### Definition of FC

**What:** The definition of FC is expanded to cover all EU AIFs, regardless of the location and status under AIFMD of its manager. This means that third country AIFs not managed by an EU AIFM will become entities that would be FCs if established in the EU for the purposes of EMIR. Consequently, the clearing obligation (unless the third country AIF would be a small FC) and the margining obligation will apply to new transactions between an EU counterparty in scope of those obligations and the third country AIF.

AIFs set up exclusively for the purpose of an employee share plan or which are securitisation special purpose entities under AIFMD are exempted. A similar exemption for employee share plans is introduced for UCITS. Central securities depositories authorised under CSDR will also come in scope of the revised FC definition.

**When:** These changes come into effect on 17 June 2019.

**Impact:** The change in the scope of AIFs considered as FCs (or third country equivalents) from 17 June 2019 will likely give rise to a significant repapering exercise under an exceptionally challenging timetable. The industry is seeking regulatory forbearance, but ESMA’s response on this is awaited.

ISDA has published an explanatory note outlining the effect of these changes for AIFs, including third country AIFs.

### Changes to clearing threshold calculation and clearing obligation for NFCs

**What:** The methodology for the calculation of derivatives positions for the clearing thresholds is changing. NFCs will be required to calculate their aggregate average month-end positions (at group level) over 12 months rather than on a rolling 30 working day average. Hedging transactions will continue to be excluded from the calculation. The scope of the clearing obligation is also limited such that NFCs will only be subject to the clearing obligation in those asset classes for which the clearing threshold is exceeded.

**When:** To benefit from reduced scope of the clearing obligation, these calculations and any necessary notifications must be made by the time REFIT comes into force on 17 June 2019.

**Impact:**

- By 17 June 2019, NFCs seeking to benefit from these changes and NFCs more generally should:
  - calculate their positions in accordance with the new methodology for the period June 2018 to May 2019;
  - notify ESMA and their national competent authority (NCA) of any asset classes for which the clearing threshold is exceeded.

**NFC+s** NFC+s that do not run the calculations must notify ESMA and their NCA of this on 17 June 2019 and will remain subject to the clearing obligation for all asset classes within the scope of mandatory clearing.

**NFC-s** An NFC that does not do so must:

- notify ESMA and their NCA of this on 17 June 2019;
- commence clearing in accordance with EMIR within four months, i.e. by 18 October 2019, unless, in the meantime, it is able to demonstrate to its NCA that it falls below the clearing thresholds.

Failure to calculate positions would also prejudice NFC-status under the margining and risk mitigation provisions of EMIR.

### New exemption from the clearing obligation for “small FCs”

**What:** REFIT introduces a new category of “small FCs” exempted from the clearing obligation. The clearing thresholds applied and calculation methodology are the same as those for NFCs, described above, with two important distinctions:

- to benefit from the new small FC regime, an FC’s positions (at group level) must be below all of the clearing thresholds; and
- hedging transactions must be included in the calculations.

**When:** FCs seeking small FC status should calculate their positions by 17 June 2019. FCs that do not run these calculations, or exceed any of the clearing thresholds, must notify both ESMA and their NCA on that date.

**Impact:**

- **Category 1 and 2 counterparties**
  - Category 1 and 2 counterparties will remain subject to the clearing obligation but will still be expected to notify ESMA and their NCA that the calculations have not been performed, or that one or more of the clearing thresholds has been exceeded, on 17 June 2019.

- **Category 3 counterparties**
  - REFIT will enter into force ahead of the 21 June 2019 clearing phase-in date for Category 3 counterparties. Those counterparties that run their position calculations by 17 June 2019 and meet the small FC requirements (or are able to demonstrate this to their NCA prior to 18 October 2019) will not become subject to the clearing obligation.
  - Category 3 counterparties that do not calculate their positions for the purposes of the clearing obligation, or exceed any of the clearing thresholds, will not benefit from the small FC regime. They will need to notify ESMA and their NCA of their status on the date REFIT comes into force. The REFIT amendments have the effect that the clearing obligation will only apply to them four months after they make that notification, rather than on 21 June 2019.

### Changes to counterparty classification

Counterparties should consider whether the above changes affect their classification and/or that of their counterparties.

ISDA has recently published a new ISDA Master Regulatory Disclosure Letter to assist counterparties in disclosing changes in classification where appropriate.

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1 [Regulation (EU) 2019/834](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0083&from=EN) of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

2 Importantly, physically settled FX forwards are outside the scope of the clearing obligation, and are subject to regulatory forbearance from margining except where both counterparties are “institutions” defined in Regulation (EU) No 575/2013.


4 See updated EMIR Q&As published by ESMA on 14 June 2019.

5 [Disclosure Letter](https://www.esma.europa.eu/clearing-thresholds) to assist counterparties in disclosing changes in classification where appropriate.
Changes to reporting of derivative transactions

Intra-group transactions

**What:** A new exemption from reporting of intra-group transactions involving an NFC (or an entity that would be an NFC if established in the EU) will be available where certain conditions are met:

- both parties must be subject to full consolidation and appropriate centralised risk evaluation, measurement and control procedures;
- the parent undertaking must not be an FC; and
- the NCA has been notified and has not, within three months, objected to the use of the exemption.

**When:** The exemption will come into effect on 17 June 2019.

**Impact:** ESMA’s updated EMIR Q&As confirm that NFCs wishing to benefit from the exemption must continue to report during the three month period following notification unless confirmation that the relevant NCA(s) agree upon fulfilment of the conditions is received beforehand.

Other reporting changes

**What:** Under REFIT, FCs that effect transactions with NFC-s will become responsible for reporting both sides of the transaction and for ensuring correctness of details reported, unless an NFC chooses to report and notifies the FC accordingly.

**When:** These changes will take effect 12 months after REFIT comes into force, i.e. 18 June 2020.

**Other resources**

For more detail on how EMIR REFIT will affect NFCs generally see our client note: EMIR REFIT – impact on corporates and, for the effect on repackaging vehicles specifically, please see: EMIR REFIT – impact on repackagings.

For a general summary of key changes introduced by EMIR REFIT, see our client note: EMIR REFIT amendments agreed.

Timeline of key developments

- **28 May 2019**
  - EMIR REFIT published in Official Journal and enters into force 20 days later

- **18 December 2019**
  - CCPs to provide more information on initial margins

- **17 June 2019**
  - EMIR REFIT comes into force and the following changes apply:
    - change to FC definition
    - change to calculation of clearing thresholds and scope of clearing obligation for NFCs
    - small FC exemption from clearing
    - new exemption from reporting for intra-group transactions between NFCs, subject to certain conditions

- **18 December 2020**
  - Commission to report on:
    - alignment of trading obligation under MiFIR with clearing obligation
    - duplication of reporting under MiFIR for non-OTC derivatives
    - exemption from clearing for trades resulting from post-trade risk reduction services

- **18 June 2021**
  - FRANDT principle in force
  - TRs to comply with new RTS
  - expiry of relief from clearing for pension schemes unless extended by the Commission for a further 12 months (a further, final 12 month extension may also be made)

- **18 June 2020**
  - FCs to report on behalf of NFC-s
  - EU fund managers to report on behalf of funds
  - ESMA to produce draft RTS/ITS on reporting and TRs, and on procedures for validating initial margin models

- **18 June 2021**
  - Commission to complete assessment of application of EMIR and submit report

- **18 June 2024**
  - CCPs to provide more information on initial margins

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