Commission Delegated Regulation (EU) 2017/2155 of 22 September 2017 amending Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2017/2155

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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 4(4) thereof,

Whereas:

(1) Indirect clearing arrangements should not expose central counterparties (CCPs), clearing members, clients, indirect clients or further layers of indirect clients to additional counterparty risk, and the assets and positions of indirect clients should benefit from an appropriate level of protection. It is therefore essential that any type of indirect clearing arrangement complies with minimum conditions for ensuring their safety. To that end, the parties involved in indirect clearing arrangements should be subject to specific obligations, and indirect clearing arrangements should only be allowed where they meet the conditions defined in this Regulation.

(2) As the assets and positions of the counterparty to which indirect clearing services are provided should benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of Regulation (EU) No 648/2012, the different concepts of indirect client are pivotal for this Regulation and should be defined herein.

(3) Taking into account that clearing members should qualify as participants within the meaning of Directive 98/26/EC of the European Parliament and of the Council[(2)], and to ensure an equivalent level of protection to indirect clients as granted to clients under Regulation (EU) No 648/2012, clients providing indirect clearing services should be credit institutions, investment firms, or third country entities equivalent to credit institutions or investment firms.

(4) The higher degree of intermediation activity between a CCP and the different layers of indirect clients requires additional operational steps, additional accounts as well as more complex technological solutions and processing flows. This results in an increased complexity of indirect clearing arrangements compared to client clearing arrangements. That higher degree of intermediation should therefore be mitigated with requirements

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/2155. (See end of Document for details)*

for an alternative and operationally simpler choice of account structures for indirect clearing arrangements than for client clearing arrangements.

(5) Client clearing arrangements require offering individually segregated accounts. For indirect clearing arrangements, however, only a gross omnibus indirect account structure, with a mechanism to transfer called margin and, if agreed, margin in excess of called margin, from the indirect client all the way up to the CCP, and without allowing any netting of positions of different indirect clients in the same gross omnibus indirect account, should be required to be offered on top of omnibus indirect accounts allowing such netting. That mechanism allows for identifying, in a way equivalent to individually segregated accounts, between the collateral and the positions held for the account of a specific indirect client, on the one hand, and the collateral and the positions held for the account of the client or other indirect clients on the other.

(6) In addition, even if assets and positions held in a gross omnibus account structure for indirect clearing arrangements may still be exposed to the losses of another indirect client since those assets and positions are comingled in one account, the speed in which those assets and positions can be identified where necessary to liquidate them following a default, contributes to minimise that potential loss.

(7) That mechanism allows, at the same time, for a much simpler account structure that reduces the costs and complexity compared to individually segregated accounts while permitting to distinguish the collateral and the positions of different indirect clients and thus ensures a level of protection that is equivalent to the level of protection offered by an individually segregated account. Requiring the offer of gross omnibus indirect accounts should however not preclude the possibility of offering individually segregated indirect accounts to indirect clients within clearing arrangements consisting of a CCP, a clearing member, a client and a single layer of indirect clients.

(8) To facilitate access to central clearing, by rationalising clearing services and simplifying the commercial relationships between clearing members, clients and indirect clients, some groups offer clearing services using two entities from the same group which intermediate in the provision of those services. For similar reasons, the group of the client sometimes uses one entity to deal directly with the clearing member and a different entity to deal directly with the indirect client, typically because that second entity is established in the jurisdiction of the indirect client. In those cases, clearing services are rationalised across different economic activities of the group and the commercial relationship between clearing members, clients and indirect clients is also simplified. Provided that those types of arrangements meet specific conditions which ensure that counterparty risk is not increased and that an appropriate level of protection is provided to the indirect clearing, they should be allowed.

(9) In chains of indirect clearing involving more than a CCP, a clearing member, a client and a single layer of indirect clients, the use of individually segregated accounts could lead to unexpected technical difficulties since the potential default of one or more of the counterparties in that chain and a multitude of individually segregated accounts would have to be managed. The offering of individually segregated accounts in those longer chains could mislead counterparties seeking the level of protection normally

associated with individually segregated accounts since that level of protection may not be achieved in some of those longer chains. To avoid the risks stemming from that false assumption, only omnibus segregated accounts should be allowed to be used in those longer chains of indirect clearing, provided that counterparties that are clearing through those arrangements are fully informed of the level of segregation and the risks associated with that type of account.

(10) To ensure that the amount of margin called within a gross omnibus indirect account structure is the same as the amount that would have been called if an individually segregated indirect clearing account had been used, a CCP should receive information on the positions held for the account of the indirect client to calculate the associated margin call on an indirect client by indirect client basis.

