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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 19 December 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: COMMISSION DELEGATED REGULATION (EU) No .../.. of 19.12.2012
supplementing Regulation (EU) No 648/2012 of the European Parliament and
of the Council with regard to regulatory technical standards on capital
requirements for central counterparties

Delegations will find attached Commission document C(2012) 9614 final.

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Brussels, 19.12.2012
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COMMISSION DELEGATED REGULATION (EU) No .../..

of 19.12.2012

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on capital requirements for central counterparties

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 16 (3) of Regulation (EU) No 648/2012 ('the Regulation') empowers the Commission to adopt, following submission of draft standards by the European Banking Authority (EBA), and in accordance with Article 10 of Regulation No (EU) 1093/2010, delegated acts on regulatory technical standard specifying requirements regarding the capital, retained earnings and reserves of a CCP referred to in paragraph 16 (2).

In accordance with Articles 10 to 15 of Regulation No (EU) 1095/2010 establishing the EBA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 16(3) of Regulation No (EU) 648/2012. A consultation paper was published on the EBA internet site on 15 June 2012, and the consultation closed on 31 July 2012. Moreover, the EBA worked in close cooperation with the ESCB, consulted the ESMA and the ESCB on the draft RTS and invited the EBA's Banking Stakeholder Group set up in accordance with Article 37 of Regulation No (EU) 1093/2010 to provide advice on them. Together with the draft technical standards, the EBA has submitted an explanation how the outcome of these consultations have been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has submitted an analysis of the costs and benefits related to the draft technical standards submitted to the Commission.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

According to the Regulation, the capital of a CCP, including retained earnings and reserves, should be at all times at least equal to the sum of:

1. the CCP's gross operational expenses during an appropriate time span for winding down or restructuring its activities;
2. the capital necessary to cover the overall operational and legal risks;
3. the capital necessary to cover credit, counterparty credit and market risks 'not covered' by specific financial resources; and
4. business risk.

Article 1 specifies the components of the capital requirements and introduces a notification threshold.

Articles 2 and 5 require that a CCP provides its own estimate on the time span necessary to wind-down and restructure its activities and to estimate the level of capital necessary to cover business risk.

Article 3 requires the use of the Basic Indicator Approach or the use of Advanced Measurements Approaches for calculating operational risk. Legal risk is already captured by these two methodologies.

Capital requirements for non covered credit, counterparty credit and market risks are set in Article 4 in line with the methodologies of Directives (EU) No 2006/48/EC and (EU) No 2006/49/EC.

Article 6 specifies the entry into force of this Regulation and its applicability to all the Member States.

COMMISSION DELEGATED REGULATION (EU) No .../..

of 19.12.2012

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on capital requirements for central counterparties

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to the opinion of the European Central Bank¹,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on over the counter (OTC) derivatives transactions, central counterparties and trade repositories², and in particular Article 16 (3) thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 establishes, among other matters, prudential requirements for central counterparties (CCPs) to ensure that they are safe and sound and comply at all times with the capital requirements. Given that to a great extent risks stemming from clearing activities are covered by specific financial resources, such capital requirements should ensure that a CCP is at all times adequately capitalised against credit risks, counterparty risks, market risks, operational risks, legal and business risks which are not already covered by those specific financial resources and that it is able to conduct an orderly winding down or restructuring of its operations if necessary.
- (2) The capital treatment of credit institutions and investment firms should be specifically taken into account in respect of technical standards because CCPs are exposed, while performing non covered activities, to risks that are similar to the risks incurred by credit institutions and investment firms. Relevant parts of the Principles for Financial Market Infrastructure issued by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions ('CPSS-IOSCO Principles') should also be taken into account. In order to ensure that they are able to organise an orderly winding down or restructuring of their activities, CCPs should hold sufficient financial resources to withstand operational expenses over an appropriate period of time. A CCP should be able during such a period of time to set up any kind of arrangement in order to reorganise its critical operations, including recapitalising, replacing management, revising its business strategies, cost or fee

¹ OJ C X, xx.xx.201x, p.xx

² OJ L 201, 27.7.2012, p.1

structures, restructuring the services it provides, liquidating its clearing portfolio or merging with - or transferring its clearing activities to - another CCP. During the winding down or restructuring a CCP still needs to continue its operations. While in this case some costs, such as marketing ones, may decrease, other costs, such as legal expenses, may increase. Therefore, using the gross annual operating expenses is deemed to be an appropriate approximation of the actual expenses during the winding down or restructuring of a CCPs' operations. In order to take into account the diversity of accounting practices among CCPs, the operational expenses should be considered in accordance with International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards³ or in accordance with a number of limited other rules applicable in the field, as indicated by Union law.

