

# Questions and Answers

## Application of the UCITS Directive

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## I. Background

1. The Undertakings for Collective Investment in Transferable Securities (UCITS) Directive puts in place a comprehensive framework for the regulation of harmonised investment funds within Europe. The extensive requirements with which UCITS must comply are designed to ensure that these products can be sold on a cross-border basis. The most recent version of the Directive (as amended by Directive 2014/91/EU, so called 'UCITS V') introduces rules on remuneration policies and sanctions and strengthens the depositary regime.
2. The UCITS framework is made up of Directive 2009/65/EC which has been supplemented by technical delegated and implementing measures<sup>1</sup>, including Directive 2007/16/EC<sup>2</sup>; Directive 2010/43/EU<sup>3</sup>; Regulation No 583/2010<sup>4</sup>; Directive 2010/42/EU<sup>5</sup>; Regulation No 584/2010<sup>6</sup>; and Regulation (EU) 2016/1212<sup>7</sup>.
3. ESMA is required to play an active role in building a common supervisory culture by promoting common supervisory approaches and practices. In this regard, the Authority develops Q&As as and when appropriate to elaborate on the provisions of certain EU legislation or ESMA guidelines.
4. Moreover, according to Article 16b of the ESMA Regulation, ESMA forwards questions that require the interpretation of Union law to the European Commission. In this document, ESMA publishes also answers provided by the European Commission to the questions forwarded.

## II. Purpose

5. The purpose of this document is to promote common supervisory approaches and practices in the application of the UCITS Directive and its implementing measures. It does this by providing responses to questions posed by the general public and competent authorities in relation to the practical application of the UCITS framework.

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<sup>1</sup> Link to implementing and delegated acts for Directive 2009/65/EC on undertakings for collective investment in transferable securities: [https://finance.ec.europa.eu/system/files/2022-09/ucits-directive-level-2-measures-full\\_en.pdf](https://finance.ec.europa.eu/system/files/2022-09/ucits-directive-level-2-measures-full_en.pdf).

<sup>2</sup> COMMISSION DIRECTIVE 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions.

<sup>3</sup> COMMISSION DIRECTIVE 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

<sup>4</sup> COMMISSION REGULATION (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website.

<sup>5</sup> COMMISSION DIRECTIVE 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure.

<sup>6</sup> COMMISSION REGULATION (EU) No 584/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities.

<sup>7</sup> Commission Implementing Regulation (EU) 2016/1212 of 25 July 2016 laying down implementing technical standards with regard to standard procedures and forms for submitting information in accordance with Directive 2009/65/EC of the European Parliament and of the Council.

The content of this document is aimed at competent authorities under UCITS to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. However, the answers are also intended to help UCITS management companies by providing clarity as to the content of the UCITS Directive rules, rather than creating an extra layer of requirements.

### **III. Status**

6. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 16b of the ESMA Regulation.<sup>8</sup>
7. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committee's Consultative Working Group or, where specific expertise is needed, with other external parties.
8. ESMA will review these questions and answers on a regular basis to identify if, in a certain area, there is a need to convert some of the material into ESMA guidelines. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.

### **IV. Questions and Answers**

9. This document is intended to be continually edited and updated as and when new questions are received. The date each question was last amended is included after each question for ease of reference.

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<sup>8</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

## Section I – General

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### Question 1: Directive 2014/91/EU (UCITS V) – update of documentation

Date last updated: February 2016

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**Question 1a [last update 1 February 2016] Q&A 938:** UCITS V requires (i) the KIID to include a prescribed statement in relation to remuneration policy and (ii) the prospectus to include some remuneration-related information. UCITS are required to make an updated KIID available within 35 days of 31 December each year, while the ‘essential elements’ of the prospectus must be kept up to date at all times. Will UCITS be required to issue a further KIID and a revised prospectus on 18 March 2016 to reflect the UCITS V requirement?

**Answer 1a:** No: except where a UCITS is subject to national laws and regulations in its home Member State that require updates to be made by 18 March 2016, the UCITS will be allowed to update the KIID with this information at the next annual update after 18 March 2016, or on the first occasion after 18 March 2016 on which the KIID is revised or replaced for another purpose, if the information is available at that point in time. Similarly, a UCITS will be allowed to add the relevant information to the prospectus at the next occasion it is revised for another purpose or in any event by 18 March 2017 at the latest.

In the meantime, UCITS management companies should make available on a relevant website the additional information about the management company’s remuneration arrangements as soon as it becomes available.

**Question 1b [last update 1 February 2016] Q&A 945:** UCITS V requires the annual report to include some remuneration-related information. The annual report shall be published within four months from the end of the period to which it relates. Does the UCITS V requirement apply to all annual reports published on or after 18 March 2016?

**Answer 1b:** No, it is not necessary to include the remuneration-related information in any annual report relating to a period that ended before 18 March 2016. For annual reports relating to periods that end on or after 18 March 2016, but before the UCITS management company has completed its first annual performance period in which it has to comply with articles 14a and 14b of the Directive, the UCITS management company should include the remuneration-related information in the report on a best efforts basis and to the extent possible, explaining the basis for any omission.

