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*EMIR – a year (and a bit!) on...*

# Agenda

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# Introduction

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# European Market Infrastructure Regulation (EMIR)

- EMIR entered into force 16 August 2012
- EMIR is binding and directly applicable in all EU member states
- 6 RTS published in the EU Official Journal on 25 February 2013 and entered into law on 15 March 2013
- Consultation on contracts having a direct, substantial and foreseeable effect closed on 16 September 2013 – draft RTS to be submitted to the Commission by 15 November 2013
- Consultation on the Clearing Obligation under EMIR closed 12 September 2013
- BCBS/IOSCO final report on margin requirements for non-centrally cleared derivatives published September 2013 – draft RTS under EMIR expected Q1 2014

# 15 September Obligations

# 15 September Obligations – What we know

- Portfolio Reconciliation
  - Start date – 15 September 2013
  - FCs and NFCs must agree in writing or by other equivalent electronic means with their counterparties the terms on which portfolios will be reconciled
  - Portfolio Reconciliation must cover key trade terms and valuation
  - Frequency of reconciliation set out in Article 13 of RTS and dictated by counterparty status and number of OTC derivative contracts outstanding
  - Portfolio reconciliation can be delegated

# 15 September Obligations – What we know

- Dispute Resolution
- Start date – 15 September 2013
  - FCs and NFCs must agree detailed procedures and processes in relation to:
    - The identification, recording and monitoring of disputes relating to the recognition or valuation of the contract and exchange of collateral
    - The resolution of disputes in a timely manner with a specific process for disputes outstanding for more than five business days

# 15 September Obligations – What we know

- Portfolio compression
  - Start date – 15 September 2013
  - Applies to FCs and NFCs with over 500 uncleared OTC derivative contracts outstanding to a single counterparty
  - Obligation to analyse the possibility of compression twice a year and be able to provide a reasonable and valid explanation to the relevant competent authority if conclude portfolio compression not appropriate
- Third country entities

# 15 September Obligations – What we still don't know

- Portfolio Reconciliation
  - static portfolios
  - when does the agreement in writing need to be in place
  - what constitutes an agreement in writing – is acceptance by conduct or some other means sufficient
  - reconciliation of valuations
  - scope of portfolios
- Dispute Resolution
  - what constitutes a dispute?
- Portfolio Compression
  - reasonable and valid explanation as to why portfolio compression is not appropriate

# 15 September Obligations – What's been done / What you need to do

- ISDA 2013 Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol and Bilateral Amendment Agreement
- German and French Master Agreement equivalents
- ISDA DF Protocol Extension
- Depends on who you are but may include:
  - Bilateral outreach
  - Assessment of portfolios
  - Assessment of status and counterparty status

# Reporting Obligations

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## Reporting Obligations – What we know

- All counterparties and CCPs must report details of all derivative contracts concluded, modified or terminated
- To a registered or recognised trade repository, or, if not available, ESMA
- No later than the working day following the event
- Information to be reported (sort of)
- Reporting must not be duplicated
- Reporting can be delegated

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## Reporting Obligations – What we know

- Obligation applies to derivative contracts which:
  - Were entered into before 16 August 2012 and remain outstanding on 16 August 2012
  - Were entered into on or after 16 August 2012
- Reporting start date pushed back to February 2014 for OTC derivative contracts and probably also exchange traded derivative contracts

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# Reporting Obligations – What we still don't know

- Timing
- Nature of delegated reporting obligation – standardisation?
- Identifier numbers
- ETD business

# Reporting Obligations – What’s been done / What you need to do

- ISDA Reporting Guidance Note (19 July 2013)
- Work in relation to identifier numbers
- Depends on who you are but may include:
  - Establishing whether you will report
  - Establishing who will report on your behalf
  - Establishing what your delegated reporting offering is and how it will be documented
- Structured finance transactions
  - New deals
  - Existing deals

