

**2013 No. 1908**

**FINANCIAL SERVICES AND MARKETS**

**The Financial Services and Markets Act 2000 (Over the Counter  
Derivatives, Central Counterparties and Trade Repositories)  
(No. 2) Regulations 2013**

*Made* - - - - *30th July 2013*

*Laid before Parliament* *31st July 2013*

*Coming into force in accordance with regulation 1(3)*

The Treasury are designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to financial services.

The Treasury make the following Regulations in exercise of—

- (a) the powers conferred by section 2(2) of the European Communities Act 1972;
- (b) the powers conferred by sections 155(4) and (5), 186(1) and 187(3) of the Companies Act 1989(c) and now vested in them(d);
- (c) the powers conferred by sections 286 and 428(3) of the Financial Services and Markets Act 2000(e), with the approval of the Secretary of State required by section 286(2) of that Act.

The Treasury and the Secretary of State make the following Regulations in exercise of the powers conferred by sections 158(4) and (5), 185 and 186(1) of the Companies Act 1989(f) and now vested in them jointly(g).

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- (a) S.I. 2012/1759.
  - (b) 1972 c.68; section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) and by section 3 of, and the Schedule to, the European Union (Amendment) Act 2008 (c. 7).
  - (c) 1989 c.40.
  - (d) The powers originally vested in the Secretary of State under sections 155(4) and (5), and 187(3) were transferred to the Treasury by the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992/1315). Powers originally vested in the Secretary of State under section 186(1) were transferred to the Treasury insofar as they relate to functions under those sections.
  - (e) 2000 c.8; section 286 was amended by S.I. 2006/2975 and 2007/126 and sections 30 and 35 of, and paragraphs 1, 2 and 3 of Schedule 8 to, the Financial Services Act 2012 (c.21).
  - (f) Section 185 was amended by S.I. 2001/3649.
  - (g) The powers originally vested in the Secretary of State under sections 158(4) and (5), and 185 of the Companies Act 1989 are now exercisable by the Secretary of State jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992. Powers originally vested in the Secretary of State under section 186(1) are now exercisable by the Secretary of State jointly with the Treasury insofar as they relate to functions under those sections.

## Citation, interpretation and commencement

1.—(1) These Regulations may be cited as the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) (No. 2) Regulations 2013.

(2) In these Regulations, the “Recognition Requirements Regulations” means the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001(a).

(3) These Regulations come into force—

- (a) on 1st February 2014 for the purposes of regulation 3, insofar as that regulation inserts paragraphs 29B and 36 into the Schedule to the Recognition Requirements Regulations;
- (b) on 1st May 2014 for the purposes of regulation 3, insofar as that regulation inserts paragraphs 23A and 29A into the Schedule to the Recognition Requirements Regulations;
- (c) for all other purposes on 26th August 2013.

## Amendments to the Companies Act 1989

2.—(1) The Companies Act 1989 is amended as follows.

(2) In section 155 (market contracts)(b)—

- (a) in subsection (2B)(c), after “subsection (2C)”, insert “or (2D)”;
- (b) after subsection (2C) insert—

“(2D) A client trade is also excluded by this subsection from subsection (2B)(c) if—

- (a) the client trade was entered into by a client in the course of providing indirect clearing services to an indirect client;
- (b) the client defaults; and
- (c) the clearing member client contract corresponding to the client trade is not transferred within—
  - (i) the period specified for this purpose in the default rules of the recognised central counterparty; or
  - (ii) if no such period is specified in the default rules of the recognised central counterparty, a period of 14 days beginning with the day on which proceedings in respect of the client’s insolvency are begun.”; and

(c) after subsection (3A) insert—

“(3B) The reference in subsection (2D)(c)(ii) to the beginning of insolvency proceedings is to—

- (a) the presentation of a bankruptcy petition or a petition for sequestration of a client’s estate, or
- (b) the application for an administration order or the presentation of a winding-up petition or the passing of a resolution for voluntary winding up, or
- (c) the appointment of an administrative receiver.

