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COMMISSION DELEGATED REGULATION (EU) 2017/2359

of 21 September 2017

supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products

(Text with EEA relevance)

(OJ L 341, 20.12.2017, p. 8)

Amended by:

		Official Journal		
		No	page	date
► <u>M1</u>	Commission Delegated Regulation (EU) 2018/541 of 20 December 2017	L 90	59	6.4.2018

**COMMISSION DELEGATED REGULATION (EU) 2017/2359****of 21 September 2017****supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products****(Text with EEA relevance)**

CHAPTER I

SCOPE AND DEFINITIONS

*Article 1***Scope**

This Regulation shall apply to insurance distribution in relation to the sale of insurance-based investment products carried out by insurance intermediaries or insurance undertakings.

*Article 2***Definitions**

For the purposes of this Regulation, the following definitions shall apply:

- (1) ‘relevant person’ in relation to an insurance intermediary or insurance undertaking, means any of the following:
 - (a) a director, partner or equivalent, or manager of the intermediary or undertaking, where applicable;
 - (b) an employee of the insurance intermediary or insurance undertaking, as well as any other natural person whose services are placed at the disposal and under the control of the insurance intermediary or insurance undertaking and who is involved in the distribution of insurance-based investment products;
 - (c) a natural person who is directly involved in the provision of services to the insurance intermediary or insurance undertaking under an outsourcing agreement for the purpose of the distribution by the intermediary or undertaking of insurance-based investment products;
- (2) ‘inducement’ means any fee, commission, or any non-monetary benefit provided by or to such an intermediary or undertaking in connection with the distribution of an insurance-based investment product, to or by any party except the customer involved in the transaction in question or a person acting on behalf of that customer;
- (3) ‘inducement scheme’ means a set of rules governing the payment of inducements, including the conditions under which the inducements are paid.



CHAPTER II

CONFLICTS OF INTEREST AND INDUCEMENTS

*Article 3***Identification of conflicts of interest**

1. For the purposes of identifying, in accordance with Article 28 of Directive (EU) 2016/97, the types of conflicts of interest that arise in the course of carrying out any insurance distribution activities related to insurance-based investment products and which entail a risk of damage to the interests of a customer, insurance intermediaries and insurance undertakings shall assess whether they, a relevant person or any person directly or indirectly linked to them by control, have an interest in the outcome of the insurance distribution activities, which meets the following criteria:

- (a) it is distinct from the customer's or potential customer's interest in the outcome of the insurance distribution activities;
- (b) it has the potential to influence the outcome of the distribution activities to the detriment of the customer.

Insurance intermediaries and insurance undertakings shall proceed in the same way for the purposes of identifying conflicts of interest between one customer and another.

2. For the purposes of the assessment pursuant to paragraph 1, insurance intermediaries and insurance undertakings shall take into account, by way of minimum criteria, the following situations:

- (a) the insurance intermediary or insurance undertaking, a relevant person or any person directly or indirectly linked to them by control is likely to make a financial gain, or avoid a financial loss, to the potential detriment of the customer;
- (b) the insurance intermediary or insurance undertaking, a relevant person or any person directly or indirectly linked to them by control has a financial or other incentive to favour the interest of another customer or group of customers over the interest of the customer;
- (c) the insurance intermediary or insurance undertaking, a relevant person or any person directly or indirectly linked by control to an insurance intermediary or an insurance undertaking is substantially involved in the management or development of insurance-based investment products, in particular where such a person has an influence on the pricing of those products or their distribution costs.

*Article 4***Conflicts of interest policy**

1. For the purposes of Article 27 of Directive (EU) 2016/97, insurance intermediaries and insurance undertakings shall be expected to establish, implement and maintain an effective conflicts of interest policy set out in writing and appropriate to their size and organisation and the nature, scale and complexity of their business.

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Where the insurance intermediary or insurance undertaking is a member of a group, the policy shall also take into account any circumstances, of which the insurance intermediary or insurance undertaking is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other members of the group.

2. The conflicts of interest policy established in accordance with paragraph 1 shall include the following content:

- (a) with reference to the specific insurance distribution activities carried out, the circumstances which constitute or may give rise to a conflict of interest entailing a risk of damage to the interests of one or more customers;
- (b) procedures to be followed and measures to be adopted in order to manage such conflicts and prevent them from damaging the interests of the customer.

