



Brussels, 11.10.2023  
C(2023) 6692 final

**COMMISSION DELEGATED REGULATION (EU) .../...**

**of 11.10.2023**

**amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to the TONA and SOFR benchmarks referenced in certain OTC derivative contracts**

(Text with EEA relevance)

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE DELEGATED ACT**

With the common objective to ensure the accuracy and integrity of benchmarks, and thus increase contracts' robustness, several jurisdictions, including the US, the UK and Japan, have introduced benchmark reforms in recent years. In the EU, this work corresponds to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds.<sup>1</sup> This reform led to the discontinuation of certain widely used benchmarks in a range of financial instruments and contracts and to the development in parallel of a few new ones. This benchmark transition was also reflected in the derivatives market, meaning that new benchmarks started being used as reference rates in derivative contracts as well. Consequently, this reform impacted the clearing obligation which required clearing of certain classes of OTC derivatives referencing those benchmarks that ceased (or are due to cease, such as most settings of USD LIBOR) to be published.

ESMA published a final report in November 2021<sup>2</sup>, presenting a first set of draft regulatory technical standards (RTS) amending Commission Delegated Regulation (EU) 2015/2205.<sup>3</sup> The amending RTS on the clearing obligation was adopted by the European Commission on 8 February 2022, published in the Official Journal on 17 May 2022<sup>4</sup> and entered into force on the following day. On the basis of the delegated act, EONIA and LIBOR classes were removed from the scope of the obligation, while OIS classes referencing €STR (EUR) and SOFR (USD) were added to the clearing obligation, and additional maturities for the OIS class referencing SONIA (GBP) were introduced.

In the same report, ESMA committed to continue monitoring the benchmark transition and to reconsider the classes of derivatives subject to the clearing obligation, where necessary. Following a second consultation closed in September 2022, ESMA proposed to introduce the TONA OIS class and to extend the SOFR OIS class up from 3 to 50 years.

There are currently three Commission Delegated Regulations on the clearing obligation. They mandate a range of interest rate and credit derivative classes to be cleared. In view of the benchmark transition, there is a need to review the scope of the clearing obligation for the classes and currencies impacted by these changes, namely interest rate derivative classes in JPY and USD. Commission Delegated Regulation (EU) 2015/2205 should therefore be amended to reflect the transition to the new benchmarks, namely TONA and SOFR.

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<sup>1</sup> Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1–65)

<sup>2</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-156-4953\\_final\\_report\\_on\\_the\\_co\\_and\\_dto\\_re\\_benchmark\\_transition.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-4953_final_report_on_the_co_and_dto_re_benchmark_transition.pdf)

<sup>3</sup> Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13–21)

<sup>4</sup> Commission Delegated Regulation (EU) 2022/750 of 8 February 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts (OJ L 138, 17.5.2022, p. 6–10)

## **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

ESMA held a public consultation between 11 July and 30 September 2022 on a proposal to further amend the scope of the clearing obligation to accompany the benchmark transition. ESMA received eighteen responses from a well-diversified range of stakeholders and has taken this feedback into account in the finalisation of the proposed amendments to Commission Delegated Regulation (EU) 2015/2205. In parallel, ESMA has continued to monitor the progress made with the benchmark transition, including an analysis of more recent regulatory reporting data, in order to calibrate the changes to be made to the scope of the clearing obligation. Furthermore, ESMA has continued its dialogue with the authorities from other jurisdictions to facilitate coordination and convergence to the extent possible. Finally, ESMA has received input from the European Systemic Risk Board (ESRB) on the amendments to the clearing obligation which have been reflected in the analysis and in this amending regulation. This amending regulation is based on ESMA's final report sent to the Commission on 1 February 2023.<sup>5</sup>

## **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

The delegated act introduces a modification to Commission Delegated Regulation (EU) 2015/2205.

Article 1 modifies Article 3 of Commission Delegated Regulation (EU) 2015/2205 regarding interest rate derivative classes, as well as its annex, in the following way:

- Article 3(1c) is added to specify the date from which the clearing obligation shall take effect for certain transactions referencing SOFR and TONA.
- The annex is amended to reflect the deletion of old benchmarks and the introduction of new benchmarks.

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<sup>5</sup> The full document can be found here: [ESMA reviews the scope of clearing and derivatives trading obligations \(europa.eu\)](https://esma.europa.eu/press-material/press-events/presentation-esma-reviews-the-scope-of-clearing-and-derivatives-trading-obligations).