(3C) In subsection (3B)(b) the reference to an application for an administration order is to be taken to include a reference to—

- (a) in a case where an administrator is appointed under paragraph 14 or 22 of Schedule B1 to the Insolvency Act 1986 (appointment by floating charge holder, company or directors) following filing with the court of a copy of a notice of intention to appoint under that paragraph, the filing of the copy of the notice, and

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(a) S.I. 2001/995, to which there are amendments not relevant to these Regulations.

(b) Section 155 has been amended by S.I. 1991/880, S.I. 2009/853 and S.I. 2013/504.

- (b) in a case where an administrator is appointed under either of those paragraphs without a copy of a notice of intention to appoint having been filed with the court, the appointment of the administrator.”.
- (3) In section 155A(a) (qualifying collateral arrangements and qualifying property transfers), in subsection (4)—
- (a) after paragraph (a), insert—
- “(aa) payments of money by a clearing member to indirect clients in accordance with Article 4(5) of the EMIR Level 2 Regulation;”;
- (b) after paragraph (b), insert—
- “(c) transfers of property to the extent that they—
- (i) are made by a clearing member to a non-defaulting client or another clearing member instead of, or in place of, a defaulting client;
- (ii) represent the termination or close out value of a client trade which is transferred from a defaulting client to another clearing member or a non-defaulting client; and
- (iii) do not exceed the termination or close out value of the clearing member client contract corresponding to that client trade, as determined in accordance with the default rules of the recognised central counterparty.”.
- (4) In section 158(1)(d) (modifications of the law of insolvency)—
- (a) after “by the clearing member”, insert “or client”; and
- (b) in the phrase “action taken to transfer the client trades”, omit “the”.
- (5) In section 159 (proceedings of exchange or clearing house take precedence over insolvency procedures)—
- (a) in subsection (1), paragraph (f)—
- (i) after “by the clearing member”, insert “or client”;
- (ii) for “the client trade”, substitute “a client trade”;
- (b) in subsection (2), paragraph (d)—
- (i) after “by the clearing member”, insert “or client”; and
- (ii) for “the client trade”, substitute “a client trade”.
- (6) In section 166 (powers to give directions), in subsection (9), paragraph (b), after “recognised clearing house”, insert “or a defaulting clearing member”.
- (7) In section 167 (application to determine whether default proceedings to be taken), in subsection (1)—
- (a) at the end of paragraph (a), omit “or”;
- (b) at the end of paragraph (b), insert—
- “, or
- (c) a client which is providing indirect clearing services to an indirect client.”;
- (c) in the last sentence, for “or clearing house”, substitute “clearing house or client”.
- (8) In section 170A(b) (EEA central counterparties and third country central counterparties)—
- (a) in subsection (1), at the end of paragraph (g), insert—
- “, and
- (h) “UK client” means a client—
- (i) which offers indirect clearing services, and

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(a) Section 115A was inserted by S.I. 2013/504.

(b) Section 170A was also inserted by S.I. 2013/504.

- (ii) to which the law of a part of the United Kingdom will apply for the purposes of an insolvent re-organisation or winding up.”;
  - (b) in subsection (2), after “a UK clearing member”, insert “or a UK client”.
- (9) In section 182A(a) (recognised central counterparties: disapplication of provisions on mutual credit and set-off), after subsection (1), insert—
- “(2) Nothing in the law of insolvency shall enable the setting off against each other of—
    - (a) positions and assets recorded in an account at a clearing member and held for the account of an indirect client or a group of indirect clients in accordance with Articles 4(2) and (3) of the EMIR Level 2 Regulation; and
    - (b) positions and assets recorded in any other account at the clearing member.”.
- (10) In section 188 (meaning of “default rules” and related expressions)—
- (a) in subsection (1), omit from “and in the case of a recognised central counterparty” to the end of the subsection;
  - (b) after subsection (1), insert—
    - “(1A) In the case of a recognised central counterparty, “default rules” includes—
      - (a) the default procedures referred to in Article 48 of the EMIR Level 1 Regulation; and
      - (b) any rules of the recognised central counterparty which provide for the taking of action in accordance with a request or instruction from a clearing member under the default procedures referred to in Article 4(4) of the EMIR Level 2 Regulation in respect of assets or positions held by the recognised central counterparty for the account of an indirect client or group of indirect clients.”;
    - (c) after subsection (2), insert—
      - “(2A) For the purposes of subsection (2), where a recognised central counterparty takes action under the rules referred to in subsection (1A)(b), the action is to be treated as taken in respect of the client providing the indirect clearing services.”.
- (11) After section 189, insert—

