

**COMMISSION DELEGATED REGULATION (EU) 2017/2155****of 22 September 2017****amending Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements****(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 <sup>(1)</sup>, and in particular Article 4(4) thereof,

Whereas:

- (1) Indirect clearing arrangements should not expose central counterparties (CCPs), clearing members, clients, indirect clients or further layers of indirect clients to additional counterparty risk, and the assets and positions of indirect clients should benefit from an appropriate level of protection. It is therefore essential that any type of indirect clearing arrangement complies with minimum conditions for ensuring their safety. To that end, the parties involved in indirect clearing arrangements should be subject to specific obligations, and indirect clearing arrangements should only be allowed where they meet the conditions defined in this Regulation.
- (2) As the assets and positions of the counterparty to which indirect clearing services are provided should benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of Regulation (EU) No 648/2012, the different concepts of indirect client are pivotal for this Regulation and should be defined herein.
- (3) Taking into account that clearing members should qualify as participants within the meaning of Directive 98/26/EC of the European Parliament and of the Council <sup>(2)</sup>, and to ensure an equivalent level of protection to indirect clients as granted to clients under Regulation (EU) No 648/2012, clients providing indirect clearing services should be credit institutions, investment firms, or third country entities equivalent to credit institutions or investment firms.
- (4) The higher degree of intermediation activity between a CCP and the different layers of indirect clients requires additional operational steps, additional accounts as well as more complex technological solutions and processing flows. This results in an increased complexity of indirect clearing arrangements compared to client clearing arrangements. That higher degree of intermediation should therefore be mitigated with requirements for an alternative and operationally simpler choice of account structures for indirect clearing arrangements than for client clearing arrangements.
- (5) Client clearing arrangements require offering individually segregated accounts. For indirect clearing arrangements, however, only a gross omnibus indirect account structure, with a mechanism to transfer called margin and, if agreed, margin in excess of called margin, from the indirect client all the way up to the CCP, and without allowing any netting of positions of different indirect clients in the same gross omnibus indirect account, should be required to be offered on top of omnibus indirect accounts allowing such netting. That mechanism allows for identifying, in a way equivalent to individually segregated accounts, between the collateral and the positions held for the account of a specific indirect client, on the one hand, and the collateral and the positions held for the account of the client or other indirect clients on the other.
- (6) In addition, even if assets and positions held in a gross omnibus account structure for indirect clearing arrangements may still be exposed to the losses of another indirect client since those assets and positions are comingled in one account, the speed in which those assets and positions can be identified where necessary to liquidate them following a default, contributes to minimise that potential loss.

<sup>(1)</sup> OJ L 201, 27.7.2012, p. 1.

<sup>(2)</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

- (7) That mechanism allows, at the same time, for a much simpler account structure that reduces the costs and complexity compared to individually segregated accounts while permitting to distinguish the collateral and the positions of different indirect clients and thus ensures a level of protection that is equivalent to the level of protection offered by an individually segregated account. Requiring the offer of gross omnibus indirect accounts should however not preclude the possibility of offering individually segregated indirect accounts to indirect clients within clearing arrangements consisting of a CCP, a clearing member, a client and a single layer of indirect clients.
- (8) To facilitate access to central clearing, by rationalising clearing services and simplifying the commercial relationships between clearing members, clients and indirect clients, some groups offer clearing services using two entities from the same group which intermediate in the provision of those services. For similar reasons, the group of the client sometimes uses one entity to deal directly with the clearing member and a different entity to deal directly with the indirect client, typically because that second entity is established in the jurisdiction of the indirect client. In those cases, clearing services are rationalised across different economic activities of the group and the commercial relationship between clearing members, clients and indirect clients is also simplified. Provided that those types of arrangements meet specific conditions which ensure that counterparty risk is not increased and that an appropriate level of protection is provided to the indirect clearing, they should be allowed.
- (9) In chains of indirect clearing involving more than a CCP, a clearing member, a client and a single layer of indirect clients, the use of individually segregated accounts could lead to unexpected technical difficulties since the potential default of one or more of the counterparties in that chain and a multitude of individually segregated accounts would have to be managed. The offering of individually segregated accounts in those longer chains could mislead counterparties seeking the level of protection normally associated with individually segregated accounts since that level of protection may not be achieved in some of those longer chains. To avoid the risks stemming from that false assumption, only omnibus segregated accounts should be allowed to be used in those longer chains of indirect clearing, provided that counterparties that are clearing through those arrangements are fully informed of the level of segregation and the risks associated with that type of account.
- (10) To ensure that the amount of margin called within a gross omnibus indirect account structure is the same as the amount that would have been called if an individually segregated indirect clearing account had been used, a CCP should receive information on the positions held for the account of the indirect client to calculate the associated margin call on an indirect client by indirect client basis.
- (11) To ensure equivalence with client clearing, a clearing member should have procedures in place to facilitate the transfer of indirect clients' positions to an alternative client following the failure of a client that provides indirect clearing services. For the same reason, a clearing member should also have procedures to liquidate the positions and assets of the indirect clients and to return the liquidation proceeds to those indirect clients where known. Where, for any reason, the liquidation proceeds cannot be returned directly to the indirect clients concerned, the liquidation proceeds should be returned to the defaulting client for the account of its indirect clients.
- (12) Procedures should be put in place so that, in case of the default of the client, the information on the identity of the indirect clients can become known and the clearing member is able to identify which assets and positions belong to which indirect client.
- (13) A client providing indirect clearing services should present the indirect client with a choice of account structures. It is however possible that an indirect client has not instructed a client of its choice within a reasonable period of time. In that case, that client should be able to provide indirect clearing services to that indirect client by using any account structure, provided that the client informs the indirect client of the account structure used, the risks associated to that account and its level of segregation, and the possibility to change the account structure at any time.
- (14) Indirect clearing arrangements may give rise to specific risks. It is therefore necessary that all the parties participating in indirect clearing arrangements, including clearing members and CCPs, identify, monitor and manage any material risks arising from those arrangements on an ongoing basis. Appropriate sharing of information between clients and clearing members is especially important for those purposes. Clearing members should however ensure that that information is only used for risk management and margining purposes and that commercially sensitive information is not misused.

