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Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2016/908

of 26 February 2016

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance

(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 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[(1)], and in particular the third subparagraph of Article 13(7) thereof,

Whereas:

(1) The specification of common criteria, procedures and requirements should contribute to the development of uniform arrangements in the sphere of accepted market practices (AMPs), improve the clarity of the legal regime under which these practices are permitted and promote fair and efficient conduct among market participants. It should further serve to reinforce the orderly functioning of the market and market integrity.

(2) To ensure that AMPs do not undermine innovation and the continued dynamic development of financial markets, new or emerging market trends that could result in novel market practices should not automatically be assumed to be unacceptable by competent authorities. Rather, those competent authorities should assess whether such market practices comply with the criteria set out in this Regulation and in Regulation (EU) No 596/2014.

(3) AMPs should be conducted in a manner that ensures market integrity and investor protection without creating risks for other market participants and other related markets. Consequently, due regard should be given to transparency and the conditions governing the market practices proposed for designation as AMPs. When assessing the level of transparency of market practices proposed as AMPs both to the public and to the competent authorities, competent authorities should consider the various stages of

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the performance of the potential AMPs. Consequently, it is also appropriate to lay down specific transparency requirements for those stages, namely before the AMP is performed by market participants, during its performance and when the market participants cease to perform the AMP.

(4) Market practices that can be established by competent authorities as AMPs can be different in type and nature. When establishing a market practice as an AMP, a competent authority should assess the frequency of the disclosure required from all the persons who will perform it to ensure it is adapted and appropriate to the market practice under consideration. The frequency of disclosure should achieve a balance between the need to inform the public and to provide the competent authority with information for the on-going monitoring and the burden to periodically disclose information by those performing the AMP. Moreover, when assessing a market practice that may be performed outside a trading venue, competent authorities should consider whether the requirement for a substantial level of transparency to the market is met.

(5) Competent authorities that have accepted a market practice should ensure it is monitored adequately with due care and attention. Therefore, persons performing the market practice should be required to keep sufficient records of all transactions and orders undertaken so as to enable competent authorities to fulfil their supervisory functions and to carry out the enforcement actions provided for in Regulation (EU) No 596/2014. It is also of paramount importance that their activity of performing the market practice can be distinguished from the other trading activities they conduct on their own account or on the account of clients. This may be achieved through the maintenance of separate accounts.

(6) The status of the entity performing the accepted market practice is a particular element to be considered, especially when that entity is acting on behalf of or on the account of another person who is the direct beneficiary of the market practice. Competent authorities should assess whether being a supervised person is relevant for the acceptance of the particular market practice under consideration.

(7) When assessing the impact of market practices proposed for designation as AMPs on market liquidity and efficiency, competent authorities should consider the objective of the market practices, for instance, whether, in a particular circumstance, the objective of the market practices is to promote regular trading of illiquid financial instruments, to avoid abusive squeezes, or to provide quotes when there is a risk of not having counterparties for a trade or to facilitate orderly operations where a participant has a dominant position. In relation to price, such objectives could also seek to minimize price fluctuations due to excessive spreads and limited supply or demand of a financial instrument without compromising a market trend, to provide transparency of prices or to facilitate fair evaluation of prices in markets where most trades are conducted outside a trading venue.

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

(9) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is

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based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of that Regulation (EU) No 1095/2010 of the European Parliament and of the Council[2].

(10) In order to ensure the smooth functioning of the financial markets, it is necessary that this Regulation enters into force as a matter of urgency and that the provisions laid down in this Regulation apply from the same date as those laid down in Regulation (EU) No 596/2014,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISION

Article 1

Definitions

For the purposes of this Regulation, 'supervised persons' means any of the following:

(a) investment firms authorised under Directive 2014/65/EU of the European Parliament and of the Council[3];

(b) credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council[4];

(c) financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 of the European Parliament and of the Council[5];

(d) any person subject to authorisation, organisational requirements and supervision by 'competent financial authority' or 'national regulatory authority' as defined in Regulation (EU) No 1227/2011 of the European Parliament and of the Council[6];

(e) any person subject to authorisation, organisational requirements and supervision by competent authorities, regulators or agencies responsible for commodities spot or derivatives markets;

(f) operators with compliance obligations under Directive 2003/87/EC of the European Parliament and of the Council[7] establishing a scheme for greenhouse gas emission allowance trading.

