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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**

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# Introduction

Please make your introductory comments below, if any:

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

[UBS is grateful for the opportunity to comment on the ESMA consultation paper on "Indirect clearing arrangements under EMIR and MiFIR". We are supportive of ESMA's decision to re-consult on the indirect clearing requirements under EMIR and MiFIR to take into account previous industry feedback.

The UBS Group includes investment banking and wealth management businesses. Both of these business areas will be significantly impacted by the proposed ESMA indirect clearing provisions. The UBS response to the consultation paper therefore seeks to highlight impacts from both an Investment Bank (clearing member and direct client) and Wealth Management (indirect clearer) perspective.

UBS has also contributed to, and supports, the responses of FIA Europe and ISDA to this consultation paper.

For several years now, the industry has collectively been working to devise a commercially viable approach to offering indirect clearing requirements for OTC derivatives that is compliant with the requirements under EMIR. But as of today, no solution has been found, and no OTC derivatives indirect clearing offerings are available. Whilst we believe some positive changes have been proposed by ESMA in the consultation, we have significant concerns with several of the proposals which we consider will have a seriously detrimental impact of the functioning of the existing ETD indirect clearing model and likely result in no workable OTC derivative indirect clearing model emerging.

**We do not believe that the requirements in the EMIR and MiFIR Level 1 legislation for indirect clients to benefit from protections with equivalent effect to those for direct clients are feasible in the absence of national client asset regimes across the EU that provide appropriate client asset protections at all levels of the clearing chain.** We do not consider that operational segregation of ICs' assets and positions in the books and records at each level of the chain will be effective in the absence of such national client asset regimes. In order to make the Level 1 "equivalent effect" obligation viable, it is imperative that there is a robust legal construct in EU and national legislation to ensure an equivalent level of protection, rather than a reliance on bespoke arrangements to be devised by counterparties at each level of the chain. The latter approach is simply not scalable and will not result in a robust, uniform or commercially viable approach. We note that ESMA is of the opinion that EMIR Article 48(7) overrides national insolvency law. Whilst this view is untested and subject to challenge, if the policy intent is that it does override national insolvency law, then we think that a similar approach to that should be taken in respect of the indirect clearing structures as opposed to putting the onus on clearing members (CMs) and direct clients (DCs) to individually validate the effectiveness and potentially supplement national client asset protections by putting in place additional bespoke structures.

Regarding the specific proposals in the consultation paper, we believe the proposal in the RTS for a new type of Gross Omnibus Segregated Account (GOSA) account, and associated requirements regarding the functionality associated with such accounts, will require CCPs, CMs, DCs and indirect clients (ICs) and any additional entities in the chain to develop systems, change booking models, controls and procedures to support this new account functionality which will differ from CCP to CCP and therefore be highly complex and costly. The indirect clearing requirements are also likely to require the repapering of all indirect clearing arrangements (regardless of whether the client selects an omnibus or gross omnibus account). This would impact thousands of legal relationships along the entire clearing chain (including structures to meet the Article 5(8) obligations) which will be extremely burdensome and costly for CMs, DCs, indirect clearers and ICs. For direct clearing, it has proven difficult for clients to sign the FOA Clearing Module so a re-documentation exercise of this scale would be incredibly resource intensive and costly at all levels of the chain.

The ESMA proposals will require fundamental changes to the current collateral model that is typical in ETD indirect clearing arrangements offered by wealth managers where collateral provided by wealth management clients to wealth managers is held on a regular pledge only, so not passed through to the next party in the chain. The broker side is usually funded from the wealth manager's own working capital and assets, on behalf of the wealth management clients. The reason for this is that physical collateral transfer for hundreds and thousands of often small end client accounts would be extremely administratively burdensome and cost intensive. **We believe the changes to this model** **(which is long-standing and accepted by indirect clients) required by the ESMA proposals will increase the operating and collateral costs for the end client significantly and likely make the costs of clearing prohibitive.**

