



Brussels, 4.2.2019
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COMMISSION DELEGATED REGULATION (EU) .../...

of 4.2.2019

supplementing Regulation (EU) No 345/2013 of the European Parliament and of the Council with regard to conflicts of interest in the area of European venture capital funds

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 345/2013 of the European Parliament and of the Council¹ establishes a "European Venture Capital Fund (EuVECA)" label and introduces measures to allow venture capitalists to market their funds across the European Union using a single set of rules. Under Regulation (EU) No 345/2013, every fund using the label has to prove that a high percentage of investments (70% of the capital received from investors) is spent on supporting small companies.

Article 9(5) of Regulation (EU) No 345/2013 lays down an empowerment for the Commission to adopt delegated acts specifying (a) the types of conflict of interest referred to in Article 9(2) and (b) the steps that managers of qualifying venture capital funds must take, in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 27 May 2014, the Commission requested the European Securities and Markets Authority (ESMA) to issue technical advice on the preparation of the delegated acts set out in Regulation (EU) No 345/2013.

Throughout the process of drafting its advice, ESMA was in close contact with the relevant stakeholders. ESMA published its Final Report on technical advice to the Commission on 3 February 2015.² The advice took into account the views expressed by stakeholders during the public consultation between 26 September 2014 and 10 December 2014. An open hearing with experts organised by ESMA took place on 10 November 2014. The Securities and Markets Stakeholder Group of ESMA was also consulted. Throughout the process of the preparation of technical advice ESMA was in close contact with stakeholders from Member States. The advice included a cost-benefit analysis.

On 8 February 2016, the Commission services initiated the consultation of the Member States; the Expert Group of the European Securities Committee was duly consulted.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Regulation (EU) No 345/2013 provides a common legal framework for the management and marketing of qualifying venture capital funds in the Union. It establishes common rules for the use of the "EuVECA" label for qualifying venture capital funds.

The legal basis for the delegated act is set out in Article 9(5) of Regulation (EU) No 345/2013.

Given the legal form of Regulation (EU) No 345/2013 and the need to guarantee a level playing field, uniform conditions of competition and the highest possible standard of investor protection and investor confidence, a delegated Regulation is considered to be the most appropriate instrument. This delegated Regulation contains uniform rules for all venture

¹ Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

² Final Report - ESMA's technical advice to the European Commission on the delegated acts of the Regulations on European Social Entrepreneurship Funds and European Venture Capital Funds (2015/ESMA/227).

capital fund managers. The risk of divergent implementation in different Member States is thus avoided.

This proposal consists of the following provisions. Article 1 provides a list of types of conflict of interest in the context of qualifying venture capital funds. It covers situations that involve a manager of the qualifying venture capital fund, an employee of the management company, another qualifying venture capital fund, a collective investment undertaking or UCITS managed by the same manager making gain or avoiding financial loss at the expense of the qualifying venture capital fund and its investor.

Article 2 sets out the obligation on the part of the managers of qualifying venture capital funds to establish, implement and maintain an effective conflicts of interest policy. Article 3 sets out steps to be taken as part of the procedures and measures preventing and managing conflicts of interest.

Article 4 enumerates the minimum steps that should be taken in cases where the organisational or administrative arrangements are not sufficient to prevent the risks of damage to the interests of the qualifying venture capital funds or its investors.

Article 5 sets out provisions pertaining to the requirements of the managers of the qualifying venture capital funds to adopt strategies for the exercise of voting rights to prevent conflicts of interest. Article 6 specifies the ways and format in which disclosure of conflicts of interest should be made.

Finally, Article 7 defers the application of this Regulation to six months following the date of its entry into force in order to provide managers of the qualifying venture capital funds time to adapt to the new requirements.

This delegated Regulation is of European Economic Area (EEA) relevance and should hence extend to the EEA.

4. BUDGETARY IMPLICATIONS

This delegated Regulation has neither budgetary implications for the EU budget, nor for the budget of ESMA. No additional funding and no additional posts for ESMA will, therefore, be required in relation to this act.

