



Brussels, 14.7.2016
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COMMISSION DELEGATED REGULATION (EU) .../...

of 14.7.2016

**supplementing Directive 2014/65/EU of the European Parliament and of the Council
with regard to regulatory technical standards on information and requirements for the
authorisation of investment firms**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Directive (Directive 2014/65/EU, MiFID II) requests competent authorities, when granting an authorisation to a firm for the provision of investment services and/or the performance of investment activities, to assess that the applicant firm complies with all requirements under the provisions adopted pursuant to the Directive.

In this context, article 7(4) of MiFID II requires the European Securities and Markets Authority (ESMA) to develop a harmonised list of information to be provided to the competent authorities by investment firms as part of their authorisation process; the requirements applicable to the management of investment firms; and the requirements applicable to shareholders and members with qualifying holdings, as well as obstacles which may prevent effective exercise of the supervisory functions of the competent authority.

In accordance with Articles 10 to 15 of Regulation No (EU) 1095/2010 establishing ESMA, the Commission shall decide within three months of receipt of the draft standards whether to endorse them. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA has carried out a public consultation on these draft regulatory technical standards in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010. In addition to this ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) set up in accordance with Article 37 of Regulation (EU) No 1095/2010. The SMSG chose not to provide advice on these issues due to the technical nature of the standards.

The ESMA final report sets out the feedback statement to the Consultation Paper which provided an analysis of responses to the consultation, described any material changes (or confirmed that there have been no material changes as respondents broadly agreed with ESMA's suggested approach), and explained the reasons for this in the light of feedback received.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

These regulatory technical standards comprise clearly specified criteria for the authorisation process of investment firms which shall be applied consistently across Member States. This benefits both entities seeking authorisation and competent authorities by providing more clarity, predictability and certainty in the authorisation process.

As the draft regulatory technical standards are largely based on the existing standards and forms contained in the CESR (ESMA's predecessor) Protocol on MiFID Notifications, the costs implied by these rules are not expected to be significant. Moreover, any additional costs would be outweighed by the benefits of clarity and standardisation.

Articles 1 to 7 detail the information to be provided to the competent authorities by investment firms as part of the process for granting and refusing requests for authorisation.

Articles 8 to 10 sets out the requirements applicable to the management of investment firms and the requirements applicable to shareholders and members with qualifying holdings, as

well as obstacles which may prevent effective exercise of the supervisory functions of the competent authority.

Article 11 provides that the Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal.

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

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supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on information and requirements for the authorisation of investment firms

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU¹, and in particular Article 7(4) thereof,

Whereas:

- (1) In order to enable competent authorities to carry out a thorough assessment as part of the process for granting and refusing requests for authorisation of investment firms, an applicant should be required to submit to the competent authority precise information at the time of the initial request for authorisation. The competent authority should retain the right to request additional information from the applicant during the assessment process in accordance with the criteria and timelines set out in Directive 2014/65/EU.
- (2) In order to ensure that the competent authority's assessment is based on accurate information, it is essential that an applicant provide copies of its corporate documents, including a certified copy of the instrument of incorporation, by-laws and the articles of association and a copy of registration of the company in the national register of companies.
- (3) Information on the sources of capital available, including the means used for transferring financial resources when raising capital, should be submitted by an applicant in order to enable competent authorities to assess that all relevant requirements in the field of financial crime have been complied with.
- (4) Newly established entities, when submitting an application, may only be in a position to provide information on how capital will be raised and the types and amount of capital that will be raised. However, evidence of paid-up share capital and other types of capital raised, together with information on the sources of capital, should be provided to the competent authorities, in view of obtaining authorisation, before authorisation is granted. Such evidence may include copies of relevant capital instruments and corresponding bank statements.
- (5) In order to enable competent authorities to assess the reputation of any person who will direct the business of the investment firm, of the proposed shareholders and

¹ OJ L 173, 12.5.2014, p. 349.

members with qualifying holdings it is important to require an applicant to provide information on these persons.

