

2 December 2015

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InfoNet



# *MiFID II/R Seminar*

## Indirect Clearing

Sponsored by



- 08.30 - 09.00 Registration
- 09.00 - 09.20 Presentation  
*Jeremy Walter, Partner, Clifford Chance*
- 09.20 - 10.20 Panel Session  
*Janina Marks, Global Head of Clearing Product Management, UBS*  
*Mitja Siraj, Head of Legal, FIA Europe (Moderator)*  
*Tom Springbett, Manager, Derivatives Reform, FCA*  
*Jeremy Walter, Partner, Clifford Chance*  
*Declan Ward, Director: Clearing Policy and Operations, FIA Europe*  
*Ric Wilding, Head of Collateral & Risk, Deputy Head of Business Development, Eurex Clearing*
- 10.20 - 10.30 Q&A

Jeremy Walter, Partner, Clifford Chance

# Indirect clearing

ESMA consultation paper on indirect clearing arrangements under EMIR and MiFIR

2 December 2015

**C L I F F O R D**  
**C H A N C E**



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This document is not intended to be comprehensive or to provide legal advice. For more information, speak to your usual Clifford Chance contact or one of the lawyers named below.

## Article 4 of EMIR

“3. The OTC derivative contracts that are subject to the clearing obligation pursuant to paragraph 1 shall be cleared in a CCP authorised under Article 14 or recognised under Article 25 to clear that class of OTC derivatives and listed in the register in accordance with Article 6(2)(b).

For that purpose a counterparty shall become a clearing member, a client, or shall establish indirect clearing arrangements with a clearing member, provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation as referred to in paragraph 1(a)(v), and the types of indirect contractual arrangements that meet the conditions referred to in the second subparagraph of paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.”

## Article 30 of MiFIR

“1. Indirect clearing arrangements with regard to exchange-traded derivatives are permissible provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of Regulation (EU) No 648/2012.

2. ESMA shall develop draft regulatory technical standards to specify the types of indirect clearing service arrangements, where established, that meet the conditions referred to in paragraph 1, ensuring consistency with provisions established for OTC derivatives under Chapter II of Commission Delegated Regulation (EU) No 149/2013 ( 1 ).

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.”



ESMA is seeking feedback on draft requirements for indirect clearing arrangements for both OTC derivatives (under EMIR) and exchange-traded derivatives (under MiFIR).

**On 5 November 2015, ESMA published a consultation paper proposing amendments to the indirect clearing provisions for OTC derivatives in Commission Delegated Regulation 149/2013 and revised draft regulatory technical standards (RTS) on indirect clearing requirements for exchange-traded derivatives (ETD) under MiFIR.**

The consultation period closes on 17 December 2015. ESMA proposes to submit draft RTS amending the indirect clearing provisions in Regulation 149/2013 and revised draft RTS on indirect clearing arrangements for ETDs to the European Commission at the same time.

