



EMIR Implementation: Legal Documentation Workshop – Summary Notes

August, 2013



DOCUMENT PURPOSE

This is a Document of Record of the “FOA EMIR implementation, Legal Documentation” workshop. This document reflects the discussion that took place in the workshop and has sought to collate the information in a logical format.

The intent is for the document to increase awareness of the implementation challenges that exist and provide a basis for constructive dialogue to address some of these challenges.

An Executive Presentation of the findings and themes drawn from the 4 FOA Segregation and Portability workshops will be shared with Regulators.

DISCLAIMER

THIS DOCUMENT REPRESENTS THE FOA’S INTERPRETATION OF THE DISCUSSION POINTS FROM THE APPLICABLE WORKSHOP AND SHOULD NOT BE VIEWED AS BEING ENDORSED IN ANY WAY BY THE PARTICIPATING FIRMS.

1. EXECUTIVE SUMMARY

Headlines	Significant change required in a compressed timeline within the context of a congested regulatory landscape	<ul style="list-style-type: none"> - The degree of change that is taking place for the industry to be compliant with EMIR segregation is significant. The challenges associated with this change are magnified in light of the compressed EMIR implementation timelines. EMIR changes should be viewed as one part of a broader landscape including: CRR/CRD IV, IAS 32 and amendments to Part 7 of the Companies Act 1989. These add additional layers of complexity in achieving EMIR objectives within the timescale.
	Collegiate effort and early engagement is required to ensure EMIR objectives are achieved	<ul style="list-style-type: none"> - There are fundamental timeline issues that cannot be addressed without external influence from CCPs and regulators. Dialogue with Regulators and CCPs needs to be amplified as the industry works through the details of implementation to ensure greater transparency and clearer interpretation of the regulation. A forum where discussions can be directed to all regulatory bodies would be of value.
	Level of variation in segregation models introduces an increased level of systemic risk	<ul style="list-style-type: none"> - Europe has more than 7 different segregation models that CCPs will offer. The number of models available to clients will add to the implementation challenge for clearing members and poses the risk of confusing clients, which increases the need for sufficient communication time. The need for clearing members to keep track of changes to the terms across a wide variety of documents across CCPs and clients introduces systemic risk due to the volume of change to be implemented by a potentially limited pool of resources.
	Feasibility of the EMIR Timeline is questionable given the lead time for legal documentation changes	<ul style="list-style-type: none"> - Legal teams are aiming to disclose their offerings and repaper clients in line with the CRD IV/CRR timelines of 1st January 2014 to meet legal requirements. In order to meet this timeline, clearing members need to gain greater clarification from regulators on the definition of certain facets of the regulation in order to proceed and complete the implementation. - The prevailing view among clearing members is that the legal documentation process will take between 6-12 months to complete based on prior experience of the LCH move to IceClear where the onboarding took 6 months. However, in this example there was a much greater level of disclosure than the present situation with CCPs.
Key changes required	Volume of repapering and supporting flows will be significant	<ul style="list-style-type: none"> - The scale and scope of the changes that are required from the industry to deliver EMIR compliance from a legal documentation perspective is large. The volume of repapering and consequential outflow / inflow will have a significant impact on operational processes. At a minimum every client will need an addendum on top of their existing Terms of Business for EMIR. At the maximum a complete repapering and consequential renegotiations may be required.
	Authorisation Rule Book Changes increases the administrative burden	<ul style="list-style-type: none"> - Upon authorisation, CCP rule books may differ from the draft rule books on which clearing members have based their documentation. For each change to a CCP rule book, the clearing member would have to repaper. If CCP authorisation is staggered this could mean multiple repapering for the same client, introducing additional risk to the

		clearing member and client due to the volume of documentation exchanged.
Key challenges	CCP Proposition and Implementation Transparency	- Greater visibility across CCP offerings, specifically their rule books and the approach by regulators to Authorise/Recognise CCPs is required. In addition to this, operational implementation plans will assist CM's in preparing accordingly.
	CMs proceeding on the basis of assumption and interpretation of regulatory guidelines	- Operational Risk is introduced as CMs are planning their implementation approach and require increased dialogue with regulators to ensure their interpretation is compliant. There is an associated level of operational and compliance risk in proceeding on the basis of significant assumptions such as the details in rule books or interpretation of offering, respectively
	Sensitivity of CCP propositions and interpretation of regulation	- Key operational areas such as Disclosure, Client Documentation and Records Management are highly sensitive to details contained in CCP rule books and to interpretations of regulations. There is a significant implementation challenge to members if timely clarity is not gained.
Implications: Client	Increased volume of documentation for the Client to manage	- The implications to the client from a documentation perspective in implementing EMIR compliance changes are primarily an increase in the volume of documentation. There will be an increase in administration and interaction with clearing members and CCPs. Clients will also have to prepare for CCP authorisations on a rolling basis and the associated draft paperwork and repapering's prior to, and upon authorisation respectively.
	Increased legal and operational risk if client education is not provisioned for in implementation plans	- There may be increased legal and operational risk where clients do not understand the permutations available to them and select a model that is not suited to their needs. Due to the complexity of offerings, clearing members would need to ensure sufficient engage with client for them to make a suitable informed decision. - Some models that are currently badged as 'Individual Segregation' will be Omnibus models under EMIR as they are tagged by value not asset. There needs to be additional consideration by clearing members to ensure clients understand their models. It is possible that some clients will not consider the scale of change any thought until the repapering, thus posing further risk around client readiness.
	Client CSD and middleware providers agreements. BAU implementation and operating costs	- Additional paperwork for the client should be considered for CSDs (Central Securities Depositories) or any middleware provider. The client needs to be aware that there may be terms within agreements between themselves and a CCP that overrule terms in agreements between them and a clearing member. - Due to the scale of the change by the industry, it is expected that the client would experience an increase in costs associated with segregation changes, both in the form of passed on costs from the CCP and clearing member as well as their own resourcing, training and operational change costs.
Implications:	Significant market competition for	- There will be a significant demand on resources, specifically legal teams for redrafting paperwork and also a demand for trained resources understanding the documentation and the offering permutations available to the client. There