**Question 1c [last update 1 February 2016] Q&A 946:** When must existing UCITS depositary contracts be updated in order to meet the requirements under Directive 2014/91/EU (UCITS V)?

**Answer 1c:** UCITS V will start to apply on 18 March 2016. Under Article 22(2) of the UCITS Directive, introduced by UCITS V, the appointment of the depositary shall be evidenced by written contract, while the delegated acts required under Article 26b will set out the particulars

that need to be included in that written contract. UCITS depositary contracts should be revised promptly in accordance with any transitional arrangements outlined in the delegated acts.

UCITS V contains provisions which prescribe in law the liability of depositaries. While there is no requirement to include those liability provisions in depositary contracts, in practice existing depositary contracts will contain liability provisions which will not be consistent with the depositary liability provisions set out in UCITS V. In accordance with Article 24(4), those provisions of a contract which set out the parties' agreement on depositary liability and which conflict with the UCITS V depositary liability provisions will be void with effect from 18 March 2016. The UCITS V depositary liability provisions will apply instead. The liability provisions in existing depositary contracts should be amended to reflect the UCITS V depositary liability provisions when those depositary contracts are revised to comply with the delegated acts.

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## Question 2: Master-feeder structures

Date last updated: April 2016

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**Question 2a [last update 1 April 2016] Q&A 947:** Can a UCITS invest in a UCITS feeder fund?

**Answer 2a:** No. As UCITS feeder funds have to invest at least 85% of their net assets in their UCITS master fund, another UCITS cannot invest in a UCITS feeder fund. According to Article 50(1)(e)(iv) of the UCITS Directive, a UCITS can only invest in other UCITS if “no more than 10 % of the assets of the UCITS or of the other collective investment undertakings, whose acquisition is contemplated, can, according to their fund rules or instruments of incorporation, be invested in aggregate in units of other UCITS or other collective investment undertakings”.

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## Question 3: Regulated markets under the UCITS Directive

Date last updated: October 2016

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**Question 3a [last update 12 October 2016] Q&A 948:** Can the term “regulated market in a Member State” in Article 50(1)(b) of the UCITS Directive be understood to include a “multilateral trading facility” (MTF) as defined in Article 4(1)(15) of MiFID?

**Answer 3a:** Yes. An MTF operated in the EU is a regulated market within the scope of the UCITS framework as long as it meets the requirements set out in Article 50(1)(b). Instruments in which a UCITS invests that are traded on such an MTF on behalf of a UCITS must comply with the Eligible Assets Directive<sup>9</sup>, in particular with its Article 2(1). If a UCITS proposes to invest in such an instrument, it should actively seek and review information regarding the

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<sup>9</sup> Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions (“Eligible Assets Directive”)



liquidity and negotiability of that instrument in order to be satisfied that the presumptions of liquidity and negotiability in the last sub-paragraph of Article 2(1) are well-founded.

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#### **Question 4: Investment limits**

Date last updated: November 2016

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**Question 4a [last update 21 November 2016] Q&A 949:** Pursuant to Article 56(2)(c) of the UCITS Directive, a UCITS may acquire no more than 25% of the units of any single UCITS or other collective investment undertaking. Where the underlying UCITS or other collective investment undertaking is an umbrella fund, should this limit be applied at the level of the umbrella or at the level of the individual sub-funds within the umbrella?

**Answer 4a:** The limit set out in Article 56(2)(c) should be applied at the level of the individual sub-funds in the UCITS or collective investment undertaking of which the units are to be acquired, to ensure the principle of risk-spreading within the investing UCITS. Where an investment company or a management company is currently applying a different interpretation of this limit, it must at the earliest convenience adjust the funds' portfolios whilst acting with due skill, care and diligence in the best interest of the UCITS it manages.

**Question 4b [last update 21 November 2016] Q&A 950:** Pursuant to Article 55(1) of the UCITS Directive, a UCITS may acquire the units of UCITS or other collective investment undertakings referred to in Article 50(1)(e), provided that no more than 10% of its assets are invested in units of a single UCITS or other collective investment undertaking. Where the underlying UCITS or other collective investment undertaking is an umbrella fund, should this limit be applied at the level of the umbrella or at the level of the individual sub-funds within the umbrella?

**Answer 4b:** The limit set out in Article 55(1) applies at the level of the individual sub-funds in the UCITS or collective investment undertaking of which the units are to be acquired. Where an investment company or a management company is currently applying a different interpretation of this limit, it must at the earliest convenience adjust the funds' portfolios whilst acting with due skill, care and diligence in the best interest of the UCITS it manages.

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#### **Question 5: Issuer concentration**

Date last updated: February 2023

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**Question 5a Q&A 951:** Does the 40% limit set out in Article 52(2) of the UCITS Directive apply to index-tracking UCITS that are subject to Article 53 of the UCITS Directive?

**Answer 5a:** No. The 40% limit set out in Article 52(2) does not apply to index-tracking UCITS that comply with the requirements set out in Article 53.

**Question 5b Q&A 952:** Can netting and hedging arrangements be taken into account for the purposes of calculating issuer concentration limits pursuant to Article 52 of the UCITS Directive?

**Answer 5b:** Only netting arrangements in accordance with the definition and conditions set out in the guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS (Ref. CESR/10-788) may be taken into account when calculating issuer concentration limits.

