

## Our position

# EMIR REFIT Review: A Step in the Right Direction



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Introduction

In connection with the Commission's review of the European Market Infrastructure Regulation (EMIR), the Commission released its proposal to revise the text of the EMIR on 4 May 2017. Since then, the Council has adopted a General Approach on this proposal on 20 December 2017, and the European Parliament is currently engaged in its deliberations. AmCham EU applauds the European Commission for having considered stakeholder input, including the input of AmCham EU, and providing amendments that make some inroads towards reducing unnecessary burdens on non-financial companies (NFCs), allowing these real-economy employers to invest more in their businesses, creating jobs and economic growth. More specifically, AmCham EU is grateful for the Commission's amendments that would (i) provide an exemption from reporting requirements for certain intragroup transactions involving an NFC; (ii) remove the legal liability from NFC's below the reporting threshold (NFC-s) for the reporting and content of such reports for their trades with financial counterparties; and (iii) make clear that transactions that are for hedging purposes would not be counted towards the clearing thresholds. AmCham EU also welcomes the constructive inputs from the Council's General Approach and the direction of Parliamentary deliberations, all of which signal recognition of the need to reduce burdens on NFC's while improving the consistency and quality of transactional data. While AmCham also supports the International Swaps and Derivatives Association's (ISDA) ongoing advocacy work on the EMIR REFIT, including as it applies to Financial Counterparties (FCs) and Small Financial Counterparties (SFCs), we would like to focus in this position paper mainly on reducing unnecessary burdens on NFCs, as well as offer comments on the Commission's proposal to require clearing members to provide access to clearing on a fair, reasonable and non-discriminatory (FRAND) basis.

## Key issues

An exemption from the reporting requirements for all intragroup transactions within a corporate group is needed to avoid imposing significant costs on NFCs simply for engaging in the best practice of centralizing their treasury desks and entering into swaps to mitigate commercial risks. Further, the removal of the legal liability from reporting will reduce unnecessary burdens and is an important step towards aligning with other international jurisdictions such as the US and Canada, which apply a single sided reporting regime. Finally, clarification that the current corporate hedging exemption in connection with clearing requirements will remain in place is critical, as the loss of this exemption would impose billions of euros of capital costs on NFCs for transactions that actually reduce risk, and would divert that capital from the real economic activity that would otherwise be used for expanding operations, building inventory, research and development and sustaining and growing jobs.

## Reporting requirements for NFCs and intragroup transactions

While we are extremely appreciative of the Commission's proposed amendments around reporting and the corporate hedging exemption, further clarification in the Article 9 EMIR text (ie, regarding the reporting obligation) would be welcomed to make clear that the legal liability for reporting a single set of data, as well as the accuracy and content of such data, falls on the financial counterparty and never on the NFC-. Requiring an NFC- to verify the accuracy of data reported by an FC would greatly reduce the benefits of the reporting relief by imposing significant costs and operational burdens on NFC-s. Of course commensurate safeguards should be put in place that would obligate NFC-s to pass on information that the financial counterparty cannot reasonably be expected to possess to that financial counterparty.

Further, intragroup transactions will often involve an NFC affiliate in the EU and another affiliate outside the EU. Accordingly, much of the benefit of an exemption from reporting requirements for intragroup transactions would be lost for global companies, and the practicality of placing centralized treasury desks in the EU would be undermined, unless the exemption extends to all transactions of NFC affiliates within the corporate group, even those involving an affiliate outside the European Union. Accordingly, we would urge the co-legislators to make

clear that internal transactions within the same corporate group, where at least one affiliate is an NFC, are exempt from the Article 9 reporting requirements, regardless of the other affiliate's location.

The Commission's proposed amendments and the above clarifications would reduce burdens on end-users and enhance liquidity for the real economy, improving growth and jobs. Accordingly, we urge the co-legislators to consider and approve the Commission's proposals relating to the reporting and the intragroup exemption (with clarifying amendments as needed).

## Pension fund requirement

In addition, many corporates with significant operations in Europe have pension fund affiliates within their corporate group. These pension funds help to provide retirement security to corporates' employees, help attract and retain talent, and provide an important social benefit. These pension funds would typically enter into derivatives on their own behalf, and because they are classed as financial counterparties under EMIR, they would not qualify for the reporting relief contemplated in the Commission's proposal. Because of the unique nature of pension funds and their position within a non-financial corporate group, the reporting obligation under EMIR should lie solely with the sell-side counterparty and not with the pension fund. Further, pension funds and small financial counterparties should not be automatically subject to uncleared margin requirements but should have discretion to determine with their counterparties, from a risk and cost basis, whether margin should be required.

## Access to Clearing on FRAND basis

AmCham EU supports the concept that clearing services should be provided on fair, reasonable and non-discriminatory (FRAND) commercial terms. However, we believe that more research is required to ensure that the possible introduction of FRAND requirements facilitate access to clearing and avoids the risk of having the opposite effect.

Clearing needs be offered on a commercially viable basis, taking into account a wide range of factors. Constraining firms' ability to weigh these factors may have the consequence either of a higher cost for all and less flexible range of pricing models, or a reduction in the total risk appetite to offer clearing. A comprehensive review of client access to clearing should include the impacts of regulatory capital and leverage ratio constraints on clearing members, low interest rate environments, credit quality of clients, and client access to liquidity to meet margining obligations. Focus should be on addressing these points, where possible, rather than imposing an additional requirement on clearing members.

If FRAND is implemented, the detail should be included at level 1. This would require framing of the new requirement to ensure that (1) it is clear there is no obligation on clearing members to offer clearing services; (2) the principles of FRAND are properly conveyed; 3) it interacts properly with other regulatory requirements for the provision of clearing services; and (4) it is restricted to cleared OTC transactions only.