



30 September 2019

GFMA CWG comments on practical and operational difficulties with reporting under Articles 4 and 12 SFTR (ESMA70-151-1985)

The GFMA CWG welcomes the detailed Guidelines proposed by ESMA in relation to reporting under SFTR but believes that, while the proposed Guidelines are very helpful regarding securities SFTs, commodities SFTs are structured differently to securities SFTs and present a range of different issues, particular in relation to categorisation of commodities SFTs as one or other of the types of SFT under SFTR.

Over the last year, the GFMA CWG has focussed on identifying and trying to resolve these categorisation issues, holding multiple meetings and calls with members to discuss their key concerns, commissioning external legal advice to support solutions based on the existing legislation and guidance under SFTR and analysing the remaining situations where the position is unclear in order to try to reach an industry consensus. However, there remain a number of transaction types where it has not yet been possible to reach an industry consensus on categorisation (and in some cases, whether or not the relevant transaction is even within scope of SFTR at all).

It seems unlikely that the industry will be able to reach agreement on these questions without further detailed guidance from ESMA, raising the risk that large numbers of transaction reports relating to commodities SFTs will fail to match within the trade repositories once reporting commences. Even where agreement can be reached between counterparties regarding categorisation before the trade is reported, in the absence of guidance specific to commodities SFT structures, firms will report on the basis of the transaction type which presents the fewest difficulties in adapting commodities SFT structures to the required reporting fields. This approach may not give ESMA or other regulators an accurate picture of the market in commodities SFTs, but this may not become apparent until there is a problem in the market that requires the regulators to have access to accurate data.

ESMA states in paragraph 75 of its consultation paper on Guidelines for reporting under SFTR (the "**May 2019 Consultation Paper**")¹ that the counterparties need to identify the type of SFT that they are concluding on the basis of the agreement used for the transaction, and that in most cases this is defined by the existence of / lack of a master agreement. ESMA goes on to state that the counterparties should assess the extent to which the type of SFT involving commodities could fit into the fields applicable to that SFT, which will help to determine whether the transaction needs to be reported as a commodities lending or borrowing transaction, or as a SBB / BSB collateralised with commodities.

However, the GFMA CWG understands from its members that it is likely to be difficult for counterparties to reach an agreement on the type of SFT that they are concluding in many cases. Where the SFT is documented on industry standard repo documentation, we understand that the transaction is likely to be considered to be a repo / reverse repo (and that, based on ESMA's comments in paragraph 77 of the consultation paper, it would not matter whether the transaction involved title transfer or pledge arrangements). However, this only addresses one specific characterisation question and there remain a significant number of categorisation questions still unresolved even after extensive discussions between industry participants and external law firms.

We have summarised the key issues in this letter and have also provided worked examples (set out in the Annex) in order to illustrate the difficulties that firms are facing in completing the reporting templates for commodities SFTs.

¹ ESMA70-151-1985

1. Questions on the definitions of securities financing transactions

Definition of repo / reverse repo

SFTR defines a repurchase transaction as "a transaction governed by an agreement by which a counterparty transfers securities, commodities or guaranteed 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 particular security or commodity to more than one counterparty at a time, subject to a commitment to repurchase them, or substituted securities or commodities of the same description at a specified price on a future date specified, or to be specified, by the transferor".

Based on this definition, we understand that a transaction would only qualify as a "repurchase transaction" if it is documented and executed as a single transaction (i.e., a transfer of commodities subject to a commitment to repurchase those commodities or substitute commodities). For example, the Global Master Repurchase Agreement provides for parties to enter into transactions under which one party agrees to sell assets to the other with a simultaneous agreement for the other party to sell back equivalent assets at a later date. We understand that transactions which may have similar economic effect to a repurchase transaction, but which are not documented and executed as a single transaction, would not qualify as a "repurchase transaction" under SFTR, although they may qualify as another type of SFT.

We also understand, based on the definition of a repurchase transaction in SFTR, that a transaction would qualify as a "repurchase transaction" whether the assets in question are transferred by way of outright title transfer or whether they are pledged.

