DRAFT TECHNICAL STANDARDS FOR

THE REGULATION ON OTC DERIVATIVES, CCPs AND TRADE REPOSITORIES

An ESMA Consultation Paper

A response by the Futures and Options Association

AUGUST 2012

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1. Introduction

1.1 This response is submitted on behalf of the Futures and Options Association ("the FOA"), which is the principal European industry association for 160 firms and organisations engaged in the carrying on of business in futures, options and other derivatives. Its international membership includes banks, financial institutions, brokers, commodity trade houses, energy and power market participants, exchanges, clearing houses, IT providers, lawyers, accountants and consultants (see Appendix 1).

1.2 The FOA reiterates its general support for OTC regulatory reform, the core objectives of EMIR to make the OTC markets safer for all participants and less risky to the financial system and the priority given to CCP clearing and trade reporting.

The FOA welcomes this further opportunity to comment on ESMA's Draft Technical Standards in support of EMIR and the consideration that has been given by ESMA's officials to industry responses to its original DP and has noted that many of the industry's observations have been taken into account in developing the draft standards set out in this CP.

1.3 As stated in its original March submission to ESMA, the FOA supports:

(a) ESMA's intention to align its Technical Standards with CPSS-IOSCO recommendations/guidance issued in relation to market infrastructures and the OTC markets and the need for a more granular approach, but the FOA would urge ESMA to take into account:

(i) the adverse impact of a set of unduly super-equivalent standards on the global competitiveness of EU market infrastructures and regulated firms; and

(ii) the need for a converged approach (where appropriate and possible) with the global regulatory agenda, particularly with the US, to simplify and clarify the regulation of cross-border business to the benefit of both the providers and consumers of financial services, and to better facilitate regulatory recognition, particularly of non-EU CCPs, and scale back on regulatory extra-territoriality; and

(b) the criteria-driven approach in ESMA's CP, but would emphasise the need to monitor how the criteria are being interpreted and implemented by member states, to ensure the adoption of an even-handed approach.

The FOA anticipates that ESMA will take these factors into account, not just in its final proposals, but in considering any subsequent changes introduced to them.

1.4 The FOA notes ESMA's view that *"one essential element in the development of draft technical standards is the analysis of the costs and benefits that these legal provisions will* imply*"* (2nd paragraph in the Executive Summary) – a view with which the FOA completely concurs. Increased costs are an inevitable result of the widespread economic distress generated by the recent financial crisis and the consequential drive for more effective and comprehensive regulation and supervision. However, if the cost increase is taken too far, it will have an adverse impact on market economics/participation and will undermine other key post-crisis policy objectives. For these reasons, the FOA would urge ESMA, in developing its technical standards, to take into account:

(a) the real risk that the cost of an overly 'safety first' set of standards, however understandable, could challenge the attainment of other key post-crisis public policy objectives, e.g.:

(i) the running of risk and the role of innovation are critical to growth – and economic growth / business recovery are key elements in the post-crisis agenda – yet regulatory compression on risk and innovation could reach the point where this post-crisis objective is progressively undermined;

(ii) order flow is essential to sustaining market liquidity – and mitigation of liquidity risk was one of the lessons of the recent financial crisis – yet compression on order flow from a variety of financial sources (e.g. short-sellers, high-frequency traders, banks, speculators) combined with increased market participation costs faced by end-users could reduce liquidity to the point where, for example, small markets are no longer viable;

(iii) economically viable market/product/service access is essential to risk management – and a key post-crisis objective was to enhance the capability of market participants to better manage their risks – yet the cumulative impact of increased costs of market participation could

- establish an economic barrier to market access by small and medium-size or low-volume users of the markets; and
- disturb the underlying economics of risk management for all market participants to the point where some of them may elect to run uncovered risks or price the risk in such a way that it is passed down to their customers.

(b) the economic impact of applying high-cost changes to dealings on listed derivative markets without evidenced cause, where those changes are designed to strengthen the OTC markets, could undermine, potentially significantly, the regulatory policy objective to encourage greater use of those markets;

(c) the cumulative cost of the provisions contained in ESMA's CP will, in large part, be borne by end-users, either directly or indirectly; and it can reasonably be anticipated that this will change the underlying economics of market participation, with the possible adverse consequences indicated above.

(d) the tendency to date has been to undertake cost-benefit analyses within individual regulatory change silos, i.e. vertically, as opposed to assessing their collective/cumulative impact, i.e. horizontally, which means that there has been no clear assessment of the potential to create the kind of public policy conflicts / unintended consequences indicated above.

The FOA, in this context, welcomes the intention by ESMA to undertake a qualitative-based, cost-benefit analysis of its proposals and recognises that this will be a difficult undertaking.

In making these points, the FOA understands that ESMA has a limited role in regulatory policy formation and is substantially constrained by Level 1, but the FOA believes that these broader-based points are relevant and appropriate for consideration by ESMA in terms of targeting as well as developing technical standards and introducing timetables that are efficient, appropriate, deliverable and cost-effective for market stakeholders.

In addition, the FOA believes it would be extremely helpful if ESMA could indicate how it is defining, for these purposes, a listed derivatives market. For example, does that include dealings on all multilateral platforms, including MTFs and OTFs? This is important because these kinds of distinctions are relevant to various sections in the Technical Standards. The FOA believes that all eligible multilateral platforms should, for the purposes of the Technical Standards, be treated in the same way, as opposed to the regulation of those platforms which may be differentiated because of functional or risk differences.

1.5 The FOA represents generally the listed derivative markets and would emphasise that these markets are soundly based, effectively regulated and proven in terms of market and systemic safety insofar as they performed well through the recent financial crisis. In order to address the concern identified in para 1.4(b) above, the FOA would urge ESMA:

(a) to avoid introducing regulatory changes to a market sector where there is no evidenced need for regulatory change;

(b) to avoid undermining one of the key advantages of trading in the listed derivatives market, namely, the comparatively low cost of participation;

(c) to distinguish carefully between the two asset classes, namely, OTC contracts and exchange-traded contracts, and avoid introducing new rules into the listed derivatives market until they can be properly assessed in terms of appropriateness, proportionality and cost-benefit;

(d) to introduce new market constructs (e.g. indirect client clearing) cautiously and on a phased basis, bearing in mind the risk of unintended/unforeseeable consequences.

The FOA believes that it would be extremely helpful if ESMA could produce, as an annex to its technical standards, a graph identifying specifically which of the standards are intended to apply only to OTC contracts and which will apply to both OTC and exchange-traded contracts. This would be an invaluable aid in terms of being able to assess the appropriateness and consequences of regulatory change to these two market sectors, and implementing the new requirements.

1.6 It is not surprising that the advantages and strengths of trading in listed derivatives (e.g. effective supervision, CCP clearing, price formation and transparency) are such a core part of strengthening the regulation of the OTC marketplace. However, the FOA would reiterate the importance of the OTC markets in terms of:

(a) their capacity to offer a diversified, complementary and now better-regulated alternative venue to the listed markets in which key areas of concern such as regulatory oversight, transparency, trade reporting, prudential treatment, post-trade processing and, where appropriate, CCP clearing will be addressed;

(b) acting as an economically viable "birthpool" for introducing new contracts;

(c) facilitating dealings in small specialist markets with limited participation on an economically viable basis; and

(d) enabling fund managers, corporate treasurers and other institutional end-users to enter into tailored bilateral risk management transactions to address their unique and sometimes complex underlying business risks.

The FOA would urge ESMA to bear these key factors in mind when it comes to finalising its technical standards in support of EMIR. The need to preserve the economic functionality of these markets has been well recognised by, for example:

- the IMF, when it stated that *"many end-users continue to prefer OTC bilateral arrangements in order to meet their specific hedging requirements and hence have a desire for customised contracts*" (Chapter 3, page 10, 'Meeting New Challenges to Stability and Building a Safer System' – April 2010); and

- the European Commission, which emphasised that it "*does not want to limit the economic terms of derivatives contracts, neither to prohibit the use of customised contracts nor to make them excessively costly for non-financial institutions*" (COM 2009 563/4).

1.7 The FOA would urge ESMA, insofar as it has the power/discretion to so act, to ensure that implementation timetables are sensitive to:

- the need to sustain business continuity; and

- the practical problems of implementing a complex and far-reaching change agenda, which will have major consequences for existing IT, documentation and a range of customer-facing and market-facing practices.

The FOA welcomes therefore the recognition:

- that the need for time for *"market participants to adapt to the new requirements"* is an *"important element"* (para 7, Introduction to the CP);

- of *"giving market participants the necessary time for implementation"* (para 28); and

- of the importance of adopting *"a reasonable and balanced approach… in order to avoid an unnecessarily heavy workload, while assessing appropriateness of the clearing obligation when required"* (para 30).

The FOA believes that the above policy approach should govern the development of implementation timetables at every level. In this context, the FOA would urge ESMA to take into account the fact that many firms are having to analyse how they are affected by the US regulatory change agenda, which is no less comprehensive and deep-rooted than the EU change agenda and, further, in some jurisdictions, is having to deal with structural changes to member state supervisory authorities.

1.8 With regard to collateral, the FOA would continue to urge ESMA to be as non-prescriptive as possible, in order to take account of the fact that significant numbers of end-users that traditionally use the OTC markets will now be expected to meet:

(a) new high prudential requirements in respect of their OTC exposures;

(b) more exacting and frequent margin calls in respect of their CCP-cleared exposures, necessitating the provision of highly liquid collateral in support of those exposures;

(c) increasingly higher costs of collateral transformation, exacerbated further by the consequences of a likely collateral 'crunch'.

In this particular context, the FOA welcomes ESMA's recognition in para 35 to the Introduction that, while a CCP can potentially clear highly illiquid products, this would involve the application of *"disproportionate margins"* and that *"… it would not be appropriate to apply a clearing obligation as it would not fulfil its overarching objective of reducing systemic risk"*. Clearly, any requirement to meet disproportionate margins would exacerbate the position regarding collateral.

1.9 In summing up these general points, the FOA notes that, in the context of assessing the appropriateness of the clearing obligation, ESMA stated in para 30 that, in this respect, *"a reasonable and balanced approach is required… in order to avoid an unnecessarily heavy workload"*. The FOA believes that this policy approach should

govern the development of the technical standards to ensure, if nothing else, that they are proportionate, effective and cost-efficient.

2. FOA response to specific draft proposals in the ESMA Consultation Paper

NB. In addressing ESMA's draft proposals, the FOA:

(a) relies on the matters raised in its previous submission to ESMA's Discussion Paper, but, in the interests of brevity, does not seek to recycle those points again in this response;

(b) has restricted its response to matters of general concern or to issues which touch upon the listed derivatives markets on the basis that many of the proposals put forward in the ESMA Consultation Paper apply to the OTC markets and will be the subject therefore of a detailed response by ISDA.

2.1 Indirect Clearing Arrangements

2.1.1 The FOA supports the introduction of indirect clearing arrangements for OTC market participants, particularly in the context of permitting EU clearing members to offer access to non-EU CCPs to EU clients through their clearing members. However, insofar as this is a new market approach, it would urge ESMA to err on the side of caution in order to minimise any unforeseeable consequences that may flow from the introduction of such a requirement – and this has a bearing on the points raised below with regard to indirect clearing.

