

Changes to EMIR Reporting Responsibilities from 18 June 2020 – Key Considerations

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Derivatives reporting responsibilities under the European Market Infrastructure Regulation (EMIR) will change from 18 June 2020¹, as (i) alternative investment fund managers (AIFMs) will become responsible for reporting for their alternative investment funds (AIFs); and (ii) entities which are “financial counterparties” (FCs) will become responsible for reporting for their “NFC- entities”.

The changes do not apply to non-EU AIFs managed by non-EU AIFMs, which remain outside of the scope of the reporting obligations under EMIR. Non-EU AIFMs will need to be aware that they will be responsible for reporting for their EU AIFs, but may in practice delegate reporting to their contractual counterparties.

The key changes are as follows:

1. AIFMs responsible for reporting OTC derivative transactions by AIFs

EU and non-EU AIFMs² will be “responsible, and legally liable for reporting the details of OTC derivative contracts to which [their EU AIFs are] counterparty, as well as ensuring the correctness of the details reported.”³

While, as a practical and contractual matter, an AIFM already currently ensures that AIFs under its management comply with their regulatory obligations, including the EMIR reporting requirements, the changes shift the legal compliance obligation to the AIFM. As the changes only apply to over-the-counter (OTC) derivatives, AIFs will remain responsible for reporting the details of exchange-traded derivative contracts (ETDs),⁴ although this may be delegated in practice.⁵

Key considerations:

- AIFMs and AIFs may wish to consider adhering to the new industry-produced Master Regulatory Reporting Agreement (“MRRRA”) which is designed to cover the regulatory reporting requirements under the EMIR refit for OTC derivatives and ETDs.⁶

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2. FCs responsible for reporting OTC derivative transactions for NFC-counterparties

Presently, all FCs and NFCs, whether or not they exceed the clearing threshold, are required to report the details of OTC derivative and ETD contracts which they have concluded on a “T+1” basis.⁷ To reduce the regulatory compliance burden for NFC-entities, FCs will become “solely responsible, and legally liable, for reporting on behalf of [themselves and NFC- entities], the details of OTC derivative contracts concluded with [an NFC-], as well as for ensuring the correctness of the details reported.”⁸

NFC- entities (which no longer include AIFs but include special-purpose vehicles (SPVs)⁹ may choose to retain reporting responsibility for OTC derivatives, however they must inform the FC to avoid duplicate reporting.¹⁰ NFC- entities will need to provide FCs with the details of the OTC derivative contracts concluded between them “*which the [FC] cannot be reasonably expected to possess*”, and, “*shall be responsible for ensuring that those details are correct.*” The European Securities and Markets Authority (ESMA) Q&A on EMIR was recently updated to specify the information to be provided.¹¹

Industry associations had requested ESMA to issue a statement to national regulators not to prioritise supervision of the requirements given operational challenges in light of the COVID-19 pandemic.¹² As ESMA has not done so firms should comply fully from 18 June.

Key considerations:

- NFCs may wish to consider adhering to the new MRRA (referred to above), as this addresses delegated reporting arrangements under the EMIR refit, and transactions post-Brexit.¹³
- Where reporting is not delegated:
 - NFC- entities should notify their FCs as soon as possible if they do not wish for FCs to report on their behalf.
 - NFC- entities that wish for FCs to report for them may wish to clarify with their FCs whether any contractual amendments will be required. NFC- entities should decide whether FCs should report lifecycle events for trades entered into before 18 June which continue in effect after this date.¹⁴
 - NFCs should consider whether their classification may change from “NFC+” to “NFC-” in the future, as their FCs will be required to report on their behalf immediately from the time of their change in classification (unless requested otherwise).

3. Overview of changes:

Type of entity

EU AIF of an EU AIFM

Responsibility for reporting

EU AIFM responsible for reporting OTC derivatives (but not ETDs) of the EU AIF. Reporting ETDs remains responsibility of EU AIF. EU AIF may delegate reporting but retains responsibility for reporting.

Change to reporting responsibilities, as previously EU AIF responsible for OTC derivative and ETD reporting.

Non-EU AIF of an EU AIFM

EMIR reporting obligation does not apply.

No change to reporting responsibilities.

EU AIF of a non-EU AIFM

Non-EU AIFM responsible for reporting OTC derivatives (but not ETDs) of the EU AIF (subject to ESMA/regulator clarification to the contrary).¹⁵ Reporting ETDs remains responsibility of EU AIF. EU AIF may delegate reporting but retains responsibility for reporting.