**Question 5c Q&A 953:** Article 54 of Directive 2009/65/EC permits competent authorities to authorise UCITS to invest up to 100% of their assets in transferable securities issued by certain issuers e.g. sovereigns. Do the six different issues mentioned in Article 54(1), third subparagraph of the UCITS Directive refer to any kinds of issues of transferable securities and money market instruments or must they be guaranteed by a Member State, one or more of its local authorities, a third country or a public international body to which one or more Member States belong? If the UCITS holds more than six different issues, must all of these issues comply with the 30 % limit?

**Answer 5c:** Pursuant to article 54(1) of the UCITS Directive, UCITS cannot invest up to 100% of their assets in transferable securities or money markets instruments that are not issued nor guaranteed by a Member State, one or more of its local authorities, a third country or a public international body to which one or more Member States belong. In addition, Article 54(1) of the UCITS Directive unambiguously provides that if a UCITS holds more than six issues in transferable securities and money market instruments issued or guaranteed by a Member State, one or more of its local authorities, a third country or a public international body to which one or more Member States belong, all the issues should respect the 30% limit (i.e. even if the UCITS holds more than 6 issues).

**Question 5d Q&A 954:** Where a UCITS has a hedged share class in a different currency, should unrealised FX profits and losses be counted towards the NAV of the hedged share class and accordingly be taken into account when calculating the counterparty risk limit of Article 52(1) of the UCITS Directive?

**Answer 5d:** FX forward are OTC instruments. This means that when UCITS invest in this type of instruments for currency hedging purposes in a share class they should comply with the counterparty risks limits laid down in Article 52(1) of the UCITS Directive in respect to the NAV of the share class as provided in paragraph 26a of the ESMA's Opinion on share classes<sup>[1]</sup>. Therefore, unrealised FX profits and losses should be counted towards the NAV of the hedged share class of the UCITS and taken into account when calculating the counterparty risk limits of Article 52(1) of the UCITS Directive in respect to the NAV of the hedged share class.

**Question 5e [last update 3 February 2023] Q&A 955:** Article 52(1)(b) of the UCITS Directive requires a UCITS not to invest more than 20% of its assets in deposits made with the same body. Does the term "body" referred to in the aforementioned article mean "credit institution"

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<sup>[1]</sup> See ESMA's Opinion on share classes ([ESMA34-43-296](#))

as mentioned in Article 50(1)(f) of the UCITS Directive or does it include also any other counterparty which is not a credit institution?

**Answer 5e:** The term “body” as referred to in Article 52(1)(b) means “credit institution” as mentioned in Article 50(1)(f) of the UCITS Directive.

The guidance provided by this Q&A is only applicable in the context of Article 52(1)(b) and should not affect the meaning of the term “body” in other instances of the UCITS Directive.

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### Question 6: UCITS investing in other UCITS with different investment policies

Date last updated: July 2018

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**Question 6a Q&A 956:** Is a UCITS permitted to invest in other UCITS or collective investment undertakings with different investment strategies or investment restrictions? By way of example, could a UCITS that in accordance with its fund rules or instruments of incorporation and prospectus is not permitted to invest in certain assets or use derivatives for purposes other than hedging invest in other UCITS or collective investment undertakings that are not subject to the same investment restrictions?

**Answer 6a:** The prospectus of a UCITS should clearly disclose whether in the case of fund of fund investments, the target fund(s) might have different investment strategies or restrictions. Where the fund rules or instruments of incorporation and prospectus of a UCITS expressly rule out certain types of assets or derivative use without any reservations, UCITS management companies/self-managed investment companies should carry out proportionate due diligence to ensure that fund of fund investments do not result in a circumvention of the investment strategies or restrictions set out in the fund rules or instruments of incorporation and prospectus of the investing UCITS.

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### Question 7: Supervision of branches

Date last updated: July 2018

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**Question 7a Q&A 957:** What are the supervisory responsibilities of competent authorities in host Member States when a UCITS management company provides investment services through a branch established in the host Member State?

**Answer 7a:** Under both the UCITS and the AIFM Directives, supervisory powers of competent authorities in relation to branches of UCITS management companies or alternative investment fund managers (AIFMs) established in a Member State that is not the home Member State are shared. The competent authority of the Member State in which the branch is located (host Member State) is responsible for the supervision of the branch’s compliance with conduct rules referred to in Article 17(5) of the UCITS Directive and Article 45(2) of the AIFMD and the competent authority of the Member State in which the UCITS management company or the

alternative investment fund manager is established (home Member State) is responsible for the supervision of the other requirements provided under the relevant applicable framework.<sup>10</sup>

Neither the UCITS Directive nor the AIFMD provides for an explicit framework for the allocation of supervisory responsibilities and powers for those cases where UCITS management companies or AIFMs are authorised to carry out investment services set out in Article 6(3) of the UCITS Directive and Article 6(4) of the AIFMD and have branches providing those services in other Member States. ESMA is of the view that responsibilities of home and host Member States should be identified similarly to, and consistently with, the general framework established for the provision of activities pursued by UCITS management companies and AIFMs through branches as well as with the MiFID II framework regulating the supervision on the provision of investment services across the EU. This approach is in line with the division of responsibilities provided under the MiFID II framework. In accordance with Article 35(8) of MiFID II, the competent authority of the host Member State has the responsibility for ensuring that the services provided by the branch of an investment firm or a credit institution in its territory comply with the MiFID II requirements under Articles 24 (“General principles and information to clients”) and 25 (“Assessment of suitability and appropriateness and reporting to clients”) of MiFID II, which also apply to UCITS management companies and AIFMs providing investment services.