2.1.2 The FOA notes that clearing members will be *"required"*:

(a) to facilitate indirect clearing arrangements and;

(b) in the event of a default and where the positions and assets of indirect clients cannot be successfully transferred, to *"hold directly the positions and assets in an equivalent account with the CCP for a period of at least 30 days"*.

The FOA believes that both these *"requirements"* will exacerbate the counterparty risk of clearing members, contrary to the often-repeated ESMA proviso that:

- such arrangements with a clearing member *"do not increase counterparty risk"* (Article 4.3);
- *"indirect clearing arrangements cannot increase counterparty risk"* (para 15 of III.1 in the CP); and
- indirect clearing arrangement should not expose *"the clearing member… to additional counterparty risk"* (Recital (2) in the draft standards).

This risk is multiplied, potentially significantly, by the possibility that, behind each single transaction between a clearing member and its client, there may be multiple back-to-back transactions between that client and its underlying clients, which could be further exacerbated by the fact that those back-to-back transactions may not be exactly the same as the transaction between the clearing member and the client. This could arise, for example, in the case of a client of a clearing member that is a pension fund provider, which operates a centralised 'treasury centre' model (which the FOA understands is the case with some large Dutch pension fund providers). The consequence could be that, in the event of a default by such a centralised client operation, the clearing member will not only face an exacerbation in its counterparty risk, but may have to clear multiple back-to-back trades over the required period of 30 days.

2.1.3 With regard to 2.1.2(a) above, the FOA believes that clearing members should be free to exercise their own discretion as to whether or not they are able to facilitate indirect clearing arrangements and whether or not they have the systems, controls and capability of managing those arrangements and the risks generated by them.

2.1.4 With regard to 2.1.2(b) above, while the FOA understands the reasons for the 30 day period, the indirect client would actually benefit from a super-equivalent level of protection greater than that available to direct clients. This contradicts the recognition in para 22 that indirect clients will not necessarily have the same or better rights as direct clients because the relationship is *"one step lower, i.e. at the level of the clearing member instead of at the level of the CCP"*. The fact is that, while the books and records must be kept in such a way that they *"facilitate the transfer of positions and assets of a defaulting member… or the orderly liquidation of client positions"*, there is no guarantee of portability.

Accordingly, the FOA would urge ESMA to consider deleting 4.6 to bring the indirect client relationship with a clearing member more into line with the direct client relationship with a CCP.

As an extension to this concern, the FOA would emphasise that the intention at Level 1 to offer segregation choice to end-users should not be distorted or emphasised in any way by offering more generous collateral treatment to customers in individual segregation (or by requiring such accounts to be held at the level of the CCP, as opposed to with the direct client, which seems contrary to the 'one step lower' policy approach), bearing in mind particularly the obligation placed upon CCPs / clearing firms, to ensure that customers are made fully aware of the different levels of segregation that are available to them and, particularly importantly, the different levels of protection (and potential for increased risk) that flows from those different tiers of segregation.

2.1.5 While indirect client clearing does not apply to dealings in the listed derivatives markets, the FOA is concerned that indirect OTC clients could pose a potentially significant overall risk for clearing members in the event of the default of a direct client. It is essential therefore that clearing members:

- are able to carry out all due diligence and on-going credit checks on indirect clients;

- are able to satisfy themselves that business conduct requirements are being met, e.g. know your customer, anti-money laundering checks and, while some reliance can be placed on the direct client in this context, it is likely that there will be a high degree of duplication because of the direct credit risk that will be borne by clearing members;

- are able to enter into new terms of business with indirect clients, covering the terms that will govern default management, particularly in relation to the proposed minimum 30-day period and secure all the necessary consents to enable the clearing member to exercise default management discretion;

- are able to determine whether or not they are prepared to meet the increased operational cost and impact of indirect client clearing, bearing in mind that, in some cases, this may generate, from a commercial perspective, an unacceptable increase in cost.

2.1.6 It would appear that clearing members will be subject to obligations and responsibilities in relation to the management of the assets/positions of indirect clients in the event of a default by its direct client, which are comparable to those of a CCP. However, it is not clear that a clearing member will – but they should – have the benefit of the special asset protection legislation that supports the exercise of comparable obligations and responsibilities undertaken by a CCP in relation to the default of a clearing member.

The FOA would urge ESMA to give some thought as to if and to what extent clearing members may require a similar degree of legal protection in the management and transfer/liquidation of the positions of indirect clients.

2.1.7 The FOA notes the reference to *"reasonable commercial terms"*, but would emphasise that, in the context of the cost and risk involved in providing these arrangements, the test of reasonableness should be measured against the costs and risks of offering an indirect clearing facility and may result in justifiable high charges that will have to be borne by indirect customers.

2.1.8 The FOA anticipates that, because it will be a matter for the client to offer different types of account segregation to indirect clients, any required disclosure regarding the different types of account segregation available to indirect clients and the level of protection provided by each option (para 23) will have to be provided by them rather than by the clearing member (which mirrors the position regarding CCPs and clearing members).

2.2 Clearing Obligation Procedure

2.2.1 The FOA agrees broadly with ESMA's approach, particularly its recognition that it will adopt a *"more granular approach"* (para 24) for the purpose of defining which

contracts within a class will be subject to the CCP clearing obligation, since the tests will not be able to be applied evenly to each OTC derivative within a class. The FOA notes ESMA's assurance that *"No CCP will be forced to clear contracts that it is not able to manage"* (para 24) – an assurance that will also be welcomed by clearing members who carry the contingent risk of CCPs supported by them.

2.2.2 The FOA acknowledges that systemic importance as a criterion for determining whether or not a particular contract or class of contract should be subject to the mandatory CCP clearing obligation has been the subject of debate during the passage of Level 1. However, the FOA believes that it continues to be an important test, particularly where there is some uncertainty surrounding whether or not the more specific criteria for assessing eligibility do not lend themselves to a clear decision. If, for example, compelling the central clearing of a particular contract could have serious adverse economic consequences for its viability (bearing in mind that financial end-users do not have the benefit of an exemption from the clearing obligation), one reason for allowing it to be continued to be traded on a bilaterally-cleared basis could be that the contract would not be deemed to be of systemic importance, and so avoid putting its viability at risk.

The FOA notes and welcomes ESMA's policy approach towards eligibility that

> *"The reason for linking liquidity to the level of margins applied by the CCP is that a CCP can potentially clear highly illiquid products applying disproportionate margins. In such a situation, it would not be appropriate to apply a clearing obligation as it would not fulfil its overarching objective of reducing systemic risk."* (para 35)

2.2.3 The FOA believes that it is critically important for ESMA to have all the relevant material made available to it for the purposes of reaching a decision on the issue of clearing eligibility and welcomes therefore ESMA's assurances that it will consult widely with the industry before coming to a final decision. Equally, it is important that ESMA is made aware by the competent authority of the outcome of any public consultations that may have taken place. In this context, the FOA has already identified the kind of additional information that will be required by ESMA in para 2.9 of its response to ESMA's original Discussion Paper on this topic.

2.2.4 The FOA notes that ESMA shall take into consideration, in assessing the degree of standardisation to which the relevant contract(s) are subject, the extent to which it is the subject of *"common legal documentation"* and *"operational processes"* that are managed in a common manner. The FOA would simply point out that, while these are important aspects, it is essential to distinguish between legal standardisation, process standardisation and, of course, economic standardisation.

2.2.5 The FOA notes ESMA's view that the register would not be an appropriate means of informing the industry of possible future clearing obligations / applications made by competent authorities. It is, nevertheless, important that market participants can readily access information as to what contracts are subject to the mandatory CCP clearing obligation and are put in the position of being able to take an early view on the prospects of potential changes to existing clearing arrangements for particular

contracts, bearing in mind the economic and other consequences of transitioning from bilateral clearing to CCP clearing. This means that such information must be transparent and readily accessible. The FOA notes, for example, that it is ESMA's intention *"to adequately inform market participants about the notification received, in order to avoid any misunderstanding"* (para 28).

2.2.6 In this context, the FOA would emphasise the importance of transitional implementation periods which are sensitive to the need to sustain business continuity, e.g. to re-price contracts, negotiate new terms of business, access CCPs, and welcomes ESMA's intention of *"giving market participants the necessary time for implementation"* (para 28).

2.2.7 Bearing in mind the kind of changes in liquidity that can take place, it is conceivable that contracts deemed eligible for CCP clearing may subsequently fail the test of eligibility and, equally, contracts deemed ineligible for CCP clearing may become sufficiently liquid and standardised to the point where they may become eligible for CCP clearing. For these reasons, it is important that CCPs, competent authorities and ESMA adopt a dynamic approach to monitoring eligibility for CCP clearing.

2.3 Access to a Trading Venue

2.3.1 The FOA notes the observation that access to a trading venue by a CCP should not be such as to *"threaten the smooth and orderly functioning of markets, in particular due to* liquidity *fragmentation"*. The FOA understands the concerns surrounding the fragmentation of liquidity, but if there is to be a competitive marketplace in which competing infrastructures will be able to launch lookalike contracts, then some degree of fragmentation must be accepted as a price for ensuring a competitive marketplace. The FOA would urge ESMA to reflect on the fact that one of the reasons why the EU Competition Directorate rejected the proposed merger between NYSE Liffe and Deutsche Börse was their view that competitiveness between market infrastructures (implicitly recognising that this would generate a degree of liquidity fragmentation) was regarded as of critical importance.

The FOA would urge ESMA to introduce a series of tests for determining the kind of fragmentation that would be regarded as *"serious"*, bearing in mind particularly that it must be of such gravity that it actually *"threatens"* the smooth and orderly functioning of markets, i.e. it has to constitute a significant and real threat to market functioning.

2.3.2 So far as interoperability of derivative contracts between CCPs is concerned, we welcome the decision that this will not be mandated or prohibited, pending the outcome of the proposed review by ESMA, particularly since there may have to be some degree of interoperability where more than one CCP can access a trading venue. Further, it should be open to CCPs to enter into interoperable arrangements of their own volition if they are satisfied that they can manage the consequences, and on the basis that the competent authority of each of the CCPs involved will look very carefully at any such arrangement to ensure that it poses no risk to market integrity or to either of the CCPs or their clearing members or, because of their systemic importance, to the financial system generally. For this reason, the FOA welcomes

ESMA's assurance that the ability of CCPs to enter into interoperable arrangements of their own volition *"should not be excluded"* (para 43).

2.4 Non-Financial Counterparties

NB. The FOA has seen and supports the more detailed suggested amendments put forward by ISDA in addressing this particular section in the ESMA CP.

2.4.1 The FOA recognises the importance of this exemption, but anticipates that it will have the effect of imposing regulatory responsibilities on unregulated non-financial counterparties. It is important that the imposition of those responsibilities is proportionate and imposed only on an 'as needed' basis.

