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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	16 March 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2017) 1658 final
Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 16.3.2017 amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives

Delegations will find attached document C(2017) 1658 final.

Encl.: C(2017) 1658 final



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COMMISSION DELEGATED REGULATION (EU) .../...

of 16.3.2017

amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 5(2) of the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories (EMIR) empowers the Commission to adopt, following submission of draft standards by the European Securities and Market Authority (ESMA), and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 delegated acts in relation to the clearing obligation, in particular on the dates from when the clearing obligation takes effect. Following from this mandate, there are three Commission Delegated Regulations¹ in force on the clearing obligation². To allow a smooth and orderly application of the clearing obligation, counterparties are classified in four categories with a different date of application for each category. For the Category 3, financial counterparties (and certain funds which are classified as non-financial counterparties) belonging to a group whose aggregate positions in OTC derivatives are EUR 8bn or below, the start of the clearing obligation is set for 21 June 2017 with regard to OTC interest rate derivatives denominated in EUR, GBP, JPY, and USD and for 9 February 2018 with regard to OTC index credit default swaps and OTC interest rate derivatives denominated in NOK, PLN and SEK.

On 10 November 2016, ESMA submitted to the Commission draft regulatory technical standards amending the date of application of the clearing obligation set in these three Commission Delegated Regulations for the Category 3 to start on 21 June 2019 to cater for the difficulties some financial counterparties with a limited volume of activity are facing in preparing for the clearing obligation. ESMA published its Final Report on 14 November 2016.

In accordance with Article 10(1) of Regulation (EU) No 1095/2010, the Commission shall decide within three months of receipt of the draft regulatory technical standards whether to endorse the draft submitted.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA carried out a public consultation on the draft regulatory technical standards submitted to the Commission. A Consultation Paper containing the draft standards was published on 13 July 2016 on the ESMA internet site, and the consultation closed on 5 September 2016.

Together with the draft regulatory technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA submitted its analysis of the costs and benefits of the draft regulatory standards, and a report on how the outcome of the public consultation has been taken into account.

¹ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 (OJ L 314, 1.12.2015, p. 13), Commission Delegated Regulation (EU) 2016/592 (OJ L 103, 19.4.2016, p. 5.) of 1 March 2016 and Commission Delegated Regulation (EU) 2016/1178 of 10 June 2016 (OJ L195, 20.7.2016, p. 3).

² OTC interest rate derivatives denominated in EUR, GBP, JPY, and USD; OTC index credit default swaps; and OTC interest rate derivatives denominated in NOK, PLN and SEK.

The Final Report on the draft technical standards that can be found at: https://www.esma.europa.eu/sites/default/files/library/20161565_final_report_on_clearing_obligation.pdf. Within that report ESMA provided new evidence regarding the lack of access to central clearing for counterparties in Category 3 that was not available when the Commission Delegated Regulations were adopted that will be amended by this Delegated Act and that justifies the amendments. This postponement is consistent with the conclusions reached as part of the Report on EMIR adopted by the Commission on 23 November 2016.³

ESMA also requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010, and consulted the European Systemic Risk Board.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The Delegated Act amends point (c) of Article 3(1) of each of these three Commission Delegated Regulations so that the phase-in periods for counterparties in Category 3 are extended to 21 June 2019. Hence, it aligns the date in which all three clearing obligations take effect with respect to counterparties in Category 3.

³ COM/2016/0857 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1480141638729&uri=COM:2016:857:FIN>

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ⁽¹⁾, and in particular Article 5(2) thereof,

Whereas:

- (1) Commission Delegated Regulations (EU) 2015/2205⁽²⁾, (EU) 2016/592⁽³⁾ and (EU) 2016/1178⁽⁴⁾ determine 4 categories of counterparties for the purposes of setting out the dates on which their respective clearing obligations take effect. Counterparties are categorised according to their level of legal and operational capacity and by their trading activity in relation to OTC derivatives.
- (2) In order to ensure a timely and orderly application of the clearing obligation, staggered phase-in periods were applied to those different categories of counterparties.
- (3) The date on which the clearing obligation takes effect for counterparties within Category 3 takes into account the fact that the majority of those counterparties can only get access to a central counterparty (CCP) by becoming either a client or an indirect client of a clearing member.
- (4) Counterparties with the lowest level of activity in OTC derivatives are comprised in Category 3. Recent evidence suggests that counterparties in that category face significant difficulties in the preparation of necessary arrangements for clearing those

¹ OJ L 201, 27.7.2012, p. 1.

² Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

³ Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 103, 19.4.2016, p. 5).

⁴ Commission Delegated Regulation (EU) 2016/1178 of 10 June 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L195, 20.7.2016, p. 3).

derivative contracts. This is due to complexities affecting both types of access to clearing arrangements, namely client clearing and indirect client clearing.

- (5) Firstly, in relation to client clearing arrangements, there appears to be little incentive for clearing members to extensively develop their client clearing offer, because of cost issues. This is even more so for counterparties with a limited volume of activity in OTC derivatives. In addition, the regulatory framework on the capital requirements applicable to client clearing activities is being modified, which creates uncertainties that act as impediments to the development of a range of client clearing offerings by clearing members.
- (6) Secondly, in relation to indirect clearing arrangements, as a result of the lack of the offer, counterparties are currently unable to access CCPs by becoming an indirect client of a clearing member.
- (7) On the basis of those difficulties and in order to provide those counterparties with an additional period of time to finalise the necessary clearing arrangements it is appropriate to postpone the dates on which the clearing obligation takes effect for counterparties within Category 3. However, account has already been taken of the incentives to centralise risk management within a group in relation to intragroup transactions and the postponement of the dates has no impact on those incentives and those dates concerning certain OTC derivatives concluded between counterparties belonging to the same group.
- (8) In light of the positive consequences arising from the establishment of clearing arrangements and to avoid duplication of efforts regarding the preparations to clear different asset classes subject to the clearing obligation, it is appropriate to align the new dates on which the clearing obligation takes effect for counterparties within Category 3.
- (9) Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 should therefore be amended.
- (10) This Regulation is based on draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (11) ESMA has conducted an open public consultation on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁵, and consulted the European Systemic Risk Board,

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p.84).

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2015/2205

In Article 3(1) of Delegated Regulation (EU) 2015/2205, point (c) is replaced by the following:

"(c) 21 June 2019 for counterparties in Category 3;"

Article 2

Amendment to Delegated Regulation (EU) 2016/592

In Article 3(1) of Delegated Regulation (EU) 2016/592, point (c) is replaced by the following:

"(c) 21 June 2019 for counterparties in Category 3;"

Article 3

Amendment to Delegated Regulation (EU) 2016/1178

In Article 3(1) of Delegated Regulation (EU) 2016/1178, point (c) is replaced by the following:

"(c) 21 June 2019 for counterparties in Category 3;"

Article 4

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16.3.2017

For the Commission
The President
Jean-Claude JUNCKER