- (6) In order to assess the experience of any person who will direct the business of the investment firm, competent authorities should be presented by an applicant with information on the relevant education and professional training, and professional experience of the members of the management body and persons effectively directing the business and their related powers and any proxies.
- (7) Financial information concerning the investment firm should be submitted by an applicant to the competent authorities so that these may assess the financial soundness of that investment firm.
- (8) Since, at time of the application, newly established firms might not be in the position to provide information on the auditors; those applicants should be exempted from providing this information to the competent authority unless the auditors have already been appointed.
- (9) Information relevant to the assessment of the organisational structure of the investment firm should include details on the internal control system, on the measures to detect conflicts of interests, and on client assets safeguarding arrangements, in order to allow the competent authority to assess whether that investment firm will be able to comply with its obligations under Article 16 of Directive 2014/65/EU.
- (10) National competent authorities may authorise as investment firm a natural person or a legal person managed by a single natural person. It is therefore appropriate to set out authorisation requirements applicable to the management of investment firms that are natural persons or legal persons managed by a single natural person.
- (11) In order to provide legal certainty, clarity and predictability with regards to the authorisation process, it is appropriate that the criteria against which competent authorities appraise the suitability of the shareholders or members with qualifying holdings, when authorising an investment firm, are the same criteria set out by Article 13 of Directive 2014/65/EU for the assessment of a proposed acquisition. In particular, competent authorities should appraise the suitability of the shareholders or members with qualifying holdings and the financial soundness of the firm taking into account criteria relating to the reputation, experience of the persons directing the business of the investment firm and the financial soundness of the firm.
- (12) In order to identify obstacles that could prevent effective exercise of the supervisory functions, competent authorities should consider the complexity and transparency of group structure of investment firm, the geographical location of the entities of the group and the activities the group entities perform.
- (13) Directive 95/46/EC of the European Parliament and of the Council² applies to the processing of personal data by the Member States in the application of this Regulation.
- (14) . For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions laid down in this Regulation and the related national provisions transposing Directive 2014/65/EU apply from the same date.

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

- (15) This Regulation is based on the draft regulatory technical standards submitted by European Securities and Markets Authority (ESMA) to the Commission.
- (16) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³, ESMA has conducted open public consultations, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of that Regulation,

HAS ADOPTED THIS REGULATION:

Article 1
General information

An applicant seeking authorisation as an investment firm in accordance to Title II of Directive 2014/65/EU shall submit to the competent authority an application that includes the following general information:

- (a) its name (including its legal name and any other trading name to be used); legal structure (including information on whether it will be a legal person or, where allowed by national legislation, a natural person), address of the head office and, for existing companies, registered office; contact details; its national identification number, where available; as well as:
- (i) for domestic branches: information on where the branches will operate;
 - (ii) for domestic tied agents: details on its intention to use tied agents;
- (b) the list of investment services and activities, ancillary services and financial instruments to be provided, and whether clients' financial instruments and funds will be held (even on a temporary basis).
- (c) copies of corporate documents and evidence of registration with the national register of companies, where applicable.

Article 2
Information on capital

An applicant seeking authorisation as an investment firm in accordance to Title II of Directive 2014/65/EU shall provide to the competent authority information and, where available, evidence on the sources of capital available to it. The information shall include:

- (a) details on the use of private financial resources including the origin and availability of those funds;
- (b) details on access to capital sources and financial markets including details of financial instruments issued or to be issued;
- (c) any relevant agreements and contracts regarding the capital raised;
- (d) information on the use or expected use of borrowed funds including the name of relevant lenders and details of the facilities granted or expected to be granted, including maturities, terms, pledges and guarantees, along with information on the

³ 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).

origin of the borrowed funds (or funds expected to be borrowed) where the lender is not a supervised financial institution;

- (e) details on the means of transferring financial resources to the firm including the network used to transfer such funds.

For the purposes of point (b), information on types of capital raised shall refer, where relevant, to the types of capital specified under Regulation (EU) No 575/2013, specifically whether the capital comprises Common Equity Tier 1 items, Additional Tier 1 items or Tier 2 items.

Article 3

Information on shareholders

An applicant seeking authorisation as an investment firm in accordance to Title II of Directive 2014/65/EU shall provide to the competent authority the following information on its shareholders:

- (a) the list of persons with a direct or indirect qualifying holding in the investment firm, and the amount of these holdings and, for indirect holdings, the name of the person through which the stake is held and the name of the final holder;
- (b) for persons with a qualifying holding (direct or indirect) in the investment firm the documentation required from proposed acquirers for the acquisition and increases in qualifying holdings in investment firms in accordance with Articles 3, 4 and 5 of Commission Delegated Regulation (EU) of XXX⁴;
- (c) for corporate shareholders that are members of a group, an organisational chart of the group indicating the main activities of each firm within the group, identification of any regulated entities within the group and the names of the relevant supervisory authorities as well as the relationship between the financial entities of the group and other non-financial group entities.
- (d) For the purposes of point (b), where the holder of a qualifying holding is not a natural person, the documentation shall also relate to all members of the management body and the general manager, or any other person performing equivalent duties.

Article 4

Information on the management body and persons who direct the business

An applicant seeking authorisation as an investment firm in accordance to Title II of Directive 2014/65/EU shall provide to the competent authority the following information:

- (a) in respect of members of the management body and persons effectively directing the business and their related powers and any proxies:
 - (i) personal details comprising the person's name, date and place of birth, personal national identification number, where available, address and contact details;
 - (ii) the position for which the person is/will be appointed;

⁴ Commission Delegated Regulation (EU) of XXX supplementing Directives 2004/39/EC and 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for an exhaustive list of information to be included by proposed acquirers in the in the notification of a proposed acquisition of a qualifying holding in an investment firm (OJ...)