2.4.2 In its previous response, the FOA identified – and would reiterate – a number of suggested amendments which, in its view, would better accommodate the broad variety of risks that can arise in connection with the range of commercial activities / treasury financing activities of non-financial counterparties.

More particularly, the FOA believes:

(a) that there should be specific references in para 56 to macro, anticipatory and cash-flow hedging similar to the specific and welcome reference to proxy hedging (NB. Anticipatory hedging may be covered through the language in para 56, which simply requires the objective of a derivative contract to "*to reduce the potential change in the value of assets…*", which does not appear to specifically exclude anticipatory hedging);

(b) that additional generic terms would be helpful to cover future unexpected risk classes and risk management instruments, e.g. *"and other economic inputs"* and *"and other money rates or indices"*;

(c) that the terms *"commercial activities"* and *"treasury financing* activities" may not be sufficiently inclusive for hedging the investment / portfolio risk of non-financial counterparties (e.g. employee pension fund management) and would urge ESMA therefore to include the savings and investment hedging activities of non-financial counterparties (cf. the US position summarised in para 2.4.3);

(d) that it would be appropriate to either abandon the reference to specific categories of risk or to enlarge them, as suggested by ISDA, insofar as they are, as currently drafted, firstly, too restrictive and out of line with the authentic hedging needs of non-financial counterparties; and, secondly, any categories of authentic hedging activities not covered within the definition would automatically (and the FOA believes that this is not intended by ESMA) count towards the calculation of the proposed clearing thresholds.

The FOA would reiterate its observation that institutions with large mixed portfolios tend to hedge their exposure on a portfolio or 'book' basis, and not necessarily on a transaction-by-transaction basis, to avoid hedging complexity and to secure the

significant cost-benefits of portfolio hedging. It is assumed that this approach is accommodated within the existing text, insofar as para 56 defines objective measurement in the context of reducing risks directly related to the commercial activity or treasury financing activity of a non-financial counterparty, without requiring a transaction-by-transaction test measured against specific and individual identifiable risks. It would be helpful, however, if this could be made clear.

2.4.3 By way of comparison, the US approach to defining hedging activities for the purposes of determining eligibility for the equivalent exception for non-financial entities (and, interestingly, certain financial entities), has adopted the following general principles:

- The eligibility of a swap for exemptive treatment is determined not by the type of swap, but by its purpose, so that there are no types of derivatives that are automatically excluded from entitlement to exemptive treatment

- Commercial risk is determined by the underlying activity creating the risk, not just by the nature of the core business undertaken by a non-financial end-user, with the result that the exemption covers certain types of 'financial risks', which comprise an incidental part of that core business

- OTC contracts entered into to hedge the risk posed by other OTC contracts may also be eligible for exemptive treatment

- Swaps that facilitate portfolio hedging or dynamic hedging are also eligible for exemptive treatment.

As for the scope of the US exemption, the FOA would point out that:

- it disapplies the (potentially burdensome) obligations arising in connection not just with CCP clearing or reporting the terms of an OTC transaction to a trade repository, but also the (MIFIR) obligation of multilateral execution;

- in addition to non-financial entities, it also covers certain financial institutions, namely small banks and other organisations (i.e. with $10 billion or less in assets), financial entities whose primary business is providing financing, but which use swaps to hedge commercial risk; and affiliates of end-users that provide a central trading service to the group.

2.4.4 The FOA specifically welcomes the inclusion of proxy hedging, insofar as the cost of using a highly-tailored OTC contract to address a complex underlying risk will be different to (and potentially higher than) using a standardised derivative, which will not be precisely correlated with such an underlying risk. In effect, there may be a trade-off between reducing the high cost of the former by accepting an increased level of basis risk when using the latter. ESMA's approach provides end-users with a welcome degree of hedging flexibility that may become increasingly important once the new rules and the consequential cost increases begin to take effect.

The FOA supports the option of hedge accounting treatment set out in para 57, but believes that this should not be restricted to IFRS Principles, but rather include the use of other credible sets of accounting rules, which address hedge accounting treatment.

2.4.5 With regard to clearing thresholds, the FOA would re-emphasise the importance of the definition of hedging being as wide and as comprehensive as possible (as suggested in paras 2.4.2 and 2.4.3 above), insofar as it is clearly not intended that the use of OTC derivatives for authentic hedging activities should be part of the calculation of whether or not a clearing threshold has been breached. A less than comprehensive and far-reaching definition would have the effect of bringing into that calculation types of hedging activities that are not otherwise covered.

2.4.6 The FOA appreciates the simplicity of the argument that stands behind the use of the gross notional value of OTC derivative contracts when calculating threshold exposures, but would urge ESMA to consider basing the threshold on net exposures (or making that available as an alternative methodology for calculating the threshold), insofar as it would be a more accurate measure of real transactional risk. In any event, the FOA believes that it is critically important that ESMA consults closely with those most affected by the threshold exposures to determine a methodology that would be a fair and accurate means for calculating threshold exposures.

In terms of the level of the threshold is set, the FOA notes that a careful balance has to be drawn in order to avoid setting it at a level where a non-financial counterparty could almost be regarded as a financial counterparty, but, at the same, for non-financial transactions, establishing a threshold that is practical and meaningful.

2.4.7 The FOA is particularly concerned over the fact that a breach of the threshold in one class of instruments would disapply exemptive treatment for all classes of derivatives, including derivatives used for hedging and treasury financing transactions. The FOA notes that ESMA has emphasised that it believes it has little room for manoeuvre as regards this approach, but it is unconvinced that this is a Level 1 requirement. Moreover, it is an approach that contrasts significantly and adversely with the US approach, which safe-harbours all the hedging activities of non-financial counterparties in such a way that they will have exemptive treatment, irrespective of the level of non-hedging activities of a non-financial corporate.

Since this, in the view of the FOA, could undermine the whole purpose of affording an exemption for the hedging and treasury financing activities of large-size non-financial counterparties, FOA would urge ESMA and the Commission to analyse the provisions carefully to see what room for flexibility there may be in this area, firstly, to ensure that non-financial counterparties in the EU are not seriously disadvantaged economically in comparison with their non-EU counterparties and, secondly, to fulfil the need for improved regulatory convergence between the EU and the US.

More specifically, the FOA would urge ESMA to disallow the exemption, where the non-financial counterparties within a group exceed the threshold for one class of uncleared OTC derivatives, to <u>only</u> that class. The FOA does not believe that such a

restriction would diminish market stability and, more positively, it would have the following advantages:

(a) Simplifying compliance monitoring

(b) Significantly reducing the risk of hedging and treasury financing transactions being brought into mandatory CCP clearing obligation

(c) Preventing the disincentivisation of risk management through the imposition of potentially disproportionate, onerous and expensive clearing, margining and collateral requirements (which is especially important and relevant to non-financial counterparties as most are within non-banking groups and have less ready access to liquid collateral than banks and no access at all Central Bank liquidity).

In this context, it is noteworthy that the suitability of OTC derivatives for mandatory clearing will be assessed on a class-by-class basis.

The FOA supports the introduction of broad but well-defined derivatives classes for calculating thresholds (recognising also that there may be a case for reflecting the MiFIR 'exotic' class of derivatives), but questions the position with regard to derivatives that straddle more than one of the suggested asset classes.

2.4.8 The FOA welcomes the ESMA approach to phase in the requirements on the basis that they will be the subject of review *"on a regular basis"*, which should be at least annually. This is particularly important, insofar as the setting of reasonable thresholds will become infinitely clearer once more data is available.

2.4.9 Finally, the FOA would emphasise that the burden of monitoring and ensuring compliance with the clearing thresholds should be the responsibility of the NFC and not its counterparty.

2.5 Risk Mitigation for OTC Derivative Contracts Not Cleared by a CCP

2.5.1 The FOA notes that the ESMA CP is restricted to particular risk management techniques and that there will be further related proposals, which will be developed jointly by the three ESAs, and which will be the subject of a separate CP to be issued shortly.

2.5.2 With regard to timely confirmation of trades, the FOA would defer to ISDA's response, particularly insofar as ISDA is best-placed to judge whether the timelines are deliverable, which is likely to be more a concern for SMEs and non-financial counterparties. The FOA believes that, since the primary and underlying obligation is to confirm contracts as soon as possible, ESMA could offer a bit more latitude in setting the maximum permissible period of time post-execution by which confirmations must be made to allow for extenuating circumstances.

2.5.3 With regard to portfolio reconciliation, the FOA supports the general approach of ESMA, but also believes that further consideration should be given to exceptions and

the need for greater flexibility in the context of portfolios with less than 300 trades which are not systemically important.

2.5.4 With regard to portfolio compression, the FOA believes this question is best answered by ISDA, which has played a key role in developing portfolio compression.

2.5.5 With regard to marking-to-market and marking-to-model, the FOA supports the general approach adopted by ESMA and the increased flexibility in terms of Board approval of models.

2.5.6 The FOA broadly welcomes ESMA's general approach towards intragroup dealings.

However, Article 10 of EMIR states that a transaction between an EU financial or non-financial counterparty and a non-EU counterparty can only be regarded as an intragroup transaction where both counterparties are included *"in the same consolidation on a full basis and they are subject to appropriate centralised risk evaluation, measurement and control procedures and… …the Commission has adopted an implementing act under Article 13(2) in respect of that third country"*. This would suggest that a prior equivalence ruling is required from the Commission before any transaction between two members of a consolidated group where one of them is established outside the EU can be regarded as an intragroup transaction. This means that intragroup dealings in these circumstances could be subject to all the risk mitigation requirements, including margining, for uncleared trades and possibly even a mandatory clearing requirement, in the same way as transactions with companies outside the group.

The FOA would strongly urge ESMA to address this issue through the use of transitional provisions in order to give sufficient time for the Commission to make its equivalence assessments. The FOA is particularly concerned that this restrictive approach to intragroup dealings will apply even to non-EU counterparties based in countries where there are already Memoranda of Understanding with EU authorities, third-country compliance with the IOSCO Principles for Securities Regulation, and to third countries where there are (partial) recognition frameworks already in place (e.g. the US).

2.5.7 With regard to the issue of contracts which have a *"direct, substantial and foreseeable effect"* within the EU, the FOA recognises that this is a Level 1 requirement, but notes ESMA's observation in para 114 that a good regulatory outcome, international consistency and the preservation of the global nature of the OTC derivatives market are objectives that are best achieved by *"negotiations with other international partners… to avoid duplications and conflicting requirements"*. The FOA very much supports this approach in preference to home states applying their rules extraterritorially, which can only generate legal risk, compliance complexity and high costs for what is essentially a global business. ESMA will be familiar with the recent report "Inter-jurisdictional Regulatory Recognition: Facilitating Recovery and Streamlining Regulation", produced by the EU-US Coalition on Financial Regulation comprising 12 transatlantic trade bodies, which emphasised the importance of mutual recognition (or, as it is described in the US, substituted

compliance) and exemptive relief between states that have comparable regulatory policies, standards, objectives and outcomes (see Appendix 2).

