Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) No 285/2014. 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 2014 No. 285 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) No 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 285/2014

of 13 February 2014

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations

(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 4(4) and point (e) of Article 11(14) thereof,

Whereas:

(1) Given the broad variety of OTC derivative contracts, in order to determine when an OTC derivative contract may be considered to have a direct, substantial and foreseeable effect within the Union and cases where it is necessary or appropriate to prevent the evasion of rules and obligations arising from any provision of Regulation (EU) No 648/2012, a criteria based approach should be adopted.

(2) Given that pursuant to Article 13(3) of Regulation (EU) No 648/2012, the provisions of that Regulation would be deemed fulfilled when at least one of the counterparties is established in a country for which the Commission has adopted an implementing act declaring equivalence in accordance with Article 13(2) of Regulation (EU) No 648/2012, these regulatory technical standards should apply to contracts where both counterparties are established in a third country whose legal, supervisory and enforcement arrangements have not yet been declared equivalent to the requirements laid down in that Regulation.

(3) Certain information on contracts concluded by third country entities would still only be available to third country competent authorities. Therefore Union competent authorities should closely cooperate with those authorities in order to ensure that the relevant provisions are applied and enforced.

(4) Given that a technical term is necessary for a comprehensive understanding of the appropriate technical standards, this term should be defined.

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(5) OTC derivative contracts concluded by entities established in third countries covered by a guarantee provided by entities established in the Union create a financial risk for the guarantor established in the Union. Furthermore, given that the risk would depend on the size of the guarantee granted by financial counterparties in order to cover OTC derivative contracts and given the interconnections between financial counterparties compared to non-financial counterparties, only OTC derivative contracts concluded by entities established in third countries that are covered by a guarantee which exceeds certain quantitative thresholds and is provided by financial counterparties established in the Union should be considered as having a direct, substantial and foreseeable effect in the Union.

(6) Financial counterparties established in third countries can enter into OTC derivative contracts through their Union branches. Given the impact of the activity of those branches on the Union market, OTC derivative contracts concluded between those Union branches should be considered to have a direct, substantial and foreseeable effect within the Union.

(7) OTC derivative contracts that are entered into by specific counterparties with the primary purpose of avoiding the application of the clearing obligation or of the risk mitigation techniques applicable to entities that would have been the natural counterparties to the contract, should be considered as evading the rules and obligations laid down in Regulation (EU) No 648/2012 as they hinder the achievement of a purpose of that Regulation, namely mitigating counterparty credit risk.

(8) OTC derivative contracts that are part of an arrangement whose characteristics are not supported by a business rationale or commercial substance and has as its primary purpose the circumvention of the application of Regulation (EU) No 648/2012, including rules relating to the conditions of an exemption, should be considered as evading the rules and obligations laid down in that Regulation.

(9) Situations where the individual components of the arrangement are inconsistent with the legal substance of the arrangement as a whole, where the arrangement is carried out in a manner which would not ordinarily be used in what is expected to be reasonable business conduct, where the arrangement or series of arrangements includes elements that have the effect of offsetting or nullifying their reciprocal economic substance, where transactions are circular in nature, should be considered as indicators of an artificial arrangement or an artificial series of arrangements.

(10) It is desirable to provide technical standards related to contracts that have a direct, substantial and foreseeable effect within the Union as well as technical standards related to the prevention of evasion of rules and obligations provided for in Regulation (EU) No 648/2012 in a single instrument since both sets of technical standards relate to the clearing obligation and the risk mitigation techniques. Furthermore, they share common features such as their application to a contract whose counterparties would not be subject to the clearing obligation or to the risk mitigation techniques if the conditions of Article 4(1)(a)(v) and Article 11(14)(e) of Regulation (EU) No 648/2012 specified further by this Regulation were not met.

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(11) Given that third country entities affected by these regulatory technical standards require time in order to arrange for compliance with the requirements of Regulation (EU) No 648/2012 when their OTC derivative contracts fulfil the conditions set out in these regulatory technical standards for being considered to have a direct, substantial and foreseeable effect within the Union, it is appropriate to delay the application of the provision containing those conditions by six months.

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

(13) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(2)], the European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of that Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation the following definition shall apply:

'guarantee' means an explicitly documented legal obligation by a guarantor to cover payments of the amounts due or that may become due pursuant to the OTC derivative contracts covered by that guarantee and entered into by the guaranteed entity to the beneficiary where there is a default as defined in the guarantee or where no payment has been effected by the guaranteed entity.

Article 2

Contracts with a direct, substantial and foreseeable effect within the Union

1 An OTC derivative contract shall be considered as having a direct, substantial and foreseeable effect within the Union when at least one third country entity benefits from a guarantee provided by a financial counterparty established in the Union which covers all or part of its liability resulting from that OTC derivative contract, to the extent that the guarantee meets both of the following conditions:

a it covers the entire liability of a third country entity resulting from one or more OTC derivative contracts for an aggregated notional amount of at least EUR 8 billion or the equivalent amount in the relevant foreign currency, or it covers only a part of the liability of a third country entity resulting from one or more OTC derivative contracts for an aggregated notional amount of at least EUR 8 billion or the equivalent amount in the relevant foreign currency divided by the percentage of the liability covered;

b it is at least equal to 5 per cent of the sum of current exposures, as defined in Article 272, point (17) of Regulation (EU) No 575/2013 of the European Parliament and of the Council[(3)], in OTC derivative contracts of the financial counterparty established in the Union issuing the guarantee.