clear to trade

eurex clearing *circular 076/12*

Date: 14 September 2012
Recipients: All Clearing Members and Non-Clearing Members of Eurex Clearing AG
Authorized by: Thomas Book

⚠ **Action required** ⚠ **High priority**

Implementation of a new outsourcing framework

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Content may be most important for:	**Attachments:**
➲ All departments	1. Updated sections of the Clearing Conditions for Eurex Clearing AG 2. Announcement of Outsourcing of Clearing Functions by Clearing Members of Eurex Clearing AG 3. Announcement of Outsourcing of Back-Office Functions by Non-Clearing Members of Eurex Clearing AG

Summary:

On September 12, 2012, the Executive Board of Eurex Clearing AG decided with effective date 1 October 2012 on amendments to the Clearing Conditions for Eurex Clearing AG which reflect the new outsourcing framework for clearing-related functions of Clearing Members and Non-Clearing Members.

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Sitz in Frankfurt/Main
HRB Nr. 44828
Amtsgericht
Frankfurt/Main

Implementation of a new outsourcing framework

Introduction

Eurex Clearing will implement a new outsourcing framework with effective date 1 October 2012.
The new framework applies to all clearing, risk management and back-office functions which have to be performed by Clearing Members or Non-Clearing Members in the context of clearing.

The existing outsourcing framework of Eurex Clearing was implemented in 2006. In order to meet demands from our members and to ensure consistency across all markets cleared, the following facts will change with the implementation of the new outsourcing framework applicable for outsourcing arrangements between Clearing Members and Non-Clearing Members:

- The Insourcer can be located in any country provided that Eurex Clearing is appropriately licensed or does not have to obtain any additional license or authorisation as a result of the outsourcing.
- The insourcing firm does not necessarily have to be a financial service provider anymore or a member of Eurex Clearing.
- The Insourcer may have a direct connection to the EDP (electronic data processing) of Eurex Clearing, if required.
- The outsourcing clearing member firm does not have to obtain approval from the Exchange Surveillance Authority of Hesse any longer in order to outsource its clearing functions.

Outsourcing principles

In addition to the above-mentioned key changes, the following outsourcing principles apply:

1) Each outsourcing arrangement has to be notified to Eurex Clearing in writing, as determined by Eurex Clearing. For further information, see “Application Process for New Outsourcing Arrangements”.
2) The Outsourcer remains fully responsible towards Eurex Clearing AG for orderly conduct of the outsourced functions at all times.
3) The outsourcing must be in compliance with the laws and regulations applicable to the Outsourcer and Insourcer and the relevant clearing agreement.
4) Orderly conduct of outsourced functions must be ensured, i.e., the Outsourcer is required to establish and maintain throughout the term of the outsourcing appropriate procedures documented in writing for supervising the performance of the outsourced functions by the Insourcer.
5) The Outsourcer ensures access at any time to the outsourced functions, monitors the capability to perform such functions on an on-going basis and conducts audits at the Insourcer on a regular basis. The audits can either be performed by the Outsourcer itself or an independent auditor, or by requiring the Insourcer to certify compliance with the outsourcing principles.
6) The Outsourcer must contractually ensure that Eurex Clearing is entitled to execute compliance audits at the Outsourcer itself and at the Insourcer.
7) The Outsourcer must oblige the Insourcer to appoint a qualified staff member in the back-office if the Outsourcer itself is required to meet such requirement (except in the case of an outsourcing to a Clearing Member).
8) The Outsourcer and Insourcer must appoint at least one contact person to escalate any issues in respect of the outsourced functions who is sufficiently fluent in German and/or English and who must be available without interruptions during the entire clearing business day including all trading and post-trading phases.
9) If the Insourcer envisages to have a direct technical connection to the EDP of Eurex Clearing the Insourcer has to sign and hand in the form “Technical Agreement for the Connection to the EDP of Eurex Clearing”.