2.5.8 The FOA notes that it is ESMA's intention to undertake further work and issue a separate CP covering this issue, but would only emphasise its concern that whether or not a contract has a *"direct, substantial and foreseeable effect within the EU"* will vary significantly from time to time in many cases, depending upon volumes, continuing eligibility for EU clearing (which may fluctuate) and a continuing high degree of economic connectivity. Interestingly and by way of comparison, the recent CFTC release on draft guidance governing the US regulation of cross-border swaps generally restricts the US connectivity test to business undertaken for US customers, which removes a significant degree of uncertainty. Clearly, greater regulatory convergence between the US and the EU as to clearing eligibility, etc. will help to avoid this kind of unnecessary regulatory complexity and legal risk.

2.5.9 The FOA would reiterate its previous references to Recommendation 15 in the Requirements for Mandatory Clearing issued by IOSCO's Technical Committee (February 2012), which urges authorities to *"closely co-operate to identify overlaps, conflicts and gaps between regimes with respect to cross-border application of the clearing obligation"* and Recommendation 16, which urges supervisory authorities to *"give due consideration to allowing the use of third country CCPs to meet mandatory clearing obligations"*.

2.5.10 The FOA welcomes EMIR's recognition in para 110 that evasion should not be presumed insofar as *"many companies enter into transactions with third-country entities or branches in third countries for legitimate business reasons"* and, of course, legitimate business reasons can also motivate relocation strategies of the whole or a part of a firm's business.

2.6 CCP Requirements

NB. The FOA recognises the prime importance of ensuring that minimum standards are observed in relation to systems and controls for managing CCP risks and to resist the possibility of a CCP subordinating those controls in the interests of gaining competitive advantage. However, the FOA would urge ESMA to review its proposals in this section to ensure that it is not being unduly prescriptive to the extent that it may be impairing the ability of a CCP to take discretionary actions to manage effectively their business and the risks of that business, particularly at times of market stress, taking into account also the increased level of on-going oversight of CCPs by their supervisors.

2.6.1 With regard to the practical arrangements governing the operation of colleges, the FOA welcomes the primacy given by ESMA to *"maintain the right degree of balance and flexibility"* (para 123), but would also emphasise the primacy of the role of the licensing authority of a CCP and the need for clarity in the decision-making process, insofar as colleges of this nature can get mired in disagreement and difficulties in reaching a consensus.

2.6.2 In relation to the recognition of third country CCPs, the FOA supports the governing criterion set out in para 125. The FOA anticipates that the Commission and ESMA, between them, will agree the different classes of information that will be required by them in fulfilling their respective roles and avoid any unnecessary duplication, but the FOA believes it is important that ESMA is in possession of sufficient information to fulfil its supervisory co-operation arrangements with the third-country competent authority.

2.6.3 Timely recognition of third-country CCPs is critical to market continuity and the global role of derivatives business (see Appendix 3). For example, institutions which clear derivatives on a third-country CCP through a local branch may be faced with a situation of that branch having to cease clearing business on that CCP until it becomes a recognised CCP or going to the considerable (and short-term) expense of setting up a non-EU affiliate to continue clearing transactions on that third country CCP for the short period of time that may be involved in considering and then granting recognition status.

Organisational requirements

2.6.4 In the matter of governance, the FOA would emphasise the importance of accountability and the adoption of a conservative approach, to take into account the fact that, firstly, CCPs will become significantly more important in terms of maintaining the integrity of the market and the financial system and, secondly, their 'at risk' clearing members are entitled to expect high priority to be afforded by CCPs to systems and controls for managing risk and risk management to be at the core of governance.

Sustaining a balance between accommodating competitiveness between CCPs and preventing any diminution in systems and controls for managing the various risks faced by CCPs will be critically important.

More particularly, the FOA continues to believe that it is important that:

- key senior members of a CCP's executive should be closely involved in its Risk Committee;
- at least one non-executive director of the CCP Board should be a member of the Risk Committee and act as a link and means of communication between the Board and the Committee; and
- there is a strong clearing membership representation on the Risk Committee insofar as, as previously stated, they have committed significant capital to support the CCP.

The FOA is concerned at the prescriptive requirements which prohibit a group that contains more than one CCP to lose the benefits of co-ordinated governance and operational efficiency by requiring, firstly, separately composed boards and, secondly, a prohibition on sharing human resources. The FOA believes that this

underestimates closer regulatory oversight by the licensing authority of CCPs and, in any event, fails to take adequate account of the fact that CCPs are experienced in managing conflicts of interest. Indeed, the ability of systemically important institutions to manage their conflict of interest is recognised across-the-board as regards banks, non-bank broker-dealers, fund managers, insurance companies, etc. The FOA believes that the ability of CCPs to share human resources should be preserved, but in the context of each CCP being required to have 'sufficient' dedicated human resources in order to ensure that it can fulfil its regulatory obligations, avoid putting the CCP at risk and effectively manage conflicts of interest. The FOA believes that reliance should be placed on comparable relevant criteria applying to CCP governance.

2.6.5 In general terms, the FOA supports ESMA's approach to organisational requirements, including record-keeping (and the FOA notes that a number of changes have been adopted by ESMA) and business continuity (and the FOA welcomes the fact that a third alternative site has not been deemed necessary for CCPs).

Margins

2.6.6 The FOA notes that ESMA's minimum margin requirements cover listed derivatives. This enlarged scope exceeds the minimum requirement placed upon it by Article 1.1 EMIR, which requires it to establish *"clearing and bilateral risk management requirements for OTC derivative contracts"* and it is noteworthy that, by imposing *"reporting requirements for derivative contracts"*, the Article clearly intends to distinguish between what is appropriate for *"OTC derivative contracts"* and what is appropriate for *"derivative contracts"* at large. In the circumstances, the FOA would strongly urge ESMA to take into account avoidance of regulatory creep (see para 1.5 in this response) and to include in its cost-benefit analysis a careful review of the economic consequences of its approach towards the setting of margins for listed futures and options. The FOA understands that the combined impact of a required confidence level of at least 99%, a liquidation period of at least two days and the proposals for the look-back period could generate a 40% increase in margin costs for listed derivatives. Such an increase would undermine seriously the post-crisis regulatory objective of encouraging the use of listed derivatives by market participants and create the kind of economic cost hurdle that would impact adversely on the post-crisis importance of enhancing risk management capability by ESMA (see paras 1.4(b) and 1.5).

The FOA shares ISDA's concerns over the overly prescriptive approach adopted towards percentage confidence levels, the look-back period, the liquidation period and the portfolio margining proposals.

2.6.7 The FOA notes ESMA's intention to sustain its criteria-driven approach and to continue to engage closely internationally – and particularly with the US authorities – on establishing a consensus as regards margin requirements.

Default fund

2.6.8 The FOA supports the general approach adopted by ESMA.

Liquidity risk controls

2.6.9 The FOA supports the general approach adopted by ESMA.

Default waterfall

2.6.10 The FOA supports the revised approach of ESMA and the importance of a CCP having substantial 'skin in the game' to a meaningful extent to ensure that a CCP is disincentivised from scaling back on its risk management processes (e.g. reducing margin requirements to sustain competitiveness) by having its own capital buffer in the default 'waterfall'.

On the other hand, the FOA questions whether 50% of the minimum capital requirements of a CCP is the required percentage for the purpose of achieving these objectives. The FOA believes that it is essential that the financial integrity of a CCP is maintained, particularly at times of market distress and would urge ESMA:

(a) to consider carefully the recapitalisation and systemic consequences for a CCP – and the viability of recapitalisation in a distressed market – when it is called upon to make the required contribution; and

(b) to carry out a full economic impact analysis in order to determine whether 50% (or some other figure) would be the appropriate percentage or whether the requirement could be, for example, equated to the contribution required by the largest clearing member to the default fund (on the basis that this represents the largest risk faced by the CCP) and how to avoid the risk of penalising the better-capitalised CCPs.

Collateral requirements

2.6.11 The FOA welcomes ESMA's decision to maintain a criteria-based approach to strike an appropriate balance *"between ensuring the robustness of the CCP and ensuring that adequate collateral is available"*. The FOA believes that this is crucial, reflecting the fact that CCPs will become significantly more systemically important and their responsibility to manage their risks prudently is an obligation owed not only to the system but also to the clearing members, who have committed significant financial resource to maintaining the financial credibility of a CCP. At the same time, the FOA believes that the demand for highly liquid assets will exceed significantly their availability, with potentially significant consequences for the economic viability of CCP clearing for the buy-side.

2.6.12 The FOA appreciates the concerns over the use of commercial bank guarantees and recognises that there will have to be restrictions on their use to ensure consistency with the CPSS-IOSCO Principles for Financial Market Infrastructures, but their role in

providing collateral relief and facilitating market access for non-financial counterparties, particularly in this climate, should not be underestimated. In determining the appropriateness of restricting the use of commercial bank guarantees, the FOA would urge ESMA to consider carefully the potentially significant cost implications of securing the kind of high-quality collateral that will be required by ESMA and that those costs will be exacerbated considerably as demand exceeds supply; and further exacerbated if the expected collateral crunch takes place.

The FOA would urge ESMA to give consideration to the use of other credit-mitigation documentation, such as letters of credit.

2.6.13 In its response to the ESMA DP on technical standards in support of EMIR, the FOA urged that consideration should be given to the use of assets that are closely correlated with the underlying exposures that are the subject of margining (noting that issues of liquidity could be addressed through the use of haircuts).

2.6.14 In summary, the FOA believes that, subject to the foregoing, ESMA has adopted a fairly balanced approach to the issue of collateral, but believes that this is an issue that should be closely monitored in the current climate to ensure that the balance referred to in para 2.6.11 above is maintained dynamically.

2.7 Investment Policy

2.7.1 The FOA notes ESMA's intention to maintain the criteria-based approach as regards the investment policy of a CCP and welcomes this decision. However, the FOA is equally conscious of the fact that there is a general need for consistency in approach which would, in turn, require on-going monitoring by the national supervisors of the CCPs, and the consequential pooling of knowledge between them (or, in some cases, within a regulatory college attached to the CCP). The consequence would be that, if a CCP had adopted a significantly different interpretation of the criteria governing its investment policy, it would then be in a position of 'comply or explain'.

At the same time, the FOA anticipates that the establishment of robust and accountable Risk Committees, where there is an adequate cross-representation of interests, will help to ensure that a CCP's policy with regard to the setting of margins, the acceptability/eligibility of collateral and, in this case, the investment policy of a CCP, will be such as to prioritise the prudent management of risk.

2.7.2 The FOA notes ESMA's view and its recognition that the use of derivatives should only be permissible in the context of the exercise of a CCP's default management procedures. However, the FOA believes this is unduly prescriptive insofar as:

(a) there are no comparable hedging restrictions imposed on other systemically important organisations;

(b) one of the key lessons of the crisis was to enhance the capability of organisations, particularly those that are systemically important, to better manage their risks;

(c) if it is possible to define a permissible hedging activity in the context of a non-financial counterparty, it should be perfectly possible to define it in the context of a CCP; and

(d) it is surely in the interests of the prudent management of risk that a CCP is given greater latitude in terms of managing a variety of different underlying risks and exposures, particularly in a climate of market stress, without the pre-condition of default – to do otherwise could actively exacerbate CCP risk!

