Call for EC/ESAs to publish a communication that clarifies that market participants are not required to implement EMIR 3.0 Level 1 provisions prior to the date of application of the associated Level 2 RTS.

EBF, EFAMA, FIA and ISDA (the 'Associations') welcome the co-legislators' political agreement on EMIR 3.0, which was endorsed by the Council and European Parliament on 14 February and 4 March 2024, respectively.

We support the objectives of the co-legislators to promote EU clearing through new measures that allow for a quicker adoption of margin-model changes at CCPs, and that facilitate the launching of new products and services. We also welcome the increased transparency that the revisions to EMIR bring about and are committed to fully implement the legislative changes in a timely and consistent manner.

While the Associations acknowledge and welcome that the Level 1 text provides a clear transition period for the application of certain provisions, we are very concerned with the lack of clarity regarding the effective date of application of some other Level 1 provisions.

In line with the European Commission President's political guidelines for the next Commission, which put a strong emphasis on enhancing the EU's competitiveness, we strongly recommend that EU authorities take a proportionate and practical approach to the implementation timelines of EMIR 3.0.

To support the EC commitment to reduce administrative burdens and simplify legislation, firms should not be expected to implement the requirements of EMIR 3.0 twice, first to comply with Level 1 provisions (which are very broad and subject to different interpretations on a standalone basis) once EMIR 3.0 enters into force and, subsequently, at a later stage, when the associated Level 2 Regulatory Technical Standards will become applicable.

This would impose disproportionate and unnecessary costs and would not provide any substantial benefits. More importantly, it would also risk the industry implementing on an uncoordinated and inconsistent basis. In previous instances where firms were required to implement Level 1 provisions, and subsequently comply with associated implementing RTS (e.g. Sustainable Finance Disclosures

Regulation), the Level 2 uplift often proved significant and triggered substantial additional costs for the industry.

Whereas Article 5 of EMIR 3.0 specifies that the new methodology for the calculation of the clearing threshold (Article 1, points (4) and (9) amending Articles 4a(1), (2) and (3) and Article 10(1), (2) and (3)) shall not apply until the date of application of the associated RTS, it is silent on the application date of other Level 1 measures that will also require further clarification and specifications through Level 2 RTS. This is an unfortunate outcome. In addition, in some instances, we believe that stand alone Level 1 provisions cannot apply on the date of entry into force of EMIR 3.0 for practical reasons (for example, application for authorisation for initial margin models).

For these reasons, we urge the EC and ESAs to publish a communication that clarifies that market participants are not expected to comply with Level 1 provisions prior to the date of application of the associated Level 2 RTS. Such communication could set realistic expectation for firms to prepare to implement which can be finalised once associated Level 2 RTS are published and become applicable.

We note that in March 2024, the EC published an interpretative notice on the transitional provision in the MiFIR review to provide clarity to market participants[1], which was complemented by an ESMA statement[2].

We strongly believe that such interpretative notice is needed for EMIR 3.0 to ensure a full, effective, and consistent implementation by market participants, and strongly recommend EC/ESAs to publish such notice as soon as possible and well in advance of the entry into force of EMIR 3.0.

1. Level 1 provisions which require RTS to be applicable

Article 4aa - Post-trade risk reduction (PTRR) services

Paragraph 1 of Article 4aa introduces an exemption from the clearing obligation where OTC derivative contracts are concluded as the result of an eligible PTRR exercise carried out pursuant to paragraphs 2 to 4 of this Article. ESMA is mandated to specify in RTS the conditions set out in paragraphs 3 and 4 as well as other conditions or characteristics of PTRR exercises set out in paragraph 6.

While we would like the clearing exemption to apply as soon as possible, we believe that the intention of the co-legislators was for the exemption to apply only once the RTS specifying the conditions for the exemption would have entered into force.

We recommend that EC/ESMA clarify that the PTRR clearing exemption is applicable only once the relevant RTS have entered into force and have become applicable.

Article 7a - Active account

Paragraph 1 of Article 7a requires in-scope counterparties to open an account at an EU CCP no later than six months after the date of entry into force of EMIR 3.0. Paragraph 3 specifies that in-scope

[1] Commission publishes draft interpretative notice on the transitional provision of the MiFIR review - European Commission (europa.eu)
[2] ESMA74-2134169708-7163 Public Statement on the transition for the application of the MiFID II/MiFIR review (europa.eu)

counterparties shall comply with the operational conditions mentioned under (a), (b) and (c) within 6 months of entry into force of EMIR 3.0 and shall regularly report to their National Competent Authorities (NCAs) and ESMA in accordance with Article 7b. ESMA is mandated to specify in RTS the conditions set out under (a), (b) and (c), and the conditions of the stress testing thereof, as well as the details of the reporting in accordance with Article 7b. Whereas counterparties are in principle in a position to open an account at an EU CCP within six months of entry into force, they will not be able to fully comply with the operational conditions under (a), (b) and (c), the stress testing and the reporting requirement before the ESMA RTS specify the operational and stress testing conditions and reporting requirements. The implementation timeframe under the RTS will also need to take into account time needed for any systems/operational developments to be made by in-scope entities to meet the requirements once they have been finalised.