Operational	qualified, scarce resource to deliver implementation	is a limited skilled resource pool in the market to cater for this demand and it will be required across the industry, CCPs and clients.
	Business as Usual resources requirements	- Record keeping, managing the inflow and outflow of documentation, evidencing and auditing contact with clients will be an additional demand on operational process. This will be additional workload that is on top of business as usual processing
	Wholesale change of Terms could lead to client negotiation and impact overall implementation timeframes	- For some clients, clearing members will be able to supplement older legacy agreements with documents such as the FOA Clearing Module and avoid the full repapering route. For other clients, who have been with clearing members for 20 years for instance, this may require a full repapering. There may also be clients that would like to take the opportunity to change some of their terms, which would mean negotiations. Clearing members need to consider that negotiations could ensue across a large number of clients which would impact resourcing and could vary in timescales from 6 months to 18months+ depending on the size of the client.
Key areas of uncertainty	Reliance on Regulators interpretation of provisions	- There are overarching areas of uncertainty for clearing members around regulators interpretation of provisions, and ensuring they comply for implementation.
	Clarification required on definitions and the approach to negative affirmation. Indirect Clearing	- The primary area of uncertainty is the interpretation of certain EMIR articles. The definition of 'excess' and 'to offer' and what to do in the event of non-responsive clients, needs to be clarified so that the industry can execute segregation changes in a consistent and efficient manner. - There are many open questions around indirect clearing, such as the protection of the clearing member for porting
	Article 38	- Although this wasn't discussed in the workshop due to Competition Law, consideration must be made for differences in interpretation by clearing members of this Article and varying granularity in fees.

2. WORKING ASSUMPTIONS

In order to provide the appropriate framework for discussion and analysis of the regulation impact the group made a number of assumptions when working through issues across the various categories;

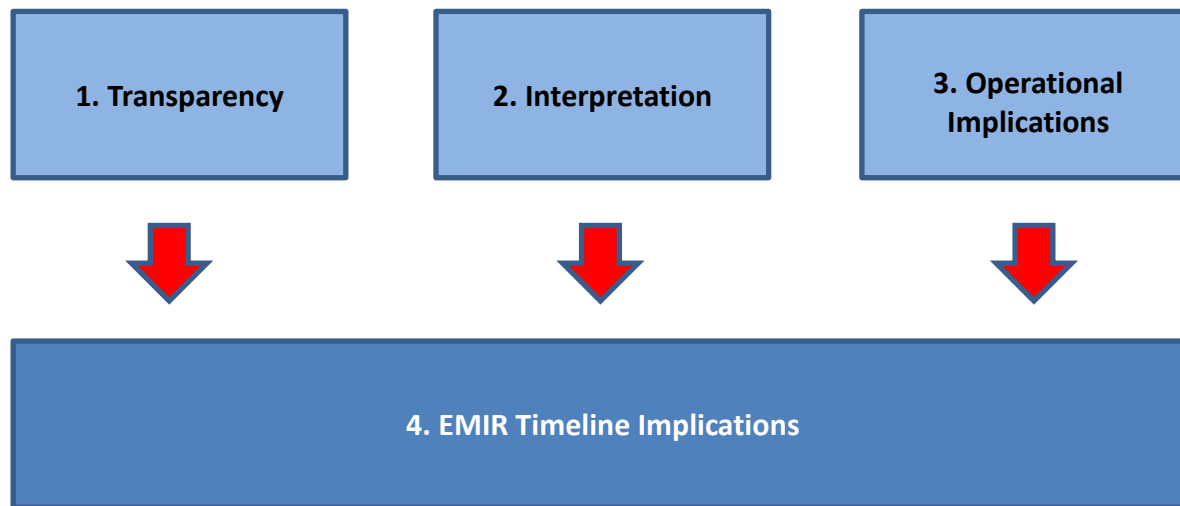
#	Assumption	Detail
1	Non-Response	The FCA have said that in the event of non-response by a client, and after a reasonable and evidenced attempt to contact them, the clearing member is within their right to treat the client in whatever means necessary to comply with EMIR regulation.
2	Give Ups	There is an assumption that give up agreements need to be amended to comply with EMIR.
3	CCP Offerings	There is an assumption that over the course of the Authorisation process, some details within CCPs offerings are likely to change.

3. REQUIREMENTS, CHALLENGES AND IMPLICATIONS

a. Document Approach

The document is split by the major themes, identified in the legal documentation workshop discussion. The overarching theme across all of these areas is the challenge of meeting EMIR compliance timelines, so the document is structured in order to demonstrate this. The key challenges faced by the industry in implementing EMIR regulation for segregation are:


- Transparency, where members are managing significant ambiguity in their implementation approach.
- Interpretation challenges of the regulation by the industry
- Operational Considerations that clearing members need to address when implementing changes



b. Workshop Summary – Headline themes and implications

● Major stumbling block ○ Limited challenge

Key Area / Theme	Degree of Challenge	Implementation Challenge – Regulators can help address	Implementation Challenge – for the industry and partners to address
Transparency	●	<ul style="list-style-type: none"> • Lack of transparency around the authorisation approach is a significant challenge for clearing members in their implementation approach and planning. Clearing members would like the regulators to disclose their intent on how to authorise CCPs so that the necessary coordination and planning can be undertaken within clearing member firms and with CCPs and clients. 	<ul style="list-style-type: none"> • Transparency is a major challenge around the following areas: <ul style="list-style-type: none"> - Understanding details of CCP Offering - Approach by regulators for Authorisation - Gaining legal opinions such as Netting - Repapering – variety of templates • There is a significant operational challenge for the industry to address these challenges. Clearing members need to include in their documentation, detail contained in rule books and start work on the increased volume and breadth of legal documentation that is required for EMIR segregation compliance. • These legal documents act as a basis to plan implementation approach and operational processes across other areas of clearing member firms.
Interpretation of Regulation	●	<ul style="list-style-type: none"> • The definition of aspects of the regulation such as ‘offering’ and ‘excess’ are very important to Clearing members to ensure they are planning operational processes and legal documentation accurately and efficiently. Clearing members would benefit greatly if the regulators would address areas within the regulation that are open to interpretation. Without this firms may be implementing non-compliant processes which pose a legal and operational risk. • Regulators can add clarity to interpretations of the 	<ul style="list-style-type: none"> • Interpretation of regulation is a challenges across the following areas: <ul style="list-style-type: none"> - Definition of ‘offering’ - Definition of ‘excess’ - Interpretation of Article 39 (7): whether clearing members need to include CCP disclosure as part of their own - Interpretation of client non-response procedure - Interpretation of how to deal with unallocated trades