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**\*\*\*NEW\*\*\* Question 8: Management of AIFs and pension schemes by UCITS management companies**

Date last updated: 13 June 2023

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**Answers provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>11</sup>**

**\*\*\*NEW\*\*\* Question 8a Q&A 1074:** Pursuant to Article 6(2) of the UCITS Directive, are UCITS management companies allowed to manage AIFs as a registered AIFM under Article 3 of Directive 2011/61/EU (AIFMD)?

**Answer 8a:** Yes. UCITS management companies are allowed to manage AIFs as AIFMs registered under Article 3 AIFMD. Pursuant to Article 6(2) of the UCITS Directive, management

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<sup>10</sup> See Article 17(4) and (5) of UCITS Directive and Article 45(1) and (2) of AIFMD. On this subject, see also “Notification frameworks and home-host responsibilities under UCITS and AIFMD”, an ESMA Thematic Study among National Competent Authorities [https://www.esma.europa.eu/sites/default/files/library/esma34-43-340\\_final\\_report\\_on\\_thematic\\_study\\_on\\_notification\\_frameworks.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-43-340_final_report_on_thematic_study_on_notification_frameworks.pdf)

<sup>11</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

companies can manage other collective investment vehicles, for which the management company is subject to prudential supervision. Registered AIFMs are subject to the prudential supervision under AIFMD to the degree commensurate with their complexity and systemic relevance for the stability of the financial system. Pursuant to Article 3(3) and (4) AIFMD, sub-threshold AIFMs shall be at least registered by the home competent authorities and identify the AIFs they manage providing information on the employed investment strategies. Such AIFMs are also subject to the periodic supervisory reporting obligation. There is national discretion to make those requirements stricter. Importantly, the national competent authorities can exert any of the supervisory powers enumerated in Article 46 AIFMD. This allows concluding that AIFMs registered in accordance with Article 3(3) AIFMD should be considered as prudentially supervised within the meaning of Article 6(2) of the UCITS Directive.

**\*\*\*NEW\*\*\* Question 8b Q&A 1075:** Pursuant to Article 6(2) of the UCITS Directive, are UCITS management companies allowed to manage pension schemes under Directive (EU) 2016/2341?

**Answer 8b:** Yes, provided that it is authorised by national legislation implementing the UCITS Directive. The scope of the UCITS license allows UCITS management companies to undertake as core services only the management of UCITS. However, Article 6(3), point (a), of the UCITS Directive provides the possibility for Member States to authorise UCITS management companies to provide, in addition to the management of UCITS, the management of pension funds' portfolios, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Section C of Annex I to Directive 2004/39/EC. Therefore, Member States can authorise UCITS management companies, in addition to the management of UCITS, to manage investment portfolios of pension funds only on a mandate basis, acting as service providers and not as investment managers of the pension funds.

## Section II – Key Investor Information Document (KIID) for UCITS<sup>12</sup>

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### Question 1: Preparation of KIID by UCITS that are no longer marketed to the public or by UCITS in liquidation

Date last updated: September 2012

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**Question 1a Q&A 1078:** Where an existing UCITS is no longer marketed to the public, should it be required to prepare a KIID?

**Answer 1a:** In accordance with Article 82 of the UCITS Directive a UCITS is required to keep the essential elements of key investor information up-to-date. In accordance with Article 23 of Commission Regulation (EU) No 583/2010, a KIID with duly revised presentation of past performance of the UCITS shall be made available no later than 35 business days after 31 December each year. Notwithstanding that a UCITS is no longer marketed to the public, an up-to-date version of the KIID should be available to the existing investors.

**Question 1b Q&A 1079:** Similarly, should there be an obligation to prepare a KIID for a UCITS that is in liquidation?

**Answer 1b:** When a UCITS is in liquidation there can be no obligation to prepare a KIID as the liquidator may have assumed many of the powers of the UCITS management company.

**Question 1c Q&A 1080:** For a structured UCITS, as defined in Article 36 of Commission Regulation (EU) No 583/2010 that is no longer marketed to the public, should there be an obligation to update the KIID?

**Answer 1c:** Yes. A structured UCITS, as defined in Article 36 of Commission Regulation (EU) No 583/2010, needs to keep its KIID up to date.

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### Question 2: Communication of KIID to investors

Date last updated: September 2012

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**Question 2a Q&A 1081:** Should existing investors within a UCITS be provided with a KIID in the case of additional investments?

**Answer 2a:** Yes. Existing investors should be provided with a KIID in the case of additional investments, on the basis that the KIID is a pre-contractual document and each additional subscription is a new contract. However, where unit holders in a UCITS invest through a regular savings plan, a KIID is not required in relation to the periodic subscriptions, unless a

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<sup>12</sup> This section mirrors the content of the old Q&A on the Key Investor Information Document (KIID) for UCITS (2015/ESMA/631), which is replaced by the present document.

change is made to the subscription arrangements, for example, increases or decreases in the subscription amount, which would require a new subscription form.