(11) To ensure equivalence with client clearing, a clearing member should have procedures in place to facilitate the transfer of indirect clients' positions to an alternative client following the failure of a client that provides indirect clearing services. For the same reason, a clearing member should also have procedures to liquidate the positions and assets of the indirect clients and to return the liquidation proceeds to those indirect clients where known. Where, for any reason, the liquidation proceeds cannot be returned directly to the indirect clients concerned, the liquidation proceeds should be returned to the defaulting client for the account of its indirect clients.

(12) Procedures should be put in place so that, in case of the default of the client, the information on the identity of the indirect clients can become known and the clearing member is able to identify which assets and positions belong to which indirect client.

(13) A client providing indirect clearing services should present the indirect client with a choice of account structures. It is however possible that an indirect client has not instructed a client of its choice within a reasonable period of time. In that case, that client should be able to provide indirect clearing services to that indirect client by using any account structure, provided that the client informs the indirect client of the account structure used, the risks associated to that account and its level of segregation, and the possibility to change the account structure at any time.

(14) Indirect clearing arrangements may give rise to specific risks. It is therefore necessary that all the parties participating in indirect clearing arrangements, including clearing members and CCPs, identify, monitor and manage any material risks arising from those arrangements on an ongoing basis. Appropriate sharing of information between clients and clearing members is especially important for those purposes. Clearing members should however ensure that that information is only used for risk management and margining purposes and that commercially sensitive information is not misused.

(15) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions of this Regulation and the provisions adopted pursuant to Article 30(2) of Regulation (EU) No 600/2014[(3)] apply from the same date.

(16) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

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(17) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[4], ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010.

(18) Commission Delegated Regulation (EU) No 149/2013[5] should therefore be amended.

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Commission Delegated Regulation (EU) No 149/2013

Commission Delegated Regulation (EU) No 149/2013 is amended as follows:

(1) In Article 1, point (b) is replaced by the following:

(b) 'indirect clearing arrangements' means the set of contractual relationships between providers and recipients of indirect clearing services provided by a client, an indirect client or a second indirect client;.

(2) In Article 1, the following point (d) and (e) are inserted:

(d) 'second indirect client' means a client of an indirect client;

(e) 'third indirect client' means a client of a second indirect client..

(3) Article 2 is replaced by the following:

Article 2

Requirements for the provision of indirect clearing services by clients

1 A client may only provide indirect clearing services to indirect clients provided that all of the following conditions are fulfilled:

a the client is an authorised credit institution or investment firm or an entity established in a third country that would be considered to be a credit institution or investment firm if that entity were established in the Union;

b the client provides indirect clearing services on reasonable commercial terms and publicly discloses the general terms and conditions under which it provides those services;

c the clearing member has agreed to the general terms and conditions referred to in point (b) of this paragraph.

2 The client referred to in paragraph 1 and the indirect client shall conclude, in writing, an indirect clearing arrangement. The indirect clearing arrangement shall include at least the following contractual terms:

a the general terms and conditions referred to in paragraph 1(b);

b the client's commitment to honour all obligations of the indirect client towards the clearing member with regard to the transactions covered by the indirect clearing arrangement.

All aspects of the indirect clearing arrangement shall be clearly documented.

3 A CCP shall not prevent the conclusion of indirect clearing arrangements that are entered into on reasonable commercial terms..

(4) Article 3 is replaced by the following:

Article 3

Obligations of CCPs

1 A CCP shall open and maintain any of the accounts referred to in Article 4(4) in accordance with the request of the clearing member.

2 A CCP that holds the assets and positions of several indirect clients in an account as referred to in Article 4(4)(b) shall keep separate records of the positions of each indirect client, calculate the margins in respect of each indirect client and collect the sum of those margins on a gross basis, based on the information referred to in Article 4(3).

3 A CCP shall identify, monitor and manage any material risks arising from the provision of indirect clearing services that could affect the resilience of the CCP to adverse market developments..

(5) Article 4 is replaced by the following:

Article 4

Obligations of clearing members

1 A clearing member that provides indirect clearing services shall do so on reasonable commercial terms and shall publicly disclose the general terms and conditions under which it provides those services.

The general terms and conditions referred to in the first subparagraph shall include the minimum financial resources and operational capacity requirements for clients that provide indirect clearing services.

2 A clearing member that provides indirect clearing services shall open and maintain at least the following accounts in accordance with the request of the client:

a an omnibus account with the assets and positions held by that client for the account of its indirect clients;

b an omnibus account with the assets and positions held by that client for the account of its indirect clients, in which the clearing member shall ensure that the positions of an indirect client do not offset the positions of another indirect client and that the assets of an indirect client cannot be used to cover the positions of another indirect client.

3 A clearing member holding assets and positions for the account of several indirect clients in an account as referred to in paragraph 2(b) shall provide the CCP