

ESMA Publishes Statement on Clearing and Trading Obligations for Small Financial Counterparties

Friday, February 1, 2019

On January 31, the European Securities and Markets Authority (ESMA) published a statement addressing issues on the forthcoming implementation of the European Market Infrastructure Regulation Regulatory Fitness and Performance program (EMIR REFIT), relating to clearing and trading obligations for small financial counterparties. ESMA's statement also addresses the requirements for reporting of derivatives that were outstanding on or after August 16, 2012, and terminated before the EMIR reporting start date of February 12, 2014, which is a process commonly referred to as "backloading."

In its statement, ESMA notes that it is aware of the challenges faced by certain small financial counterparties when preparing for the deadline of June 21, to start clearing through central counterparties (CCPs) and trading some of their over-the-counter (OTC) derivative contracts on trading venues. As EMIR REFIT negotiations have not yet been finalized, it is not yet known when the resulting text of the EMIR REFIT is expected to apply. This could result in a timing gap during which small financial counterparties, whose derivative positions are below the clearing thresholds, would need to have clearing arrangements in place and start clearing their derivative contracts, before, once again, they are no longer required to do so after EMIR REFIT comes into force.

ESMA is also aware of the challenges that reporting counterparties would face regarding having to comply with the backloading requirement by February 12. The EMIR REFIT proposals remove the backloading requirement from EMIR to help relevant parties meet regulatory needs, and to reduce the substantial and costly adjustments that reporting entities need to make.

The European Commission previously extended the deadline for the completion of backloading from February 12, 2017, to February 12, 2019. The extension of the deadline was in line with ESMA's previous recommendation, and the EMIR REFIT was expected to become effective by the new deadline. However, it is still unclear as to whether these amendments would go into effect before February 12, and ESMA is still addressing the backloading requirement with respect to the reporting obligation.

Consequently, ESMA has indicated that it expects national competent authorities (NCAs) not to prioritize supervisory actions towards counterparties' reporting of backloaded transactions or to counterparties whose positions are expected to be below the clearing thresholds that apply once the EMIR REFIT becomes effective. ESMA also expects NCAs to apply the same proportionate approach to their risk-based supervisory powers in their day-to-day enforcement of EMIR.

ESMA's statement is available [here](#).

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