*Article 5***Procedures and measures under the conflicts of interest policy**

1. The procedures and measures referred to in Article 4(2)(b) shall be appropriate to the size and activities of the insurance intermediary or insurance undertaking and of the group to which they may belong, and to the risk of damage to the interests of the customer.

The procedures to be followed and measures to be adopted in accordance with Article 4(2)(b) shall include, where appropriate, the following:

- (a) effective procedures to prevent or control the exchange of information between relevant persons engaged in activities involving a risk of conflict of interest where the exchange of that information may damage the interests of one or more customers;
- (b) the separate supervision of relevant persons whose principal functions involve carrying out activities on behalf of, or providing services, to customers whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the insurance intermediary or insurance undertaking;
- (c) the removal of any direct link between payments, including remuneration, to relevant persons engaged in one activity and payments, including remuneration, to different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
- (d) measures to prevent or limit any person from exercising inappropriate influence over the way in which insurance distribution activities are carried out by the insurance intermediary or insurance undertaking or their managers or employees or any person directly or indirectly linked to them by control;

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- (e) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate insurance distribution activities where such involvement may impair the proper management of conflicts of interest;
- (f) a gifts and benefits policy which determines clearly under which conditions gifts and benefits can be accepted or granted and which steps are to be taken when accepting and granting gifts and benefits.

2. Where insurance intermediaries and insurance undertakings can demonstrate that the measures and procedures referred to in paragraph 1 are not appropriate to ensure that the insurance distribution activities are carried out in accordance with the best interest of the customer and are not biased due to conflicting interests of the insurance intermediary, the insurance undertaking or another customer, insurance intermediaries and insurance undertakings shall adopt adequate alternative measures and procedures for that purpose.

*Article 6***Disclosure**

1. Insurance intermediaries and insurance undertakings shall avoid over-reliance on disclosure to ensure that disclosure to customers, pursuant to Article 28(2) of Directive (EU) 2016/97, is a measure of last resort that can be used only where the effective organisational and administrative arrangements established by the insurance intermediary or insurance undertaking to prevent or manage conflicts of interest in accordance with Article 27 of Directive (EU) 2016/97 are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of the customer will be prevented.

2. For the purposes of a disclosure of conflicts of interest insurance intermediaries and insurance undertakings shall do all of the following:

- (a) provide a specific description of the conflict of interest in question;
- (b) explain the general nature and sources of the conflict of interest;
- (c) explain the risks to the consumer that arise as a result of the conflict of interest and the steps undertaken to mitigate those risks;
- (d) clearly state that the organisational and administrative arrangements established by the insurance intermediary or insurance undertaking to prevent or manage the conflict of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of the customer will be prevented.



Article 7

Review and record keeping

1. For the purposes of Article 27 of Directive (EU) 2016/97, insurance intermediaries and insurance undertakings shall assess and periodically review, on an at least annual basis, the conflicts of interest policy established in accordance with Article 4 and take all appropriate measures to address any deficiencies.

2. Insurance intermediaries and insurance undertakings shall keep and regularly update a record of the situations in which a conflict of interest entailing a risk of damage to the interests of a customer has arisen or, in the case of an ongoing service or activity may arise.

Senior management of the insurance intermediary or insurance undertaking shall receive on a frequent basis, and at least annually, written reports on the situations referred to in the first subparagraph.

Article 8

Assessment of inducements and inducement schemes

1. An inducement or inducement scheme shall be considered to have a detrimental impact on the quality of the relevant service to the customer where it is of such a nature and scale that it provides an incentive to carry out insurance distribution activities in a way that is not in compliance with the obligation to act honestly, fairly and professionally in accordance with the best interests of the customer.

2. For the purposes of assessing whether an inducement or inducement scheme has a detrimental impact on the quality of the relevant service to the customer, insurance intermediaries and insurance undertakings shall perform an overall analysis taking into account all relevant factors which may increase or decrease the risk of detrimental impact on the quality of the relevant service to the customer, and any organisational measures taken by the insurance intermediary or insurance undertaking carrying out distribution activities to prevent the risk of detrimental impact.

