Joint Trade Association request for clarification on EMIR AAR implementation - representativeness

ISDA, EFAMA and FIA welcome the publication of the ESMA Final Report on the active account requirement (AAR) under EMIR of 19 June and encourage the European Commission to swiftly endorse the Regulatory Technical Standards (RTS) accompanying the report. We also note the publication of relevant Q&As on the ESMA website, which in conjunction with the EMIR Level 1 text and the RTS provide helpful clarity for implementation purposes.

As a general remark, the RTS has significantly improved in comparison to the draft subject to consultation from November 2024. Requirements in relation to operational conditions (and the related stress-testing obligations) and reporting have been significantly streamlined. ESMA therefore contributed to the broader objective of simplification, despite the limitations of the EMIR Level 1 text, which had been agreed prior to the EU's renewed focus on competitiveness.

Our members are currently in the process of further implementing AAR and other EMIR 3 requirements and the recent publications of Level 2 and 3 regulation or guidance will assist this process. However, our members we have identified a - by no means exhaustive - set of issues which may require regulatory guidance, with a view to standardising compliance and avoiding fragmented implementation of requirements across EU Member States.

Representativeness obligation – determination of most relevant subcategories – frequency

We understand that market participants and regulators have different interpretations of certain requirements related to the representativeness obligation, particularly regarding the required frequency to determine the most relevant subcategories. It appears that the requirement set out in the fifth paragraph of Article 7a(4) of EMIR 3 to clear *"on an annual average basis, at least five trades in each of the most relevant subcategories per class of derivative contracts and per reference period"*, has led to uncertainty as to whether determinations must be carried out annually or more frequently.

We strongly encourage ESMA and the European Commission to clarify that **an annual determination of the most relevant subcategories is sufficient for compliance purposes**. Under this approach, firms would calculate the total number of trades over the previous 12 months (i.e. July to June in each year) to identify the most relevant subcategories for the following year. This interpretation is consistent with Recital 14 of EMIR 3, which specifies that, *"in assessing whether counterparties fulfil the representativeness obligation, competent authorities should consider the total number of trades over a year"*. On that basis, firms would then determine the number of representative trades they must clear over the course of the year, depending on the length of the

reference period to which they are subject (as articulated in Article 4, 5 and 6 of the RTS in the ESMA final report on AAR). Moreover, the wording in the second sentence of the fifth subparagraph of Article 7a(4) — which allows firms to satisfy the representativeness requirement with only one trade per most relevant subcategory where the resulting number of trades would otherwise exceed half of their annual trades for the preceding 12 months — further indicates that the obligation should be assessed on an annual basis.

This interpretation is the most consistent with the EMIR 3 Level 1 text, including Recital 14, and represents the least operationally complex approach. For buy-side firms in particular, which are typically small derivatives users and are mostly under the €100 billion threshold, an annual determination is the only proportionate and workable approach. Even in the limited number of cases where buy-side firms exceed the €6 billion notional clearing volume outstanding threshold under Article 7a(4), their cleared volumes remain very low, often amounting to only a few trades per year and not necessarily covering all relevant derivative asset classes.

At the same time, we acknowledge that certain larger firms with portfolios exceeding €100 billion in notional clearing volume outstanding may prefer the flexibility to determine their most relevant subcategories on a more frequent basis, in line with their applicable reference periods (i.e. monthly for EUR IRS and EUR STIR referencing Euribor or 6 monthly for EUR STIR referencing ESTR or yearly for PLN IRS) . While this flexibility should be preserved for those who wish to make use of it, the standard expectation should be that an annual determination is sufficient for regulatory compliance purposes.

It should be stressed that the frequency of the most relevant subcategory determinations does not affect the overall number of trades subject to mandatory clearing at EU CCPs. An annual determination provides firms with greater flexibility in scheduling their AAR trades at EU CCPs, while avoiding the disproportionate reporting burden that would arise from more frequent determinations, without delivering additional supervisory value. We believe an annual determination would be aligned with the spirit and the letter of EMIR 3 and with ESMA's broader objectives of simplification, burden reduction and supervisory convergence across the Union.

Representativeness obligation – Treatment of counterparties no longer meeting the €6 billion notional clearing volume outstanding threshold

We also request ESMA to confirm how firms should comply with representativeness if, during the reference period , a counterparty determines that it no longer meets the €6 billion notional clearing volume outstanding threshold under Article 7a(4) of EMIR. We believe that in the same vein as ESMA's clarifications in ESMA QA 2506 with respect to a continuous assessment, **ESMA should clarify that a counterparty would be immediately relieved from the representativeness**

obligation upon demonstrating that it no longer meets the €6 billion notional clearing volume outstanding threshold under Article 7a(4) of EMIR, and on the formal procedure for notifying ESMA and the counterparty's national competent authority. For buy-side firms, where trading volumes can fluctuate significantly over time, they could otherwise find themselves having to meet representativeness obligations despite no longer exceeding the threshold, creating an undue compliance burden.

