EUROPEAN
COMMISSION

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COMMISSION DELEGATED DIRECTIVE (EU) .../…

of 7.4.2016

supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

1.1 General background and objectives

Directive 2014/65/EU (commonly referred to as 'MiFID II') is due to become applicable on 3 January 2017 and, together with Regulation (EU) No 600/2014 (MiFIR), replace Directive 2004/39/EC (MiFID I). MiFID II/MiFIR provide an updated harmonised legal framework governing the requirements applicable to investment firms, regulated markets, data reporting services providers and third country firms providing investment services or activities in the Union.

MiFID II/MiFIR aim to enhance the efficiency, resilience and integrity of financial markets, notably by:

- Achieving greater transparency: introduction of a pre- and post-trade transparency regime for non-equities and strengthening and broadening of the existing equities trade transparency regime;
- Bringing more trading onto regulated venues: creation of a new category of platforms to trade derivatives and bonds - the Organised Trading Facilities - and of a trading obligation for shares on regulated venues;
- Fulfilling the Union's G20 commitments on derivatives: mandatory trading of derivatives on regulated venues, introduction of position limits and reporting requirements for commodity derivatives, broadening the definition of investment firm to capture firms trading commodity derivatives as a financial activity;
- Facilitating access to capital for SMEs: introduction of the SME Growth Market label;
- Strengthening the protection of investors: enhancement of the rules on inducements, a ban on inducements for independent advice and new product governance rules;
- Keeping pace with technological developments: regulating high-frequency trading (HFT) imposing requirements on trading venues and on firms using HFT;
- Introducing provisions on non-discriminatory access to trading and post-trading services in trading of financial instruments notably for exchange-traded derivatives;
- Strengthening and harmonising sanctions and ensuring effective cooperation between the relevant competent authorities.

Finally, the overarching aim of the MiFID II/MiFIR regulatory package is to level the playing field in financial markets and to enable them to work for the benefit of the economy, supporting jobs and growth.

The present Delegated Directive aims at specifying the rules relating to the safeguarding of clients' financial instruments and funds, to product governance obligations for investment firms manufacturing and/or distributing financial instruments and to the provision or reception of fees, commissions or any monetary or non-monetary benefits (inducements).

1.2 Legal background

The Delegated Directive is based on 2 empowerments in MiFID II and should be read together with the MiFID II Delegated Regulation and the MiFIR Delegated Regulation. The issue of subsidiarity was covered in the impact assessment for the MiFIDII/MiFIR and the

EU's and the Commission's right of action in the impact assessment accompanying these delegated measures. All empowerments on which this Delegated Directive is based are "shall" empowerments.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Commission mandated ESMA to provide it with technical advice on possible delegated acts concerning MiFID II and MiFIR. On 23 April 2014, the Commission services sent a formal request for technical advice (the "Mandate") to ESMA on possible delegated acts and implementing acts concerning MiFID II/MiFIR. On 22 May 2014 ESMA published a consultation paper with regard to its technical advice on delegated acts. ESMA received 330 responses by 1 August 2014. ESMA delivered its technical advice on 19 December 2014. This draft Delegated Directive is based on the technical advice provided by ESMA.

The Commission services had numerous meetings with various stakeholders to discuss the future delegated acts throughout 2014 and the first half of 2015. The Commission has also had several exchanges with Members of the ECON Committee of the European Parliament and held several meetings of the relevant expert group, during which the delegated measures were discussed among experts from the finance ministries and supervisory authorities of Member States and involving observers from the European Parliament and ESMA. This consultation process brought a broad consensus on the draft Delegated Directive.

3. IMPACT ASSESSMENT

The extensive process of consultation described above was complemented by an Impact Assessment report. The Impact Assessment Board delivered a positive opinion on 24 April 2015.

Given the number of delegated measures covered by this Delegated Directive, which covers numerous and technical aspects of MiFID II client assets rules, the Impact Assessment report does not discuss elements in the Delegated Directive with limited scope or impact, or elements that have been consensual for a long time in the in-depth consultation process described above. Instead, the Impact Assessment report rather concentrates on the measures with greater impact or scope for Commission choice. In particular, the impact assessment dealt with the measures in relation to the limits on intra-group deposits and to inducements.

3.1 Analysis of costs and benefits

The costs of the choices for the MiFIDII/MiFIR delegated acts made by the Commission described in the impact assessment fall almost entirely on market participants who will incur, amongst others, certain costs for implementing the enhanced organisational and conduct of business rules. The Impact Assessment provided further estimations of the compliance costs triggered by the delegated acts. By ensuring a harmonised implementation and application of MiFID II and MiFIR the delegated acts will make sure that the objectives of the legal texts adopted by the European Parliament and the Council can be achieved without imposing inordinate additional burden on stakeholders.

The benefits concern investment firms and other entities subject to MiFID II/MiFIR requirements but also investors and society more widely. This includes the benefits from increased market integration, harmonised rules or increased investor protection. The suggested measures should make financial markets more secure and improve investor confidence and participation in financial markets. These benefits are considered to considerably outweigh the costs. There is no effect on the EU budget.

3.2 Proportionality

The need for proportionality is reaffirmed in several provisions and duly taken into account across all of the Delegated Directive. For instance, requirements concerning the application by investment firms of the limit on client funds deposited with group entities or in relation to the appointment of an officer with responsibility for matters regarding the safeguarding of clients' financial instruments and funds reflect proportionality concerns.

4. LEGAL ELEMENTS OF THE DELEGATED ACT

Chapter I: Scope

The Chapter clarifies the rules which are further specified under this Delegated Directive and the application of these rules to managements companies under UCITS/AIFMD.

Chapter II: Safeguarding of client financial instruments and funds

The draft Delegated Directive sets out the governance and organisational arrangements to ensure the safeguarding of client financial instruments and funds. In particular it further specifies the measures ensuring the appropriate use of title transfer collateral arrangements when dealing with non-retail clients or preventing the unintended use of client financial instruments, the arrangements to be adopted with respect to securities financing transactions or those concerning the recording and disclosure requirements. In order to address concentration and contagion risks to client funds, the draft Delegated Directive also strengthens firms' due diligence requirements, including by requiring firms to consider diversification when depositing client funds as well as the compliance with the principle of a limit on client funds deposited with group entities.

As far as the choice of the legal instrument is concerned, a directive was favoured for this area where measures and arrangements should take into account any applicable legal regimes that could affect the clients' rights and their rights to property in particular. This will enable Member States, when transposing its provisions into national law, to ensure coherence with other bodies of law. However, this should not imply that legal provisions in other existing areas of law which are inconsistent with the provisions of the draft Delegated Directive should not be repealed or adjusted to ensure proper implementation.

Chapter III: Product governance requirements

The Chapter sets out details for the implementation of the product governance rules introduced under MiFID II. The product governance rules concern both investment firms that manufacture financial instruments as well as investment firms that distribute them to clients.

