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| 11 July 2014|2014/799 Reply Form |

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| Reply form to the Consultation Paper on the Clearing Obligation under EMIR (no. 1) |
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| Date: 11 July 2014  2014/799 Reply Form |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the questions listed in the Consultation Paper on the Clearing Obligation under EMIR (n0. 1), published on ESMA’s website.

Comments are most helpful if they:

* respond to the question stated;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

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

ESMA will consider all comments received by **18 August 2014.**

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

How to use this form to reply

Please note that, in order to facilitate the analysis of the responses, ESMA will be using an IT tool that does not allow processing of responses which do not follow the formatting indications described below.

Therefore, in responding you are kindly invited to proceed as follows:

* use this form to reply and send your response in Word format;
* type your response in the frame “TYPE YOUR TEXT HERE” and do not remove the tags of type <ESMA\_QUESTION\_1> Your response should be framed by the 2 tags corresponding to the question; and
* if you have no response to a question, do not delete the tags and leave the text “TYPE YOUR TEXT HERE” between the tags.

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’.

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from financial and non-financial counterparties of OTC derivatives transactions which will be subject to the clearing obligation, as well as central counterparties (CCPs).

# General information about respondent

|  |  |
| --- | --- |
| Name of the respondent | EFAMA |
| Are you representing an association? | Yes |
| Activity | Investment Services |
| Country/Region | Europe |

# Introduction

**Please make your introductory comments below:**

<ESMA\_COMMENT\_1>

EFAMA is the representative association for the European investment management industry. EFAMA represents through its 27 member associations and 62 corporate members almost EUR 17 trillion in assets under management of which EUR 10.2 trillion managed by 55,000 investment funds at end March 2014. Just over 35,600 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit [www.efama.org](http://www.efama.org/)

Despite the short deadline, we welcome the opportunity to respond to the ESMA Consultation on the Clearing Obligation under EMIR (n°1).

**Executive summary**

1. **Clearing obligation procedure.** EFAMA welcomes the proposal made by ESMA for the clearing obligation procedure, and generally agrees with the proposed structure for the interest rate OTC derivative classes (see however our detailed reply to Question 2 of the Consultation Paper for further details)**.**
2. **Phase-in approach for regulated investment funds**. We strongly agree with ESMA’s proposal and **welcome the lengthy phase-in of 18 months for category 2 counterparties** (e.g. UCITS and AIFs), as this gives our members sufficient time to prepare for clearing (see our reply to Question 8 of the Consultation Paper).
3. **Front-loading requirements.** We welcome the proposal to effectively limit front-loading to contracts entered into during period B. **We are concerned, however, that the practical impact of the application of front loading to contracts with a minimum remaining maturity of 6 months, on the date of application of the clearing obligation will mean that the phase-in will be of little practical use to a large number of category 2 counterparties.** We therefore recommend alternative approaches to ESMA (see our reply to Question 9 of the Consultation Paper).
4. **Public register**. EFAMA supports the principle of a public register available on ESMA’s website. Such register will indeed enable all market participants (including investment fund management companies) to access in a timely manner all relevant data belonging to a class of OTC derivative contracts which is subject to the clearing obligation. This will also help reducing research costs incurred by market participants who will no longer have to conduct their own research for each authorized or registered CCP. We have some concerns, however, on the practical implications of the public register process, in particular in cases where derivative classes should be removed from the register (see our reply to Question 4 for further details).

<ESMA\_COMMENT\_1>

# The clearing obligation procedure

Question 1: Do you have any comment on the clearing obligation procedure described in Section 1?

<ESMA\_QUESTION\_1>

We have no particular comments on the clearing obligation procedures described in Section 1 of the Consultation Paper. We are supportive of ESMA’s approach consisting in grouping the analysis of the notified classes of OTC derivatives in a minimal set of consultation papers, grouped by asset classes.

<ESMA\_QUESTION\_1>

# Structure of the interest rate derivatives classes

## Characteristics to be used for interest rate derivative classes

Question 2: Do you consider that the proposed structure defined here for the interest rate OTC derivative classes enables counterparties to identify which contracts fall under the clearing obligation as well as allows international convergence? Please explain.