**Question 2b Q&A 1082:** Should existing investors within a UCITS umbrella fund, who switch or exchange units in one sub-fund for units in another, be provided with the KIID for the sub-fund in which they are going into?

**Answer 2b:** Yes. As a pre-contractual document, the investor must receive the KIID for the sub-fund they are going into including where this investment arises from switching from another sub-fund within the umbrella.

**Question 2c Q&A 1083:** Should an amended KIID be provided to existing investors within the UCITS?

**Answer 2c:** No. In accordance with Article 79 of the UCITS Directive, key investor information shall constitute pre-contractual information. A KIID does not need to be provided to existing investors unless they are making additional subscriptions. Investors always have the right to be provided with the KIID on request.

**Question 2d Q&A 1084:** Must professional investors be provided with a KIID?

**Answer 2d:** Yes. All prospective investors must be provided with a KIID.

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### Question 3: Treatment of UCITS with share or unit classes

Date last updated: September 2012

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**Question Q&A 1085:** Should individual KIIDs be prepared for each class of units or shares within a UCITS?

**Answer:** In accordance with Article 26 of Commission Regulation (EU) No 583/2010 a separate KIID shall be produced for each individual share class. However, information relevant to two or more share classes may be combined into a single KIID provided the resulting KIID complies in full with all KIID requirements (including the limit on length). Also, a UCITS may select a class to represent one or more other classes of the UCITS provided the information in the KIID is fair, clear and not misleading to prospective investors in those other classes. Where charging structures differ between classes, the share class with the highest overall charge is the most appropriate representative share class to avoid the risk of understating charges. However, it is the responsibility of the UCITS to select the most appropriate representative share class having regard to the characteristics of the UCITS, the natures of the differences between share classes in the UCITS and the range of choices on offer to each investor.



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## Question 4: Past performance

Date last updated: March 2019

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**Question 4a Q&A 1086:** If a UCITS does not yet have performance data for one complete calendar year (and is not a UCITS which may provide simulated data for past performance), how should this position be disclosed in the KIID?

**Answer 4a:** In accordance with Article 15(4) of Commission Regulation (EU) No 583/2010 a statement that there is insufficient data to provide a useful indication of past performance should be included in the KIID. There is no need to accompany that statement with a blank performance chart.

**Question 4b Q&A 1087:** Where a UCITS refers to an index in its investment objectives and policy as a benchmark and will measure the performance against that index, but does not intend to track it, is it necessary to show the performance of the benchmark index in the past performance section of the KIID?

**Answer 4b:** Yes, in accordance with Article 18(1) of Commission Regulation (EU) No 583/2010, a bar showing the performance of the benchmark index must be included in the bar chart alongside each bar showing the UCITS past performance. It should be made clear in the past performance section of the KIID that the performance is not tracking the index.

For additional clarity, the requirements of Article 18(1) apply to all UCITS, including total return/absolute return UCITS. For example, the requirement also applies to cases where:

The comparator is not named a 'benchmark', but the objectives and investment policy make it clear that it is a comparator the UCITS aims to outperform. For example, if the fund's objectives and investment policy state it will seek to:

- outperform cash (for example, 3-month EURIBOR), the performance of the fund against the full target should be shown
- outperform a target 'plus X%', the performance of the fund against the enhanced target should be shown.

The UCITS targets outperformance of the benchmark index over a period of time, for example 'X% per annum over four years'. In this case, annualised performance of the benchmark index should be shown alongside that of the UCITS, even if the target is to beat it over four years.

UCITS management companies should make any changes to the KIID in order to incorporate this additional guidance as soon as practicable, or by the next KIID update following the publication of this Q&A.

In accordance with Article 79(1) of the UCITS Directive and to ensure fair, clear and not misleading communications, the information disclosed in the UCITS KIID should be consistent with the UCITS' Investment Objective in the Prospectus.



**Question 4c Q&A 1088:** Does the overall requirement for the UCITS KIID to be 'fair, clear and not misleading' under Article 3(2) mean that performance disclosed in the KIID regarding a benchmark index should be consistent with performance disclosure in other investor communications, including marketing?

**Answer 4c:** Yes. UCITS management companies should ensure that disclosure of performance in the KIID is not misleading by way of being inconsistent, including by ensuring consistency:

- Across offering documents and marketing material, including the prospectus. It may be unclear to investors if the UCITS names and measures performance against a benchmark index in the prospectus, or other marketing material, but not in the KIID. The KIID should be consistent with other fund documents. This also applies to ensuring that the benchmark index used is consistent.
- Across distribution channels. It may be inconsistent if a UCITS arranges for, or permits, an index to be referred to as a benchmark in certain media, such as online platforms or financial data providers, but it does not make the same comparison in the KIID. This also applies to ensuring that the benchmark index used is consistent.
- Across investor types. It should be ensured that all types of investors receive consistent and not misleading information regarding whether or not the UCITS has a benchmark index. For example, it may be inconsistent if a UCITS suggests performance should be measured against a benchmark index to only a cohort of investors (such as in communications to professional investors only) but does not provide the equivalent performance comparison to all investors through the KIID. This also applies to ensuring the version of the benchmark index used is consistent.