Paragraph 1 of Article 7a also requires counterparties to notify ESMA and their NCA where they become subject to the requirement to hold an active account. The notification requirement must also be fulfilled within six months of entry into force of EMIR 3.0.

Paragraph 3(d) of Article 7a requires in-scope counterparties to clear in the active account trades which are representative of the derivatives contracts referred in paragraph 6 of Article 7a. In-scope counterparties will not be able to comply with this representativeness requirement until ESMA specifies in RTS the different classes, maturity ranges, trade size ranges and reference periods.

We recommend that EC/ESMA clarify that while in-scope counterparties are required to open an account at an EU CCP within six months of entry into force of EMIR 3.0, they are only required to comply with the operational and stress testing conditions, the reporting and notification requirements and the representativeness requirements once the relevant RTS have entered into force and have become applicable.

Article 7c - Information on the provision of clearing services

Paragraph 2 of Article 7c requires clearing members to disclose, in a clear and understandable manner, for each CCP at which they provide clearing services, the fees to be charged to clients for the provision of a clearing service and other associated costs related to the provision of clearing services. ESMA is mandated to specify in RTS the type of information referred to under paragraph 2.

We recommend that EC/ESMA clarify that the disclosure requirements set out in paragraph 2 are only applicable once the relevant RTS have entered into force and have become applicable.

Article 7d - Information on clearing activity in CCPs recognised under Article 25

Paragraph 1 of Article 7d requires clearing members to report to authorities the scope of clearing activity on recognised CCPs on an annual basis. ESMA is mandated to specify in RTS and ITS the content and format of the information to be reported.

We recommend that EC/ESMA clarify that the reporting requirements set out in paragraph 1 are only applicable once the relevant RTS and ITS have entered into force and have become applicable.

Article 11 - Initial Margin Model Validation

Paragraph 3 of Article 11 requires FCs and NFCs+ to apply for authorisation from their competent authorities before using, or adopting a change to, an initial margin model via the 'central database'. Where the model is based on a pro forma model, the counterparty shall also apply to EBA for the validation of that model and shall provide EBA with all relevant information via the central database.

In addition, FCs and NFCs+ are required to provide EBA with the information on the outstanding notional amount (used to determine the fee to be paid to EBA for its validation of pro forma models) via the central database**.** The EC is empowered to adopt a Delegated Act (DA) setting out the methodology for the determination of the fees and the modalities for the payment of the fees. The EC requested EBA to provide technical advice on fees by 30 June 2025.

The ESAs are mandated to specify in RTS the validation procedures for initial margin model validation for counterparties above EUR 750bn Average Aggregated Notional Amount (AANA).

It is not practicable to require counterparties, a large majority of which use pro forma models such as ISDA SIMM, to apply for authorisation of initial margin models on the date of entry into force of EMIR 3.0 as (i) they will not know what information to submit in their application; (ii) the central database through which they are required to apply for authorisation will not be in place; and (iii) the EBA will not have collected the fees to cover the costs incurred in the validation of the pro forma models.

We expect counterparties above and below the EUR 750bn AANA threshold to be required to apply for authorisation of initial margin models only once the EBA RTS on validation procedures, and EBA guidelines to ensure the uniform application and authorisation process, have entered into force and become applicable. As noted in a previous communication[3], to avoid any market disruption, we expect that firms can also continue using existing initial margin models (and any updated version of the models) while the regulatory approval process by EBA and NCA is ongoing.

We recommend that EC/ESAs clarify that the requirement for FCs and NFCs+ to apply for authorisation of initial margin models only applies once the EBA RTS on validation procedures, and EBA guidelines to ensure the uniform application and authorisation process, have entered into force and have become applicable.

Article 12 – Penalties for breach of reporting

Paragraph 1a of Article 12 requires competent authorities to impose administrative penalties or periodic penalty payments on the entities subject to the reporting obligation pursuant to Article 9 where the details reported repeatedly contain systematic manifest errors. ESMA is mandated to specify in RTS what constitutes systematic manifest errors as referred to in paragraph 1a.

In the absence of a definition of what constitutes systematic manifest errors, it is unclear how competent authorities can impose penalties for such errors. Firms would also not be able to predict which breach would trigger a penalty.

[3] Trade-Associations-Submit-Letter-on-EMIR-IM-Model-Validation.pdf (isda.org)

We recommend that EC/ESMA clarify that the requirement on competent authorities to impose penalties for systematic manifest errors in reporting only applies once the RTS defining 'systematic manifest errors' have entered into force and have become applicable.