<ESMA\_QUESTION\_2>

EFAMA generally agrees with the proposed structure of the interest rate OTC derivatives classes.

However, we are concerned that the draft RTS do not adequately reflect the proposed structure as outlined in the consultation paper (CP). The CP (paragraph 22) states that derivative contracts that are (1) supported by CCPs and (2) have their seven characteristics meeting the scope of classes defined in section 3.2.4 (also in Annex I of the draft RTS) will need to be cleared. However the RTS only refers to the second part of the test.

As it stands, it is our understanding that all transactions on IRS listed in tables 1 to 4 attached to the draft RTS would be subject to mandatory clearing, provided that at least one of the approved CCPs can clear it. If such was the case, market participants would be forced to do their own analysis on the offer of the CCPs (with more detail than what would be available in the central public register published by ESMA).

We suggest that ESMA include an explicit reference to the first part of the ‘two-step test’ that appropriately reflects the detailed terms that CCPs use to determine whether a contract can be cleared. This will minimise the burden on counterparties having to undertake their own analysis (on a trade-by-trade basis) of whether an authorised or recognised CCP is able to clear a particular contract.

Furthermore, the draft RTS could be interpreted as to mean that if one CCP introduces a new flexibility that enables it to clear a particular IRS that used to be ‘unclearable’ before, it might lead to an immediate obligation to clear, without prior regulatory analysis and announcement. This would clearly be very problematic and we therefore request the draft RTS to confirm that, within a class, new contracts will not be subject to clearing obligation without prior consultation and a new RTS defining the extension of the clearing obligation and determining the dates for the implementation, as well as the conditions for a potential front loading.

<ESMA\_QUESTION\_2>

## Additional Characteristics needed to cover Covered Bonds derivatives

Question 3: Do you consider that the proposed approach on covered bonds derivatives ensures that the special characteristics of those contracts are adequately taken into account in the context of the clearing obligation? Please explain why and possible alternatives.

Stakeholders (CCPs and covered bond derivatives users, in particular) are invited to provide detailed feedback on paragraph 38 above. In particular: what is the nature of the impediments (e.g. legal, technical) that CCPs are facing in this respect, if any? Has there been further discussions between CCPs and covered bond derivatives users and any progress resulting thereof?

<ESMA\_QUESTION\_3>

We have no particular comments on this question.

<ESMA\_QUESTION\_3>

## Public Register

Question 4: Do you have any comment on the public register described in Section 2.3?

<ESMA\_QUESTION\_4>

EFAMA supports the principle of a public register available on ESMA’s website. Such register will indeed enable all market participants (including investment fund management companies) to access in a timely manner all relevant data belonging to a class of OTC derivative contracts which is subject to clearing obligation. This will also help reducing research costs incurred by market participants who will no longer have to conduct their own research for each authorized or registered CCP.

We have some concerns, however, on the practical implications of the public register process, in particular in cases where derivative classes should be removed from the register:

* We fully support the principle that the introduction of a clearing obligation for a new contract within a class of derivative should be implemented with an appropriate phase-in period which gives market participants sufficient time to adapt to the new legal and operational arrangements.
* We also agree that the addition of new derivative classes to the public register should be undertaken within the regulatory framework of issuing new Regulatory Technical Standards (including the public consultation of stakeholders prior to the adoption of those RTS). This allows stakeholders to provide feedback in a timely and transparent manner.
* To the contrary, we disagree with the same process being applied in cases where derivative classes should be removed from the register and, therefore, no longer be subject to the clearing obligation. In our view, ESMA should be able to remove quickly a clearing obligation in case of unexpected market circumstances, in particular in instances where the CCPs may impose extremely high margin requirements. Even though we understand the legal constraints highlighted by ESMA in terms of amending existing RTS, and the proposal to review the removal process as part of the overall 2015 EMIR review, we urge ESMA to consider alternatives to a full consultation process, which is not expressly prescribed by the Level 1 text of EMIR. In our view, the removal of a clearing obligation need not be treated in the same manner as the imposition of a clearing obligation, and the absence of a full consultation process in that case would not be detrimental to those who wish to continue to clear such contracts. One option for ESMA could be to provide in each set of RTS imposing the clearing obligation, a mechanism for removing a class of contracts, if the criteria set out in Article 7 of the Commission Delegated Regulation n° 149/2013 are no longer fulfilled, or for the obligation to be removed in certain extreme circumstances, pending a full consultation process.