		<p>regulation so that clearing members, CCPs and clients are fully aware of the changes that need to be implemented.</p>	<ul style="list-style-type: none"> • There is an implementation challenge for the industry to proceed without a clear understanding of the regulation. Clearing members should continue to analyse and further their work in areas where they are able to proceed with confidence.
<p>Operational Considerations</p>		<ul style="list-style-type: none"> • The key operational considerations mentioned in this document are primarily dependent on the clearing member, however there are dependencies on clarity of intent and interpretation of regulation. 	<ul style="list-style-type: none"> • The following are a subset of operational challenges that clearing members should be considering for implementation: <ul style="list-style-type: none"> - Method of client contact and how to ensure disclosure to the client - Volume of documentation options available to the client, training to clearing member firms employees - Client readiness to implement - Record management across an increased volume and breadth of documentation - Increased client contact and client support - Insolvency law specific to jurisdiction - CCP readiness to implement • These areas are important considerations as they have a dependency upon clarification and interpretation of CCP intent and EMIR regulation.

c. Transparency: Requirements and implications

Transparency: Section Summary

This section explores the implications of a lack of transparency on legal documentation and implementation of EMIR regulations across clearing members, CCPs and clients. Transparency is important because it allows the industry to act with a level of certainty on implementation changes and allows for effective implementation planning.

Level of change:

- **Significant operational challenge.** Not having full visibility over the detail of CCP rule books or understanding the Authorisation approach by regulators in advance could result in a large degree of change to documentation and the process of getting all legal documentation completed before the EMIR deadline would be a significant operational challenge.
- **Significant change to documentation volume.** The overall level of change to the documentation is high for clearing members, CCPs and the client through increased volume and increased communication. This would have knock-on consequences on operational processes and system capability in the case of the clearing member, handling the volume and managing it in an effective way would be imperative.
- **Significant change to documentation content.** A change to content such as netting language and details within CCP Authorised rule books within the documentation will be high; there will be new disclosures, new addendums and new terms of business that needs to be agreed across legal teams. Standardised industry templates would be beneficial to create a level of consistency across CCPs, clearing members and client relationships.

Level of impact:

- The level of impact on the ability for clients, clearing members and CCPs to be operable and compliant under EMIR is high if clarification required from dialogue between those groups, including regulators is not addressed.

Topic	Area	Implementation requirements and challenges	Options for addressing challenge	Level/type of external dependency
Transparency	CCP Structure	<p>Requirement:</p> <ul style="list-style-type: none"> To gain transparency over CCP detailed offerings through their rule books. <p>Challenge:</p> <ul style="list-style-type: none"> Transparency of details in rule books. In regard to disclosure of the clearing members' offering based on Article 39(7) of the EMIR regulation, the key challenge is gaining transparency of the details of CCPs' rule books. CCP Competition. There is a large dependency on the CCPs disclosing this information and the ability for the clearing members to meet compliance timelines once disclosed. The expectation is that due to competition between CCPs they will not disclose details of their offerings until they have been 'Authorised' under Article 17 or 'Recognised' under Article 25 by the regulators. Documentation bound to CCP rule books. This creates a challenge for the clearing member and the client, as clearing members are bound to the CCP offering. Clearing members cannot prepare documentation and gain the clients confirmation of choice for an offering that has not been fully disclosed or authorised. Clearing members are aware of CCP offerings at a high level but the details are an important facet in the preparation of legal documentation. Work on a draft offering basis. It should be noted that even if the details of these offerings were published they may still be changed by regulators throughout the 	<p>Consent on a draft basis. One of the options to mitigate this risk could potentially be for clearing members to gain consent on a draft structure prior to CCP Authorisation/Recognition based on best endeavours.</p> <p>Repaper on authorised rule books. However once the CCP is Authorised/Recognised, clearing members need to allow for a change to the CCP offering and the consequential paperwork updates, which should not be underestimated in terms of scale or timelines.</p> <p>Timescale. The prevailing view among clearing members is that repapering clients will take between 6-12 months per client and any repapering that is done on a draft rule book will need a further 6 months to update from the point of authorisation.</p>	<p>There is a high dependency on the CCP disclosing the details of their rule book to assist clearing members complying with EMIR timeframes.</p> <p>Some of the legal documentation work could be drafted in advance of authorisation if CCPs were able to disclose.</p>

		<p>Authorisation/Recognition process, so clearing members would still have to work on a draft offering basis.</p> <ul style="list-style-type: none"> • Compliance within EMIR timelines is a problem in both cases however early disclosure of detailed CCP offerings would ease the burden of clearing members drafting these documents from scratch at the point of Authorisation/Recognition. 		
Transparency	Regulator Authorisation Approach	<p>Requirement:</p> <ul style="list-style-type: none"> • To gain transparency from the regulators on their approach for Authorisation/ Recognition. <p>Challenge:</p> <ul style="list-style-type: none"> • Transparency around CCP Authorisation by the Regulators would allow clearing members, CCPs and clients to effectively plan the implementation of segregation. • Phased or Big Bang Approach. Once the applications have been reviewed and approved the regulators may decide to implement the Authorisation/Recognition of CCPs in a phased, or a 'Big Bang' approach. • This poses a risk around EMIR compliancy within the timelines because clearing members are unable to plan with a degree of certainty how to implement EMIR compliance for their clients. There are real challenges from an operational perspective around timelines to implement a high volume of clients if the big bang approach was applied. Resourcing would be an important consideration and an effective plan to undertake this project would need to be in place. Transparency on the 	<p>There are two considerations here.</p> <p>CCP Capacity. Firstly the CCP may not necessarily be able to meet the implications of 'go-live' on Day 1 across all clearing members and clients, especially if the approach was 'big bang'.</p> <p>It is understood by some clearing members that CCPs do not expect a large demand for Individual Segregation, so are planning for low volumes.</p> <p>If demand is greater than anticipated by the CCP then they may decide to 'onboard' clearing members and clients in a phased approach based on client preferences, asset classes, clearing members etc. The clearing member should ideally</p>	<p>There is a high dependency on the regulators disclosing the method in which they might Authorise/Recognise CCPs.</p> <p>If this information was shared then clearing members, CCPs and clients could prepare and plan for implementation with certainty, and understand their resource requirements and ability to meet EMIR timelines.</p> <p>There is a high interdependency on understanding the term 'offering' and whether a phased approach to onboarding is an EMIR compliance option.</p>

