

**COMMISSION IMPLEMENTING DECISION (EU) 2021/1108****of 5 July 2021****on the recognition of the legal, supervisory and enforcement arrangements of the United States of America for derivatives transactions supervised by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency as equivalent to certain requirements of Article 11 of Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories****(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 13(2) thereof,

Whereas:

- (1) Article 13 of Regulation (EU) No 648/2012 provides for a mechanism under which the Commission is empowered to adopt equivalence decisions whereby the legal, supervisory and enforcement arrangements of a third country are declared equivalent to the requirements laid down in Articles 4, 9, 10 and 11 of Regulation (EU) No 648/2012 so that counterparties which enter into a transaction within the scope of that Regulation, where at least one of the counterparties is established in that third country, are deemed to have fulfilled those requirements by complying with the requirements set out in that third country's legal regime. The declaration of equivalence contributes to the achievement of the overarching aim of Regulation (EU) No 648/2012 namely to reduce systemic risk and increase the transparency of derivatives markets by ensuring an internationally consistent application of the principles agreed with third countries and laid down in that Regulation.
- (2) Article 11(1), (2) and (3) of Regulation (EU) No 648/2012 which is supplemented by Commission Delegated Regulation (EU) No 149/2013 <sup>(2)</sup> and Commission Delegated Regulation (EU) 2016/2251 <sup>(3)</sup>, establish the Union's legal requirements concerning the timely confirmation of the terms of an OTC derivative contract, the conduct of a portfolio compression exercise and the arrangements under which portfolios are reconciled in relation to OTC derivative contracts not cleared by a central counterparty ('CCP'). In addition, those provisions lay down the valuation and dispute resolution obligations applicable to those contracts ('operational risk mitigation techniques') as well as the obligations on the exchange of collateral ('margins') between.
- (3) In order for a third country's legal, supervisory and enforcement regime to be considered equivalent to the regime of the Union in respect of operational risk mitigation techniques and margins requirements, the substantive outcome of the applicable legal, supervisory and enforcement arrangements is to be equivalent to Union requirements under Article 11 of Regulation (EU) No 648/2012, ensure protection of professional secrecy that is equivalent to the protection provided for in Article 83 of that Regulation. Furthermore, equivalent legal, supervisory and enforcement arrangements must be effectively applied in an equitable and non-distortive manner in that third country. The assessment of equivalence therefore encompasses a verification whether the legal, supervisory and

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

<sup>(2)</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).

<sup>(3)</sup> Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

enforcement arrangements of a third country ensure that OTC derivative contracts not cleared by a CCP and entered into by at least one counterparty established in that third country do not expose financial markets in the Union to a higher level of risk and consequently do not pose unacceptable levels of systemic risk in the Union.