10) An outsourcing arrangement may comprise further outsourcing of outsourced functions by the Insourcer to another Insourcer ("sub-outsourcing") with prior approval of the relevant Outsourcer.
11) The Insourcer must keep customer-related data confidential and implement adequate technical and organisational measures to adequately protect such customer-related data for the purpose of fulfilling the outsourced functions.
12) The Outsourcer is responsible to ensure that the limitations on self-contracting pursuant to section 181 of the German Civil Code or similar provisions in other applicable laws are complied with.
13) Outsourcing of a Non-Clearing Member's back-office functions to another entity than its Clearing Member for the respective market requires prior approval of that Clearing Member.
14) If a Clearing Member outsources all clearing functions the Clearing Member does not need to have the full technical connection to the EDP of Eurex Clearing but has to establish contractually and physically at least a connection to the Common Report Engine and to have at least one access to the Eurex Clearing GUI (alternatively over access to a MISS).
15) Eurex Clearing may at any time exercise a veto right in respect of an outsourcing arrangement if it becomes aware that orderly conduct of the outsourced functions is not ensured (as specified in the Clearing Conditions for Eurex Clearing AG).

Existing outsourcing arrangements

Eurex Clearing allows a transitional period of three months for Clearing and Non-Clearing Members who have a clearing and/or back-office outsourcing arrangement in place to comply with the new principles and the updated version of the Clearing Conditions for Eurex Clearing AG as well as to submit the updated version of the application form for notification of existing clearing and/or back-office outsourcing.
In case of non-compliance after three months starting with the day of implementation, Eurex Clearing may use its veto right according to the new Clearing Conditions for Eurex Clearing to terminate the outsourcing arrangement.

Application process for new outsourcing arrangements

Clearing Members and Non-Clearing Members are requested to notify their outsourcing arrangements by means of one of the following forms (for Clearing Members: "Announcement of Outsourcing of Clearing Functions by Clearing Members of Eurex Clearing AG"; for Non-Clearing Members: "Announcement of Outsourcing of Back-Office Functions by Non-Clearing Members of Eurex Clearing AG"). They have to make sure to include all required details and define the market for which they intend to outsource the respective functions. For any questions you may have or further information you may require, please contact the Member Services & Admission team at tel. +49-69-211-1 17 00 or memberservices@eurexclearing.com.

14 September 2012

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CHAPTER I PART 1 AND CHAPTER IX ARE BEING ADJUSTED.

AMENDMENTS ARE MARKED AS FOLLOWS:

INSERTIONS ARE UNDERLINED.

DELETIONS ARE CROSSED OUT.

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Chapter I
General Provisions

Part 1
General Clearing Provisions

7 Termination Rules with respect to the Clearing Member

7.2 Termination Events

7.2.1 […]

(1)-(11) […]

(12) **Non-Compliance with Outsourcing Requirements**

Non-compliance with the obligation to terminate the Outsourcing or to re-assume the Outsourced Functions upon the exercise of the veto right by Eurex Clearing AG pursuant to Number 14.2.10.

[…]

13 Liabilities, Emergency Actions, Contractual Penalties (*Vertragsstrafen*), Delegation

13.1 Liability, Emergency Actions

[…]

13.1.3 In case an orderly ~~clearing procedure~~ Clearing Procedure with a Clearing Member or a Link Clearing House is disrupted, in particular by technical disruptions, the relevant Clearing Member or Link Clearing House, respectively, shall immediately notify Eurex Clearing AG thereof. Any respective emergency actions by Eurex Clearing AG are legally binding on all contractual parties.

[…]

13.2 Contractual Penalties (*Vertragsstrafen*)

13.2.1 If a Termination Event pursuant to Number 7.2.1 Paragraph (1) occurs or in the event of a failure to deliver ~~of~~ Securities or other assets or ~~fails~~ a failure to provide any cash amount where a Physical Settlement shall occur in accordance with the Special Clearing Provisions – irrespective of whether Eurex Clearing AG has suffered any damage – the Clearing Member shall pay, in accordance with the instructions received from Eurex Clearing AG, a contractual penalty in the amount of 0.025 percent of the relevant unpaid due amount, but no less than EUR 2,500 − or the corresponding equivalent in CHF − per calendar day, however, no more than EUR 25,000 or the corresponding equivalent in CHF. If the amount calculated from the above percentage exceeds EUR 25,000, the amount of the contractual penalty shall − notwithstanding the provisions in Sentence 1 − be calculated according to a percentage of the relevant unpaid due amount, such percentage having been fixed and notified in advance by Eurex Clearing AG. Such percentage shall be based on the effective overnight interest rate applicable to the relevant Clearing Currency.

