INTRODUCTION

On 16 August 2012, the European Market Infrastructure Regulation (EMIR) came into force. Many of the provisions of EMIR are subject to the introduction of regulatory technical standards (RTS) on the scope and interpretation of the EMIR obligations, the first of which came into force on 15 March 2013. This update describes the significant provisions that came into force on 15 March 2013 and the anticipated timetable for further implementation.

While the RTS that came into force on 15 March do introduce new obligations on participants in the derivatives markets, regular users of derivatives may find that they already comply with the obligations under their normal procedures.

An entity’s obligations under EMIR vary depending on its categorisation:

- A “financial counterparty” is an investment firm, a bank, an insurer, a registered UCITS fund, a pension fund or an alternative investment fund managed by an alternative investment fund manager (all as defined in the EU legislation under which the entity is authorised or regulated). A wide range of entities are therefore financial counterparties for the purposes of EMIR.

- An entity that is not a financial counterparty, if it is established in the EEA, is referred to in EMIR as a “non-financial counterparty” (NFC).

- When an NFC’s positions, on a 30 working day rolling average basis, exceed the clearing thresholds, it becomes an NFC+ and is subject to additional obligations.

More detail regarding the implications of EMIR can be found in the following client briefings, all of which are available at www.slaughterandmay.com:

- The Impact of EU OTC Derivatives Regulation on Non-Financial Counterparties (December 2012)
- The Impact of EU OTC Derivatives Regulation on Financial Counterparties (16 November 2012)
- The Impact of EU OTC Derivatives Regulation on Pension Funds (October 2012)
- Regulation of OTC Derivatives (24 August 2012)
IMPLEMENTATION OF THE REGULATORY TECHNICAL STANDARDS

When the first RTS entered into force on 15 March 2013, the following EMIR provisions became effective.

Non-financial counterparties
When an NFC takes positions in OTC derivative contracts such that those positions exceed the clearing thresholds, the NFC (i) must immediately notify the European Securities and Markets Authority (ESMA) and the local competent authority, presently the Financial Conduct Authority (FCA) in the UK, (ii) will become subject to the clearing obligation (when in due course this comes into force) when its positions exceed the clearing threshold on a 30 working day rolling average basis, (iii) will become subject to stricter deadlines under the “timely confirmation” requirement discussed below, (iv) will come within the scope of marking-to-market obligations, and (v) will become subject to certain other obligations of counterparties.

An NFC+ that subsequently falls below the clearing thresholds may give a further notification to ESMA and the FCA. It will then no longer be treated as an NFC+. Details of the ESMA and FCA notifications, including notification forms, can be found respectively at www.esma.europa.eu and www.fca.org.uk.

Details of the clearing thresholds for NFCs and the method of calculating positions can be found in our client briefing of December 2012, entitled “The Impact of EU OTC Derivatives Regulation on Non-Financial Counterparties”.

Timely confirmation
Overview
With effect from 15 March 2013, both financial counterparties and NFCs that enter into OTC derivative contracts that are not cleared by a central counterparty must have in place appropriate procedures and arrangements to ensure timely confirmation, by electronic means where available, of the terms of the relevant OTC derivative contracts.

The FCA has stated that financial counterparties must have procedures in place to enable reporting to the FCA (at its request) of the number of unconfirmed OTC derivative transactions outstanding for more than five business days, on a month-by-month basis. There is no requirement to submit a report unless it has been requested by the FCA, but procedures must be in place to report when required. ESMA, the European Supervisory Authority with primary responsibility for implementing EMIR, has stated that where timely confirmation deadlines are missed for legitimate reasons, this should be reported to the local competent authority, presently the FCA for UK established NFCs.