<ESMA\_QUESTION\_4>

# Determination of the OTC interest rate classes to be subject to the clearing obligation

Question 5: In view of the criteria set in Article 5(4) of EMIR, do you consider that this set of classes addresses appropriately the systemic risk associated to interest rate OTC derivatives? Please include relevant data or information where applicable.

Please include relevant data or information where applicable.

<ESMA\_QUESTION\_5>

We agree with the proposed criteria described in section 3 of the Consultation Paper.

<ESMA\_QUESTION\_5>

# Determination of the dates on which the obligation applies and the categories of counterparties

## Analysis of the criteria relevant for the determination of the dates

Question 6: Do you have any comment on the analysis presented in Section 4.1?

<ESMA\_QUESTION\_6>

We generally agree with the analysis presented in Section 4.1. Based on our experience, the client clearing offerings provided both at the level of the CCPs and of the clearing members are sufficiently broad to support the introduction of the clearing obligation for the OTC interest rate classes as foreseen for regulated investment funds in the Consultation Paper.

<ESMA\_QUESTION\_6>

## Determination of the categories of counterparties (Criteria (d) to (f))

Question 7: Do you consider that the classification of counterparties presented in Section 4.2 ensures a smooth implementation of the clearing obligation? Please explain why and possible alternatives.

<ESMA\_QUESTION\_7>

Yes. We support ESMA’s proposed categorisation of counterparties, which reflects Option B proposal put forth in the Discussion Paper on the clearing obligation.

<ESMA\_QUESTION\_7>

## Determination of the dates from which the clearing obligation takes effect

Question 8: Do you consider that the proposed dates of application ensure a smooth implementation of the clearing obligation? Please explain why and possible alternatives.

<ESMA\_QUESTION\_8>

We strongly agree with ESMA’s proposal and welcome the lengthy phase-in of 18 months for category 2 counterparties (e.g. UCITS and AIFs), as this gives our members sufficient time to prepare for clearing.

Regulated investment funds need sufficient time to put in place new legal and operational arrangements with the clearing members and the CCPs. For instance, the implementation of the segregation requirements for regulated funds takes additional time given that fund management companies have to conduct an analysis of the various complex framework agreements with the CCP in order to determine if such agreements are in compliance with the European investment fund law.

<ESMA\_QUESTION\_8>

# Remaining maturity and frontloading

Question 9: Do you consider that the proposed approach on frontloading and the minimum remaining maturity ensures that the uncertainty related to this requirement is sufficiently mitigated, while allowing a meaningful set of contracts to be captured? If not, please explain why and provide possible alternatives compatible with EMIR.

<ESMA\_QUESTION\_9>

We welcome the proposal to effectively limit front-loading to contracts entered into during period B.

**We are concerned, however, that the practical impact of the application of the front-loading requirements to contracts with a minimum remaining maturity of 6 months, on the date of application of the clearing obligation will mean that the phase-in will be of little use**.

Some of our members’ clients execute long-dated OTC contracts (longer than 6 months), often to hedge long-dated liabilities. A minimum remaining maturity of 6 months will mean that the vast majority of OTC contracts subject to mandatory clearing which are executed during the phase-in period will become subject to front-loading requirements. In addition to the often mentioned pricing impact of front-loading, such a large front loading requirement would have a substantial operational impact on clients, clearing members and CCPs, and would require significant time and resources to be effectively implemented.

In order to complete the front loading process by the end of the phase-in period, the process would have to be initiated well in advance of the deadline. The structures for client clearing (including operational procedures and legal documentation) would have to be in place before starting the front loading process**. In practical terms, this would significantly reduce the phase-in period for many category 2 counterparties**.