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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 Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds³, and in particular Article 9(5) thereof,

Whereas:

- (1) To ensure effective control and management of conflicts of interest in the area of European venture capital funds, it is important to specify the situations where conflicting interests are likely to occur.
- (2) In the context of qualifying venture capital funds, the types of conflict of interest differ depending on the role, interests and incentives of the persons involved. To facilitate the identification of conflicts of interest in that context, it is necessary to establish a list of situations deemed to give rise to conflicts of interest. That list should be sufficiently broad to cover any type of conflict of interest that may arise in the area of European venture capital funds. Therefore, the types of conflict of interest should include situations where there is a prospect of financial gain or avoidance of financial loss, or where incentives are provided in a way that favours particular interests at the expense of the interests of the qualifying venture capital fund or investors therein.
- (3) Managers of qualifying venture capital funds should adopt procedures and measures to ensure that persons engaged in such business activities carry out those activities in the best interests of the qualifying venture capital funds and their investors. To achieve a harmonised level of investor protection in the Union, and to enable those managers to adopt and follow a consistent and effective practice to prevent, monitor and manage conflicts of interest, a minimum set of steps should be listed in their conflicts of interest policy. To avoid unnecessary administrative burdens while ensuring an appropriate level of investor protection, the conflicts of interest policies should be adapted to the nature, scale and complexity of the managers' businesses.
- (4) The procedures and measures set out in the conflicts of interest policies may be insufficient to protect the interests of the qualifying venture capital fund or its investors, in which case managers of qualifying venture capital funds should take the necessary additional steps to protect those interests. Those steps should include informing the senior management or other competent internal body of the qualifying

³ Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

venture capital fund, and taking the necessary decisions or actions to act in the best interest of the qualifying venture capital or its investors.

- (5) Managers of qualifying venture capital funds may be active in the management of companies in which the qualifying venture capital funds invest. To prevent conflicts of interest and to ensure that those managers' voting rights are exercised for the benefit of both the qualifying venture capital fund concerned and its investors, it is necessary to specify detailed requirements in relation to the exercise of those voting rights. To ensure a sufficient standard of investor protection, managers of qualifying venture capital funds should develop adequate and effective strategies in that respect and provide upon request a summary of those strategies and the actions they have taken.
- (6) To secure the effectiveness of the disclosure of conflicts of interest, the information provided should be regularly updated. Given the inherent risks of using a website as a tool to disclose conflicts of interest, it is necessary to lay down criteria for the publication of that information on a website.
- (7) To enable managers of qualifying venture capital funds to adapt to the new requirements, the date of application of this Regulation should be deferred by six months,

HAS ADOPTED THIS REGULATION:

Article 1

Types of conflict of interest

For the purposes of Article 9(2) of Regulation (EU) No 345/2013, the types of conflict of interest shall be situations where a manager of a qualifying venture capital fund, a person who effectively conducts the business of that manager, an employee, or any person who directly or indirectly controls or is controlled by that manager by another qualifying venture capital fund or a collective investment undertaking, including an undertaking for collective investment in transferable securities (UCITS), managed by the same manager, or the investor therein,

- (a) is likely to make a financial gain, or avoid a financial loss, at the expense of the qualifying venture capital fund or its investors;
- (b) has an interest in the outcome of a service or an activity provided to the qualifying venture capital fund or to its investors which is distinct from the interest of the qualifying venture capital fund or its investors;
- (c) has an interest in the outcome of a transaction carried out on behalf of the qualifying venture capital fund or its investors which is distinct from the interest of the qualifying venture capital fund or its investors;
- (d) has a financial or other incentive to favour:
 - the interest of an investor, a group of investors or another collective investment undertaking, including a UCITS, over the interest of the qualifying venture capital fund or its investors;
 - the interest of one investor in the qualifying venture capital fund over the interest of another investor or group of investors in that fund;
- (e) carries out the same activities for the qualifying venture capital fund, another collective investment undertaking, including a UCITS, or an investor;

- (f) pays or is paid any fee or commission, or provides or is provided with any non-monetary benefits, other than those laid down in Article 24(1) of Commission Delegated Regulation (EU) No 231/2013⁴;
- (g) influences and has a personal interest in influencing the development of a qualifying portfolio undertaking to the disadvantage of the qualifying venture capital fund or its investors or at the expense of the achievement of the objectives of the qualifying venture capital fund.