**“Meaning of “transfer”**

**189A.**—(1) In this Part, a reference to a transfer of a clearing member client contract, a client trade or a qualifying collateral arrangement shall be interpreted in accordance with this section.

- (2) A transfer of a clearing member client contract or client trade includes—
  - (a) an assignment;
  - (b) a novation; and
  - (c) terminating or closing out the clearing member client contract or client trade and establishing an equivalent position between different parties.

(3) Where a clearing member client contract is recorded in the accounts of a recognised central counterparty as a position held for the account of an indirect client or group of indirect clients, the clearing member client contract is to be treated as having been transferred if the position is transferred to a different account at the recognised central counterparty.

(4) A reference to a transfer of a qualifying collateral arrangement includes an assignment or a novation.”.

- (12) In section 190 (minor definitions)—
  - (a) at the appropriate place, insert—

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(a) Section 182A was also inserted by S.I. 2013/504

“indirect clearing services” has the same meaning as in the EMIR Level 2 Regulation;  
”; and

(b) omit subsection (3A).

(13) In the table in section 191 (index of defined expressions), at the appropriate places, insert the following rows—

“indirect clearing services transfer	Section 190(1) Section 189A”
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### **Amendments to the Recognition Requirements Regulations**

**3.**—(1) The Recognition Requirements Regulations are amended as follows.

(2) In regulation 3(1) (interpretation), in the definition of “defaulter” and “default”, for “section 188(2)” substitute “sections 188(2) and (2A)”.

(3) In Part 3 of the Schedule, after paragraph 23 (complaints), insert—

#### *“Recovery Plans*

**23A.** The clearing house must maintain a plan that sets out the steps that it will take in order to maintain the continuity of its exempt activities in the event that such continuity is threatened.”.

(4) In Part 5 of the Schedule, after paragraph 29 (requirements of the EMIR regulation), insert—

#### *“Loss allocation*

**29A.** The central counterparty must maintain effective arrangements (which may include rules) for ensuring that losses that—

- (a) arise otherwise than as a result of clearing member default; and
- (b) threaten the central counterparty’s solvency;

are allocated with a view to ensuring that the central counterparty can continue to provide the services and carry on the activities specified in its recognition order.

#### *Recovery plans*

**29B.** The central counterparty must maintain a plan that sets out the steps that it will take in order to maintain the continuity of the services that it provides and the activities that it carries on that are specified in its recognition order in the event that such continuity is threatened.”.

(5) In Part 6 of the Schedule, after paragraph 35 (liquidation of accounts), insert—

#### *“Loss allocation*

**36.** The default rules must contain provision ensuring that losses that—

- (a) arise as a result of clearing member default;
- (b) remain after the resources to which the central counterparty has access pursuant to Article 45 of the EMIR Level 1 Regulation have been exhausted; and
- (c) threaten the central counterparty’s solvency;

are allocated with a view to ensuring that the central counterparty can continue to provide the services and carry on the activities specified in its recognition order.”.

## **Amendments to the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013**

**4.**—(1) The Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013<sup>(a)</sup> are amended as follows.

(2) In regulation 7 (power of the FCA to require information), in paragraph (1)—

(a) omit “or” after sub-paragraph (a);

(b) after sub-paragraph (b) insert—

“; or

(c) an entity referred to in Article 4(1)(a)(v) of the EMIR regulation which is not an authorised person.”.