- (3) As the capital shall be at all times sufficient to ensure an orderly winding down and an adequate protection against the relevant risks as required by Article 16(2) of Regulation (EU) No 648/2012, it is necessary to establish an early warning tool to enable the competent authorities to gain knowledge sufficiently in advance of the situation in which the capital of the CCP is close to the capital requirement, by introducing a notification threshold set at 110% of the capital requirement.
- (4) Notwithstanding the difficulties in quantifying the exposure to operational risk, Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions⁴ is the relevant benchmark for the purpose of establishing the capital requirement for CCPs. Consistently with Directive 2006/48/EC, the definition of operational risk should include legal risk in respect of technical standards on capital requirements for central counterparties.
- (5) Directive 2006/48/EC and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions⁵ are an appropriate benchmark for the purpose of establishing capital requirements to cover credit, counterparty and market risks non covered by specific financial resources, since they are similar to those carried out by credit institutions or investment firms.
- (6) A CCP does not have to hold capital for trade exposures and default fund contributions which arise under an interoperability arrangement where the requirements of Articles 52 and 53 of Regulation (EU) No 648/2012 are fulfilled. However, where these requirements are not fulfilled, links between CCPs might expose them to additional risk if the collateral posted by them is not fully protected and bankruptcy remote or if the default fund contributions are at risk in case a clearing member of the receiving CCP defaults. Therefore, in such cases capital charges should apply to default fund contributions and to trade exposures with other CCPs. In order to avoid contagion effects, the treatment regarding default fund contributions to other CCPs should in general be more conservative than the treatment of credit institution exposures to CCPs. The own resources of a CCP used to contribute to the default fund of another CCP should not be taken into account for the purposes of Article 16(2) of Regulation (EU) No 648/2012 as they are not invested in accordance with its investment policy.

³ OJ L 243, 11.9.2002, p. 1.

⁴ OJ L 177, 30.6.2006, p.1.

⁵ OJ L 177, 30.6.2006, p.201

They should also not be double-counted for the purpose of calculating risk weighted exposures stemming from these contributions.

- (7) The time necessary for an orderly winding down is strictly dependent on the clearing services provided by the single CCP and on the market environment in which it operates, especially in the case where another CCP can take on its services. Therefore, the number of months required for winding down should be based on the CCP's own estimate, subject to the approval of the competent authority. A minimum number of six months needs to be introduced in order to ensure a prudent level of the capital requirements.
- (8) Business risk refers to the risk a CCP assumes due to its efficiency and potential changes in general business conditions which are likely to impair its financial position as a consequence of decline in its revenues or an increase in its expenses resulting in a loss that must be charged against its capital. Since the level of business risk is highly dependent on the individual situation of each CCP and can be caused by various factors such as inefficient procedures, adverse market environment, ineffective response to technological progress, or poor execution of business strategies, the capital requirement should be based on a CCP's own estimate subject to the approval of the competent authority. A floor needs to be introduced in order to ensure a prudent level of the capital requirements.
- (9) The European Banking Authority (EBA) has worked in close cooperation with the European System of Central Banks (ESCB) and has consulted the European Securities and Markets Authority (ESMA) before submitting the draft technical standards on which this Regulation is based. It has also conducted open public consultations on the draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (European Banking Authority) to the European Commission,

HAS ADOPTED THIS REGULATION:

Article 1

Capital requirements

1. A CCP shall hold capital, including retained earnings and reserves, which shall be at all times more than or equal to the sum of:
 - (a) the CCP's capital requirements for winding down or restructuring its activities calculated in accordance with Article 2;
 - (b) the CCP's capital requirements for operational and legal risks calculated in accordance with Article 3;
 - (c) the CCP's capital requirements for credit, counterparty and market risks calculated in accordance with Article 4;

- (d) the CCP's capital requirements for business risk calculated in accordance with Article 5.
- 2. A CCP shall have procedures in place to identify all sources of risks that may impact its on-going functions and shall consider the likelihood of potential adverse effects on its revenues or expenses and its level of capital.
- 3. If the amount of capital held by a CCP according to paragraph 1 is lower than 110% of the capital requirements or lower than 110% of EUR 7.5 million ('notification threshold'), the CCP shall immediately notify the competent authority and keep it updated at least weekly, until the amount of capital held by the CCP returns above the notification threshold.
- 4. That notification shall be made in writing and shall contain the following elements:
 - (a) the reasons for the CCP's capital being below the notification threshold and a description of the short-term perspective of the CCP's financial situation;
 - (b) a comprehensive description of the measures the CCP intends to adopt to ensure the on-going compliance with the capital requirements.

Article 2

Capital requirements for winding down or restructuring

- 1. A CCP shall divide its annual gross operational expenses by twelve in order to determine its monthly gross operational expenses, and multiply the resulting number by its time span for winding down or restructuring its activities determined according to paragraph 2. The result of this calculation is the capital required to ensure an orderly winding down or restructuring of the activities of the CCP.
- 2. In order to determine the time span for winding down or restructuring its activities referred to in paragraph 1, a CCP shall submit to the competent authority for approval in accordance with that competent authority's powers under Title III of Regulation (EU) No 648/2012 its own estimate of the appropriate time span for winding down or restructuring its activities. The estimated time span shall be sufficient to ensure, including in stressed market conditions, an orderly winding down or restructuring of its activities, reorganising its operations, liquidating its clearing portfolio or transferring its clearing activities to another CCP. The estimate shall take into account the liquidity, size, maturity structure and potential cross-border obstacles of the positions of the CCP and the type of products cleared. The time span for winding down or restructuring its activities used for the calculation of the capital requirement is subject to a minimum number of six months.
- 3. A CCP shall update its estimate of the appropriate time span for winding down or restructuring its activities whenever there is a significant change in the assumptions underlying the estimation and submit this updated estimate to the competent authority for approval.

