Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2017/582. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details)EUR 2017 No. 582 may be subject to amendment by EU Exit Instruments made by both the Financial Conduct Authority and the Bank of England under powers set out in The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), regs. 2, 3, Sch. Pt. 5. These amendments are not currently available on legislation.gov.uk. Details of relevant amending instruments can be found on their website/s. (See end of Document for details) View outstanding changes*

Commission Delegated Regulation (EU) 2017/582 of 29 June 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2017/582

of 29 June 2016

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing

(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 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012[(1)], and in particular Article 29(3) thereof,

Whereas:

(1) In order to manage operational and other risks when transactions in cleared derivatives are submitted and accepted for clearing and to provide certainty to counterparties as soon as possible, it is important to determine whether a cleared derivative transaction will be accepted for clearing by a CCP at an early stage, and to the extent possible before the transaction is entered into, as well as the consequences of a CCP not accepting for clearing the derivative transaction submitted.

(2) In order to apply scalable technical solutions ensuring that transactions in cleared derivatives can be submitted and accepted for clearing as quickly as technologically practicable, the information needed by a trading venue and a CCP to perform their tasks should be pre-determined and clearly set in the documentation of the trading venue and the CCP.

(3) In order to appropriately price transactions in derivatives, counterparties take into account that centrally cleared transactions are subject to a different collateral regime than non-centrally cleared transactions, regardless of whether the transaction is cleared because it is mandated to be cleared or whether the transaction is cleared because the relevant parties have otherwise agreed for it to be cleared. Therefore, counterparties should benefit from having the same process and the same requirements for both mandatorily cleared and voluntarily cleared derivative transactions to ensure that cleared derivative transactions are submitted and accepted for clearing as soon as technologically practicable.

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(4) Where cleared derivative transactions are concluded on a trading venue, in order to identify before a transaction is entered into whether the transaction will be cleared by a CCP, the trading venue and the CCP should have rules to ensure that that transaction can be automatically cleared. Otherwise, the trading venue should provide the ability to clearing members of the CCP to check orders against the limits set for their clients.

(5) The time granted to a trading venue to process a cleared derivative transaction should be shorter for electronically traded cleared derivative transactions than for non-electronically traded cleared derivative transactions as the level of automated processing should be higher in the former case.

(6) A trading venue should send the information related to cleared derivative transactions to a CCP in a pre-agreed electronic format for both electronically traded and non-electronically traded cleared derivative transactions. Therefore, the time granted to a CCP to decide whether a cleared derivative transaction can be accepted for clearing should be the same for electronically traded and non-electronically traded cleared derivative transactions.

(7) The processing of cleared derivative transactions entered into on a bilateral basis is usually less automated than the processing of cleared derivative transactions concluded on a trading venue. Therefore, the time granted to counterparties to submit a cleared derivative transaction entered into on a bilateral basis to a CCP should be longer than the time granted for a cleared derivative transaction concluded on a trading venue.

(8) In order to manage the credit risks related to cleared derivative transactions that are entered into on a bilateral basis, a CCP should allow clearing members to review the transaction details of their clients and to decide whether to accept it. As the process between a CCP and a clearing member is usually automated, this process should require limited time.

(9) CCPs as well as clearing members manage credit risk associated to the build-up of current exposures resulting from the clearing of cleared derivatives. Typically, this includes the setting of limits by the CCP or the clearing member per counterparty in order to mitigate the associated exposure risk, which can result in new requests to clear certain cleared derivative transactions not being accepted by the clearing member or by the CCP. Ensuring that cleared derivative transactions are submitted to clearing as quickly as technologically practicable does not therefore imply that all cleared derivative transactions will be accepted for clearing in all circumstances. Where cleared derivative transactions are not accepted for clearing, counterparties should have clarity on the treatment of those transactions in order to hedge their risk.

(10) As the processing of a cleared derivative transaction concluded electronically on a trading venue and submitted for clearing to a CCP requires limited time, the time for the market to move, and for the value and the risk of the cleared derivative transaction to change, in between the order and the non-acceptance is also very limited. Since the damage potentially suffered by counterparties whose transactions are not accepted for clearing by the CCP is negligible, and in order to provide certainty to counterparties,

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cleared derivative transactions concluded electronically on a trading venue and not accepted for clearing by a CCP should be considered void.

