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COVER NOTE

from:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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to:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union

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Subject:	COMMISSION DELEGATED REGULATION (EU) No.../.. of 12.7.2012 supplementing Regulation (EC) 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 Market Authority, including rules on the right of defence and temporal provisions

Delegations will find attached Commission document C(2012) 4787 final.

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EUROPEAN COMMISSION

Brussels, 12.7.2012
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COMMISSION DELEGATED REGULATION (EU) No .../..

of 12.7.2012

supplementing Regulation (EC) 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)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 23e (7) of Regulation (EC) No 1060/2009 on credit rating agencies (hereafter — **CRA Regulation**) as amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 establishes that ‘the Commission shall adopt further rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on rights of defence, temporal provisions, and the collection of fines or periodic penalty payments, and shall adopt detailed rules on the limitation periods for the imposition and enforcement of penalties. The rules shall be adopted by means of delegated acts in accordance with Article 38a and subject to the conditions of Articles 38b and 38c’.

Regulation (EU) No 513/2011 (hereafter **CRA II Regulation**), amending the CRA Regulation, made the European Securities and Markets Authority (ESMA) responsible for central supervision of credit rating agencies including the power to impose fines and periodic penalty payments.

This delegated act takes the form of a delegated Regulation and clarifies the rules of procedures to be followed by ESMA in the exercise of its power to impose fines or periodic penalty payments, including rights of defence for CRAs subject to a sanctioning procedure. The delegated Regulation also sets out limitation periods for infringements of the CRA Regulation and for the enforcement of the fines thereafter.

This delegated act will thus enhance legal certainty by creating a clear, transparent and proportionate procedure when ESMA is to impose fines or periodic penalty payments on CRAs.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Information on limitation periods has been gathered (1) from other policy areas of the Union and (2) from Member States' laws via ESMA and the national experts in the Expert Group of the European Securities Committee (hereafter EGESC). Information has been received from PT, ES, DE, LUX, PL, SV, and NE.

On 15 May 2012 ESMA requested input from Member States' supervisory authorities in relation to national rules on limitation periods applicable in national financial regulations. On 16 May 2012 the Commission requested input from Member States through the EGESC as regards those national rules.

Member States were consulted through the EGESC on this draft delegated act.

An impact assessment has not been carried out for the following reasons:

- The decision to impose fines and periodic penalty payments on CRA, which is the main policy decision, was taken in the CRA Regulation, which already sets out the method for calculating these penalties and the situations when they should be imposed. The CRA Regulation also establishes CRAs' rights of defence. The overall objectives and the need for these rules were outlined in the impact assessment accompanying the Commission proposal for the CRA II Regulation.

- The provisions to be included in this delegated act are essentially of a procedural nature; they refer to limitation periods, procedures concerning the right to be heard and access to the file.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

3.1. Legal basis

This delegated act is made pursuant to Article 23e (7) of Regulation (EC) No 1060/2009 on credit rating agencies (hereafter — **CRA Regulation**) as amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011.

3.2. Subsidiarity and proportionality

According to the principle of subsidiarity (Article 5.3 of the TEU), EU level-action should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU.

The analysis undertaken in the context of Regulation 513/2011 amending Regulation 1060/2009 CRAs showed that the rating business has a global nature due to the mobility of the rating service and the cross-border impact of credit ratings. On this basis ESMA was entrusted with the power to impose fines and periodic penalty payments at EU level over CRA and persons involved in rating activities. On that same basis the Commission was entrusted to adopt rules of procedure for the exercise of those powers.

As regards proportionality of the specific provisions in the delegate act, the latter strikes the balance between (1) analogous provisions in the Member States' legal orders, partly communicated to the Commission in the context of the consultations referred to in point 2 of this explanatory memorandum, and (2) analogous enforcement powers granted to the Commission by EU law.

3.3. Choice of legal instrument

This delegated act spells out procedural provisions to be applied by ESMA when exercising its power to impose fines and penalty payments according to the CRA Regulation. Those procedural rules should be set out in a regulation which is directly applicable to ESMA and the persons subject to ESMA's supervision. Using a directive would not be appropriate as it would not be clear on the basis of which national implementing law ESMA should act. In addition, this delegated act spells out procedural provisions and rights of defence included in the CRA Regulation, which can suitably only be provided by a regulation. Furthermore the objective of having uniform rules on rights of defence for credit rating agencies can only be achieved via Regulation.