In summary, we are concerned that the proposals in the draft RTS will entail a number of challenges which could result in the widespread withdrawal of ETD indirect clearing arrangements in light of the resultant operational, documentation, business, capital / collateral and compliance requirements. **In view of this, we do not consider the ESMA proposals to be workable in the proposed form. Fundamentally, we do not consider that the EMIR and MiFIR Level 1 requirement for indirect clients to benefit from protections equivalent to direct clients can be achieved in a scalable manner without (a) changes to EU client asset regimes and (b) changes to the proposed account model and booking model requirements to allow a more simplified gross omnibus account structure within an indirect clearing chain.**

Recognising that the necessary changes to EU client asset regimes will not take place in the short term, we believe that an interim regime in the period before the more fundamental changes that are required can be implemented, should focus on delivering an indirect clearing solution that meets clients’ clearing access requirements but is also legally robust and operationally scalable. Consistent with this, we believe the EMIR and MiFIR regimes should be based on the following principles:

* Disclosure of segregation arrangements / risks to the indirect client and client choice regarding the level of protection received, instead of a need to offer both a net omnibus indirect clearing account (NOSA) and gross omnibus indirect clearing account (GOSA).
* It should be sufficient for each CM to open one NOSA and/or GOSA at the CCP for holding the assets and positions of all of its indirect clients (segregated from its direct clients' and house business) with no additional segregation at each level of the indirect clearing chain.
* Allow indirect (bank) participants to continue to hold client non-cash collateral on regular pledge, so on custody, which provides an effective collateral protection option to the end client in most jurisdictions today, in combination with a net omnibus account for the indirect participant on its broker side.
* A scope that focuses exclusively on EU entities and does not capture non-EU entities, or provides flexibility for indirect clearing arrangements that include non-EU entities to be permissible with adequate disclosure of the risks. Special emphasis should be given in respect of cases where a non-EU entity is included within the clearing chain, interposed between EU-entities, as would be typically the case with UBS Wealth Management ("WM") clearing arrangements and for DC investment banking entities outside of the EU (e.g. UBS AG). It is important that such non-EU entities should clearly not fall in scope of the draft RTS given the concerns this would create in respect of potential conflicts of law issues (e.g. insolvency). ]

<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>

[**Impacts of the proposed approach**

**From the perspective of UBS as CM and DC:**

We are concerned that Article 3 of the MiFIR RTS is intended to require a CM to open a separate NOSA and/or GOSA at the CCP for holding the assets and positions of the ICs of each DC of the CM (i.e. at least one IC omnibus account per DC). We are also concerned that this level of segregation is required to be replicated at each level of the indirect clearing chain.

**If our interpretation is correct, we are seriously concerned that this would require a huge number of accounts along the length of the chain. We believe this would increase the complexity, cost and operational risk of indirect clearing obligations to an unworkable level.** This would also mean that ICs receive a greater level of segregation than DCs of the CM, whose assets and positions could be recorded together with the other clients' assets and positions in a single omnibus account at the CCP. **We therefore strongly believe that the focus should first be on national client asset protection regimes rather than operational segregation of assets through books and records at each level of the chain.**

**From the perspective of UBS as an Indirect Clearer:**

From the perspective of UBS entities servicing clients out of Switzerland, we believe the proposed requirement to offer a choice of accounts to clients would be too cost intensive and would require a complete overhaul of our systems. The changes will require not only a change to the existing indirect clearing business model, but will also involve a repapering of all ICs through the chain. This is highly likely to be too onerous for servicing individual clients that do not have a high trading volume. Client populations with limited trade volumes may not be able to have access to derivatives going forward and will therefore struggle to hedge their positions, as the industry may discontinue certain offerings due to cost and risk issues. Risks considered in daily clearing business (transit risk, liquidation risk, haircut risk and fellow client risk) could be amplified or may not reflect the accurate value of the margins passed through the chain.

Given the forms of collateral being accepted (mostly cash only, and in WM in the form of pledges transferred to the entity providing the ETD service, with this entity itself funding the collateral to be posted further up the clearing chain), and given that the collateral is calculated at a client entity level as opposed to a product specific level, the funding of collateral to be posted further up the clearing chain is achieved without requiring individual client collateral accounts to be set-up and managed. Consequently, if the ESMA proposals were to come into force, the collateral costs for the end client may increase significantly.