[…]

14 Transmission of information by Eurex Clearing AG; Outsourcing of Clearing Functions

14.1 Transmission of information ~~via Link Clearing Houses,~~ relating to Clearing Members or Non-Clearing-Members ~~of~~ by Eurex Clearing AG ~~to a Third Party~~

14.1.1 Eurex Clearing AG treats all data and information which relate to its Clearing Members, Non-Clearing Members and Link Clearing Houses confidentially. Eurex Clearing AG shall be authorised – subject to applicable law – to transfer data and information to competent supervisory authorities or other authorised third parties domestic or abroad which are subject to confidentiality regulations comparable to those of Eurex Clearing AG. ~~Customer-related information may only be passed on by Eurex Clearing AG if it is already publicly available or if it is legally required to be passed on or if the relevant Clearing Member, Non-Clearing Member or Link Clearing House has agreed to it.~~

Customer-related information may only be passed on by Eurex Clearing AG if it is already publicly available or if it is legally required to be passed on or if the relevant Clearing Member, Non-Clearing Member or Link Clearing House has agreed to it.

14.1.2 Notwithstanding the provisions in Number 14.1.1, Eurex Clearing AG shall be entitled to pass on the following information to the exchange and off-exchange trading platforms and Link Clearing Houses for which the Clearing Member has applied to become a Market Participant:

(1) granting of a Clearing License;

(2) termination or suspension of a Clearing License;

(3) occurrence of a Termination Event, Insolvency Termination Event and Termination Date;

(4) termination of the Clearing Agreement.

14.1.3 Notwithstanding the provisions in Number 14.1.1, Eurex Clearing AG shall ~~also~~ be entitled to transmit ~~or to request~~ to or to request from clearing and settlement institutions or independent auditors which are subject to confidentiality regulations comparable to those applicable to Eurex Clearing AG, all data and information which refer to Clearing Members or Non-Clearing Members and which are necessary for the orderly conduct of ~~clearing~~ the Clearing and for the fulfilment of Transactions~~, to the clearing, settlement institutions or independent auditors, which are subject to confidentiality regulations comparable to those applicable to Eurex Clearing AG~~.

14.1.4 ~~Paragraph~~Number 14.1.1 and 14.1.2 shall apply *mutatis mutandis* to any Link Clearing House affected by any of the transaction events stipulated therein. In addition, Eurex Clearing AG may transfer ~~other~~ Clearing Members' data to a Link Clearing House if this is required for risk management purposes with regard to the clearing link existing between them.

14.2 Fulfilment and ~~partial~~ outsourcing of ~~a~~ Clearing ~~Members'~~ -related functions

14.2.1 ~~Clearing Members have~~ Subject to Numbers 14.2.2 to 14.2.12, each Clearing Member and each Non-Clearing Member has to perform ~~themselves~~ itself and on ~~their~~ its own responsibility all functions incumbent on ~~them~~ it in the context of the Clearing ~~of Transactions by Eurex Clearing AG, especially risk management~~. This applies irrespective of the fact that the Clearing

Procedures are being technically conducted via the clearing systems operated by Eurex Clearing AG or a Link Clearing House, as the case may be.

14.2.2 ~~A Clearing Member may, upon giving prior written notice to Eurex Clearing AG, outsource specific clearing and risk management functions to a third party, provided that the following prerequisites are fulfilled:~~A Clearing Member or a Non-Clearing Member may outsource the Clearing, risk management or back-office functions ("**Outsourced Functions**") to be performed by it in whole or in part to another Clearing Member, Non-Clearing Member or third party (each an "**Insourcer**" and each outsourcing Clearing Member or Non-Clearing Member an "**Outsourcer**") by way of an outsourcing arrangement between the Outsourcer and the Insourcer ("**Outsourcing**"). Outsourcing may also comprise the further outsourcing of Outsourced Functions by the Insourcer ("**Sub-Outsourcer**") to another Insourcer ("**Sub-Outsourcing**") with the prior approval of the relevant Outsourcer. The requirements to Outsourcing shall apply accordingly to any Sub-Outsourcing. The Outsourcer remains fully responsible towards Eurex Clearing AG for the orderly conduct of the Outsourced Functions.