Definition of buy-sell back / sell-buy back

SFTR defines a 'buy-sell back transaction' or 'sell-buy back transaction' as a transaction by which a counterparty buys or sells securities, commodities, or guaranteed rights relating to title to securities or commodities, agreeing, respectively, to sell or to buy back securities, commodities or such guaranteed rights of the same description at a specified price on a future date, that transaction being a buy-sell back transaction for the counterparty buying the securities, commodities or guaranteed rights, and a sell-buy back transaction for the counterparty selling them, such buy-sell back transaction or sell-buy back transaction not being governed by a repurchase agreement or by a reverse repurchase agreement.

Based on this definition, we understand that a key difference between repurchase transactions and BSB / SBB is that a BSB / SBB is a transaction "not being governed by a repurchase agreement or by a reverse-repurchase agreement". ESMA stated in its September 2016 Consultation Paper on draft RTS and ITS under SFTR² that "ESMA considers the main difference between a commodity repo and a commodity buy/sell back to be that the former transaction is governed by an agreement whereas the latter is not. This implies that when a (bespoke) master agreement is in place which governs both legs of the transaction, the transaction is considered a commodity repo. In the absence of one master agreement for both legs, the transaction is a commodity buy/sell back".

However, ESMA states in the May 2019 Consultation Paper that "in the course of the consultations it has become apparent that certain BSB / SBB are governed by bilateral or master agreements, though the specific annexes covering them are different from those pertaining to repos and reverse repos. Undoubtedly, the type of SFT concluded is BSB / SBB".

The GFMA CWG would welcome guidance from ESMA on the circumstances in which a transaction is "undoubtedly" a BSB / SBB. We understand that a transaction documented on the terms of the Global Master Repurchase Agreement, where the parties have agreed to apply the Buy / Sell Back Annex, should qualify as a BSB / SBB (even though this transaction would be governed by a repurchase agreement or reverse repurchase agreement). However, where a transaction is documented on different terms or where

² ESMA/2016/1409

it is not documented at all, it would be useful to have guidance from ESMA on the features that distinguish a BSB / SBB from a repurchase transaction or a securities / commodities lending transaction.

For example, we understand that a transaction would only qualify as a BSB / SBB if the relevant assets are transferred by way of outright title transfer (and not by way of a pledge). We also understand that an undocumented transaction might still qualify as a BSB / SBB even though the two legs of the transaction are considered to be two separate contracts, so long as the intention of the parties at the time that the transaction was executed was to enter into a single transaction with two legs. However, we understand that two separately documented transactions should not be deemed to constitute a single BSB / SBB.

Transactions entered into for commercial purposes

ESMA states in the May 2019 Consultation Paper (at para 5.1.1.4) that "SFTs do not have a (non-financial) commercial purpose. Market participants use repos for liquidity and collateral management, and to cover short positions. Securities lending can also be used to earn additional returns from the ownership of a security or to arbitrage between dividend tax regimes. Margin lending is used to finance the purchase of securities for trading purposes".

We understand that ESMA considers syndicated loans to be out of scope for SFTR on the basis that they generally have a commercial purpose. Commodities transactions which could fall within the definition of "SFTs" may also be entered into for hedging or other commercial purposes, and so we would welcome further guidance on the definition of a "commercial purpose" in order to help firms determine whether these transactions are SFTs or not.

2. Application of SFTR to commodities transactions

We have set out below high level descriptions of common commodities transactions where there are questions over how to categorise these transactions for the purposes of SFTR reporting.

Commodities rolls / physically settled gold swaps

Certain commodities transaction structures (e.g., commodities rolls and physically settled gold swaps) may have features which may have a similar effect to a repurchase agreement or BSB / SBB, but would be made up of separate transactions (e.g., a commodity spot and a commodity forward). The transactions that make up these structures may be documented under a single master agreement (e.g., under an ISDA master agreement, although the individual transactions may not qualify as a "derivative" for the purposes of either EMIR or MiFID2), but would be executed and confirmed as separate transactions under that master agreement. These transactions would also be booked separately in the firm's booking system. Each transaction would give rise to individual settlement and each transaction could be unwound independently of the other.