**Recommended approach:**

**We strongly believe that the focus should first be on strengthening national client asset protection regimes to ensure an equivalent level of protection, rather than increasing operational segregation of assets through books and records at each level of the chain and requiring bespoke legal agreements to be put in place by firms.**

**We consider that it should be sufficient for each clearing member to open one NOSA and/or GOSA at the CCP for holding the assets and positions of all of its ICs, segregated from DCs' and house business.** This would be consistent with the aim of the GOSA/NOSA structure, which was introduced as an operationally simpler choice of account structures, as per Recital 4 of the MiFIR RTS, in order to mitigate the increased complexity of indirect clearing, due to the greater number of entities between the CCP and end IC. This level of segregation is also consistent with Recital 5 of the MiFIR RTS, which refers to "*ensuring a separation between the collateral and positions of the end indirect client and the collateral and positions of the client providing clearing services*".

**It should also be sufficient at each level of the indirect clearing chain to have only a single GOSA and/or NOSA for all ICs.** It should also be sufficient at each level of the indirect clearing chain to have only a single GOSA and/or NOSA for all ICs. This would assist with the operational implementation of requirements but would not resolve the legal burden that is required for NOSAs and GOSAs under the requirements. We propose that indirect (bank) participants should continue to be allowed to hold client non-cash collateral on regular pledge, so on custody, which provides an effective collateral protection option to the end client in most jurisdictions today, in combination with a net omnibus account for the indirect participant on its broker side.

We note that this would assist with the operational implementation of requirements but would still not resolve the legal burden imposed for NOSAs and GOSAs under the requirements.]

<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>

[**Default management**

**Porting**

**We do not support the proposals to reintroduce porting for the IC at the CM level upon a DC default under both EMIR and MiFIR and propose that they are deleted.** In our view, porting is likely to be subject to challenge under local insolvency laws which cannot be over-ridden by the RTS. We understand that ESMA has tried to address the insolvency law issue by introducing an “obligation of means” as opposed to an “obligation of results”. However, it is not clear to us that the “obligation of means” reduces the obligations materially, as it is not clear how a CM can be expected to make any promises upon a client default other than to immediately risk manage its position in the manner it deems most appropriate (including by immediate close-out).

We question whether an “obligation of means” would allow a CM to introduce a process without any substance or one that can be disapplied at the CM's complete discretion. It is important that a realistic picture of available default management processes is given to the IC and that a false impression of the range of realistic options is not given. We are of the view that structures should only be required to be put in place if there is sufficient certainty that the insolvency regime would permit such structures to operate effectively.

We also note that whilst the term “obligation of means” is referenced in the narrative section of the consultation paper, it is not referenced in the draft EMIR or MiFIR RTS. The term is therefore not defined and its legal status is very unclear meaning CMs are unlikely to be able to take much, if any, comfort from the change in the nature of the obligation.

From a practical perspective, we consider it highly unlikely that a CM would be able to port the assets and positions of indirect clients from a defaulting client to another client. For porting to have any chance of succeeding it would be necessary for all indirect clients to request porting and have arrangements in place with the same backup client. We also note that porting would result in Know Your Customer (KYC) issues since the CM would be required to face ICs with which it may have had no prior relationship for an interim period prior to porting. As ETD is a highly liquid market, closing (including close-out netting) followed by re-opening the positions can be achieved more easily than porting. Close-out netting is generally already provided as a business as usual right of the client. A lack of flexibility to risk manage counterparty exposure of a defaulting client and its customer business could lead to a contamination effect at more points in the indirect clearing chain.

**Leapfrog payments**

Similar to porting, ESMA has made the obligation under EMIR and MiFIR for CMs and DCs to make leapfrog payments to ICs an "obligation of means". We again raise our strong concerns regarding the lack of legal clarity as to what an "obligation of means" entails. We highlight that we consider leapfrog payments to be highly problematic from an insolvency law perspective (especially in cross-jurisdiction set-ups) and we do not believe that CMs or DCs will be able to take comfort from changing the obligation from an “obligation of results” to an "obligation of means".

