



European Securities and
Markets Authority

Consultation Paper

Indirect clearing arrangements under EMIR and MiFIR



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the questions listed in this Consultation Paper on Indirect clearing arrangements under EMIR and MiFIR.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Please follow the instructions given in the document 'Reply form for the Consultation Paper on Indirect clearing arrangements under EMIR and MiFIR' also published on the ESMA website.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by 17 December 2015

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from financial and non-financial counterparties of derivative transactions which will facilitate or use indirect clearing services, as well as central counterparties (CCPs).

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Acronyms used

CCP	Central Counterparty
EMIR	European Market Infrastructures Regulation – Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETD	Exchange-traded derivatives
MiFIR	Markets in Financial Instruments Regulation – Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
OTC	Over-the-counter
Q&A on EMIR	Questions and Answers on the implementation of EMIR available on ESMA's website
RTS	Regulatory Technical Standards
EMIR RTS	Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP

1 Executive Summary

Reasons for publication

This consultation paper seeks stakeholders' views on the draft requirements on indirect clearing arrangements for OTC derivatives and exchange-traded derivatives (ETD). This consultation paper thus covers the draft regulatory technical standards (RTS) on indirect clearing arrangements for ETD under Regulation No 600/2014 (MiFIR) as well as the draft amendments to Commission Delegated Regulation No 149/2013 with regard to the regulatory technical standards on indirect clearing arrangements for OTC derivatives under Regulation No 648/2013 (EMIR).

ESMA can initiate the review of RTS it has developed to ensure they fulfil their objective and ESMA is conducting such a review for the EMIR RTS with regard to the provisions related to indirect clearing. The objective of this consultation is to a) consider certain amendments to the EMIR RTS in order to address specific issues raised in the context of the prior consultation for the draft MiFIR RTS on indirect clearing for exchange-traded derivatives, and to b) consider a new version of the draft RTS that takes into account the feedback from the MiFIR consultation and the consistency requirement of the MiFIR mandate.

The input from stakeholders will help ESMA develop a revised draft of the EMIR RTS and finalise a draft MiFIR RTS in relation to indirect clearing arrangements to be submitted together to the European Commission for endorsement in the form of Commission Delegated Regulations, i.e. legally binding instruments directly applicable in all Member States of the European Union. Finally, one essential element in the development of draft technical standards is the analysis of the costs and benefits that those legal provisions will imply. Input in this respect and any supportive data will be highly appreciated and kept confidential where required.

Contents

The report focuses exclusively on indirect clearing under EMIR and MiFIR, and with respect to the EMIR RTS it does not cover the other items included in the EMIR RTS. The report explains in Section 2 the rationale and the scope of the review of the EMIR RTS launched by ESMA and the new consultation on the draft MiFIR RTS. Section 3 presents the proposed amendments to the EMIR RTS and the draft MiFIR RTS, and raises questions seeking all relevant stakeholders' views on these proposed amendments in light of the mandates and the specificities of indirect clearing arrangements.

Next Steps

As provided for by Regulation No 1095/2010 of the European Parliament and Council establishing ESMA, following the analysis of the responses to the public consultation, the



finalised draft amendments to the EMIR RTS and the finalised draft MiFIR RTS will be submitted to the European Commission for endorsement.

2 Introduction

2.1 Review of the EMIR RTS on indirect clearing

2. EMIR introduced provisions to increase the resiliency of the OTC derivatives market and to reduce the systemic risk associated to this market. In particular, under Article 4, EMIR introduced the clearing obligation¹, detailing the conditions and the requirements for counterparties to clear specific classes of OTC derivatives, which classes would be determined following the procedure of Article 5. In order to comply with the clearing obligation, EMIR adds that counterparties can be a clearing member of a CCP, a direct client of a clearing member or establish indirect clearing services. With regard to the latter, indirect clearing services, a mandate is included in EMIR to further detail the applicable requirements.
3. Specifically, under Article 4 of EMIR, ESMA is empowered to develop a draft RTS on the types of indirect clearing arrangements that 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 EMIR. The protections provided for in Articles 39 and 48 relate to the segregation and portability requirements as well as to the default management procedures. The requirements for indirect clearing arrangements under EMIR were set in Commission Delegated Regulation No 149/2013 of 19 December 2012 (EMIR RTS).
4. Indirect clearing services are not only relevant for OTC derivatives but also for exchange-traded derivatives (ETD). Under Article 30 of MiFIR, indirect clearing arrangements with regard to ETD² are permissible provided that they meet certain requirements. Under Article 30, ESMA is empowered to define the requirements with regard to ETD with the same objective as the objective for the EMIR RTS for OTC derivatives, i.e. to develop a draft RTS on the types of indirect clearing arrangements that 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 EMIR.
5. In summary, under EMIR and under MiFIR, ESMA has been mandated to develop both RTS on indirect clearing arrangements for OTC derivatives and for ETD respectively, with one shared objective of ensuring an appropriate level of protection. Whereas the EMIR RTS entered into force already, the draft MiFIR RTS has been in development. However, in the context of the development of the MiFIR RTS, the responses to the MiFIR consultations have raised a series of concerns that also relate to the EMIR RTS on OTC derivatives. These concerns are detailed in Section 3, they relate in particular to the types of accounts available and the requirements related to the management of a default.
6. ESMA can initiate the review of technical standards it has developed to ensure their purpose is appropriately fulfilled. In the present case, ESMA is indeed of the opinion that amendments to the EMIR RTS need to be considered to address some of the problems raised in the context of the consultations on the draft MiFIR RTS. ESMA communicated this view in a letter sent to the European Commission on 2 October 2015³.

¹ Under Article 29(1), MiFIR extends the scope of the clearing obligation to all derivative transactions concluded on a regulated market.

² Under Article 2 of MiFIR, 'exchange-traded derivative' means a derivative that is traded on a regulated market or on a third-country market considered to be equivalent to a regulated market in accordance with Article 28 of MiFIR, and as such does not fall within the definition of an OTC derivative as defined in Article 2 of EMIR.

³ The letter (ESMA/2015/1498) sent by ESMA to the European Commission on 2 October 2015 is available at the following address: <http://www.esma.europa.eu/content/Letter-European-Commission-re-RTS-indirect-clearing-under-EMIR-and-under-MiFIR>

7. The objective of this consultation paper is thus precisely to consult on the draft requirements that could address both the problems affecting the development of indirect clearing arrangements for OTC derivatives and the problems raised in relation to indirect clearing arrangements for ETD, as the issues encountered are essentially the same for ETD and OTC derivatives (although some nuances exist between the two).
8. For clarity, this consultation only relates to indirect clearing arrangements (under EMIR and MiFIR) and does not cover any other aspects of the EMIR RTS⁴.
9. In terms of process, following this consultation, ESMA intends to submit to the European Commission together the draft MiFIR RTS and the proposed amendments to the EMIR RTS, as indicated in the letter referred to above.