The product governance obligations for manufacturers (firms that create, develop, issue and/or design products) include procedures and arrangements to ensure that conflicts of interest are properly managed, governance processes to ensure effective control over the manufacturing process, the assessment of products' potential target market, the assessment of the risks of poor investor outcomes posed, due consideration of products' charging structure, the provision of adequate information to distributors and the regular review of products.

The product governance obligations for distributors apply to investment firms when deciding the range of products (issued by themselves/other investment firms/non-MiFID entities) and services they intend to offer to clients and include processes to ensure that the products/services that investment firms intend to offer are compatible with the characteristics, objectives and needs of an identified target market, the involvement of management bodies, the periodic review of product governance arrangements to ensure that they remain robust and fit for purpose.

Chapter IV: Inducements

The Chapter sets out the rules with which an investment firm has to comply when providing or receiving fees, commissions or any monetary or non-monetary benefits. In particular, the provisions further specify the condition that inducements should enhance the quality of the service to the client as well as the application of new rules for the reception or payment of inducements with respect to investment firms providing investment advice on an independent basis or portfolio management services.

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(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/EU[1], and in particular Article 16(12) and Article 24(13) thereof,

Whereas:

(1) Directive 2014/65/EU sets out comprehensive regime aiming to ensure investor protection.

(2) The protection of client financial instruments and funds is an important part of that regime, investment firms being subject to an obligation to make adequate arrangements to safeguard investor's ownership and rights in respect of securities and funds entrusted to an investment firm. Investment firms should have in place proper and specific arrangements to ensure the safeguarding of client financial instruments and funds.

(3) In order to further specify the regulatory framework for the protection of investors and increased clarity to clients, and in line with the overall strategy to foster jobs and growth in the Union through an integrated legal and economic framework that is efficient and treats all actors fairly, the Commission has been empowered to adopt detailed rules to address specific risks to investor protection or to market integrity.

(4) Where an investment firm deposits funds it holds on behalf of a client with a qualifying money market fund, the units or shares in that money market fund should be held in accordance with the requirements for holding financial instruments belonging to clients. Clients should be required to explicitly consent to the depositing of those funds. When assessing the quality of money market instrument there should be no mechanistic reliance on external ratings. However a downgrade below the two highest short-term credit ratings by any agency registered and supervised by ESMA that has rated the instrument should lead the manager to undertake a new assessment of the credit quality of the money market instrument to ensure it continues to be of high quality.

(5) A single officer with overall responsibility for the safeguarding of client instruments and funds should be appointed in order to reduce risks of fragmented responsibility

[1] OJ L 173, 12.06.2014, p. 349.

across diverse departments, especially in large and complex firms, and to remedy unsatisfactory situations where firms do not have overarching sight of their means of meeting their obligations. The single officer should possess sufficient skills and authority in order to discharge duties effectively and without impediment, including the duty to report to the firm's senior management in respect of oversight of the effectiveness of the firm's compliance with the safeguarding of client assets requirements. The appointment of a single officer should not preclude that officer from carrying out additional roles where this does not prevent the officer from discharging the duties for safeguarding client financial instruments and funds effectively.

(6) Directive 2014/65/EU requires investment firms to safeguard client assets. Article 16(10) of Directive 2014/65/EU prohibits firms from concluding title transfer collateral arrangements (TTCAs) with retail clients for the purpose of securing or covering present or future, actual or contingent or prospective obligations. Investment firms are, however, not prohibited from concluding TTCA with non-retail clients. There is therefore a risk that without further guidance investment firms could use TTCA more often than reasonably justified when dealing with non-retail clients, undermining the overall regime put in place to protect client assets. Therefore, in light of the effects of TTCAs on firms' duties towards clients and in order to ensure the safeguarding and segregation rules pursuant to Directive 2014/65/EU are not undermined, investment firms should consider the appropriateness of title transfer collateral arrangements used with non-retail clients by means of the relationship between the client's obligations to the firm and the client assets subject to TTCA. Firms should be allowed to use TTCA with non-retail client only if they demonstrate the appropriateness of TTCA in relation to that client and disclose the risks involved as well as the effect of the TTCA on his assets. Firms should have a documented process of their use TTCA. The ability of firms to enter into TTCAs with non-retail clients should not reduce the need to obtain clients' prior express consent to use client assets.

(7) Demonstrating a robust link between collateral transferred under a TTCA and client's liability should not preclude taking appropriate security against a client's obligation. Investment firms could thus continue to require a sufficient collateral and where appropriate, to do so by a TTCA. That obligation should not prevent compliance with requirements under Regulation (EU) No 648/2012 of the European Parliament and of the Council and should not prohibit the appropriate use of TTCAs in the context of contingent liability transactions or repos for non-retail clients.

(8) While some securities financing transactions may require the transfer of title of clients' assets, in that context investment firms should not be able to effect arrangements prohibited under Article 16(10) of Directive 2014/65/EU.

(9) In order to ensure appropriate protection for clients in relation to securities financing transactions (SFTs), investment firms should adopt specific arrangements to ensure that the borrower of client assets provides the appropriate collateral and that the firm monitors the continued appropriateness of such collateral. Investment firms' duty to monitor collateral should apply where they are party to an SFT agreement, including when acting as an agent for the conclusion of a SFT or in cases of tripartite agreement between the external borrower, the client and the investment firm.

(10) Prior express consent by clients should be given and recorded by investment firms in order to allow the investment firm to demonstrate clearly what the client agreed to and to help clarify the status of client assets. However, no legal requirement should be set

out in respect of the form in which consent may be given, and a record should be understood as any evidence permissible under national law. Client's consent may be given once at the start of the commercial relationship, as long as it is sufficiently clear that the client has consented to use of their securities. Where an investment firm is acting on a client instruction to lend financial instruments and where this constitutes consent to entering into the transaction, the investment firms should hold evidence to demonstrate this.

(11) To maintain a high standard of investor protection, investment firms depositing financial instruments held on behalf of their clients into an account or accounts opened with a third party should exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements for the holding and safekeeping of those financial instruments. To ensure that financial instruments are subject to due care and protection at all times, investment firms should, as part of their due diligence, also take into account the expertise and market reputation of the other third parties to which the initial third-party, with whom they might deposit financial instruments, may have delegated functions concerning the holding and safekeeping of financial instruments.

(12) Where investment firms place client funds with a third party, the investment firm should exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements for holding and safekeeping client funds, and should consider the need for diversification and mitigation of risks, where appropriate, by placing client funds with more than one third party in order to safeguard clients' rights and minimise the risk of loss and misuse. Investment firms should not circumvent their duty to consider diversification by requiring clients to waive protection. Diversification requirement should apply to client funds deposited in accordance with Article 4 of this Directive. Diversification requirements should not apply to client funds placed with the third party merely for the purpose of executing a transaction for the client. Therefore where an investment firm has transferred client funds to a transaction account in order to make a specific transaction for the client, such funds should not be subject to a requirement to diversify, for example where a firm has transferred funds to a central counterparty (CCP) or exchange in order to pay a margin call.

