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Briefing note January 2016

The SFTR – new EU rules for securities financing transactions and collateral

The EU Securities Financing Transactions Regulation – or SFTR – has now been published in the Official Journal and will come into force on 12 January 2016, although many requirements are subject to transitional provisions.

The SFTR is integral to the European Commission's strategy to reduce perceived 'shadow banking' risks in the securities financing markets and forms part of the EU's response to the Financial Stability Board's August 2013 policy proposals on Securities Lending and Repos. This briefing outlines the key requirements of the SFTR and discusses some of the issues for the market as it prepares for implementation.

Scope and objectives

The SFTR aims to reduce risks by improving transparency in the securities financing markets in three ways:

- By imposing conditions on the 'reuse' of financial instruments which have been provided as 'collateral', so that clients and counterparties understand the risks involved and give their consent to the reuse
- By requiring managers of UCITS and alternative investment funds (AIFs) to make detailed disclosures to their investors of the use they make of securities financing transactions (SFTs) and total return swaps, both in their periodical reports and through pre-contract disclosures
- By requiring counterparties to report SFTs to a trade repository so as to provide transparency to regulators on the use of SFTs by market participants

The SFTR has a broad application. The requirements on reuse of collateral are not limited to SFTs. The definition of SFTs includes some transactions in relation to commodities and margin loans and the transparency requirements for UCITS and AIFs also apply to total return swaps. In addition, the new rules have significant extraterritorial effects.

The SFTR also amends the definition of OTC derivatives in the EU market infrastructure regulation (EMIR) to create a new procedure for recognising 'equivalent' non-EU markets (so that derivatives traded on those markets are no longer treated as 'OTC').

Key Facts

- New information and execution conditions on the reuse of securities collateral
- Disclosure requirements on the use of SFTs and total return swaps by managers of collective investment schemes to their investors
- New requirements to report SFTs to a trade repository by T+1
- Amends EMIR definition of OTC derivatives
- Applies to financial and non-financial counterparties and fund managers
- Applies to a broad range of transactions in addition to SFTs – derivatives collateral, total return swaps, margin loans and some commodities finance transactions
- Extraterritorial scope
- Very limited exemptions
- Phased implementation of most requirements
- Some requirements (e.g. record-keeping) apply from the in-force date
- SFTR comes into force 12 January 2016

"The SFTR is just one step in a wider series of regulatory initiatives affecting securities financing markets and collateral both in the EU and elsewhere."

Implementation timeline

The SFTR was published in the Official Journal of the EU on 23 December 2015. It will come into force 20 days after publication, on 12 January 2016.

Only a limited number of obligations apply from the date on which the SFTR comes into force. The other obligations are phased-in, as shown in the illustrative implementation timeline set out below.

The SFTR is directly applicable in all EU member states and member states do not need to adopt national rules to give effect to its requirements. However, member states will need to adopt national rules to ensure that national competent authorities can supervise the implementation of the SFTR and to give their national authorities powers to impose sanctions and other measures to enforce its provisions (see below).

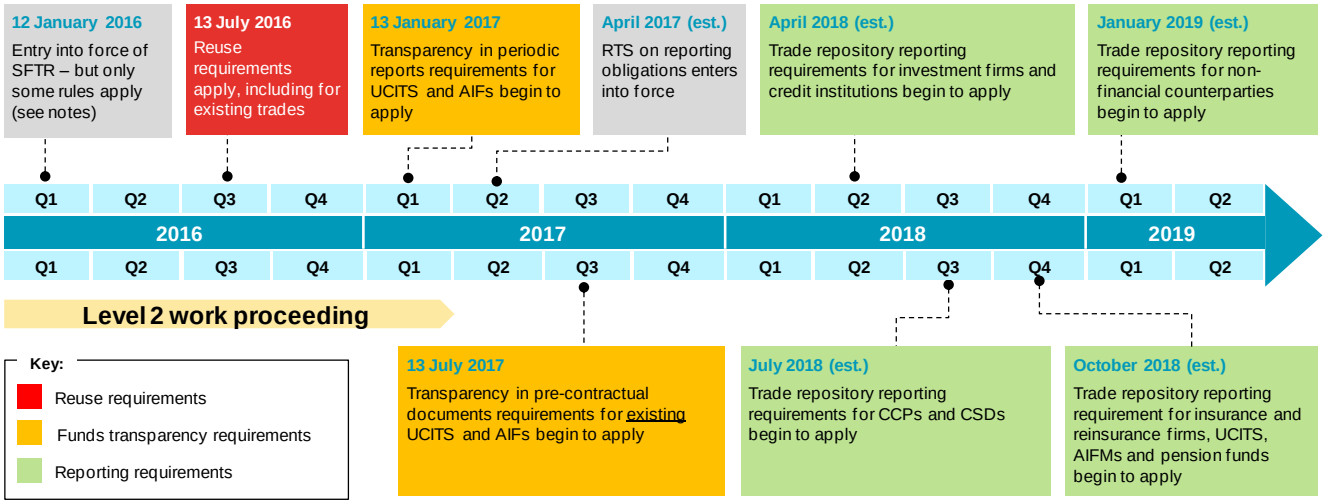
Level 2

The SFTR requires the European Securities and Markets Authority (ESMA) to develop detailed rules on reporting to trade repositories through regulatory technical standards (RTS) and implementing technical standards (ITS). ESMA is given one year from the date on which the SFTR comes into force to submit these RTS and ITS to the European Commission for adoption. The phase-in of the rules on reporting only begins when these RTS have been adopted.

In addition, ESMA may develop RTS in respect of periodical reports and pre-contractual disclosure by managers of UCITS and AIFs. No timeline is specified for these, as they are optional, but timing may be an issue if further content is specified close to the dates these requirements come into effect.

There are no requirements for Level 2 measures to be adopted in relation to the rules on reuse of collateral.

SFTR – illustrative implementation timeline



Notes:

- The SFTR was published in the OJ on 23 December 2015
- Record-keeping requirement for SFTs (Art. 4(4)), transparency requirements for pre-contractual documents for new funds (Art. 14) and the obligation to establish internal procedures for reporting breaches (Art. 24(3)) apply from date SFTR comes into force i.e. 12 January 2016
- Reuse requirements (Art. 15) apply from 13 July 2016, 6 months after date SFTR came into force, with retroactive effect for existing collateral arrangements
- Funds transparency requirements apply from 13 January 2017 (Art. 13) and, for existing funds, 13 July 2017 (Art. 14)
- Reporting requirements (Art. 4) apply from 12, 15, 18 and 21 months after the RTS on Art. 4 come into force (depending on counterparty category)
- ESMA to deliver draft RTS/ITS on Art. 4 by 13 January 2017
- Illustrative reporting dates assume delivery of the draft RTS/ITS in January 2017 and that the RTS come into force in April 2017, meaning that the phase-in of the reporting requirements starts in April 2018
- Dates could be earlier if ESMA acts quickly or later if Commission amends ESMA's draft RTS or the Parliament or the Council object to the RTS

Reuse of collateral

The requirements on reuse of collateral will apply to the reuse of securities and other financial instruments provided as collateral under all security and title transfer collateral arrangements, not just SFTs, including, for example, financial instruments collateral provided in respect of derivatives transactions and margin loans. However, they will not apply to the reuse of cash collateral.

The SFTR will impose conditions on the right to reuse financial instruments provided as collateral. All counterparties – not just financial intermediaries – will have the right to reuse financial instruments received as collateral under a security or title transfer collateral arrangement only if the following conditions are satisfied:

- **Duly informed in writing**: The providing counterparty must be duly informed in writing by the receiving counterparty of the 'risks and consequences' that may be involved in giving consent to a right of reuse under a security collateral arrangement or concluding a title transfer collateral arrangement. The providing counterparty must at least be informed in writing of the risks and consequences that may arise in the event of the default of the receiving counterparty
- **Express consent**: The providing counterparty must have 'granted its prior express consent, as evidenced by a signature in writing or in a legally equivalent manner to a security collateral arrangement which provides a right of use' or must have 'expressly agreed' to provide collateral by way of a title transfer collateral arrangement

The SFTR then stipulates additional conditions which will apply to the exercise of any right of reuse:

- **Reuse in accordance with terms**: Reuse must be undertaken in accordance with the terms of the collateral arrangement
- **Transfer from account**: The financial instruments received under a collateral arrangement must be transferred from the account of the providing counterparty, although there is also provision for reuse to be evidenced by 'other appropriate means' if third country counterparties are involved in the transaction and are subject to the laws of the third country

The definitions of security and title transfer collateral arrangements follow those in the Financial Collateral Directive but apply regardless of the nature of the obligation that is secured.

What is an SFT?

The SFTR defines SFTs as:

- Repurchase transactions for securities, commodities and guaranteed rights
- Lending and borrowing transactions on securities and commodities
- Buy-sell backs and sell-buy backs of securities, commodities and guaranteed rights
- Margin lending transactions – extending credit in connection with the purchase, sale, carrying or trading of securities – but not other loans secured by collateral in the form of securities

The recitals to the SFTR indicate that SFTs:

- Include 'liquidity swaps' and 'collateral swaps' where they are not derivatives contracts as defined in EMIR
- Do not include any derivatives contract as defined in EMIR

For these purposes:

- 'Commodities' are defined by reference to the implementing regulation under the Markets in Financial Instruments Directive (e.g. includes electricity but not emissions allowances or other intangibles)
- 'Guaranteed rights' are rights relating to title to securities or commodities where that guarantee is issued by a recognised exchange which holds the rights to the securities or commodities and the agreement does not allow a counterparty to transfer or pledge a security or commodity to more than one counterparty at one time

The reuse requirements will apply to a broad range of ´counterparties´ – defined to cover any 'undertaking' established in the EU or in a third country – that receives collateral with a right of reuse (possibly including when receiving collateral from individuals that are not undertakings). The requirements will apply to counterparties established in the EU even if they are acting through a branch outside the EU. They will also apply extraterritorially to non-EU counterparties but only if they are receiving collateral from counterparties established in the EU or if the non-EU counterparty is acting through a branch in the EU.

There are limited exemptions. The reuse requirements will not apply to members of the European System of Central Banks (ESCB), EU public bodies charged with or intervening in the management of the public debt or the Bank for International Settlements (BIS). The Commission may adopt delegated acts in the future to extend the list of exempt entities e.g. to cover non-EU central banks. However, counterparties receiving collateral from exempt entities must still comply with the reuse requirements.

The SFTR rules on reuse overlap with other EU legislation, such as the UCITS Directive and the AIFMD, which contain provisions on rights of reuse, as well as some national rules (e.g. the rules of the UK Financial Conduct Authority on disclosures by prime brokers). The SFTR makes clear that its requirements are without prejudice to any more stringent rules under EU legislation or national law that aims to ensure a higher level of protection for providing counterparties.

In order to give the market time to prepare, the reuse requirements will take effect six months after the SFTR comes into force. However, the requirements will have retroactive effect, as they will also apply to collateral arrangements existing on the date the reuse requirements take effect.

The main focus will be on ensuring that there is adequate disclosure to providing counterparties, as the requirements seem likely to go beyond existing disclosures. Industry associations have already started work on standard disclosures. These disclosures will have to be made to existing counterparties before the new rules come into effect and incorporated into new arrangements going forward.

Market participants will also have to consider the impact of the requirement for prior express consent. Although these should not impose additional requirements on industry standard form documentation, some existing documentation may not comply with the requirements.

There is more uncertainty about how to satisfy the requirement for the financial instruments to be transferred from the account of the providing counterparty. However, at least where the receiving counterparty acts as custodian for the providing counterparty, the new rule indicates that it will be necessary to change systems so that the client's account indicates that securities have been transferred from the account where they are reused under security collateral arrangements or are the subject of title transfer arrangements.

It is important to consider the consequences of infringing these new requirements given the widespread use of collateral arrangements with a right of reuse in financial markets, the uncertainty as to how to comply with the requirements in some cases and the retroactive effect of the new rules on existing collateral arrangements. Member States are required to implement regimes for administrative sanctions for infringements and notify these to the Commission and to ESMA within 18 months of the date the SFTR comes into force but may choose to impose criminal sanctions (see below). Article 15(4) of the SFTR also provides that 'Article15 does not affect national law concerning the validity or effect of a transaction'. However, this does not provide the same level of reassurance as Article 22(5) of the SFTR which explicitly provides that infringement of the reporting requirements in Article 4 will not affect the validity of a transaction or the enforceability of its terms or give rise to compensation rights. Therefore, it would be helpful if national laws made clear that

infringement of these requirements do not affect the validity or enforceability of a transaction that would otherwise be valid under national law and clarify any liability to counterparties that might arise as a result of non-compliance, but there is a risk that any legislative clarification will only come into place after the date that Article 15 begins to apply. In addition, the relevant governing law for these purposes may not be the governing law of the contract but the law of the *situs* of the relevant securities accounts.

Transparency by UCITS and AIFs

The SFTR will impose disclosure requirements on managers of UCITS and AIFs with respect to SFTs and total return swaps. Total return swaps have a similar economic effect to SFTs and are commonly used by fund managers to enhance returns or to fulfil investment objectives. The rationale for the increased transparency is because it is perceived by policymakers that SFTs and total return swaps increase the risk profile of the fund but that this risk may not be fully disclosed to investors.

The SFTR will address these concerns by requiring managers of UCITS and managers of AIFs (AIFMs) that are authorised in the EU to make detailed disclosure of their funds' use of SFTs and total return swaps through:

- **Periodic reports:** disclosure of the information set out in Section A of the Annex to the SFTR in the six monthly and annual reports required under the UCITS Directive or the annual report required under the AIFMD
- **Pre-contract disclosure:** disclosure of the information set out in Section B of the Annex to the SFTR in the prospectus required under the UCITS Directive or the pre-contractual documents required under the AIFMD

Sections A and B of the Annex to the SFTR will require disclosure of extensive information and ESMA may (although is not obliged) propose RTS further specifying the data requirements. UCITS managers and AIFMs will have to prepare early in order to retain sufficient information to be able to comply with the transparency requirements once they take effect.

There will be a transitional period but this will not apply in all circumstances. The pre-contract disclosure requirements will apply 18 months after the SFTR comes into force, but only in relation to funds which are constituted before that date. Funds constituted after 12 January 2016 (the date on which the SFTR comes into force) will have to comply with the pre-contract disclosure requirements immediately.

There is, however, a 12- month grace period before the periodic disclosure requirements apply.

Reporting to trade repositories

The SFTR reporting regime generally follows the model for derivatives reporting under EMIR. Under the SFTR, both parties to a trade (whether they are financial or non-financial counterparties) will have to report new, modified or terminated SFTs to a registered or recognised trade repository by T+1 and must maintain records of SFTs for at least five years following the termination of the transaction.

Counterparties will be permitted to delegate reporting, although there are also some mandatory rules in this area. Financial counterparties entering into SFTs with non-financial counterparties that qualify as 'small or medium sized enterprises (SMEs)' will be required to report on behalf of these counterparties and UCITS managers and AIFMs will have to report on behalf of their funds.

The SFTR reporting obligation will apply even where the SFT transaction is part of a larger transaction, for example, a securities borrow in the context of an equity capital markets transaction, such as for the purposes of a greenshoe or stabilisation. The reporting obligation is also not restricted to SFTs on securities, but also will apply in some cases where the underlying is a commodity or 'guaranteed rights' (see box above). It will apply to counterparties established in the EU, including their branches outside the EU, and to EU branches of third country counterparties. There is, however, some uncertainty as to the application of the reporting requirements to AIFs, in particular where a non-EU AIF is managed by an EU AIFM.

Counterparties subject to the reporting obligation will be required to report all SFTs, including those with non-EU counterparties and individuals or other counterparties not subject to the reporting obligation.

However, the ESCB, EU public bodies charged with or intervening in the management of the public debt and the BIS will be exempt from reporting (and the European Commission can adopt delegated acts to extend this list).

As mentioned above, in most instances the SFTR will require two-sided reporting, but counterparties entering into SFTs with the ESCB will be exempted from reporting those transactions to trade repositories under the SFTR. However, it is expected that EU investment firms will have to report exempted transactions with members of the ESCB to their regulator under the transaction reporting

requirements in the new Markets in Financial Instruments Regulation when that comes into force (although it is expected that other SFTs will be exempted from those transaction reporting requirements, even if those requirements come into effect before the SFTR reporting requirements). Counterparties will not benefit from any exemption from reporting under the SFTR when entering into SFTs with EU public bodies charged with or intervening in the management of the public debt, the BIS or non-EU central banks.

To alleviate confidentiality concerns, the SFTR makes clear that trade reporting will not infringe confidentiality restrictions in the EU and neither the reporting entity or its directors and employees will incur liability for making the required disclosures. However, reporting counterparties may be subject to confidentiality requirements under non-EU laws (e.g. where they are acting through branches or dealing with counterparties outside the EU) and may need to seek confidentiality waivers from their counterparties to permit reporting (in a similar way to the exercise carried out in relation to EMIR reporting).

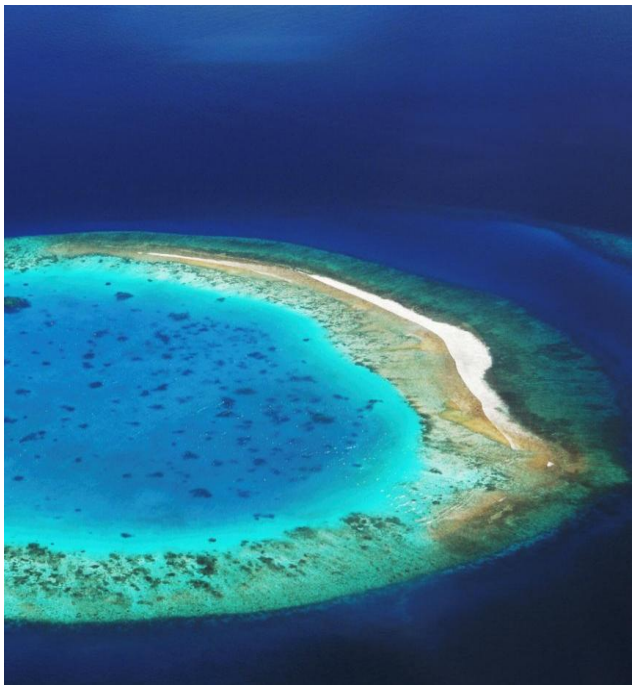
The SFTR sets out the information that must be reported to the trade repository and further detail will be provided in the RTS and ITS to be adopted under the SFTR. These will need to ensure consistency with the reporting regime under EMIR and internationally agreed standards, in particular the Standards and Processes for Global Securities Financing Data Collection and Aggregation published by the FSB (November 2015). However, other regulatory or supervisory authorities, such as the ECB and Bank of England are introducing SFT reporting regimes in addition to SFTR and the requirements overlap to a degree. This is challenging from an implementation perspective and would lead to inefficiencies, so the industry is working with regulators to develop a consistent approach to the interpretation of the requirements and the collection of data in order to comply with as little duplication of effort as possible.

To allow the market sufficient time to prepare for SFTR reporting, the requirements will be phased-in over a period of between 12 and 21 months after the RTS for trade reporting come into force and thus the full requirements are known. The length of the transitional period will vary depending on the type of reporting counterparty. Banks and investment firms will have a 12-month grace period, central securities depositories and central counterparties will have a 15-month grace period, with other financial counterparties (including UCITS and AIFs) having 18 months. Non-financial counterparties will not need to begin reporting their trades until 21 months after the relevant RTS comes into force.

The reporting obligation will apply to trades which are entered into by a reporting counterparty after the reporting obligation begins. However, it will also apply to some existing trades: those concluded before the reporting start date with a remaining maturity of 180 days and open trades which are still on the books 180 days after the reporting start date (these trades must be reported within 190 days of the reporting start date).

In contrast to the reporting requirement, there will be no grace period for record-keeping. Counterparties must comply with the record-keeping obligation from the date the SFTR comes into force. This may be onerous for entities that currently do not keep records of SFTs in this way, even though the SFTR does not specify a particular form or content requirements for these records.

The SFTR creates a framework for the registration of EU trade repositories and for the recognition of non-EU trade repositories subject to equivalent regimes. If no trade repository is registered or recognised for any class of SFTs, reporting counterparties would then need to report those trades to ESMA instead.



Disclosure requirements by UCITS and AIFs

Information to be provided in periodic reports – Section A of the Annex	
■ Global data – amount of securities/commodities on loan as a proportion of total lendable assets – the amount of assets engaged in each type of SFT or total return swap, expressed as an absolute amount and as a proportion of AUM	■ Data on collateral reuse – amount of collateral reused, compared with the maximum amount disclosed to investors – cash collateral reinvestment returns to fund
■ Concentration data – ten largest collateral issuers across all SFTs and total return swaps, with volume breakdown per issuer name – top ten counterparties of each type of SFTs and total return swaps, including counterparty name and gross volume of outstanding transactions	■ Safekeeping of collateral received by the fund as part of SFTs and total return swaps – number and name of custodians and amount of collateral held in safekeeping by each
■ Aggregate transaction data for each type of SFT and total return swaps – type and quantity of collateral – maturity tenor of collateral broken down into 7 maturity buckets, ranging from less than 1 day to open – currency of collateral – maturity tenor of SFTs and total return swaps broken down by 7 maturity buckets, ranging from less than 1 day to open – country in which the counterparties are established – settlement and clearing of trade (e.g. tri-party, CCP, bilateral)	■ Safekeeping of collateral granted by the fund through SFTs and total return swaps – proportion of collateral held in segregated, pooled or other accounts ■ Data on return and cost for each type of SFT and total return swaps, broken down between fund, fund manager and third parties (e.g. agent lender) in absolute terms and as a percentage of overall returns generated by relevant type of SFT and total return swaps

Information to be provided in pre-contractual documents – Section B of the Annex	
■ General description of SFTs and total return swaps used and the rationale for use ■ Overall data for each type of SFT and total return swaps – type of assets – maximum proportion of AUM subject to them – expected proportion of AUM that will be subject to them	■ Risk management, including risks linked to SFTs and total return swaps and collateral management (such as operational, liquidity, counterparty, custody and legal risks) and risks of reuse ■ Specification of how assets received under a SFT, total return swap and collateral arrangement are kept e.g. with a fund custodian
■ Counterparty selection criteria (including legal status, country of origin, minimum credit rating)	■ Specification of any restriction (regulatory or self-imposed) on reuse
■ Description of acceptable collateral with regard to asset types, issuer, maturity, liquidity, diversification and correlation	■ Policy on sharing the return generated by SFTs and total return swap – How much is returned to the fund? – Cost and fees of the manager and third parties (e.g. agent lenders) – If the third parties are related parties to the manager this must be disclosed
■ Collateral valuation methodology, including rationale and whether daily mark-to-market and daily variation margin is used	

Sanctions

The SFTR requires Member States to introduce effective, proportionate and dissuasive administrative sanctions and other measures, at least for the infringement of the reuse and trade reporting requirements. These must include sanctions for members of the management body or other individuals responsible for the breach. The SFTR specifies a minimum set of sanctions and penalties, including fines of up to at least 10% of turnover for legal persons, withdrawal or suspension of authorisation and temporary bans against persons with managerial responsibilities.

Member States can choose to apply criminal sanctions instead and must notify their rules to ESMA and the Commission within 18 months of the SFTR coming into force. The sanctions or other measures applicable under the UCITS Directive and the AIFMD will apply to infringements of the transparency requirements under the SFTR for UCITS and AIFs.

The SFTR will also require procedural change for competent authorities and firms. Competent authorities must establish mechanisms for reporting ´actual or potential´ infringements of the reuse, reporting and record keeping requirements. Counterparties must have in place appropriate internal procedures for their employees to report infringements of the reuse and reporting requirements. These requirements apply to counterparties from the date the SFTR comes into force but their impact is partially mitigated by the phase-in of the reuse and reporting requirements.

Reports and reviews

In common with other EU legislation, the SFTR requires a number of reports and reviews of various aspects of the SFTR regime. These are set out below, together with the associated timings.

Reports and Reviews	
13 October 2016	ESMA to report on impact of SFTs on leverage and pro-cyclicality not addressed by the Regulation and possible measures to address this
13 October 2017	The Commission to report on progress in international efforts to mitigate the risks associated with SFTs, including the FSB recommendations for haircuts on non-centrally cleared SFTs
2019	ESMA to publish first annual report on aggregate SFT volumes by counterparty type and transaction, based on data reported to trade repositories (date not specified in Level 1 text)
Q2 2020? (24 months from reporting start date)	ESMA to report on efficiency of reporting obligation, taking into account the appropriateness of single-sided reporting (and every three years thereafter or earlier if material developments)
Q2 2021? (36 months from reporting start date)	The Commission to report on the effectiveness, efficiency and proportionality of the obligations under SFTR
Q3 2021? (39 months from reporting start date)	The Commission to report on supervisory fees charged by ESMA to trade repositories

Preparing for implementation

The SFTR introduces a number of compliance requirements that need to be addressed now.

The checklist below summarises the steps to be taken in order to prepare for implementation. This will need to be refined as further information becomes available during the Level 2 process or under national requirements.

The SFTR is just one step in a wider series of regulatory initiatives affecting securities financing markets and collateral both in the EU and elsewhere. Market participants will need to integrate their implementation project for the SFTR with other projects and monitor developments as these initiatives unfold.

Key implementation actions

Reuse of collateral

- Identify in-scope entities (EU and non-EU)
- Identify and remediate all in-scope collateral arrangements existing as at 13 July 2016
- Establish processes for all new in-scope collateral arrangements by 13 July 2016
- Consider
  - Specific disclosures to be included in new master agreements (e.g. GMSLA, GMRA and ISDA) and leveraging industry initiatives on standard disclosures
  - Cross-agreement disclosure through one-way notices or terms of business, in particular when remediating for existing collateral arrangements
  - Overlap with existing and future requirements under CASS 9, MiFID and MiFID2
  - Possible need to assist clients that are collateral takers to comply with their disclosure obligations
  - The need for "prior express consent" which is "evidenced by a signature in writing or in a legally equivalent manner", although this should be covered by using signed market-standard securities financing or credit support documentation
  - Requirement for reuse to be in accordance with the terms specified in the collateral arrangement, but should not require additional implementation steps
  - Where holding financial instruments in custody for a client which are reused under a collateral agreement, need to ensure that the reuse is reflected in the client's securities accounts

Funds transparency

- Identify entities in group that are in-scope UCITS managers or AIFMs
- Consider
  - Data sources and processes required to generate required disclosures
  - Any issues with required disclosures of counterparty identity
  - Implementing pre-contract disclosure for new funds from in-force date

Reporting

- Identify in-scope entities for reporting obligations
- Consider
  - Systems necessary to identify in-scope transactions
  - Client communication requirements and possible need for confidentiality waivers from non-EU counterparties where there are conflicting local laws
  - Counterparty classification processes necessary to identify SME counterparties (and any information required from them in order to report on their behalf)
  - Likely available trade repositories, sign-up processes and technical access requirements
  - Likely required data sources and processes, including sources for LEIs, ISINs and UTIs
  - Implementation of record-keeping from in-force date

Procedures

- Establish internal procedures for employees to report infringements of Articles 4 and 15

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