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 SFTR 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

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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.
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
### Table 2 - Loan and Collateral Data

<table>
<thead>
<tr>
<th>Field</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Unique Transaction Identifier (UTI)</td>
</tr>
<tr>
<td>3</td>
<td>Event date 2019-03-15</td>
</tr>
<tr>
<td>4</td>
<td>Type of SFT SBSC</td>
</tr>
<tr>
<td>5</td>
<td>Cleared: FALSE</td>
</tr>
<tr>
<td>7</td>
<td>CCP</td>
</tr>
<tr>
<td>8</td>
<td>Trading venue XXX</td>
</tr>
<tr>
<td>9</td>
<td>Master agreement type</td>
</tr>
<tr>
<td>10</td>
<td>Other master agreement type</td>
</tr>
<tr>
<td>11</td>
<td>Master agreement version</td>
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<tr>
<td>12</td>
<td>Execution timestamp</td>
</tr>
<tr>
<td>13</td>
<td>Value date (Start date) 2019-03-15</td>
</tr>
<tr>
<td>14</td>
<td>Maturity date (End date) 2019-04-15</td>
</tr>
<tr>
<td>15</td>
<td>Termination date</td>
</tr>
<tr>
<td>16</td>
<td>... Floating rate</td>
</tr>
<tr>
<td>17</td>
<td>... Spread</td>
</tr>
<tr>
<td>18</td>
<td>Agent lending</td>
</tr>
</tbody>
</table>

#### Notes:

- 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 are the same.
<table>
<thead>
<tr>
<th>Table 1 - Counterparty Data</th>
<th>Table 2 - Loan and Collateral Data</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Party</strong></td>
<td><strong>Collateral</strong></td>
</tr>
<tr>
<td><strong>Reporting timestamp</strong></td>
<td><strong>Master agreement type</strong></td>
</tr>
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<td><strong>Report submitting entity</strong></td>
<td><strong>Other master agreement type</strong></td>
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<tr>
<td><strong>Reporting counterpart</strong></td>
<td><strong>Agent lender</strong></td>
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<tr>
<td><strong>Device of the other Counterparty</strong></td>
<td><strong>Type of asset</strong></td>
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<tr>
<td><strong>Country of the other Counterparty</strong></td>
<td><strong>Security quality</strong></td>
</tr>
<tr>
<td><strong>Beneficiary</strong></td>
<td><strong>Loan value</strong></td>
</tr>
<tr>
<td><strong>Tri-party agent</strong></td>
<td><strong>Market value</strong></td>
</tr>
<tr>
<td><strong>Broker</strong></td>
<td><strong>Floating rate reference period - time period</strong></td>
</tr>
<tr>
<td><strong>Clearing member</strong></td>
<td><strong>Floating rate reference period - multiplier</strong></td>
</tr>
<tr>
<td><strong>CSD participant or indirect participant</strong></td>
<td><strong>Floating rate payment frequency - time period</strong></td>
</tr>
<tr>
<td><strong>Agent lender</strong></td>
<td><strong>Floating rate payment frequency - multiplier</strong></td>
</tr>
<tr>
<td><strong>Clearing member</strong></td>
<td><strong>Floating rate reset frequency - time period</strong></td>
</tr>
<tr>
<td><strong>CSD participant or indirect participant</strong></td>
<td><strong>Floating rate reset frequency - multiplier</strong></td>
</tr>
<tr>
<td><strong>Spreads</strong></td>
<td><strong>Lending fees</strong></td>
</tr>
<tr>
<td><strong>Margin lending currency amount</strong></td>
<td><strong>Exclusive arrangement</strong></td>
</tr>
<tr>
<td><strong>Margin lending currency</strong></td>
<td><strong>Outstanding margin loan</strong></td>
</tr>
<tr>
<td><strong>Adjusted rate</strong></td>
<td><strong>Base currency of outstanding margin loan</strong></td>
</tr>
<tr>
<td><strong>Rate date</strong></td>
<td><strong>Short market value</strong></td>
</tr>
<tr>
<td><strong>Principal amount on value date</strong></td>
<td><strong>Classification of a security used as collateral</strong></td>
</tr>
<tr>
<td><strong>Principal amount on maturity date</strong></td>
<td><strong>Base product</strong></td>
</tr>
<tr>
<td><strong>Currency of nominal amount</strong></td>
<td><strong>Sub - product</strong></td>
</tr>
<tr>
<td><strong>Security or commodity price</strong></td>
<td><strong>Further sub - product</strong></td>
</tr>
<tr>
<td><strong>Price currency</strong></td>
<td><strong>Collateral market value</strong></td>
</tr>
<tr>
<td><strong>Security quality</strong></td>
<td><strong>Collateral quality</strong></td>
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<tr>
<td><strong>Maturity of the security</strong></td>
<td><strong>Jurisdiction of the issue</strong></td>
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<tr>
<td><strong>LEI of the issue</strong></td>
<td><strong>Collateral basket identifier</strong></td>
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<tr>
<td><strong>Security type</strong></td>
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<tr>
<td><strong>Loan value</strong></td>
<td><strong>Action type</strong></td>
</tr>
<tr>
<td><strong>Market value</strong></td>
<td><strong>Level</strong></td>
</tr>
</tbody>
</table>