2.8 Review of Models, Stress-Testing and Back-Testing

2.8.1 Here again, the FOA welcomes ESMA's commitment to a criteria-based approach, but would repeat its view that this is an approach that, in common with other areas in the technical standards, will require monitoring to ensure that the degree of latitude and flexibility that is inherent in such an approach does not result in any significant enhancement of risk to the CCP (or, as a consequence, to the clearing members). The FOA believes that the Risk Committee could have a key role to play here.

2.9 Trade Repositories

2.9.1 The FOA believes it is important to focus on the provision of necessary data and to maintain consistency between different reporting mechanisms to ensure that the data reported is of the appropriate quality and of practical use to regulators. This includes consistency in:

(a) the fields required to be report;

(b) the technical format specified for reporting data per field;

(c) the definition of the data to be included; and

(d) reporting mechanisms for transaction reporting under MiFID and trade reporting under EMIR, and avoidance of duplication in the provision of transaction information.

2.9.2 The FOA would reiterate its concerns over the requirement to identify the economic beneficiary, because it is difficult to prove in practice, particularly where natural persons are involved, and appears inconsistent with the reporting infrastructure being built by the industry to support the Dodd-Frank reporting requirements. The FOA would urge therefore the adoption of a more flexible definition of beneficiaries to be identified.

The reporting of exchange-traded derivatives to trade repositories

2.9.3 The EMIR requirement to report exchange traded derivatives (ETD) poses significant practical difficulties and as the European trade association representing the views of the futures and options industry, the FOA welcomes the opportunity to explain these and assist ESMA in its efforts to build an appropriate and proportionate European reporting regime, particularly where this relates to ETD. To this end, the FOA has attached, at Appendix 3, the result of a survey of member views on the proposed data fields in the tables of counterparty and common data.

2.9.4 This survey is a useful starting point to determine the most appropriate reporting standards for ETD, but given the time available to develop the fullest possible ETD industry consensus the FOA would caution against considering this a full and complete representation of views on each and every data field. The FOA will however continue its work in this area, and would welcome bilateral discussions with ESMA as it develops these standards further.

A. General principles

2.9.5 In its response to ESMA's Call for Evidence on Transaction Reporting in June, the British Bankers' Association (BBA) advocated that ESMA adopt three guiding principles when proposing revised transaction reporting guidance. This response was a result of joint work carried out by the FOA and the BBA. It is anticipated that a firm should be able to fulfil its transaction reporting obligations by reporting to trade repositories under EMIR, and the FOA believes therefore that ESMA should – as indicated in para 2.9.1 above – ensure, so far as possible, that reporting under EMIR is:

(i) simple;

(ii) harmonised; and

(iii) standardised.

2.9.6 These principles are important for the following reasons:

(a) Reporting requirements that are simple, clear and unambiguous are a strong driver of data quality and analysis, and this will be essential for ESMA to adequately meet its objectives

(b) While international compatibility, in particular with the U.S. even at a high-level is welcome, compatibility with high level principles is not itself sufficient because working with combined data across jurisdictions will in practice require data which is reported and expressed consistently. Compatibility at a more detailed level would more easily enable firms to design and build systems and processes to meet the same or at least similar reporting obligations, and further, Dodd-Frank (DFA) extra-territoriality may for example capture smaller non-US firms who will need to apply both DFA and EMIR reporting obligations, which would be proportionately a higher burden for such institutions, particularly where there is no clear convergence between the two regimes;

(c) Reporting standards should leverage existing international data standards, wherever possible. The FOA therefore welcomes ESMA's support for LEI and also the use of ISO standards. However, the FOA noted that, in some circumstances, industry standards are available but have not been referred to by ESMA. We have noted where this appears to be the case in the tables at Appendix 3. The FOA is also concerned that using an interim solution ahead of LEI is likely to require multiple technical build phases and releases for firms, and would urge ESMA to pay particular regard to this concern when establishing implementation timetables.

B. Overall concern

2.9.7 As stated in para 1.5, market structures for ETD markets differ in many respects to OTC markets, yet ESMA does not appear to recognise these key market differences. Without separate consideration of what should specifically be required to be reported for ETD, there is a risk that the proposed reporting obligations - which have been designed by ESMA very clearly with OTC derivatives in mind - will be imposed on ETD markets irrespective of how relevant or helpful some of the data fields will be for ESMA to fulfil its objectives.

C. Detailed areas for consideration

Phased implementation

2.9.8 FOA members envisage that the design and build of both workflows and technology solutions within ETD businesses will be significant and complex. In particular, for ETD products detailed consideration will need to be given to trading models and work flows, including exchanges, CCPs, and both clearing and executing brokers, to ensure not only that all impacted parties meet the reporting obligation, but also that duplicate reporting is avoided.

2.9.9 ESMA's proposal for a phased implementation dependent upon the registration of Trade Repositories for particular derivative types is not necessarily appropriate. Because "derivative type" is defined broadly in the ITS (by not referencing product types), the FOA envisages a number of unintended consequences, namely, (1) that the reporting obligation might commence before ETD businesses have been able to develop their reporting infrastructure; (2) that requiring trade repositories to offer services for all products referencing an asset class might limit the number of providers; and (3) the reporting on OTC derivatives could be unnecessarily delayed where trade repositories need to complete additional development work to support ETD referencing the same underlying asset classes before registering. Further, ESMA should be alert to the possibility that only one trade repository might be available which would present firms with significant commercial risk.

2.9.10 The FOA would therefore encourage ESMA and, where relevant, competent authorities to work closely with the industry to appreciate fully the challenges faced by both OTC and ETD businesses during implementation, and have regard to the

time that will be required for ETD businesses to build its reporting capabilities. The FOA considers in particular, that a period longer than 60 days may be necessary to enable compliance by all market participants for such a wide variety of products. Further, the date of publication of EMIR in the Official Journal means that as Article 9 is written the requirement to backload reporting of transactions would apply from 16th August 2012. As a purely practical matter this is likely to be impossible to achieve across all reportable data fields given that in some circumstances the systems required to capture the required data have not yet been built. The FOA would therefore encourage ESMA to have regard to this in its technical standards.

Relevance of data fields for ETD

2.9.11 The FOA's overall concern is reflected in the number of proposed data fields which do not seem relevant to ETD markets. In Appendix 3, the FOA seeks to identify whether or not each of the proposed data fields are currently available for ETD contracts, and whether or not it makes sense, in the context of EMIR's objectives, to report such data.

2.9.12 ESMA will note that of the 80 reportable fields:

(a) data required in some 22 fields is not currently available for ETD markets;

(b) Section 2d of the common data (amounting to an additional 5 data fields) seem irrelevant given that all ETD are centrally cleared; and

(c) Sections 2f, 2g, 2h and 2i of the common data (amounting to some 26 fields) would not necessarily need to be reported where Exchanges report – as is the case for transaction reporting – relevant reference data.

2.9.13 With respect to the data required to be reported, we would encourage ESMA therefore, to distinguish more clearly between ETD and OTC markets. In particular:

(a) to have regard to the time that will be necessary for ETD businesses to develop solutions to capture data that is not currently available in the ETD markets;

(b) to exempt the reporting of data which is required to monitor compliance with other rules in EMIR, but which are not product relevant, e.g.:

- the Clearing Obligation rules (exemptions and thresholds) and the rules on Risk Mitigation for OTC derivatives not cleared by a CCP apply only to OTC derivatives and, as such, the reporting of such data fields required to monitor compliance with these should be mandated for OTC Derivatives only; and

- the requirement to report collateral data should only apply to non-CCP cleared trades.

(c) to consider the benefits from the use of reference data from Exchanges which FOA believes will not only drive data quality, but will quite significantly reduce the burden and cost imposed on ETD business.

Reporting via third parties

2.9.14 The FOA understands that ESMA may be envisaging that the challenges faced by the ETD market mentioned above can largely or wholly be mitigated by reporting via third parties, either by firms reporting on behalf of clients or by clearing houses and exchanges reporting on behalf of their members. The complexities of reporting via third parties should not, in our view, be under-estimated. For example, the standards require the third party to *"guarantee protection of the data and compliance with the reporting obligation"*. It is highly unlikely in our view that a firm would be prepared to provide such a guarantee where they are within the ambit of ESMA's powers to accept the regulatory risk that this entails.

2.9.15 The FOA therefore encourages ESMA to be unambiguous as to who has responsibility for the accuracy and completeness of the reports. In particular, the FOA would suggest that the responsibility for the accuracy and completeness of the reports should rest with the counterparties to the trade, with any third party engaged on an outsourcing basis, with contracts used to establish standards and requirements that a third party would be subject to. It would also be preferable for there to be a single reporting counterparty for each trade (as has been proposed by the CFTC), and which is dictated by a market hierarchy or agreement as a term of the trade. A standard that reflects this will more appropriately achieve the degree of standardisation intended by the G20 commitments while also limiting the development costs for market participants. Further, where standard contract data is available via exchange reference data for example, this is preferable in order to achieve appropriate data quality.

Consistency with current and future transaction reporting obligations

2.9.16 An expectation of EMIR is that reporting under it will enable firms to fulfil both EMIR and current and future MiFID transaction reporting obligations. The FOA notes however that the proposed standards say very little about the current and future transaction reporting regimes and questions therefore whether sufficient consideration has been given to the need to ensure there is a harmonised approach between the two obligations. The FOA had intended, but in the time available has not been able to consider in great detail the extent to which the proposed data fields in the EMIR standards converge with the current and future transaction reporting requirements. The FOA intends to conduct this work and share it bilaterally with ESMA in due course.

2.9.17 The FOA has noted however, that in aligning the definition of *'Conclusion of a contract'* with *'Execution of a transaction'*, ESMA is reflecting perceived consistency in applicability between EMIR and MiFID. In practice, however, there is an on-going problem with the clarity around the definition of an 'execution' e.g. in circumstances when there is novation. The FOA is concerned that the proposals could inadvertently

capture clearing firm, which the FOA does not believe is intended by ESMA. Further clarity would be welcome.

2.9.18 Further, in its recent Call for Evidence on Transaction Reporting, ESMA asked for comments on transaction schemes that ESMA should consider in its work to harmonise reporting guidelines. It is unclear whether ESMA itself has considered how its transaction schemes will be satisfied through reporting under EMIR. Any vagueness in the standards is likely to cause duplicative reporting and/or endless iterations of the standards to ensure consistency, and we would therefore encourage a more detailed upfront consultation on this, particularly for unique ETD scenarios. For the avoidance of doubt, we have included at Appendix 4, a number of unique ETD scenarios which we think require specific consideration. You will also find these in the BBA's response to ESMA Call for Evidence on Transaction Reporting.

Large trade reporting offers a more pragmatic basis on which to build ETD reporting standards

2.9.19 As ESMA will be aware, ETD reporting under DFA was treated differently due to higher transparency and lower systemic risk related to ETD products. As such, there is no requirement to report exchange traded futures but instead reliance is placed on position reports (or 'large trader reports') made to both the CFTC and exchanges.

