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 (Text with EEA relevance)

REGULATION (EU) 2019/834 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 May 2019

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Regulation (EU) No 648/2012 of the European Parliament and of the Council[(4)] entered into force on 16 August 2012. The requirements it contains, namely, central clearing of standardised over-the-counter (OTC) derivative contracts, margin requirements and operational risk mitigation requirements for OTC derivative contracts that are not centrally cleared, reporting obligations for derivative contracts, requirements for central counterparties (CCPs) and requirements for trade repositories, contribute to reducing the systemic risk by increasing the transparency of the OTC derivatives market and reducing the counterparty credit risk and the operational risk associated with OTC derivatives.

(2) The simplification of certain areas covered by Regulation (EU) No 648/2012 and a more proportionate approach to those areas are in line with the Commission's Regulatory Fitness and Performance programme which emphasises the need for cost reduction

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2019/834 of the European Parliament and of the Council. (See end of Document for details)*

and simplification so that Union policies achieve their objectives in the most efficient way, and aim, in particular, at reducing regulatory and administrative burdens. That simplification and a more proportionate approach should, however, be without prejudice to the overarching objectives of promoting financial stability and mitigating systemic risks in line with the statement by G20 leaders at the 26 September 2009 Summit in Pittsburgh.

(3) Efficient and resilient post-trading systems and collateral markets are essential elements of a well-functioning capital markets union, that underpin the efforts to support investments, growth and jobs, in line with the political priorities of the Commission.

(4) In 2015 and 2016, the Commission carried out two public consultations on the application of Regulation (EU) No 648/2012. The Commission also received input on the application of that Regulation from the European Supervisory Authority (European Securities and Markets Authority) (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(5)], the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council[(6)] and the European System of Central Banks (ESCB). It appeared from those public consultations that the objectives of Regulation (EU) No 648/2012 were supported by stakeholders and that no major overhaul of that Regulation was necessary. On 23 November 2016, the Commission adopted a general report in accordance with Regulation (EU) No 648/2012. Although not all the provisions of Regulation (EU) No 648/2012 were fully applicable and therefore a comprehensive evaluation of that Regulation was not possible, that report identified areas for which targeted action was necessary to ensure that the objectives of Regulation (EU) No 648/2012 were reached in a more proportionate, efficient and effective manner.

(5) Regulation (EU) No 648/2012 should cover all financial counterparties that might pose an important systemic risk for the financial system. The definition of financial counterparty should therefore be amended.

(6) Employee share purchase plans are schemes, usually established by an undertaking by which persons can directly or indirectly subscribe, purchase, receive or own shares of that undertaking or of another undertaking within the same group, provided that that plan benefits at least the employees or former employees of that undertaking or of another undertaking within the same group, or the members or former members of the board of that undertaking or of another undertaking within the same group. The Commission's communication of 8 June 2017 on the Mid-Term Review of the Capital Markets Union Action Plan identifies measures relating to employee share purchase plans as a possible measure to strengthen the capital markets union with a view to fostering retail investment. Therefore, and in accordance with the principle of proportionality, an undertaking for collective investment in transferable securities (UCITS) or an alternative investment fund (AIF) that is set up exclusively for the purpose of serving one or more employee share purchase plans, should not be qualified as a financial counterparty.

(7) Certain financial counterparties have a volume of activity in OTC derivatives markets that is too low to pose an important systemic risk for the financial system and is too low

for central clearing to be economically viable. Those counterparties, commonly referred to as small financial counterparties, should be exempted from the clearing obligation, but they should remain subject to the requirement to exchange collateral to mitigate any systemic risk. However, where the position taken by the financial counterparty exceeds the clearing threshold for at least one class of OTC derivatives, calculated at the group level, the clearing obligation should apply to all classes of OTC derivatives, given the interconnectedness of financial counterparties and the possible systemic risk to the financial system that might arise if those OTC derivative contracts were not centrally cleared. The financial counterparty should have the possibility to demonstrate at any time that its positions no longer exceed the clearing threshold for any class of OTC derivatives, in which case the clearing obligation should cease to apply.

(8) Non-financial counterparties are less interconnected than financial counterparties. Also, they are often predominantly active in only one class of OTC derivatives. Their activity therefore poses less of a systemic risk to the financial system than the activity of financial counterparties. The scope of the clearing obligation for non-financial counterparties that choose to calculate their positions every 12 months against the clearing thresholds should therefore be narrowed. Those non-financial counterparties should be subject to the clearing obligation only with regard to the classes of OTC derivatives that exceed the clearing threshold. Non-financial counterparties should nonetheless remain subject to the requirement to exchange collateral where any of the clearing thresholds is exceeded. Non-financial counterparties that choose not to calculate their positions against the clearing thresholds, should be subject to the clearing obligation for all classes of OTC derivatives. The non-financial counterparty should have the possibility to demonstrate at any time that its positions no longer exceed the clearing threshold for a class of OTC derivatives in which case the clearing obligation for that class of OTC derivatives should cease to apply.

(9) In order to take account of any development in financial markets, ESMA should periodically review the clearing thresholds and update them where necessary. That periodic review should be accompanied by a report.

(10) The requirement to clear certain OTC derivative contracts concluded before the clearing obligation takes effect creates legal uncertainty and operational complications, while providing limited benefits. In particular, that requirement creates additional costs and burdens for the counterparties to those contracts, and might also affect the smooth functioning of the market without significantly improving the uniform and coherent application of Regulation (EU) No 648/2012 or establishing a level playing field for market participants. That requirement should therefore be removed.