# Indirect clearing arrangements:

## Key features

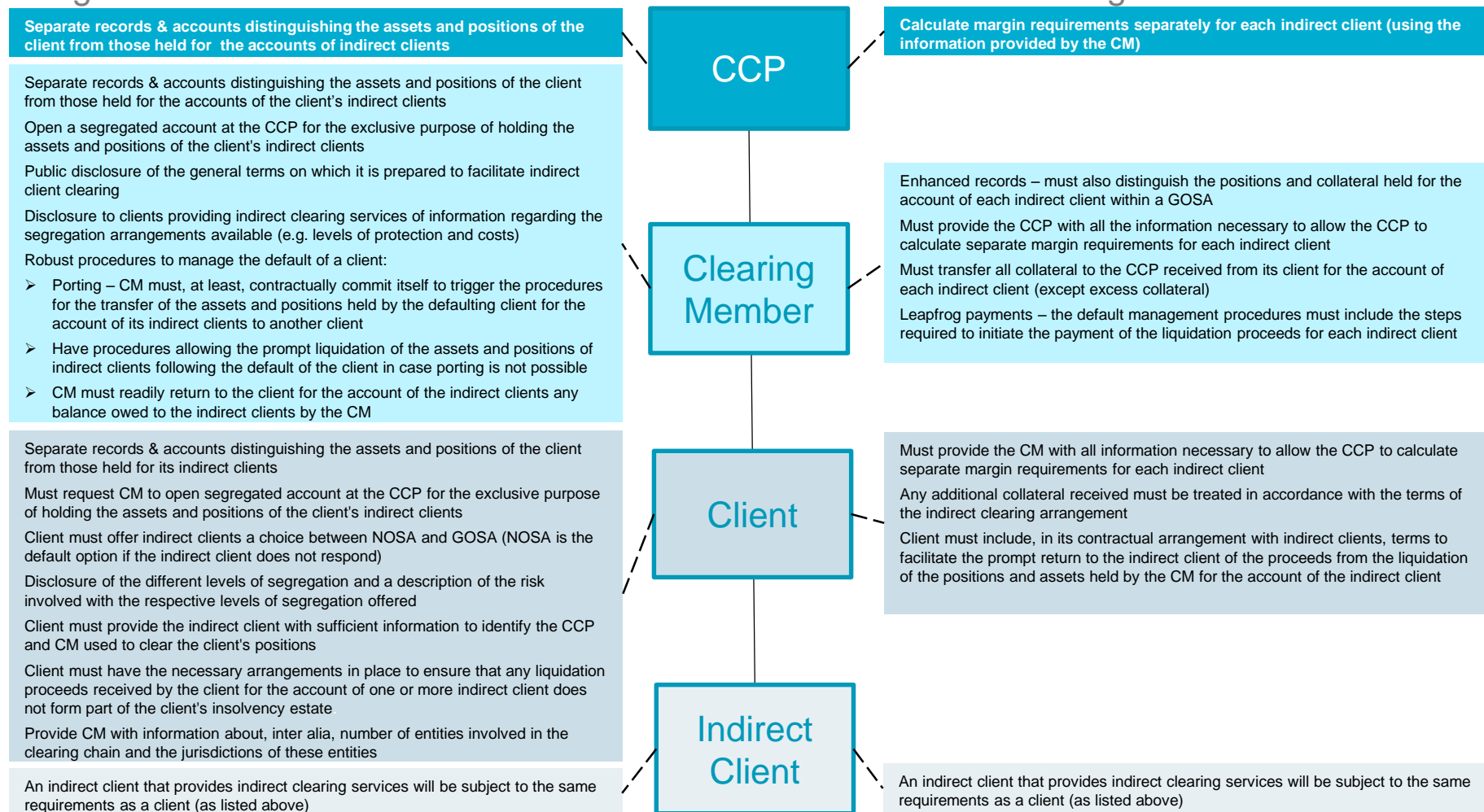
Key features	Summary
Account segregation options	<ol style="list-style-type: none"> <li>1. Net omnibus indirect clearing account (NOSA) – the least complex structure that can be offered. It ensures separation between the collateral and positions of the end indirect clients and the collateral and positions of the client providing clearing services.</li> <li>2. Gross omnibus indirect clearing account (GOSA) - this structure requires the transfer of margin from the indirect client all the way to the CCP and requires accounts and records which distinguish between the collateral and positions held for the account of a specific indirect client from the collateral and positions held for the account of the client providing clearing services as well as from other indirect clients.</li> </ol> <p>Individually segregated indirect accounts (ISAs) are still permitted. Recital (6) states that the requirements applicable to GOSAs would <u>at least</u> need to be met for ISAs.</p>
Information flows	<p>In order to ensure that the same amount of margin would be called with a GOSA as if the indirect client was using an ISA, the CCP will need to have information on the collateral and positions held for the account of the indirect client in order to calculate the margin call.</p> <p>Clearing members (CM) are required to ensure that the CCP has all necessary information to identify the positions and collateral value held for the account of each indirect client in the account on a daily basis. Clients are required to provide this information to the CM.</p>
Porting	<p>CM must, at least, contractually commit itself <u>to trigger the procedures</u> for the transfer of assets and positions held by the defaulting client for the account of its indirect clients to another client designated by all of those indirect clients, on their request and without the consent of the defaulting client.</p>
Leapfrog payments	<p>CM must have <u>procedures</u> allowing the prompt liquidation of the assets and positions of indirect clients following the default of the client, in case porting has not taken place for any reason within a predefined period specified in the indirect clearing arrangements.</p> <p><u>For GOSAs only</u>, the CM's <u>procedures</u> must include the steps required to initiate the payment of the liquidation proceeds to each of the indirect clients, and the client must include, in its <u>contractual arrangements</u> with indirect clients, terms to facilitate the prompt return to the indirect client of the proceeds from the liquidation of the positions and assets held by the CM for the account of the indirect client.</p> <p>If the CM has not been able to identify the indirect clients or to complete the payment of the liquidation proceeds to each of the indirect clients, the CM must readily return to the client for the account of the indirect clients any balance owed to the indirect clients by the CM. The client must have the necessary arrangements in place to ensure that any liquidation proceeds received by the client for the account of one or more indirect clients does not form part of the client's insolvency estate.</p>
Longer chains	<p>No limits are imposed on the length of indirect clearing chains. However, an indirect client that provides indirect client clearing services must comply with the obligations imposed on clients.</p>
Extraterritoriality	<p>ESMA has not specified in the RTS any territorial scope of the requirements.</p>



# Obligations at each level of the indirect clearing chain: summary

## Obligations under all account structures

## Additional obligations under a GOSA



## Accounts structure and segregation models

**Question 1:** Do you agree with the proposed approach to require the choice between an omnibus indirect account and a gross omnibus indirect account with margin at the level of the CCP?

## Default management requirements

**Question 3:** Do you agree with the proposed approach for the requirements related to default management? Do you think there are alternative level 2 requirements (compatible with the relevant insolvency regime situations and the level 1 mandate) that would achieve better protections?

## Longer chains

**Question 3:** Do you agree that the proposed approach adequately addresses counterparty risk throughout the longer chain by ensuring an appropriate level of protection to indirect clients? If not, are there alternative approaches compatible with Level 1?

**Question 4:** For longer chains, what other details (liquidation trigger and steps, flow and content of information, other) should be taken into account or what additional requirements or clarification should be provided in order to avoid potential difficulties when handling the default of a client or an indirect client facilitating clearing services?

## Additional draft provisions

**Question 5:** Do you consider that the new provision assigning by default to the indirect client the choice of an omnibus indirect account following reasonable efforts from the client to receive an instruction is appropriate? If not, what other considerations should be taken into account?

**Question 6:** Do you consider appropriate that the collateral provided on top of the amount of margin the indirect client is called for is treated in accordance with the contractual arrangements?

**Question 7:** In view of the different amendments described above, do you consider that this set of requirements ensures a level of protection with equivalent effect as referred to in Articles 39 and 48 of EMIR for indirect clients?

## Others

**Question 8:** Please indicate your answers to the cost-benefit survey.

**Question 9:** Do you have any comments on the draft RTS under EMIR not already covered in the previous questions?

**Question 10:** Do you have any comments on the draft RTS under MiFIR not already covered in the previous questions?

# Clifford Chance contacts




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## Questions from the floor