We also note that a CM or DC may be unable to facilitate leapfrog payments to an IC for reasons such as KYC and anti-money laundering requirements. Our understanding is that the RTS do not require a CM to conduct customer due diligence on all ICs in a chain upfront which we support as we do not think it would be proportionate to require this. However, this means that a CM would potentially have a much smaller window following a DC default to perform such checks which may be impracticable.

**Given the above, we consider it important that ESMA provides further clarity on the circumstances in which it would not be necessary for a CM to make a leapfrog payment.** For example, it is important that clarity is provided on whether a CM could choose not to make a leapfrog payment in circumstances where there is perceived risk of insolvency challenge to any attempted or completed leapfrog payment; or where there are concerns regarding the allocation of shortfalls amongst ICs; or where the information provided by the DC to the CM regarding the IC was incorrect.

**Article 5(8)**

Article 5(8) of the draft EMIR and MiFIR RTS states that:

"*A client shall have the necessary arrangements in place to ensure that any liquidation proceeds received by the client for the account of one or more indirect clients does not form part of the client’s insolvency estate*".

In the absence of existing relevant insolvency law protections, we believe this would require CMs and DCs to put in place bespoke arrangements with ICs whose enforceability and recognition will depend on the insolvency laws of the relevant jurisdiction(s) of the entities in the chain. It is very unlikely that a scalable solution can be found to meet this requirement in a way that makes commercial sense to the overall business. We consider that the proposals in Article 5(8) go beyond the obligation of means approach and that ESMA should instead seek to rely on European legislation / national insolvency law as opposed to requiring CMs and DCs to seek novel ways to override insolvency laws from a contractual perspective. We note that ESMA is of the opinion that EMIR Article 48(7) overrides national insolvency law. Whilst this view is untested and subject to challenge, if the policy intent is that it does override national insolvency law, then we think that a similar approach to that should be taken in respect of the indirect clearing structures as opposed to putting the onus on clearing members (CMs) and direct clients (DCs) to individually validate the effectiveness and potentially supplement national client asset protections by putting in place additional bespoke structures.

Whilst the obligation falls on clients, it is unclear whether there is any obligation on a CM to verify the compliance by clients with this requirement. This creates uncertainty for the CM in terms of whether it may have any liability should the obligations not be met by any clients in the chain.

We also note that neither EMIR nor MiFIR Level 1 contemplates such an obligation. **In light of the above concerns, we believe that Article 5(8) of the draft EMIR and MiFIR RTS should be deleted.**

**Limits to CM obligations along indirect clearing chain**

It is not fully clear from the consultation paper as to which other counterparties in an indirect clearing chain the CM has obligations towards. We do not consider it appropriate for a CM to have obligations to any ICs beyond the immediate IC of the DC. This is because a CM will generally not have any visibility on ICs below the IC which is the immediate client of the DC. Also, because each intermediary will look only to its immediate client to ensure performance, the failure of that immediate client will be the trigger for the intermediary taking action to preserve its own risk position and manage the default accordingly (irrespective of the ongoing solvency or otherwise of end-ICs further down the chain).

**Therefore, we believe any obligations which a CM owes to ICs in respect of porting and/or leapfrog payments should be limited to the ICs who are the immediate clients of the relevant DC.** There should be no expectation that leapfrog payments might be made by a CM to an IC who is a client of an IC (i.e. in the event that the DC and IC which is the immediate client of the DC were to default). The same should remain true of the obligations owed in turn by the DCs and ICs who are acting as intermediaries (i.e. their obligations reach down two steps in the intermediary chain only).

We believe this should be clarified in the RTS.]

