transaction must be “objectively measurable as reducing investment risks directly relating

¹⁴ As defined in Article 2(16) of EMIR. Please also see Section 3.3(b) (*All non-financial entities in the group*) of this guidance.

¹⁵ Article 2(2) of the G4 Rates RTS states that foreign exchange forwards, swaps and currency swaps must be included in the aggregate amount.

¹⁶ Non-Euro notional values should be converted to Euro for the purpose of the threshold test at the relevant spot rate for the day of calculation.

¹⁷ Undertakings for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC.

¹⁸ As noted above, the Second Rates RTS varies this line slightly, extending it to include the classes of OTC derivatives set out in the annex to the G4 Rates RTS as well as the Second Rates RTS.

¹⁹ The exemption and its use is set out in Articles 89(1) and (2) of EMIR.

²⁰ https://www.esma.europa.eu/sites/default/files/library/2016-539_qa_xvii_on_emir_implementation.pdf.

to the financial solvency of” the pension scheme arrangement. As the exemption applies per trade, the pension scheme arrangement will need to state if the exemption applies each time it enters into a relevant transaction²¹ or give a blanket statement which applies unless the scheme says otherwise on a given trade.

- (iii) The definition of pension scheme arrangement in Article 2(10) of EMIR includes four sub-sections (a), (b), (c) and (d). Schemes which fall within sub-sections (c) or (d) can only use the exemption if granted by their national competent authority. This restriction does not apply to schemes within sub-sections (a) or (b).

²¹ One which would otherwise have to be cleared.

4.2 EMIR Classifications for mandatory margin

EMIR mandates the exchange of both variation and initial margin. Both requirements are being phased in, variation margin in two stages (1 September 2016 and 1 March 2017) and initial margin in five (1 September each year from 2016 to 2020).

For both requirements, the initial test is to assess the aggregate average notional amount for all non-centrally cleared OTC derivative contracts of the entire group (AANA), on the last business day of each of March, April and May of 2016. Counterparties will have to meet the mandatory variation and initial margin requirements in respect of contracts entered into from 1 September 2016 where both counterparties have or belong to groups, each of which has an AANA above EUR 3 trillion²². The current draft regulatory technical standard (8 March 2016) permits investment funds to calculate the AANA on a per-fund (rather than group) basis where the funds are distinct segregated pools of assets for the purposes of the fund's insolvency or bankruptcy that are not collateralised, guaranteed or supported by other investment funds or the investment managers²³.

It is important to keep in mind that mandatory margin is being introduced in other jurisdictions, not just the EU. A number of regulators are expecting to keep in line with the timings set out by the BCBS IOSCO Final Report²⁴, so it may be that there are simultaneous introductions of margin requirements in different jurisdictions. Unfortunately, each margin regime will apply a different counterparty categorisation structure (based around local regulation). For example, the US refers to Swap Dealers and Major Swap Participants, the EU to FCs, NFC+s etc. Clients should therefore consider not just their classification for mandatory margin under EMIR but also classification structures for each relevant jurisdiction. SIFMA AMG understand that ISDA is working on a separate classification letter covering margin classifications/thresholds for the EU, the US and other jurisdictions.

²² Non-Euro notional values should be converted to Euro for the purpose of the threshold test at the relevant spot rate for the day of calculation.

²³ Please see Recital 14 and Articles 8(3) and 39(4) of Final Draft Regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under EMIR, published on 8 March 2016 by the European Supervisory Agencies, available at: <http://www.eba.europa.eu/documents/10180/1398349/RTS+on+Risk+Mitigation+Techniques+for+OTC+contracts+%28JC-2016-+18%29.pdf>.

²⁴ <http://www.bis.org/bcbs/publ/d317.htm>.

APPENDIX 1

FINANCIAL COUNTERPARTIES

The table below sets out a full definition of each of these categories of financial institution that constitute a financial counterparty.

Full definitions of financial counterparties

Definition under Article 2(8) of EMIR	Definition under relevant Directive
An investment firm authorised in accordance with Directive 2004/39/EC (MiFID)	<p>MiFID defines an investment firm as any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis.²⁵</p> <p>Investment services and activities include those listed in Section A of Annex I:</p> <ul style="list-style-type: none"> • reception and transmission of orders; • execution of orders; • dealing on own account; • portfolio management; • investment advice; • underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis; • placing of financial instruments without a firm commitment basis; or • operation of Multilateral Trading Facilities. <p>relating to any of the instruments listed in Section C of Annex I:</p> <ul style="list-style-type: none"> • transferable securities; • money-market instruments; • units in collective investment undertaking; • certain options, futures, swaps, forward rate agreements and other derivative contracts; • derivative instruments for the transfer of credit risk; or • financial contracts for difference.²⁶
A credit institution authorised in accordance with Directive	This now refers to a credit institution being an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account. ²⁷

²⁵ Article 4(1) of Directive 2004/39/EC (MiFID).