Article 2

Conflicts of interest policy

1. A manager of a qualifying venture capital fund shall establish, implement and maintain a written conflicts of interest policy that is appropriate to the size and organisational structure of that manager given the nature, scale and complexity of its business.
2. The conflicts of interest policy referred to in paragraph 1 shall identify, in line with Article 1, the circumstances that may give rise to a conflict of interest and shall specify the measures to be adopted and the procedures to be followed on an ongoing basis.

Article 3

Procedures and measures to prevent, manage and monitor conflicts of interest

The measures to be adopted and procedures to be followed referred to in Article 2(2) shall include at least the following steps:

- (a) the prohibition of the exchange of information between the persons or entities referred to in Article 1, where such an exchange of information could lead to or facilitate a conflict of interest;
- (b) the separation of the supervision of persons or entities referred to in Article 1 whose interests may conflict;
- (c) the removal of the connection between or dependence on the remuneration of the persons or entities referred to in Article 1 principally engaged in one activity, and the remuneration of, or revenues generated by, persons or entities principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
- (d) the prevention of persons or entities referred to in Article 1 from exercising inappropriate influence over the management of the qualifying venture capital fund;
- (e) the prevention or control of the involvement of persons or entities referred to in Article 1 in any activity that may lead to a conflict of interest.

⁴ Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1).

Article 4

Managing the consequences of conflicts of interest

Where the measures and procedures set out in the conflicts of interest policy pursuant to Article 2(2) and Article 3 are insufficient to prevent, with reasonable confidence, the risks of damage to the interests of the qualifying venture capital fund or its investors, managers of a qualifying venture capital fund shall take the following steps:

- (a) promptly inform their senior management or other competent internal body, or the senior management or other competent internal body of the qualifying venture capital fund, of the risk of damage to the interests of that fund or its investors;
- (b) take any decision or action to ensure that they act in the best interest of the qualifying venture capital fund or its investors.

Article 5

Strategies for the exercise of voting rights to prevent conflicts of interest

1. Managers of qualifying venture capital funds shall develop in writing adequate and effective strategies for determining when and how to exercise voting rights held in the qualifying venture capital fund portfolio for the benefit of both the qualifying venture capital fund concerned and its investors.
2. The strategies referred to in paragraph 1 shall determine the measures to be adopted and procedures to be followed and shall include at least the following steps:
 - (a) monitoring of relevant corporate actions;
 - (b) ensuring that the exercise of voting rights is in accordance with the investment objectives and policy of the qualifying venture capital fund;
 - (c) prevention and management of any conflicts of interest arising from the exercise of those voting rights.
3. Managers of qualifying venture capital funds shall upon request, provide investors with a summary description of the strategies referred to in paragraphs 1 and 2 and the details of the actions taken pursuant to those strategies.

Article 6

Disclosure of conflicts of interest

1. Managers of qualifying venture capital funds shall provide the information referred to in Article 9(4) of Regulation (EU) No 345/2013 in a durable medium as referred to in point (m) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council⁵ and keep that information up to date.
2. Managers of qualifying venture capital funds may provide the information referred to in paragraph 1 by means of a website, without addressing that information personally to the investor, provided that all of the following conditions are satisfied:

⁵ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

- (a) the investors have been notified of the address of the website and of the place on the website where the information can be accessed;
- (b) the investors have consented to the provision of that information by means of a website;
- (c) the information is continuously accessible on the website for such period of time as the investors may reasonably need to access it.

Article 7

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 [*PO: please insert a date six months following the date of entry into force*].

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

Done at Brussels, 4.2.2019

For the Commission
The President
Jean-Claude JUNCKER