<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>

[**Longer chains**

We understand the draft MiFIR RTS have the effect of bringing into scope of the MiFIR indirect clearing regime entities that receive ETD clearing services from ICs. This understanding is based on the definition of an "indirect client" as "*an undertaking with a direct or indirect contractual relationship with a client of a clearing member which enables that undertaking to clear its transactions with a CCP*" and Article 5(1) which states that "*An indirect client that provides indirect clearing services shall be subject to the requirements of paragraphs 2 to 8 as if it were a client*".

We understand ESMA's intention of applying the requirement to longer chains is to deliver protection down to the end counterparty but we consider it vital that ESMA sets out very clearly the level of protections it considers should be afforded to counterparties at each link of the chain.

We highlight that applying the requirements to longer chains introduces a number of additional complexities and uncertainties will exacerbate the other general issues that apply to a four party chain. In particular, it will be much more likely that one or more of the parties in the chain is a non-EU domiciled entity potentially subject to conflicting insolvency law, and the greater degree of separation between the CCP and end indirect client make operational issues such as information flows more difficult. **In light of this, we stress our view that the protections proposed by ESMA in the consultation paper should only apply to EU domiciled counterparties and that ESMA should clarify that clearing chains involving non-EU domiciled counterparties should be "permissible". Further, it is to be mentioned that as soon as a non EU-domiciled counterparty is in the chain, the requirements as per the RTS cannot be met further down / up the chain. Therefore, the EU domiciled ICs should have no obligation to comply with the RTS as soon as there is a non EU-domiciled party further up the chain.** ]

<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>

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<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>

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<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>

[**Direct costs**

*Investment Bank:*

* There will be a substantial negative impact to client access because certain clearing flows will no longer be permissible or are incompatible from an insolvency regime perspective.
* Indirect clearing requirements will have significant front to back processing implications, including execution, allocation, collateral processing etc. Next to the one off cost for implementation there are ongoing IT and operational costs to support the new set ups and processes. The costs will be significant both in terms of infrastructure and people.
* Our staff costs will be substantial, both for the change resources to detail the business change requirements, and the technical requirements to implement the regulatory requirements for the sales & client facing staff, legal and on-boarding teams. Our sales and client facing staff will need to ensure the clients fully understand the EMIR and MIFIR requirements and ensure that where we are offering indirect clearing, it is clear the terms on which this service will be offered.
* In addition to our sales and client facing teams, our legal department would need to re-document clients to ensure they are in line with regulatory requirements and, if GOSAs are requested, our on-boarding teams and operations teams will need to arrange for the new accounts to be opened internally and at the CCP and position transfers to be initiated to move positions from the NOSA to the GOSA.

*Wealth management /IB entities outside EEA further down the chain as the CM:*

Key impacts include the following (in descending order of importance):

* Setup/registration of additional accounts for offering the choices (NOSA & GOSA) across our Global WM client base
* IT costs for supporting these additional account structures, including the appropriate account handling, reporting, monitoring and client facing documentation; including both change the bank and run the bank costs
* Requirement to enhance documentation for contractual clearing terms and conditions including jurisdictional variations for both NOSA & GOSA structures
* Re-papering of existing clients from indirect clearing solution to the revised terms and conditions including customised agreements and complex legal validation for global account domiciles
* Client by client migration to new account T&Cs, training, explanations, support to transfer collateral and information collation for the CCP
* Accounting changes regarding balance sheet treatment of assets/liabilities across transitioned and new account setups
* Collateral handling changes including costs of transfer of collateral, direct transfers of assets and replacement of existing pledge structure – impacts processes, reporting, manual validations monitoring and reporting
* Capacity to handle greater granularity for coping with margin calls, change of domiciles for client documentation, intraday funding requirements and internal reporting to understand individual daily position updates
* Reporting, tracking and monitoring for collateral including limits and margin call handling
* Updated policies and procedures for managing accounts for these products as well as legal framework validation, compliance and risk assessments, operations and accounting process changes, training across all impacted business areas and documentation to support the clients and client advisors for these changes
* Additional charges from the CCP for a greater number of accounts as well as supporting a less static client base with ‘natural persons’ often moving domiciles, bank accounts, addresses etc, all of which have to be maintained with the CCP and/or the direct clearing member
* Change of service offering for WM clients including revised documentation, training for client advisors and closure of existing account structures which choose not to move to the proposed model
* Additional changes to contracts and client agreements on default management requirements due to changes introduced by the respective DC, CM and CCPs
* External counsel costs of due diligence opinions on porting and leapfrog compatibility with clients local insolvency law / regimes