2.2 Link between the EMIR RTS and the MiFIR RTS

10. It is important to bear in mind that under Article 30 of MiFIR, ESMA is empowered to develop the draft MiFIR RTS ensuring consistency with provisions for OTC derivatives under the EMIR RTS. Therefore, not only the two RTS share the same objective of ensuring an appropriate level of protection but the two RTS also have to be consistent with one another.
11. As a result, following this consultation, ESMA will need to ensure that the draft MiFIR RTS and the draft revised EMIR RTS are consistent. This means that respondents are invited to not only consider Articles 39 and 48 of EMIR as the reference points for their feedback and input, but to also consider whether there should be differences or nuances between the draft MiFIR RTS and the draft revised EMIR RTS and how it can still be ensured that the two RTS can be deemed consistent in spite of these differences or nuances.
12. Given the link between the two RTS as explained in paragraph 10, and given that the issues faced are broadly shared by the two RTS as explained in paragraph 7, the feedback from the MiFIR consultations is taken into account in this consultation paper in relation to both OTC derivatives and ETD to respectively amend and draft both standards.
13. The following section describes the proposed requirements for the technical standards on indirect clearing, which would be draft amendments with regard to the EMIR RTS and which would be draft provisions for the draft MiFIR RTS. The consultation paper is seeking all relevant stakeholders' views on these amendments. The stakeholders' responses and suggestions should take into account how to ensure that a) the EMIR and MiFIR mandates for a level of protection with equivalent effect to that referred to in Articles 39 and 48 of EMIR are fulfilled, b) the MiFIR mandate for consistency between the two RTS is fulfilled, and c) the revised requirements allow to address, to the extent permitted under the mandate granted to ESMA and the applicable EU legal framework, the issues raised during the prior consultations on indirect clearing.

⁴ Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 is not only with regard to indirect clearing arrangements but is with regard to regulatory technical standards on the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivative contracts not cleared by a CCP.

3 Proposed requirements for the two RTS on indirect clearing

14. The majority of the comments raised during the consultations related to three particular aspects that are addressed in the following three sections: accounts structure and segregation models, default management and longer chains. In addition, a few additional items were raised that are covered in a fourth section.

3.1 Accounts structure and segregation models

15. Several stakeholders raised the issue of the operational burden in the context of the MiFIR discussion paper in relation to the individually segregated indirect account of the EMIR RTS. As a result, a new set of accounts and segregation models were introduced in the MiFIR consultation paper with the objective to reduce this operational burden while still aiming for a level of protection with equivalent effect to that referred to in Articles 39 and 48 of EMIR.

16. The choice of accounts was replaced from being between an omnibus indirect account and an individually segregated indirect account (in the MiFIR discussion paper), to being between an omnibus indirect account and a gross omnibus indirect account with additional requirements (in the MiFIR consultation paper). The new proposal made the distinction between net and gross, with the intent to reflect the account models that have been developed and implemented by industry since EMIR was drafted, while staying within the framework and definitions of EMIR. A parallel can be drawn with the discussion paper on margin periods of risk⁵, which also considers the distinction between accounts margined on a gross basis and accounts margined on a net basis as it is a distinction that is quite prevalent in the accounts implemented in the market.

17. In the MiFIR consultation paper, the first account choice remained the same, an omnibus indirect account, while the change (from the version of the discussion paper) was with regard to the second account choice, the new gross omnibus indirect account. The gross omnibus indirect account was presented in the consultation paper in conjunction with additional requirements, such as the requirement to pass through margin collected from the indirect clients all the way to the CCP, as a potential alternative to the individually segregated indirect account of the EMIR RTS.

18. It is to be noted that the EMIR RTS and the subsequent draft MiFIR RTS did not specify whether the first account choice, the omnibus indirect account, was net or gross. This is in line with Article 39 (2) of EMIR which also does not specify whether the omnibus account should be net or gross. This leaves flexibility to the possible netting arrangements with these accounts. For instance, netting could be done at the level of the clearing member (and net at the CCP level) or at the level of CCP (the clearing member calling gross but being called net from the CCP). Independently from the netting arrangement, there would still be a difference with the gross omnibus indirect account as the proposed gross omnibus indirect account is complemented with additional requirements as described in detail in this paper.

19. The MiFIR consultation paper explained how the new account structure was aiming to meet the requirement of ensuring a level of protection with equivalent effect to that referred to in Articles 39 and 48 of EMIR. The objective was to present a combination of a simpler account structure, the gross omnibus indirect account, and additional requirements that would ensure that, taking into account all the

⁵ Discussion paper (ESMA/2015/1295) of 26 August 2015 on the review of the EMIR standards related to margin period of risk for CCPs is available at the following link: http://www.esma.europa.eu/system/files/2015-1295_dp_on_review_of_article_26_of_rts_153-2013.pdf

relevant requirements combined, the new requirements could be considered to provide overall a level of protection with equivalent effect to that referred to in Articles 39 and 48 of EMIR. In other words, the additional requirements would increase certain protections to compensate for other protections that may have been reduced by the change in the choice of accounts.

20. The gross omnibus indirect account structure was chosen as it presents a simpler structure than that of the individually segregated indirect account of Article 4(2)(b) of the EMIR RTS. First of all, an omnibus account allows the comingling of positions and collateral for several indirect clients in a single account, thus simplifying its operational set-up and processing. Secondly, gross margining has the objective to ensure an equivalent amount of collateral is distinguished between different indirect clients in the account as would be the case between them if they had chosen separate individually segregated indirect accounts. Indeed, with an account margined on a gross basis, the margin would be calculated for the positions of each indirect client and the amount of collateral for each indirect client would be the same as if the positions were in separate accounts.
21. Going in more details on the gross omnibus indirect account proposal, the main characteristic would be that the margin for each indirect client in the account would be calculated separately at the level of the CCP. This gross calculation would be made possible by ensuring that each entity in the indirect clearing chain is responsible for making sure the necessary information is passed throughout the chain. The client would be required to ensure that the clearing member has sufficient information to identify the positions and the amount of collateral held for the account of each indirect client. Similarly, the clearing member would be required to ensure that the CCP also has sufficient information to identify the positions of each indirect client.
22. The additional requirement for CCPs to conduct the calculation, compared to the EMIR RTS, allows for the amount of collateral held for the account of each indirect client to be further segregated at the level of the CCP. First of all, the clearing member would be called gross and not net, so the amount of collateral held at the level of the CCP for the account of the indirect clients would be greater than under the current EMIR RTS, even for the indirect clients opting for individual segregation. This would increase the level of protection provided to indirect clients in the case of the default of a clearing member.
23. As a result, a) the clear identification of positions and amount of collateral held for the account of each indirect client at the different levels of the indirect clearing chain, and b) the pass through of margin all the way to the CCP, would help provide a level of protection to indirect clients, in the case of the default of a client or the clearing member, that overall would be of equivalent effect to the one provided under the current EMIR RTS.
24. Although the vast majority of the feedback concentrated on the issue of the potential conflict of laws in relation to insolvency, overall, many respondents to the MiFIR consultation welcomed the efforts and the amendments made to the draft MiFIR RTS in order to address the range of issues raised by respondents to the discussion paper, including the new account choice.
25. As per the introduction, under MiFIR there is the requirement to have consistent RTS between OTC derivatives and ETD. Therefore, it is important to consider whether there may be differences between the ETD and the OTC derivative markets that could prevent the EMIR RTS from following the same approach as the approach for the draft MiFIR RTS.
26. On the one hand, a large share of the ETD market activity is already going through indirect clearing services. Indeed many counterparties are relying on indirect clearing services to access certain markets

or to find clearing arrangements that fit their size and profile. On the other hand, indirect clearing for OTC derivatives is relatively new and has not developed so far, but its importance will grow as the clearing obligation is rolled out. With regard to OTC derivatives, clearing in general was not the norm and was only taking place between clearing members, thus clearing by non-clearing members has only really started after the Pittsburgh G20 commitments, and so far it has concentrated on client clearing.

