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EU Derivatives Trade Reporting Obligations to Begin on February 12, 2014

Starting February 12, 2014, the European Market Infrastructure Regulation (EMIR) will require EU-counterparties to all derivative contracts, whether traded on or off exchange, to report certain trade information and details to a registered trade repository (TR) for that particular class of derivatives. The annex to the [Commission Delegated Regulation \(EU\) No 148/2013](#) sets out the data items that need to be reported to a TR. The annex to the [Commission Implementing Regulation \(EU\) No 1247/2012](#) specifies the format of the report. Derivatives contracts entered into prior to August 16, 2012 that were outstanding on that date and derivatives contracts entered into on or after August 16, 2012 must be reported to a TR.

The EU trade reporting obligation for a particular class of derivative is triggered when the European Securities and Markets Authority (ESMA) registers a TR that accepts reports for that particular class of derivative.

On November 7, 2013, ESMA registered four TRs (which collectively cover equity, credit, foreign exchange, interest rate and commodity derivatives), with each registration coming into effect on November 14, 2013. These include:

- DTCC Derivatives Repository Ltd.
- Krajowy Depozyt Papierów Wartościowych S.A.
- Regis-TR S.A.
- UnaVista Ltd.

ESMA has stated that it is also considering other TR applications made by registered swap data repositories in the United States.

There are a number of important points that are relevant to both EU and non-EU derivatives counterparties. The EU trade reporting obligations mirror many of the reporting obligations under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) and the U.S. Commodity Futures Trading Commission's (CFTC) regulations for swaps.¹ However, there are significant differences between the EMIR and Dodd-Frank requirements that may result in additional reporting obligations under EMIR where at least one counterparty is in the EU.

Scope

Unlike the U.S. swap data reporting regime under Dodd-Frank, the EMIR reporting obligation applies to all derivatives, whether traded on or off exchange. Many market participants and ESMA supported a phased implementation for certain reporting obligations. However, the European Commission (the Commission) determined that the reporting obligation for all derivatives contracted would begin February 12, 2014.

Another notable difference from Dodd-Frank is that the EU trade reporting obligations apply to both parties to the trade, as long as those parties are established in the EU. Non-EU entities who trade with EU entities may find themselves having to provide information to their EU counterparty, but do not need to report their trades to a TR.

Finally, there is no exemption to the reporting obligation for intra-group transactions. This means an EU entity entering into a derivatives transaction with a non-EU group entity will still have to comply with the trade reporting obligation. Furthermore, market participants that are relying on CFTC no-action letter relief² to avoid reporting certain inter-affiliate swaps under the Dodd-Frank reporting regime may need to begin reporting such trades between their EU and non-EU affiliates under EMIR.

Delegation and Operational Issues

An EU entity is allowed to delegate reporting to another party, including its counterparty or a Central Counterparty. However, it cannot impose the reporting requirement on its counterparty and, more importantly, it cannot delegate the legal responsibility to report to another party. Therefore, a counterparty that is required to report its derivative transaction under EMIR will remain liable for any misreporting by its delegate(s).

Some sell-side firms have expressed an unwillingness to offer a reporting service and the scope of indemnification for losses arising from reporting errors is a commercial point which requires individual agreement. Similar issues arose during the implementation of the Dodd-Frank reporting requirements. Some sell-side firms that were not obligated to report on their counterparty's behalf under Dodd-Frank ultimately agreed to do so, while others did not. It remains unclear whether a similar split between sell-side firms will develop as the EMIR reporting deadline approaches.

Even if sell-side firms are willing to report trades that they enter into with the buy-side and provide adequate comfort on liability, buy-side firms will still need to ensure that intra-group trades involving EU counterparties are reported. Therefore, many buy-side firms may still need to look into using third-party reporting providers or setting up direct links with TRs and building internal systems to allow them to report the required data.

There also will be a number of operational issues that need to be worked out. EMIR requires the back-reporting of derivative transactions entered into before August 16, 2012, the time periods for making those reports are dependent on when the contract was entered into and the date on which it was outstanding (please see table below for the reporting deadlines). Further, dual reporting is particularly challenging in the bilateral, over-the-counter derivatives market in which there is no central infrastructure to issue a unique trade identifier (UTI) to both counterparties. In particular, many market participants have raised concerns that lack of any central infrastructure may be particularly challenging in the foreign exchange market.

Date of Derivative Contract	Reporting Deadline
Derivative contracts entered into from February 12, 2014 (the Reporting Start Date)	Within one working day after the conclusion, modification or termination of any derivative contract
Derivative contracts which were outstanding on August 16, 2012 and remain outstanding on the Reporting Start Date	On or before May 12, 2014
Derivative contracts which were entered into on or after August 16, 2012, but are not outstanding on or after the Reporting Start Date	On or before February 12, 2017
Derivative contracts which were entered into before August 16, 2012 and remained outstanding on August 16, 2012, but are not outstanding on or after the Reporting Start Date	On or before February 12, 2017

EU-US Equivalence?

EMIR allows counterparties to comply with equivalent rules in a non-EU country instead of the rules under EMIR. The Commission will determine, after considering ESMA's advice, which rules are equivalent and adopt secondary legislation accordingly.

On September 1, 2013, ESMA delivered its **technical advice** on equivalence of the U.S. regime to the Commission. ESMA advised the Commission that it does not consider the U.S. legal, supervisory and enforcement arrangements to be equivalent to the reporting obligation under EMIR. Although the Commission has not determined whether to adopt ESMA's advice, it appears likely that EU counterparties will not be able to apply Dodd-Frank (instead of EMIR) reporting requirements to trades concluded with U.S. counterparties.

On July 12, 2013, the CFTC issued guidance and a time-limited exemptive order addressing, among other things, substituted compliance with derivatives regulatory requirements in the EU and other jurisdictions. To avoid duplicative regulatory requirements, the CFTC, upon request, may make a "substituted compliance" determination for certain Dodd-Frank obligations if the home country regulations are "comparable and comprehensive." The CFTC's exemptive order delayed compliance with many Dodd-Frank requirements in the EU, including certain reporting obligations, until the earlier of the date on which the CFTC makes a substituted compliance determination for the EU or December 21, 2013. To date, the CFTC has not made a substituted compliance determination for the EU or any other jurisdiction.³

END NOTES

- 1 The U.S. Securities and Exchange Commission (SEC) is responsible for implementing Dodd-Frank reporting requirements for security-based swaps. However, the SEC's rules have not been finalized and remain at the proposal stage. See Regulation SBSR — Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208 (proposed Dec. 2, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-12-02/pdf/2010-29710.pdf>.
- 2 See Skadden Client Alert "CFTC Issues No-Action Relief From Certain Inter-Affiliate Swap Reporting Requirements" (April 9, 2013), *available at* <http://www.skadden.com/insights/cftc-issues-no-action-relief-certain-inter-affiliate-swap-reporting-requirements>.
- 3 See Skadden Client Alert "CFTC Issues Final Guidance and Accompanying Exemptive Order on Cross-Border Application of Certain Swap Regulations" (July 31, 2013), *available at* <http://www.skadden.com/insights/cftc-issues-final-guidance-and-accompanying-exemptive-order-cross-border-application>.