**Party**
- **Bilateral**: Precious Metal Loan, Precious Metal Deposit
- **Collateral**: None
- **Parameters**: Term, Term
- **Source System**: OLE
- **Timing**: Intrada

**Reporting timestamp**
- 2019-03-15T05:47:11Z
- 2019-03-15T05:47:11Z

**Report submitting entity**
- GGDZP1UYGU9STUHRDP48
- GGDZP1UYGU9STUHRDP48

**Reporting counterpart**
- GGDZP1UYGU9STUHRDP48
- GGDZP1UYGU9STUHRDP48

**Nature of the reporting counterpart**
- FF

**Sector of the reporting counterpart**
- INVF

**Additional sector classification**
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**Branch of the other counterpart**
- Blank

**Branch of the reporting counterpart**
- Blank

**Entity responsible for the report**
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- GGDZP1UYGU9STUHRDP48

**Other counterpart**
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- 1YTO5FMJDSOFIDOSLFJ

**Country of the other Counterparty**
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**Beneficiary**
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**Tri-party agent**
- Blank

**Broker**
- Blank

**Clearing member**
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**CSD participant or indirect participant**
- Blank

**Agent lender**
- Blank

**Spreads**
- Blank

**Margin lending currency amount**
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**Margin lending currency**
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**Adjusted rate**
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**Rate date**
- Blank

**Principal amount on value date**
- Blank

**Principal amount on maturity date**
- Blank

**Currency of nominal amount**
- Blank

**Security or commodity price**
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- 1228.35

**Price currency**
- USD

**Security quality**
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**Maturity of the security**
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**Jurisdiction of the issue**
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**LEI of the issue**
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**Security type**
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**Loan value**
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**Market value**
- 2784250
- 61415000

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**Floating rebate rate reference period - time period**
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**Floating rebate rate reference period - multiplier**
- Blank

**Floating rebate rate payment frequency - time period**
- Blank

**Floating rebate rate payment frequency - multiplier**
- Blank

**Floating rebate rate reset frequency - time period**
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**Floating rebate rate reset frequency - multiplier**
- Blank

**Spread of the rebate rate**
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**Lending fees**
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**Exclusive arrangement**
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**Outstanding margin loan**
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**Base currency of outstanding margin loan**
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**Short market value**
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**Classification of a security used as collateral**
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**Base product**
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**Sub - product**
- Blank

**Further sub - product**
- Blank

**Collateral quantity or nominal amount**
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**Collateral unit of measure**
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**Currency of collateral nominal amount**
- Blank

**Price currency**
- Blank

**Price per unit**
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**Collateral market value**
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**Haircut or margin**
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**Collateral quality**
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**Maturity of the security**
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**Jurisdiction of the issue**
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**LEI of the issue**
- Blank

**Collateral type**
- Blank

**Availability for collateral reuse**
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**Collateral basket identifier**
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**Portfolio code**
- Blank

**Action type**
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- NEWT

**Level**
- TCTN
- TCTN