3 December 2018

Fabrizio Planta,

Head, Markets,

ESMA,

103 Rue de Grenelle

75345 Paris Cedex 07,

France

Dear Mr. Planta,

**EMIR Refit: Timing for implementation and proposal to remove the requirement to backload historical trades**

The International Swaps and Derivatives Association (ISDA) welcomes the proposal, as part of the EMIR Refit, to amend Article 9 of EMIR to remove the obligation for counterparties to report historical derivative transactions that were entered into before 16 August 2012 and remained outstanding on that date, or that were entered into on or after 16 August 2012 but were no longer outstanding when the reporting obligation under EMIR commenced.

The deadline for reporting these historical derivative transactions is currently 12 February 2019. As a result, if the EMIR Refit is not published in the Official Journal and in effect before that date, market participants will have to report all details of these historical derivative transactions even though the obligation to do so will be repealed shortly thereafter.

We urge ESMA to publish a statement to national competent authorities stating that, if the EMIR Refit does not come into effect in time, it expects competent authorities not to prioritise supervisory action against counterparties that have not reported all details of historical derivatives transactions by 12 February 2019.

**About ISDA**

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: [www.isda.org](http://www.isda.org).

**The reporting obligation**

Article 9 of EMIR currently requires counterparties and CCPs to report the details of any derivative contracts which:

1. Were entered into before 16 August 2012 and remain outstanding on that date;
2. Were entered into on or after 16 August 2012 but were no longer outstanding when the EMIR reporting obligation commenced.

Article 5 of Commission Implementing Regulation No 1247/2012[[1]](#footnote-1) set the reporting start date for these historical derivative transactions at five years after the reporting start date for derivatives of the relevant class[[2]](#footnote-2). As a result, these historical derivative transactions are currently required to be reported to a trade repository by 12 February 2019.

The problems with reporting these historical derivative transactions are recognised in the recitals to the EMIR Refit proposal, which acknowledge that reporting historic transactions has proven to be difficult due to the lack of availability of certain reporting details which were not required to be reported before the entry into force of EMIR. The recitals acknowledge that this has resulted in a high reporting failure rate and poor quality of reported data, while the burden of reporting those transactions is significant. There is a high likelihood that these historic data will remain unused, and by the time the deadline for reporting these historic transactions becomes effective a number of those transactions will have expired, and with them the corresponding exposures and risks.

As a result, the EMIR Refit proposal would remove the requirement to report historic transactions. Historical derivative transactions would only be required to be reported if they:

1. Were entered into before 12 February 2014 and remain outstanding on that date;
2. Were entered into on or after 12 February 2014.

However, if the EMIR Refit is not published in the Official Journal and in effect before 12 February 2019, market participants will have to report all details of these historical derivative transactions even though the obligation to do so will be repealed shortly thereafter.

**Need for regulatory forbearance**

As discussed above, reporting of these historical transactions is likely to continue to result in a high reporting failure and these data are highly unlikely to be used. However, if the EMIR Refit proposal is not published in the Official Journal and in effect before 12 February 2019 then counterparties that fail to report these historical data will be in breach of their obligations under EMIR.

Since we understand that the intention of the Commission, Parliament and Council was to remove the obligation to report these historical data before the final reporting deadline, we also understand that pursuing enforcement action for failing to report these historical data should not be a regulatory priority.

We respectfully request that ESMA publish a statement to national competent authorities stating that, if the EMIR Refit does not come into effect in time, it expects competent authorities not to prioritise supervisory action against counterparties that have not reported all details of historical derivatives transactions by 12 February 2019.

We would welcome the opportunity to discuss this issue with you and are also very happy to answer any questions you may have in the meantime.

Yours sincerely,

Scott O’Malia,

CEO,

ISDA

1. As amended by Commission Implementing Regulation 2017/105 [↑](#footnote-ref-1)
2. The first registration decision for Trade Repositories was effective from 14 November 2013. The requirement to report derivatives transactions came into force 90 calendar days later (i.e., 12 February 2014). [↑](#footnote-ref-2)