- (4) On 1 September 2013, the Commission received the technical advice of the European Markets Supervisory Authority (ESMA) on the legal, supervisory and enforcement arrangements in the USA <sup>(4)</sup> regarding, among others, the operational risk mitigation techniques and margins applicable to OTC derivative contracts not cleared by a CCP. However, in its technical advice, ESMA focused on the rules issued by the Commodity Futures Trading Commission ('the CFTC') and the Securities and Exchange Commission ('the SEC') and did not cover the rules applicable to counterparties regulated by the Board of Governors of the Federal Reserve System ('the FRS'), the Office of the Comptroller of the Currency ('the OCC'), the Federal Deposit Insurance Corporation ('the FDIC'), the Farm Credit Administration ('the FCA') and the Federal Housing Finance Agency ('the FHFA') (together 'the US prudential regulators').
- (5) The Commission has considered the regulatory developments that have taken place since it received ESMA's technical advice. This Decision is not only based on a comparative analysis of the legal, supervisory and enforcement requirements applicable in the USA, but also on an assessment of the outcome of those requirements, and their adequacy to mitigate the risks arising from those contracts in a manner considered equivalent to the outcome of the requirements laid down in Regulation (EU) No 648/2012.
- (6) The legal, supervisory and enforcement arrangements applicable in the USA for OTC derivative contracts are laid down in title VII of the Dodd Frank Wall Street Reform and Consumer Protection Act ('Dodd-Frank Act') and in the specific implementing rules adopted by the US prudential regulators.
- (7) There are no equivalent rules to the operational risk mitigation techniques applicable to OTC derivatives not cleared by a CCP under the Dodd-Frank Act and the US prudential regulators have not issued rules or regulations imposing equivalent requirements. This decision shall therefore not cover the legal, supervisory and enforcement arrangements applicable to OTC derivatives transactions entered into between a counterparty regulated by the US prudential regulators and a counterparty established in the Union and subject to the requirements laid out in paragraphs 1 and 2 of Article 11 of Regulation (EU) No 648/2012 and regarding timely confirmation, portfolio compression and reconciliation, valuation and dispute resolution obligations.
- (8) In the Union, pursuant to Article 11(3), OTC derivative contracts not cleared by a CCP are subject to the obligation to exchange collateral ('margin requirement'). Pursuant to that rule, all counterparties have to exchange variation margins and counterparties above a certain threshold have to exchange initial margins. In this respect, each counterparty regulated by a US prudential regulator, has to comply with the rule adopted by this US prudential regulators as laid down in Title 12 of the Code of Federal Regulation, respectively in Part 45 (for the OCC), 237 (for the FRS), 349 (for the FDIC), 624 (for the FCA) and 1221 (for the FHFA) (together 'the Swap Margin Rule').
- (9) The Swap Margin Rule applies to swaps and security-based swaps entered into between Covered Swap Entities ('CSEs') and other swap entities, financial end users with material swaps exposure as well as, to a certain extent, financial end users without material swaps exposure and other counterparties such as sovereigns, multilateral development banks or the Bank for International Settlements. For an entity to have a material swaps exposure, this entity must have an average daily aggregate notional amount of non-cleared OTC derivatives for June, July and August of the previous calendar year that exceeds USD 8 billion, whereas the analogous threshold set out in Article 28 of Delegated Regulation (EU) 2016/2251 is EUR 8 billion. In the Union, the requirement to exchange variation margin does not have a materiality threshold, and applies to all counterparties subject to Article 11(3) of Regulation (EU) No 648/2012. The rules for combined minimum transfer amount of initial and variation margin in the Swap Margin Rule is USD 500 000, whereas the related requirement set out in Article 25 of Delegated Regulation (EU) 2016/2251 is EUR 500 000. Taking into account the limited impact due to the difference in currencies, these amounts should be considered equivalent.

<sup>(4)</sup> ESMA/2013/BS/1157, Technical advice on third country regulatory equivalence under EMIR – US, Final report, European Securities and Markets Authority, 1 September 2013.

