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Directorate General Internal Market and Services

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Financial markets infrastructure

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Mr Georges Handjinicolaou
Deputy Chief Executive
Officer and Head of Europe,
Middle East and Africa
International Swaps and Derivatives
Association, Inc. (ISDA)
Square de Meeus 38/40, 4th floor
B-1000 Brussels

Subject: Application of Article 11 (3) EMIR

Dear Mr Handjinicolaou,

With reference to your letter of 10 August 2012 to Mr Faull seeking further clarity about Article 11 (3) of Regulation No 648/2012 (EMIR) by the services of the European Commission, I would like to inform you as follows.

EMIR was adopted on 4 July and entered into force on 16 August 2012.

Article 11(3) contains the general requirement for risk management procedures to be in place for uncleared OTC derivatives contracts that are entered into on or after 16 August 2012. Furthermore, Article 11 (15) requires ESMA to develop draft regulatory technical standards for adoption by the Commission specifying these risk management procedures, including the levels and type of collateral and segregation arrangements.

These provisions have to be read in relation to recital 93 which stipulates that "any obligation imposed by the Regulation will only apply from the date on which the necessary Regulatory Technical Standards take effect".

As a general rule, recitals offer guidance as to the interpretation of the articles, but they cannot invalidate or override a clear obligation set out in the Articles.

In this case the Community legislator clearly decided in Article 11 (3) that procedures, requiring the timely, accurate and appropriate segregated exchange of collateral with respect to OTC contracts, should be in place as of 16 August 2012. To the extent that this provision is sufficiently clear and precise its requirements are directly applicable as from 16 August 2012.

The precise level and exact type of collateral to be exchanged will be specified by the Regulatory Technical Standards to be adopted by the Commission under Article 11 (15). As long as those standards are not yet in place, counterparties have the freedom to apply their own rules. As soon as those standards are adopted, counterparties will have to change to the extent necessary their procedures to make them compatible with those standards from the date that they take effect and apply them to contracts concluded as of that date.

Finally, I draw your attention to the fact that the only the Court of Justice of the European Union can give an authoritative interpretation of Union legislation.



Patrick Pearson
Head of Unit

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