(3) In regulation 8 (applications and notifications to FCA)—

(a) for the heading substitute “Applications, notifications and reports to FCA”;

(b) after paragraph (1) insert—

“(1A) Paragraphs (2), (6) and (8) apply where a financial counterparty is required to make a report under Article 12(4) or 15(2) of Commission Delegated Regulation (EU) 149/2013 of 19 December 2012 supplementing the EMIR regulation<sup>(b)</sup>.”;

(c) in paragraph (2), for “or notification” substitute “, notification or report”;

(d) in paragraph (6)—

(i) for “or notifications” substitute “, notifications or reports”;

(ii) for “or notification” substitute “, notification or report”.

(4) In regulation 9 (penalties)—

(a) at the end of the heading insert “and statements”;

(b) in paragraph (1) after “the FCA may” insert “publish a statement to that effect or”;

(c) in paragraph (2) after “the FCA may” insert “publish a statement to that effect or”.

(5) After regulation 15 (offences) insert—

## **“PART 6A**

### **Removal of directors of recognised central counterparties**

#### **Removal of directors of recognised central counterparties**

**15A.**—(1) If the Bank proposes to remove a member of the board of directors of a recognised central counterparty (“M”) under the second sub-paragraph of Article 31(1) of the EMIR regulation, it must give M and the recognised central counterparty concerned a notice.

(2) A notice under paragraph (1) must inform the recipients that they may make representations to the Bank within such period as may be specified in the notice.

(3) The Bank may extend the period allowed under a notice under paragraph (1) for making representations.

(4) If, having considered any representations made in response to the notice under paragraph (1), the Bank decides to remove M from the board, it must without delay give M and the recognised central counterparty concerned a further notice.

(5) If the Bank decides to remove M from the board, M or the recognised central counterparty concerned may refer the matter to the Tribunal.

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(a) S.I. 2013/504.

(b) OJ No L 52, 23.2.2013, p11.

(6) A notice under paragraph (4) must inform the recipient of their right to refer the matter to the Tribunal, and give an indication of the procedure on such a reference.

(7) In this regulation, “board of directors” includes, if there is no such board, the equivalent management body.”.

#### **Amendment to the Financial Services and Markets Act 2000: markets in financial instruments directive**

**5.**—(1) The Financial Services and Markets Act 2000(a) is amended as follows.

(2) In section 301A(b) (obligation to notify the FCA: acquisitions of control), after subsection (4) insert—

“(5) Nothing in this Chapter applies to an overseas investment exchange.”.

#### **Transitory provision: recovery plans and loss allocation for recognised clearing houses applying for authorisation under EMIR**

**6.**—(1) In this regulation—

“EMIR” means Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories(c);

“relevant CCP” means a body corporate or an unincorporated association which—

- (a) is established in the United Kingdom;
- (b) was a recognised clearing house immediately before 15th March 2013; and
- (c) applies to the Bank of England in accordance with Article 17 of EMIR for an order granting authorisation for the purposes of that Article;

“transition period” means the transition period for a relevant CCP, determined in accordance with regulations 52(1) and (2) of the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013.

(2) Paragraphs (3) and (4) modify the application of Parts 3 and 4 of the Schedule to the Recognition Requirements Regulations to a relevant CCP during its transition period(d).

(3) If the relevant CCP’s application in accordance with Article 17 of EMIR is not determined before 1st February 2014—

- (a) paragraph 23A of the Schedule to the Recognition Requirements Regulations applies to the relevant CCP from 1st February 2014; and
- (b) the Recognition Requirements Regulations apply to the relevant CCP with the following paragraph inserted into Part 4 of the Schedule, after paragraph 28—

#### *“Loss Allocation*

**28A.** The default rules must contain provision ensuring that losses that—

- (a) arise as a result of the default of a member of the clearing house; and
- (b) threaten the clearing house’s solvency;

are allocated with a view to ensuring that the clearing house can continue to provide its exempt activities.”.

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(a) 2000 c.8.

(b) Section 301A was substituted by S.I. 2009/534 and amended by paragraph 23 of Schedule 8 to the Financial Services Act 2012 (c.21).

(c) OJ No L 201, 27.7.2012, p1.

(d) Regulation 52(5) of S.I. 2013/504 applies the Recognition Requirements Regulations to a relevant CCP during its transition period without the amendments made to the Recognition Requirements Regulations by S.I. 2013/504.