4. For the purposes of this Article, operational expenses shall be considered in accordance with International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 or, in accordance with Directives 78/660/EEC, 83/349/EEC and 86/635/EC or, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance with Regulation (EC) No 1569/2007 or accounting standards of a third country the use of which is permitted in accordance with Article 4 of that Regulation, as applicable. CCPs shall use the most recent audited information from their annual financial statement.

Article 3

Capital requirements for operational and legal risks

1. A CCP shall calculate its capital requirements for operational – including legal – risk referred to in Article 1 using either the Basic Indicator Approach or Advanced Measurement Approaches as provided in Directive 2006/48/EC subject to the restrictions provided in paragraphs 2 to 7.
2. A CCP may use the basic indicator approach in order to calculate its capital requirements for operational risk in accordance with Article 103 of Directive 2006/48/EC.
3. A CCP shall have in place a well-documented assessment and management system for operational risk with clear responsibilities assigned for this system. It shall identify its exposures to operational risk and track relevant operational risk data, including material loss data. This system shall be subject to regular review carried out by an independent party possessing the necessary knowledge to carry out such review.
4. A CCP operational risk assessment system shall be closely integrated into the risk management processes of the CCP. Its output shall be an integral part of the process of monitoring and controlling the CCP's operational risk profile.
5. A CCP shall implement a system of reporting to senior management that provides operational risk reports to relevant functions within the institutions. A CCP shall have in place procedures for taking appropriate action according to the information within the reports to management.
6. A CCP may also apply to its competent authority for permission to use Advanced Measurement Approaches. The competent authority may grant the CCP the permission to use Advanced Measurement Approaches based on its own operational risk measurement systems in accordance with Article 105 of Directive 2006/48/EC.
7. CCPs using the Advanced Measurement Approaches as specified in paragraph 6 for the calculation of their capital requirements for operational risk shall hold capital which is at all times more than or equal to 80% of the capital required using the basic indicator approach according to paragraph 2.

Article 4

Capital requirements for credit risk, counterparty credit risk and market risk which are not already covered by specific financial resources as referred to in Articles 41 to 44 of Regulation (EU) No 648/2012

1. A CCP shall calculate its capital requirements referred to in Article 1 as the sum of 8% of its risk-weighted exposure amounts for credit and counterparty credit risk and its capital requirements for market risk calculated in accordance with Directives 2006/48/EC and 2006/49/EC, subject to the restrictions provided in paragraphs 2 to 5.
2. For the calculation of capital requirements for market risk which is not already covered by specific financial resources as referred to in Articles 41 to 44 of Regulation (EU) No 648/2012, a CCP shall use the methods provided for in Annexes I to IV of Directive 2006/49/EC.
3. For the calculation of the risk-weighted exposure amounts for credit risk which is not already covered by specific financial resources as referred to in Articles 41 to 44 of Regulation (EU) No 648/2012, a CCP shall apply the Standardised Approach for credit risk provided for in Articles 78 to 83 of the Directive 2006/48/EC.
4. For the calculation of the risk-weighted exposure amounts for counterparty credit risk which is not already covered by specific financial resources as referred to in Articles 41 to 44 of Regulation (EU) No 648/2012, a CCP shall use the Mark-to-market Method provided for in Annex III, part 3 of Directive 2006/48/EC and the Financial Collateral Comprehensive Method applying supervisory volatility adjustments provided for in Annex VIII, Part 3 of Directive 2006/48/EC.
5. Where all the conditions referred to in Articles 52 and 53 of Regulation (EU) No 648/2012 are not fulfilled and where a CCP does not use its own resources, the CCP shall apply a risk weight of 1250% to its exposure stemming from contributions to the default fund of another CCP and a risk weight of 2% to its trade exposures with another CCP.

Article 5

Capital requirements for business risk

1. The CCP shall submit to the competent authority for approval in accordance with that competent authority's powers under Title III of Regulation (EU) No 648/2012 its own estimate of the capital necessary to cover losses resulting from business risk based on reasonably foreseeable adverse scenarios relevant to its business model.
2. The capital requirement for business risk shall be equal to the approved estimate and shall be subject to a minimum amount of 25% of its annual gross operational expenses. For the purposes of this Article, gross operational expenses shall be considered in accordance with Article 2(4).

Article 6

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19.12.2012

For the Commission
The President
José Manuel BARROSO