(13) In order to ensure that client funds are adequately protected, as required by Article 16(9) of Directive 2014/65/EU, it is necessary to set a specific limit on the percentage of client funds that can be deposited at an intra-group credit institution. This should significantly reduce any potential conflicts with due diligence requirements and address the contagion risk inherent in depositing all client funds with a credit institution in the same group as the investment firm. While in certain circumstances it may be proportionate and appropriate for investment firms to deposit, after proper consideration, client funds with entities within their own group, national authorities should closely monitor the reasons for not diversifying client funds outside of the investment firm's group in order to avoid creating loopholes where the general intragroup limit is applied.

(14) In order to protect client financial instruments or funds from appropriation by third parties seeking to recover debts or charges which are not client's debts or charges, investment firms should be able to agree to security interests, liens or rights of set-off over client assets only where this is required by the applicable law in a third country. Sufficiently tailored risk disclosures should be made to clients in order to alert them to the specific risks they face in such cases.

(15) In order to avoid and reduce from an early stage potential risks of failure to comply with investor protection rules, investment firms manufacturing and distributing financial instruments should comply with product governance requirements. For the purpose of product governance requirements, investment firms that create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments, should be considered as manufacturers while investment firms that offer or sell financial instrument and services to clients should be considered distributors.

(16) Entities which are not subject to the requirements of Directive 2014/65/EU but which may be authorised to perform investment services under that Directive, should also comply, as regards such services, with the product governance requirements set out under Directive 2014/65/EU.

(17) Where an investment firm that creates, develops, issues or designs financial instruments is also involved in the distribution of those products, both the product governance rules for manufacturers and distributors should apply. While there is no need to duplicate the target market assessment and distribution strategy exercise, firms should ensure the single target market assessment and distribution strategy exercise is sufficiently detailed to meet the relevant manufacturer and distributor obligations in this area.

(18) In light of the requirements set out in Directive 2014/65/EU and in the interest of investor protection, product governance rules should apply to all products sold on primary and secondary markets, irrespective of the type of product or service provided and of the requirements applicable at point of sale. However, those rules may be applied in a proportionate manner, depending on the complexity of the product and the degree to which publicly available information can be obtained, taking into account the nature of the instrument, the investment service and the target market. Proportionality means that these rules could be relatively simple for certain simple, products distributed on an execution-only basis where such products would be compatible with the needs and characteristics of the mass retail market.

(19) The level of granularity of the target market and the criteria used to define the target market and determine the appropriate distribution strategy should be relevant for the product and should make it possible to assess which clients fall within the target market, for example to assist the ongoing reviews after the financial instrument is launched. For simpler, more common products, the target market could be identified with less detail while for more complicated products such as bail-inable instruments or less common products, the target market should be identified with more detail.

(20) For the efficient functioning of product governance obligations, distributors should periodically inform the manufacturers about their experience with the products. While distributors should not be required to report every sale to manufacturers, they should provide the data that is necessary for the manufacturer to review the product and check that it remains consistent with the needs, characteristics and objectives of the target market defined by the manufacturer. Relevant information could include data about the amount of sales outside the manufacturer's target market, summary information of the types of clients, a summary of complaints received or by posing questions suggested by the manufacturer to a sample of clients for feedback.

(21) In order to strengthen the protection of investors and increase clarity to clients as to the quality of services they receive, Directive 2014/65/EU further restricted the possibility for firms to receive or pay inducements. For those purposes, detailed

conditions for the reception or payment of inducements should be laid down. In particular, the condition that inducements should enhance the quality of the service to the client should be further specified and framed. For that purpose, and subject to certain other conditions, a non-exhaustive list of situations deemed relevant for the condition that inducements enhance the quality of the service to the relevant client should be provided for.

(22) A fee, commission or non-monetary benefit should only be paid or received where justified by the provision of an additional or higher level service to the relevant client. That may include the provision of investment advice on and access to a wide range of suitable financial instruments including an appropriate number of instruments from third party product providers, or the provision of non-independent advice combined with either an offer to the client, at least on an annual basis, to assess the continuing suitability of the financial instruments in which the client has invested or with another ongoing service that is likely to be of value to the client. This could also be the case, in the area of non-advisory services, where investment firms provide access, at a competitive price, to a wide range of financial instruments that are likely to meet the needs of the client, including an appropriate number of instruments from third party product providers having no close links with the investment firm, together with, for instance, the provision of added-value tools, such as objective information tools, helping the relevant client to take investment decisions or enabling the relevant client to monitor, model and adjust the range of financial instruments in which they have invested. The value of the above-mentioned quality enhancements that the investment firm provides to the clients receiving the relevant service has to be proportional to the inducements received by the investment firm.

(23) While investment firms should, once they have fulfilled the quality enhancement criterion, maintain the enhanced level of quality, this should not imply that they are required to provide for a continuously increasing quality of services over time.

(24) Investment firms' obligations to pass on to clients all fees, commissions or monetary benefits received from third-parties in relation to investment advice on an independent basis or portfolio management services should also be further specified. While firms should pass on inducements as soon as possible, a specific timeframe should not be imposed since third party payments may be received by the investment firm at various points in time and for several clients at once.

(25) In order to ensure clients receive a comprehensive overview of the relevant information in respect of the services provided, investment firms should inform clients about the fees, commissions or any monetary benefits transferred to them.

(26) Investment firms providing both execution and research services should price and supply them separately in order to enable investment firms established in the Union to comply with the requirement to not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients set out in Article 24(7) and (8) of Directive 2014/65/EU.

(27) In order to provide legal certainty concerning the application of new rules for the reception or payment of inducements, in particular with respect to investment firms providing investment advice on an independent basis or portfolio management services, further clarifications in relation to the payment or reception of research should be provided. In particular, where research is not paid directly by the investment firm out of its own resources but in return for payments from a separate research

payment account certain essential conditions should be ensured. The research payment account should only be funded by a specific research charge to the client which should only be based on a research budget set by the investment firm and not linked to the volume and/or value of transactions executed on behalf of clients. Any operational arrangements for the collection of the client's research charge should fully comply with those conditions. When using such arrangements, an investment firm should ensure that the cost of research funded by client charges is not linked to the volume or value of other services or benefits or used to cover any other purposes, such as charges for execution.

(28) In order to ensure that portfolio managers and independent investment advisers properly monitor the amounts paid for research and to ensure that research costs are incurred in the best interests of the client, it is appropriate to specify detailed governance requirements on research spending. Investment firms should retain sufficient control over the overall spending for research, the collection of client research charges and the determination of payments. Research in this context should be understood as covering research material or services concerning one or several financial instruments or other assets, or the issuers or potential issuers of financial instruments, or be closely related to a specific industry or market such that it informs views on financial instruments, assets or issuers within that sector. That type of material or services explicitly or implicitly recommends or suggests an investment strategy and provides a substantiated opinion as to the present or future value or price of such instruments or assets, or otherwise contains analysis and original insights and reach conclusions based on new or existing information that could be used to inform an investment strategy and be relevant and capable of adding value to the investment firm's decisions on behalf of clients being charged for that research.