- (15) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions of this Regulation and the provisions adopted pursuant to Article 30(2) of Regulation (EU) No 600/2014 <sup>(1)</sup> apply from the same date.
- (16) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (17) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council <sup>(2)</sup>, ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010.
- (18) Commission Delegated Regulation (EU) No 149/2013 <sup>(3)</sup> should therefore be amended.

HAS ADOPTED THIS REGULATION:

#### Article 1

### Amendment to Commission Delegated Regulation (EU) No 149/2013

Commission Delegated Regulation (EU) No 149/2013 is amended as follows:

- (1) In Article 1, point (b) is replaced by the following:

‘(b) ‘indirect clearing arrangements’ means the set of contractual relationships between providers and recipients of indirect clearing services provided by a client, an indirect client or a second indirect client;’.

- (2) In Article 1, the following point (d) and (e) are inserted:

‘(d) ‘second indirect client’ means a client of an indirect client;

‘(e) ‘third indirect client’ means a client of a second indirect client.’.

- (3) Article 2 is replaced by the following:

‘Article 2

#### Requirements for the provision of indirect clearing services by clients

1. A client may only provide indirect clearing services to indirect clients provided that all of the following conditions are fulfilled:

- (a) the client is an authorised credit institution or investment firm or an entity established in a third country that would be considered to be a credit institution or investment firm if that entity were established in the Union;
- (b) the client provides indirect clearing services on reasonable commercial terms and publicly discloses the general terms and conditions under which it provides those services;
- (c) the clearing member has agreed to the general terms and conditions referred to in point (b) of this paragraph.

2. The client referred to in paragraph 1 and the indirect client shall conclude, in writing, an indirect clearing arrangement. The indirect clearing arrangement shall include at least the following contractual terms:

- (a) the general terms and conditions referred to in paragraph 1(b);
- (b) the client’s commitment to honour all obligations of the indirect client towards the clearing member with regard to the transactions covered by the indirect clearing arrangement.

All aspects of the indirect clearing arrangement shall be clearly documented.

<sup>(1)</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

<sup>(2)</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

<sup>(3)</sup> Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52, 23.2.2013, p. 11).

3. A CCP shall not prevent the conclusion of indirect clearing arrangements that are entered into on reasonable commercial terms.’

(4) Article 3 is replaced by the following:

*‘Article 3*

#### **Obligations of CCPs**

1. A CCP shall open and maintain any of the accounts referred to in Article 4(4) in accordance with the request of the clearing member.

2. A CCP that holds the assets and positions of several indirect clients in an account as referred to in Article 4(4)(b) shall keep separate records of the positions of each indirect client, calculate the margins in respect of each indirect client and collect the sum of those margins on a gross basis, based on the information referred to in Article 4(3).

3. A CCP shall identify, monitor and manage any material risks arising from the provision of indirect clearing services that could affect the resilience of the CCP to adverse market developments.’

(5) Article 4 is replaced by the following:

*‘Article 4*

#### **Obligations of clearing members**

1. A clearing member that provides indirect clearing services shall do so on reasonable commercial terms and shall publicly disclose the general terms and conditions under which it provides those services.

The general terms and conditions referred to in the first subparagraph shall include the minimum financial resources and operational capacity requirements for clients that provide indirect clearing services.