²⁶ Article 4(2) of Directive 2004/39/EC (MiFID).

2006/48/EC (BCD)	
<p>An insurance undertaking authorised in accordance with Directive 73/239/EEC (First Non-Life Directive)</p>	<p>This now refers to insurance undertakings authorised under Directive 2009/138/EC (Solvency II) for the classes of insurance set out in Annex I of Solvency II:²⁸</p> <ul style="list-style-type: none"> • accident; • sickness; • land vehicles; • railway rolling stock; • aircraft; • ships; • goods in transit; • fire and natural forces; • damage to property; • motor vehicle liability; • aircraft liability; • liability for ships; • general liability; • credit; • suretyship; • miscellaneous financial loss; • legal expenses; and • assistance.
<p>An assurance undertaking authorised in accordance with Directive 2002/83/EC (Life Directive)</p>	<p>This now refers to insurance undertakings authorised under Solvency II for the classes of insurance set out in Annex II of Solvency II:²⁹</p> <ul style="list-style-type: none"> • life assurance (on contractual basis); • annuities (on contractual basis); • supplementary insurance by life assurance undertakings (e.g. insurance against death resulting from an accident) (on contractual basis); • marriage assurance and birth assurance; • life assurance and annuities linked to investment funds; • permanent health insurance; • tontines; • capital redemption operations;

²⁷ Article 4(1) of Directive 2006/48/EC (BCD), replaced by Article 4(1)(1) of Regulation (EC) No 575/2013 (the Capital Requirements Regulation).

²⁸ Article 1 and Annex to Directive 73/239/EEC (First Non-Life Directive), replaced by Article 2 and Annex I of Solvency II.

²⁹ Article 1(a) of Directive 2002/83/EC (Life Directive), replaced by Article 13(1) and Annex II of Solvency II.

	<ul style="list-style-type: none"> • management of group pension funds; • operations carried out by assurance undertakings under the French ‘Code des assurances’, Chapter 1 Title 4 Book IV; and • operations relating to the length of human life, prescribed/provided for by social insurance legislation.
A reinsurance undertaking authorised in accordance with Directive 2005/68/EC (Reinsurance Directive)	Reinsurance undertakings are defined under Solvency II as undertakings that have received official authorisation under that Directive to pursue reinsurance activities. ³⁰ Reinsurance means either of (a) the activity consisting in accepting risks ceded by an insurance undertaking or third-country insurance undertaking, or by another reinsurance undertaking or third-country reinsurance undertaking; or (b) in the case of the association of underwriters known as Lloyd’s, the activity consisting in accepting risks, ceded by any member of Lloyd’s, by an insurance or reinsurance undertaking other than the association of underwriters known as Lloyd’s. ³¹
A UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC (UCITS IV Directive)	<p>A UCITS is defined by the UCITS IV Directive as an undertaking:</p> <ul style="list-style-type: none"> (a) with the sole object of collective investment in transferable securities or in other liquid financial assets³² of capital raised from the public and which operate on the principle of risk-spreading; and (b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings’ assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption.³³ <p>A UCITS management company is a company whose regular business is the collective portfolio management of UCITS.³⁴</p>
An institution for occupational retirement provision authorised in accordance within the meaning of Article 6(a) of Directive 2003/41/EC (Occupational Pension)	<p>An institution for occupational retirement provision is defined by the Occupational Pension Funds Directive as an institution operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed:</p> <ul style="list-style-type: none"> (i) individually or collectively between the employer(s) and the employee(s) or their respective representatives, or

³⁰ Article 2(c) of Directive 2005/68/EC (Reinsurance Directive), replaced by Article 13(4) of Solvency II.

³¹ Articles 13(7) of Solvency II.

³² As listed in Article 50(1), and including transferable securities and money market instruments, units of UCITS or other collective undertakings, certain deposits with credit institutions and financial derivative instruments.

³³ Article 1(2) of Directive 2009/65/EC (UCITS IV Directive).

³⁴ Article 2(1)(b) of Directive 2009/65/EC (UCITS IV Directive).

Funds Directive)	(ii) with self-employed persons, in compliance with the legislation of the home and host Member States, and which carries out activities directly arising therefrom.
An alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EC (AIFM Directive)	<p>Alternative investment funds (AIFs) are defined by the AIFM Directive as collective investment undertakings which:</p> <ul style="list-style-type: none"> (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) do not require authorisation under the UCITS IV Directive.³⁵ <p>AIFMs are legal persons whose regular business is managing one or more alternative investment funds (AIFs).³⁶</p>

³⁵ Article 4(1)(a) of Directive 2011/61/EC (AIFM Directive)

³⁶ Article 4(1)(b) of Directive 2011/61/EC (AIFM Directive)