2.9.20 Reporting ETD positions in this way has been in place in both the US and Hong Kong for decades and has proved effective, not least because a significant number of positions are opened and closed intraday and the huge volume of trades being transacted on a daily basis tend in practical terms to support the view that an end of day aggregated position for ETD should be reported. Firms have the infrastructure in place to report in this way in the EU. Indeed, some exchanges such as the London Metal Exchange (LME) already receive such reports, but there is no such routine reporting to competent authorities.

2.9.21 The FOA recognises the value of this information being sent under EMIR to trade repositories but would encourage ESMA to consider, instead of the current draft format and content, requiring a report similar to the large trade report whereby firms calculate and submit positions against LEIs to the repository, including the exchange and exchange product codes. The FOA believes that this could appropriately delineate the reporting requirements for OTC and ETD markets, meet the expectations of EMIR, and prove less complicated and time consuming to implement.

APPENDIX 1

LIST OF FOA MEMBERS

FINANCIAL INSTITUTIONS
ABN AMRO Clearing Bank N.V.
ADMISI
Altura Markets S.A./S.V
AMT Futures Limited
Jefferies Bache Limited
Banco Santander
Bank of America Merrill Lynch
Banca IMI S.p.A.
Barclays Capital
Berkeley Futures
BGC International
BHF Aktiengesellschaft
BNP Paribas Commodity Futures
BNY Mellon Clearing International
Citadel Derivatives Group (Europe)
Citigroup
City Index
CMC Group Plc
Commerzbank AG
Crédit Agricole CIB
Credit Suisse Securities (Europe)
Deutsche Bank AG
ETX Capital
FOREX.COM UK
FXCM Securities
GFI Securities
GFT Global Markets UK Ltd
Goldman Sachs International
HSBC Bank Plc
ICAP Securities Limited
IG Group Holdings Plc
International FC Stone Group
JP Morgan Securities
Liquid Capital Markets
London Capital Group
Macquarie Bank
Mako Global Derivatives
Marex Spectron
Mitsubishi UFJ Securities International Plc
Mizuho Securities USA, Inc London
Monument Securities
Morgan Stanley & Co International
Newedge Group (UK Branch)
Nomura International Plc
Rabobank International
RBC Europe Limited
Saxo Bank A/S
Scotia Bank
S E B Futures
Schneider Trading Associates
S G London
Standard Bank Plc
Standard Chartered Bank
Starmark Trading
State Street GMBH London Branch
The Kyte Group
The RBS
UBS Limited
Vantage Capital Markets LLP
Wells Fargo Securities

EXCHANGE/CLEARING HOUSES
APX Group
CME Group, Inc.
Dalian Commodity Exchange
European Energy Exchange AG
Global Board of Trade
ICE Futures Europe
LCH.Clearnet Group
MCX Stock Exchange
MEFF RV
Nasdaq OMX
Nord Pool Spot AS
NYSE Liffe
Powernext SA
RTS Stock Exchange
Shanghai Futures Exchange
Singapore Exchange
Singapore Mercantile Exchange
The London Metal Exchange
The South African Futures Exchange
Turquoise Global Holdings

SPECIALIST COMMODITY HOUSES
Amalgamated Metal Trading
BASF SE. EIL
Cargill Plc
ED & F Man Capital Markets
Glencore Commodities
Gunvor SA
Hunter Wise Commodities LLC
Koch Metals Trading Ltd
Metdist Trading Limited
Mitsui Bussan Commodities
Natixis Commodity Markets
Noble Clean Fuels
Phibro GMBH
J.P. Morgan Metals
Sucden Financial
Toyota Tsusho Metals
Triland Metals
Vitol SA

ENERGY COMPANIES
BP International IST
Centrica Energy
ChevronTexaco
ConocoPhillips Limited
E.ON EnergyTrading SE
EDF Energy
EDF Trading Ltd
International Power plc
Phillips 66 TS Limited
National Grid Electricity Transmission Plc
RWE Trading GMBH
Scottish Power Energy Trading
Shell International
SmartestEnergy Limited

PROFESSIONAL SERVICE COMPANIES
Ashurst LLP
ATEO Ltd
Baker & McKenzie
Berwin Leighton Paisner LLP
BDO Stoy Hayward
Clifford Chance
Clyde & Co
CMS Cameron McKenna
Deloitte
FfastFill
Fidessa Plc
Freshfields Bruckhaus Deringer
Herbert Smith LLP
Holman Fenwick Willan LLP
ION Trading Group
JLT Risk Solutions Ltd
Katten Muchin Rosenman LLP
Linklaters LLP
Kinetic Partners LLP
KPMG
McDermott Will & Emery LLP
Mpac Consultancy LLP
Norton Rose LLP
Options Industry Council
Orrick, Herrington & Sutcliffe LLP
PA Consulting Group
R3D Systems Ltd
Reed Smith LLP
Rostron Parry
RTS Realtime Systems
Sidley Austin LLP
Simmons & Simmons
SJ Berwin & Company
SmartStream Techologies
SNR Denton UK LLP
Speechly Bircham LLP
Stellar Trading Systems
SunGard Futures Systems
Swiss FOA
Traiana Inc
Travers Smith LLP
Trayport

APPENDIX 2

EU-US COALITION ON FINANCIAL REGULATION REPORT:

"INTER-JURISDICTIONAL REGULATORY RECOGNITION: FACILITATING RECOVERY AND STREAMLINING REGULATION"

EXECUTIVE SUMMARY

EU-US Coalition on Financial Regulation Report

"Inter-jurisdictional Regulatory Recognition: Facilitating Recovery and Streamlining Regulation"

Executive Summary

Background

In 2005, a group of transatlantic financial service trade associations established the EU-US Coalition on Financial Regulation with the objective of energising the transatlantic dialogue to deliver on the three 'gateways' to establishing a more coherent framework of regulation for the conduct of cross-border business, namely, regulatory recognition, exemptive relief and targeted rules' convergence. To that end, and in the years preceding the crisis, the Coalition produced a number of reports, including a 'gap analysis' of the business conduct rules of the EU, the US and Switzerland.

On 1st February 2008, the European Commission and the US SEC, in their Joint Statement on Mutual Recognition in Securities Markets, mandated their respective organisations to *"intensify work on a possible framework for EU-US mutual recognition for securities in 2008"* on the basis that *"the concept of mutual recognition offers significant promises and means for better protecting investors, fostering capital formation and maintaining fair, orderly and efficient transatlantic securities markets"*.

The subsequent emergence of the sub-prime financial crisis resulted in a refocusing of regulatory priorities away from regulatory recognition to restructuring financial services regulation at both the macro- and micro-levels. Nevertheless, the importance of developing a framework of coherent and coordinated regulation for the carrying-on of cross-border business remains as true today as it was before the crisis.

In this context, it is noteworthy that the G20, in its first post-crisis Leaders' Summit in November 2008, underscored *"the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty".* For its part, the European Commission, in its first report after the crisis, cautioned that *"protectionism and a retreat towards national markets can only lead to stagnation, a deeper and longer recession and lost prosperity"* ('Driving Economic Recovery' (4/3/09)).

While it is true that the post-crisis regulatory agenda of the various transatlantic constituencies has adopted in large part the objectives and standards set by the G20, the FSB, Basel and IOSCO, regulatory convergence is nevertheless being increasingly undermined by growing regulatory differentiation, protectionism and extraterritoriality. This, in turn, has generated needless legal risk and compliance complexity, restricted customer choice and increased cost in relation to the carrying on of cross-border business.

As a result, the Coalition, noting the global importance of energising business recovery and economic growth in the current climate and recognising that the transatlantic marketplace (through which 80% of the world's financial business flows) has a potentially significant contribution to make

in achieving those key targets, commissioned Clifford Chance to produce a report emphasising the post-crisis importance of an urgent resumption of the pre-crisis dialogue to establish a framework of regulatory recognition in the transatlantic marketplace. This report, called *'Inter-Jurisdictional Regulatory Recognition: Facilitating Recovery and Streamlining Regulation'* was published on 19th June 2012.

Summary of the Report's Findings

The Report emphasises that regulatory recognition must be based on acceptable comparability in shared regulatory policy objectives, standards and outcomes, but recognises that there will inevitably be regional differences in overarching legal systems, market practices, etc. It identifies the key areas where regulatory recognition should be concentrated and the kind of regulatory criteria necessary for it to be credible and reliable. The Report also recognises the critical importance of accommodating operational differentiation within Memoranda of Understanding entered into between regulatory authorities, insofar as while they may all be subjected to common regulatory objectives, standards and outcomes, they will be fundamentally different in terms of experience and resources and this will impact on the degree of operational inter-reliance that can take place between differentiated authorities.

More particularly, the report recommends:

- that the international standard setting bodies should move beyond expressing policy objectives and aspirations to defining the negotiating architecture for progressing the dialogue on regulatory recognition, setting timetables and actively 'mentoring' the dialogue;

- that the 38 IOSCO Principles and Objectives for Securities Regulation (exhibited to the Report) are the only international agreed measure regulatory adequacy and, as such, should serve as the foundation for the dialogue, but this should be supported by additional tiers of due diligence and in-depth analysis, particularly in the area of supervision and enforcement; and that the IOSCO Multilateral Memorandum of Understanding should be widely adopted and extended beyond its scope of facilitating information-sharing and evidence-gathering;

- that a dedicated working group drawn from the key regulatory authorities on both sides of the Atlantic should be established (or the work outsourced on a collective basis to a major law firm) to undertake a regulatory gap analysis; and establish a process whereby new regulations with potential extraterritorial effect or which depart from the basis for regulatory recognition are made subject to inter-regulatory consultations prior to their introduction (other than in cases of extreme market stress or urgency);

- that an advisory group comprising investment banks, non-bank broker-dealers, market infrastructures and corporate and institutional end-users of the markets should be established to identify areas of regulatory conflict which impose significant cost or other resource burdens or unnecessary complexity on financial service providers and/or consumers and/or market infrastructures (and regulatory authorities) and provide input into the dialogue in terms of ensuring that it delivers commercial and business efficiency alongside regulatory efficiency for the key 'stakeholders' in the outcome.