(29) For further clarity concerning the restriction on the receipt of inducements by investment firms in relation to independent investment advice or portfolio management and the application of research rules, it is also appropriate to indicate how the minor non-monetary benefit exemption may be applied in relation to certain other types of information or material received from third parties. In particular, written material from a third party that is commissioned and paid for by a corporate issuer or potential issuer to promote a new issuance by that company, or where the third party is contractually engaged and paid by the issuer to produce such material on an ongoing basis, should be deemed acceptable as a minor non-monetary benefit subject to disclosure and the open availability of that material. In addition, non-substantive material or services consisting of short term market commentary on the latest economic statistics or company results for example or information on upcoming releases or events, which is provided by a third party and contains only a brief summary of its own opinion on such information that is not substantiated nor includes any substantive analysis such as where they simply reiterate a view based on an existing recommendation or substantive research material or services, can be deemed to be information relating to a financial instrument or investment service of a scale and nature such so that it constitutes an acceptable minor non-monetary benefit.

(30) In particular, any non-monetary benefit that involves a third party allocating valuable resources to the investment firm shall not be considered as minor and shall be judged to impair compliance with the investment firm's duty to act in their client's best interest.

(31) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union and in particular the right

to the protection of personal data, the freedom to conduct a business, the right to consumer protection, the right to an effective remedy and to a fair trial and has to be applied in accordance with those rights and principles.

(32) The European Securities and Markets Authority, established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council has been consulted for technical advice on the rules laid down in this Directive.

(33) In order to allow competent authorities and investment firms to adapt to the new requirements contained in this Directive so that they can be applied in an efficient and effective manner, the date of transposition as well as date of application of this Directive should be aligned respectively with the transposition and entry into application dates of Directive 2014/65/EU,

(34) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents , Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments.

HAS ADOPTED THIS DIRECTIVE:

Chapter I
Scope

Article 1
Scope and definitions

1. This Directive shall apply to management companies in accordance with Article 6(4) of Directive 2009/65/EC and Article 6(6) of Directive 2011/61/EU.

2. For the purposes of Chapters II, III and IV of this Directive, references to investment firms and financial instruments shall include credit institutions and structured deposits in relation to all the requirements referred to in Article 1(3) and (4) of Directive 2014/65/EU.

3. 'securities financing transaction' means transactions as defined in Article 3 point (11) of Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse[2].

4. ‘qualifying money market fund’ means a collective investment undertaking authorised under Directive 2009/65/EC, or which is subject to supervision and, if applicable, authorised by an authority under the national law of the authorising Member State, and which satisfies all of the following conditions:

   (a) its primary investment objective must be to maintain the net asset value of the undertaking either constant at par (net of earnings), or at the value of the investors’ initial capital plus earnings;

   (b) it must, with a view to achieving that primary investment objective, invest exclusively in high quality money market instruments with a maturity or residual maturity of no more than 397 days, or regular yield adjustments consistent with such a maturity, and with a weighted average maturity of 60

[2] OJ L 337, 23.12.2015, p. 1

days. It may also achieve this objective by investing on an ancillary basis in deposits with credit institutions;

(c) it must provide liquidity through same day or next day settlement.

For the purposes of point (b), a money market instrument shall be considered to be of high quality if the management/investment company performs its own documented assessment of the credit quality of money market instruments that allows it to consider a money market instrument as high quality. Where one or more credit rating agencies registered and supervised by ESMA have provided a rating of the instrument, the management/investment company's internal assessment should have regard to, inter alia, those credit ratings.

Chapter II

Safeguarding of client financial instruments and funds

Article 2
Safeguarding of client financial instruments and funds

1. Member States shall require that investment firms comply with the following requirements:

(a) they must keep records and accounts enabling them at any time and without delay to distinguish assets held for one client from assets held for any other client and from their own assets;

(b) they must maintain their records and accounts in a way that ensures their accuracy, and in particular their correspondence to the financial instruments and funds held for clients and that they may be used as an audit trail;

(c) they must conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third parties by whom those assets are held;

(d) they must take the necessary steps to ensure that any client financial instruments deposited with a third party, in accordance with Article 3, are identifiable separately from the financial instruments belonging to the investment firm and from financial instruments belonging to that third party, by means of differently titled accounts on the books of the third party or other equivalent measures that achieve the same level of protection;

(e) they must take the necessary steps to ensure that client funds deposited, in accordance with Article 4, in a central bank, a credit institution or a bank authorised in a third country or a qualifying money market fund are held in an account or accounts identified separately from any accounts used to hold funds belonging to the investment firm;

(f) they must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of client assets, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence.

2. If, for reasons of the applicable law, including in particular the law relating to property or insolvency, investment firms cannot comply with paragraph 1 of this

Article to safeguard clients' rights to satisfy the requirements of Article 16(8) and (9) of Directive 2014/65/EU, Member States shall require that investment firms put in place arrangements to ensure that clients' assets are safeguarded to meet the objectives of paragraph 1 of this Article.

3. If the applicable law of the jurisdiction in which the client funds or financial instruments are held prevents investment firms from complying with points (d) or (e) of paragraph 1, Member States shall prescribe requirements which have an equivalent effect in terms of safeguarding clients' rights.

When relying on such equivalent requirements under Article 2(1)(d) or (e), Member States shall ensure that investment firms inform clients that in such instances they do not benefit from the provisions envisaged under Directive 2014/65/EU and this Directive.

4. Member States shall ensure that security interests, liens or rights of set-off over client financial instruments or funds enabling a third party to dispose of client's financial instruments or funds in order to recover debts that do not relate to the client or provision of services to the client are not permitted except where this is required by applicable law in a third country jurisdiction in which the client funds or financial instruments are held

Member States shall require investment firms, where the firm is obliged to enter into agreements that create such security interests, liens or rights of set-off, to disclose that information to clients indicating to them the risks associated with those arrangements.

Where security interests, liens or rights of set-off are granted by the firm over client financial instruments or funds, or where the firm has been informed that they are granted, they shall be recorded in client contracts and the firm's own accounts to make the ownership status of client assets clear, such as in the event of an insolvency.

5. Member States shall require that investment firms make information pertaining to clients' financial instruments and funds readily available to the following entities: competent authorities, appointed insolvency practitioners and those responsible for the resolution of failed institutions. The information to be made available shall include the following :

(a) related internal accounts and records that readily identify the balances of funds and financial instruments held for each client;

(b) where client funds are held by the investment firm in accordance with Article 4, as well as details of the accounts where client funds are held and the relevant agreements with those entities;

(c) where financial instruments held by the investment firm in accordance with Article 3, as well as details of accounts opened with third parties and the relevant agreements with those entities;

(d) details of third parties carrying out any related (outsourced) tasks and details of any outsourced tasks

(e) key individuals of the firm involved in related processes, including those responsible for oversight of the firm's requirements in relation to the safeguarding of client assets; and

(f) agreements relevant to establish client ownership over assets.

Article 3
Depositing client financial instruments

1. Member States shall allow investment firms to deposit financial instruments held by them on behalf of their clients into an account or accounts opened with a third party provided that the firms exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements for the holding and safekeeping of those financial instruments.