3.4. Detailed explanation of the proposal

As required in Article 23e (7) of the CRA Regulation, this delegated act deals with the penalties (fines and periodic penalty payments) that ESMA is required to impose on credit rating agencies pursuant to Articles 36a and 36b of the CRA Regulation (Article 1 of the Act) and with CRAs' rights of defence in the event of ESMA's taking enforcement action.

Article 2 and Article 3 of the Act set out the rules on the CRA's right to be heard by the investigating officer and by ESMA's board of supervisors. The credit rating agencies have the right to make written submissions in response to statements of findings issued by ESMA's investigating officer and Board of Supervisors.

Article 5 lays down the rules on access to the file and use of documents by a credit rating agency to which ESMA has addressed a statement of findings for an alleged infringement of Annex III of the CRA Regulation.

Article 6 and Article 7 set limitation periods for imposing and enforcing penalties. A limitation period for the purpose of this Regulation is the time within which ESMA may impose a fine after an infringement has been committed, or within which ESMA may enforce that fine after it has taken a decision to impose it. In accordance with the common legal tradition of Member States, the principle of legal certainty requires, on the one hand, that the possibility of sanctioning certain behaviour may not remain open indefinitely and, on the other, that, once that behaviour has been sanctioned, the sanction be executed within a reasonable period, which is often defined by law.

Input from Member States gathered via the EGESC shows that only some Member States have specific rules on limitation periods in the field of securities law within which supervisors may impose penalties and enforce them (such as PT, PL and, partially, ES). Other Member States allow supervisors the general limitation periods which are provided for in their general administrative law for the Public Administration (such as DE, NE, and, partially ES). Some Member States have no general rules on limitation periods (SV), while others (LUX) apply the general principle of acting within a reasonable time.

It follows then, that there are two types of limitation period within which a public authority may impose a penalty after an infringement has been committed, and period within which the authority may enforce a penalty, once imposed.

Limitation periods for the imposition of penalties vary between six months (SV) and five years, normally counting from when the infringement was committed or, if the infringement persists, after has ceased. Exceptionally the limitation period for imposing penalties may be as much as ten years (PL), but this may have something to do with differences in time counting. It is often found (e.g. in DE, PL, ES, NE) that the less serious the infringement, the shorter the limitation period for the authority to impose a fine.

Several Member States set the limitation period for a public authority to enforce its decision to impose penalty at five years (PT, ES, NE), which starting from the moment the decision to impose a fine has become final. Some Member States, exceptionally, set this period at 15 years (PL) but this may have something to do with differences in time counting.

As regards limitation periods in the EU legislation, Regulation 1/2003¹ lays down detailed rules in this respect when the Commission intends to fine an undertaking under Articles 101 or 102 of the Treaty on the Functioning of the European Union. The limitation period for the Commission to impose fines varies between three and five years depending on the type and seriousness of the infringement. Three years is the normal period for less serious infringements (attracting a fine of up to 1 % of the undertaking's turnover). Five years is the normal period for more serious infringements (fines of up to 10 % of turnover). The limitation

¹ COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

period normally runs from the moment the infringement was committed or, if it persists, from the moment when it ceased. The limitation period for enforcing the fine is five years from the moment the decision became final.

In general, then, there is not a great difference between the regime for limitation periods used in EU legislation in the competition field, where the Commission has the power to impose penalties, and the limitation period provided for in Member States, where it is the national administration or supervisors who impose those penalties.

Article 8 sets out the specifics on collection of fines by ESMA as provided for under Regulation 1060/2009 and generally in accordance with Article 74 of the general Financial Regulation and Article 85a of the Implementing Rules.

Article 9 concerned with how to calculate periods, dates and time limits. There are already EU provisions which apply to acts of the Commission and the Council, namely, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 on rules applicable to periods, dates and time limits². So it makes sense, in the interests of consistency and legal certainty, to expressly extend their application to acts adopted by ESMA under the CRA Regulation.

4. BUDGETARY IMPLICATIONS OF THE DELEGATED ACT

The amounts that ESMA receives from fines and periodic penalty payments that it has imposed on CRAs shall not become part of its revenues which are defined in article 62 of Regulation 1095/2010 setting up ESMA.