Deadlines
The technical standards require non-cleared OTC derivative contracts between financial counterparties and/or NFCs+ to be confirmed, by electronic means where available, as soon as possible, and at the latest:

---

1 The UK’s previous financial regulator, the Financial Services Authority, was replaced with a new financial regulatory regime on 1 April 2013, under which the FCA is the new local competent authority. We will publish a revised version of our guide to the Financial Services and Markets Act 2000, including a full description of the new regime, in due course. If you would like to discuss these issues, please contact your usual Slaughter and May contact or one of the following: Ruth Fox (ruth.fox@slaughterandmay.com), Jan Putnis (jan.putnis@slaughterandmay.com) or Ben Kingsley (ben.kingsley@slaughterandmay.com).
• for credit default swaps and interest rate swaps concluded (i) until 28 February 2014, by the end of the second business day following execution, and (ii) from 1 March 2014, by the end of the next business day following the date of execution; and

• for equity swaps, foreign exchange swaps, commodity swaps and all other classes of derivative concluded (i) until 31 August 2013, by the end of the third business day, (ii) from 1 September 2013 until 31 August 2014, by the end of the second business day, and (iii) from 1 September 2014, by the end of the next business day following the date of execution.

OTC derivative contracts concluded with an NFC whose positions do not exceed the clearing thresholds must be confirmed, by electronic means where available, as soon as possible, and at the latest:

• for credit default swaps and interest rate swaps concluded (i) until 31 August 2014, by the end of the fifth business day following execution, (ii) from 1 September 2013 until 31 August 2014, by the end of the third business day, and (iii) from 1 September 2014, by the end of the second business day following the date of execution; and

• for equity swaps, foreign exchange swaps, commodity swaps and all other classes of derivative concluded (i) until 31 August 2013, by the end of the seventh business day, (ii) from 1 September 2013 until 31 August 2014, by the end of the fourth business day, and (iii) from 1 September 2014, by the end of the second business day following the date of execution.

Mark-to-market value of outstanding derivatives contracts
From 15 March 2013, financial counterparties and NFCs+ must mark-to-market on a daily basis the value of outstanding derivatives contracts. In certain situations, such as when the market is inactive or the range of fair value estimates is wide and an accurate estimate cannot be assessed, marking-to-model may be used instead. The board of directors (or a delegated committee) is responsible for approving any model, and the board or committee must review and approve such a model at least annually.

ISDA NFC REPRESENTATION PROTOCOL

The International Swaps and Derivatives Association (ISDA) has published the EMIR Non-Financial Counterparty Representations Protocol, which parties may adhere to in order to give certain representations as to their status as non-financial counterparties or NFCs+.

We are happy to discuss the implications of this protocol with any parties considering entering into the protocol, or who would like further information.

ESMA QUESTIONS AND ANSWERS ON THE IMPLEMENTATION OF EMIR
On 20 March 2013, ESMA released a document including the responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of EMIR. The document is available at www.esma.europa.eu.
**EMIR TIMETABLE UPDATE**

As the first RTS have come into force, there is now greater certainty regarding the key dates for the future implementation of the EMIR provisions. This update sets out a revised timetable for the entry into force of EMIR, to be read alongside our briefings of 24 August 2012, entitled “Regulation of OTC Derivatives”, 16 November 2012, entitled “The Impact of EU OTC Derivatives Regulation on Financial Counterparties”, and December 2012, entitled “The Impact of EU OTC Derivatives on Non-Financial Counterparties,” available at www.slaughterandmay.com.

**REVISED TIMETABLE OF KEY DATES**

<table>
<thead>
<tr>
<th>Event</th>
<th>Timing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification by non-financial counterparties exceeding clearing thresholds</td>
<td>15 March 2013</td>
</tr>
<tr>
<td>Timely confirmation for non-cleared OTC derivative contracts</td>
<td>15 March 2013</td>
</tr>
<tr>
<td>Marking-to-market for non-cleared OTC derivative contracts</td>
<td>15 March 2013</td>
</tr>
<tr>
<td>Portfolio reconciliation and compression for non-cleared OTC derivative contracts</td>
<td>15 September 2013</td>
</tr>
<tr>
<td>Dispute resolution mechanisms for non-cleared OTC derivative contracts</td>
<td>15 September 2013</td>
</tr>
<tr>
<td>Collateral exchange and capital requirements for non-cleared OTC derivative contracts</td>
<td>No RTS yet drafted as further international coordination required before EU rules can be developed.</td>
</tr>
<tr>
<td>Rules on collateral exchange were effective from 16 August 2012 for financial counterparties. The precise level and exact type of collateral to be exchanged will be specified by a future (but delayed) RTS. Until the RTS enters into force, counterparties may apply their own rules on collateral, but must change their rules to comply with the RTS once it enters into force.</td>
<td></td>
</tr>
<tr>
<td>Reporting to trade repositories of all derivative contracts</td>
<td>The reporting obligation for credit derivatives and interest rate products may take effect as early as 1 July 2013, and as early as 1 January 2014 for other classes of derivatives. The reporting obligation can take effect only if a trade repository has been registered with ESMA for the relevant products. The latest the reporting obligations can take effect is 1 July 2015.</td>
</tr>
<tr>
<td>Mandatory clearing of eligible OTC derivative contracts</td>
<td>Clearing obligations for first classes of derivatives are not expected to take place before mid-2014. Following a compromise agreement between the Commission and the European Parliament, the clearing obligation for NFCs will be phased in “over an appropriate period of time”. Press reports state that this will be a three-year phase in period.</td>
</tr>
</tbody>
</table>