27. Therefore, as reflected by its inclusion in both EMIR and MiFIR, indirect clearing will play an important role in both markets (ETD and OTC derivatives) going forward, and having the appropriate requirements for both is thus key. Yet, at the same time, in terms of the impact on the legacy activity, the possible implications of how the requirements are set will thus be more important with respect to the ETD market than with the OTC derivatives market, given the latter has not yet really developed. As a result, having in mind the consistency requirement, it appears important setting the requirements in a way that fulfils the mandate and allows indirect clearing arrangements to work for both markets going forward, but at the same time takes into consideration how the impact on the ETD market could be minimised.
28. With regard to ETD, indirect clearing arrangements have been traditionally and primarily based on net margining. First of all, as developed in this section, the proposed set of accounts is designed to offer a choice of accounts with a set of requirements ensuring a level of protection with equivalent effect in order to fulfil the mandate. But secondly, this proposed set of accounts should as well minimise the impact on the existing market, while ensuring increased segregation standards. In particular, for the case of indirect clients who have relied on net omnibus accounts in the ETD market and who would want to continue, they could do so, but in addition the requirements would also ensure that there is segregation between the indirect client omnibus account and a direct client's own account.
29. With regard to OTC derivatives, although indirect clearing has not developed, the implementation of EMIR in respect to client clearing tells us that, so far, there has been a lot more interest for more distinction and more segregation between clients in the case of OTC derivatives than in the case of ETD. First of all, more clients have opted for individually segregated accounts for OTC derivatives. Secondly, in view of this demand for more distinction between clients, some CCPs have thus focused on offering gross omnibus structures rather than net omnibus structures when complying with the requirement to offer the omnibus account under Article 39(2) of EMIR.
30. In view of the above, it is reasonable to expect that more clients will opt for the account structures offering more distinction and/or segregation as the clearing obligation is rolled out. At the same time, in the feedback to the MiFIR consultations, some respondents have commented on the complexity and the cost associated with the individually segregated account as factors that may limit the take up of such accounts.
31. Therefore, the set of accounts envisaged under MiFIR should help addressing these two aspects. On the one hand, the gross omnibus indirect account would allow indirect clients in the OTC derivative market to have that choice of a greater distinction between their positions and amount of collateral and those from other indirect clients than in the standard omnibus accounts. And on the other hand, the gross omnibus indirect clearing account, having been designed also to minimise the operational burden as compared to individually segregated accounts, and thus the complexity and the cost, should make it more accessible to indirect clients.
32. Taking all these aspects into consideration, the proposal for the amendments of the EMIR RTS and for the new version of the draft MiFIR RTS is to follow the same approach as the approach envisaged in the MiFIR consultation paper. The proposal is the requirement to offer an omnibus indirect account (like

in the current EMIR RTS) and a gross omnibus indirect account with the related additional requirements presented in this section.

33. In addition, it should be noted that Article 39(5) of EMIR indicates that clearing members should at least offer a choice between the two types of required accounts and segregation models, which means that other types of segregation models can be offered too. Indeed, under EMIR, other account structures have been implemented on top of the two accounts required under Article 39 of EMIR, as long as they provided at least the level of segregation of Article 39(2).
34. Similarly, in the case of the requirements for indirect clearing arrangements, the minimum choice should be at least between the types of accounts described in this section, but additional types of account structures and segregation models could be offered as long as they provide at least the level of segregation of the omnibus indirect account. In particular, although it is proposed not to require individually segregated indirect accounts to be part of the minimum set of accounts, this type of account could still be offered if solutions are found by market participants to address the challenges that are currently preventing its development.

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?

3.2 Default management requirements

35. The biggest issue encountered by the two RTS on indirect clearing requirements has been with regard to the requirements related to the management of a default. Respondents have unanimously commented on that aspect, mentioning the many situations under which there could be a conflict of law between these requirements and the local insolvency regimes. Indeed, indirect clearing arrangements involve many entities and thus the number of permutations of jurisdictions where the different entities in the clearing chain can be established increases and include permutations where the conflict of law would indeed exist.
36. Without going through the list of problematic permutations, one can take the example of indirect clearing arrangements including a client established in a third country jurisdiction. In that example, it is not unlikely there could be a conflict of law between an EU regulation requiring to by-pass the insolvency administrator of the defaulting intermediary entity that provides clearing services and the third country insolvency regime. Indeed the EU legal framework cannot override the third country insolvency regime.
37. As a result, requiring the porting of the assets and positions of the indirect client and/or the so-called leapfrog payment (the direct return of the liquidation proceeds to the indirect client) can conflict in many cases with the relevant insolvency regimes. However, the EMIR and MiFIR mandates require having provisions in the RTS on indirect clearing related to these protections for the indirect client, in line with Article 48 of EMIR.
38. Starting with porting, in the MiFIR consultation paper it was proposed to not include porting as a requirement and instead focus on ensuring liquidation. Indeed, in the ETD market, it may protect the assets of the indirect client better to proceed to liquidation sooner. However, in the OTC derivative

market, it may not be as evident as some of the positions may not be as liquid as in the ETD case and in the case porting can be achieved it may be more beneficial to the indirect client.

39. In addition to the issue of the possible conflict of law and the differences that can exist between OTC derivatives and ETD, these considerations on the default management requirements need to also take into account a) the perimeter provided by the EMIR and MiFIR mandates when setting the requirements, i.e. what flexibility there is in level 1 around the requirements for porting and the leapfrog payment, and b) the specificities of the market practice, in particular the likelihood of finding an alternative intermediary to achieve porting.
40. With regard to a), Articles 48(5) and 48(6) of EMIR require that “the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of” the client or its clients. EMIR thus requires to trigger the procedure but not to actually guarantee this can be done in all circumstances. Indeed, EMIR envisages the case that “the transfer to that other clearing member has not taken place for any reason within a predefined transfer period”. And in that scenario, EMIR states that “the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the clearing member for the account of” the client or its clients.
41. With regard to b), based on the experience of client clearing, it appears it is not always possible to guarantee porting. It can in fact be challenging for various reasons to have a clearing member to commit taking on a certain portfolio of cleared trades. In the case of indirect client, the situation appears to be the same: the MiFIR consultation paper reported a similar comment from respondents that there was a lack of back-up clients. As a result, to the extent possible, the requirement on porting should thus allow to move to the liquidation step quickly as it can be the more risk averse and the more realistic step to take in a default scenario in a range of cases.
42. As a result, taking all the above into account, in the proposed amendments to the EMIR RTS and in the new version of the draft MiFIR RTS, the requirement around porting is reintroduced, in comparison to the MiFIR consultation paper, as it could be the right solution in certain scenarios and because it is envisaged in Article 48 of EMIR. However the requirement on porting is drafted in a way that focuses on the obligation of means, via the procedures, and not on an obligation of results, guaranteeing porting, so the appropriate steps can be taken in the case of a default and in the case porting cannot be achieved.
43. Moving to the requirement related to the leapfrog payment, the approach was modified in the MiFIR consultation paper to take into account that contractual arrangements can help protect the liquidation proceeds owed to the indirect client. First of all, a new requirement was introduced requiring the indirect client is provided with the information on how and when the liquidation should be conducted, so that the indirect client can better manage the risk of its portfolio. In addition, new provisions were also introduced to ensure that contractual arrangements between the direct and indirect clients would be required so that the direct client would look to protect to the extent possible the return of the liquidation proceeds to the indirect client from its own insolvency.
44. In view of the fact that the liquidation is the most likely scenario, and in view of the possible circumstances where the leapfrog payment may not be immediately possible as commented earlier in this section, the proposed amendments to the EMIR RTS and the new version of the draft MiFIR RTS continue in the direction taken in the MiFIR consultation paper. This means the provisions reflect the elements described in the above paragraph 43: greater visibility to the indirect client on when and how the liquidation is going to be conducted in order for the indirect client to better manage its risk and thus its assets, and the requirement for contractual arrangements to protect to the extent possible what is

owed to the indirect client from the insolvency of the direct client. In addition, the requirements on the leapfrog payment are centred on the procedure and its initiation, thus constituting more an obligation of means.