Based on the guidance summarised above, we understand that these transaction structures would not be "repurchase transactions", as they are not documented as a single transaction under a repurchase agreement or reverse repurchase agreement.

We also understand that they would not be "BSB / SBB transactions", as they are two separate transactions and are executed and documented separately, and because they are not documented under a repurchase or reverse repurchase agreement.

As a result, we understand that these transaction structures would be out of scope for SFTR reporting. However, if ESMA considers that there are circumstances in which separate transactions should be considered to constitute a single repurchase transaction or BSB / SBB, it is vital that ESMA publishes guidance as soon as possible giving details of the circumstances in which two or more transactions which are executed and booked separately and which are not contingent upon one another or otherwise contractually linked should be deemed to be a single BSB / SBB.

Physical loans and leases

Counterparties may enter into a transaction structured as a sale and buy-back of commodities, typically documented under a single agreement, where the lender would have the obligation to take back the physical commodity at the end of the loan. However, in some cases, title to the physical commodity would not transfer.

Based on the guidance summarised above, we understand that where title to the physical commodity does not transfer, these transactions would not qualify as a "BSB / SBB transaction", as there is no outright title transfer and so the commodity is not being "sold". However, these transactions may still qualify as "commodities lending transactions".

3. Challenges in completing the reporting templates for commodities transactions

The decision to require reporting of different information for different types of SFTs has meant that there is more emphasis on the distinction between repurchase transactions, BSB / SBB transactions and commodities lending transactions than there was under the Level 1 text of SFTR.

As discussed above, there are several types of commodity transactions where it is unclear which category of SFT the transaction should be reported as, or whether these transactions are in scope for reporting under SFTR at all. ESMA had suggested in the May 2019 Consultation Paper that firms look to the proposed reporting fields for guidance. However, in some cases firms are struggling to complete the reporting fields for any of the types of SFT in a meaningful way.

We are concerned that without further guidance from ESMA this may lead to firms reporting similar types of transaction in significantly different ways, potentially resulting in mismatches at the trade repository and also resulting in potentially misleading information being reported so that regulators reviewing this data would not have a full or correct picture of market activity in these types of transactions.

We have attached in the Annex annotated examples of completed reports for different types of commodity transactions. In some cases, the problem arises because the "transaction" is actually executed and booked as two separate transactions (rather than as a single transaction with two legs). For the reasons discussed above, we do not consider that separate transactions, which are documented and executed separately and which are not contingent upon one another or otherwise contractually linked, should be deemed to be a single transaction for the purposes of SFTR reporting. However, in the event that ESMA disagrees with this analysis and requires firms to report these transactions as if they were a single SFT, we have described some of the difficulties in reporting these transaction in the examples set out in the Annex.

However, even if ESMA confirms that there is no requirement to report separately executed transactions as if they were a single SFT, there are other significant problems that firms are facing with completing the proposed reporting fields in relation to commodities transactions, and these are described further in the sample reports set out in the Annex.

4. GFMA - Commodities Working Group (CWG)

The CWG of GFMA focuses on regulatory issues specific to banks operating in the financial and physical commodities markets. CWG's work centres around the creation of a more level regulatory playing field for the commodity markets, advocating consistency and avoiding duplication among legislative measures.

For more information, visit <http://www.gfma.org>.

The CWG would welcome the opportunity to discuss further the questions outlined above with the aim of developing guidance specific to commodities SFTs.

Kathleen Traynor

Advisor, Commodities

SFT Buy Sell Back
 Parties Bilateral
 Collateral None
 Parameters Term
 Source System OLE
 Timing Intraday
 Event NEWT

Table 1 - Counterparty Data

1	Reporting timestamp	2019-03-15T05:47:11Z
2	Report submitting entity	GGDZP1UYGU9STUHRDP48
3	Reporting counterparty	GGDZP1UYGU9STUHRDP48
4	Nature of the reporting counterparty	F
5	Sector of the reporting counterparty	INVF
6	Additional sector classification	Blank
7	Branch of the reporting counterparty	Blank
8	Branch of the other counterparty	Blank
9	Counterparty side	TAKE
10	Entity responsible for the report	GGDZP1UYGU9STUHRDP48
11	Other counterparty	1YTOSFMJDSOFIDOSLFJ
12	Country of the other Counterparty	US
13	Beneficiary	Blank
14	Tri-party agent	Blank
15	Broker	Blank
16	Clearing member	Blank
17	CSD participant or indirect participant	Blank
18	Agent lender	Blank

GFMA:
 ESMA require a single UTI when these types of transactions are more typically booked as two trades.