If you would like to discuss any of the issues raised in this briefing, please contact one of the following or your usual Slaughter and May contact:

Richard Levitt: richard.levitt@slaughterandmay.com
Jan Putnis: jan.putnis@slaughterandmay.com
Ben Kingsley: ben.kingsley@slaughterandmay.com
EMIR Implementation Timetable

16 August 2012
EMIR took effect

15 March 2013
First technical standards entered into force

19 December 2012
First technical standards adopted by the Commission

16 August 2012
Record-keeping obligation entered into force

15 September 2013
The following EMIR provisions now apply:
• NFC clearing threshold;
• timely confirmation obligations; and
• marking-to-market obligations

01 July 2013
Reporting obligation for an interest rate or credit default swap takes effect if a trade repository is registered by 01 April 2013 for that type of derivative contract (if no trade repository is registered for that type of derivative contract by 01 April 2013, reporting obligation begins 90 days after the registration of the relevant trade repository)

01 January 2014
Reporting obligation for a derivative contract other than an interest rate swap or credit default swap takes effect if a trade repository is registered by 01 October 2013 for a certain type of derivative contract (if no trade repository is registered for that type of derivative contract by 01 October 2013, reporting begins 90 days after registration)

01 July 2015
If no trade repository has been registered for a certain type of derivative contract by 01 July 2015, the reporting obligation for that derivative contract will be to ESMA

15 March to 15 September 2013
Existing CCPs to apply for authorisation within 6 months of technical standards entering into force. Once a CCP is authorised ESMA has 6 months to decide whether to propose a clearing mandate. Commission has 3 months to decide on ESMA’s proposal and issue notification that a certain class of derivatives is subject to clearing. The clearing obligation applies to trades entered into after notification

EU CCP authorisation decision made by national authority within 6 months of CCP application

2014: Draft regulatory technical standards on risk mitigation including procedures for the exchange of collateral for non-cleared trades expected to be released

End of 2015
Commission to assess implementation and effectiveness of EMIR and present report to European Parliament

15 March 2013
First technical standards entered into force

16 August 2012
EMIR took effect

19 December 2012
First technical standards adopted by the Commission

16 August 2012
Record-keeping obligation entered into force

15 March 2013
First technical standards entered into force

19 December 2012
First technical standards adopted by the Commission

16 August 2012
EMIR took effect

15 March 2013
First technical standards entered into force

19 December 2012
First technical standards adopted by the Commission

16 August 2012
Record-keeping obligation entered into force

15 March 2013
The following EMIR provisions now apply:
• NFC clearing threshold;
• timely confirmation obligations; and
• marking-to-market obligations

01 July 2013
Reporting obligation for an interest rate or credit default swap takes effect if a trade repository is registered by 01 April 2013 for that type of derivative contract (if no trade repository is registered for that type of derivative contract by 01 April 2013, reporting obligation begins 90 days after the registration of the relevant trade repository)

01 January 2014
Reporting obligation for a derivative contract other than an interest rate swap or credit default swap takes effect if a trade repository is registered by 01 October 2013 for a certain type of derivative contract (if no trade repository is registered for that type of derivative contract by 01 October 2013, reporting begins 90 days after registration)

01 July 2015
If no trade repository has been registered for a certain type of derivative contract by 01 July 2015, the reporting obligation for that derivative contract will be to ESMA