2. A clearing member that provides indirect clearing services shall open and maintain at least the following accounts in accordance with the request of the client:

(a) an omnibus account with the assets and positions held by that client for the account of its indirect clients;

(b) an omnibus account with the assets and positions held by that client for the account of its indirect clients, in which the clearing member shall ensure that the positions of an indirect client do not offset the positions of another indirect client and that the assets of an indirect client cannot be used to cover the positions of another indirect client.

3. A clearing member holding assets and positions for the account of several indirect clients in an account as referred to in paragraph 2(b) shall provide the CCP on a daily basis with all the necessary information to allow the CCP to identify the positions held for the account of each indirect client. That information shall be based on the information referred to in Article 5(4).

4. A clearing member that provides indirect clearing services shall at least open and maintain in the CCP the following accounts in accordance with the request made by the client:

(a) a segregated account for the exclusive purpose of holding the assets and positions of indirect clients held by the clearing member in an account as referred to in paragraph 2(a);

(b) a segregated account for the exclusive purpose of holding the assets and positions of indirect clients of each client held by the clearing member in an account as referred to in paragraph 2(b).

5. A clearing member shall establish procedures to manage the default of a client that provides indirect clearing services.

6. A clearing member holding the assets and positions of indirect clients in an account as referred to in paragraph 2(a) shall:

(a) ensure that the procedures referred to in paragraph 5 allow for the prompt liquidation of those assets and positions following the default of a client, including the liquidation of those assets and positions at the level of the CCP, and include a detailed procedure to communicate to the indirect clients the default of the client and the expected period of time to liquidate the assets and positions of those indirect clients;

(b) after the completion of the default management process for the default of a client, readily return to that client, for the account of the indirect clients, any balance owed from the liquidation of those assets and positions.

7. A clearing member holding assets and positions of indirect clients in an account as referred to in paragraph 2(b) shall:

(a) include in the procedures referred to in paragraph 5:

(i) the steps to transfer the assets and positions held by a defaulting client for the account of its indirect clients to another client or to a clearing member;

(ii) the steps to pay each indirect client the proceeds from the liquidation of the assets and positions of that indirect client;

(iii) a detailed procedure to communicate to the indirect clients the default of the client and the expected period of time to liquidate the assets and positions of those indirect clients;

(b) contractually commit itself to trigger the procedures for the transfer of the assets and positions held by a defaulting client for the account of its indirect clients to another client or clearing member that has been designated by the relevant indirect clients of the defaulting client at the request of those indirect clients and without obtaining the consent of the defaulting client. That other client or clearing member shall be obliged to accept those assets and positions only where that other client or clearing member has previously entered into a contractual relationship with those relevant indirect clients committing to do so;

(c) ensure that the procedures referred to in paragraph 5 allow for the prompt liquidation of those assets and positions following the default of a client, including the liquidation of those assets and positions at the level of the CCP, in case the transfer referred to in point (b) has not taken place for any reason within a predefined transfer period specified in the indirect clearing arrangement;

(d) following the liquidation of those assets and positions, contractually commit itself to trigger the procedures for the payment of the liquidation proceeds to each of the indirect clients;

(e) where the clearing member has not been able to identify the indirect clients or to complete the payment of the liquidation proceeds referred to in point (d) to each of the indirect clients, readily return to the client for the account of the indirect clients any balance owed from the liquidation of those assets and positions.

8. A clearing member shall identify, monitor and manage any material risks arising from the provision of indirect clearing services that could affect its resilience to adverse market developments. The clearing member shall establish internal procedures to ensure that the information referred to in Article 5(8) cannot be used for commercial purposes.

(6) Article 5 is replaced by the following:

*Article 5*

### **Obligations of clients**

1. A client that provides indirect clearing services shall offer indirect clients a choice between at least the types of accounts referred to in Article 4(2) and shall ensure that those indirect clients are fully informed about the different levels of segregation and the risks associated with each type of account.

2. The client referred to in paragraph 1 shall assign one of the types of accounts referred to in Article 4(2) to indirect clients that have not chosen one within a reasonable period of time established by the client. The client shall inform the indirect client about the risks associated with the type of account assigned without undue delay. The indirect client may choose a different type of account at any time by requesting so in writing to the client.

3. A client that provides indirect clearing services shall keep separate records and accounts that enable it to distinguish between its own assets and positions and those held for the account of its indirect clients.

4. Where the assets and positions of several indirect clients are held by the clearing member in an account as referred to in Article 4(2)(b), the client shall provide the clearing member with all the necessary information on a daily basis to allow the clearing member to identify the positions held for the account of each indirect client.