GFMA:
 Where two trades make up the buy-sell back then the VALUE DATE is assumed to be the End Date [Delivery Date] of the far trade (Forward)

Table 2 - Loan and Collateral Data

1	Unique Transaction Identifier (UTI)	UTI333333
2	Report tracking number	Blank
3	Event date	2019-0315
4	Type of SFT	SBSL
5	Cleared	FALSE
6	Clearing timestamp	Blank
7	CCP	Blank
8	Trading venue	XXXX
9	Master agreement type	ISDA
10	Other master agreement type	Blank
11	Master agreement version	Blank
12	Execution timestamp	2019-03-15T07:20:54Z
13	Value date (Start date)	2019-0315
14	Maturity date (End date)	2019-0415
15	Termination date	Blank
16	Minimum notice period	Blank
17	Earliest call-back date	Blank
18	General collateral indicator	GENE
19	DBV indicator	Blank
20	Method used to provide collateral	Blank
21	Open term	Blank
22	Termination optionality	Blank
23	Fixed rate	Blank
24	Day count convention	Blank
25	Floating rate	Blank
26	Floating rate reference period - time period	Blank
27	Floating rate reference period - multiplier	Blank
28	Floating rate payment frequency - time period	Blank
29	Floating rate payment frequency - multiplier	Blank
30	Floating rate reset frequency - time period	Blank
31	Floating rate reset frequency - multiplier	Blank
32	Spread	Blank
33	Margin lending currency amount	Blank
34	Margin lending currency	Blank
35	Adjusted rate	Blank
36	Rate date	Blank
37	Principal amount on value date	2784250
38	Principal amount on maturity date	2790000
39	Principal amount currency	USD
40	Type of asset	Blank
41	Security identifier	Blank
42	Classification of a security	Blank
43	Base product	Blank
44	Sub - product	Blank
45	Further sub - product	Blank
46	Quantity or nominal amount	Blank
47	Unit of measure	Blank
48	Currency of nominal amount	Blank
49	Security or commodity price	15.91
50	Price currency	USD
51	Security quality	Blank
52	Maturity of the security	Blank
53	Jurisdiction of the issuer	Blank
54	LEI of the issuer	Blank
55	Security type	Blank
56	Loan value	Blank
57	Market value	Blank
58	Fixed rebate rate	Blank
59	Floating rebate rate	Blank
60	Floating rebate rate reference period - time period	Blank
61	Floating rebate rate reference period - multiplier	Blank
62	Floating rebate rate payment frequency - time period	Blank
63	Floating rebate rate payment frequency - multiplier	Blank
64	Floating rebate rate reset frequency - time period	Blank
65	Floating rebate rate reset frequency - multiplier	Blank
66	Spread of the rebate rate	Blank
67	Lending fee	Blank
68	Exclusive arrangements	Blank
69	Outstanding margin loan	Blank
70	Base currency of outstanding margin loan	Blank
71	Short market value	Blank
72	Uncollateralised SL flag	Blank
73	Collateralisation of net exposure	FALSE
74	Value date of the collateral	Blank
75	Type of collateral component	Blank
76	Cash collateral amount	Blank
77	Cash collateral currency	Blank
78	Identification of a security used as collateral	Blank
79	Classification of a security used as collateral	Blank
80	Base product	METL
81	Sub - product	PRME
82	Further sub - product	SLVR
83	Collateral quantity or nominal amount	175000
84	Collateral unit of measure	OZTR
85	Currency of collateral nominal amount	Blank
86	Price currency	Blank
87	Price per unit	15.91
88	Collateral market value	2784250
89	Haircut or margin	Blank
90	Collateral quality	Blank
91	Maturity of the security	Blank
92	Jurisdiction of the issuer	Blank
93	LEI of the issuer	Blank
94	Collateral type	Blank
95	Availability for collateral reuse	Blank
96	Collateral basket identifier	Blank
97	Portfolio code	Blank
98	Action type	NEWT
99	Level	TCTN