(11) Counterparties that have a limited volume of activity in the OTC derivatives market face difficulties in accessing central clearing, whether as a client of a clearing member or through indirect clearing arrangements. Clearing members and clients of clearing members that provide clearing services, either directly to other counterparties or indirectly by allowing their own clients to provide those services to other counterparties, should therefore be required to do so under fair, reasonable, non-discriminatory and transparent commercial terms. While this requirement should not result in

price regulation or an obligation to contract, clearing members and clients should be permitted to control the risks related to the clearing services offered, such as counterparty risks.

(12) Information on the financial instruments covered by the authorisations of CCPs might not specify all classes of OTC derivatives which a CCP is authorised to clear. To ensure that ESMA can carry out its tasks and duties in relation to the clearing obligation, competent authorities should notify ESMA without delay of any information received from a CCP regarding the CCP's intention to start clearing a class of OTC derivatives that is covered by its existing authorisation.

(13) It should be possible to temporarily suspend the clearing obligation in certain exceptional situations. Such a suspension should be possible where the criteria on the basis of which specific classes of OTC derivatives have been made subject to the clearing obligation are no longer met. That could be the case where particular classes of OTC derivatives become unsuitable for mandatory central clearing or where there has been a material change to one of those criteria in respect of particular classes of OTC derivatives. A suspension of the clearing obligation should also be possible where a CCP ceases to offer a clearing service for specific classes of OTC derivatives or for a specific type of counterparty and other CCPs cannot step in fast enough to take over those clearing services. The suspension of the clearing obligation should also be possible where it is considered necessary to avoid a serious threat to financial stability in the Union. In order to ensure financial stability and to avoid market disruption, ESMA should, while keeping in mind the G20 objectives, ensure that, where the abolition of the clearing obligation is appropriate, that abolition is instigated during the suspension of the clearing obligation and in sufficient time to enable the amendment of the relevant regulatory technical standards.

(14) The obligation laid down in Regulation (EU) No 600/2014 of the European Parliament and of the Council[7] for counterparties to trade derivatives that are subject to the clearing obligation on trading venues is, in accordance with the trading obligation procedure detailed in that Regulation, triggered when a class of derivatives is declared to be subject to the clearing obligation. The suspension of the clearing obligation might prevent counterparties from being able to comply with the trading obligation. As a consequence, where the suspension of the clearing obligation has been requested, and where it is considered to be a material change in the criteria for the trading obligation to take effect, it should be possible for ESMA to propose the concurrent suspension of the trading obligation on the basis of Regulation (EU) No 648/2012 instead of Regulation (EU) No 600/2014.

(15) The reporting of historic contracts has proven to be difficult because certain details which are now required to be reported were not required to be reported before the entry into force of Regulation (EU) No 648/2012. This has resulted in a high reporting failure rate and the poor quality of reported data, while the burden of reporting those contracts remains significant. There is therefore a high likelihood that those historic data will remain unused. Moreover, by the time the deadline for reporting historic contracts becomes effective, a number of those contracts will have already expired and, with

them, the corresponding exposures and risks. For that reason, the requirement to report historic contracts should be removed.

(16) Intragroup transactions involving non-financial counterparties represent a relatively small fraction of all OTC derivative contracts and are used primarily for internal hedging within groups. Those transactions therefore do not significantly contribute to systemic risk and interconnectedness, yet the obligation to report such transactions imposes significant costs and burdens on non-financial counterparties. Transactions between counterparties within a group, where at least one of the counterparties is a non-financial counterparty, should therefore be exempted from the reporting obligation, regardless of the place of establishment of the non-financial counterparty.

(17) In 2017, the Commission launched a fitness check on public reporting by companies. The purpose of that check is to gather evidence on the consistency, coherence, effectiveness and efficiency of the Union reporting framework. Against that background, the possibility of avoiding unnecessary duplication of reporting and the possibility of reducing or simplifying the reporting of non-OTC derivative contracts should be further analysed, taking into account the need for timely reporting and the measures adopted pursuant to Regulations (EU) No 648/2012 and (EU) No 600/2014. In particular, that analysis should consider the details reported, the accessibility of the data by relevant authorities, as well as measures to further simplify reporting chains for non-OTC derivative contracts without undue loss of information, in particular with respect to non-financial counterparties that are not subject to the clearing obligation. A more general assessment of the effectiveness and efficiency of the measures that were introduced in Regulation (EU) No 648/2012 to improve the functioning and reduce the burden of reporting OTC derivative contracts should be considered, when sufficient experience and data on the application of that Regulation is available, in particular regarding the quality and accessibility of data reported to trade repositories and regarding the take-up and implementation of delegated reporting.

(18) To reduce the burden of reporting OTC derivative contracts for non-financial counterparties that are not subject to the clearing obligation, the financial counterparty should, as a rule, be solely responsible, and legally liable, for reporting on behalf of both itself and non-financial counterparties that are not subject to the clearing obligation with regard to OTC derivative contracts entered into by those counterparties, as well as for ensuring the correctness of the details reported. To ensure that the financial counterparty has the data it needs to fulfil its reporting obligation, the non-financial counterparty should provide the details relating to the OTC derivative contracts that the financial counterparty cannot be reasonably expected to possess. However, it should be possible for non-financial counterparties to choose to report their OTC derivative contracts. In such cases, the non-financial counterparty should inform the financial counterparty accordingly and should be responsible, and legally liable, for reporting that data and for ensuring their correctness.

(19) The responsibility for reporting OTC derivative contracts where one or both of the counterparties are UCITSs or AIFs should also be determined. It should therefore be specified that the management company of an UCITS is responsible and legally liable