5. A client that provides indirect clearing services shall, in accordance with the choice of its indirect clients, request the clearing member to open and maintain in the CCP the accounts referred to in Article 4(4).

6. A client shall provide its indirect clients with sufficient information to allow those indirect clients to identify the CCP and the clearing member used to clear their positions.

7. Where the assets and positions of one or more indirect clients are held by the clearing member in an account as referred to in Article 4(2)(b), the client shall include in the indirect clearing arrangement with its indirect clients all necessary terms and conditions to ensure that, in the case of default of that client, the clearing member may promptly return to the indirect clients the proceeds from the liquidation of the positions and assets held for the account of those indirect clients in accordance with Article 4(7).

8. A client shall provide the clearing member with sufficient information to identify, monitor and manage any material risks arising from the provision of indirect clearing services that could affect the resilience of the clearing member.

9. A client shall have arrangements in place to ensure that, when it defaults, all information it holds in respect of its indirect clients is made immediately available to the clearing member, including the identity of the indirect clients referred to in Article 5(4).'

(7) The following Article 5a is inserted:

*'Article 5a*

#### **Requirements for the provision of indirect clearing services by indirect clients**

1. An indirect client may only provide indirect clearing services to second indirect clients provided that the parties to the indirect clearing arrangements fulfil one of the requirements set out in paragraph 2 and that all of the following conditions are met:

- (a) the indirect client is an authorised credit institution or investment firm or an entity established in a third country that would be considered to be a credit institution or investment firm if that entity were established in the Union;
- (b) the indirect client and the second indirect client conclude, in writing, an indirect clearing arrangement. The indirect clearing arrangement shall include at least the following contractual terms:
  - (i) the general terms and conditions referred to in Article 2(1)(b);
  - (ii) the indirect client's commitment to honour all obligations of the second indirect client towards the client with regard to transactions covered by the indirect clearing arrangement;
- (c) the assets and positions of the second indirect client are held by the clearing member in an account as referred to in Article 4(2)(a).

All aspects of the indirect clearing arrangement referred to in point (b) shall be clearly documented.

2. For the purposes of paragraph 1, the parties to the indirect clearing arrangements shall fulfil one of the following requirements:

- (a) the clearing member and the client are part of the same group, but the indirect client is not part of that group;
- (b) the client and the indirect client are part of the same group, but neither the clearing member nor the second indirect client is part of that group.

3. For indirect clearing arrangements entered into by parties in the situation referred to in paragraph 2(a):

- (a) Articles 4(1), 4(5), 4(6) and 4(8) shall apply to the client as if that client were a clearing member;
- (b) Articles 2(1)(b), 5(2), 5(3), 5(6), 5(8) and 5(9) shall apply to the indirect client as if that indirect client were a client.

4. For indirect clearing arrangements entered into by parties in the situation referred to in paragraph 2(b):

- (a) Articles 4(5) and 4(6) shall apply to the client as if that client were a clearing member;
- (b) Articles 2(1)(b), 5(2), 5(3), 5(6), 5(8) and 5(9) shall apply to the indirect client as if that indirect client were a client.'

(8) The following Article 5b is inserted:

*'Article 5b*

**Requirements for the provision of indirect clearing services by second indirect clients**

1. A second indirect client may only provide indirect clearing services to third indirect clients provided that all of the following conditions are met:

- (a) the indirect client and the second indirect client are authorised credit institutions or an investment firms or entities established in a third country that would be considered to be a credit institution or an investment firm if that entity were established in the Union;
- (b) the clearing member and the client are part of the same group, but the indirect client is not part of that group;
- (c) the indirect client and the second indirect client are part of the same group, but the third indirect client is not part of that group;
- (d) the second indirect client and the third indirect client conclude, in writing, an indirect clearing arrangement. The indirect clearing arrangement shall include at least the following contractual terms:
  - (i) the general terms and conditions referred to in Article 2(1)(b);
  - (ii) the second indirect client's commitment to honour all obligations of the third indirect client towards the indirect client with regard to transactions covered by the indirect clearing arrangement;
- (e) the assets and positions of the third indirect client are held by the clearing member in an account as referred to in Article 4(2)(a).

All aspects of the indirect clearing arrangement referred to in point (d) of the first subparagraph shall be clearly documented.

2. Where second indirect clients provide indirect clearing services pursuant to paragraph 1:

- (a) Articles 4(1), 4(5), 4(6) and 4(8) shall apply to both the client and to the indirect client as if they were clearing members;
- (b) Articles 2(1)(b), 5(2), 5(3), 5(6), 5(8) and 5(9) shall apply to both the indirect client and the second indirect client as if they were clients.'

*Article 2*

**Entry into force**

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

It shall apply from 3 January 2018.

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

Done at Brussels, 22 September 2017.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

---