		<p>approach would be imperative.</p>	<p>be aware of this approach in sufficient time to comply and coordinate.</p> <p>Clearing member capacity. Secondly, in the event of a 'big bang' approach the clearing member would have to comply on a best endeavours basis, given timeline restrictions on documentation sign off.</p>	
Transparency	Repapering	<p>Requirement:</p> <ul style="list-style-type: none"> • The current Terms of Business are not EMIR compliant so they have to be amended by a document such as the ISDA/FOA Addendum and FOA Clearing Module. Clearing members need transparency on the options and understand the permutations available for them to offer their clients. • There are CCP based client clearing documentation initiatives such as EUREX Clearing Agreement, Industry based documentation such as ISDA-FOA Addendum and other initiatives such as FBF. <p>Challenge:</p> <ul style="list-style-type: none"> • The FOA clearing module and ISDA FOA Addendum are intended to provide an industry standard for OTC and ETD clearing, but not all firms will follow them for Terms of Business. Unlike the ISDA/FOA Addendum, the FOA clearing module is shorter and includes only regulation and logistically driven provisions. It doesn't include buy 	<p>The FOA are currently speaking to CCPs before publishing the FOA Clearing Module.</p> <p>The FOA will be arranging training sessions on the FOA Clearing Module in a similar manner to the training that exists for the ISDA/FOA Addendum.</p>	<p>There is a high dependency on the publishing of the FOA Clearing Module and training sessions for clearing members so they fully understand the options that they can present to clients.</p>

		<p>side protection so clients may want to include this in their Terms of Business, hence clearing members will need to customise them to deal with requirements such as this. The FOA Clearing module has not been published but is expected to be soon.</p> <ul style="list-style-type: none"> • Some clearing members would like the FOA Clearing Module to be finalised as soon as possible so that they can make an internal decision on which documentation they want to use. There is standardised documentation but clearing members need to amend this in line with client requirements. The biggest challenge is the number of options and permutations available to the client and the clearing member. It will be difficult for clearing members to pre-empt what clients will demand and hence understand what they should be informing their client. Some clearing members will be looking to test this with their clients in the near future. • Addendum Training. There is a challenge around ensuring employees at clearing member firms have the correct level of training on the options available to clients. The FOA will be looking to set up training to help here. • CRR/CRD IV. Again there is a challenge around timelines on repapering by the end of the year so that it ties in with Basel III and CRR/CRD IV repapering so that clearing members can reach out to clients at the same time and in the most efficient manner. 		
Transparency	Legal Opinions on Netting	<p>Requirement:</p> <ul style="list-style-type: none"> • There is a requirement for new netting language based on netting opinions to be in place prior to Authorisation 	The FOA are currently working on upstream and downstream netting opinions to facilitate the	There is a high dependency on the FOA procuring netting opinions in order to create suitable netting

		<p>so that clearing members can benefit from holding capital on a net basis.</p> <p>Challenge:</p> <ul style="list-style-type: none"> • Netting language has changed due to EMIR, so as a consequence new netting opinions need to be obtained. The FOA are currently working with legal firms to create client facing netting opinions, these need to be delivered on time so that clearing members can start to make changes to netting language in their documentation. • Upstream netting opinions also need to be amended to comply with EMIR. The FOA are procuring CCP opinions and are aware that all opinions need to be in place prior to CCP Authorisation, which will be difficult to achieve due to timelines. There is a challenge here as some CCPs are not willing to share draft rule books, so the FOA are leveraging a counsel, acting on behalf of CCPs to provide an opinion on draft rules prior to CCP Authorisation. • Clearing members will need to start work on documentation now based on draft rules with the expectation that they will need to review and revisit this work upon CCP Authorisation. Completing this work upfront, albeit on a draft basis, could save months of time upon Authorisation. 	<p>creation of netting language in the industry's documentation.</p>	<p>language to use in documentation prior to repapering by 1st January 2014.</p>
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Transparency	Intragroup Transactions	<p>Requirement:</p> <ul style="list-style-type: none"> • Some clearing members have been considering the impact of intragroup transactions under Article 3 of EMIR: • How and when will clearing members apply for intra-group exemptions under EMIR given the back to back nature of many internal bookings • Under Articles 18 and 20 of RTS 149/2013 how and where will disclosure of intragroup exemptions be made 	These are questions for the regulator to advise on, so that the industry understands how to build this into their operational processes and legal documentation.	<p>There is a dependency on regulators to answer these questions.</p> <p>If this is not correctly included in the documentation then clearing members could be exposed to regulatory sanctions.</p>
Transparency	Transaction Reporting	<p>Requirement:</p> <ul style="list-style-type: none"> • There are open questions that some clearing members have flagged around transaction reporting, however these will need to be treated separately to the clearing challenges: <ul style="list-style-type: none"> - they need to understand which fields do and do not need to be reported - they need to understand which products are in scope for reporting • Would clearing member firms have the correct data privacy and banking secrecy consents to report on behalf of clients and where would these be documented and stored • What level of liability will clearing members accept if they offer client reporting, given the client will remain primarily liable for any error under Article 9(1), and where would this be documented • There is also a general concern around the challenge of how to do legacy reporting once CCPs have been Authorised/Recognised and the clearing members are 	These are questions for the regulator to advise on, so that the industry understands how to build this into their operational processes.	If this is not correctly included in the documentation or reporting then clearing members could be exposed to regulatory sanctions.