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CHAPTER II

ACCEPTED MARKET PRACTICES

SECTION 1

Establishing an accepted market practice

Article 2

General requirements

1 Prior to establishing a market practice as an accepted market practice (AMP) competent authorities shall:

a evaluate the market practice against each of the criteria set out in Article 13(2) of Regulation (EU) No 596/2014 and specified further in Section 2 of this Chapter;

b consult as appropriate with relevant bodies including, at a minimum, representatives of issuers, investment firms, credit institutions, investors, emission allowance market participants, market operators operating a multilateral trading facility (MTF) or an organised trading facility (OTF) and operators of a regulated market, and other authorities on the appropriateness of establishing a market practice as an AMP.

2 Competent authorities intending to establish a market practice as an AMP shall notify ESMA and the other competent authorities of that intention in accordance with the procedure laid down in Section 3, using the template set out in the Annex.

3 Where competent authorities establish a market practice as an AMP in accordance with Article 13 of Regulation (EU) No 596/2014 and with this Regulation, they shall publicly disclose on their website the decision establishing the market practice as an AMP and a description of the AMP concerned, in accordance with the template set out in the Annex including the following information:

a a description of the types of persons who may perform the AMP;

b a description of the types of person or a group of persons who may benefit from the performance of the AMP, either by performing it directly or through the appointment of another person performing the AMP ('beneficiary');

c a description of the type of financial instrument to which the AMP relates;

d an indication of whether the AMP can be performed for a specified period of time and a description of situations or conditions leading to a temporary interruption, suspension or termination of the practice.

The persons referred to in point (a) of the first subparagraph shall be responsible for any trading decision, including, the submission of an order, the cancellation or modification of an order, and conclusion of a transaction or for the trading execution in relation with the AMP.

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Specification of the criteria to consider when establishing accepted market practices

Article 3

Transparency

1 In determining whether a market practice can be established as an AMP and whether it fulfils the criterion set out in point (a) of Article 13(2) of Regulation (EU) No 596/2014, competent authorities shall examine whether the market practice ensures that the following information will be disclosed to the public:

a before a market practice is performed as an AMP:

(i) the identities of the beneficiaries and the persons who will perform it and the one among them that is responsible to fulfil the transparency requirements under points (b) and (c) of this paragraph;

(ii) the identification of the financial instruments in relation to which the AMP will apply;

(iii) the period during which the AMP will be performed and situations or conditions leading to the temporary interruption, suspension or termination of its performance;

(iv) the identification of the trading venues on which the AMP will be carried out, and, where applicable, indication of the possibility to execute transactions outside a trading venue;

(v) reference to the maximum amounts of cash and of the number of financial instruments allocated to the performance of the AMP, if applicable.

b once the market practice is performed as an AMP:

(i) on a periodic basis, details of the trading activity relating to the performance of the AMP such as the number of transactions executed, volume traded, average size of the transactions and average spreads quoted, prices of executed transactions;

(ii) any changes to previously disclosed information on the AMP, including changes relating to available resources in terms of cash and financial instruments, changes to the identity of persons performing the AMP, and any change in the allocation of cash or financial instruments in the accounts of the beneficiary and the persons performing the AMP.

c when the market practice ceases to be performed as an AMP on the initiative of the person who has been performing it, of the beneficiary or of both:

(i) the fact that the performance of the AMP has ceased;

(ii) a description of how the AMP has been performed;

(iii) the reasons or causes for ceasing the performance of the AMP.

For the purposes of point (b)(i), where multiple transactions in a single trading session are performed, daily aggregated figures may be acceptable in relation to the appropriate categories of information.