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| Reply form for the  consultation paper on indirect clearing arrangements under EMIR and MiFIR |
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Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the questions listed in this Consultation Paper on Indirect clearing arrangements under EMIR and MiFIR, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

* if they respond to the question stated;
* contain a clear rationale, including on any related costs and benefits; and
* describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA\_ RTS\_INDIRECT\_CLEARING\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA\_RTS\_ INDIRECT\_CLEARING\_XXXX\_REPLYFORM or

ESMA\_RTS\_ INDIRECT\_CLEARING\_XXXX\_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Deadline

Responses must reach ESMA by 17 December 2015.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_RTS\_INDIRECT\_CLEARING\_1>

LME Clear is a clearing house established in the United Kingdom and has been established to provide central counterparty clearing and settlement services for the London Metal Exchange (the LME). The LME is the most liquid industrial base metals market in the world.

LME Clear welcomes the opportunity to contribute to the consultation on indirect clearing arrangements under EMIR and MiFIR. Please note that our comments are focused on the draft RTS under MiFIR, which will apply in respect of indirect clearing arrangements for ETD. However, many of these points will be equally applicable to the draft RTS under EMIR.

In summary, LME Clear’s view is as follows:

1. We agree with the suggested choice between an omnibus indirect account (NOSA) and gross omnibus account (GOSA) with collateral to be held at the CCP.
2. We believe that a very clear statement in the RTS that the collateral value of an indirect client in a GOSA is at risk from the losses on another indirect client’s positions is necessary.
3. We are concerned by the proliferation of accounts at the CCP which could be caused by the cumulative effect of Articles 3(1), 5(1) and 5(4).
4. We would like to emphasise that the CCP will only activate its default management process in the default of a Clearing Member and not in the default of a client or an indirect client. This is relevant to the question of whether the proliferation of accounts at the CCP is logical and proportionate.
5. We request further guidance on the scope of what constitutes an indirect clearing arrangement under the RTS, in particular when an arrangement can be considered to be of an OTC rather than an ETD nature.

We also refer you to the responses of the European Association of Clearing Houses (EACH) and FIA Europe to this consultation which both provide a good analysis of the issues raised by the RTS, some of which we have not addressed in detail as they will impact more heavily on Clearing Members than CCPs.

<ESMA\_COMMENT\_ RTS\_ INDIRECT\_CLEARING\_1>

Questions from the consultation paper

1. Do you agree with the proposed approach to require the choice between an omnibus indirect account and a gross omnibus indirect account with margin at the level of the CCP?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_1>

We agree with the suggested choice between an omnibus indirect account (NOSA) and gross omnibus account (GOSA) with collateral to be held at the CCP. We agree that this should not include collateral above the amount called by the CCP.

However, we believe that the current draft RTS is not clear enough as to the nature of the GOSA. Specifically, we would be grateful for a very clear statement in the RTS (possibly in the recitals) that the collateral value of an indirect client in a GOSA is at risk from the losses on another indirect client’s positions.

In addition, we do not agree that a Clearing Member should be required to open a separate NOSA and/or GOSA at the CCP for holding the assets and positions of the indirect clients of each client in the indirect clearing chain for the reasons set out below. Instead, we would support the suggestion set out in the EACH response that a single GOSA (and arguably a single NOSA) should be opened on a per Clearing Member basis.

We support the argument of FIA Europe regarding the proliferation of accounts at the CCP which could be caused by the cumulative effect of Articles 3(1), 5(1) and 5(4). In particular we refer you to the diagram provided as part of their response which illustrates the point well (attached below).