		EMIR compliant.		
Transparency	Unauthorised CCPs	<p>Requirement:</p> <ul style="list-style-type: none"> • CCP Application Rejected. A challenge that some clearing members have been considering is in the event that a currently authorised/recognised CCP has its EMIR authorisation/recognition application rejected. Some of these considerations are: <ul style="list-style-type: none"> - How to inform clients that have been impacted - Setting up a process to manage the porting of positions in an orderly manner • Porting from one CCP to another is a major consideration for clearing members and needs to be implemented correctly to avoid legal action from the client. <ul style="list-style-type: none"> - What timelines are acceptable by regulators for the clearing member to complete porting 		Timelines for porting should be clearly understood by the clearing member who would benefit from increased dialogue with the regulators.

3.3 Interpretation: Requirements and implications

Interpretation of Regulation: Section Summary

This section explores the implications of differing interpretations by the industry of specific items within EMIR regulation. The most significant areas where interpretation is an issue include:

- **Definition of offering.** Does offering refer to the ability to execute orders on the day of CCP Authorisation or to start processing clients' legal documentation and start setting up clients on operational systems
- **Client Contact.** Can clearing members act freely in the event of non-response after an adequate attempt has been made to contact the client
- **CCP offering.** Should clearing members disclose CCP offerings as part of their own disclosure

The level of impact resulting from an incorrect interpretation of regulation in areas such as this is high. For example, some clearing member firms are basing significant operational changes on their individual interpretation of the regulation, which adds an associated level of risk to the planning for Go Live.

Topic	Area	Implementation requirements and challenges	Options for addressing challenge	Level/type of external dependency
Interpretation	Definition of Offering	<p>Requirement: To understand what the term 'offer' means.</p> <p>Challenge:</p> <ul style="list-style-type: none"> • The definition of 'offering' is something that needs to be clarified further. If 'to offer' refers to having the Operational capability to start processing clients onto individual segregated accounts, then on day 1 legal departments within the clearing member firms can make themselves ready to start drafting the necessary documentation to comply with this. • Client Execution upon Authorisation. The challenge presents 	Some of the work can be done in advance of CCP authorisation for the legal departments of clearing member firms on a draft basis. However the degree to which this work is complete has a major dependency on changes to rule books during the authorisation process,	There is a high dependency on the regulators to define their expectation when CCPs are authorised whether trading is expected on day 1 or whether they expect clearing members to start processing clients.

		<p>itself if the definition is to process the first order on day 1, for various reasons. Not only would this be a challenge for the clearing member, client and CCP to be operationally ready to execute but consent across legal paperwork once the CCP is authorised is something that would be a major challenge, since documentation would at best be drawn up on a draft rule book.</p> <ul style="list-style-type: none"> • As mentioned earlier, without full CCP disclosure the clearing member cannot draft paperwork that is 100% final for the client on day 1. Clearing members need to create the paperwork on a draft basis and rework any details that change between the draft and authorised rule books. Client responsiveness and consent on legal documentation from all parties would take time. 	<p>CCPs' timely disclosure of their rule books in advance of authorisation and the clients' timely responsiveness.</p>	
<p>Interpretation</p>	<p>CCP Disclosure</p>	<p>Requirement:</p> <ul style="list-style-type: none"> • To gain clarification on whether disclosure refers to the clearing member and CCP in isolation or whether the clearing member is expected to include CCP disclosure as part of its own. <p>Challenge:</p> <ul style="list-style-type: none"> • There is a consideration around whether disclosure on segregation options for the clearing member should also include disclosure of CCP offerings as part of its own disclosure, acknowledging that the CCP will also be preparing disclosure documentation to comply with Article 39 (7): • Article 39 (7) "<i>CCPs and clearing members shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that <u>they</u> provide and shall offer those services on reasonable commercial terms. Details of the different levels of segregation shall include a description of the main legal implications of the respective levels of segregation</i> 	<p>There is an option here to just provide access to the websites of the CCPs within the clearing members' disclosure documentation. If it is a web-based disclosure option then this would be a link to the relevant page on each CCPs website. For Paper disclosure it would be a URL.</p> <p>Note that this doesn't negate the issue of inconsistent offerings by the clearing member upon</p>	<p>There is a dependency on regulators to answer whether CCP disclosure needs to be part of the disclosure by clearing members.</p>

		<p><i>offered including information on the insolvency law applicable in the relevant jurisdictions."</i></p> <ul style="list-style-type: none"> • Is the expectation that the clearing member needs to disclose this for CCPs based on the wording of the article above "that they provide". This needs to be clarified by the regulator. • If clearing members need to disclose on behalf of CCPs then there is a challenge around the legal implications of representing the CCPs offerings as a clearing member. The clearing member would be liable even if the CCP makes a mistake and given clearing members haven't seen CCPs rule books this is a significant risk. • Legal Risk. If the clearing member discloses on their website and is expected to include CCP disclosure, then this becomes a legal risk. Ensuring the information is maintained becomes a challenge for the clearing member and there is a danger of providing inconsistent legal advice to the client. 	<p>changes to CCP offerings without notice.</p> <p>There was consensus across clearing members during the workshop that there should be a liability statement separating CCP regulations from clearing member requirements, while still making reference to their regulations.</p>	
Interpretation	Client Contact	<p>Requirement: To contact all clients and ensure clients revert with segregation choices.</p> <p>Challenge:</p> <ul style="list-style-type: none"> • One of the major challenges that some clearing members expressed in the workshop was the implication of Article 39 (5) "The client shall confirm its choice in writing". • In order for the client to confirm its choice in writing, they need to be contacted, to have read the disclosure documentation and understood it. • The following challenges were identified: <ol style="list-style-type: none"> 1) The ability to contact all clients. Do firms have an up to date view of client contact details and are systems in place to facilitate the record maintenance of increased 	<p>To assist the client, clearing members might decide to adopt the precedence set by MIFID where limited sections require explicit consent within the documentation while the rest could be negatively affirmed. Working on the assumption set by FCA , clearing members would determine how to deal with non-response clients.</p>	<p>There is a high dependency on the client confirming their choice in writing.</p> <p>There is a high dependency on regulators confirming that this working assumption is correct.</p>

