



Master Reporting Agreement – Request for feedback

Deadline for submission of feedback: 23 August 2019

1 Introduction

- Upcoming changes to the reporting regime under EMIR and the introduction of a new reporting regime under SFTR mean that participants in the EU derivatives and SFT markets will likely be establishing new reporting arrangements or reappraising those already in place in the coming months.
- Given the overlapping implementation timelines for the legislation, FIA, ICMA, ISDA and ISLA (each a **Trade Association**) intend to work together to discuss the development of a new reporting agreement (the **Agreement**) to be made available to market participants.
- Whilst there are necessarily differences in the reporting regimes under EMIR and SFTR, there appear to be substantial commonalities in the way in which reporting will be delegated in practice and the concept of mandatory reporting by financial counterparties (**FCs**) on behalf of their smaller counterparties. Development of a single Agreement for these purposes would avoid the divergence of standards in different areas of the market for substantially similar reporting relationships.
- The Agreement is expected to be structured in a modular way, consisting of a main agreement together with two or more annexes that address regulation or product specific requirements (for example, a derivatives annex and an SFT annex). It is envisaged that trading entities may execute a copy of the Agreement and choose to append one or more annexes.
- This questionnaire is being sent to the memberships of each of the Trade Associations and is designed to help us to identify a common approach that can be taken to certain threshold issues.
- We are conscious that the timeline to prepare and publish the Agreement is already very challenging. The answers to this questionnaire will inform the structure of the Agreement and, we hope, avoid the need to

substantially change direction on relevant points during the project itself. The current target for publication of the form of Agreement is **December 2019**.

- This paper is structured as follows:
 - **Instructions:** regarding completion of this questionnaire
 - **Reporting requirements:** brief overview of reporting changes under EMIR and SFTR
 - **Agreement:** summary of the expected content of the Agreement
 - **Approach:** outline of intended approach to several issues for the purposes of this project
 - **Annex:** questionnaire

2 Instructions

- Feedback can be provided by completion of the attached questionnaire in whole or in part.
- To the extent possible, members are requested to collate views internally in order to produce a single set of responses that represent the institutional views of the member.
- Completed questionnaires should be returned to the appropriate Trade Association at the following email address:
 - FIA msiraj@fia.org (Mitja Siraj)
 - ICMA lisa.cleary@icmagroup.org (Lisa Cleary)
 - ISDA cmcgonagle@isda.org (Ciarán McGonagle)
 - ISLA [online survey tool](#) (link as provided)
- The deadline for return by members of their completed questionnaire is **23 August 2019**.

3 Reporting requirements

- **EMIR**
 - The reporting obligation under Article 9 of EMIR has applied to “derivatives contracts” since **12 February 2014**.
 - ISDA/FIA published a template delegated reporting agreement on **13 January 2014** (and republished it on 9 February 2016 to reflect the change of name of the FIA):
<https://www.isda.org/2016/02/09/isdafia-emir-reporting-delegation-agreement/>
 - Mandatory reporting by FCs in respect of OTC derivatives contracts concluded with NFC- counterparties will be introduced to the existing EMIR regime pursuant to Article 1(7) of the EMIR REFIT

Regulation with effect from 18 June 2020. EU fund managers become responsible for reporting OTC derivatives contracts of the funds they manage from the same date.

- **SFTR**
 - The reporting obligation under Article 4 of SFTR in respect of SFTs will be phased in over a 9-month period, starting from **14 April 2020**¹ and ending **11 January 2021**. Certain SFTs entered into prior to the reporting start date, which remain in force 180 days after that date, are also reportable (referred to as the backloading obligation).
 - The SFTR reporting regime includes mandatory reporting by FCs in respect of certain NFC entities². This is expected to apply with respect to relevant entities phased in from **11 January 2021**.
 - If one counterparty is in-scope of the reporting obligation and the other is not (for example, due to the phase-in timetable or because the second entity is a third country entity), the first counterparty may, in order to make its own reports, need to obtain data from the second entity and require it to waive any confidentiality requirements as regards disclosing that data to the relevant trade repository³.
- The EMIR and SFTR reporting regimes share certain key features – in particular, both provide for:
 - (i) **delegated reporting**, whereby in-scope entities are permitted to delegate the reporting of the details of the relevant transaction whilst retaining regulatory responsibility for the details of that report; and
 - (ii) **mandatory reporting**, whereby certain in-scope entities are required by regulation to submit reports on behalf of certain of their counterparties.
- **Brexit**
 - Assuming a hard Brexit at the end of October:
 - the EMIR REFIT changes mentioned above will not be on shored under the EU Withdrawal Act as they are not applicable as at exit day; and
 - the SFTR reporting requirements will also not be on shored under the EU Withdrawal Act as they are not applicable as at exit day.

¹ Being 12 months after the date of entry into force of the delegated regulation 2019/356, adopted pursuant to Article 4(9) of SFTR.

² NFC entities that meet the criteria set out in Article 4(3) of SFTR, often referred to as “SME-NFCs”.

³ The position is the same under EMIR, but in-scope counterparties should already have arrangements in place to facilitate reporting of counterparty data.

- Our working assumption is that these provisions will subsequently be on shored under other legislation⁴, and that the content of the reporting obligations in the UK and EU will not diverge. In any event, irrespective of onshoring, it is clear that UK counterparties entering into SFTs from EU branches will be subject to SFTR reporting.