GFMA:
 Where two trades make up the buy-sell back then the MATURITY DATE is assumed to be the Start Date [Delivery Date] of the near trade (Forward)

GFMA:
 Mandatory for BSB in Validation Rules but in the ESMA technical standards (ITS) wording it says it only applies to securities. An apparent inconsistency.

GFMA:
 Lack of clarity on the value required for this field. Could assume it is the Notional (Price x Volume) of the SPOT trade that makes up one half of the buy-sell back. Challenge remains whether these SFTs are considered one or two transactions.

GFMA:
 Lack of clarity on the value required for this field. Could assume it is the Notional (Price x Volume) of the FORWARD trade that makes up one half of the buy-sell back. Challenge remains whether these SFTs are considered one or two transactions.

GFMA:
 Lack of clarity on the value required for this field. It assumes the price for the SPOT trade that makes up one half of the buy-sell back. Challenge remains whether these SFTs are considered one or two transactions. Fields 49 and 88 potentially are the same.

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 Lack of clarity on the value required for this field. It assumes the price for the SPOT trade that makes up one half of the buy-sell back. Challenge remains whether these SFTs are considered one or two transactions. Fields 49 and 88 potentially are the same.

GFMA:
 Lack of clarity on the value required for this field.

	SFT	Precious Metal Loan	Precious Metal Deposit
	Parties	Bilateral	Bilateral
	Collateral	None	None
	Parameters	Term	Term
	Source System	OLE	OLE
	Timing	Intraday	Intraday
	Event	NEWT	NEWT
Table 1 - Counterparty Data			
1	Reporting timestamp	2019-03-15T05:47:11Z	2019-03-15T05:47:11Z
2	Report submitting entity	GGDZP1UYGU9STUHRDP48	GGDZP1UYGU9STUHRDP48
3	Reporting counterparty	GGDZP1UYGU9STUHRDP48	GGDZP1UYGU9STUHRDP48
4	Nature of the reporting counterparty	F	F
5	Sector of the reporting counterparty	INVF	INVF
6	Additional sector classification	Blank	Blank
7	Branch of the reporting counterparty	Blank	Blank
8	Branch of the other counterparty	Blank	Blank
9	Counterparty side	TAKE	GIVE
10	Entity responsible for the report	GGDZP1UYGU9STUHRDP48	GGDZP1UYGU9STUHRDP48
11	Other counterparty	1YT05FMJDSOFIDOSLFJ	1YT05FMJDSOFIDOSLFJ
12	Country of the other Counterparty	US	PH
13	Beneficiary	Blank	Blank
14	Tri-party agent	Blank	Blank
15	Broker	Blank	Blank
16	Clearing member	Blank	Blank
17	CSD participant or indirect participant	Blank	Blank
18	Agent lender	Blank	Blank
Table 2 - Loan and Collateral Data			
1	Unique Transaction Identifier (UTI)	UTI111111	UTI222222
2	Report tracking number	Blank	Blank
3	Event date	2019-0315	2019-0315
4	Type of SFT	SLFB	SLFB
5	Cleared	FALSE	FALSE
6	Clearing timestamp	Blank	Blank
7	CCP	Blank	Blank
8	Trading venue	XXXX	XXXX
9	Master agreement type	OTHR	OTHR
10	Other master agreement type	Master Lease Agreement	Master Bullion deposit
11	Master agreement version	Blank	Blank
12	Execution timestamp	2019-03-15T07:20:54Z	2019-03-15T07:20:54Z
13	Value date (Start date)	2019-0315	2019-0315
14	Maturity date (End date)	2019-0415	2019-0415
15	Termination date	Blank	Blank
16	Minimum notice period	Blank	Blank
17	Earliest call-back date	Blank	Blank
18	General collateral indicator	GENE	GENE