List of Coalition Members

American Bankers Association Securities Association (ABASA)

Association of Financial Markets in Europe (AFME) /Global Financial Markets Association (GFMA)

Bankers' Association for Finance and Trade (BAFT)

British Bankers' Association (BBA)

Futures Industry Association (FIA)

Futures and Options Association (FOA)

International Capital Market Association (ICMA)

Investment Industry Association of Canada (IIAC)

International Swaps and Derivatives Association (ISDA)

Securities Industry and Financial Markets Association (SIFMA)

Swiss Bankers Association (SBA)

Observer: European Banking Federation (EBF)

APPENDIX 3

COMMENTS ON THE PROPOSED DATA FIELDS

COUNTERPARTY DATA

	FIELD	DETAILS TO BE REPORTED	FORMAT	EXCHANGE TRADED DERIVATIVE (ETD) INDUSTRY COMMENTS	
	Parties to the contract			Is the data currently available?	Does it make sense to report?
1	Reporting timestamp	Date and time of reporting.	Reporting timestamp ISO 8601 date format / UTC time format.	Yes	Yes
2	C/P ID	The reporting counterparty shall be identified by a unique code or, in the case of individuals, by a client code.	Legal Entity Identifier (LEI), interim entity identifier, BIC or Client Code.	Yes	Yes
3	ID of the other C/P	Unique identifier for the other counterparty of the contract.	Legal Entity Identifier (LEI), interim entity identifier, BIC or Client Code.	Yes, but clarity on what is meant by 'Client Code' would be welcome i.e. can a firm's internal codes be used?	Yes, but note that in some circumstances the ID of the other C/P is not known
4	Name of C/P	Corporate name of C/P, i.e. name of financial C/P; nonfinancial C/P; or individual.	Free Text, 50 alphanumerical digits. If in the LEI, or an interim entity identifier, no need for this field.	Yes	Yes
5	Domicile of C/P	Information on the registered office, consisting of full address, city and country.	Free Text, 500 alphanumerical digits. If in the LEI, or an interim entity identifier, no need for this field.	Yes	Yes
6	Corporate sector of C/P	Nature of the company activities / status (bank, insurance company, etc.).	Taxonomy (B=Bank, I=Insurance company), if not in the LEI database.	Yes	Yes, using ISDA Standard
7	Financial or non-financial nature of C/P	Indicate if the C/P a financial or non-financial counterparty in accordance with Article 2 (8,9)of Regulation No (EU) No xx/2012 [EMIR].	F=Financial Counterparty, N = Non-Financial Counterparty	We question how helpful this and there is a risk of duplication given the data reported under #6.	We question how helpful this is and there is a risk of duplication given the data reported under #6.
8	Broker ID	In case C/P uses a broker to execute the contract, this broker shall be identified by a unique code.	Legal Entity Identifier (LEI), interim entity identifier, or BIC.	Yes, but the Broker ID is only available in agency transactions. Reporting expectations should be clarified for non-agency transactions.	Yes, but expectations should be clarified.

9	Reporting entity ID	ID of the reporting entity.	Legal Entity Identifier (LEI), interim entity identifier, or BIC.	Yes	Yes
10	Clearing member ID	In case of give-up.	Legal Entity Identifier (LEI), interim entity identifier, or BIC.	We're not clear what purpose this serves? "In case of give-up" does not seem relevant.	We're not clear what purpose this serves? "In case of give-up" does not seem relevant.
11	Beneficiary ID	If the beneficiary of the contract is not a C/P to this contract it has to be identified by a unique code or, in case of individuals, by a client code.	Legal Entity Identifier (LEI), interim entity identifier, BIC or Client Code.	Because it is sometimes difficult to know who the underlying client is, an alternative solution could be to identify the person who makes an investment decision. As the scenarios show at Appendix 4, in multi-lateral ETD transactions there are circumstances where this data would not be passed to the reporting entity.	Yes, but perhaps where the person who makes an investment decision is considered the beneficiary.
12	Trading capacity	Identifies whether the contract was executed on own account (on own behalf or behalf of a client) or for the account of, and on behalf of, a client.	P=Principal, A=Agent.	We assume this data field intends to capture the trading capacity from the C/P perspective. Clarity would be welcome. This data is available if the obligation is aligned with transaction reporting requirements. As the scenarios show at Appendix 4, in multi-lateral ETD transactions there are circumstances where this data would not be passed to the reporting entity.	Yes, where the obligation is aligned with transaction reporting requirements.
13	C/P side	Identifies whether the contract was a buy or a sell from the reporting C/P's perspective. This field shall be left blank for contracts where the relevant information has been provided	C/P side B=Buyer, S=Seller.	Yes, but as it is not known whether the other side will report this data in field #37, field #13 will always be populated. The purpose behind the exception is therefore not	Yes.

		in field No. 37 (Direction).		clear.	
14	Trade with non-EEA C/P	In case the C/P has entered into a trade with a non-EEA C/P who is not subject to the reporting obligation.	Y=Yes, N=No	N/A for ETD	Yes
15	Directly linked to commercial activity or treasury financing	For non-financial C/P; Information on whether the contract is objectively measurable as directly linked to the non-financial counterparty's commercial or treasury financing activity, as referred to in Art. 10(3) Regulation No (EU) No xx/2012 [EMIR].	Y=Yes, N=No; changes over the lifetime of a contract need to be reported. In case the hedge is no longer justified, the report should be amended.	Relevant to OTC only. Doesn't apply to ETD.	Relevant to OTC only. Doesn't apply to ETD.
16	Clearing threshold	For non-financial C/P; information whether the counterparty is above the clearing threshold referred to in Art. 10(3) Regulation No (EU) No xx/2012 [EMIR].	Y=Above, N=Below	Relevant to OTC only. Doesn't apply to ETD.	Relevant to OTC only. Doesn't apply to ETD.

Table 2 – Common Data

	FIELD	DETAILS TO BE REPORTED	APPLICABLE TYPES OF DERIVATIVE CONTRACT	FORMAT	EXCHANGE TRADED DERIVATIVE (ETD) INDUSTRY COMMENTS	
	Section 2a – contract type		All contracts		Is the data currently available?	Does it make sense to report?
1	Taxonomy	The taxonomy used for describing the classification of the reported contract.		Taxonomy to be defined either by the industry or subsidiary solution defined by ESMA.	N/A for ETD	N/A for ETD
2	Product ID	The contract shall be identified by using a		Unique Product Identifier (UPI) or	Yes, but suggest that Aii is used for un-ISIN otherwise ISIN	Yes

		unique product identifier.		information in accordance with Article 4.		
3	Underlying	The underlying shall be identified by using an unique identifier for this underlying. In case of baskets or indices, an indication for this basket or index shall be used where an unique identifier does not exist.		ISO 6166 International Securities Identifying Number (ISIN) / Legal Entity Identifier (LEI), B= Basket, I=Index.	Same as #2	Same as #2
4	Currency	The currency of the notional amount or the currency to be delivered or, for currency derivatives, the currency to be delivered.		ISO Currency Code.	Is available, but if data is reported via Aii/ISIN this data field would not be necessary	Yes
	Section 2b – Details on the transactions		All contracts		Is the data currently available?	Does it make sense to report?
5	Trade ID	An internationally agreed UTI.		Up to 20 numerical digits.	Yes - the Trade ID is expected to be provided by Exchange. However, it is unclear what would be reported for example where a trade is backed out to another client or split.	Yes
6	Venue of execution / OTC	The venue of execution shall be identified by an unique code for this venue, or that the contract was concluded OTC.		ISO 10383 Market Identifier Code (MIC) where relevant, XOFF for listed derivatives that are traded off-exchange or XXXX for OTC derivatives.	Yes - should be consistent with transaction reporting and use MIC.	Yes -should be consistent with transaction reporting and use MIC.
7	Price / rate / spread	The price per derivative excluding, where		Format (C=Cash, P=Percentage, Spread=S)	Yes	Yes

		applicable, commission and accrued interest.		and amount (xxxx,yy).		
8	Notional amount	Face value of the contract, i.e. value of the deliverables.		Up to 20 numerical digits (xxxx,yy).	Yes	Yes
9	Price multiplier	The number of derivatives represented by one contract.		Up to 10 numerical digits.	Yes	Yes
10	Quantity	Number of contracts included in the contract.		Up to 10 numerical digits.	Yes	Yes
11	Up-front payment	Amount of any up-front payment.		Numerical digits in the format xxxx,yy.	No - Relevant to CDS's and not ETD.	No - Relevant to CDS's and not ETD.
12	Delivery type	Whether the contract is settled physically or in cash.		C=Cash, P=Physical, O=Option Available to counterparty.	Yes	Yes, but use industry standard
13	Execution timestamp	The time and date a contract was executed or modified, indicating time zone.		ISO 8601 date format / UTC time format.	Yes	Yes
14	Effective date	Date when obligations under the contract come into effect.		ISO 8601 date format.	N/A for listed derivatives.	N/A for listed derivatives.
15	Maturity Date	Date when contract expires / exercise date.		ISO 8601 date format	Yes, but it should be clarified that 'Maturity Date' is the same as 'Expiry Date'	Yes
16	Termination date	If different from maturity		ISO 8601 date format.	N/A for listed derivatives.	N/A for listed derivatives.
17	Settlement date	Date of settlement of the underlying.		ISO 8601 date format.	N/A for listed derivatives.	N/A for listed derivatives.
18	Master Agreement type	Reference to any master agreement, if existent (e.g. ISDA Master Agreement; Master Power		Free Text.	N/A for listed derivatives.	N/A for listed derivatives.

		Purchase and Sale Agreement; International ForEx Master Agreement; European Master Agreement or any local Master Agreements).				
19	Master Agreement date	Reference to the date of the master agreement version, if any (e.g. 1992, 2002, ...).		ISO 8601 date format.	N/A for listed derivatives.	N/A for listed derivatives.
	Section 2c – Risk mitigation/Reporting		All contracts		Is the data currently available?	Does it make sense to report?
20	Confirmation	Whether the contract was electronically confirmed, non-electronically confirmed or remains unconfirmed.		Y=Non-electronically confirmed, N=Nonconfirmed, E=Electronically confirmed.	No. We can see why this is relevant to OTC transactions, but not for ETD transactions. Please define “confirmation”.	We can see why this is relevant to OTC transactions, but not for ETD transactions. Please define “confirmation”.
21	Confirmation timestamp	Date and time of the confirmation.		ISO 8601 date format, UTC time format	Same as #20	Same as #20
	Section 2d - Clearing		All contracts		Is the data currently available?	Does it make sense to report?
22	Clearing obligation	Whether the reported contract is subject to the clearing obligation under Regulation (EU) No. X/2012 [EMIR].		Y=Yes, N=No.	All listed derivatives are centrally cleared.	All listed derivatives are centrally cleared.
23	Cleared	Whether clearing has taken place.		Y=Yes, N=No.	All listed derivatives are centrally cleared.	All listed derivatives are centrally cleared.
24	Clearing timestamp	Time and date clearing took place.		ISO 8601 date format / UTC time format	All listed derivatives are centrally cleared.	All listed derivatives are centrally cleared.
25	CCP	In case of a contract that has been cleared, the unique code for the CCP that has cleared the		Legal Entity Identifier code (LEI), interim entity identifier, or BIC of the CCP clearing	All listed derivatives are centrally cleared.	All listed derivatives are centrally cleared.