4 Structure of the Agreement

- **General**

- The Agreement is expected to be structured as a main agreement, together with two or more annexes that address regulation or product specific requirements (for example, a derivatives annex and an SFT annex).
- It is envisaged that trading entities may execute a copy of the Agreement and choose to append one or more annexes.
- Each annex will contain a “Covered Transactions” concept that will determine the derivatives or SFTs, as appropriate, to which the relevant annex will apply.

- **Main Agreement**

We envisage including the following elements in the ‘front end’ of the Agreement:

- mechanics for voluntary delegation of reporting;
- mechanics for mandatory responsibility for reporting;
- provisions dealing with counterparty status transition;
- provisions dealing with responsibility for errors and the process for correction;
- liability and responsibility for data, and indemnities;
- confidentiality waiver;
- general representations (e.g. capacity/authority);
- interaction with existing reporting arrangements;
- boilerplate provisions (such as amendment and termination, force majeure, etc.); and
- governing law and jurisdiction.

- **Annex(es)**

We envisage including the following *general* provisions in each of the annexes:

⁴ Potentially the Financial Services (Implementation of Legislation) Bill.

- capacity in which the contracting parties are acting (e.g. principal, agent, fund manager);
- effective date of the particular annex;
- “covered transaction” concept to determine the scope of transactions subject to the relevant annex (including the dates from which such categories shall apply);
- in the EMIR annex, distinction between provisions that are relevant for OTC derivatives and those required for ETD contracts; and
- in the EMIR annex, election by an NFC- that is/not choosing to continue to self-report.

We envisage including the following *operational* provisions in the annexes:

- applicable notice periods or deadlines;
- contact and notice information, which may vary by product;
- identification of relevant trade repository(ies);
- for delegated reporting, category(ies) of data to be reported by delegate;
- for mandatory reporting, category(ies) of data to be delivered to FC (*see Question 5 below*);
- regulation-specific definitions; and
- election as to specific confidentiality waiver, if required.

5 Approach

• General

- The Agreement is expected to provide for both mandatory and delegated reporting of derivative transactions and SFTs entered into under standard industry documentation.
- The Agreement will use the ISDA/FIA form of delegated reporting agreement as a base as it already provides a mechanic for the voluntary delegation of reporting (*see Question 7 in the Annex hereto*).
- In addition, the Agreement may provide for the voluntary exchange of information where required to facilitate reporting by a single party. This may be relevant where one party is out of scope for the relevant reporting requirements but needs to provide data to its counterparty in order for that counterparty to satisfy its regulatory obligation to report.
- The project will not address other types of arrangements which are also potentially within scope of reporting. In particular, the project will not address margin lending by prime brokers and commodity transactions.

- We also note that it may not be appropriate for all related matters to be addressed in the Agreement. Certain other matters may be better addressed in the master trading document or relationship terms (rather than the Agreement). For example, responsibility for generating a UTI will arise even where there is no delegated or mandatory reporting and could potentially be addressed by a provision in other documentation, such as the GMSLA Schedule or GMRA Annex. *See Question 10 below.*
- **Counterparty status**
 - The Agreement is not expected to cover representations or provision of information by counterparties as to their regulatory status as an FC, NFC- or SME NFC (as applicable). Instead, we expect that this will continue to be addressed by separate arrangements – whether via client onboarding procedures or by use of other solutions, such as the ISDA Master Regulatory Disclosure Letter.
 - That said, the Agreement is expected to address the situation where parties change their status over time. For example, where an NFC- or SME-NFC ceases to have that status or a counterparty that has appointed an FC to report as its delegate becomes a NFC- or SME-NFC (thereby changing the regulatory obligations of that FC). *See Question 8 below.*
- **Covered transactions**
 - The Agreement is intended to cover transactions concluded once the relevant FC becomes subject to mandatory reporting (and, in the case of SFTs, once the SME NFC’s reporting obligation has been phased-in).
 - In the case of derivative transactions, where the FC was already reporting derivative transactions with the relevant NFC- prior to the mandatory reporting date, we envisage that whatever pre-existing delegated reporting arrangements are in place will continue to apply to ongoing reporting of modifications or terminations of such transactions. This could potentially be achieved by appropriate drafting of the “Covered Transactions” concept in the Agreement. *See Question 3 below.*
 - In the case of SFTs, consideration may need to be given to the following:
 - the phasing-in of reporting at different times and whether, where an FC that becomes subject to reporting in April 2020 is to make reports for its counterparty (under mandatory or voluntary delegation) from the time that counterparty is phased-in (i.e. at a later date), the FC may in practice wish to start reporting both sides of the transaction from April 2020;
 - due to the phasing-in of reporting, circumstances in which entities that are not yet required to report are required to provide data to their counterparties in order to facilitate the counterparty’s reporting (for example, this may be relevant to agency lenders which may need to provide data to borrowers from April 2020);

- the backloading obligation; and
 - whether the entity making the mandatory or delegated reports is in practice in a position to report any re-use of collateral (whether securities collateral or cash) by the counterparty, and what options might be provided for to cater for this scenario. *See Question 6 below.*
- **Brexit**
 - We propose that in view of Brexit uncertainties, the Agreement initially addresses reporting obligations arising under SFTR and EMIR (including a situation where the reporting is delegated to an entity that is not itself in-scope of SFTR or EMIR).
 - The Agreement can subsequently be modified, or a new annex drafted to cater for reporting under UK on shored SFTR and UK on shored EMIR when appropriate.