They shall, in particular, consider the following criteria:

- (a) whether the inducement or inducement scheme could provide an incentive to the insurance intermediary or insurance undertaking to offer or recommend a particular insurance product or a particular service to the customer despite the fact that the insurance intermediary or insurance undertaking would be able to offer a different insurance product or service which would better meet the customer's needs;
- (b) whether the inducement or inducement scheme is solely or predominantly based on quantitative commercial criteria or whether it takes into account appropriate qualitative criteria, reflecting compliance with applicable regulations, the quality of services provided to customers and customer satisfaction;

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- (c) the value of the inducement paid or received in relation to the value of the product and the services provided;
- (d) whether the inducement is entirely or mainly paid at the moment of the conclusion of the insurance contract or extends over the whole term of that contract;
- (e) the existence of an appropriate mechanism for reclaiming the inducement in case the product lapses or is surrendered at an early stage or in case the interests of the customer have been harmed;
- (f) the existence of any form of variable or contingent threshold or any other kind of value accelerator which is unlocked by attaining a target based on volume or value of sales.

CHAPTER III

ASSESSMENT OF SUITABILITY AND APPROPRIATENESS

SECTION 1

*Assessment of suitability**Article 9***Information to be obtained for the purposes of the assessment of suitability**

1. For the purposes of providing advice on an insurance-based investment product in accordance with Article 30(1) of Directive (EU) 2016/97, insurance intermediaries or insurance undertakings shall determine the extent of the information to be collected from the customer or potential customer in light of all the features of the advice to be provided to the customer or potential customer.

2. Without prejudice to the fact that, in accordance with Article 20(1) of Directive (EU) 2016/97, any contract proposed shall be consistent with the customer's demands and needs, insurance intermediaries or insurance undertakings shall obtain from customers or potential customers such information as is necessary for them to understand the essential facts about the customer or potential customer and to have a reasonable basis for determining that their personal recommendation to the customer or potential customer satisfies all of the following criteria:

- (a) it meets the customer's or potential customer's investment objectives, including that person's risk tolerance;
- (b) it meets the customer's or potential customer's financial situation, including that person's ability to bear losses;
- (c) it is such that the customer or potential customer has the necessary knowledge and experience in the investment field relevant to the specific type of product or service.

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3. The information regarding the customer's or potential customer's financial situation, including that person's ability to bear losses, shall include, where relevant, information on the source and extent of the customer's or potential customer's regular income, assets, including liquid assets, investments and real property and the regular financial commitments. The level of information gathered shall be appropriate to the specific type of product or service being considered.

4. The information regarding the customer's or potential customer's investment objectives, including that person's risk tolerance, shall include, where relevant, information on the length of time for which the customer or potential customer wishes to hold the investment, that person's preferences regarding risk taking, the risk profile, and the purposes of the investment. The level of information gathered shall be appropriate to the specific type of product or service being considered.

5. Where the insurance intermediary or insurance undertaking does not obtain the information required under Article 30(1) of Directive (EU) 2016/97, the insurance intermediary or insurance undertaking shall not provide advice on insurance-based investment products to the customer or potential customer.

6. When providing advice on an insurance-based investment product in accordance with Article 30(1) of Directive (EU) 2016/97, an insurance intermediary or insurance undertaking shall not make a recommendation where none of the products are suitable for the customer or potential customer.

7. When providing advice that involves switching between underlying investment assets, insurance intermediaries and insurance undertakings shall also collect the necessary information on the customer's existing underlying investment assets and the recommended new investment assets and shall undertake an analysis of the expected costs and benefits of the switch, such that they are reasonably able to demonstrate that the benefits of switching are expected to be greater than the costs.

*Article 10***Reliability of information**

Insurance intermediaries and insurance undertakings shall take reasonable steps to ensure that the information collected about customers and potential customers for the purposes of the assessment of suitability is reliable. Such steps shall include, but shall not be limited to, the following:

- (a) ensuring that customers are aware of the importance of providing accurate and up-to-date information;

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- (b) ensuring that all tools, such as risk assessment profiling tools or tools to assess a customer's knowledge and experience, employed in the suitability assessment process are fit-for-purpose and are appropriately designed for use with their customers, with any limitations identified and actively mitigated through the suitability assessment process;
- (c) ensuring that questions used in the process are likely to be understood by the customers and to capture an accurate reflection of the customer's objectives and needs and the information necessary to undertake the suitability assessment;
- (d) taking steps, as appropriate, to ensure the consistency of customer information, such as considering whether there are obvious inaccuracies in the information provided by the customer.