Conversely, according to article 36d of the CRA Regulation, the amounts that ESMA collects from fines and periodic penalty payments shall become part of the general revenue of the Union. The budgeting of these amounts via an amending budget or its inclusion in the end-of-year surplus will correspondingly reduce Member States' GNI contributions.

² OJ L 124, 8.6.1971, p. 1.

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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) 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies³, as amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011⁴, 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 OJ L 302, 17.11.2009, p.1.

⁴ OJ L 145, 31.5.2011, p. 30.

- (3) The right to be heard is recognised in the first indent of Art 41 (2) a 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 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 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 the second indent of Art 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 1/2003 of 16 December 2002 lays down detailed rules on limitation periods for when the Commission has to fine an undertaking under Articles 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 of 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 which determines the rules applicable to periods, dates and time limits⁵ for acts of the Council and the Commission.

⁵ OJ L 124, 8.6.1971, p. 1.

- (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:

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 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/hers 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 of Regulation (EC) 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 of the ones listed in Annex III of Regulation (EC) 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 of Regulation (EC) 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) 1060/2009, a periodic penalty payment can no longer be imposed.

ESMA's Board of Supervisors may also invite the person subject to the proceedings to attend an oral hearing. The person subject to the proceedings 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.

Article 5

Access to the file and use of documents

1. If so requested, ESMA shall grant access to the file to the parties to whom the investigating officer or the Board of Supervisors has sent a statement of findings. Access shall be granted following the notification of any statement of findings.
2. File documents accessed pursuant to this Article shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EC) No 1060/2009.

Article 6

Limitation periods for the imposition of penalties

1. ESMA's powers to impose fines on credit rating agencies shall be subject to the following limitation periods:
 - (a) three years in the case of infringements for which the minimum basic amount of the fine foreseen in Article 36a (2) of Regulation (EC) 1060/2009 is EUR 50.000 or less.
 - (b) five years in the case of all other infringements.
2. The periods of time referred to in paragraph 1 shall begin to run on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, those periods of time shall begin to run on the day on which the infringement ceases.
3. Any action taken by ESMA for the purpose of the investigating or proceedings in respect of an infringement of Regulation (EC) No 1060/2009 shall interrupt the limitation period for the imposition of fines. That limitation period shall be interrupted with effect from the date on which the action is notified to the credit rating agency or the person subject to the investigating or proceedings.
4. Each interruption shall cause the limitation period to start running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without ESMA having imposed a fine. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.
5. The limitation period for imposing fines shall be suspended for as long as the decision of ESMA is the subject of proceedings pending before the Board of Appeal, in accordance with article 58 of Regulation 1095/2010, and before the Court of Justice of the European Union, in accordance with article 36e of Regulation (EC) No 1060/2009.

Article 7

Limitation periods for the enforcement of penalties

1. The power of ESMA to enforce decisions taken pursuant to Articles 36a and 36b of Regulation (EC) 1060/2009 shall be subject to a limitation period of five years.
2. The five year period referred to in paragraph 1 shall start to run on the day following that on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted by:
 - (a) a notification by ESMA to the credit rating agency or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;
 - (b) any action of ESMA or a Member State authority acting at the request of ESMA, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.
4. Each interruption shall cause the limitation period to start running afresh.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
 - (a) time to pay is allowed;
 - (b) enforcement of payment is suspended pursuant to a pending decision of ESMA Board of Appeal, in accordance with article 58 of Regulation 1095/2010, and the Court of Justice of the European Union, in accordance with article 36e of Regulation (EC) No 1060/2009.

Article 8

Collection of fines and periodic penalty payments

The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest bearing account opened by the accounting officer of ESMA until such time as they become final. In the meantime such amounts shall not be entered in ESMA's budget or recorded as budgetary amounts.

Once ESMA's Accounting Officer has established that the fines and / or periodic penalty payments have become final following the outcome of all possible legal challenges he shall transfer these amounts plus any interest accruing to the Commission. These amounts shall then be entered in the EU Budget under general revenue.

ESMA's Accounting Officer shall report on a regular basis to the Authorising Officer of DG MARKT on the amounts of fines and periodic penalty payments imposed and their status.

Article 9

Calculation of periods, dates and time limits

Regulation (EEC, Euratom) No 1182/71 shall apply to periods of time, dates and time limits.

Article 10

This Regulation shall enter into force on the third 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, 12.7.2012

For the Commission
The President
José Manuel BARROSO