		contract.		the contract.		
26	Intragroup	Indicates whether the contract was concluded as an intra-group transaction, defined in [Art. 3] of Regulation No (EU) No xx/2012 [EMIR]		Y=Yes / N=No.	All listed derivatives are centrally cleared.	All listed derivatives are centrally cleared.
	Section 2e - Exposures		All contracts		Is the data currently available?	Does it make sense to report?
27	Collateralisation	Whether exchange of collateral occurred to cover the contract in accordance with Article 11 of Regulation No (EU) No xx/2012 [EMIR].		U=uncollateralised, PC= partially collateralised, OC=one way collateralised or FC- fully collateralised.	N/A for listed derivatives.	N/A for listed derivatives.
28	Collateral basis	Whether the exchange of collateral occurred on a portfolio basis.		Y=Yes / N=No.	N/A for listed derivatives.	N/A for listed derivatives.
29	Collateral type	Type of collateral that is posted to/by a counterparty.		C=cash, = securities, B=bonds, M=mixed, O=Other	N/A for listed derivatives.	N/A for listed derivatives.
30	Other	Any other type of collateral that is posted by a counterparty		Free text.	N/A for listed derivatives.	N/A for listed derivatives.
31	Collateral amount	Amount of collateral that is posted by a counterparty		Indicates the amount of collateral that is posted by a counterparty	N/A for listed derivatives.	N/A for listed derivatives.
32	Currency of collateral	Currency of the amount of collateral that is posted by a counterparty		E = Euros, US = US dollars, UK = Pound Stirling, O = Other	N/A for listed derivatives.	N/A for listed derivatives.
33	Other currency of collateral	Other currency of the amount of collateral that		Free text.	N/A for listed derivatives.	N/A for listed derivatives.

	amount	is posted by a counterparty				
34	Mark to market value of contract	Revaluation of the contract, specifying the difference between the closing price on the previous day against the current market price.		Format (C=Cash, P=Percentage, S=Spread) and amount (xxxx,yy).	N/A for listed derivatives.	N/A for listed derivatives.
35	Mark to market date of contract	Date of the last mark to market valuation.		ISO 8601 date format / UTC time format.	N/A for listed derivatives.	N/A for listed derivatives.
36	Master netting agreement	Type of master agreement in place covering netting arrangements, if different from the master agreement identified in field 18		Free text	N/A for listed derivatives.	N/A for listed derivatives.
	Section 2f – Interest Rates	If a UPI is reported and contains all the information below, this is not required to be reported.	Interest rate derivatives		Is the data currently available?	Does it make sense to report?
37	Direction	Whether the reporting counterparty is receiving or paying the fixed rate. In case of float-to-float or fixed-to-fixed contracts this field has to be filled as unspecified.		P=Payer of fixed rate, R=Receiver of fixed rate, U=Unspecified, In general, if the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed, it is unspecified. For non-swap or swaptions, the instrument that was bought or sold.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.

38	Fixed rate	Level of the fixed rate leg.		Numerical digits in the format xxxx,yy	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
39	Fixed rate day count fraction	The actual number of days in the relevant fixed rate payer calculation period.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
40	Fixed leg payment frequency	Frequency of payments for the fixed rate leg.		D=daily, W=weekly, M=monthly, Q=quarterly, S=semi-annually, A=annually, or Dxxs, if a certain number of days, xxx being the specific amount of days (e.g. D010=10 days).	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required. If it is required, industry standard should be used.
41	Floating rate payment frequency	Frequency of payments for the floating rate leg.		D=daily, W=weekly, M=monthly, Q=quarterly, S=semi-annually, A=annually, or Dxxs, if a certain number of days, xxx being the specific amount of days (e.g. D010=10 days)	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required. If it is required, industry standard should be used.
42	Floating rate reset frequency	Frequency of floating rate leg resets.		D=daily, W=weekly, M=monthly, Q=quarterly, S=semi-annually, A=annually, or Dxxs, if a certain number of days, xxx being the specific amount of days (e.g. D010=10 days).	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required. If it is required, industry standard should be used.

43	Floating rate to floating rate	An indication of the interest rates used which are reset at predetermined intervals by reference to a market reference rate.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
44	Fixed rate to fixed rate	An indication of the interest rates used which do not vary during the life of the transaction.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
45	Fixed rate to floating rate	An indication of the fixed and floating rate used.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
	Section 2g - Currency	If a UPI is reported and contains all the information below, this is not required to be reported.	Currency derivatives		Is the data currently available?	Does it make sense to report?
46	Currency 2	The cross currency, as different from the currency of delivery.		ISO 4217 Currency Code.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
47	Exchange rate 1	Exchange rate at the moment of the conclusion of the contract.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
48	Exchange rate 2	Exchange rate at the moment of the conclusion of the contract.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
49	Value date	The date on which both currencies traded will		ISO 8601 date format.	If you have product ID and reference data from Exchanges	If you have product ID and reference data from Exchanges

		settle.			then this data should not be required.	then this data should not be required.
50	Forward exchange rate	Forward exchange rate on value date.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
51	Exchange rate basis	Quote base for exchange rate.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
	Section 2h - Commodities	If a UPI is reported and contains all the information below, this is not required to be reported.	Commodity derivatives		Is the data currently available?	Does it make sense to report?
	General					We are unclear whether these fields refer only to power / electricity or to any / all energy commodities or indeed other commodities. More clarity is requested to improve certainty.
52	Commodity base	Name of the commodity group.		AP=Agricultural Commodities, E=Energy, F=Freights, P=Paper, M=Metals, PM=Precious Metals, O= Other.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required. If it is required, industry standard should be used.
53	Commodity details	Details of the particular commodity.		Free text.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
54	Load type	Product delivery profile: base load, peak, off-peak, block hours or other		Free text.	If you have product ID and reference data from Exchanges then this data should not be	If you have product ID and reference data from Exchanges then this data should not be

		which correspond to the delivery periods of a day.			required.	required.
55	Delivery point or zone	Physical or virtual point where the delivery takes place.		Free text, field of up to 20 characters.	It is unclear what is meant by "delivery point or zone". If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
56	Delivery start date and time	Start date and time of delivery.		ISO 8601 date format.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
57	Delivery end date and time	End date and time of delivery.		ISO 8601 date format.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
58	Border	Identification of the border or border point of a transportation contract.		Free text.	It is unclear what is meant by "border" or "border point". Does it relate to country borders? If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
	Energy					
59	Daily or hourly quantity	For energy commodities, daily or hourly quantity in MWh which corresponds to the underlying commodity.		Free text	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
	Section 2i - Options	If a UPI is reported and contains all the information below, this is	Contracts that contain an option		Is the data currently available?	Does it make sense to report?

		not required to be reported.				
60	Option type	Indicates whether the contract is a call or a put from the reporting counterparty's perspective.		P=Put, C=Call.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
61	Option style (exercise)	Indicates whether the option may be exercised only at a fixed date (European, Bermudan and Asian style) or at any time during the life of the contract (American style).		A=American, B=Bermudan, E=European, S=Asian.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required. If it is required, industry standard should be used.
62	Strike price (cap/floor rate)	The strike price of the option.		Numerical digits in the format xxxx,yy.	If you have product ID and reference data from Exchanges then this data should not be required.	If you have product ID and reference data from Exchanges then this data should not be required.
	Section 2j – Modifications to the trade report		All contracts		Is the data currently available?	Does it make sense to report?
63	Action type	Whether the report: -is reporting a derivative contract or post trade event for the first time, it will be identified as 'new'; -modifies details of a previously reported derivative contract, it will be identified as 'modify' -cancels a specific trade or post trade event,		N=New, M=Modify, C=Cancel.	Yes, but an example of where large trader reports may be a better basis on which to report.	Yes.

		it will be identified as 'cancel'; -Contains any other amendment, it will be identified as 'Other'.				
64	Details of action type	Where field 63 is reported as 'other' the details should be specified here.		Free text.		

APPENDIX 4

ETD TRADING SCENARIOS

17. ETD Client Trade (Aii/ISIN)

LCH Clearnet

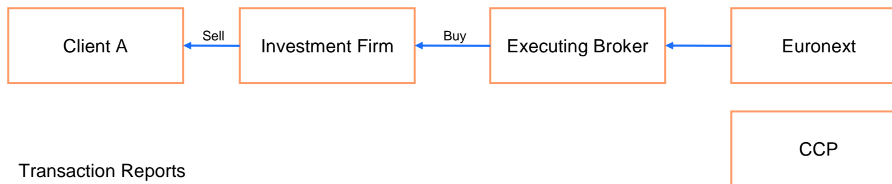
Transaction Reports

Data Field Name	Content of Report
Reporting Firm	Investment Firm
Trading Capacity	Principal Cross
Buy/Sell Indicator	B
Quantity	1
Counterparty 1	LCH Clearnet SA
Counterparty 2	Client A
Venue of execution	XEUE

The Buy/Sell Indicator is from the perspective of the Investment Firm

18. ETD Client Trade – Order passed for execution

External Client A buys 1 contract on a principal basis. Investment firm passes the order to an executing broker for execution. No client details are passed to the Executing Broker



CCP

Transaction Reports

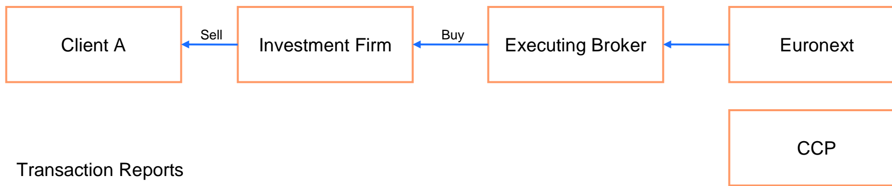
Data Field Name	Content of Report
Reporting Firm	Investment Firm
Trading Capacity	Principal Cross
Buy/Sell Indicator	B
Quantity	1
Counterparty 1	Executing Firm
Counterparty 2	Client A
Venue of execution	XOFF

Data Field Name	Content of Report
Reporting Firm	Executing Broker
Trading Capacity	Principal Cross
Buy/Sell Indicator	B
Quantity	1
Counterparty 1	LCH Clearnet SA
Counterparty 2	Investment Firm
Venue of execution	XEUE

The Buy/Sell Indicator is from the perspective of the Investment Firm or Executing Broker as appropriate

19. ETD Client Trade – Order passed for execution

External Client A buys 1 contract on a principal basis. Investment firm passes the order to an executing broker for execution. Client details are passed to the Executing Broker



Transaction Reports

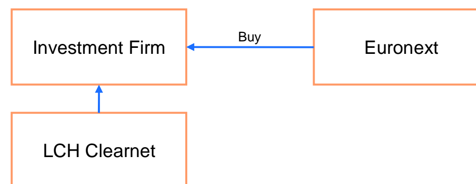
As the client details have been passed to the Executing Broker then the Investment Firm has no reporting obligation

Data Field Name	Content of Report
Reporting Firm	Executing Broker
Trading Capacity	Principal Cross
Buy/Sell Indicator	B
Quantity	1
Counterparty 1	LCH Clearnet SA
Counterparty 2	Client A
Venue of execution	XEUE

The Buy/Sell Indicator is from the perspective of the Executing Broker

20. ETD House Trade (Aii/ISIN)

Investment Firm A buys 1 contract on a principal basis



Transaction Reports

Data Field Name	Content of Report
Reporting Firm	Investment Firm
Trading Capacity	Principal
Buy/Sell Indicator	B
Quantity	1
Counterparty 1	LCH Clearnet SA
Counterparty 2	Blank
Venue of execution	XEUE

The Buy/Sell Indicator is from the perspective of the Investment Firm