45. Looking now at Article 48(7) of EMIR, it requires the liquidation proceeds to be “readily returned to those clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients”. As a result, in the case of the gross omnibus structure with the additional requirements presented in section 3.1, it should be the case that the indirect clients are identified, the proposed amendments include provisions to that end. However, this would not likely be the case with the other choice of account, the first omnibus account structure. It is thus proposed to remove the requirement related to the leapfrog payment for the first omnibus account structure and make it only applicable in the case of the gross omnibus indirect account. And for the case where the indirect clients cannot be identified, then the requirement will mirror the approach of Article 48(7) of EMIR and require the liquidation proceeds to be returned to the direct client for the account of its indirect clients.

46. As a result, the requirements set for the management of a default take into account the difficulty of achieving porting as well as the circumstances under which the prompt and direct return to the indirect client of the liquidation proceeds of the collateral and positions held for the account of this indirect client may not be feasible. Instead, the requirements put the emphasis on having procedures in place to be ready to execute these measures as well as on establishing contractual arrangements to protect what is owed to the indirect client in relation to the indirect clearing services from the insolvency of the intermediary providing clearing services, thus accounting more for an obligation of means than an obligation of result. This approach follows a similar approach to the one of Article 48 and detailed in paragraphs 40 and 45.

47. Furthermore, this obligation of means enables to take the appropriate measures in a situation of a default, including liquidation where applicable. Combined with the requirements related to the different account and segregation models, in particular the requirement to maintain gross margins at the level of the CCP for the account of the indirect clearing in the case of the gross omnibus account structure, these requirements would contribute to providing indirect clients with a high level of protection in case of a default and therefore an equivalent level of protection to the one referred to in Articles 39 and 48 of EMIR.

Question 2: 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?

3.3 Longer chains

48. Indirect clearing solutions for OTC derivatives have not really developed so far, let alone solutions involving longer chains with more than one indirect client. In line with this, the feedback with regard to longer chains that has been received in the responses to the MiFIR consultation was with regard to ETD and not really with regard to OTC derivatives.

49. Although longer chains have not been much of a focus in the context of OTC derivatives, given the objective is to set requirements that are consistent between the RTS for OTC derivatives and the RTS

for ETD, the requirements envisaged for the draft MiFIR RTS that are related to longer chains for ETD should be mirrored to the extent possible in the proposed amendments to the EMIR RTS on OTC derivatives.

50. To begin with, the definition of an indirect client was set during the drafting of the EMIR RTS and thus didn't take into account the longer chains that exist in the ETD market, the MiFIR mandate only came afterwards. However, the MiFIR consultation paper was relying on the definition of the EMIR RTS, which limited the extent to which longer chains could be addressed. As a first consequence, the definition of an indirect client and thus of indirect clearing arrangements would need to be modified in order to address the case of longer chains.
51. Furthermore, with longer chains, the complexity of indirect clearing arrangements increases, as there are more intermediaries involved, but the requirement remains to ensure the objectives of the mandate are met. As a result, to deal with longer chains, the requirements would need to ensure the related indirect clearing arrangements a) do not increase counterparty risk, and b) provide for a level of protection with equivalent effect for the counterparty, which would mean the indirect client at the end of the chain.
52. The proposal is not to define different requirements depending on the number of intermediaries in the indirect clearing chain, but instead to consider that the indirect client at the end of the chain is the one that needs to be provided with an appropriate level of protection, which means that the requirements applicable to a direct client would need to be extended to all the intermediaries between the clearing member and the counterparty at the end of the chain. This means in particular that the provisions related to default management apply throughout the chain, including the requirement to protect through contractual arrangements, to the extent possible, what is owed to the indirect client in relation to the indirect clearing services from the insolvency of any of the intermediary clients providing clearing services,
53. In addition, in order for the intermediaries to have more visibility and thus better manage the risk of these longer chains, sufficient information would need to be included in the contractual arrangements and communicated throughout the chain, in particular the length of the indirect clearing chain and the jurisdictions where each intermediary is established. Each intermediary should know their position in the chain, to which layer they correspond.

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?

3.4 Additional draft provisions

54. Beyond the requirements related to the three aspects the most discussed in prior consultations and covered in the previous sections, a few additional items are considered in this paper that were not presented in the MiFIR consultation paper.

55. First of all, having the requirement of consistent RTS across OTC derivatives and ETD in mind and although this would have no real impact in the OTC derivatives market, a new provision has been introduced to allow the direct client to assign by default to the indirect client the choice of an omnibus indirect account if after reasonable efforts to get the election choice of the indirect client, the indirect client still has not communicated its choice within an appropriate period of time.

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?

56. Secondly, a distinction is made between collateral that is called from the indirect client in order to meet the margin requirements and collateral that is provided on top of the collateral for the margin requirements in order to facilitate the acceptance for clearing of transactions. In the draft amendments, the latter is proposed to be treated in accordance with the contractual arrangements between the relevant parties, as opposed to a complete pass through of the full collateral value.

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?

4 Annexes

4.1 Annex I - Legislative mandate to develop technical standards under EMIR

Article 4 of Regulation (EU) No 648/2012

Clearing obligation

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.

4.2 Annex II - Legislative mandate to develop technical standards under MiFIR

Article 30 of Regulation (EU) No 600/2014

Indirect Clearing Arrangements

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.

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.

4.3 Annex III - Cost-benefit analysis questionnaire

4.3.1 Objective and scope of this questionnaire

This questionnaire targets compliance costs and other costs and benefits stemming from the draft RTS on the updated requirements for indirect clearing arrangements under MiFIR as well as the compliance costs and other costs and benefits stemming from the draft amendments to Commission Delegated Regulation (EU) No 149/2013 with regard to the RTS on the requirements for indirect clearing arrangements under EMIR.

4.3.2 Baseline scenarios

For OTC derivatives, the requirements were set in Commission Delegated Regulation (EU) No 149/2013. As a result, please consider the requirements as per the EMIR RTS currently in force as the baseline in relation to the proposed amendments.

For ETD, Article 30 of MiFIR establishes new requirements for indirect clearing arrangements with regard to exchange-traded derivatives. A Cost-benefit analysis was conducted with regard to MiFIR. As a result, please consider the MiFIR requirements as the baseline.

In addition, the MiFIR empowerment specifies that consistency should be ensured between the requirements for indirect clearing arrangements with regard to exchange-traded derivatives and the requirements for indirect clearing arrangements with regard to OTC derivatives as per Commission Delegated Regulation (EU) No 149/2013. As a result, please also consider this consistency mandate in order to articulate the increase or reduction in the relevant cost structure with the new requirements as laid out in the consultation paper.

4.3.3 Respondents

The key stakeholders for this consultation and this cost-benefit questionnaire are CCPs, clearing members, direct clients and indirect clients. However, given the importance of indirect clearing arrangements in the functioning of derivatives markets, input from other types of market participants would also be beneficial.

4.3.4 Survey

In order to assess the impact of these RTS with respect to your activity and profile, please consider the following questions for each RTS separately:

1. Are you a user/provider of Indirect clearing services? Please provide an estimate of the proportion of your clearing arrangements that are indirect clearing arrangements.
2. Please quantify to the extent possible each of the costs (IT, staff, legal, internal procedure and training, others) and benefits derived from complying with each of the two RTS, and the overall total. Please explain the drivers for the costs and your calculations.

3. In relation to the size of your business, would you describe those compliance costs as: Very low, Low, Medium, High, Very high?
4. Please indicate any other positive or negative market effects (liquidity impact, transaction costs, business model, client and revenue composition, others) that may arise as a result of the proposed requirements. Please be as specific as possible in your answers.
5. Do you expect broader market changes from the two RTS? If yes, please explain the expected effects (positive and/or negative) on market structure, competition, members of CCPs, direct clients, indirect clients, others.