   In particular, Member States shall require investment firms to take into account the expertise and market reputation of the third party as well as any legal requirements related to the holding of those financial instruments that could adversely affect clients' rights.

2. Where an investment firm proposes to deposit client financial instruments with a third party, Member States shall ensure that this investment firm only deposits financial instruments with a third party in a jurisdiction where the safekeeping of financial instruments for the account of another person is subject to specific regulation and supervision and that third party is subject to this specific regulation and supervision.

3. Member States shall ensure that investment firms do not deposit financial instruments held on behalf of clients with a third party in a third country that does not regulate the holding and safekeeping of financial instruments for the account of another person unless one of the following conditions is met:

   (a) the nature of the financial instruments or of the investment services connected with those instruments requires them to be deposited with a third party in that third country;

   (b) where the financial instruments are held on behalf of a professional client, that client requests the firm in writing to deposit them with a third party in that third country.

4. Member States shall ensure the requirements under paragraph 2 and 3 shall also apply when the third-party has delegated any of its functions concerning the holding and safekeeping of financial instruments to another third-party.

Article 4
Depositing client funds

1. Member States shall require investment firms, on receiving any client funds, promptly to place those funds into one or more accounts opened with any of the following:

   (a) a central bank;

   (b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council[3] -

   (c) a bank authorised in a third country;

[3] OJ L 177, 30.6.2006, p. 48

(d) a qualifying money market fund.

The first subparagraph shall not apply to a credit institution authorised under Directive 2013/36/EU of the European Parliament and of the Council[4] in relation to deposits within the meaning of that Directive held by that institution.

2. Member States shall require that, where investment firms do not deposit client funds with a central bank, they exercise all due skill, care and diligence in the selection, appointment and periodic review of the credit institution, bank or money market fund where the funds are placed and the arrangements for the holding of those funds and they consider the need for diversification of these funds as part of their due diligence.

Member States shall ensure, in particular, that investment firms take into account the expertise and market reputation of such institutions or money market funds with a view to ensuring the protection of clients' rights, as well as any legal or regulatory requirements or market practices related to the holding of client funds that could adversely affect clients' rights.

Member States shall require that investment firms ensure that clients give their explicit consent to the placement of their funds in a qualifying money market fund. In order to ensure this right to consent is effective, investment firms shall inform clients that funds placed with a qualifying money market fund will not be held in accordance with the requirements for safeguarding client funds set out in this Directive.

3. Member States shall require that, where investment firms deposit client funds with a credit institution, bank or money market fund of the same group as the investment firm, they limit the funds that they deposit with any such group entity or combination of any such group entities so that funds do not exceed 20% of all such funds.

An investment firm may not comply with this limit where it is able to demonstrate that, in view of the nature, scale and complexity of its business, and also the safety offered by the third parties considered in the previous subparagraph, and including in any case the small balance of client funds the investment firm holds the requirement under the previous paragraph is not proportionate. Investment firms shall periodically review the assessment made in accordance with this subparagraph and shall notify their initial and reviewed assessments to NCAs.

Article 5
Use of client financial instruments

1. Member States shall not allow investment firms to enter into arrangements for securities financing transactions in respect of financial instruments held by them on behalf of a client, or otherwise use such financial instruments for their own account or the account of any other person or client of the firm, unless both of the following conditions are met:

(a) the client has given his prior express consent to the use of the instruments on specified terms, as clearly evidenced in writing and affirmatively executed by signature or equivalent, and

[4] OJ L 287, 29.10.2013, p. 63

(b) the use of that client's financial instruments is restricted to the specified terms to which the client consents.

2. Member States shall not allow investment firms to enter into arrangements for securities financing transactions in respect of financial instruments which are held on behalf of a client in an omnibus account maintained by a third party, or otherwise use financial instruments held in such an account for their own account or for the account of any other person unless, in addition to the conditions set out in paragraph 1, at least one of the following conditions is met:

(a) each client whose financial instruments are held together in an omnibus account must have given prior express consent in accordance with point (a) of paragraph 1;

(b) the investment firm must have in place systems and controls which ensure that only financial instruments belonging to clients who have given prior express consent in accordance with point (a) of paragraph 1 are so used.

The records of the investment firm shall include details of the client on whose instructions the use of the financial instruments has been effected, as well as the number of financial instruments used belonging to each client who has given his consent, so as to enable the correct allocation of any loss.

3. Member States shall ensure that investment firms take appropriate measures to prevent the unauthorised use of client financial instruments for their own account or the account of any other person such as:

(a) the conclusion of agreements with clients on measures to be taken by the investment firms in case the client does not have enough provision on its account on the settlement date, such as borrowing of the corresponding securities on behalf of the client or unwinding the position;

(b) the close monitoring by the investment firm of its projected ability to deliver on the settlement date and the putting in place of remedial measures if this cannot be done; and

(c) the close monitoring and prompt requesting of undelivered securities outstanding on the settlement day and beyond.

4. Member States shall ensure that investment firms adopt specific arrangements for all clients to ensure that the borrower of client financial instruments provides the appropriate collateral and that the firm monitors the continued appropriateness of such collateral and takes the necessary steps to maintain the balance with the value of client instruments.

5. Member States shall ensure that investment firms do not enter into arrangements which are prohibited under Article 16(10) of Directive 2014/65/EU.

Article 6
Inappropriate use of title transfer collateral arrangements

1. Member States shall require that investment firms properly consider, and are able to demonstrate that they have done so, the use of title transfer collateral arrangements in the context of the relationship between the client’s obligation to the firm and the client assets subjected to title transfer collateral arrangements by the firm.

2. When considering, and documenting, the appropriateness of the use of title transfer collateral arrangements, investment firms shall take into account all of the following factors:

(a) whether there is only a very weak connection between the client's obligation to the firm and the use of title transfer collateral arrangements, including whether the likelihood of a clients' liability to the firm is low or negligible;

(b) whether the amount of client funds or financial instruments subject to title transfer collateral arrangements far exceeds the client's obligation, or is even unlimited if the client has any obligation at all to the firm; and

(c) whether all clients' financial instruments or funds are made subject to title transfer collateral arrangements, without consideration of what obligation each client has to the firm.

3. Where using title transfer collateral arrangements, investment firms shall highlight to professional clients and eligible counterparties the risks involved and the effect of any title transfer collateral arrangement on the client's financial instruments and funds.

Article 7
Governance arrangements concerning the safeguarding of client assets

Member States shall ensure that investment firms appoint a single officer of sufficient skill and authority with specific responsibility for matters relating to the compliance by firms with their obligations regarding the safeguarding of client financial instruments and funds.

Member States shall allow investment firms to decide, ensuring full compliance with this Directive, whether the appointed officer is to be dedicated solely to this task or whether the officer can discharge responsibilities effectively whilst having additional responsibilities.

Article 8
Reports by external auditors

Member States shall require investment firms to ensure that their external auditors report at least annually to the competent authority of the home Member State of the firm on the adequacy of the firm's arrangements under Article 16(8), (9) and (10) of Directive 2014/65/EU and this Chapter.