(4) If the relevant CCP's application in accordance with Article 17 of EMIR is not determined before 1st May 2014, the Recognition Requirements Regulations apply to the relevant CCP with—

- (a) the modifications mentioned in paragraph (3); and
- (b) the following paragraph inserted into Part 3 of the Schedule, after paragraph 23A—

*“Loss Allocation*

**23B.** The clearing house must maintain effective arrangements (which may include rules) for ensuring that losses that—

- (a) arise otherwise than as a result of the default of a member of the clearing house; and
- (b) threaten the clearing house's solvency;

are allocated with a view to ensuring that the clearing house can continue to provide its exempt activities.”.

*Mark Lancaster  
Robert Goodwill*

Two of the Lords Commissioners of Her Majesty's Treasury

30th July 2013

*Jo Swinson*

Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs

24th July 2013

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations make further provision to implement certain Articles of—

- (a) Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ No L 201, 27.7.2012, p1) (“the EMIR regulation”); and
- (b) 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 No L 52, 23.2.2013, p11).

Certain articles of the EMIR regulation were implemented by the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 (S.I. 2013/504).



Regulation 2 amends the Companies Act 1989 to facilitate the segregation of indirect client accounts at a clearing member and the transfer of indirect client accounts on the failure of a client providing indirect clearing services. An indirect client is a client of a client of a clearing member.

Regulation 3 amends the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (S.I. 2001/995) (“the Recognition Requirements Regulations”). The Recognition Requirements Regulations set out the recognition requirements that investment exchanges and clearing houses must satisfy in order to be or to remain recognised by the appropriate regulator under section 290 of the Financial Services and Markets Act 2000 (c.8) (“the Act”). Recognised investment exchanges and recognised clearing houses have an exemption under section 285 of the Act, permitting them to carry on certain activities which would otherwise require authorisation under Part 4A of the Act.

Regulation 3 amends the Recognition Requirements Regulations so as to include the following new requirements: Clearing houses which provide clearing services without doing so as a central counterparty must maintain recovery plans specifying the steps they will take in order to maintain the continuity of their exempt activities if such continuity is threatened. Clearing houses which act as central counterparties must have in place effective arrangements for the allocation of losses arising for reasons other than member default; they must have in place plans for maintaining the provision of certain specified services when the continuity of service provision is threatened and must include in their default rules provision allocating losses that arise as a result of member default and which are not covered by the provision made in Article 45 of the EMIR regulation.

Regulation 4 amends the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 (S.I. 2013/504):

- to give the Financial Conduct Authority (“FCA”) power to obtain information from third country entities for which the FCA has supervisory responsibilities;
- to give the FCA power to direct the manner of making and content of reports to be made to the FCA under Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012;
- to give the FCA power to publish a statement of censure as an alternative to imposing a penalty for certain contraventions of the EMIR regulation or its implementing legislation;
- to require the Bank of England to give notice before removing a member of the board of directors of a recognised central counterparty under Article 31(1) of the EMIR regulation, and to give a person so removed and the recognised central counterparty concerned the right to refer the matter to the Upper Tribunal.

Regulation 5 alters the implementation of Article 38(3) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ No L 145, 30.4.2004, p1). Article 38(3) is transposed by Chapter 1A of Part 18 of the Act (control over recognised investment exchange), and regulation 5 prevents Chapter 1A from applying to overseas investment exchanges.

Regulation 6 makes transitory provision for recognised clearing houses which are applying for authorisation under the EMIR regulation, where the applications have not been determined by 1st February 2014 or 1st May 2014.

A full impact assessment of the effect that these Regulations will have on the costs of business and the voluntary sector is available from, Her Majesty’s Treasury, 1 Horse Guards Road, London SW1A 2HQ or on <http://www.hm-treasury.gov.uk/> and is published alongside the Regulations on <http://www.legislation.gov.uk/>.





£5.75

UK2013073013 08/2013 19585

<http://www.legislation.gov.uk/id/uksi/2013/1908>

ISBN 978-0-11-110250-3



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