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## **amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to the TONA and SOFR benchmarks referenced in certain OTC derivative contracts**

(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>6</sup>, and in particular Article 5(2), second subparagraph, thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2015/2205<sup>7</sup> specifies, among others, a set of classes of over-the-counter (OTC) interest rate derivatives that are subject to the clearing obligation. Delegated Regulation (EU) 2015/2205 was amended by Commission Delegated Regulation (EU) 2022/750<sup>8</sup> as regards the set of classes of OTC interest rate derivatives denominated in Euro (EUR), Pound Sterling (GBP), Japanese Yen (JPY) and US Dollar (USD) that are subject to the clearing obligation. That change in the scope of classes that are subject to the clearing obligation reflects the transition to new benchmarks referenced in OTC derivatives, moving away from referencing the Euro Overnight Index Average (EONIA) and London Inter-Bank Offered Rate (LIBOR) benchmarks and referencing instead new risk-free rates, as some classes no longer met the criteria that are essential for subjecting them to the clearing obligation while new classes started to meet these criteria.
- (2) The ICE Benchmark Administrator, the administrator for LIBOR, had communicated that the cessation of JPY LIBOR and certain fixings of USD LIBOR was going to take place at the end of 2021, whereas the publication of all remaining settings of USD LIBOR will cease in June 2023. In addition, the Commission, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision), the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued a joint statement to strongly encourage counterparties to stop using any of the LIBOR settings, including USD LIBOR, as a reference rate in new contracts by 31 December 2021. Since 1 January 2022, counterparties are hence no longer able to enter into OTC interest rate derivatives referencing JPY LIBOR as that

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<sup>6</sup> OJ L 201, 27.7.2012, p. 1

<sup>7</sup> Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

<sup>8</sup> Commission Delegated Regulation (EU) 2022/750 of 8 February 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts (OJ L 138, 17.5.2022, p. 6).

benchmark has ceased and counterparties are expected to no longer enter into OTC interest rate derivatives referencing USD LIBOR.

- (3) Regulators and market participants have been working on replacement rates for those currencies, and in particular on the development of new risk-free rates, which are now being used as benchmarks in financial instruments and financial contracts. In particular, the Secured Overnight Financing Rate (SOFR) and the Tokyo Overnight Average Rate (TONA) risk-free rates are produced for USD and JPY respectively. More specifically with respect to the OTC derivative market, OTC interest rate derivative contracts referencing SOFR and TONA are being traded by counterparties and are being cleared at certain Central Counterparties (CCPs).
- (4) ESMA has been notified of the classes of OTC interest rate derivatives referencing SOFR or TONA that certain CCPs have been authorised to clear. For each of those classes ESMA has assessed again the criteria that are essential for subjecting them to the clearing obligation, including the level of standardisation, the volume and liquidity, and the availability of pricing information. With the overarching objective of reducing systemic risks, ESMA has determined that those classes of OTC interest rate derivatives referencing those risk-free rates should now become subject to the clearing obligation in accordance with the procedure set out in Regulation (EU) No 648/2012. Those classes should therefore be included in the scope of the clearing obligation.
- (5) In general, different counterparties need different periods of time for putting in place the necessary arrangements to start clearing their OTC interest rate derivatives subject to the clearing obligation. However, in this case, counterparties have had time to prepare for the benchmark transition, including the cessation of JPY LIBOR that took place at the end of 2021 or the planned cessation of most settings of USD LIBOR scheduled for June 2023, including with respect to their clearing arrangements. For counterparties already subject to the clearing obligation and clearing OTC interest rate derivatives denominated in JPY or in USD, clearing the new classes referencing the risk-free rates in JPY or USD does not require significant changes, if any at all, to their clearing contracts or processes. Indeed, when counterparties have clearing arrangements in place to clear OTC interest rate derivatives denominated in JPY, then clearing OTC interest rate derivatives referencing the risk-free rate in that currency does not require establishing and implementing brand new clearing arrangements as was the case when they first started clearing OTC interest rate derivatives denominated in that currency. Furthermore, for counterparties that have had clearing arrangements in place to clear OTC interest rate derivatives referencing SOFR, as SOFR Overnight Index Swaps classes of maturities up to 3 years are already in scope of the clearing obligation, then clearing OTC interest rate derivatives referencing SOFR for longer maturities does not require establishing and implementing brand new clearing arrangements. There is no need to introduce an additional phase-in in order to ensure an orderly and timely implementation of that obligation. The changes made to introduce the new classes of OTC interest rate derivatives referencing the risk-free rates and denominated in JPY and USD should start to apply on the date of entry into force of this Regulation.
- (6) Delegated Regulation (EU) 2015/2205 should therefore be amended accordingly.
- (7) This Regulation is based on the draft regulatory technical standards submitted to the Commission by ESMA.
- (8) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and

benefits, requested the advice of the Security and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>9</sup>, and consulted the European Systemic Risk Board,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

Delegated Regulation (EU) 2015/2205 is amended as follows:

- (1) in Article 3, the following paragraph 1c is inserted:  
‘1c. By way of derogation from paragraph 1, and excluding contracts referred to in paragraph 1b, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex in rows E.4.1 and E.4.2 of Table 4, the clearing obligation for such contracts shall take effect on [OP: *Insert the date of entry into force of this Amending Regulation*].’;
- (2) the Annex is amended in accordance with the Annex to this Regulation.

#### *Article 2*

This Regulation shall enter into force on the twentieth 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, 11.10.2023

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

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<sup>9</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).