Commission Implementing Decision (EU) 2019/1279 of 29 July 2019 on the recognition of the legal and supervisory framework of the United States of America as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2019/1279

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(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)], and in particular Article 5(6) thereof,

Whereas:

(1) Article 5(6) of Regulation (EC) No 1060/2009 empowers the Commission to adopt an equivalence decision where the legal and supervisory framework of a third country ensures that credit rating agencies ('CRAs') authorised or registered in that third country comply with legally binding requirements set out in that Regulation and which are subject to effective supervision and enforcement in that third country.

(2) The purpose of this equivalence decision is to allow CRAs from the United States (US), as far as they are not systemically important for the financial stability or integrity of the financial markets of one or more Member States, to apply for certification with the European Securities and Market Authority ('ESMA'). This equivalence decision offers the possibility for ESMA to assess those CRAs on a case-by-case basis and to grant an exemption from some of the organisational requirements for CRAs active in the European Union, including the requirement of a physical presence in the European Union.

(3) In order to be considered as equivalent the legal and supervisory framework of a third country is to fulfil at a minimum the three conditions set out in Article 5(6) of Regulation (EC) No 1060/2009.

(4) On 5 October 2012, the Commission adopted Implementing Decision 2012/628/EU[(2)], observing these three conditions are fulfilled and considering the US legal and supervisory framework for CRAs as equivalent to the requirements of Regulation (EC) No 1060/2009 in force at that time.

(5) According to the first condition laid down in Article 5(6) of Regulation (EC) No 1060/2009, CRAs in a third country must be subject to authorisation or registration

Changes to legislation: *There are currently no known outstanding effects for the Commission Implementing Decision (EU) 2019/1279. (See end of Document for details)*

and must be also subject to effective supervision and enforcement on an ongoing basis. The US legal and supervisory framework requires CRAs to register as Nationally Recognized Statistical Ratings Organizations (NRSRO) with the Securities and Exchange Commission (SEC) in order to allow the use of their ratings for regulatory purposes. They are subsequently supervised by the SEC on an ongoing basis. The SEC is endowed with a comprehensive range of supervisory powers allowing it to investigate whether credit rating agencies comply with their legal obligations. Those powers include the power to access documents, to conduct investigations and to carry out on-site inspections, as well as the power to require access to records of telephone recordings and electronic communication. The SEC can exercise these powers not only in respect of credit rating agencies, but also in respect of other persons involved in credit rating activities. The US legal and supervisory framework requires the SEC to conduct an examination of each NRSRO at least annually and to report on the findings of these examinations. Where the SEC has established that an NRSRO is in breach of any obligation arising from the relevant rules, it may adopt a wide range of supervisory measures in order to stop the infringement. Those measures include the power to withdraw the registration, to suspend the use of ratings for regulatory purposes and to order the credit rating agencies to stop the infringement. The SEC can also impose severe penalties on credit rating agencies for breaches of the relevant requirements. Therefore, NRSROs are subject to effective supervision and enforcement on an ongoing basis. The cooperation agreement concluded between ESMA and the SEC provides for information exchange with regard to enforcement and supervisory measures taken against cross border CRAs.

(6) According to the second condition laid down in Article 5(6) of Regulation (EC) No 1060/2009, CRAs in a third country must be subject to legally binding rules which are equivalent to those set out set out in Articles 6 to 12 of Regulation (EC) No 1060/2009 and Annex I to that Regulation. The US legal and supervisory framework is considered as equivalent to the CRA Regulation in respect of the management of conflicts of interest, the organisational processes and procedures, that a credit rating agency needs to have in place, the quality of ratings and of rating methodologies, the disclosure of credit ratings and the general and periodic disclosure of credit rating activities. Therefore, the US legal and supervisory framework provides for equivalent protection in terms of integrity, transparency, good governance of credit rating agencies and reliability of the credit rating activities.

(7) According to the third condition laid down in Article 5(6) of Regulation (EC) No 1060/2009, the regulatory regime in a third country must prevent interference by supervisory authorities and other public authorities of that third country with the content of credit ratings and methodologies. In this respect, the SEC and any other public authority in the US are prohibited by law from interfering with the substance of credit ratings and credit rating methodologies.

(8) The US legal and supervisory framework still fulfils the three conditions originally laid down in Article 5(6) of Regulation (EC) No 1060/2009. However, Regulation (EU) No 462/2013 of the European Parliament and of the Council[3] introduced additional requirements for CRAs registered in the Union making the legal and supervisory regime

for those CRAs more stringent. These additional requirements include legally binding rules for CRAs on rating outlooks, conflicts of interest management, confidentiality requirements, changes to ratings methodologies, and the presentation and disclosure of credit ratings.

(9) Pursuant to point (1)(b) of the second paragraph of Article 2 of Regulation (EU) No 462/2013, the additional requirements apply for the purposes of assessing the equivalence of third country legal and supervisory frameworks from 1 June 2018.

(10) Against this background, on 13 July 2017 the Commission requested advice to the European Securities and Market Authority ('ESMA') on the equivalence of the legal and supervisory framework of *inter alia* the US with these additional requirements introduced by Regulation (EU) No 462/2013 and its judgement on the material importance of any differences.

(11) In its technical advice published on 17 November 2017, ESMA indicated that the US legal and supervisory framework in relation to CRAs includes sufficient provisions to meet the additional requirements introduced by Regulation (EU) No 462/2013.

(12) Regulation (EU) No 462/2013 introduces in Article 3(1)w a definition of a rating outlook and Regulation (EC) No 1060/2009 now extends certain requirements applicable to credit ratings to rating outlooks. The US legal and supervisory framework recognises rating watches, which are a type of rating outlook within the meaning of Regulation (EC) No 1060/2009, as being included within its scope.

(13) With a view to enhancing the perception of independence of credit rating agencies vis-à-vis the rated entities, Regulation (EU) No 462/2013 extends in Article 6(4), 6a and 6b of Regulation (EC) No 1060/2009 the rules on conflicts of interest to those caused by shareholders or members holding a significant position within the CRA. Similarly, the US legal and supervisory framework includes provisions to provide protection in a situation where shareholders of a NRSRO could create conflicts of interests for CRAs.

(14) Regulation (EU) No 462/2013 introduces new provisions to ensure that confidential information is only used for purposes related to credit rating activities and is protected from fraud, theft or misuse. To that effect, Article 10(2a) of Regulation (EC) No 1060/2009 requires CRAs to treat all credit ratings, rating outlooks and information relating thereto as inside information up until the point of disclosure. The US legal and supervisory framework recognises that a non-published rating action may constitute inside information. A NRSRO must have policies and procedures to avoid selective and inappropriate disclosure of material non-public information obtained in connection with the performance of credit rating services. There is thus a credible framework in place to protect against the misuse of confidential information.

(15) Regulation (EU) No 462/2013 aims to increase the level of transparency and quality of rating methodologies. It introduces in Annex I, Section D, Subsection I paragraph 3 of Regulation (EC) No 1060/2009 an obligation for CRAs to provide a rated entity with the opportunity to indicate any possible factual errors ahead before publication of the credit rating or the rating outlook. The US legal and supervisory framework does not have the same requirement, but a NRSRO shall have procedures for informing rated