

EU Securities Financing Transactions Regulation Reporting – Impacts for Asset Managers

January 23, 2020

Since publication of this Client Alert, the European Commission has clarified that non-EU AIFs which are managed by EU AIFMs are not subject to the SFTR reporting obligation – for further information, please refer to our [Client Alert](#) of March 11, 2020.

Introduction

The new European Union rules requiring reporting by fund managers of securities financing transactions (SFT) take effect on October 11, 2020. While the scope of the reporting requirements under Article 4 of the [Securities Financing Transactions Regulation 2015/2365](#) (SFTR) has been subject to some discussion,¹ the European Securities and Markets Authority's (ESMA) guidance² has provided helpful guidance in clarifying the extraterritorial reach of the reporting requirement. EU alternative investment funds (AIF) and Undertakings for the Collective Investment in Transferable Securities (UCITS) are within scope of the reporting requirement, and their EU managers will be formally responsible for their compliance with the reporting requirement. In addition, non-EU funds managed by EU fund managers and non-EU fund managers with an EU branch are directly subject to the reporting requirement under the SFTR. Non-EU managers of EU funds and/or acting as sub-investment managers will likely be affected by the new reporting requirements as a result of their contractual arrangements.

The new reporting requirements do not set out any exemptions other than with respect to central banks and similar. This means that there are no carve-outs for intra-group transactions or counterparties whose SFT activities are below a *de minimis* threshold. However, the new rules allow for delegated reporting. Managers will need to ensure that their systems produce and allow for the capture of the relevant information and take steps to put in place the relevant reporting or delegation arrangements by the relevant implementation date.

When Do the New Rules Take Effect?

In the course of the next 12 months, the obligation to report on SFTs under the SFTR will be phased in. Initial commencement dates for some counterparties will be in April 2020³ and July 2020,⁴ but for fund managers, the key date will be October 11, 2020. A

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final commencement date for EU “non-financial counterparties” (including some managed accounts) will be on January 11, 2021.

The reporting rules are new to EU law, and they are extensive and technical: for context, the quality and quantity of reportable data far exceeds the reporting requirements under the European Market Infrastructure Regulation (EMIR).

Scope

Under Article 3(11) of the SFTR, the Regulation applies to SFTs. SFTs are defined to include repurchase transactions, securities/commodities lending or borrowing, buy-sell back transactions/sell-buy back transactions and margin lending⁵ transactions. The SFTR explicitly excludes derivative contracts as defined under EMIR, however it does cover certain swap transactions with characteristics similar to SFTs that are not covered by EMIR, in particular, collateral swaps and liquidity swaps.⁶

Managers with EU presence. As noted above, the key date for investment managers will be October 11, 2020. On this date, the reporting obligation will commence for AIFs and UCITS in the EU.⁷ The reporting obligation will also apply to non-EU collective investment vehicles managed by an EU manager (or a non-EU manager from an EU branch). The SFTR specifies that a fund manager authorised under the Alternative Investment Fund Managers Directive (AIFMD) or a UCITS management company authorized under the UCITS Directive are responsible for reporting SFTs on behalf of the funds under their management. Non-EU managers with an EU branch are also directly subject to the reporting obligations in respect of the funds managed by the EU branch.

Non-EU managers. In addition, EU funds managed by non-EU investment managers are required to comply, although the responsibility for the reporting is not formally assigned to the manager under the SFTR. Nevertheless, as the manager is generally responsible for the fund’s compliance, it will need to put in place relevant arrangements. Similar, indirect application of the SFTR reporting requirement to non-EU managers may also arise with respect to EU managed accounts or sub-investment management arrangements where responsibility for the investment vehicle’s compliance with regulatory requirements is contractually allocated to the non-EU manager.

Meaning of an EU branch. A branch is defined under the SFTR as “a place of business other than the head office which is part of a counterparty and which has no legal personality.” EU subsidiaries or affiliates of non-EU investment managers which are set up as companies or other entities with legal personality therefore do not constitute a branch under the SFTR. ESMA’s guidance on the meaning of “concluded in the course of the operations” of an EU branch indicates that transactions booked by the EU branch are “concluded” by it.

Nonfinancial counterparties. As mentioned above, the commencement date for non-financial counterparties, including, for example, some managed account vehicles, is January 2021. Where a nonfinancial counterparty that is a small or medium sized enterprise (SME)⁸ enters into an SFT with a financial counterparty, the SFTR provides that the financial counterparty shall be responsible for reporting on behalf of both counterparties.

The Reports

If it is determined that there is a reportable transaction, Article 4 of the SFTR sets out the principal obligation. Under this provision, counterparties to SFTs must report the details of any SFT they have concluded, as well as any modification or termination of that SFT, to a trade repository which has either (i) been registered with ESMA or (ii) is recognised under an equivalence decision issued by the EU Commission. Reports must be made on a T+1 basis (i.e., no later than one working day after the SFT is entered into, modified or terminated). As under EMIR, firms are permitted to delegate their reporting duties.

The necessary contents of a report will vary according to the SFT in question. At a minimum, reports will need to include details about the counterparties to the SFT, the principal amount, currency, assets used as collateral, whether collateral is available for re-use, the repurchase rate, the lending fee or margin lending rate, any haircut, the value date and the maturity date. A full list of potential requirements, along with an indication of which requirement is relevant for which type of transaction, is available in the Annex to [Commission Delegated Regulation 2019/356](#). The records of SFTs must be retained for at least five years after the termination of a transaction.

As well as reporting for events occurring after the counterparty's relevant commencement date, firms will be under an additional obligation to report transactions which have been open for at least 180 days on their commencement date. Firms will have 190 days from commencement to discharge this "backloading" requirement.

Dual-sided reporting. The SFTR includes a concept of "dual-sided" reporting. Under this regime, counterparties to a transaction making a report will need to share information to ensure consistency, for example, when completing the "unique transaction identifiers" field. Counterparties not subject to the reporting requirement (either since the commencement date has not passed or they are simply out of scope) should therefore not be surprised if they are asked to share this sort of information.

Conclusion

Preparing for these new reporting obligations is expected to take firms some time and expense, particularly since the reports themselves can be extensive. Given that the reports must all be made on a T+1 basis, and especially given that firms may have a large "backload" of SFTs to report within the first 190 days, early preparation of the necessary systems and processes is advisable.

¹ While the scope expressed in Article 2(1) of the SFTR seems to clearly express the limited application to non-EU entities including only those that have an EU branch and conclude SFTs through the same, the definitions and the drafting more broadly allowed for a potentially more expansive reading.

² ESMA's [Final Report on Guidelines for reporting under Articles 4 and 12 of SFTR](#).

³ Investment firms and credit institutions.

⁴ Central counterparties and central securities depositories.

⁵ Margin lending includes, among other things, Lombard loans to undertakings (i.e., in a commercial context).

⁶ Recital 7 SFTR.

⁷ Insurance undertakings and occupational retirement schemes are also within this class of financial counterparties.

⁸ Undertakings which do not exceed at least two of the following three thresholds: balance sheet total: EUR 20,000,000; net turnover: EUR 40,000,000; and average number of employees during the financial year: 250.

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