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

4.4 Annex III - Draft RTS on the indirect clearing arrangements under EMIR

COMMISSION DELEGATED REGULATION (EU) No .../..

of XXX

[...]

Amending Commission Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements of [] (text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, and in particular Article 4(4) thereof,

Whereas:

- (1) An indirect clearing arrangement should not expose a CCP, clearing member, client or indirect client to additional counterparty risk and the assets and positions of the indirect client should benefit from an appropriate level of protection. It is therefore essential that any type of indirect clearing arrangements comply with minimum conditions for ensuring their safety. To that end, the parties involved in indirect clearing arrangements shall be subject to specific obligations. Such arrangements extend beyond the contractual relationship between indirect clients and the client of a clearing member that provides indirect clearing services.
- (2) In order to clearly identify a concept stemming from Regulation (EU) No 648/2012, the definition of a term, indirect client, should be amended.
- (3) Regulation (EU) No 648/2012⁶ requires a CCP to be a designated system under Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems. This implies that clearing members of CCPs

⁶ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p.1)

should qualify as participants within the meaning of that Directive. Therefore to ensure an equivalent level of protection to indirect clients as granted to clients under Regulation (EU) No 648/2012, it is necessary to ensure that clients providing indirect clearing services are credit institutions, investment firms, or equivalent third country credit institutions or investment firms.

- (4) Indirect clearing arrangements involve by design a larger number of entities in comparison to direct clearing arrangements. The larger number of intermediary entities in indirect clearing arrangements means there is a larger number of intermediation activity between the CCP and the end indirect client. Additional intermediary entities and the resulting increased intermediation activity require additional operational steps, additional accounts as well as more complex technological solutions and processing flows. The increased complexity associated to the higher number of entities between the CCP and the indirect client compared to client clearing arrangements should be mitigated with requirements for an alternative and operationally simpler choice of account structures for indirect clearing arrangements than for client clearing arrangements.
- (5) For client clearing, the first choice of account is an omnibus account. This account structure is the less complex structure that can be required while still ensuring a separation between the collateral and positions of the end indirect client and the collateral and positions of the client providing clearing services. The requirement for this first choice of account structure should therefore be mirrored for indirect clearing arrangements.
- (6) The second choice of account is an individually segregated account, which requires separate accounts for each indirect client and thus an increased number of operational processes to manage all the separate accounts than if the indirect clients were managed in a single account. Requiring such an account structure in the case of indirect clearing services would multiply the number of necessary accounts and related operational processes, raising the complexity, cost and operational risk of indirect clearing arrangements.

Alternatively, a gross omnibus indirect account structure with a mechanism of a transfer of margin from the indirect client all the way to the CCP would allow to achieve an equivalent distinction between the collateral and the positions held for the account of a specific indirect client from the collateral and the positions held for the account of the direct client or other indirect clients, while requiring a much simpler account structure. Such an alternative account structure and processing would reduce the number of accounts to be opened and maintained and therefore the related number of operational steps to margin and settle collateral in these accounts. This structure would reduce the cost and complexity compared to individually segregated indirect client accounts, while still permitting to distinguish the collateral and the positions of different indirect clients and therefore ensuring an equivalent level of protection as an individually segregated account. Although an individually segregated indirect account could still be offered, the requirements applicable to the use of the gross omnibus indirect account would at least need to be met.

- (7) In order to ensure that the same amount of margin would be called with a gross omnibus indirect account structure as if the indirect client was using an individually segregated indirect clearing account structure, the CCP would need the necessary information on the collateral and the positions held for the account of the indirect client in order to calculate the associated margin call on an indirect client by indirect client basis.
- (8) As for client clearing, where, following the failure of a clearing member that facilitates clearing services, the CCP should be prepared to transfer the clients positions to an alternative clearing member and to liquidate them if necessary, for indirect clearing, the clearing member should have procedures to facilitate the transfer of indirect clients' positions to an alternative client and commit to trigger these procedures following the failure of a client that facilitates indirect clearing services. The clearing member should also have procedures to liquidate the positions and assets of the indirect clients and to return the liquidation proceeds to the indirect clients when known.
- (9) Under the gross omnibus indirect account structure, the information on the positions and the amount of collateral held for the account of each indirect client is passed to the different entities involved in the indirect clearing arrangement. Therefore, safeguards are put in place so the indirect clients could become known. However, this is not the case with the other choice of account, therefore this is a clear example of a situation when the liquidation proceeds could not be returned directly to the indirect client but should be returned to the client for the account of its indirect clients.
- (10) In some circumstances the direct return of the liquidation proceeds to the indirect client could not be conducted. The failure of a client providing indirect clearing services and established in a third country where the insolvency regime would not allow the direct return of the liquidation proceeds would require the clients, in collaboration with the clearing member and the indirect clients, to put in place contractual arrangements to protect to the extent possible the positions and assets of the indirect client from insolvency challenge, ensuring that if direct return cannot be achieved, any liquidation proceeds returned to a defaulted client for the account of indirect clients does not form part of that defaulted client's insolvency estate.
- (11) Although individually segregated accounts guarantee a better identification of clients' assets and positions than gross omnibus accounts, in practice for CCPs it is quite hard to ensure portability in a short timeframe. For clearing members ensuring portability for indirect clients in individually segregated accounts would thus be unrealistic, therefore the extra administrative burden of individual segregation of indirect client's assets and positions in individually segregated accounts, compared to gross omnibus indirect accounts, would come with no real benefit with regard to the ability to transfer these positions .
- (12) Margining on a gross basis would imply that the netting of positions of different indirect clients in the same gross omnibus indirect account, or the use of the margin of an indirect client to cover

for the margin requirement of another indirect client in the same gross omnibus account, could not be performed when recording the positions of each indirect client and when calculating and calling the corresponding margin requirements.

Under normal circumstances, with a gross omnibus indirect account structure and process, gross margining by the CCP would mean that the assets covering the positions of one indirect client would not be exposed to losses connected to positions of another indirect client.

However, in the case of a default if the positions need to be liquidated, then the risk exists of some exposure to the losses of another indirect client as the positions and collateral are comingled in one account. Yet, when positions need to be liquidated, the speed with which these positions can be liquidated can contribute to minimising the loss on the liquidation of these positions and collateral, which can be the case with the gross omnibus indirect account.

- (13) Margins are the first line of defence in case of a default and maintaining margins at the level of the CCP protects the clients from the default of the clearing member. Requiring passing margins all the way to the CCP would protect the indirect client not only from the default of a client, but also from the default of the clearing member.
- (14) A direct client providing indirect clearing services should present the indirect client with the new choice of account structures and make reasonable efforts to receive instructions from the indirect client on its choice of account and segregation model. However, in order to ensure this Regulation is complied with while ensuring a continuity of service, when the indirect client has not instructed the direct client of its choice of account and segregation model within a reasonable period of time, the client shall be permitted to provide indirect clearing services to this indirect client using the account corresponding to the account choice with the minimum segregation requirement, provided that the client inform the indirect client accordingly of the use of this account, the risks of this account segregation and the possibility for the indirect client to change of account segregation later.
- (15) As indirect clearing arrangements may give rise to specific risks, all the parties included in an indirect clearing arrangement, including clearing members and CCPs, should routinely identify, monitor and manage any material risks arising from the arrangement. Appropriate sharing of information between clients that provide indirect clearing services and clearing members that facilitate those services is especially important in this context. Clearing members should use information provided by clients for risk management and margining purposes only and should prevent the misuse of commercially sensitive information, including through the use of effective barriers between different divisions of a financial institution to avoid conflicts of interest.
- (16) In the scope of the mandate granted by article 30 of MiFIR, ESMA has performed a public consultation related to the development of draft regulatory technical standards related to indirect clearing for exchange traded derivatives that shall be consistent with the RTS related to indirect

clearing for OTC derivatives. In view of issues raised by stakeholders, Commission Delegated Regulation (EU) No 149/2013 should be amended in order to address some of these issues.