**Indirect costs**

Investment Bank:

* There will be a substantial negative impact to client access because certain clearing flows will no longer be permissible or are incompatible from an insolvency regime perspective.
* There will also be opportunity costs to clearing businesses. The scale of change to the business will be resource intensive which will divert resources away from servicing new clients. We also believe client interest and uptake of individually segregated accounts under EMIR will increase. However, in order for this to happen, clearing houses and clearing members will need to continue to invest. With the short implementation timeline and the significant amount of infrastructure and people cost, this investment in individually segregated accounts will also be an opportunity cost.
* Transactions costs for clients will increase. If the uptake of GOSAs is similar to what we have seen under EMIR for ISAs (i.e. very low), there is still a cost to the business to make these changes which will needed to be funded. This will mean increased costs to end users.
* Clients will see fragmentation of relationships, where historically they had one global provider. Clients will incur additional legal, on-boarding and operational costs in doing this.
* There will likely be clearing member exits due to high cost of compliance as the clearing business is one which already requires economies of scale to be profitable. This exacerbates the problem.

Wealth Management:

* Loss of opportunity costs for assets transferred as collateral which cannot be used for other purposes as per the current pledge agreement structure
* Loss of WM business revenue as smaller or less frequent client investors will not be able to sustain this product type due to the increased costs or inflexibilities of being set up with the proposed accounting structure]

<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>

[**Scope of application**

**Application to non-EU, EMIR recognised CCPs**

As per EMIR Q&A CCP 8(j)), ESMA has clarified that EU CMs of non-EU CCPs are not required to comply with Article 39 EMIR when offering client clearing to DCs (ESMA Q&A CCP 8(j)). The recognition process under EMIR Article 25, which includes an assessment of the adequacy of segregation requirements, should ensure adequate client protection for EU clients. We believe the same approach should be followed for indirect clearing. We believe it would be inappropriate for ESMA to apply specific requirements on non-EU CCPs in respect of indirect clearing since they are not subject to EMIR.

It should be acceptable for compliance with EMIR to be satisfied by a recognised CCP either on the basis that (i) the equivalent protection limb does not apply in the context of recognised CCPs (with the recognition process ensuring comfort on the protections provided by recognised CCPs); or the equivalent protection limb does apply but is deemed satisfied by the recognition process.

Whilst non-EU CCP services comparable to gross omnibus arrangement might exist, the detailed set-up may not be exactly the same as required under the RTS and any obligation upon the CM and/or DC to demonstrate comparability would be onerous and should not be required, on the basis that the jurisdiction in which that non-EU CCP is operating has been deemed equivalent.

Where the equivalent protections limb is either disapplied or deemed satisfied following the recognition process in respect of a recognised (non-EU) CCP, we propose that indirect client clearing arrangements should be permitted provided there has been appropriate disclosure to the IC by the DC. The minimum disclosure should highlight (i) the protections that EMIR provides to an IC if an authorised CCP, EU CM and EU DC are used, (ii) that recognised CCPs are not subject to the same detailed client protection requirements of EMIR and (iii) that, by choosing to satisfy the EMIR Clearing Obligation by way of an indirect clearing arrangement through a recognised CCP, the IC will not receive those protections. This disclosure obligation should be imposed at the DC level on the basis the DC will have the customer relationship with the IC and will also have a choice as to which CCP(s) and which CM(s) it will use to facilitate its services to ICs.

