Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 946/2012

of 12 July 2012

supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[(1)], as amended by Regulation (EU) No 513/2011[(2)], and in particular Article 23e(7) thereof,

Whereas:

(1) The Commission has been empowered to adopt rules of procedure for the exercise of the power to impose fines or periodic penalty payments by the European Securities and Markets Authority (ESMA) upon credit rating agencies and persons involved in rating activities. Those rules are to be adopted via delegated act and they should include provisions on rights of defence, temporal provisions, provisions on the collection of fines or periodic penalty payments, as well as detailed provisions on the limitation periods for the imposition and enforcement of fines and periodic penalty payments.

(2) This delegated act specifies rules of procedures to be followed by ESMA when imposing fines and penalty payments as part of its direct supervisory power over credit rating agencies. It is important that such rules of procedure to be followed by an EU regulatory agency are directly applicable and do not require further implementation in national law. Therefore, it is appropriate that the Commission adopts these rules by means of an EU Regulation. Furthermore the objective of having uniform rules on rights of defence for credit rating agencies can only be achieved via Regulation.

(3) The right to be heard is recognised in point (a) of Article 41(2) of the Charter of Fundamental Rights. In order to respect the rights of defence of credit rating agencies and of other persons subject to action by the European Securities and Markets Authority (ESMA) and to ensure that it takes all relevant facts into account when adopting enforcement decisions, ESMA should hear the credit rating agencies or any other persons concerned. The right to be heard should take place by granting the persons

Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) No 946/2012. 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) View outstanding changes*

concerned the right to make written submissions in response to statements of findings issued by ESMA's investigating officer and ESMA's Board of Supervisors.

(4) Following the written submissions by the credit rating agency to the investigating officer, the Board of Supervisors will receive a complete file, including those submissions.

(5) However, it may occur that some elements of the written submissions that the credit rating agency made to the investigating officer or, the case being, to the Board of Supervisors, are not sufficiently clear or detailed, and that they need to be further explained by the credit rating agency. Should the investigating officer or, the case being, the Board of Supervisors, consider that this is the case, ESMA may convoke an oral hearing for the credit rating agency to clarify those elements.

(6) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy is recognised in point (b) of Article 41(2) of the Charter of Fundamental Rights of the European Union. Articles 23e(4), 25(2) and Article 36c(2) of Regulation (EC) No 1060/2009 establish that, safeguard rights of defence of persons subject to the ESMA proceedings, they shall be entitled to have access to ESMA's file, subject to the legitimate interest of other persons in protecting their business secrets and of their personal data. The right of access to the file should not extend to confidential information.

(7) Council Regulation (EC) No 1/2003[(3)] lays down detailed rules on limitation periods for when the Commission has to fine an undertaking under Article 101 or 102 of the Treaty on the Functioning of the European Union. Legislation in force in Member States also provides for rules on limitation periods either specifically within the securities field, or generally in their general administrative laws. Common features have been extracted from those national rules and from Union legislation and are mainly reflected in Articles 6 and 7 of this Regulation.

(8) Regulation (EC) No 1060/2009 and this Regulation refer to time periods and dates. This is the case, for instance, for the registration process of credit rating agencies, or when establishing limitation periods for the imposition and enforcement of penalties. To enable those periods to be correctly calculated, it is appropriate to apply rules which already exist within Union legislation, namely, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits[(4)] for acts of the Council and the Commission.

(9) Article 36d of Regulation (EC) No 1060/2009 provides that penalties imposed by ESMA pursuant to Articles 36a and 36b of that Regulation shall be enforceable, and that enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The corresponding amounts shall be allocated to the general budget of the EU.

(10) In the interest of an immediate exercise of effective supervisory and enforcement activity, this Regulation should enter into force on the third day following that of its publication,

HAS ADOPTED THIS REGULATION:

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Article 1

Subject matter

This Regulation lays down procedural rules regarding fines and periodic penalty payments to be imposed by the European Securities and Markets Authority (ESMA) on credit rating agencies or other persons that are subject to ESMA's enforcement proceedings, including rules on rights of defence and limitation periods.

Article 2

Right to be heard by the investigating officer

1 Upon completion of his/her investigations and before submitting the file to ESMA's Board of Supervisors pursuant to Article 3(1), the investigating officer shall inform the person subject to investigation in writing of his/her findings and shall provide it with the opportunity to make written submissions pursuant to paragraph 3. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009, including any aggravating or mitigating factors of these infringements.

2 The statement of findings shall set a reasonable time limit within which the person subject to investigation may make its written submissions. The investigating officer shall not be obliged to take into account written submissions received after that time limit has expired.

3 In its written submissions, the person subject to investigation may set out all the facts known to it which are relevant to its defence. It shall attach any relevant documents as proof of the facts set out. It may propose that the investigating officer hear other persons who may corroborate the facts set out in the submissions of the person subject to investigation.

4 The investigating officer may also invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by the investigating officer. Oral hearings shall not be held in public.

Article 3

Right to be heard by ESMA's Board of Supervisors with regard to fines and supervisory measures

1 The complete file to be submitted by the investigating officer to ESMA's Board of Supervisors shall include at least the following documents:

— copy of the statement of findings that he addressed to the credit rating agency,

— copy of the written submissions by the credit rating agency,

— minutes of any oral hearing.

2 Where ESMA's Board of Supervisors considers that the file submitted by the investigating officer is not complete, it shall send back the file to the investigating officer with reasoned request for additional documents.

3 Where ESMA's Board of Supervisors considers, on the basis of a complete file, that the facts, described in the statement of findings, appear not to disclose any possible infringement

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of the ones listed in Annex III to Regulation (EC) No 1060/2009, it shall take a decision to close the case and it shall notify such a decision to the persons subject to investigation.

4 Where ESMA's Board of Supervisors does not agree with the findings of the investigating officer it shall submit a new statement of findings to the persons subject to investigation.

The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions. ESMA's Board of Supervisors shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 24 and 36a of Regulation (EC) No 1060/2009.

ESMA's Board of Supervisors may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors. Oral hearings shall not be held in public.

5 Where ESMA's Board of Supervisors agrees with the findings of the investigating officer it shall inform the persons subject to investigation accordingly. Such communication shall set a reasonable time limit within which the person subject to investigation may make written submissions. ESMA's Board of Supervisors shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 24 and 36a of Regulation (EC) No 1060/2009.

ESMA's Board of Supervisors may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors. Oral hearings shall not be held in public.

6 If ESMA's Board of Supervisors has decided that one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 36a, it shall notify immediately such decision to the person subject to investigation.

Article 4

Right to be heard by ESMA's Board of Supervisors with regard to periodic penalty payments

Before taking a decision imposing a periodic penalty payment according to Article 36b(1) of Regulation (EC) No 1060/2009, the Board of Supervisors shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a penalty payment and the amount of the penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person concerned may make written submissions. The Board of Supervisor shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

Once the credit rating agency or person concerned has complied with the relevant decision referred to in paragraphs (a) to (d) of Article 36b(1) of Regulation (EC) No 1060/2009, a periodic penalty payment can no longer be imposed.