From a CCP perspective, we are concerned that sheer number of accounts will increase operational risk, cost and complexity. This may be particularly acute where a CCP has to liquidate the account in the default of a Clearing Member. If, for any reason, a CCP is unable to hedge or auction the accounts on a net basis then it is likely that default management costs will be increased and the amounts returnable to clients and, therefore, indirect clients will be reduced. We would also like to note that any splitting of netting sets between a large number of accounts is likely to lead to a substantial increase in margin requirements at the CCP. This ultimately makes clearing more expensive. There is also a question over whether the financial markets have the capacity to absorb CCP investment of cash margin in an EMIR compliant manner at substantially increased levels. This is something which policymakers should bear in mind whenever they make proposals which will lead to an increase of collateral required for clearing.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_1>

1. Do you agree with the proposed approach for the requirements related to default management? Do you think there are alternative level 2 requirements (compatible with the relevant insolvency regime situations and the level 1 mandate) that would achieve better protections?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_2>

We believe that it is very important to emphasise that the CCP will not play any part in managing the default of an indirect client. A CCP will only activate its default management process in the default of a Clearing Member and not in the default of a client or an indirect client. This is relevant to the question of whether the proliferation of accounts at the CCP-level caused by Articles 3(1), 5(1) and 5(4) is logical and proportionate (see above). We would be happy to discuss the involvement of CCPs in default management with you in more detail if helpful.

More generally, we refer to the response of FIA Europe on this issue which provides a good analysis of the issues which the current approach will raise for the industry.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_2>

1. Do you agree that the proposed approach adequately addresses counterparty risk throughout the longer chain by ensuring an appropriate level of protection to indirect clients? If not, are there alternative approaches compatible with Level 1?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_3>

We refer to the response of FIA Europe on this issue which provides a good analysis of the issues which the current approach will raise for the industry.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_3>

1. For longer chains, what other details (liquidation trigger and steps, flow and content of information, other) should be taken into account or what additional requirements or clarification should be provided in order to avoid potential difficulties when handling the default of a client or an indirect client facilitating clearing services?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_4>

We refer to the response of FIA Europe on this issue which provides a good analysis of the issues which the current approach will raise for the industry.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_4>

1. Do you consider that the new provision assigning by default to the indirect client the choice of an omnibus indirect account following reasonable efforts from the client to receive an instruction is appropriate? If not, what other considerations should be taken into account?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_5>

We do not foresee any issues with this provision.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_5>

1. Do you consider appropriate that the collateral provided on top of the amount of margin the indirect client is called for is treated in accordance with the contractual arrangements?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_6>

We welcome this provision. CCPs should hold collateral which is required in order to support their clearing activities and should not become repositories for additional margin in the financial system.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_6>

1. In view of the different amendments described above, do you consider that this set of requirements ensures a level of protection with equivalent effect as referred to in Articles 39 and 48 of EMIR for indirect clients?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_7>

[TYPE YOUR TEXT HERE]

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_7>

1. Please indicate your answers to the cost-benefit survey?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_8>

[TYPE YOUR TEXT HERE]

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_8>

1. Do you have any comments on the draft RTS under EMIR not already covered in the previous questions?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_9>

Our comments are focused on the draft RTS under MiFIR, which will apply in respect of indirect clearing arrangements for ETD. However, many of these points will be equally applicable to the draft RTS under EMIR.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_9>

1. Do you have any comments on the draft RTS under MiFIR not already covered in the previous questions?

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_10>

We have a particular question on the scope of what constitutes an indirect clearing arrangement under the RTS. The LME market uses the concept of Exchange Contracts (i.e. those contracts which are actually executed on the LME) and LME Client Contracts (i.e. those contracts between an LME Member and its direct clients which are subject to the rules of the LME). Only LME Members which are also Clearing Members of LME Clear or clients of Clearing Members with a specific non-clearing status (referred to as LME Category 4 Members) are permitted to issue LME Client Contracts to their clients under the rules of the LME.

We believe it is arguable that only LME Client Contracts issued by LME Category 4 Members are cleared ETDs in respect of indirect clients and that any trading which occurs elsewhere in a chain is OTC in nature. Since metals contracts are not currently subject to mandatory clearing this classification can make a major difference to what is expected in terms of indirect clearing.

We would therefore appreciate further guidance on when a chain of ETD is effectively broken by the existence of an OTC trade.

We would be happy to discuss this issue with you in more detail if helpful.

<ESMA\_QUESTION\_RTS\_INDIRECT\_CLEARING\_10>