**Application to EMIR authorised CCPs in the case of non-EU CMs and/or DCs**

Both EU and non-EU CMs of EU CCPs may be subject to Article 39 EMIR when providing clearing services to DCs. However, ESMA’s Q&A CCP 8(i) provides that where the insolvency regime of a non-EU CM could interfere with the provisions of omnibus client segregation or individual client segregation, the CM should: (i) offer its clients alternative possibilities that ensure those clients receive such a choice of protections – e.g. clearing solutions provided by an affiliate or other clearing member of the CCP and (ii) where, notwithstanding the alternatives offered, the client chooses to use the non-EU CM, disclose the risks to the client at the outset of the relationship.

This approach was essential in order to recognise that non-EU CMs subjected to the requirements of EMIR could not be expected to act outside the scope or possibilities of the legal and regulatory regimes within which they operated. We consider that the same issues arise in relation to indirect clearing, and indeed are likely to be more prevalent in practice since there will be at least two intermediaries (CM and DC) whose positions need to be taken into account. Taking any other approach in the context of indirect clearing would potentially add significant geographical limitations on the entities capable of acting as CMs and/or DCs. **A solution which retains the features of alternatives, client choice and appropriate disclosure should be extended for circumstances where the CM and/or DC involved in providing indirect clearing access to an authorised CCP is non-EU. The same principles should apply to an IC1 providing indirect clearing access to an IC2 and further down the chain.**

That is, where the insolvency regime of a non-EU CM or non-EU DC could interfere with the provisions of relevant IC segregation options, the DC should: (a) offer ICs or suggest ICs may wish to seek alternative possibilities that ensure those clients receive such a choice of protections – e.g. clearing solutions provided by an EU CM of the CCP or by another CM/DC arrangement; and (b) where, notwithstanding the alternatives offered, the client chooses to use the non-EU CM/non-EU DC arrangement, make appropriate disclosure to the IC at the outset of the relationship. The same principles should apply to an IC1 providing indirect clearing access to an IC2 and further down the chain.

The same approach to disclosure in respect of recognised CCPs should apply here.

**Application to non-EU ICs**

As per our comments on the scope of the MiFIR indirect clearing rules, we are of the view that non-EU ICs should be excluded from the scope of the indirect client clearing requirements. However, we recognise that some non-EU ICs may be subject to the EMIR clearing obligation and be required to use EMIR authorised or recognised CCPs.

**Discretion to offer indirect clearing services**

We emphasise our strongly held view that indirect clearing should not be made mandatory under EMIR or MiFIR. CMs should have discretion as to whether they offer indirect clearing services at all and where they do, they should have discretion as to which clients they are willing to offer indirect clearing services to, on the basis of objective, risk-based criteria. There are many potentially legitimate reasons why a CM would seek to limit access to indirect clearing services to a subset of its clients such as on risk, legal or commercial grounds. ]

<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>

[**Scope of requirements**

**Application to non-EU CCPs**

We are of the view that the MiFIR indirect clearing RTS should only apply in respect of ETDs (i.e. derivatives traded on an EU regulated market or an equivalent third country market) cleared on an EU CCP and should not apply to third country CCPs as we consider this to go beyond the scope of MiFIR. We consider this CCP scope to be consistent with MiFIR Level 1, as Article 30(1) MiFIR states that indirect clearing arrangements are permissible provided they do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with "*equivalent effect*" to that referred to in EMIR Articles 39 and 48. ESMA's EMIR Q&A CCP Q8(j) has clarified that the requirements of EMIR Article 39 apply only to EMIR authorised CCPs, whereas non-EU CCPs wishing to provide clearing services to EU clearing members or trading venues would instead be subject to the third country recognition procedure in Article 25 EMIR.

**Application to non-EU ICs**

In our view, the scope of the MiFIR indirect clearing requirements should be limited to ensuring protections for EU ICs only and should not extend to non-EU ICs in an indirect clearing chain. In cases where an indirect clearing chain consists of both EU and non-EU ICs, we believe it would be appropriate for each entity in the clearing chain that is subject to the requirements of the MiFIR RTS to comply with its own obligations under the MiFIR RTS.

**Discretion to offer indirect clearing services**

Please also see our response to Q9 above regarding our view that offering indirect clearing services should not be mandatory.]

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