19	DBV indicator	FALSE	FALSE
20	Method used to provide collateral	NOAP	NOAP
21	Open term	FALSE	TRUE
22	Termination optionality	ETSB	Blank
23	Fixed rate	Blank	Blank
24	Day count convention	Blank	Blank
25	Floating rate	Blank	Blank
26	Floating rate reference period - time period	Blank	Blank
27	Floating rate reference period - multiplier	Blank	Blank
28	Floating rate payment frequency - time period	Blank	Blank
29	Floating rate payment frequency - multiplier	Blank	Blank
30	Floating rate reset frequency - time period	Blank	Blank
31	Floating rate reset frequency - multiplier	Blank	Blank
32	Spread	Blank	Blank
33	Margin lending currency amount	Blank	Blank
34	Margin lending currency	Blank	Blank
35	Adjusted rate	Blank	Blank
36	Rate date	Blank	Blank
37	Principal amount on value date	Blank	Blank
38	Principal amount on maturity date	Blank	Blank
39	Principal amount currency	Blank	Blank
40	Type of asset	COMM	COMM
41	Security identifier	Blank	Blank
42	Classification of a security	Blank	Blank
43	Base product	METL	METL
44	Sub - product	PRME	PRME
45	Further sub - product	SLVR	GOLD
46	Quantity or nominal amount	175000	50000
47	Unit of measure	OZTR	OZTR
48	Currency of nominal amount	Blank	Blank
49	Security or commodity price	15.91	1228.3
50	Price currency	USD	USD
51	Security quality	Blank	Blank
52	Maturity of the security	Blank	Blank
53	Jurisdiction of the issuer	Blank	Blank
54	LEI of the issuer	Blank	Blank
55	Security type	Blank	Blank
56	Loan value	2784250	61415000
57	Market value	2784250	61415000
58	Fixed rebate rate	Blank	Blank
59	Floating rebate rate	Blank	Blank
60	Floating rebate rate reference period - time period	Blank	Blank
61	Floating rebate rate reference period - multiplier	Blank	Blank
62	Floating rebate rate payment frequency - time period	Blank	Blank
63	Floating rebate rate payment frequency - multiplier	Blank	Blank
64	Floating rebate rate reset frequency - time period	Blank	Blank
65	Floating rebate rate reset frequency - multiplier	Blank	Blank
66	Spread of the rebate rate	Blank	Blank
67	Lending fee	2.60	0.48
68	Exclusive arrangements	Blank	Blank
69	Outstanding margin loan	Blank	Blank
70	Base currency of outstanding margin loan	Blank	Blank
71	Short market value	Blank	Blank
72	Uncollateralised SL flag	TRUE	TRUE
73	Collateralisation of net exposure	FALSE	FALSE
74	Value date of the collateral	Blank	Blank
75	Type of collateral component	Blank	Blank
76	Cash collateral amount	Blank	Blank
77	Cash collateral currency	Blank	Blank
78	Identification of a security used as collateral	Blank	Blank
79	Classification of a security used as collateral	Blank	Blank
80	Base product	Blank	Blank
81	Sub - product	Blank	Blank
82	Further sub - product	Blank	Blank
83	Collateral quantity or nominal amount	Blank	Blank
84	Collateral unit of measure	Blank	Blank
85	Currency of collateral nominal amount	Blank	Blank
86	Price currency	Blank	Blank
87	Price per unit	Blank	Blank
88	Collateral market value	Blank	Blank
89	Haircut or margin	Blank	Blank
90	Collateral quality	Blank	Blank
91	Maturity of the security	Blank	Blank
92	Jurisdiction of the issuer	Blank	Blank
93	LEI of the issuer	Blank	Blank
94	Collateral type	Blank	Blank
95	Availability for collateral reuse	Blank	Blank
96	Collateral basket identifier	Blank	Blank
97	Portfolio code	Blank	Blank
98	Action type	NEWT	NEWT
99	Level	TCTN	TCTN