		<p>documentation.</p> <p>2) To ensure all clients have been contacted. What is the best channel for contacting clients to ensure they have received new disclosures and documentation?</p> <p>3) Non response by the client. Is negative affirmation acceptable, can clearing members move clients, including those with open positions over to a default omnibus segregated account.</p> <p>• Assumption confirmed by FCA. Clearing members will proceed under the assumption confirmed by the FCA that it's up to each clearing member to determine how the client will be treated in the event of non-response. They may decide to move the client over to a default EMIR compliant account but only after reasonable attempts have been made to contact the client with evidence to that effect. There is an underlying legal risk here where clearing members are acting on behalf of the client without their express permission.</p>	<p>There are a few options that the clearing members should consider:</p> <ul style="list-style-type: none"> - Provide evidence that a reasonable attempt was undertaken to contact the client - Enforce Pre/Post trade rules or place trades into a default or Omni segregated account - Reject the trade or explain that the client may lose the right to trade <p>There is an underlying legal risk when dealing with non-responsive clients</p>	
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<p>Interpretation</p>	<p>Client Preferences</p>	<p>Challenge: There are a few considerations and potential challenges around client preferences that some clearing members have recognised: 1) The treatment of Block trade transactions are an important consideration for clearing members because they require clarity on how to manage them, whether they treat them as house or not. The challenge is knowing the allocation at the point of execution (Executing Broker level), and if not known then the transactions may have to be placed in a suspense account for a period of time. At the point of default, the clearing member would not know how to close out the allocation. This would need to be clearly understood by the client and documented accordingly in legal paperwork. 2) Margin and collateral preferences, which will be addressed later in this document.</p> <p>Funding costs would need to be passed to the clients. Thus this would also need to be reflected in agreements with the clients.</p>	<p>The treatment of block trades is a question that clearing members would like to pose to CCPs, to understand how they will be treated.</p> <p>Client preferences need to be well detailed in the legal documentation and understood by the client.</p>	<p>If this is not correctly understood or included in the documentation then clearing members could be exposed to regulatory sanctions.</p>
<p>Interpretation</p>	<p>Excess and Collateral</p>	<p>Challenge:</p> <ul style="list-style-type: none"> • Interpretation of Excess. There is a challenge for clearing members in their interpretation of ‘excess’ and how it should be handled. There is a legal risk that this interpretation of treatment of excess may not be EMIR compliant, so clarification by regulators is required. • There is an operational challenge for the clearing member when receiving collateral and excess from a client. Unless allocated, the clearing member would not know which CCP or which account within the CCP the excess/collateral should sit under. • Treatment of Excess. The clearing member firms are not able to 	<p>This operational process would need to be automated due to the massive support overhead for clearing members in allocating for clients on an intraday basis.</p> <p>Clients would need to pre-instruct excess and collateral allocation arrangements which</p>	

		<p>hold onto excess in an unsegregated environment so they would need instruction for each piece of collateral/excess received.</p> <ul style="list-style-type: none"> • Collateral transformation, collateral upgrade, single currency financing, margin calls and haircuts are also a concern for clearing members and they should be explicitly mentioned to clients in legal documentation. The client would have to be aware that collateral posted may not be the same as the collateral repaid and that different grades of collateral may have different haircuts applied to them. 	would need to be agreed and included in legal documentation.	
Interpretation	CRR/CRD IV	<p>Challenge:</p> <ul style="list-style-type: none"> • CRR/CRD IV: This is not EMIR driven but interconnected in relation to the capitalisation of exposures for CCPs. Under CRR /CRD IV there is uncertainty around the interpretation of some of the provisions, there are drafting errors and provisions that are contradictory. An example of this is the Look Through Principle; at the moment it seems that the conditions can only be satisfied in theory but not in practice. Requirements are not clear and impossible to fulfil, such as the question of segregation, bankruptcy notice, porting and legal opinions. 	<p>The FOA need to ask regulators for more clarity on the interpretation of these provisions.</p> <p>Regulators should have capital impact at the forefront of consideration.</p>	



3.4 Operational Considerations: Requirements and implications

Operational Considerations: Section Summary

This section explores the legal documentation operational considerations for the industry in implementing EMIR. They are, in part, dependent upon clarification and interpretation of CCP intent and EMIR regulation. . They are considerations that clearing members need to be thinking about over the coming months in key areas such as:

- **Disclosure.** How should clearing members disclose their offering to clients with a high level of certainty that the client has read the disclosure. This is important in the event of non-response and evidencing a sufficient attempt to contact the client
- **Client Documentation.** Which documentation templates should be used and offered to clients and do clearing members have the appropriate level of knowledge around the benefits of each approach to advise the client
- **Record Management.** Is the appropriate level of operational process in place to manage and audit the increased volume and breadth of documentation and the associated interaction with the client and CCPs.

This is a subset of a much larger set of operational considerations clearing members are working through. However, the workshop attendees agreed the 6 areas covered in this section represent those that are highly sensitive to details contained in CCP proposition, and interpretation of regulatory guidelines.