# Clearing Obligations

# Clearing Obligation – What we know

- CCP / CM offerings
  - CCPs have launched / are launching various OTC cleared offerings (many not yet in EMIR-compliant form)
  - CCPs receiving EMIR authorisation between Nov 2013 and Mar 2014
  - CCP and CM disclosure obligations re cleared services from point of EMIR authorisation
  - New models applicable to ETD and OTC, though clearing obligation only for “OTC” derivatives
  - Clearing documentation developing

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# Clearing Obligation – What we know

- Mandatory clearing obligation
  - Approaching quickly
  - ESMA submitting draft RTS re clearing obligation any time from April 2014 (CCP authorisation + 6 months)
  - Frontloading – an urgent consideration, from point of first CCP EMIR authorisation

# Clearing Obligation – What we still don't know

- CCP / CM offerings
  - Operation of ISA and OSA models
  - Indirect clearing
- Mandatory clearing obligation
  - Frontloading – the actual impact
  - Phasing in
  - Granularity of clearing obligation for an asset class
  - Single CCP vs. Multi-CCP asset classes
  - Consistency with overseas regimes regarding scope (e.g. FX)
  - Trigger for reconsideration of obligation
  - Lifting of the clearing obligation

# **Direct, substantial and foreseeable effect**

# Direct, substantial and foreseeable effect

## – What we know

Relevant to extraterritorial (ET) application of mandatory clearing obligation and OTC risk mitigation obligations (subject also to usual EMIR conditions)

### – Who may be affected?

- TCEs guaranteed by EU financial counterparties
- TCEs acting through EU branches
- “Avoidance” transactions

### – What is NOT covered under ET provisions:

- “cross-border” transactions, between and FC/NFC and a TCE (whether or not the TCE is acting through an EEA branch)
- Any transaction between two TCEs where either side has a home state recognised as equivalent under EMIR

## Direct, substantial and foreseeable effect

### – Who may be affected

- A relationship which meets ALL of the following:
  - A TCE
  - Acting through an EEA branch
  - Established in a home state which is not recognised as equivalent under EMIR
  - Dealing with a counterparty who also meets ALL of the above conditions
- A relationship between two TCEs (established in non EMIR-equivalent states) falling outside of the above, but where either counterparty is explicitly guaranteed (subject to thresholds) by an EU-established financial counterparty
- Avoidance, abuse and circumvention of EMIR

# Direct, substantial and foreseeable effect

## – What we still don't know

- Practical scope still relies on equivalence assessment on third country regimes.
  - What about a regime which is only recognised to be partially equivalent?
  - Ability to “opt-in” to the EMIR regime?
  - Branches and overlapping / underlapping regimes
- Guaranteed arrangements
  - Nature of the guarantee – form and/or substance?
  - Timing of assessment
  - Diligence
- How will this be enforced, and against whom?

# Collateral Obligation

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## Collateral Obligation – What we know

- FCs and NFC+s will have risk management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts (Article 11(3) EMIR)
- Delay in implementation
- BCBS/IOSCO Report published September 2013

# Collateral Obligation – What we know

- BCBS/IOSCO Report sets out 8 key principals
  - Applies to all uncleared transactions
  - All financial firms and systemically important non-financial entities must exchange initial and variation margin
  - Consistent methodologies for calculating initial and variation margin
  - Assets used as margin should be highly liquid
  - Two way exchange of initial margin and available on default of collateral provider or taker
  - Appropriate framework for inter-affiliate transactions to be set by relevant local regulators
  - Interaction to ensure consistent and non-duplicative requirements across jurisdictions
  - Phase-in

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## Collateral Obligation – What we still don't know

- How this will translate into the RTS required to be developed by the joint European supervisory authorities under EMIR or into other rule making elsewhere

# Collateral Obligation – What's been done / What you need to do

- Some industry documentation initiatives that may feed into this but not much – yet...

## Next Steps

- Ongoing implementation of requirements already in place
- Preparing for the reporting obligations
- Preparing for the mandatory clearing obligation including front-loading
- Monitoring ongoing developments on extra-territoriality and OTC collateralisation

# Questions?

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