CHAPTER III
Product Governance Requirements

Article 9
Product governance obligations for investment firms manufacturing financial instruments

1. Member States shall require investment firms to comply with this Article when manufacturing financial instruments, which encompasses the creation, development, issuance and/or design of financial instruments.

Member States shall require investment firms manufacturing financial instruments to comply, in a way that is appropriate and proportionate, with the relevant requirements in paragraphs 2 to 15, taking into account the nature of the financial instrument, the investment service and the target market for the product.

2. Member States shall require investment firms to establish, implement and maintain procedures and measures to ensure the manufacturing of financial instruments complies with the requirements on proper management of conflicts of interest, including remuneration. In particular, investment firms manufacturing financial instruments shall ensure that the design of the financial instrument, including its features, does not adversely affect end clients or does not lead to problems with market integrity by enabling the firm to mitigate and/or dispose of its own risks or exposure to the underlying assets of the product, where the investment firm already holds the underlying assets on own account.

3. Member States shall require investment firms to analyse potential conflicts of interests each time a financial instrument is manufactured. In particular, firms shall assess whether the financial instrument creates a situation where end clients may be adversely affected if they take:

   (a) an exposure opposite to the one previously held by the firm itself; or

   (b) an exposure opposite to the one that the firm wants to hold after the sale of the product.

4. Member States shall ensure that investment firms consider whether the financial instrument may represent a threat to the orderly functioning or to the stability of financial markets before deciding to proceed with the launch of the product.

5. Member States shall require investment firms to ensure that relevant staff involved in the manufacturing of financial instruments possess the necessary expertise to understand the characteristics and risks of the financial instruments they intend to manufacture.

6. Member States shall require investment firms to ensure that the management body has effective control over the firm's product governance process. Investment firms shall ensure that the compliance reports to the management body systematically include information about the financial instruments manufactured by the firm, including information on the distribution strategy. Investment firms shall make the reports available to their competent authority on request.

7. Investment firms shall ensure the compliance function monitors the development and periodic review of product governance arrangements in order to detect any risk of failure by the firm to comply with the obligations set out in this Article.

8. Member States shall require investment firms, where they collaborate, including with entities which are not authorised and supervised in accordance with Directive 2014/65/EU or third-country firms, to create, develop, issue and/or design a product, to outline their mutual responsibilities in a written agreement.

9. Member States shall require investment firms to identify at a sufficiently granular level the potential target market for each financial instrument and specify the type(s) of client for whose needs, characteristics and objectives the financial instrument is compatible. As part of this process, the firm shall identify any group(s) of clients for whose needs, characteristics and objectives the financial instrument is not compatible. Where investment firms collaborate to manufacture a financial instrument, only one target market needs to be identified.

   Investment firms manufacturing financial instruments that are distributed through other investment firms shall determine the needs and characteristics of clients for whom the product is compatible based on their theoretical knowledge of and past experience with the financial instrument or similar financial instruments, the financial markets and the needs, characteristics and objectives of potential end clients.

10. Member States shall require investment firms to undertake a scenario analysis of their financial instruments which shall assess the risks of poor outcomes for end clients posed by the product and in which circumstances these outcomes may occur. Investment firms shall assess the financial instrument under negative conditions covering what would happen if, for example:

(a) the market environment deteriorated;

(b) the manufacturer or a third party involved in manufacturing and or functioning of the financial instrument experiences financial difficulties or other counterparty risk materialises;

(c) the financial instrument fails to become commercially viable; or

(d) demand for the financial instrument is much higher than anticipated, putting a strain on the firm's resources and/or on the market of the underlying instrument.

11. Member States shall require investment firms to determine whether a financial instrument meets the identified needs, characteristics and objectives of the target market, including by examining the following elements:

(a) the financial instrument's risk/reward profile is consistent with the target market; and

(b) financial instrument design is driven by features that benefit the client and not by a business model that relies on poor client outcomes to be profitable.

12. Member States shall ensure that investment firms consider the charging structure proposed for the financial instrument, including by examining the following:

(a) financial instrument's costs and charges are compatible with the needs, objectives and characteristics of the target market;

(b) charges do not undermine the financial instrument's return expectations, such as where the costs or charges equal, exceed or remove almost all the expected tax advantages linked to a financial instrument; and

(c) the charging structure of the financial instrument is appropriately transparent for the target market, such as that it does not disguise charges or is too complex to understand.

13. Member States shall require investment firms to ensure that the provision of information about a financial instrument to distributors includes information about the appropriate channels for distribution of the financial instrument, the product approval process and the target market assessment and is of an adequate standard to enable distributors to understand and recommend or sell the financial instrument properly.

14. Member States shall require investment firms to review the financial instruments they manufacture on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. Investment firms shall consider if the financial instrument remains consistent with the needs, characteristics and objectives of the target market and if it is being distributed to the

target market, or is reaching clients for whose needs, characteristics and objectives the financial instrument is not compatible.

15. Member States shall require investment firms to review financial instruments prior to any further issue or re-launch, if they are aware of any event that could materially affect the potential risk to investors and at regular intervals to assess whether the financial instruments function as intended. Investment firms shall determine how regularly to review their financial instruments based on relevant factors, including factors linked to the complexity or the innovative nature of the investment strategies pursued. Firms shall also identify crucial events that would affect the potential risk or return expectations of the financial instrument, such as:

(a) the crossing of a threshold that will affect the return profile of the financial instrument; or

(b) the solvency of certain issuers whose securities or guarantees may impact the performance of the financial instrument.

Member States shall ensure that, when such events occur, investment firms take appropriate action which may consist of:

(a) the provision of any relevant information on the event and its consequences on the financial instrument to the clients or the distributors of the financial instrument if the investment firm does not offer or sell the financial instrument directly to the clients;

(b) changing the product approval process;

(c) stopping further issuance of the financial instrument;

(d) changing the financial instrument to avoid unfair contract terms;

(e) considering whether the sales channels through which the financial instruments are sold are appropriate where firms become aware that the financial instrument is not being sold as envisaged;

(f) contacting the distributor to discuss a modification of the distribution process;

(g) terminating the relationship with the distributor; or

(h) informing the relevant competent authority.

Article 10
Product governance obligations for distributors

1. Member States shall require investment firms, when deciding the range of financial instruments issued by themselves or other firms and services they intend to offer or recommend to clients, to comply, in a way that is appropriate and proportionate, with the relevant requirements laid down in paragraphs 2 to 10, taking into account the nature of the financial instrument, the investment service and the target market for the product.

Member States shall ensure that investment firms also comply with the requirements of Directive 2014/65/EU when offering or recommending financial instruments manufactured by entities that are not subject to Directive 2014/65/EU. As part of this process, such investment firms shall have in place effective arrangements to ensure that they obtain sufficient information about these financial instruments from these manufacturers.

Investment firms shall determine the target market for the respective financial instrument, even if the target market was not defined by the manufacturer.

