

ESMA PROPOSES A DELAY IN MANDATORY CLEARING FOR FIRMS WITH LIMITED VOLUMES OF OTC DERIVATIVES

On 13 July 2016 ESMA issued a consultation paper proposing a two-year delay to EMIR OTC derivatives clearing for financial counterparties (**FCs**) and alternative investment funds (**AIFs**) that trade limited volumes of uncleared derivatives. A copy of this can be found [here](#). If this proposal is brought into effect this would delay the first clearing obligation for those entities from 21 June 2017 until 21 June 2019.

Those affected by the potential delay are FCs that are not clearing members and AIFs that are not FCs (for example, an AIF with a non-EU manager), and which had less than €8bn notional amount of uncleared derivatives when measured as the average over the month-ends from January to March 2016. FCs and AIFs with greater than €8bn notional amount of uncleared derivatives over that period are not affected by this proposal, which means that, other than for clearing members, 21 December 2016 remains the date when the first clearing obligation takes effect for those larger FCs and AIFs. See our note on the previous timelines [here](#) (for interest rate derivatives) and [here](#) (for credit derivatives).

The reasons given by ESMA for the proposed delay are:

- ◆ It is not practical for small OTC derivative users to become direct clearing members.
- ◆ Clearing members have a limited appetite to offer client clearing to other than their largest clients.
- ◆ Indirect clearing (where a client's derivative counterparty is not a clearing member but that counterparty is itself a client of a clearing member) has not yet become established practice for OTC derivatives, despite being common for exchange-traded derivatives.

ESMA anticipates that the delay will give an opportunity to address some of the difficulties that smaller users of OTC derivatives face in establishing clearing relationships.

Currently the timing for clearing of derivatives is:

- ◆ Interest rate derivatives in G4 currencies:
 - Category 1 (Clearing members): took effect on 21 June 2016
 - Category 2 (FCs and non-FC AIFs that are not clearing members but which had more than €8bn in uncleared derivatives): 21 December 2016

- Category 3 (FCs and non-FC AIFs that are not category 1 or 2): 21 June 2017, but now potentially 21 June 2019
- Category 4 (Non-financial counterparties that are above the clearing threshold (**NFC+s**)): 21 December 2018

◆ European index CDS:

- Category 1: 9 February 2017
- Category 2: 9 August 2017
- Category 3: 9 February 2018, but now potentially 9 February 2020
- Category 4: 9 May 2019

◆ Interest rate derivatives in NOK, PLN and SEK:

- Category 1: [entry into force of the relevant regulation] + 6 months
- Category 2: [entry into force of the relevant regulation] + 12 months
- Category 3: [entry into force of the relevant regulation] + 18 months, but now potentially 3 years, 6 months
- Category 4: [entry into force of the relevant regulation] + 3 years

Given that the proposal would have the effect of delaying the implementation of mandatory clearing for some FCs beyond that for NFC+s, it would be reasonable to expect that, if the proposal is given effect, a delay will also be implemented for NFC+s.

The consultation paper closes for comment on 5 September 2016. Please contact us if you would like further advice on the consultation or would like us to assist in making comments on the paper.

CONTACT DETAILS

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