Article 38 - Transparency

Paragraph 6 of Article 38 is amended to require CCPs to provide clearing members with a simulation tool that includes a simulation of the margin requirements they may be subject to in different scenarios at portfolio level. Paragraph 7 of Article 38 is amended to require CCPs to provide the initial margin methodologies for add-ons, including in stressed market conditions. New paragraph 8 of Article 38 requires clearing members to provide clients with a simulation of margin requirements under different scenarios covering both the margin required by the CCP and any additional margin required by the clearing members.

ESMA is mandated to specify the requirements that the CCP margin simulation tool must meet under paragraph 6, as well as the information to be provided by CCPs and clearing members under paragraphs 7 and 8.

We do not expect CCPs to be able to provide the required additions to the margin model simulation tools before the RTS specifying the requirements for these tools become applicable. Developing these simulation tools are significant technology projects that can entail considerable costs. Therefore, we expect that CCPs will need some time to build the required simulation tool once the RTS are in force. Similarly, clearing members cannot be expected to provide clients with information on CCP margin models before CCPs provide them with the required information.

Furthermore, clearing members will only be able to undertake any work necessary to provide a simulation of the additional margin required under different scenarios (beyond the CCP initial margin) once the requirements are specified in the RTS. Finally, we note that the international standards on margin transparency are not yet finalised, meaning clearing members cannot rely on them as a guide for future ESMA RTS.

We recommend that EC/ESMA clarify that the new transparency requirements set out in Article 38 only apply once the relevant RTS have entered into force and have become applicable.

2. Other implementation issues

Article 3 - Intragroup transactions

We very much welcome the removal of equivalence as a pre-condition for the availability of the intragroup transaction exemptions from clearing and margining requirements where one counterparty is in a third country. This amendment will provide certainty to the market and reduce market fragmentation.

We note that firms should not be required to reapply to their NCAs to continue to benefit from intragroup exemptions that already apply to the firm under EMIR, including in accordance with the derogations in the various technical standards on clearing for intragroup transactions with a

counterparty in a third country, and in Article 36(2) and Article 37(3) of Commission Delegated Regulation (EU) 2016/2251, provided that the intragroup transaction complies with the new definition under Article 3.

In addition, where transactions with counterparties established in a third country cease to benefit from an intragroup exemption due to the application of Article 3(4) (e.g. AML/tax list) or Article 3(5) (issues in the legal, supervisory and enforcement arrangements of a third country), a minimum three-month transitional period is necessary. EU counterparties will need some time to put in place the necessary clearing and margining documentation and arrangements with the third country counterparties.

We recommend that EC/ESAs clarify firms can continue to rely on existing exemptions and derogations from clearing and margining for intragroup transactions, including after 30 June 2025 for temporary derogations. We also recommend that a minimum three month transitional period is introduced where transactions with counterparties established in a third country cease to benefit from an intragroup exemption due to the application of Article 3(4) or Article 3(5).

Article 4a – New Clearing Threshold Calculation

Paragraph 4 of Article 4a mandates ESMA to revise the clearing thresholds within 12 months after the entry into force of EMIR 3.0. It would be preferable to align the timeline for the application of the new clearing thresholds with the entry into force of the AAR, given that the clearing obligation is a key factor in determining which counterparties are in scope of the AAR. Under the current clearing obligation (CO) calculation methodology established by EMIR 2.2, the CO calculation is performed following a 12-month cycle. Under the current cycle, counterparties must submit the results of their calculations by June 2025. This means that counterparties will be required to perform the CO calculation twice within the first year after EMIR 3.0 comes into force with potentially different results on determining which entities are in scope of AAR. It is important to avoid this outcome, as it would lead to a major compliance burden, requiring firms to put in place controls and systems to adhere to AAR obligations only to see that requirement reversed six months later.

Given that the requirements (AAR and the new clearing threshold calculations) are only separated by six months, it would be preferable if both provisions came into force at the same time.

About AIMA

The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than US$3 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage over US$1 trillion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

About EBF

The European Banking Federation is the voice of the European banking sector, uniting 33 national banking associations in Europe that together represent some 3,500 banks – large and small, wholesale and retail, local and international – employing about 2,7 million people.

About EFAMA

EFAMA, the European Fund and Asset Management Association, is the voice of the EUR 28.5tn European investment management industry. As a trade association, our role is to promote the interests of our members and raise awareness of the importance of the services and solutions they provide. Our pan-European membership as well as our governance ensure that we represent the rich diversity of the European investment management industry, and not merely a subset thereof. This makes us the natural interlocutor of the EU institutions for all issues relevant to our sector. Our remit goes beyond the EUR 31tn however. We support open and well-functioning global capital markets and engage with international standard seters and relevant third country authorities on a wide range of issues. Since its establishment, EFAMA has been fully supportive of the EU project and working hard towards helping the EU achieve its objectives, whether in terms of single market, consumer protection or more recently CMU and sustainable finance.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers. FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 77 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube.