



MANAGED FUNDS  
ASSOCIATION



European Securities and Markets Authority  
201-203 rue de Bercy  
75012 Paris

By online submission - [www.esma.europa.eu](http://www.esma.europa.eu)

26 November 2019

**Consultation Paper on draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT) – AIMA and MFA response**

Dear Sir or Madam,

The Alternative Investment Management Association<sup>1</sup> (“AIMA”) and Managed Funds Association<sup>2</sup> (“MFA”; collectively, the “Associations”) welcome the opportunity to respond to the European Securities and Markets Authority (“ESMA”) regarding its “Consultation Paper on draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT)”<sup>3</sup> (the “CP”).

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<sup>1</sup> AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA’s fund manager members collectively manage more than \$2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (“ACC”) to help firms focused in the private credit and direct lending space. The ACC currently represents over 100 members that manage \$350 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

<sup>2</sup> Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policymakers in Asia, Europe, the Americas, Australia and all other regions where MFA members are market participants.

<sup>3</sup> ESMA70-151-2672. Online at: [https://www.esma.europa.eu/sites/default/files/library/esma70-151-2672\\_ta-frandt\\_art\\_43a.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-151-2672_ta-frandt_art_43a.pdf)

The Alternative Investment Management Association Ltd

The Associations strongly support the change made to Article 4 of EMIR as part of the Refit<sup>4</sup> package to require clearing services to be provided on a “fair, reasonable, non-discriminatory and transparent” (“FRANDT”) basis. Taken together with other recent legislative changes, notably recent developments under the Capital Requirements Regulation,<sup>5</sup> which have clarified the treatment of client margin posted on centrally cleared derivatives positions, FRANDT has the potential to improve significantly the access of buy-side market participants to central clearing and the terms of which such access is provided. We, therefore, welcome the CP and ESMA’s work to properly implement the FRANDT concept through Level 2 measures to ensure that it is effective in its goals.

On Question 3 of the CP, ESMA asks for feedback regarding its suggestions to assist in facilitating access to clearing services. On this specific point, the Associations believe that it is critical that both the onboarding process and the commercial terms offered to the client are fair and transparent, and thus, we request that ESMA consider additional requirements in this area. In particular, we believe that ESMA should prohibit trading personnel from interfering with, or attempting to influence, decisions by clearing personnel with respect to whether to onboard a client or the commercial terms offered to such client. The Level 1 text already includes a prohibition on conflicts as it relates to the FRANDT concept.<sup>6</sup> Therefore, imposition of our recommended requirement in the Level 2 measures would be consistent with the Level 1 text as well as the internal conflicts of interest requirements that clearing members must comply with in other jurisdictions, notably the US.<sup>7</sup>

Further, in the context of “unbiased and rational contractual arrangements”, we believe that the delegated act should stipulate that clearing terms offered by clearing members should not contain terms that unnecessarily reduce clients’ rights relating to cleared derivatives compared to uncleared derivatives. In particular, clients should not be limited in their rights to make a claim against their clearing members for losses that clients incur should their clearing member be declared in default.

Overall, we believe that ESMA has approached its work on draft technical advice in a comprehensive and well-considered manner, and the Associations welcome the level of detail that has been provided with respect to the principles associated with the FRANDT concept. We encourage ESMA and, ultimately, the European Commission to ensure that this detailed approach is reflected in the final Level 2 measures. We also encourage the National Competent Authorities (“NCAs”) to pay close attention to the FRANDT provision in their supervision of clearing members and central counterparties.

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<sup>4</sup> Regulation (EU) 2019/834 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. Online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0834&from=EN>.

<sup>5</sup> Online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0575&from=EN>.

<sup>6</sup> See Article 4(3a) of the EMIR Refit text. Online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R0834&from=EN>.

<sup>7</sup> See US Commodity Futures Trading Commission final rules on “Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants”, 77 Fed. Reg. 64 (April 3, 2012). Online at: <https://www.govinfo.gov/content/pkg/FR-2012-04-03/pdf/2012-5317.pdf>.

If you would like to discuss any aspect of this submission further, please contact Adam Jacobs-Dean ([ajacobs-dean@aima.org](mailto:ajacobs-dean@aima.org)) and Carlotta King ([cking@managedfunds.org](mailto:cking@managedfunds.org)).

Yours truly,

/s/ Adam Jacobs-Dean

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