(17) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (European Securities and Markets Authority) to the Commission.

(18) The European Supervisory Authority (European Securities and Markets Authority) has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁷.

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Commission Delegated Regulation (EU) No 149/2013

Article 1 of Commission Delegated Regulation (EU) No 149/2013 is amended as follows:

(1) In Article 1, point a is replaced by the following:

“(a) ”indirect client” means an undertaking with a direct or indirect contractual relationship with a client of a clearing member which enables that undertaking to clear its transactions with a CCP;”

(2) In Article 2, paragraph 2 is replaced by the following:

“2. The client of a clearing member and the indirect client, as well as the indirect clients between themselves as the case may be, shall agree upon the contractual terms of an indirect clearing arrangement, after consultation with the clearing member on the aspects that can impact the operations of the clearing member. The arrangements shall include contractual requirements on the client to honour all obligations of the indirect client towards the clearing member. These requirements shall refer only to transactions arising as part of the indirect clearing arrangement, the scope of which shall be clearly documented in the agreed contracts.”

(3) In Article 3, the following paragraph 2 is added:

⁷ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

“2. Where a client manages the assets and positions of several indirect clients in a single account with the segregation option provided for in Article 4(2)(b), the CCP shall calculate margin requirements separately for each indirect client. This calculation shall be based on the information referred to in Article 4(3).”

(4) Article 4 is replaced by the following:

“1. A clearing member that offers to facilitate indirect clearing services shall do so on reasonable commercial terms. Without prejudice to the confidentiality of contractual arrangements with individual clients, the clearing member shall publicly disclose the general terms on which it is prepared to facilitate indirect clearing services. These terms shall include minimum operational requirements for clients and indirect clients that provide indirect clearing services.”

2. When facilitating indirect clearing arrangements, a clearing member shall implement at least any of the following segregation arrangements as indicated by the client:

- (a) keep separate records and accounts enabling each client to distinguish in accounts with the clearing member the assets and positions of the client from those held for the accounts of its indirect clients;
- (b) keep separate records and accounts enabling each client to:
 - (i) distinguish in accounts with the clearing member the assets and positions of the client from those held for the accounts of its indirect clients; and
 - (ii) distinguish in records the positions and the collateral value, after applying any haircut as agreed between the counterparties, held for the account of each indirect client within an omnibus indirect client account.

3. When a client manages the assets and positions of several indirect clients in a single account with the segregation option provided for in paragraph 2(b), the clearing member shall ensure that the CCP has all the necessary information to identify the positions and the collateral value held for the account of each indirect client in the account on a daily basis. This information shall be based on the information referred to in Article 5(2).

4. A clearing member that offers to facilitate indirect clearing services shall transfer to the CCP the collateral value, after applying any haircut as agreed between the counterparties, it received from its client for the account of each indirect client under segregation option in paragraph 2(b), which does not include any additional collateral received above the margin amount called by the clearing member.

5. A clearing member that offers to facilitate indirect clearing services shall open a segregated account at the CCP for the exclusive purpose of holding the assets and positions of the client’s indirect clients.

6. A clearing member that offers to facilitate indirect clearing services shall disclose the information under Article 39(7) of Regulation (EU) No 648/2012 with reference to the segregation arrangements available to clients that provide indirect clearing services.

7. A clearing member shall establish robust procedures to manage the default of a client that provides indirect clearing services.

The clearing member shall, at least, contractually commit itself to trigger the procedures for the transfer of the 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. That other client shall be obliged to accept those assets and positions only where it has previously entered into a contractual relationship with the indirect clients by which it has committed itself to do so.

The clearing member shall have procedures allowing the prompt liquidation of the assets and positions of indirect clients following the default of the client, in case the transfer to that other client has not taken place for any reason within a predefined transfer period specified in the indirect clearing arrangements. The procedures shall provide for the details of the communication from the clearing member to the indirect clients regarding the default of the client and the period of time during which the relevant indirect client portfolios will be liquidated. The assets held for the account of the indirect clients and distinguished in accordance with paragraph 2 shall be used exclusively to cover the positions held for their account.

When the assets and positions of one or more indirect clients are managed under the segregation option provided for in paragraph 2(b), the procedures shall include the steps required to initiate the payment of the liquidation proceeds to each of the indirect clients.

After the completion of the default management process for the default of a client, and when the clearing member 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 clearing member shall readily return to the client for the account of the indirect clients any balance owed to the indirect clients by the clearing member.

8. A clearing member shall identify, monitor and manage any risks arising from facilitating indirect clearing arrangements, including the use of the information provided by clients under paragraph 4 of Article 5. The clearing member shall establish robust internal procedures to ensure this information cannot be used for commercial purposes.”

(5) Article 5 is replaced by the following:

“1. An indirect client that provides indirect clearing services shall be subject to the requirements of paragraphs 2 to 8 as if it was a client.

2. A client that provides indirect clearing services shall keep separate records and accounts that enable it to distinguish between its own assets and positions and those held for the account of its indirect clients. It shall offer indirect clients a choice between the alternative account segregation options provided for in Article 4(2) and shall ensure that indirect clients are fully informed of the risks associated with each segregation option. Where an indirect client does not reply to a request of the client to disclose its choice of account segregation within a reasonable deadline fixed by the latter, the client shall be permitted to use the account segregation option provided for in Article 4(2)(a). The client should inform the indirect client accordingly, provide the indirect client with the relevant information about the risks associated with that account segregation, and explain that this does not preclude the indirect client from electing a different level of segregation at any time by communicating it in writing to the client.
3. When a client manages the assets and positions of several indirect clients in a single account with the segregation option provided for in Article 4(2)(b), the client shall ensure that the clearing member has all the necessary information to identify the positions and the collateral value held for the account of each indirect client in the account on a daily basis. Any additional collateral received above the margin amount called by the clearing member shall be treated in accordance with the relevant terms of the indirect clearing arrangements.
4. A client that provides indirect clearing services shall request the clearing member to open a segregated account at the CCP. The account shall be for the exclusive purpose of holding the assets and positions of its indirect clients.
5. A client that provides indirect clearing services shall disclose the details of the different levels of segregation and a description of the risk involved with the respective levels of segregation offered.
6. A client shall provide the indirect client with sufficient information to identify the CCP and the clearing member used to clear the indirect client's positions.
7. When the assets and positions of one or more indirect clients are managed under the segregation option provided for in Article 4(2)(b), the client that provides indirect clearing services shall include, in its contractual arrangement 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 clearing member for the account of the indirect client.
8. A client shall 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.
9. A client shall provide the clearing member with sufficient information to identify, monitor and manage any risks arising from facilitating indirect clearing arrangements, including information on the number of entities involved in the indirect clearing arrangements and the jurisdictions of these entities. Prior to a default, clients should put arrangements in place to the effect that, in the event of

default of the client, all information held by the client in respect of its indirect clients shall be made immediately available to the clearing member. In particular, in the event of default of the client, the client shall provide immediately the clearing member with sufficient information to identify the indirect clients in relation to the information under paragraph 2.”