Change to reporting responsibilities, as previously EU AIF responsible for OTC derivative and ETD reporting.

Non-EU AIF of a non-EU AIFM

EMIR reporting obligation does not apply.

No change to reporting responsibilities.

EU SPV

EU SPV responsible for reporting OTC derivatives and ETDs, unless NFC-, in which case FC counterparty is responsible for reporting OTC derivatives on behalf of NFC- (subject to EU SPV electing to retain responsibility).

NFC- SPV remains liable for reporting:

(a) ETDs (NFC- SPV may delegate but retains responsibility for reporting); and

(b) OTC derivative contracts entered into with a third-country counterparty that would be an FC were it established in the EU.¹⁶

Change to reporting responsibilities, as previously EU SPV responsible for all OTC derivative and ETD reporting where NFC-.

Non-EU SPV

EMIR reporting obligation does not apply.

No change to reporting responsibilities.

¹ Please see our previous Client Alert on other key changes under the European Market Infrastructure Regulation (EMIR) "refit": <https://www.akingump.com/en/news-insights/emir-refit-redefining-a-financial-counterparty-and-why-this.html>

² Subject to the position regarding non-EU AIFMs being clarified to the contrary, new Article 9(1c) of the EMIR refit states that "the **AIFM** shall be responsible, and legally liable, for reporting the details of OTC derivative contracts [...]." Further, recital (19) of the EMIR Refit states that "an **AIF manager** should be responsible and legally liable for reporting on behalf [...] [an] AIF." Neither provision indicates that the AIFM must be authorised and/or registered under the AIFMD for the provision to apply. In practice the non-EU AIFM may in any case elect to take on the reporting obligation and either report to a trade repository or delegate to a third party.

³ Article 9(1c), EMIR refit: "The AIFM shall be responsible, and legally liable, for reporting the details of OTC derivative contracts to which the relevant AIF is a counterparty, as well as for ensuring the correctness of the details reported."

⁴ OTC derivatives are derivatives which are **not** executed on a regulated market, or on a third country market considered equivalent to a regulated market. Conversely, ETDs are derivatives which are executed on a regulated market or on a third country market considered equivalent to a regulated market.

⁵ Legal responsibility for reporting will however remain with the delegating entity.

⁶ The MRRRA ([link](#)) was published by the Association for Financial Markets in Europe (AFME), Futures Industry Association (FIA), International Capital Market Association (ICMA), International Swaps and Derivatives Association (ISDA) and International Securities Lending Association (ISLA) in December 2019. The MRRRA is also designed to meet the requirements of reporting under the Securities Financing Transactions Regulation (SFTR).

⁷ Article 9(1), EMIR. Presently, both parties to the derivative contract are required to report.

⁸ Article 9(1a), EMIR refit.

⁹ Under the EMIR refit, the definition of FC was amended to include "an AIF which is either established in the Union or managed by an AIFM authorised or registered in accordance with [the AIFMD]" – essentially all EU AIFs are now FCs. As a result of the change in the definition of FC to include all EU AIFs, the hypothetical question, whether a fund would be an FC "were [it] established in the Union," will now always be answered affirmatively.

¹⁰ EMIR notes that this may be relevant for "[NFCs] who have already invested in a reporting system" (Article 10(1a), EMIR refit).

¹¹ ESMA Q&A on EMIR ([link](#)).

¹² Letter ([link](#)) from ISDA, Global Financial Markets Association (GFMA), AFME, Asia Securities Industry and Financial Markets Association (ASIFMA) and Securities Industry and Financial Markets Association (SIFMA) to ESMA of 27 April 2020.

¹³ Including delegation to a UK/EU trade repository, as may be required.

¹⁴ It is not clear whether the change in reporting responsibilities applies only to transactions executed on or after 18 June 2020, or whether lifecycle events of trades executed prior to 18 June 2020, and which remain live as of 18 June 2020, are in-scope. Counterparties should therefore confirm between themselves their preference for reporting lifecycle events under legacy transactions which remain live.

¹⁵ See footnote 2.

¹⁶ Article 10(1a), EMIR refit. Unless (i) such third-country reporting legal regime has been declared equivalent to EMIR; and (ii) such third country FC reports OTC derivative contracts to a trade repository in accordance with EMIR. Note that no regime has yet been declared equivalent.

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