**Question 4d Q&A 1089:** What should be displayed in the bar chart for years when there is no data?

**Answer 4d:** Pursuant to Article 15, paragraph 3 of Regulation 583/2010, when there is no data available, the year shall be shown as blank with no annotation other than the date.

**Question 4e Q&A 1090:** If the benchmark is changed, how should the chart of past performance be displayed for the period preceding the change?

**Answer 4e:** Pursuant to Article 17 of Regulation 583/2010, where a material change occurs to a UCITS' objectives and investment policy during the period displayed in the bar chart, the UCITS' past performance prior to that material change shall continue to be shown. Therefore, if the benchmark is modified, the bar chart should display the performance of the previous benchmark for the period preceding the change. A statement indicating this change should also be included in the past performance section.

**Question 4f Q&A 1091:** When several versions of a benchmark are available which differ in the approach taken to reinvestment of revenues, which version should be used in the past performance chart?

**Answer 4f:** Pursuant to Article 16 of Regulation 583/2010, past performance figures shall be calculated on the basis that any distributable income of the fund has been reinvested. Therefore, where available the performance of the benchmark with reinvestment of revenues should be used in the bar chart alongside the UCITS' past performance. Where such a benchmark does not exist, an appropriate disclosure highlighting that the benchmark does not take into account the reinvestment of revenues should be included in the KIID.

**Question 4g Q&A 1092:** Article 19(4) of Commission Regulation (EU) No 583/2010 states that "In the case of mergers referred to in Article 2(1)(p)(i) and (iii) of Directive 2009/65/EC, only the past performance of the receiving UCITS shall be maintained in the key investor information document." Article 19(4) applies in cases where a receiving UCITS has a performance history. How should Article 19(4) be interpreted in cases where the receiving UCITS is a newly established UCITS with no performance history and is in effect a continuation of the merging UCITS?

**Answer 4g:** In the case of a merger where the receiving UCITS is a newly established UCITS with no performance history, UCITS should use the past performance of the merging UCITS in the KIID of the receiving UCITS if the competent authority of the receiving UCITS reasonably assesses that the merger does not impact the UCITS' performance. ESMA expects the performance of the UCITS to be impacted if there is, inter alia, a change to the investment policy or to the entities involved in the investment management. It should also be made clear in the KIID of the receiving UCITS that the performance is that of the merging UCITS.

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## Question 5: Clear language

Date last updated: September 2012

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**Question 5a Q&A 1093:** Is it possible to signpost to a glossary?

**Answer 5a:** Yes. However, as provided by the guide to clear language and layout for the Key Investor Information document (ref. CESR/10-1320), the use of a glossary should not result in too numerous cross-references.

**Question 5b Q&A 1094:** Is it possible to show the complete name of the fund when first mentioned and then simply refer it as "the Fund" after in the KIID.

**Answer 5b:** Yes and the same approach can be taken for share classes of funds with a reference to "the share class of the fund" in the KIID.

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**Question 6: Identification of the UCITS**

Date last updated: September 2012

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**Question Q&A 1098:** Should the name of the investment manager(s) of the UCITS, if any, be disclosed in the KIID?

**Answer:** No. Only the name of the UCITS management company should be disclosed.

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**Question 7: Translation requirements in relation to the remuneration disclosure**

Date last updated: October 2016

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**Question 7 [last update 12 October 2016] Q&A 1099:** Article 78(4), second sub-paragraph of the UCITS Directive requires the KIID to include a statement to the effect that the details of the up-to-date remuneration policy are available by means of a website and that a paper copy will be made available free of charge upon request. Does this mean that, in case of cross-border distribution of a UCITS, the information on the remuneration policy which has to be made available on a website (and the paper copy of it to be made available on request) needs to be translated into the same language as the one into which the KIID has to be translated?

**Answer 7:** No. The information on the remuneration policy which has to be made available on a website (and the paper copy of it to be made available on request) should fall under Article 94(1)(c) of the UCITS Directive relating to information or documents other than the KIID. Therefore, this information should be translated, at the choice of the UCITS, into one of the following:

- a) the official language, or one of the official languages, of the UCITS host Member State,
  - b) a language approved by the competent authorities of that Member State, or
  - c) a language customary in the sphere of international finance.
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**Question 8: Disclosure of the benchmark index in the objectives and investment policies**

Date last updated: March 2019

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**Question 8a Q&A 1100:** Does Article 7(1)(d) of Commission Regulation (EU) No 583/2010 require a UCITS to provide a clear indication of whether it is actively or passively managed?

**Answer 8a:** Yes. Article 7(1)(d) requires that a UCITS either has an index tracking objective, or alternatively allows for discretionary choices, and in both cases this must be disclosed in the objectives and investment policy section of the KIID.

In the case of index-tracking UCITS, using the terms 'passive' or 'passively managed' in addition to 'index-tracking' is recommended practice in order to assist investor understanding. A UCITS management company should consider providing additional wording to ensure the meaning of the term 'passive' or 'passively managed' is clear. An index-tracking (passive) UCITS must disclose the index it is tracking and show performance against that index in the past performance section of the KIID.