Representativeness obligation – reporting considerations

An annual determination would also allow for a straightforward reporting approach, where firms would report all activity over the past 12 months in services of substantial systemic importance on in-scope subcategories (left-hand panel of the table in Annex III of the final draft RTS). In the same table (right-hand panel), they would report activity on an annual average basis at the EU CCP. This would allow national competent authorities to immediately assess compliance, as the most relevant subcategories over a year would stand out instantly on the left-hand panel, and the reporting at the EU CCP of numbers based on annual averages would also instantly demonstrate compliance (i.e by showing a number greater than 5 in the right-hand panel on the most relevant subcategories).

Relatedly, regarding reporting on representativeness, we flag that certain specifications in the final draft RTS lead to reporting approaches that are not evidently meaningful: in particular, Article 9(1)(b) of the final draft RTS requires reporting on *"the number of trades cleared [...] per reference period at clearing services of systemic importance"* while the reporting of activity at EU CCP would be, per Article 9(1)(c) *"based on the average for the 12 previous months"*. We think the only way for this reporting to be understandable would be for the number of trades cleared at clearing services of systemic importance to be reported over the 12-month period used to determine, for i.e. EUR IRS, the 5 most relevant subcategories, such that this information could easily be compared with the annual average required to be reported under Article 9(1)(c) to demonstrate compliance, following the reporting approach that we describe above. Otherwise, the current language suggests that there could be reports filled "per reference period" for activity at Tier 2 CCPs, while there would be reports filled with annual average data for activity at EU CCPs. As a result, we do not see how such reports would provide any meaningful information for compliance monitoring purposes. Consequently, **Article 9(1)(a) of the Final RTS which now seems to require reporting on *"the most relevant subcategories identified […] for each reference period, as defined in Articles 4 to 6 of this Regulation"* should be amended to cater for identification of the most relevant subcategories on an annual basis**. **Articles 4 to 6, which also include references to determination of most relevant subcategories for each reference period, should also be amended, to cater for the possibility to comply with the**

representativeness requirement on an annual average basis, as permitted by EMIR 3 Article 7a(4), fourth subparagraph. The current wording leave room for unclarity on how to determine the most relevant subcategories where within one compliance period of a year, the reference periods shorter than a year have differing most relevant subcategories.

We would also welcome clarification from ESMA on the timing of the representativeness reporting obligation in cases where counterparties in scope of the AAR, but benefitting from the exemption under Article 7a(4) from the representativeness obligation by virtue of remaining below the EUR 6 billion threshold, subsequently exceed this threshold during a given reference period. To illustrate, consider a counterparty that has been subject to the AAR since EMIR 3 entered into force but remains below the EUR 6 billion threshold until 30 June 2026. In such a case, it is clear that the representativeness obligation should begin to apply from that date. However, requiring the counterparty to report already by the first EMIR 3 reporting date of 31 July 2026 would mean reporting based on only one month of activity. This appears inconsistent with Recital 14 of EMIR 3, which specifies that '*in assessing whether counterparties fulfil the representativeness obligation, competent authorities should consider the total number of trades over a year'*, meaning that NCAs should assess compliance on an annual average basis.

Similarly, requiring reporting by 31 January 2027 would still capture only around seven months of activity and therefore not provide a full reference period on an annual basis. Accordingly, **it would seem that the first reporting date for representativeness in such cases should be 31 July 2027, once a complete year of trading activity has elapsed since the threshold was exceeded**. In the meantime, the counterparty would report on the AAR itself (Annex II tables 1 and 2) as of July 2026, but not yet on representativeness (Annex III). This pragmatic approach would ensure that Recital 14 is applied as was arguably intended.

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EFAMA is the voice of the European investment management industry, which manages around EUR 33 trillion of assets on behalf of its clients in Europe and around the world. We advocate for a regulatory environment that supports our industry's crucial role in steering capital towards investments for a sustainable future and providing long-term value for investors.

Besides fostering a Capital Markets Union, consumer empowerment and sustainable finance in Europe, we also support open and well-functioning global capital markets and engage with international standard setters and relevant third-country authorities. EFAMA is a primary source of industry statistical data and issues regular publications, including Market Insights and the EFAMA Fact Book. More information is available at www.efama.org

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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
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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.