- (iii) a curriculum vitae stating relevant education and professional training, professional experience, including the names of all organisations for which the person has worked and nature and duration of the functions performed, in particular for any activities within the scope of the position sought; for positions held in the previous 10 years, when describing those activities, details shall be included on all delegated powers and internal decision-making powers held and the areas of operations under control;
- (iv) documentation relating to person's reputation and experience, in particular a list of reference persons including contact information, letters of recommendation;
- (v) criminal records and information on criminal investigations and proceedings relevant civil and administrative cases, and disciplinary actions opened against them (including disqualification as a company director, bankruptcy, insolvency and similar procedures), notably through an official certificate (if and so far as it is available from the relevant Member State or third country), or through another equivalent document; for ongoing investigations, the information may be provided through a declaration of honour;
- (vi) information on refusal of registration, authorisation, membership or licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of such a registration, authorisation, membership or licence; or expulsion by a regulatory or government body or by a professional body or association;
- (vii) information on dismissal from employment or a position of trust, fiduciary relationship, or similar situation;
- (viii) information on whether an assessment of reputation and experience as an acquirer or as a person who directs the business has already been conducted (including the date of the assessment, the identity of that authority and evidence of the outcome of this assessment);
- (ix) description of any financial and non-financial interests or relationships of the person and his/her close relatives to members of the management body and key function holders in the same institution, the parent institution and subsidiaries and shareholders;
- (x) details of the result of any assessment of the suitability of the members of the management body, performed by the applicant itself;
- (xi) information on the minimum time that will be devoted to the performance of the person's functions within the firm (annual and monthly indications);
- (xii) information on human and financial resources devoted to the induction and training of the members (annual indications);
- (xiii) the list of executive and non-executive directorships currently held by the person.

For the purposes of point (ix) of point (a), financial interests include interests such as credit operations, guarantees and pledge, whereas non-financial interests may include interests such as family or close relationships.

- (b) The staff of the internal management and control bodies.

Article 5
Financial information

An applicant seeking authorisation as an investment firm in accordance to Title II of Directive 2014/65/EU shall provide to the competent authority the following information on its financial situation:

- (a) forecast information at an individual and, where applicable, at consolidated group and sub-consolidated levels, including:
 - (i) forecast accounting plans for the first three business years including:
 - forecast balance sheets;
 - forecast profit and loss accounts or income statements;
 - (ii) planning assumptions for the above forecasts as well as explanations of the figures, including expected number and type of customers, expected volume of transactions/orders, expected assets under management;
 - (iii) where applicable, forecast calculations of the firm's capital requirements and liquidity requirements under Regulation (EU) No 575/2013 of the European Parliament and of the Council⁵ and forecast solvency ratio for the first year;
- (b) for companies that are already active, statutory financial statements, at an individual and, where applicable, at consolidated group and sub-consolidated levels for the last three financial periods, approved, where the financial statements are audited, by the external auditor, including:
 - (i) the balance sheet;
 - (ii) the profit and loss accounts or income statements;
 - (iii) the annual reports and financial annexes and any other documents registered with the relevant registry or authority in the particular territory relevant to the company financial statements and, where applicable, a report by the company's auditor of the last three years or since the beginning of the activity;
- (c) an analysis of the scope of consolidated supervision under Regulation (EU) No 575/2013, including details on which group entities will be included in the scope of consolidated supervision requirements post-authorisation and at which level within the group these requirements will apply on a full or sub-consolidated basis.

Article 6
Information on the organisation of the firm

An applicant seeking authorisation as an investment firm in accordance to Title II of Directive 2014/65/EU shall provide to the competent authority the following information on its organisation:

- (a) a programme of initial operations for the following three years, including information on planned regulated and unregulated activities detailed information on the geographical distribution and activities to be carried out by the investment firm. Relevant information in the programme of operations shall include:

⁵ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

- (i) the domicile of prospective customers and targeted investors;
 - (ii) the marketing and promotional activity and arrangements, including languages of the offering and promotional documents; identification of the Member States where advertisements are most visible and frequent; type of promotional documents (in order to assess where effective marketing will be mostly developed);
 - (iii) the identity of direct marketers, financial investment advisers and distributors, geographical localisation of their activity;
- (b) details of the firm's auditors, when available at time of application for authorisation;
 - (c) the organisational structure and internal control systems of the company, comprising:
 - (i) the personal details of the heads of internal functions (management and supervisory), including a detailed curriculum vitae, stating relevant education and professional training, professional experience;
 - (ii) the description of the resources (in particular human and technical) allocated to the various planned activities;
 - (iii) in relation to holding client financial instruments and funds, information, specifying any client asset safeguarding arrangements (in particular, where financial instruments and funds are held in a custodian, the name of the custodian, and related contracts);
 - (iv) an explanation of how the firm will satisfy its prudential and conduct requirements.
 - (d) information on the status of the application undertaken by the investment firm to become a member of the investor compensation scheme of the Home Member State or evidence of membership to the investor compensation scheme, where available;
 - (e) a list of the outsourced functions, services or activities (or those intended to be outsourced) and a list of the contracts concluded or foreseen with external providers and resources (in particular, human and technical, and the internal control system) allocated to the control of the outsourced functions, services or activities;
 - (f) measures to identify and to prevent or manage conflicts of interest that arise in the course of providing investment and ancillary services and a description of product governance arrangements;
 - (g) a description of systems for monitoring the activities of the firm, including back-up systems, where available, and systems and risk controls where the firm wishes to engage in algorithmic trading and/or provide direct electronic access;
 - (h) information on the compliance, internal control, and, risk management systems (a monitoring system, internal audits and the advice and assistance functions).
 - (i) details on the systems for assessing and managing the risks of money laundering and terrorist financing;
 - (j) business continuity plans, including systems and human resources (key personnel);
 - (k) record management, record-keeping and record retention policies;
 - (l) a description of the firm's manual of procedures.

Article 7
General requirements

1. The information to be provided to the competent authority of the home Member State, as set out in Articles 1 and 6, shall refer to both the head office of the firm and its branches and tied agents.
2. The information to be provided to the competent authority of the home Member State, as set out in Articles 2 to 5, shall refer to the head office of the firm.

Article 8
Requirements applicable to the management of investment firms that are natural persons or investment firms that are legal persons managed by a single natural person

1. The competent authority shall only authorise as investment firm an applicant natural person or a legal person managed by a single natural person where:
 - (a) the natural person is easily contactable at short notice by the competent authorities;
 - (b) the natural person has sufficient time dedicated to this function;
 - (c) the governing bodies or bylaws of the investment firm empower a person to substitute the manager immediately and perform all his duties if the latter is unable to perform them;
 - (d) the person empowered pursuant to the previous point shall be of sufficiently good repute and have sufficient experience to substitute the manager for the time of absence, or until a new manager is appointed, so as to ensure sound and prudent management of the investment firm. The person empowered for investment firms that are natural persons, shall be also available to assist insolvency practitioners and relevant authorities in the liquidation of the firm. This person shall have the necessary availability for this function.
2. As part of its authorisation process, an applicant investment firm which is a natural person, or a legal person managed by a single natural person, shall provide to the competent authority the information listed in Article 4(1)(a), (c), (d), (e) and (f) in relation to the person empowered under paragraph 1(d) of this Article.

Article 9
Requirements applicable to shareholders and members with qualifying holdings

The competent authority shall verify that the request of an applicant for authorisation as an investment firm, in accordance to Title II of Directive 2014/65/EU, offers sufficient guarantees for a sound and prudent management of the entity by assessing the suitability of proposed shareholders and members with qualifying holdings, having regard to the likely influence on the investment firm of each proposed shareholder or member with qualifying holdings, against all of the following criteria:

- (a) the reputation and experience of any person who will direct the business of the investment firm;
- (b) the reputation of the proposed shareholders and members with qualifying holdings;
- (c) the financial soundness of the proposed shareholders and members with qualifying holding, in particular in relation to the type of business pursued and envisaged in the investment firm;

- (d) whether the investment firm will be able to comply and continue to comply with the prudential requirements set out in Article 15 of Directive 2014/65/EU and, where applicable, Directives 2002/87/EC⁶ and 2013/36/EU⁷ of the European Parliament and of the Council and in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;
- (e) whether there are reasonable grounds to suspect that, in connection with the authorisation of the investment firm, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council⁸ is being or has been committed or attempted, or that the authorisation of the investment firm could increase the risk thereof.

Article 10

Effective exercise of supervisory functions

A group structure within which the investment firm will operate shall be considered to be an obstacle to the exercise of the supervisory function of the competent authority for the purposes of Article 10(1) and (2) of Directive 2014/65/EU in any of the following cases:

- (a) it is complex and not sufficiently transparent;
- (b) it has a geographical location of group entities;
- (c) it includes activities performed by the group entities that may prevent the competent authority to effectively appraise the suitability of the shareholders or members with qualifying holdings or the influence of close links with the investment firm.

Article 11

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from the date that appears first in the second subparagraph of Article 93(1) of Directive 2014/65/EU.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

⁶ Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

⁷ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁸ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

Done at Brussels, 14.7.2016

For the Commission
The President
Jean-Claude JUNCKER