14.2.3 Any Outsourcing shall fulfil the following requirements:

(1) the ~~supervisory status of the third party shall at least be similar to the status of a financial service provider, as regards the approval to perform financial services for others;~~Outsourcing is in compliance with the laws and regulations applicable to the Outsourcer as well as to the Insourcer and the relevant Clearing Agreement;

(2) ~~the third party shall have its registered offices in a country in which an information exchange of the national supervisory authority with the Federal Financial Supervisory Authority is guaranteed;~~as a result of the Outsourcing Eurex Clearing AG will not be required to obtain any additional license or authorisation unless Eurex Clearing AG in its free discretion decides to apply for such license or authorisation;

(3) the orderly conduct of the ~~clearing is guaranteed and the transferee of clearing and/or risk management functions provides evidence of the following~~ Outsourced Functions is ensured; in this respect, the Outsourcer is required to:

(a) ~~the appointment of~~ contractually oblige the Insourcer to (i) appoint a qualified employee in the back office pursuant to Number 2.1.2 Paragraph (5)(c)~~, applied by analogy~~ applied *mutatis mutandis* (this shall only apply if the Outsourcer itself is required to comply with such requirement and shall not apply if the Insourcer is a Clearing Member which is already required to comply with such requirement vis-a-vis Eurex Clearing AG directly), (ii) keep customer-related data (i.e. data relating to the Outsourcer's customers) confidential and to implement adequate technical and organisational measures to adequately protect such customer-related data, and to (iii) only use such customer-related data for the purposes of fulfilling the Outsourced Functions;

(b) ~~the outsourcing Clearing Member having access at any time to the outsourced clearing and/or risk management functions in the relevant systems of the transferee;~~ establish and maintain throughout the term of the Outsourcing appropriate procedures documented in writing for supervising the performance of the Outsourced Functions by the Insourcer; in this respect, the Outsourcer is required to (i) ensure access at any time to the Outsourced Functions (except in

the case of an Outsourcing by a Non-Clearing Member to its Clearing Member), (ii) monitor the Insourcer's capability to perform the Outsourced Functions on an ongoing basis, (iii) conduct audits at the Insourcer on a regular basis either by (a) checking, or by authorising an independent auditor to check, the documents and processes related to the Outsourced Functions in the business premises of the Insourcer, or by (b) obliging the Insourcer to certify and document the orderly performance of the Outsourced Functions in accordance with the principles for Outsourcing set out in this Number 14.2.3;

(c) ~~compliance with the requirements for the orderly recording, management and deposit of money and securities stocks (holdings) under the rules of the KWG or comparable provisions of any jurisdiction applicable to the outsourcing Clearing Member;~~ ensure that the limitations on self-contracting pursuant to section 181 of the German Civil Code (*Bürgerliches Gesetzbuch*) or similar provisions in other applicable laws are complied with in respect of the Outsourced Functions, in particular with respect to the establishment of Transactions;

(d) in the case of a direct technical connection of the Insourcer to the systems of Eurex Clearing AG, procure that all consents and authorisations that are necessary for the transfer of personal data from Eurex Clearing AG to the Insourcer and for any other processing or use of personal data, in connection with the Outsourced Functions are in place; and

(e) to provide to Eurex Clearing AG the following information in a format determined by Eurex Clearing AG: (i) a list of the Outsourced Functions, (ii) the name and registered office of the Insourcer, (iii) a confirmation that the Insourcer has adequate resources and expertise for the performance of the Outsourced Functions, (iv) the envisaged term of the Outsourcing, (v) the contact persons at the Outsourcer and the Insourcer in relation to the Outsourced Functions, including in each case at least one contact person to escalate any issues in respect of the Outsourced Functions who shall be available without interruptions during regular business hours and has sufficient German or English language skills, and (vi) any other information as may reasonably be requested by Eurex Clearing AG for the purposes of assessing the envisaged Outsourcing;

(4) in the case of an Outsourcing by a Non-Clearing Member to an entity other than its Clearing Member, the Clearing Member has consented to the Outsourcing; and

(5) ~~(4)~~ such further prerequisites as may be determined by Eurex Clearing AG in its reasonable discretion and published ~~to the Clearing Members~~ in accordance with Number 15.1.