Topic	Area	Implementation requirements and challenges	Options for addressing challenge	Level/type of external dependency
Operational Considerations	Disclosure Method	<p>Requirement:</p> <ul style="list-style-type: none"> • To understand operational considerations for disclosing details of clearing members' offerings. <p>Consideration:</p> <ul style="list-style-type: none"> • There is a consideration around the method in which clearing members should publically disclose the levels of protection and costs associated with different levels of segregation, and the general challenges associated with doing this. • There is a general challenge around CCP disclosure, which is a dependency for clearing members, to understand what 	<p>The two main options for disclosure discussed and presented by clearing members were:</p> <ol style="list-style-type: none"> 1) Disclosing at the same time as repapering clients. 2) Disclosure on the clearing members 	<p>There is a high dependency on CCPs disclosing their offering, although until the CCP is Authorised offerings should not be viewed as final.</p>

		<p>they are able to offer clients. Up until the point of CCP Authorisation/Recognition the clearing member must be prepared to make changes if the CCP needs to amend its offering.</p> <p>Disclosure Methods. There are two methods of complying with this article as suggested by clearing members:</p> <p>1) Online</p> <ul style="list-style-type: none"> • There are two options for website disclosure. One is for full disclosure on a publically available page of the website; the other is for the disclosure to be targeted towards existing customers controlled through password protection. • The challenge with this is the maintenance of the information on the website. The clearing member needs to ensure their disclosure of options always matches that of the CCP. Checking that the CCP offering, especially in the time around authorisation has not changed will be an overhead in terms of maintenance of correct information. <p>2) Paper all clients at the office of the trustee</p> <ul style="list-style-type: none"> • One option is to add a disclosure document as part of documentation already being sent out to clients. The key challenges here are not specific to disclosure but to repapering in general, as the clearing members will need to know the entirety of the client population impacted, have up to date contact details, and identify where they plan to store the documentation received from clients. This is an operational challenge. Repapering in general, as the clearing members will need to know the entirety of the client population impacted, have up to date contact details, and identify where they plan to store the documentation received from clients. <ul style="list-style-type: none"> • Evidencing disclosure. There is also a disclosure challenge 	<p>Website or password protected page</p> <p>In the future, firms may be prepared to participate in a central repository of disclosure documents for CCPs and clearing members, where clients log into a portal. This will not benefit the industry on day 1 as the work still needs to be done but is a long term solution that will aid disclosure.</p>	
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		<p>for the repapering option and that is around evidencing the disclosure to clients, there wouldn't be the expectation that clients would consent to receiving disclosure so any evidence of public disclosure would have to be self-approved by the clearing member.</p> <ul style="list-style-type: none"> • There is also an internal challenge for clearing members to present an offering for a vast array of products to retail and wholesale customers and ensuring that all customers have been informed. 		
Operational Considerations	Client Documentation	<p>Requirement:</p> <ul style="list-style-type: none"> • To maintain a level of consistency across clearing members for legal documentation. <p>Consideration:</p> <ul style="list-style-type: none"> • Volume of choice. There is a consideration around whether a single document is required per CCP or whether one document will suffice for all markets if available. LCH SwapClear and EUREX have their own documentation for OTC Clearing but are also happy for clients to use the ISDA/FOA Addendum. • The challenge here is the number of provision options on offer to the client. Unlike the US where there is only one choice, Europe has six or seven to date. Clearing members believe that there should be one or two templates that are used as industry standards rather than clearing members designing new templates. • Client choice. There is an implication of having so many options for both clients and clearing members. Additional clarity is needed to make sure the client is fully aware of the choices there are since a high volume of choices may lead to confusion. The clearing members would also have to 	Some clearing members would like the FOA to engage with the industry and promote one or two industry standard templates to ensure consistency across clearing members.	<p>There is a dependency on the FOA to engage with CCPs, clearing members and regulators and create a standardised template.</p> <p>There is a dependency on FOA & ISDA providing training sessions on templates.</p>

		<p>consider how to communicate with the client in the best way and ensure that communication is undertaken by a team that are fully trained on the differences between the options, and the benefits and disadvantages of each. Teams would need to be set up to work more regularly with European legal teams.</p> <ul style="list-style-type: none"> • Clearing members need to ensure they are tracking all the different terms within these documents, but the variety of documents across clients and CCPs introduces systemic risk. • FOA Clearing Module. Besides this, the FOA Clearing Module is still under discussion. In addition, some clearing members have expressed a desire for the FOA to set up training sessions on the FOA Clearing Module in the same manner that ISDA have for the ISDA/FOA Addendum to add clarity on the documentation. 		
Operational Considerations	Inflow and Outflow: Record Keeping and Management	<p>Consideration:</p> <ul style="list-style-type: none"> • Record Management. There are considerations by some clearing members around the challenges of effective record keeping. • The challenge is to ensure that the clearing members understand which clients have received documentation, what has been signed, that any feedback or comments from the clients have been acknowledged and actioned where appropriate and that all information is accurate and stored effectively. • Communication inflow/outflow. An increase in the volume of communication inflow and outflow that needs to be maintained and kept up to date causes constraints on current BAU resourcing. Clearing member firms need to decide who will pick up this additional effort, whether it would be internally managed or outsourced, owned by a 	<p>If the dependencies are met then the clearing member firms could consider sending out a version of the documentation that would be revised if the CCPs change their rule books which impacts client agreements and would require a second follow up.</p> <p>If the dependencies are not met and clearing member firms are forced</p>	

		<p>project management team, Operations, or part of Onboarding.</p> <ul style="list-style-type: none"> • If the assumption is that there are 1000 clients then there is a question as to whether this could be achieved by year end. This is considered by some clearing members to be a big implementation challenge and would heavily depend on when the FOA published the Clearing Module; due in November, and that firms take on CCP rule books being authorised in the last 6 weeks of the year. • Client Prioritisation. Another challenge that was mentioned was the priority in which clients will be repapered i.e. based on strength or relationship or P/L impact (balance sheet usage) 	<p>to wait until CCPs are authorised then they will have a hectic November and December and a huge bottleneck on resources.</p> <p>Another option would be to repaper the top 150 clients by the end of the year that have the highest impact on the clearing members RWA / balance sheet usage.</p>	
Operational Considerations	Client Feedback	<p>Consideration:</p> <ul style="list-style-type: none"> • Managing feedback from clients is considered as a challenge by some clearing member firms. Given the volume of documentation inflow and outflow that is expected for EMIR compliance, clearing member firms need to consider how they might prioritise responses back to their clients and how they would communicate with them effectively. 		
Operational Considerations	Interaction with CCPs and Clients: Client Change	<p>Consideration:</p> <ul style="list-style-type: none"> • Change in models. There is a concern by some clearing members that adverse market shocks could cause a large demand in a change of their models by clients. This would cause a spike in resource support for some firms. • There are some further considerations for clearing members: • Should interaction with the client base be in writing only or should it include in-person support, acknowledging the resource and skills change for different approaches 		