2. Member States shall require investment firms to have in place adequate product governance arrangements to ensure that products and services they intend to offer or recommend are compatible with the needs, characteristics, and objectives of an identified target market and that the intended distribution strategy is consistent with the identified target market. Investment firms shall appropriately identify and assess the circumstances and needs of the clients they intend to focus on, so as to ensure that clients' interests are not compromised as a result of commercial or funding pressures. As part of this process, firms shall identify any groups of clients for whose needs, characteristics and objectives the product or service is not compatible.

Member States shall ensure that investment firms obtain from manufactures that are subject to Directive 2014/65/EU information to gain the necessary understanding and knowledge of the products they intend to recommend or sell in order to ensure that these products will be distributed in accordance with the needs, characteristics and objectives of the identified target market,

Member States shall require investment firms to take all reasonable steps to ensure they also obtain adequate and reliable information from manufacturers not subject to Directive 2014/65/EU to ensure that products will be distributed in accordance with the characteristics, objectives and needs of the target market. Where relevant information is not publicly available, the distributor shall take all reasonable steps to obtain such relevant information from the manufacturer or its agent. Acceptable publicly available information is information which is clear, reliable and produced to meet regulatory requirements, such as disclosure requirements under Directive 2003/71/EC or Directive 2004/109/EC. This obligation is relevant for products sold on primary and secondary markets and shall apply in a proportionate manner, depending on the degree to which publicly available information is obtainable and the complexity of the product.

Investment firms shall use the information obtained from manufacturers and information on their own clients to identify the target market and distribution strategy. When an investment firm acts both as a manufacturer and a distributor, only one target market assessment shall be required.

3. Member States shall require investment firms, when deciding the range of financial instrument and services that they offer or recommend and the respective target markets, to maintain procedures and measures to ensure compliance with all applicable requirements under Directive 2014/65/EU including those relating to disclosure, assessment of suitability or appropriateness, inducements and proper management of conflicts of interest. In this context, particular care shall be taken when distributors intend to offer or recommend new products or there are variations to the services they provide.

4. Member States shall require investment firms to periodically review and update their product governance arrangements in order to ensure that they remain robust and fit for their purpose, and take appropriate actions where necessary.

5. Member States shall require investment firms to review the investment products they offer or recommend and the services they provide on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. Firms shall assess at least whether the product or service remains

consistent with the needs, characteristics and objectives of the identified target market and whether the intended distribution strategy remains appropriate. Firms shall reconsider the target market and/or update the product governance arrangements if they become aware that they have wrongly identified the target market for a specific product or service or that the product or service no longer meets the circumstances of the identified target market, such as where the product becomes illiquid or very volatile due to market changes.

6. Member States shall require investment firms to ensure their compliance function oversee the development and periodic review of product governance arrangements in order to detect any risk of failure to comply with the obligations set out in this Article.

7. Member States shall require investment firms to ensure that relevant staff possess the necessary expertise to understand the characteristics and risks of the products that intend to offer or recommend and the services provided as well as the needs, characteristics and objectives of the identified target market.

8. Member States shall require investment firms to ensure that the management body has effective control over the firm's product governance process to determine the range of investment products that they offer or recommend and the services provided to the respective target markets. Investment firms shall ensure that the compliance reports to the management body systematically include information about the products they offer or recommend and the services provided. The compliance reports shall be made available to competent authorities on request.

9. Member States shall ensure distributors provide manufacturers with information on sales and, where appropriate, information on the above reviews to support product reviews carried out by manufacturers.

10. Where different firms work together in the distribution of a product or service, Member States shall ensure the investment firm with the direct client relationship has ultimate responsibility to meet the product governance obligations set out in this Article. However, intermediary investment firms shall:

(a) ensure that relevant product information is passed from the manufacturer to the final distributor in the chain;

(b) if the manufacturer requires information on product sales in order to comply with their own product governance obligations, enable them to obtain it; and

(c) apply the product governance obligations for manufacturers, as relevant, in relation to the service they provide.

CHAPTER IV
Inducements

Article 11
Inducements

1. Member States shall require investment firms paying or being paid any fee or commission or providing or being provided with any non-monetary benefit in connection with the provision of an investment service or ancillary service to the client to ensure that all the conditions set out in Article 24(9) of Directive 2014/65/EU and requirements set out in paragraphs 2-5 are met at all times.

2. A fee, commission or non-monetary benefit shall be considered to be designed to enhance the quality of the relevant service to the client if all of the following conditions are met:

(a) it is justified by the provision of an additional or higher level service to the relevant client, proportional to the level of inducements received, such as:

(i) the provision of non-independent investment advice on and access to a wide range of suitable financial instruments including an appropriate number of instruments from third party product providers having no close links with the investment firm;

(ii) the provision of non-independent investment advice combined with either: an offer to the client, at least on an annual basis, to assess the continuing suitability of the financial instruments in which the client has invested; or with another on-going service that is likely to be of value to the client such as advice about the suggested optimal asset allocation of the client; or

(iii) the provision of access, at a competitive price, to a wide range of financial instruments that are likely to meet the needs of the client, including an appropriate number of instruments from third party product providers having no close links with the investment firm, together with either the provision of added-value tools, such as objective information tools helping the relevant client to take investment decisions or enabling the relevant client to monitor, model and adjust the range of financial instruments in which they have invested, or providing periodic reports of the performance and costs and charges associated with the financial instruments

(b) it does not directly benefit the recipient firm, its shareholders or employees without tangible benefit to the relevant client;

(c) it is justified by the provision of an on-going benefit to the relevant client in relation to an on-going inducement.

A fee, commission, or non-monetary benefit shall not be considered acceptable if the provision of relevant services to the client is biased or distorted as a result of the fee, commission or non-monetary benefit.

3. Investment firms shall fulfil the requirements set out in paragraph 2 on an ongoing basis as long as they continue to pay or receive the fee, commission or non-monetary benefit.

4. Investment firms shall hold evidence that any fees, commissions or non-monetary benefits paid or received by the firm are designed to enhance the quality of the relevant service to the client:

(a) by keeping an internal list of all fees, commissions and non-monetary benefits received by the investment firm from a third party in relation to the provision of investment or ancillary services; and

(b) by recording how the fees, commissions and non-monetary benefits paid or received by the investment firm, or that it intends to use, enhance the quality of the services provided to the relevant clients and the steps taken in order not to impair the firm’s duty to act honestly, fairly and professionally in accordance with the best interests of the client.

5. In relation to any payment or benefit received from or paid to third parties, investment firms shall disclose to the client the following information:

(a) prior to the provision of the relevant investment or ancillary service, the investment firm shall disclose to the client information on the payment or benefit concerned in accordance with the second paragraph of Article 24(9) of Directive 2014/65/EU. Minor non-monetary benefits may be described in a generic way. Other non-monetary benefits received or paid by the investment firm in connection with the investment service provided to a client shall be priced and disclosed separately;

(b) where an investment firm was unable to ascertain on an ex-ante basis the amount of any payment or benefit to be received or paid, and instead disclosed to the client the method of calculating that amount, the firm shall also provide its clients with information of the exact amount of the payment or benefit received or paid on an ex-post basis; and

(c) at least once a year, as long as (on-going) inducements are received by the investment firm in relation to the investment services provided to the relevant clients, the investment firm shall inform its clients on an individual basis about the actual amount of payments or benefits received or paid. Minor non-monetary benefits may be described in a generic way.