- (10) The requirements of the Swap Margin Rule apply to 'swaps' as defined in section 721 of the Dodd-Frank Act and 'security-based swaps' as defined in section 761 of the Dodd-Frank Act, thus encompassing almost all contracts defined as OTC derivatives in Regulation (EU) No 648/2012 with the exception of foreign exchange forwards and foreign exchange swaps, for which the Swap Margin Rule sets no requirements. In addition, the Swap Margin Rule does not contain any specific treatment for structured products including covered bonds and securitisations. In the Union, foreign exchange swaps and foreign exchange forwards are exempted from the initial margins requirements, and derivatives associated with covered bonds for hedging purposes may also be exempted from initial margin requirements. This Decision should therefore only apply to OTC derivatives transactions that are subject to margins under both the Union law and the Swap Margin Rule.
- (11) The requirements in the Swap Margin Rule for the calculation of initial margin are equivalent to the requirements set out in Regulation (EU) No 648/2012. Like Annex IV to Delegated Regulation (EU) 2016/2251, the Swap Margin Rule allows the use of a standardised approach. Alternatively, internal or third party models may be used for that calculation where those models contain certain specific parameters, including minimum confidence intervals and margin periods of risk, and certain historical data, including stressed periods. Those models must be approved by the relevant US prudential regulator.
- (12) The requirements in the Swap Margin Rule on eligible collateral and on how that collateral is held and segregated are equivalent to those set out in Article 4 of Delegated Regulation (EU) 2016/2251. The Swap Margin Rule contains an equivalent list of eligible collateral. The Swap Margin Rule should therefore be considered equivalent to those provided for under Article 11(3) of Regulation (EU) No 648/2012.
- (13) With regard to the equivalent level of protection of professional secrecy, in the USA, information held by federal regulators is subject to the Privacy Act and the Freedom of Information Act (FOIA). Under the FOIA, in many cases, steps must be taken by an individual or an organization to secure confidential treatment of submitted information. Therefore, the Privacy Act and the FOIA provide guarantees of professional secrecy, including the protection of business secrets shared by the authorities with third parties, equivalent to those set out in Title VIII of Regulation (EU) No 648/2012. The USA requirements should be considered to provide an equivalent level of protection of professional secrecy as guaranteed in Regulation (EU) No 648/2012.
- (14) Finally, with regard to the effective supervision and enforcement of the legal arrangements in the USA, the US prudential regulators have broad investigative and surveillance powers to assess compliance of Covered Swap Entities with the Swap Margin Rule. The US prudential regulators can take a wide range of supervisory measures to stop any breach of the applicable requirements. Moreover, the USA legal framework provides for civil penalties, including temporary or permanent restraining orders or injunctions, and fines, as well as criminal penalties, for breaches of the applicable requirements. Those measures should therefore be considered to provide for the effective application of the relevant legal, regulatory and enforcement arrangements under the Dodd-Frank Act, the Commodity Exchange Act, the Securities Exchange Act, the Swap Margin Rule as well as CFTC and SEC Regulations where applicable in an equitable and non-distortive manner so as to ensure effective supervision and enforcement.
- (15) This Decision recognises equivalence of binding requirements set by the US prudential regulators relating to OTC derivative contracts applicable at the time of adoption of this Decision. The Commission, in cooperation with ESMA, will monitor on a regular basis the evolution of the legal, supervisory and enforcement arrangements for these OTC derivative contracts and their consistent and effective implementation, regarding the timely confirmation, portfolio compression and reconciliation, valuation, dispute resolution and margin requirements applicable to OTC derivative contracts, not cleared by a CCP with respect to which this Decision has been taken. As part of its monitoring efforts the Commission may request the US prudential regulators to provide information on regulatory and supervisory developments. The Commission may undertake a specific review at any time, where relevant developments make it necessary for the Commission to re-assess the declaration of equivalence granted by this Decision. Such re-assessment may lead to the repeal of this Decision, which would as a consequence make counterparties automatically subject again to all requirements laid down in Regulation (EU) No 648/2012.

- (16) The measures provided for in this Decision are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DECISION:

*Article 1*

For the purposes of Article 13(3) of Regulation (EU) No 648/2012, the legal, supervisory and enforcement arrangements of the United States of America for the exchange of collateral that apply to transactions regulated as 'swaps' as defined in section 721 of the Dodd-Frank Act or 'security-based swaps' as defined in section 761 of the Dodd-Frank Act and that are not cleared by a central counterparty shall be considered as equivalent to the requirements of Article 11(3) of Regulation (EU) No 648/2012, where at least one of the counterparties to those transactions is established in the USA and considered a Covered Swap Entity by the Board of Governors of the Federal Reserve System ('the FRS'), the Office of the Comptroller of the Currency ('the OCC'), the Federal Deposit Insurance Corporation ('the FDIC'), the Farm Credit Administration ('the FCA') or the Federal Housing Finance Agency ('the FHFA'), and that the counterparty is subject to the Swap Margin Rule laid down in Title 12 of the Code of Federal Regulations, respectively in Part 45 (for the OCC), 237 (for the FRS), 349 (for the FDIC), 624 (for the FCA) and 1221 (for the FHFA) (together 'the Swap Margin Rule').

*Article 2*

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

Done at Brussels, 5 July 2021.

*For the Commission*  
*The President*  
Ursula VON DER LEYEN

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