*Article 11***Communication with customers regarding the assessment of suitability**

Insurance intermediaries and insurance undertakings shall not create any ambiguity or confusion about their responsibilities in the process of assessing the suitability of insurance-based investment products in accordance with Article 30(1) of Directive (EU) 2016/97. Insurance intermediaries and insurance undertakings shall inform customers, clearly and simply, that the reason for assessing suitability is to enable them to act in the customer's best interest.

*Article 12***Automated advice**

The insurance intermediary's or insurance undertaking's responsibility to perform the suitability assessment in accordance with Article 30(1) of Directive (EU) 2016/97 shall not be reduced due to the fact that advice on insurance-based investment products is provided in whole or in part through an automated or semi-automated system.

*Article 13***Group insurance**

With regard to group insurance the insurance intermediary or insurance undertaking shall establish and implement a policy as to who shall be subject to the suitability assessment in case an insurance contract is concluded on behalf of a group of members and each individual member cannot take an individual decision to join. Such a policy shall also contain rules on how that assessment will be done in practice, including from whom information about knowledge and experience, financial situation and investment objectives shall be collected.

The insurance intermediary or insurance undertaking shall record the policy established pursuant to the first paragraph.



Article 14

Suitability statement

1. When providing advice on the suitability of an insurance-based investment product in accordance with Article 30(1) of Directive (EU) 2016/97, insurance intermediaries and insurance undertakings shall provide a statement to the customer (suitability statement) that includes the following:

- (a) an outline of the advice given;
- (b) information on how the recommendation provided is suitable for the customer, in particular how it meets:
 - (i) the customer's investment objectives, including that person's risk tolerance;
 - (ii) the customer's financial situation, including that person's ability to bear losses;
 - (iii) the customer's knowledge and experience.

2. Insurance intermediaries and insurance undertakings shall draw customers' attention to, and shall include in the suitability statement, information on whether the recommended insurance-based investment products are likely to require the customer to seek a periodic review of their arrangements.

3. Where an insurance intermediary or insurance undertaking has informed the customer that it will carry out a periodic assessment of suitability, the subsequent statements after the initial service is established may be limited to changes in the services or underlying investment assets, and/or the circumstances of the customer without repeating all the details contained in the first statement.

4. Insurance intermediaries and insurance undertakings providing a periodic assessment of suitability shall review, in accordance with the best interests of their customers, the suitability of the recommended insurance-based investment products at least annually. The frequency of this assessment shall be increased depending on the characteristics of the customer, such as the risk tolerance, and the nature of the recommended insurance-based investment product.

SECTION 2

Assessment of appropriateness

Article 15

Assessment procedure

Without prejudice to the fact that, in accordance with Article 20(1) of Directive (EU) 2016/97, any contract proposed shall be consistent with the customer's demands and needs, insurance intermediaries or insurance undertakings shall determine whether the customer has the necessary

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knowledge and experience in order to understand the risks involved in relation to the service or product proposed or demanded when assessing whether an insurance service or product distributed in accordance with Article 30(2) of Directive (EU) 2016/97 is appropriate for the customer.

*Article 16***Non-complex insurance-based investment products**

An insurance-based investment product shall be considered as non-complex for the purposes of Article 30(3)(a)(ii) of Directive (EU) 2016/97 where it satisfies all of the following criteria:

- (a) it includes a contractually guaranteed minimum maturity value which is at least the amount paid by the customer after deduction of legitimate costs;
- (b) it does not incorporate a clause, condition or trigger that allows the insurance undertaking to materially alter the nature, risk, or pay-out profile of the insurance-based investment product;
- (c) it provides options to surrender or otherwise realise the insurance-based investment product at a value that is available to the customer;
- (d) it does not include any explicit or implicit charges which have the effect that, even though there are technically options to surrender or otherwise realise the insurance-based investment product, doing so may cause unreasonable detriment to the customer because the charges are disproportionate to the cost to the insurance undertaking;
- (e) it does not in any other way incorporate a structure which makes it difficult for the customer to understand the risks involved.

