

COMMISSION IMPLEMENTING DECISION (EU) 2022/551**of 4 April 2022****amending Implementing Decision (EU) 2021/85 on the equivalence to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission****(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 ⁽¹⁾, and in particular Article 25(6) thereof,

Whereas:

- (1) Commission Implementing Decision (EU) 2021/85 ⁽²⁾ determines that the legal and supervisory arrangements of the United States of America ('USA') for central counterparties ('CCPs') that are supervised by the U.S. Securities and Exchange Commission (the 'SEC') and which must comply with the rules applicable to covered clearing agencies and subject to the enhanced framework laid down in SEC Rule 17Ad-22(e) ('CCPs qualified as covered clearing agencies'), are to be considered equivalent to the requirements laid down in Regulation (EU) No 648/2012 where the internal rules and procedures of such CCPs include specific risk management measures ensuring that initial margins are calculated and collected on the basis of the parameters laid down in Article 1 of that Implementing Decision.
- (2) However, when adopting Implementing Decision (EU) 2021/85, the Commission did not assess whether CCPs qualified as covered clearing agencies are to comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012 with regard to mortgage-backed securities issued or guaranteed by the government sponsored agencies Federal National Mortgage Association ('Fannie Mae'), the Federal Home Loan Mortgage Corporation ('Freddie Mac') or the Government National Mortgage Association ('Ginnie Mae') that are traded on To-Be-Announced basis ('TBAs'). TBAs do not exist in the Union. They are essentially forward or delayed delivery products, and under the rules and interpretation of the Commodity Futures Trading Commission and the SEC, TBAs are excluded from the definition of 'swap' and 'security-based swap' ⁽³⁾. Moreover, trading of TBAs takes place both on a purely bilateral basis and, to a lesser extent, on inter-dealer broker platforms. In order for the applicable legal and supervisory arrangements in the USA regarding the central clearing of TBAs to be considered equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012, the substantive outcome of those legal and supervisory arrangements should be equivalent in respect of the regulatory objectives those legal and supervisory arrangements achieve. The purpose of the equivalence assessment is therefore to verify whether the legal and supervisory arrangements of the USA ensure that CCPs which clear TBAs do not expose clearing members and trading venues established in the Union to a higher level of risk than the level of risk those clearing members and trading venues would be exposed to by CCPs authorised in the Union and, consequently, do not pose unacceptable levels of systemic risk in the Union.
- (3) The primary rules applicable to CCPs qualified as covered clearing agencies are laid down in Sections 3(a)(23) and 17A of the Securities Exchange Act of 1934 ('the Exchange Act'), Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ('the Dodd-Frank Act') and in regulations adopted by the SEC thereunder, and in particular Rule 17Ad-22 ('primary rules'). Those primary rules, however, do not provide for a minimum liquidation period for the calculation and collection of initial margins. For TBAs, margins are calculated

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

⁽²⁾ Commission Implementing Decision (EU) 2021/85 of 27 January 2021 on the equivalence to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission (OJ L 29, 28.1.2021, p. 27).

⁽³⁾ U.S. Federal Register, Vol. 77 No 156, 13 August 2012, Part II Commodity Futures Trading Commission 17 CFR Part 1, Securities and Exchange Commission, 17 CFR Parts 230, 240 and 241 Further Definition of 'Swap', 'Security-Based Swap', and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule.

on the basis of a three-day liquidation period. That three-day liquidation period takes into account the high liquidity of the TBA market, which is the second largest fixed income market in the USA, and is based on a margining model elaborated to ensure that margins cover potential exposures that the CCP estimates may occur until the hedging or liquidation of positions of a defaulting participant. The margin model uses a lookback period taking into account the last 10 years and, where relevant, stressed market periods beyond those 10 years so to ensure that periods of market stress are always taken into account. The rules and procedures for the calculation of margins for TBAs follow an approach that is similar to the rules laid down in Title IV of Regulation (EU) No 648/2012. Based on an assessment of the outcome of those rules and procedures and their adequacy to mitigate the risks that clearing members and trading venues established in the Union may be exposed to, those rules and procedures can be considered equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012, as elaborated in Article 26(1) of Commission Delegated Regulation (EU) No 153/2013 (*). That provision requires a CCP to consider minimum liquidation period of 2 days for non-OTC derivative contracts, and a minimum liquidation period of 5 days for OTC derivative contracts, typically with margin collected on a net basis.