14.2.4 An Outsourcing may only be commenced upon fulfilment of the following requirements:

(1) the Outsourcer has provided the information pursuant to Number 14.2.3 Paragraph (3)(e) and confirmed to Eurex Clearing AG that the further requirements pursuant to Number 14.2.3 are fulfilled;

(2) Eurex Clearing AG has confirmed receipt of the information pursuant to Paragraph (1) in writing and specified the date by which the Outsourcing may be commenced (the "**Outsourcing Date**").

The confirmation pursuant to Paragraph (2) does not constitute a confirmation by Eurex Clearing AG that the requirements pursuant to Number 14.2.3 are fulfilled. Eurex Clearing AG may rely on the respective information provided by the Outsourcer and will not conduct own investigations in this regard.

14.2.5 ~~14.2.3~~ In ~~case of outsourcing of specific clearing and/or risk management functions pursuant to Number 14.2.2 above, the outsourcing Clearing Member will remain responsible and liable towards Eurex Clearing AG for the orderly conduct in connection with the Clearing Procedures.~~ the case Eurex Clearing AG becomes aware or if a probable cause exists that the prerequisites for the Outsourcing set out in Number 14.2.3 are not fulfilled, the Outsourcer is obliged to ensure immediate compliance with the prerequisites for the Outsourcing or to terminate the Outsourcing upon notification by Eurex Clearing AG.

14.2.6 Eurex Clearing AG may at any time request from the Outsourcer further information and evidence concerning the orderly conduct of Outsourced Functions, in particular (i) any Outsourcing agreements, (ii) a confirmation that the Outsourcing is in compliance with applicable laws and regulations and the Clearing Conditions, or (iii) a confirmation of the competent regulatory authorities that the Outsourcing is in compliance with applicable laws and regulations and/or will not require Eurex Clearing AG to obtain any additional licenses or authorisations.

14.2.7 ~~14.2.4 Eurex Clearing AG reserves the right to require further information and evidence concerning the orderly conduct of clearing functions by a Clearing Member or the third party to which the clearing and/or risk management functions have been outsourced. Furthermore,~~ Eurex Clearing AG may at any time and at its own expense check, or authorise an independent auditor to check, documents and processes related to the Clearing Procedures in the business premises of the ~~Clearing Member and the third party to which the clearing and/or risk management functions have been outsourced. The relevant Clearing Member~~ Outsourcer and the Insourcer (each of such measures a "**Compliance Audit**"). The Outsourcer shall contractually ensure ~~the necessary powers of Eurex Clearing AG vis-à-vis the third party to which the clearing and/or risk management functions have been outsourced~~ that Eurex Clearing AG is entitled to equally execute these rights vis-à-vis the Insourcer.

~~14.2.5 In case Eurex Clearing AG notices or if a probable cause exists that the prerequisites for the outsourcing do no exist, the relevant Clearing Member is obliged to ensure immediate compliance with the prerequisites for the outsourcing or to terminate the outsourcing. The same applies if the outsourcing violates other applicable provisions of law.~~

Any Compliance Audit is solely carried out in the interest of Eurex Clearing AG and not in the interest or for the benefit of the Outsourcer or any other person. In particular, a Compliance Audit (i) does not constitute advice to the Outsourcer or any other person as to any legal, tax, accounting, regulatory or other matters and (ii) does not relieve the Outsourcer from its duty to ensure the orderly conduct of the Outsourced Functions pursuant to Number 14.2.3, in particular from conducting its own audits of the Insourcer and its performance of the Outsourced Functions.

Eurex Clearing AG is not obliged to reassess the results of any audit or any information provided by the Outsourcer.

