

Commission Delegated Directive (EU) 2017/593 of 7 April 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)

## 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 investment firms in accordance with Article 4, details on the accounts in which client funds are held and on the relevant agreements with those firms;
- c where financial instruments are held by investment firms in accordance with Article 3, details on the accounts opened with third parties and on the relevant agreements with those third parties, as well as details on the relevant agreements with those investment firms;
- 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<sup>(1)</sup>;
- c a bank authorised in a third country;
- d a qualifying money market fund.

The first subparagraph shall not apply to a credit institution authorised under Directive 2013/36/EU 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
- 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.

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*Status: This is the original version (as it was originally adopted).*

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## *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.

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