(11) As the processing of cleared derivative transactions other than cleared derivative transactions concluded electronically on a trading venue usually takes a longer time, this period of time may be sufficiently long for the market to have moved, and for the value and the risk of the cleared derivative transaction to have changed significantly, in the meantime. Therefore, voiding the transaction might not be the appropriate treatment for all transactions non-accepted by the CCP. To provide certainty on the treatment of cleared derivative transactions other than cleared derivative transactions concluded electronically on a trading venue and not accepted by a CCP for clearing, the rules of the trading venue, and the contractual arrangements between the counterparties where appropriate, should clarify in advance how these transactions are to be treated.

(12) When a cleared derivative transaction is not accepted for clearing for reasons other than credit-risk related reasons such as technical or clerical problems arising from the transmission of inaccurate or incomplete information, the counterparties may still want to clear that derivative transaction. Where both counterparties agree to re-submit the transaction, provided that the transaction is resubmitted within a relatively short period of time from the first submission and that resubmission allows the investigation and the resolution of the reason why the transaction was not accepted for clearing, a second submission in the form of a new cleared derivative transaction with the same economic terms may be allowed as it still ensures proper management of operational or other non-credit related risks.

(13) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions laid down in this Regulation and the provisions laid down in Regulation (EU) No 600/2014 apply from the same date.

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

(15) 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 of the European Parliament and of the Council[(2)],

HAS ADOPTED THIS REGULATION:

Article 1

Arrangements to facilitate the transfer of information

1 A trading venue shall detail in its rules the information it needs from counterparties to a cleared derivative transaction in order to submit that transaction to a CCP for clearing, and the format in which that information shall be provided.

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2 A CCP shall detail in its rules the information it needs from counterparties to a cleared derivative transaction and from trading venues in order to clear that transaction, and the format in which that information shall be provided.

Article 2

Pre-trade check for cleared derivative transactions concluded on a trading venue

1 Trading venues and clearing members shall subject orders for the conclusion of cleared derivative transactions on a trading venue to the requirements set out in paragraphs 2, 3 and 4, except where all the conditions set out in points (a), (b) and (c) of this paragraph are satisfied:

a the rules of the trading venue require that each member or participant of the trading venue, which is not a clearing member of a CCP through which the cleared derivative transaction is cleared, has a contractual arrangement with a clearing member of the CCP under which the clearing member automatically becomes counterparty to the cleared derivative transaction;

b the rules of the CCP provide that the cleared derivative transaction concluded on a trading venue is cleared automatically and immediately, with the clearing member referred to in point (a) becoming the counterparty to the CCP;

c the rules of the trading venue provide that the member or participant of the trading venue or its client becomes counterparty to the cleared derivative transaction, after the cleared derivative transaction is cleared, pursuant to direct or indirect clearing arrangements entered into with the clearing member.

2 A trading venue shall provide tools to ensure pre-conclusion screening on an order-by-order basis by each clearing member of the limits set and maintained by that clearing member for its client pursuant to Commission Delegated Regulation (EU) 2017/589[(3)].

3 A trading venue shall ensure before the conclusion of the order that the order of the client is within the limits applicable to this client in accordance with paragraph 2:

a within 60 seconds from the receipt of the order when the order is entered into electronically;

b within 10 minutes from the receipt of the order when the order is not entered into electronically.

4 When the order is not within the limits applicable to the client in accordance with paragraph 2, the trading venue shall inform the client and the clearing member that the order cannot be concluded in accordance with the following timelines:

a where the order is entered into electronically, on a real-time basis;

b where the order is not entered into electronically, within 5 minutes as from the moment when the order was checked against the applicable limits.

Article 3

Time frames for the transfer of information for cleared derivative transactions concluded on a trading venue

1 The trading venue, the CCP and the clearing member shall be subject to the requirements set out in paragraphs 2 to 5 of this Article except where all the conditions set out in points (a), (b) and (c) of Article 2(1) are met.