

ESMA Plans to Consult on Alternative Indirect Clearing Arrangements under EMIR and MiFIR

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Financial Services and Regulation

The European Securities and Markets Authority (ESMA) has published a letter it sent to the European Commission on October 2, 2015 explaining its intention to consult on necessary amendments to the indirect clearing rules contained in the European Markets Infrastructure Regulation (EMIR)¹. The changes are needed to ensure that the indirect clearing provisions for over-the-counter (OTC) derivatives in EMIR remain consistent with those being proposed for exchange traded derivatives (ETD) under the Markets in Financial Instruments Regulation (MiFIR)². ESMA explains that the draft amendments to the rules under EMIR will therefore be submitted to the European Commission at the same time as those being proposed under the MiFIR mandate following the newly proposed consultation³. It is not clear at this stage if this will have an impact on the application date for MiFID II/MiFIR.

New consultation on indirect clearing requirements

On October 2, 2015 the Chair of ESMA, Steven Maijor, wrote to Jonathan Hill, the European Commissioner for Financial Stability, Financial Services and Capital Markets Union, to specify ESMA's intention to launch a new consultation on amendments to the rules on indirect clearing for OTC derivatives under EMIR. He explained that the need for changes to these rules under EMIR was highlighted by the feedback received from stakeholders during the "open public consultations" on the requirements for indirect clearing of ETDs as part of the MiFIR mandate.

The MiFIR-related consultations uncovered serious concerns, in response to which ESMA has developed new indirect clearing requirements for both OTC derivatives and ETDs. As a result, ESMA feels it is only appropriate to conduct a new consultation on the necessary

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

² Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments

³ Please note that the regulatory technical standards (RTS) on indirect clearing under MiFIR were not published together with the other MiFIR-related RTS at the end of September 2015, but withheld for this reason.

changes to the relevant RTS under EMIR⁴ so as to make them consistent with the envisaged RTS for indirect clearing of ETDs under MiFIR.

The letter states that ESMA intends to submit the draft RTS relating to indirect clearing under both EMIR and MiFIR to the European Commission at the same time so as to ensure their consistency. On this basis, it did not submit the prepared RTS on indirect clearing under MiFIR to the European Commission along with the other MiFIR-related RTS which were published on September 28, 2015. It will wait until the outcome of the EMIR consultation is determined to submit these RTS.

Possible delay to implementation?

It is not clear at this stage whether ESMA's intention to make amendments to the indirect clearing rules under EMIR will have any knock-on effect on the application date of MiFIR/MiFID II which is scheduled to come into effect on January 3, 2017. Independently, a number of industry bodies, including the Investment Association, have called for the implementation of MiFIR to be delayed by 12 months, but the Level 1 legislation does not allow for any delays to its timetable. The only way in which this could be achieved is if the Level 1 legislation were reopened. Given the sheer volume of changes required under MiFID II/MiFIR, it is possible that regulatory authorities might take a more lenient and pragmatic approach to enforcement where they are able to do so under the legislation. However, it would not be sensible for firms to rely on any delay to implementation or leniency from the regulators. They must assume that they will need to be fully compliant by 2017.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services and Regulation team:

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⁴ Delegated Regulation (EU) No. 149/2013 of 19 December 2012 with regard to regulatory technical standards on indirect clearing