



May 2019

EMIR 2.1 – Big changes in June

In July 2018 we circulated a briefing note outlining the European Parliament's approval of a revised proposal to amend EMIR, also known as "**EMIR 2.1**", (which can be found [here](#)) as part of its REFIT programme. This briefing note outlines a further development in respect of EMIR 2.1, which will be particularly relevant to managers of alternative investment funds ("**AIFs**") who are, or may become, users of derivatives.

IMPLEMENTATION DATE FOR EMIR 2.1

EMIR 2.1 was published in the Official Journal of the European Union on 28 May 2019 (and can be found [here](#)). This means that EMIR 2.1 will come into force on **17 June 2019**.

POSITION SINCE OUR PREVIOUS BRIEFING NOTE

In our April 2019 briefing note (the "**April Note**", which can be found [here](#)) we outlined the European Securities and Market Authority's ("**ESMA**") statement on the implementation of the new clearing obligation regime under EMIR 2.1. Our April Note also considered EMIR 2.1's expanded definition of financial counterparty ("**FC**"), under which certain AIFs may be reclassified from being NFCs to being FCs (although, at that time, market consensus had not coalesced).

On 14 May 2019, the International Swaps and Derivatives Association ("**ISDA**") released an explanatory note (the "**ISDA Note**", which can be found [here](#)) on the expansion of the scope of the definition of AIFs that will be classified as FCs. The ISDA Note echoes the contents of our April Note.

The updated position under EMIR 2.1 will be as follows:

- EEA or non-EEA AIFs whose manager is authorised under AIFMD are FCs and will remain as such.
- EEA AIFs whose manager is not authorised under AIFMD are currently NFCs, **but will become FCs**.
- Non-EEA AIFs managed by a non-EEA manager are currently deemed NFCs, **but will become deemed FCs when facing EEA brokers/banks**.

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POTENTIAL DELAY

Given the potential implications of this change (described in greater detail below), ISDA has petitioned ESMA and national competent authorities including the FCA to delay the implementation of the change to the definition of FC for AIFs for a period of 6 months. Other industry bodies are expected to follow suit.

IMPLICATIONS

The key implication of the reclassification of certain AIFs as FCs (or deemed FCs) is that FCs (and deemed FCs) are required to exchange collateral as margin in respect of most uncleared derivatives transactions on a daily basis and, depending on the product, clear certain derivatives transactions.

A new category of "small FCs" will provide a derogation from the clearing obligation (but not the margin requirements for uncleared derivatives transactions) for some AIFs. Please refer to our April Note for more detail on small FCs.

Managers of AIFs who use or may use derivatives should think carefully about their EMIR classification. If an AIF is expected to be reclassified as an FC, the increased cost, complexity and operational burden of collateralising/clearing derivatives transactions may incentivise its manager to enter into such derivatives transactions somewhere else in the fund structure. Alternatively, the manager may intend to enter into derivatives transactions at the level of the FC. Either way, there are ways we can assist you in your planning as well as with any amendments required to your contractual arrangements. For example, it is not necessary to exchange collateral as margin in respect of certain classes of FX derivatives transactions and only certain types of interest rate and credit derivatives transactions are subject to mandatory clearing.

NOTIFYING THE FCA

As outlined in our April Note, certain firms will be required to submit notifications to the FCA (and ESMA) in respect of their classification under EMIR. Firms must submit these notifications by 17 June 2019, by using the relevant FCA forms or the FCA's [Connect](#) platform. Connect will also become the replacement portal to submit the existing disputes notifications and intragroup clearing exemption notifications (which will remain unchanged once EMIR 2.1 comes into force). The FCA's news alert of 29 May 2019, which has further details and contains links to the relevant notification forms, can be found [here](#).

CONCLUSION

All market participants are recommended to start preparing for the changes to EMIR which will come into effect on 17 June 2019.

Additionally, with the implementation date for EMIR 2.1 now known, managers of AIFs should monitor the lobbying efforts of ISDA and others to see if any delay is granted by ESMA and the FCA in respect of the change to the definition of FC for AIFs.

Should you have any questions in relation to this briefing note, please contact one of the Derivatives & Structured Products team, or your usual Travers Smith contact.

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