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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>

[Nasdaq Clearing AB (Nasdaq Clearing) appreciates the opportunity to provide comments on ESMA’s Consultation Paper on indirect clearing arrangements under EMIR and MiFIR.

Nasdaq Clearing operates central counterparty clearing for derivative instruments and offers clearing of equity and index derivatives on Swedish, Norwegian, Finnish and Danish instruments; fixed income derivatives on Swedish, Norwegian and Danish underlying; commodity derivatives on Nordic power, emission rights, gas, German and Dutch power as well as freight, iron ore, fuel oil, electricity certificates and salmon derivatives and derivative contracts on the British electricity market. Nasdaq Clearing clears exchange transactions as well as OTC trades entered into outside the regulated markets and reported to the clearing house for clearing.

Our comments below are limited to the questions that will have the largest impact on us. It should be mentioned though, that we have had the opportunity to review the responses of the European Association of CCP Clearing Houses (EACH) and fully support them.

Please do not hesitate to contact Nasdaq Clearing if you have any questions or if there is anything you would like to discuss.]

<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>

[Nasdaq Clearing agrees with the intent of the draft RTS to offer appropriate protection to indirect clients, including indirect clients further down a longer chain. Nasdaq Clearing also understands that the indirect client must be given a choice between at least two account types and we agree in principal that the choice can be between omnibus net and omnibus gross, with the added option for the direct client/member to offer individually segregated accounts if this is agreed and requested by the indirect client, as proposed in the draft RTS.

Nasdaq Clearing has a joint account model for OTC and ETD and we are in favour of applying the same choices of accounts for OTC and ETD.

Nasdaq Clearing understands from the draft RTS that the proposed minimum requirement would be for the CCP to hold separate omnibus accounts (net or gross) for each direct client offering indirect clearing. Our understanding of the proposed solution implies a proliferation of accounts, mainly at the CCP and the clearing member, not least in the case of a longer chain where the member has multiple direct clients, with multiple indirect clients etc. Although Nasdaq Clearing is well placed to handle a large number of accounts (and currently has more than 70,000 client accounts in the system), we believe that the operational cost for managing this type of account structure in the industry would be prohibitive and lead to unintended consequences. The costs would increase through increased technical requirements, resources needed for reconciliation, etc. These increased costs would be passed on down the chain and might prevent clients and indirect clients from participating in central clearing, which in turn would lead to increased systemic risk.

Nasdaq Clearing considers that in order to avoid the negative consequences described above, the ideal solution would be to allow single omnibus accounts to be held at member level, i.e. one net and/or gross omnibus account per member, at the CCP. We see broad industry support for this solution and it is described in more detail in the consultation responses from EACH and FIA Europe.

If, despite broad industry support, this option is not chosen by ESMA, Nasdaq Clearing would like to propose a solution based on allowing a single gross omnibus account per member, as a third minimum alternative, in addition to the two omnibus alternatives described by Esme in the draft RTS (i.e. omnibus accounts held at direct client level). We believe that this option would provide increased protection for the indirect client compared to many current setups, while reducing the cost to the industry, and ultimately the indirect client, compared with the proposals in the draft RTS.

The proposed solution is described below.

In relation to all alternatives mentioned above, the direct client must ask its clearing member to hold its house positions and collateral in an account with the CCP that is separate from the account where the direct client’s indirect client positions and collateral are held. This account can be an omnibus account where the house positions and collateral for the member’s other direct clients are also held. This is in line with our understanding of the draft RTS.

Single omnibus account **per member** - gross

One single omnibus gross account would be set up for a member, with the CCP, holding the positions and collateral for all the indirect clients under the member. The account could thus hold positions and accounts for indirect clients belonging to different direct clients, but only those direct clients belonging to the particular member.

The member would be responsible for allocating positions to each indirect client, in the CCP system (e.g. in position sub-accounts). The CCP would calculate a margin requirement for each indirect client and aggregate these requirements to a single gross amount per omnibus account. The member would be responsible for posting this amount to the corresponding collateral account (i.e. one single collateral account per member for its indirect clients). As indicated in the draft RTS, the handling of excess collateral would be regulated in the agreement between the direct and indirect clients, implying that excess would normally not be posted to the CCP for indirect clients. Any excess collateral posted to the member’s indirect client collateral account with the CCP would not be automatically allocated to an individual indirect client and would be subject to fellowship risk between the indirect clients belonging to that member.