An actively managed UCITS is one where the manager has discretion over the composition of its portfolio, subject to the stated investment objectives and policy. As opposed to a passive UCITS, an active UCITS does not have an index-tracking objective although it may include or imply reference to a benchmark. A spectrum exists regarding the level of discretion active UCITS may wish to take or be permitted to take against a benchmark index. Some active UCITS take a lower level of risk against a benchmark index than others, and some are managed without any reference to a benchmark index at all.

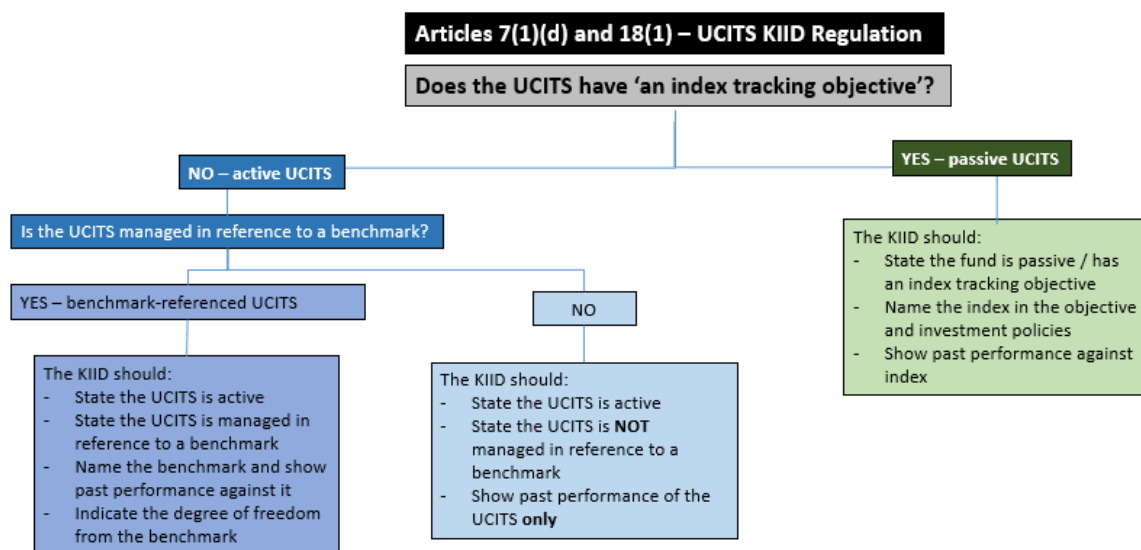
Nevertheless, just as there is a requirement under the KIID Regulation to identify a UCITS that is index-tracking (passive), it should be equally clear to investors where the UCITS is actively managed. Explicitly using the terms 'active' or 'actively managed' is recommended practice in order to assist investor understanding, and a UCITS management company should consider providing additional wording to ensure the meaning of the term 'active' or 'actively managed' is clear.

Active UCITS which are managed in reference to an index must provide additional disclosure on the use of the benchmark index (Article 7(1)(d)) and show past performance against it (Article 18(1)). They must also indicate the degree of freedom from the benchmark (see Q&A 8c). Article 18(1) requires active UCITS managed in reference to a benchmark index to display past performance against that benchmark.

It should be clear which benchmark index (or indices) the UCITS is tracking or is being managed in reference to. Where more than one version of a benchmark index is published (for example a total return version, price return version, etc.), it should be clear which version is being used by the UCITS.

To assist investor understanding, it is recommended practice that active UCITS which are not managed in reference to any benchmark should also make this clear to investors (see Q&A 8b).

This information is summarised in the following graphic, which is also applicable to Q&As 8b, 8c and 4b.



UCITS management companies should make any changes to the KIID in order to incorporate this additional guidance as soon as practicable, or by the next KIID update following the publication of this Q&A.

In accordance with Article 79(1) of the UCITS Directive and to ensure fair, clear and not misleading communications, the information disclosed in the UCITS KIID should be consistent with the UCITS’ objectives and investment policy in the Prospectus.

**Question 8b Q&A 1101:** What is the meaning of ‘whether this approach includes or implies a reference to a benchmark’ in Article 7(1)(d) of Commission Regulation (EU) No 583/2010?

**Answer 8b:** A UCITS managed in reference to a benchmark index is one where the benchmark index plays a role in the management of the UCITS, for example, in the explicit or implicit definition of the portfolio’s composition and/or the UCITS’ performance objectives and measures. This reference may be present at the outset of a UCITS’ existence, or may be introduced during its lifecycle; in both cases it should be disclosed. Ultimately, the onus is on the UCITS management company to identify whether the UCITS is in practice managed in reference to a benchmark index. However, the following are (non-exhaustive and non-cumulative) examples of where an approach may include or imply reference to a benchmark index and where a UCITS should disclose that it is managed in reference to that benchmark index:

### Portfolio composition

- The UCITS uses a benchmark index as a universe from which to select securities. This applies even if only a minority of securities listed in the index are held in the portfolio and the weightings of the UCITS’ portfolio holdings diverge from their equivalent weighting in the index.