14.2.8 Eurex Clearing AG may at any time exercise a veto right in respect of the Outsourcing if it becomes aware of a:

(1) violation of applicable provisions of law or the relevant Clearing Agreement by the Outsourcing;

(2) non-compliance by the Outsourcer or the Insourcer with the requirements set out in Number 14.2.3 as regards the orderly provision of the Outsourced Functions (e.g. by showing apparent absence of resources in terms of skills, response times and technical compatibility);

(3) violation of security standards by the Insourcer within three (3) years prior to the Outsourcing Date or during the term of the Outsourcing which may have an impact on the orderly provision of the Outsourced Functions;

(4) risk of reputational damages for Eurex Clearing AG caused by the Outsourcing (e.g. by the relevant Insourcer disclosing confidential information to third parties); or

(5) concentration risk due to the appointment of the same Insourcer by several Outsourcers.

14.2.9 Eurex Clearing AG may exercise its veto right with immediate effect (i) prior to the Outsourcing Date or (ii) following the Outsourcing Date if, in Eurex Clearing AG's determination, the incident pursuant to Number 14.2.8 may have a material adverse effect on the Clearing Procedures. In all other cases, Eurex Clearing AG shall, before exercising its veto right, grant the Outsourcer an adequate grace period to remedy the relevant issues. During such period, Eurex Clearing AG may partially restrict the Outsourcing and/or restrict the access of the Insourcer to its systems in order to ensure the orderly functioning of the Clearing Procedures, in particular with respect to the Outsourced Functions.

14.2.10 Upon exercise of the veto right by Eurex Clearing AG, the Outsourcer is obliged to terminate the Outsourcing and to re-assume the Outsourced Functions with immediate effect or at a time specified by Eurex Clearing AG. Non-compliance with this obligation shall constitute a Termination Event pursuant to Number 7.2.1 Paragraph (12). Eurex Clearing AG may instead terminate one or more Clearing Licenses of the Outsourcer. If the Outsourcer is a Non-Clearing Member, Eurex Clearing AG may terminate the Clearing Agreement with the outsourcing Non-Clearing Member in accordance with Number 12.1 or Number 12.6.

14.2.11 Eurex Clearing AG's liability for any damages, losses and expenses caused by an inadequate or wrongful exercise of (i) the veto right pursuant to Number 14.2.9 or (ii) the right to conduct Compliance Audits pursuant to Number 14.2.7 shall be restricted to wilful misconduct (*Vorsatz*) or gross negligence (*grobe Fahrlässigkeit*), except for any damages incurred as a result of injury to life, body or health caused negligently or intentionally.

14.2.12 Eurex Clearing AG shall be entitled to transfer to the Insourcer any information and customer-related data obtained by Eurex Clearing AG in connection with the Clearing Procedures to the extent that such transfer of data is necessary for the orderly conduct of the Outsourced Functions. The Outsourcer shall indemnify Eurex Clearing AG for any damages claimed by third parties alleging the violation of applicable data protection law or any contractual

provisions by such transfer. This obligation shall remain in force for a period of three (3) years after expiry or termination of the Clearing Agreement between the Outsourcer and Eurex Clearing AG.

Chapter IX

Clearing of Securities Lending Transactions

Part 1
General Provisions

1.1.3 Specific Lender ~~License~~license

[…]

(6) The following provisions of Chapter I and this Chapter IX are not applicable to holders of a Specific Lender License:

[…]

(f) the outsourcing provisions pursuant to Chapter I Part 1 Number 14.2 with respect to the use of the services of an Agent Lender in connection with the Clearing of Securities Lending Transactions pursuant to this Chapter IX, unless otherwise provided for in Number ~~1.1.3~~1.1.4 Paragraph (4);

[…]

1.1.4 Participation of Agent Lenders

[…]

(4) Chapter I Part 1 Numbers ~~14.2.3 through 14.2.5~~14.2.2 Sentence 4, 14.2.5, 14.2.6 and 14.2.7 shall apply *mutatis mutandis* to the use of the services of an Agent Lender by a Lender Clearing Member or a holder of a Specific Lender License.

[…]