Furthermore, market participants will also have to put in place an appropriate process for moving open contracts into clearing. One must remember that the experience of implementing the back-loading requirement in respect of trade reporting had a huge operational impact in terms of imposing retrospective requirements on market participants; and the front-loading of non-cleared contracts into a cleared environment is much more complex than trade reporting.

For these reasons, some EFAMA members would encourage ESMA to consider alternative approaches to the front-loading and phase-in proposals set out in the Consultation Paper.

Those members would recommend, in particular, examining the following alternative options (by order of preference):

* **Option 1:** remove the front-loading obligation for category 2 counterparties and, if considered necessary, reduce the phase-in period for new trades to be cleared, from 18 to 12 months. This is the preferred option and would result in new OTC contracts entering the cleared environment earlier than originally planned as well as reducing the front-loading burden on firms.
* **Option 2**: implement a phase-in front loading for category 2 counterparties, so that the front-loading period only starts 12 months after the start of the phase-in period for category 1 counterparties. This would give market participants sufficient time to put in place the necessary processes, procedures and documentation to ensure compliance with the clearing obligation, before having to consider also front-loading.

Lastly, we also suggest that the effective date for front-loading (i.e. the start of period B) should be the date of entry into force of the regulatory technical standards1, rather than the date of publication in the Official journal. Indeed, it is unlikely that the date of publication in the OJCE will be announced in advance to market participants, which means that they would not be in a position to anticipate with precision the exact start date of front-loading requirements. To the contrary, if the effective start date for front loading is the date of entry into force of the RTS, this will give market participants a 20 days advance notice.

**Non-financial counterparties and front-loading**

Under the current proposals, front-loading is not applicable to contracts for which at least one of the counterparties is a non-financial counterparty. However it is not clear what the process is for a counterparty that shifts from non-financial counterparty to financial counterparty during a front-loading window. For example, if an AIFM becomes authorised or registered under AIFMD, any AIFs managed by that AIFM would become financial counterparties and so be subject to front-loading. We suggest that ESMA make it clear (either through a recital in the draft regulatory technical standards or in future Q&A) that the front-loading obligation is only applicable to contracts which would, in the absence of a phase-in period, be subject to the clearing obligation at the time the contract was entered into. For example, when an AIFM becomes authorised or registered under AIFMD (and so becomes a financial counterparty), any contracts entered prior to that point would not be subject to front-loading, even if the change in counterparty status occurred in the middle of a front-loading window that would generally require financial counterparties to front-load during that entire window.

1 As stated in the Letter from ESMA to the European Commission dated of 8 May 2014: <http://www.esma.europa.eu/system/files/2014-483_letter_to_european_commission_re_frontloading_requirement_under_emir.pdf>

<ESMA\_QUESTION\_9>

# OTC equity derivative classes that are proposed not to be subject to the clearing obligation

Question 10: Do you have any comment on the analysis on the Equity OTC derivative classes presented in Section 6?

<ESMA\_QUESTION\_10>

We support ESMA’s proposal not to submit any equity OTC derivatives classes to the clearing obligation. We look forward to responding to any future consultation paper on the appropriate structure of equity classes in subsequent clearing obligation determinations.

<ESMA\_QUESTION\_10>

# OTC Interest rate future and option classes that are proposed not to be subject to the clearing obligation

Question 11: Do you have any comment on the analysis on the OTC Interest rate future and options derivative classes presented in Section 7?

<ESMA\_QUESTION\_11>

We support ESMA’s proposal not to subject the OTC interest rate future and option classes to the clearing obligation at this stage.

<ESMA\_QUESTION\_11>

# Annex I - Commission mandate to develop technical standards

# Annex II - Draft Regulatory Technical Standards on the Clearing Obligation

Question 12: Please indicate your comments on the draft RTS other than those already made in the previous questions.

<ESMA\_QUESTION\_12>

We have no additional comments to make on the draft RTS.

<ESMA\_QUESTION\_12>

# Annex III - Impact assessment

Question 13: Please indicate your comments on the CBA.

<ESMA\_QUESTION\_13>

We have no particular comments to make on the CBA.

<ESMA\_QUESTION\_13>