*SECTION 3****Provisions common to the assessment of suitability and appropriateness****Article 17***Information to be obtained from the customer**

1. For the purposes of Article 30(1) and (2) of Directive (EU) 2016/97, the necessary information to be obtained by insurance intermediaries and insurance undertakings with regard to the customer's or potential customer's knowledge and experience in the relevant investment field shall include, where relevant, the following, to the extent appropriate to the nature of the customer, and the nature and type of product or service offered or demanded, including their complexity and the risks involved:

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- (a) the types of service, transaction, insurance-based investment product or financial instrument with which the customer or potential customer is familiar;
- (b) the nature, number, value and frequency of the customer's or potential customer's transactions in insurance-based investment products or financial instruments and the period over which they have been carried out;
- (c) the level of education, and profession or relevant former profession of the customer or potential customer.

2. The insurance intermediary or insurance undertaking shall not discourage a customer or potential customer from providing information required for the purposes of Article 30(1) and (2) of Directive (EU) 2016/97.

3. Where information required for the purposes of Article 30(1) or (2) of Directive (EU) 2016/97 has already been obtained pursuant to Article 20 of Directive (EU) 2016/97, insurance intermediaries and insurance undertakings shall not request it anew from the customer.

4. The insurance intermediary or insurance undertaking shall be entitled to rely on the information provided by its customers or potential customers unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

*Article 18***Periodic report**

1. Without prejudice to Article 185 of Directive 2009/138/EC of the European Parliament and of the Council ⁽¹⁾, the insurance intermediary or insurance undertaking shall provide the customer with a periodic report, on a durable medium, of the services provided to and transactions undertaken on behalf of the customer.

2. The periodic report required under paragraph 1 shall provide a fair and balanced review of the services provided to and transactions undertaken on behalf of that customer during the reporting period and shall include, where relevant, the total costs associated with these services and transactions, and the value of each underlying investment asset.

3. The periodic report required under paragraph 1 shall be provided at least annually.

*Article 19***Retention of records**

1. Without prejudice to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council ⁽²⁾, insurance intermediaries and insurance undertakings shall maintain records of the assessment of suitability or appropriateness undertaken in accordance

⁽¹⁾ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

⁽²⁾ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

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with Article 30(1) and (2) of Directive (EU) 2016/97. The records shall include the information obtained from the customer and any documents agreed with the customer, including documents that set out the rights of the parties and the other terms on which the insurance intermediary or insurance undertaking will provide services to the customer. Such records shall be retained for at least the duration of the relationship between the insurance intermediary or insurance undertaking and the customer.

2. In the case of an assessment of suitability undertaken in accordance with Article 30(1) of Directive (EU) 2016/97, the record shall further include the following:

- (a) the result of the suitability assessment;
- (b) the recommendation made to the customer and the statement provided in accordance with Article 14(1) of this Regulation;
- (c) any changes made by the insurance intermediary or insurance undertaking with regard to the suitability assessment, in particular any change to the customer's risk tolerance;
- (d) any changes to the underlying investment assets.

3. In the case of an assessment of appropriateness undertaken in accordance with Article 30(2) of Directive (EU) 2016/97, the record shall further include the following:

- (a) the result of the appropriateness assessment;
- (b) any warning given to the customer where the insurance-based investment product was assessed as potentially inappropriate for the customer, whether the customer asked to proceed with concluding the contract despite the warning and, where applicable, whether the insurance intermediary or insurance undertaking accepted the customer's request to proceed with concluding the contract;
- (c) any warning given to the customer where the customer did not provide sufficient information to enable the insurance intermediary or insurance undertaking to assess the appropriateness of the insurance-based investment product, whether the customer asked to proceed with concluding the contract despite the warning and, where applicable, whether the insurance intermediary or insurance undertaking accepted the customer's request to proceed with concluding the contract.

4. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority. The competent authority shall be able to access them readily, to reconstitute each element in a clear and accurate manner and to identify easily any changes, corrections or other amendments, and the contents of the records prior to such modifications.

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CHAPTER IV
FINAL PROVISIONS

Article 20

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*.

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It shall apply from the date from which Member States are to apply the measures referred to in the first subparagraph of Article 42(1) of Directive (EU) 2016/97.

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