- (4) Moreover, Article 28(1) of Delegated Regulation (EU) No 153/2013 requires that a CCP applies at least one of three measures that limit procyclicality to ensure that initial margins do not fall too low in stable economic times and do not increase precipitously in times of stress. Such measures deliver stable and conservative margins. The primary rules contain no such specific requirement for TBAs. The CCPs that clear TBAs, however, do have in place internal rules and procedures with anti-procyclical effects. Therefore, a CCPs' binding internal rules and procedures deliver substantive outcomes that are equivalent to the effects of the Union rules on anti-procyclicality for TBAs.
- (5) The legal and supervisory arrangements of the USA relative to TBAs and applicable to CCPs qualified as covered clearing agencies should therefore be deemed equivalent to the Union rules, provided that the binding internal rules and procedures of a CCP that clears TBAs and applies for recognition meets certain requirements with respect to risk management. In particular, the CCP should calculate and collect initial margins on the basis of a three-day liquidation period with respect to TBAs, on a net basis. Moreover, the CCP should apply measures designed to limit procyclicality that are equivalent in delivering stable and conservative margins to any of the three measures laid down in Article 28(1) of Delegated Regulation (EU) No 153/2013 with respect to TBAs.
- (6) The Commission concludes that the legal and supervisory arrangements of the SEC for TBAs and that apply to CCPs qualified as covered clearing agencies and that comprise the requirements laid down in the primary rules and in the binding internal rules and procedures of CCPs qualified as covered clearing agencies, are to be considered as legally binding requirements that are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012, as elaborated in Delegated Regulation (EU) No 153/2013, to the extent that those arrangements meet certain requirements with respect to risk management.
- (7) To be eligible for recognition by the European Securities and Markets Authority (ESMA), CCPs clearing TBAs should comply with the rules applicable to CCPs qualified as covered clearing agencies and with legally binding requirements meeting certain risk management standards. ESMA should verify, in accordance with Article 25(2), point (b), of Regulation (EU) No 648/2012, that those risk management standards are part of the internal rules and procedures of any CCP that clears TBAs and that is supervised by the SEC and is applying for recognition in the Union. In particular, ESMA should check that the CCP applies a three-day liquidation period with respect to TBAs, on a net basis, and that the CCP applies measures designed to limit procyclicality that are equivalent in delivering stable and conservative margins to any of the three measures laid down Article 28(1) of Delegated Regulation (EU) No 153/2013.
- (8) Implementing Decision (EU) 2021/85 should therefore be amended accordingly.
- (9) To ensure that ESMA can start the recognition procedure for CCPs clearing TBAs without delay, this Decision should enter into force as a matter of urgency.

(*) Commission Delegated Regulation (EU) No 153/2013 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 requirements for central counterparties (OJ L 52, 23.2.2013, p. 41).

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

HAS ADOPTED THIS DECISION:

Article 1

Article 1 of Implementing Decision (EU) 2021/85 is amended as follows:

- (1) point (c) is replaced by the following:

'(c) in the case of mortgage-backed securities traded on To-Be-Announced basis, a liquidation period of three days calculated on a net basis;'

- (2) the following point (d) is added:

'(d) in the case of contracts as referred to in points (a), (b) and (c), measures designed to limit procyclicality equivalent to at least one of the following:

- (i) measures applying a margin buffer at least equal to 25 % of the calculated margins which the central counterparty allows to be temporarily exhausted in periods where calculated margin requirements are rising significantly;
- (ii) measures assigning at least 25 % weight to stressed observations in the look-back period;
- (iii) measures ensuring that margin requirements are not lower than those that would be calculated using volatility estimated over a 10 year historical look-back period.'

Article 2

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

Done at Brussels, 4 April 2022.

For the Commission
The President
Ursula VON DER LEYEN