Article 2

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position

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

4.5 Annex IV - Draft RTS on the indirect clearing arrangements under MiFIR

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Regulation (EU) No 600/2014 of the European Parliament and the Council with regard to regulatory technical standards on indirect clearing arrangements of [] (text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, and in particular Article 30 thereof,

Whereas:

- (1) An indirect clearing arrangement should not expose a CCP, clearing member, client or indirect client to additional counterparty risk and the assets and positions of the indirect client should benefit from an appropriate level of protection. It is therefore essential that any type of indirect clearing arrangements comply with minimum conditions for ensuring their safety. To that end, the parties involved in indirect clearing arrangements shall be subject to specific obligations. Such arrangements extend beyond the contractual relationship between indirect clients and the client of a clearing member that provides indirect clearing services.
- (2) In order to clearly identify a concept stemming from Regulation (EU) No 648/2012, the definition of a term, indirect client, should be defined.
- (3) Regulation (EU) No 648/2012⁸ requires a CCP to be a designated system under Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems. This implies that clearing members of CCPs should qualify as participants within the meaning of that Directive. Therefore to ensure an equivalent level of protection to indirect clients as granted to clients under Regulation (EU) No

⁸ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p.1)

648/2012, it is necessary to ensure that clients providing indirect clearing services are credit institutions, investment firms, or equivalent third country credit institutions or investment firms.

- (4) Indirect clearing arrangements involve by design a larger number of entities in comparison to direct clearing arrangements. The larger number of intermediary entities in indirect clearing arrangements means there is a larger number of intermediation activity between the CCP and the end indirect client. Additional intermediary entities and the resulting increased intermediation activity require additional operational steps, additional accounts as well as more complex technological solutions and processing flows. The increased complexity associated to the higher number of entities between the CCP and the indirect client compared to client clearing arrangements should be mitigated with requirements for an alternative and operationally simpler choice of account structures for indirect clearing arrangements than for client clearing arrangements.
- (5) For client clearing, the first choice of account is an omnibus account. This account structure is the less complex structure that can be required while still ensuring a separation between the collateral and positions of the end indirect client and the collateral and positions of the client providing clearing services. The requirement for this first choice of account structure should therefore be mirrored for indirect clearing arrangements.
- (6) The second choice of account is an individually segregated account, which requires separate accounts for each indirect client and thus an increased number of operational processes to manage all the separate accounts than if the indirect clients were managed in a single account. Requiring such an account structure in the case of indirect clearing services would multiply the number of necessary accounts and related operational processes, raising the complexity, cost and operational risk of indirect clearing arrangements.

Alternatively, a gross omnibus indirect account structure with a mechanism of a transfer of margin from the indirect client all the way to the CCP would allow to achieve an equivalent distinction between the collateral and the positions held for the account of a specific indirect client from the collateral and the positions held for the account of the direct client or other indirect clients, while requiring a much simpler account structure. Such an alternative account structure and processing would reduce the number of accounts to be opened and maintained and therefore the related number of operational steps to margin and settle collateral in these accounts. This structure would reduce the cost and complexity compared to individually segregated indirect client accounts, while still permitting to distinguish the collateral and the positions of different indirect clients and therefore ensuring an equivalent level of protection as an individually segregated account. Although an individually segregated indirect account could still be offered, the requirements applicable to the use of the gross omnibus indirect account would at least need to be met.

- (7) In order to ensure that the same amount of margin would be called with a gross omnibus indirect account structure as if the indirect client was using an individually segregated indirect clearing account structure, the CCP would need the necessary information on the collateral and the positions held for the account of the indirect client in order to calculate the associated margin call on an indirect client by indirect client basis.
- (8) As for client clearing, where, following the failure of a clearing member that facilitates clearing services, the CCP should be prepared to transfer the clients positions to an alternative clearing member and to liquidate them if necessary, for indirect clearing, the clearing member should have procedures to facilitate the transfer of indirect clients' positions to an alternative client and commit to trigger these procedures following the failure of a client that facilitates indirect clearing services. The clearing member should also have procedures to liquidate the positions and assets of the indirect clients and to return the liquidation proceeds to the indirect clients when known.
- (9) Under the gross omnibus indirect account structure, the information on the positions and the amount of collateral held for the account of each indirect client is passed to the different entities involved in the indirect clearing arrangement. Therefore, safeguards are put in place so the indirect clients could become known. However, this is not the case with the other choice of account, therefore this is a clear example of a situation when the liquidation proceeds could not be returned directly to the indirect client but should be returned to the client for the account of its indirect clients.
- (10) In some circumstances the direct return of the liquidation proceeds to the indirect client could not be conducted. The failure of a client providing indirect clearing services and established in a third country where the insolvency regime would not allow the direct return of the liquidation proceeds would require the clients, in collaboration with the clearing member and the indirect clients, to put in place contractual arrangements to protect to the extent possible the positions and assets of the indirect client from insolvency challenge, ensuring that if direct return cannot be achieved, any liquidation proceeds returned to a defaulted client for the account of indirect clients does not form part of that defaulted client's insolvency estate.
- (11) Although individually segregated accounts guarantee a better identification of clients' assets and positions than gross omnibus accounts, in practice for CCPs it is quite hard to ensure portability in a short timeframe. For clearing members ensuring portability for indirect clients in individually segregated accounts would thus be unrealistic, therefore the extra administrative burden of individual segregation of indirect client's assets and positions in individually segregated accounts, compared to gross omnibus indirect accounts, would come with no real benefit with regard to the ability to transfer these positions .
- (12) Margining on a gross basis would imply that the netting of positions of different indirect clients in the same gross omnibus indirect account, or the use of the margin of an indirect client to cover

for the margin requirement of another indirect client in the same gross omnibus account, could not be performed when recording the positions of each indirect client and when calculating and calling the corresponding margin requirements.

Under normal circumstances, with a gross omnibus indirect account structure and process, gross margining by the CCP would mean that the assets covering the positions of one indirect client would not be exposed to losses connected to positions of another indirect client.

However, in the case of a default if the positions need to be liquidated, then the risk exists of some exposure to the losses of another indirect client as the positions and collateral are comingled in one account. Yet, when positions need to be liquidated, the speed with which these positions can be liquidated can contribute to minimising the loss on the liquidation of these positions and collateral, which can be the case with the gross omnibus indirect account.

- (13) Margins are the first line of defence in case of a default and maintaining margins at the level of the CCP protects the clients from the default of the clearing member. Requiring passing margins all the way to the CCP would protect the indirect client not only from the default of a client, but also from the default of the clearing member.
- (14) A direct client providing indirect clearing services should present the indirect client with the new choice of account structures and make reasonable efforts to receive instructions from the indirect client on its choice of account and segregation model. However, in order to ensure this Regulation is complied with while ensuring a continuity of service, when the indirect client has not instructed the direct client of its choice of account and segregation model within a reasonable period of time, the client shall be permitted to provide indirect clearing services to this indirect client using the account corresponding to the account choice with the minimum segregation requirement, provided that the client inform the indirect client accordingly of the use of this account, the risks of this account segregation and the possibility for the indirect client to change of account segregation later.
- (15) As indirect clearing arrangements may give rise to specific risks, all the parties included in an indirect clearing arrangement, including clearing members and CCPs, should routinely identify, monitor and manage any material risks arising from the arrangement. Appropriate sharing of information between clients that provide indirect clearing services and clearing members that facilitate those services is especially important in this context. Clearing members should use information provided by clients for risk management and margining purposes only and should prevent the misuse of commercially sensitive information, including through the use of effective barriers between different divisions of a financial institution to avoid conflicts of interest.
- (16) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (European Securities and Markets Authority) to the Commission.

(17) The European Supervisory Authority (European Securities and Markets Authority) has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁹.