In implementing these requirements, investment firms shall take into account the costs and charges rules set out in Article 24(4)(c) of Directive 2014/65/EU and Article 45 of [COMMISSION DELEGATED REGULATION (EU) …/...of XXX supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, to be completed by PO].

When more firms are involved in a distribution channel, each investment firm providing an investment or ancillary service shall comply with its obligations to make disclosures to its clients.

Article 12
Inducements in respect of investment advice on an independent basis or portfolio management services

1. Member States shall ensure that investment firms providing investment advice on an independent basis or portfolio management return to clients any fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the services provided to that client as soon as reasonably possible after receipt. All fees, commissions or monetary benefits received from third parties in relation to the provision of independent investment advice and portfolio management shall be transferred in full to the client.

Investment firms shall set up and implement a policy to ensure that any fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of independent investment advice and portfolio management are allocated and transferred to each individual client.

Investment firms shall inform clients about the fees, commissions or any monetary benefits transferred to them, such as through the periodic reporting statements provided to the client.

2. Investment firms providing investment advice on an independent basis or portfolio management shall not accept non-monetary benefits that do not qualify as acceptable minor non-monetary benefits in accordance with the sub-paragraph below.

3. The following benefits shall qualify as acceptable minor non-monetary benefits only if they are:

(a) information or documentation relating to a financial instrument or an investment service, is generic in nature or personalised to reflect the circumstances of an individual client;

(b) written material from a third party that is commissioned and paid for by an corporate issuer or potential issuer to promote a new issuance by the company, or where the third party firm is contractually engaged and paid by the issuer to produce such material on an ongoing basis, provided that the relationship is clearly disclosed in the material and that the material is made available at the same time to any investment firms wishing to receive it or to the general public;

(c) participation in conferences, seminars and other training events on the benefits and features of a specific financial instrument or an investment service;

(d) hospitality of a reasonable *de minimis* value, such as food and drink during a business meeting or a conference, seminar or other training events mentioned under point (c); and

(e) other minor non-monetary benefits which a Member States deems capable of enhancing the quality of service provided to a client and, having regard to the total level of benefits provided by one entity or group of entities, are of a scale and nature that are unlikely to impair compliance with an investment firm's duty to act in the best interest of the client.

Acceptable minor non-monetary benefits shall be reasonable and proportionate and of such a scale that they are unlikely to influence the investment firm’s behaviour in any way that is detrimental to the interests of the relevant client.

Disclosure of minor non-monetary benefits shall be made prior to the provision of the relevant investment or ancillary services to clients. In accordance with Article 47(5)(a), minor non-monetary benefits may be described in a generic way.

Article 13
Inducements in relation *to research*

1. Member States shall ensure that the provision of research by third parties to investment firms providing portfolio management or other investment or ancillary services to clients shall not be regarded as an inducement if it is received in return for any of the following:

(a) direct payments by the investment firm out of its own resources, :

(b) payments from a separate research payment account controlled by the investment firm, provided the following conditions relating to the operation of the account are met:

(i) the research payment account is funded by a specific research charge to the client;

(ii) as part of establishing a research payment account and agreeing the research charge with their clients, investment firms set and regularly assess a research budget as an internal administrative measure;

(iii) the investment firm is held responsible for the research payment account.;

(iv) the investment firm regularly assesses the quality of the research purchased based on robust quality criteria and its ability to contribute to better investment decisions.; .

(c) where an investment firm makes use of the research payment account, it shall provide the following information to clients:

(i) before the provision of an investment service to clients, information about the budgeted amount for research and the amount of the estimated research charge for each of them.

(ii) annual information on the total costs that each of them has incurred for third party research.

2. Where an investment firm operates a research payment account, Member States shall ensure that the investment firm shall also be required, upon request by their clients or by competent authorities, to provide a summary of the providers paid from this account, the total amount they were paid over a defined period, the benefits and services received by the investment firm, and how the total amount spent from the account compares to the budget set by the firm for that period, noting any rebate or carry-over if residual funds remain in the account. For the purposes of point (b)(i) of paragraph 1, the specific research charge shall:

(a) only be based on a research budget set by the investment firm for the purpose of establishing the need for third party research in respect of investment services rendered to its clients; and

(b) not be linked to the volume and/or value of transactions executed on behalf of the clients.

3. Every operational arrangement for the collection of the client research charge, where it is not collected separately but alongside a transaction commission, shall indicate a separately identifiable research charge and fully comply with the conditions in paragraph 1, points (b) and (c).

4. The total amount of research charges received may not exceed the research budget.

5. The investment firm shall agree with clients, in the firm's investment management agreement or general terms of business, the research charge as budgeted by the firm and the frequency with which the specific research charge will be deducted from the resources of the client over the year. Increases in the research budget shall only take place after the provision of clear information to clients about such intended increases. If there is a surplus in the research payment account at the end of a period, the firm should have a process to rebate those funds to the client or to offset it against the research budget and charge calculated for the following period.

6. For the purposes of point (b)(ii) of paragraph 1, the research budget shall be managed solely by the investment firm and is based on a reasonable assessment of the need for third party research. The allocation of the research budget to purchase third party research shall be subject to appropriate controls and senior management oversight to

ensure it is managed and used in the best interests of the firm's clients. Those controls include a clear audit trail of payments made to research providers and how the amounts paid were determined with reference to the quality criteria referred to in paragraph 1 (b) (iv). Investment firms shall not use the research budget and research payment account to fund internal research.

7. For the purposes of point (b)(iii) of paragraph 1, the investment firm may delegate the administration of the research payment ac-count to a third party, provided that the arrangement facilitates the purchase of third party research and payments to research providers in the name of the investment firm without any undue delay in accordance with the investment firm's instruction.

8. For the purposes of point (b) (iv) of paragraph 1, investment firms shall establish all necessary elements in a written policy and provide it to their clients. It shall also address the extent to which research purchased through the research payment account may benefit clients' portfolios, including, where relevant, by taking into account investment strategies applicable to various types of portfolios, and the approach the firm will take to allocate such costs fairly to the various clients' portfolios.

9. An investment firm providing execution services shall identify separate charges for these services that only reflect the cost of executing the transaction. The provision of each other benefit or service by the same investment firm to investment firms, established in the Union shall be subject to a separately identifiable charge; the supply of and charges for those benefits or services shall not be influenced or conditioned by levels of payment for execution services.

CHAPTER V
Final provisions

Article14

Entry into force and application

1. Member States shall adopt and publish, by the date referred to in the first subparagraph of Article 93(1) of Directive 65/2014/EU, at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

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

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 15

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

Article 16

This Directive is addressed to the Member States.

Done at Brussels, 7.4.2016

For the Commission
The President
Jean-Claude JUNCKER