In the default of a direct client, the indirect clients belonging to the defaulting direct client would have the possibility to attempt to port positions and collateral to another direct client belonging to the member for which the gross omnibus account has been set up. This would be handled by the member and would only need limited support from the CCP in the form of transferring positions between subaccounts. Provided that the member continues to post the required collateral amount for the gross omnibus account, the CCP would have no reason to act.

Porting to a direct client of a different member would also be possible, but the likelihood of this succeeding would be lower than the likelihood of porting to a direct client belonging to the same member. The reason for this is that the porting would be more complex and would require an agreement between the give-up and take-up member on collateral value and unrealised settlement obligations.

Nasdaq Clearing is of the view that this model would provide appropriate protection for the indirect client, as both the position and the collateral value of each individual indirect client would be held at the CCP and porting would at least be more likely compared to the alternative involving a net omnibus model. It should still be noted that porting of collateral in any omnibus account is less likely to succeed compared to porting of an individually segregated account.]

<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>

[The main responsibility in a default, at any level in a chain, lies with the party directly above the defaulting party. For example, a CCP has a limited, or no, role in the case of a default of a direct client in an omnibus account (i.e. two levels down the chain from the CCP). The only role of the CCP in such a situation is to offer support to the member, e.g. simulation of margin calculations and possible transfers between accounts. If the direct client has an individually segregated account, the CCP has a slightly larger role and will support the clearing member in porting or closeout of the account.

If the client in the example above has indirect clients, the main responsibilities for protecting the indirect client lies with the clearing member and the CCP has a very limited role.

The limited role of the CCP in a default further down the chain should be considered when deciding how much information should be passed up the chain.]

<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>

[As described above, the CCP has a limited role in managing a default of a direct client of a clearing member, where the direct client has chosen an omnibus account setup. In the case of longer chains, where the aim is to protect clients of indirect clients, in the default of an indirect client, the CCP would have no role at all. It is therefore logical to restrict the level of detail held in the account structure of the CCP to the first four levels, which includes the direct client and its indirect clients.

In a situation where there are five levels in a chain, i.e. where the indirect client in turn has clients of its own, Nasdaq Clearing proposes that details of the fifth level would be held by the direct client and clearing member, i.e. not by the CCP. This logic would continue further down the chain, giving each indirect client the same options of segregation and protection, where the accounts reflecting these choices are maintained at the level directly above, two levels above and three levels above the indirect client in question. Each entity in the chain would thus have to hold accounts for a maximum of three levels below its own entity. It could possibly even be argued that it should be sufficient to hold accounts for a maximum of two levels below the own entity.

In a default in a longer chain as described above, those potentially involved in porting or liquidating accounts would be restricted to the entities directly above and two levels above the defaulting entity.

Nasdaq Clearing believes that this approach would limit the proliferation of accounts required while offering appropriate protection to indirect clients, including clients in longer chains. With the gross calculation and posting of positions and collateral, the protection of the individual indirect client is deemed to be significantly higher than in the net omnibus case and the likelihood of being able to achieve porting is also higher. It could therefore be argued that the level of protection for all indirect clients is equivalent to Articles 39 and 48 of EMIR.

<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>

[TYPE YOUR TEXT HERE]

<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>

[TYPE YOUR TEXT HERE]

<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>

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<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>

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

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

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

[Nasdaq Clearing would be able to set up a large number of position accounts for the benefit of indirect clients with low/medium costs; the costs would mainly be due to additional resources in account operations. With regard to holding the value of posted collateral for each indirect client, in a gross omnibus model, the cost would depend on the detailed requirements. If the CCP can use the calculated margin requirement as the basis for this value, this would not create significant additional costs. However, if the CCP is required to receive and hold information from the clearing member, including specific excess collateral values for each individual indirect client, this would require system changes which would involve significant costs. ]

<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>

[TYPE YOUR TEXT HERE]

<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>

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