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation the following definitions apply:

- (1) “indirect client” means an undertaking with a direct or indirect contractual relationship with a client of a clearing member which enables that undertaking to clear its transactions with a CCP;
- (2) “indirect clearing arrangement” or “indirect clearing service arrangement” means the set of contractual relationships between a central counterparty, a clearing member, the client of a clearing member and an indirect client, which arrangement allows the client of a clearing member to provide clearing services to an indirect client.

Article 2

Structure of indirect clearing arrangements

1. Where a clearing member is prepared to facilitate indirect clearing, any client of such clearing member shall be permitted to provide indirect clearing services to one or more of its own clients, provided that the client of the clearing member is an authorised credit institution, investment firm or an equivalent third country credit institution or investment firm.
2. The client of a clearing member and the indirect client, as well as the indirect clients between themselves as the case may be, shall agree upon the contractual terms of an indirect clearing arrangement, after consultation with the clearing member on the aspects that can impact the operations of the clearing member. The arrangements shall include contractual requirements on the

⁹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

client to honour all obligations of the indirect client towards the clearing member. These requirements shall refer only to transactions arising as part of the indirect clearing arrangement, the scope of which shall be clearly documented in the agreed contracts.

Article 3

Obligations of CCPs

1. Indirect clearing arrangements shall not be subject to business practices of the CCP which act as a barrier to their establishment on reasonable commercial terms. At the request of a clearing member, the CCP shall maintain separate records and accounts enabling each client to distinguish in accounts held with the CCP the assets and positions of the client from those held for the accounts of the indirect clients of the client.
2. Where a client manages the assets and positions of several indirect clients in a single account with the segregation option provided for in Article 4(2)(b), the CCP shall calculate margin requirements separately for each indirect client. This calculation shall be based on the information referred to in Article 4(3).
3. A CCP shall identify, monitor and manage any material risks arising from indirect clearing arrangements that could affect the resilience of the CCP.

Article 4

Obligations of clearing members

1. A clearing member that offers to facilitate indirect clearing services shall do so on reasonable commercial terms. Without prejudice to the confidentiality of contractual arrangements with individual clients, the clearing member shall publicly disclose the general terms on which it is prepared to facilitate indirect clearing services. These terms shall include minimum operational requirements for clients and indirect clients that provide indirect clearing services.
2. When facilitating indirect clearing arrangements, a clearing member shall implement at least any of the following segregation arrangements as indicated by the client:
 - (a) keep separate records and accounts enabling each client to distinguish in accounts with the clearing member the assets and positions of the client from those held for the accounts of its indirect clients;
 - (b) keep separate records and accounts enabling each client to:

- (i) distinguish in accounts with the clearing member the assets and positions of the client from those held for the accounts of its indirect clients; and
- (ii) distinguish in records the positions and the collateral value, after applying any haircut as agreed between the counterparties, held for the account of each indirect client within an omnibus indirect client account.

3. When a client manages the assets and positions of several indirect clients in a single account with the segregation option provided for in paragraph 2(b), the clearing member shall ensure that the CCP has all the necessary information to identify the positions and the collateral value held for the account of each indirect client in the account on a daily basis. This information shall be based on the information referred to in Article 5(2).

4. A clearing member that offers to facilitate indirect clearing services shall transfer to the CCP the collateral value, after applying any haircut as agreed between the counterparties, it received from its client for the account of each indirect client under segregation option in paragraph 2(b), which does not include any additional collateral received above the margin amount called by the clearing member.

5. A clearing member that offers to facilitate indirect clearing services shall open a segregated account at the CCP for the exclusive purpose of holding the assets and positions of the client's indirect clients.

6. A clearing member that offers to facilitate indirect clearing services shall disclose the information under Article 39(7) of Regulation (EU) No 648/2012 with reference to the segregation arrangements available to clients that provide indirect clearing services.

7. A clearing member shall establish robust procedures to manage the default of a client that provides indirect clearing services.

The clearing member shall, at least, contractually commit itself to trigger the procedures for the transfer of the 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. That other client shall be obliged to accept those assets and positions only where it has previously entered into a contractual relationship with the indirect clients by which it has committed itself to do so.

The clearing member shall have procedures allowing the prompt liquidation of the assets and positions of indirect clients following the default of the client, in case the transfer to that other client has not taken place for any reason within a predefined transfer period specified in the indirect clearing arrangements. The procedures shall provide for the details of the communication from the clearing member to the indirect clients regarding the default of the client and the period of time during which the relevant indirect client portfolios will be liquidated. The assets held for the account

of the indirect clients and distinguished in accordance with paragraph 2 shall be used exclusively to cover the positions held for their account.

When the assets and positions of one or more indirect clients are managed under the segregation option provided for in paragraph 2(b), the procedures shall include the steps required to initiate the payment of the liquidation proceeds to each of the indirect clients.

After the completion of the default management process for the default of a client, and when the clearing member 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 clearing member shall readily return to the client for the account of the indirect clients any balance owed to the indirect clients by the clearing member.

8. A clearing member shall identify, monitor and manage any risks arising from facilitating indirect clearing arrangements, including the use of the information provided by clients under paragraph 4 of Article 5. The clearing member shall establish robust internal procedures to ensure this information cannot be used for commercial purposes.

Article 5

Obligations of clients

1. An indirect client that provides indirect clearing services shall be subject to the requirements of paragraphs 2 to 8 as if it was a client.

2. A client that provides indirect clearing services shall keep separate records and accounts that enable it to distinguish between its own assets and positions and those held for the account of its indirect clients. It shall offer indirect clients a choice between the alternative account segregation options provided for in Article 4(2) and shall ensure that indirect clients are fully informed of the risks associated with each segregation option. Where an indirect client does not reply to a request of the client to disclose its choice of account segregation within a reasonable deadline fixed by the latter, the client shall be permitted to use the account segregation option provided for in Article 4(2)(a). The client should inform the indirect client accordingly, provide the indirect client with the relevant information about the risks associated with that account segregation, and explain that this does not preclude the indirect client from electing a different level of segregation at any time by communicating it in writing to the client.

3. When a client manages the assets and positions of several indirect clients in a single account with the segregation option provided for in Article 4(2)(b), the client shall ensure that the clearing member has all the necessary information to identify the positions and the collateral value held for the account of each indirect client in the account on a daily basis. Any additional collateral received

above the margin amount called by the clearing member shall be treated in accordance with the relevant terms of the indirect clearing arrangements.

4. A client that provides indirect clearing services shall request the clearing member to open a segregated account at the CCP. The account shall be for the exclusive purpose of holding the assets and positions of its indirect clients.

5. A client that provides indirect clearing services shall disclose the details of the different levels of segregation and a description of the risk involved with the respective levels of segregation offered.

6. A client shall provide the indirect client with sufficient information to identify the CCP and the clearing member used to clear the indirect client's positions.

7. When the assets and positions of one or more indirect clients are managed under the segregation option provided for in Article 4(2)(b), the client that provides indirect clearing services shall include, in its contractual arrangement 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 clearing member for the account of the indirect client.

8. A client shall 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.

9. A client shall provide the clearing member with sufficient information to identify, monitor and manage any risks arising from facilitating indirect clearing arrangements, including information on the number of entities involved in the indirect clearing arrangements and the jurisdictions of these entities. Prior to a default, clients should put arrangements in place to the effect that, in the event of default of the client, all information held by the client in respect of its indirect clients shall be made immediately available to the clearing member. In particular, in the event of default of the client, the client shall provide immediately the clearing member with sufficient information to identify the indirect clients in relation to the information under paragraph 2.

Article 6

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 3 January 2017.

This Regulation shall be binding in its entirety and directly applicable in all Member States.



Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position

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