		<ul style="list-style-type: none"> • How might clearing members prioritise their client base in regard to client account changes • Clearing members should recognise the level of training needed on provisions added to Addendums for employees communicating with clients • New BAU processes would be needed for Operations and Legal teams for contacting CCPs to update them on changes or cancellations of the status of a client, their choice of segregation model or transactions • Validating the open list of clients that have Individual Segregation Accounts between the clearing member and CCP 		
Operational Considerations	Insolvency	<p>Consideration:</p> <ul style="list-style-type: none"> • Jurisdiction Specific. One of the challenges of EMIR segregation is that insolvency law is subject to the jurisdiction of the clearing member's legal entity, so segregation of clients will have different legal implications per jurisdiction. • Industry Standard. In terms of legal documentation, each jurisdiction will need to be considered in isolation. This is also the case for individual clearing members and CCPs and the structure of their corporation, whether they are holding companies, subsidiaries etc. Clearing members need to create these documents themselves which will be costly because there is currently no industry standard or consistency between firms. • There is an argument that both clearing members and CCPs can progress work by looking at insolvency independently. However there could be a disconnect between FCA regulating clearing members and Bank of England regulating CCPs. 	<p>The FOA are to agree on an approach with ISDA to create a template for consistency across the industry.</p> <p>Clearing members and CCPs need to comply by producing jurisdiction and firm specific legal documentation. The implication would be increased documentation and interaction with legal teams, potentially external legal teams from other jurisdictions.</p> <p>Clients may become</p>	<p>An industry standard template would be better for clearing members but if not in place for go live, clearing members would have to produce their own documents.</p>

			<p>confused as there will be jurisdiction and CCP specific documentation all worded and ordered differently. There needs to be a consistent approach.</p>	
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3.5 Timeline Implications

Area	Impact on Implementation Timeline
Transparency of CCP Offerings	<ul style="list-style-type: none"> • Greater clarification over CCP offerings would allow clearing members to commence drafting documentation with a greater degree of certainty. Given the timelines estimated by clearing members of 6-12 months to repaper clients, this exercise needs to be undertaken as soon as possible due to approaching EMIR timelines and a target date of 1st January 2014. • It should be noted that any work that is done in advance of CCP authorisation is done on a draft basis and there would still be a large degree of work at the point of Authorisation where CCP offerings would be final. The prevailing view by some clearing members is that this rework would take a further 6 months per client. •
Definition of Offering	<ul style="list-style-type: none"> • The definition of offering has a significant impact on timelines. CCP offerings will not be deemed final until Authorisation, so legal teams will only be able to do the necessary rework that was untaken on a draft basis once this has been finalised. • If the expectation is to be able to start executing orders or transfer clients positions on the day of authorisation then this will pose a legal and operational risk to the clearing member, CCP and client as it is assumed final legal documentation will not be in place at that point.
Transparency on Authorisation /Recognition Approach	<ul style="list-style-type: none"> • The Authorisation approach will have a significant impact on timelines, based on whether regulators decide to authorise in a staggered or 'big bang' fashion. • If a staggered approach is adopted then CCPs and clearing members could manage the transition in a planned way and minimise any legal and operational risk to themselves and the client. • If a 'big bang' approach was adopted then the volume of paperwork that needs to be redrafted would need to happen in parallel which would have a heavy impact on resourcing. It's imperative that this is planned in advance because this is a huge implementation fraught with operational risks, operational implications on resourcing, training, system capabilities and operational process set up across clearing, reporting, accounting, banking and treasury. Thorough testing needs to be co-ordinated across CCPs, clearing members and the client. • It is also important that CCPs are prepared to handle a high volume of accounts per clearing member and that they implement the swap to segregated models in parallel.

4. OUTSTANDING QUESTIONS FOR REGULATORS AND CCPs

a. Questions for the regulator

Question Area	Question
Article 39 Definition	Does Article 39 apply to recognised CCPs based on Article 13? To what degree are clearing members subject to Article 39 on authorisation?
Unallocated Trades	Clearing members are working to the assumption that unallocated trades can be held in a suspense account intraday but not overnight. Is this assumption correct?
Negative Affirmations	Clearing members are working on the assumption that after a reasonable and evidenced attempt to contact clients, the clearing member is within their right to treat the client in whatever means necessary to comply with EMIR regulation, including defaulting to an omnibus account or refusal to trade.
Porting	What timelines are acceptable by regulators for the clearing member to complete porting in the event of a CCP not being recognised/authorised?

b. Questions for the CCPs

Question Area	Question
Draft Rule Books	A question for the EMIR counsel – could an opinion be published on draft rules prior to CCP authorisation?
Block Trades	How will CCPs deal with block trades?
Indirect Clearing	Will CCPs set up accounts to offer indirect clearing at omnibus and individual segregation levels?

5. FOA Actions and Work in Progress

Area	Action / Work in Progress
FOA Clearing Module	In progress
Training Sessions	FOA to organise training sessions on the FOA Clearing Module for industry members
EMIR Counsel	FOA in discussions with the EMIR Counsel to discuss publishing a standard CCP view of draft rules
Authorisation Approach by Regulators	FOA to raise with the regulators
Definition of Offering	FOA to raise with the regulators
Application of 39(7) to non-European CCPs	FOA to raise with the regulators
CCP Disclosure by the clearing member	FOA to raise with the regulators
Negative Affirmation	FOA to raise with the regulators
Block Trade Treatment and Disclosure	FOA to raise with the regulators
Definition of Excess	FOA to raise with the regulators
Uncertainty of Provisions for CRR/CRD IV	FOA to raise with the regulators