EUROPEAN
COMMISSION

Brussels, XXX
[…](2016) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

amending Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the extension of the transitional periods related to pension scheme arrangements

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

During the negotiations of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), the Council and the European Parliament agreed a three-year exemption from the clearing obligation for Pension Scheme Arrangements (PSAs) meeting certain criteria. This transitional period is set out under Article 89(1) of EMIR and provides further time for central counterparties (CCPs) to develop technical solutions for the transfer of non-cash collateral by PSAs in order to meet collateral calls. In accordance with Article 85(2) of EMIR, the exemption can be extended once by two years, and once by one year, through means of Delegated Acts.

On 5 June 2015, the Commission adopted Delegated Regulation 2015/1515 (Commission Delegated Regulation (EU) 2015/1515 of 5 June 2015 amending Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the extension of the transitional periods related to pension scheme arrangements, OJ L239/63 of 15.9.2015), extending the exemption of the three-year period referred to in Article 89(1) of EMIR by two years, until 16 August 2017. The Commission is now proposing to prolong the existing exemption by an additional year, through means of this Delegated Act.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In order to assess the current situation fully, the Commission ordered a baseline study on whether necessary efforts have been made by CCPs to develop appropriate technical solutions for the transfer of non-cash collateral by PSAs. This baseline study also provided analysis of potential and alternative solutions. Finally the baseline study analysed the impact of removing the exemption in the absence of a solution, calculating the reduction in retirement income for the pensioner beneficiaries of the affected PSAs.

In its report (COM/2015/039 of 3.2.2015) that was based on the study, the Commission concluded that the necessary effort to develop appropriate technical solutions has not been made at this point in time and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remains unchanged.

In accordance with Article 85(2) of EMIR, the European Commission consulted ESMA and EIOPA on its Report COM/2015/039. Both ESMA and EIOPA supported the adoption of the report.

The Commission also ran two public consultations which provided further input on the exemption from the clearing obligation for PSAs. Submissions to the public consultation on EMIR[1] and to the Call for Evidence on the EU regulatory framework for financial services[2] confirmed that the conclusions of the report remained valid.

The Commission services discussed the Delegated Act with the Expert Group of the European Securities Committee. This consultation process led to a broad consensus on the draft Delegated Regulation.

[1] http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/consultation-document_en.pdf

[2] http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document_en.pdf

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt a delegated act is provided for under Article 85(2) of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

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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[3] and in particular Article 85(2) thereof,

Whereas:

(1) Central counterparties (CCPs) interpose themselves between counterparties to the contracts traded on one or more financial markets. The credit risk of those counterparties is mitigated through the posting of collateral which is calculated to cover any potential losses upon a default. CCPs accept only highly liquid assets, generally cash, as collateral to meet variation margin (VM) calls in order to allow for a rapid liquidation in the event of a default.

(2) Pension Scheme Arrangements (PSAs) in many Member States are active participants in the OTC derivatives markets. However, PSAs generally minimise their cash positions, instead holding higher yielding investments such as securities in order to ensure strong returns for pensioners. Entities operating pension scheme arrangements, the primary purpose of which is to provide benefits upon retirement, usually in the form of payments for life, but also as payments made for a temporary period or as a lump sum, typically minimise their allocation to cash in order to maximise the efficiency and the return for their policy holders. Hence, requiring such entities to clear OTC derivative contracts centrally would lead to divesting a significant proportion of their assets for cash in order for them to meet the ongoing margin requirements of CCPs.

(3) Article 89(1) of Regulation (EU) No 648/2012 therefore provides that, for three years after the entry into force of that Regulation, the clearing obligation set out in Article 4 of Regulation (EU) No 648/2012 does not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of PSAs. The transitional period also applies to entities established for the purpose of providing compensation to members of PSAs in case of a default.

(4) Article 85(2) of Regulation (EU) No 648/2012 requires the Commission to prepare a report assessing whether necessary efforts have been made by CCPs to develop appropriate technical solutions for the transfer of non-cash collateral as VM by PSAs. In order to carry out

[3] OJ L 201, 27.7.2012, p. 1.

the assessment, the Commission ordered a baseline study on solutions for the posting of non-cash collateral to central counterparties by pension scheme arrangements, as well as on the impact of removing the exemption in the absence of a solution in terms of the reduction in retirement income for the pensioner beneficiaries of the affected PSAs. On this basis, the Commission adopted its report[4] on 3 February 2015.

(5) In accordance with the findings of its report, the Commission considered that the necessary effort to develop appropriate technical solutions has not been made by CCPs at this point in time and that the adverse effect of centrally clearing OTC derivative contracts on the retirement benefits of future pensioners remained unchanged. Consequently, Commission Delegated Regulation (EU) 2015/1515[5] extending the three-year transitional period referred to in Article 89(1) of Regulation (EU) No 648/2012 by two additional years was adopted.

(6) Since then, the Commission has run a public consultation, which closed in August 2015, to prepare a report on the implementation of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories, in accordance with Article 85(1) of that Regulation. The Commission has also consulted the public in a Call for Evidence on the EU regulatory framework for financial services. The outcome of the public consultation on Regulation (EU) No 648/2012 and the submissions to the Call for Evidence have confirmed that the necessary effort to develop appropriate technical solutions has not been made by CCPs at this point in time and that the adverse effect of centrally clearing OTC derivative contracts on the retirement benefits of future pensioners remains unchanged, in line with the Commission Report.

(7) The three-year transitional period referred to in Article 89(1) of Regulation (EU) No 648/2012 should therefore be further extended.

(8) This Regulation should enter into force as soon as possible to allow the extension of the existing transitional periods to occur prior to or as soon after expiry as possible. A later entry into force could lead to legal uncertainty for pension scheme arrangements as to whether they need to begin preparing for upcoming clearing obligations,

HAS ADOPTED THIS REGULATION:

Article 1

The first subparagraph of Article 89(1) of Regulation (EU) No 648/2012 is replaced by the following:

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[4] Report from the Commission to the European Parliament and the Council under Article 85(2) of 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, assessing the progress and effort made by CCPs in developing technical solutions for the transfer by pension scheme arrangements of non cash collateral as variation margins, as well as the need for any measures to facilitate such solution COM(2015) 39 final of 3 February 2015.

[5] Commission Delegated Regulation (EU) 2015/1515 of 5 June 2015 amending Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the extension of the transitional periods related to pension scheme arrangements (OJ L 239, 15.9.2015, p. 63).

"Until 16 August 2018, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements as defined in Article 2(10). The transitional period shall also apply to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of a default."

Article 2

This Regulation shall enter into force on the 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,

For the Commission
The President
Jean-Claude Juncker