- The UCITS portfolio holdings are based upon the holdings of the benchmark index. For example:
  - The individual holdings of the UCITS' portfolio do not deviate materially from those of the benchmark index.
  - Monitoring systems are in place to limit the extent to which portfolio holdings and/or weightings diverge from the composition of the benchmark index.
- The UCITS invests in units of other UCITS or AIFs in order to achieve similar performance to a benchmark index.

### Performance measures

- Performance fees are calculated based on performance against a reference benchmark index.
- The UCITS has an internal or external target to outperform a benchmark index.
- Contracts between the management company and third parties, such as the Investment Management Agreement covering delegation of investment management, or between the management company and its directors and employees, state that the portfolio manager must seek to outperform a benchmark index.
- The individual portfolio manager(s) receive(s) an element of performance-related remuneration based on the fund's performance relative to a benchmark index.
- The UCITS is constrained by internal or external risk indicators that refer to a benchmark index (e.g. tracking error limit, relative VaR for global exposure calculation).
- Marketing issued by the UCITS management company to one or more investors or potential investors shows the performance of the fund compared with a benchmark index.

For clarity, a benchmark index may refer to an individual index or composite index comprised of more than one index / a basket of indices.

For additional clarity on disclosure of benchmarks, see the graphic in Q&A 8a.

To assist investor understanding, it is recommended that UCITS which are not managed in reference to a benchmark index also make this clear to investors.

UCITS management companies should make any changes to the KIID in order to incorporate this additional guidance as soon as practicable, or by the next KIID update following the publication of this Q&A.

In accordance with Article 79(1) of the UCITS Directive and to ensure fair, clear and not misleading communications, the information disclosed in the UCITS KIID should be consistent with the UCITS' Investment Objective in the Prospectus.

**Question 8c Q&A 1102:** What is the meaning of indicating 'the degree of freedom from the benchmark' in Article 7(1)(d) of Commission Regulation (EU) No 583/2010?

**Answer 8c:** To satisfy the requirements of this element of the Article, investors should be provided with an indication of how actively managed the UCITS is, compared to its reference

benchmark index. The KIID should strike a balance between providing the level of detail required to sufficiently disclose a UCITS' degree of freedom from a benchmark index, and the obligation to do so in clear language understandable to a retail investor.

On this basis, the UCITS management company should at least take into account the following elements when indicating in the KIID the degree of freedom from the benchmark index for actively managed UCITS whose investment approach includes or implies a reference to a benchmark index:

- a) The description of the underlying investment universe of the UCITS should indicate to what extent the target investments are part of the benchmark index or not.
- b) The KIID should describe the degree or level of deviation of the UCITS in regards to the benchmark index, thereby considering, where applicable, the quantitative and/or qualitative deviation limitations underlying the investment approach (e.g. risk limits defined by reference to the benchmark index such as tracking error) as well as the narrowness of the investment universe. In this context UCITS may, when necessary for investor understanding, also disclose quantitative metrics (e.g. precise internal limits on tracking error etc.).

Unless stricter requirements specific to a Member State apply, UCITS which are actively managed in reference to a benchmark index are not required to numerically quantify the degree of freedom by outlining for instance expected tracking error, active share, or other metrics in order to provide a quantitative indication. However, where the UCITS management company believes such information will assist investor understanding, it may do so by providing explanations in language sufficiently comprehensible to retail investors.

Some examples of wording that is likely to be acceptable when indicating the degree of freedom from the benchmark index in the KIID can be found below. These examples are for illustrative purposes only and are non-exhaustive:

1. Regarding point a) above: "The majority of the Sub-Fund's equity securities will be components of and have similar weightings to the Benchmark. The Investment Manager may use its discretion to invest in companies or sectors not included in the Benchmark in order to take advantage of specific investment opportunities."
2. Regarding point b) above: "The investment strategy will restrict the extent to which the portfolio holdings may deviate from the ABCD index. This deviation may be [limited]/[material]/[significant]. This is likely to limit the extent to which the Sub-Fund can outperform the ABCD Index. Deviations from the ABCD index are limited by a target tracking error of [X] [accompanied by a clear, concise description of the quantitative indicator's meaning]".

Where a UCITS has a defined strategy to vary the risk it will take against an index, this should be disclosed. For example, where a UCITS is structured in order to be managed in alignment with an index during periods of market volatility, it should disclose this. This does not imply that



the KIID should be updated to reflect very short-term / one-off variations in the investment strategy during a UCITS lifecycle, as long as the capacity for such variations has been previously disclosed.

For additional clarity on disclosure of benchmarks, see the graphic in Q&A 8a.

UCITS management companies should make any changes to the KIID in order to incorporate this additional guidance as soon as practicable, or by the next KIID update following the publication of this Q&A.

In accordance with Article 79(1) of the UCITS Directive and to ensure fair, clear and not misleading communications, the information disclosed in the UCITS KIID should be consistent with the UCITS' Investment Objective in the Prospectus



## Section III – ESMA’s guidelines on ETFs and other UCITS issues<sup>13</sup>

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### Question 1: Information to be inserted in the prospectus

Date last updated: 11 July 2013

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**Question 1a Q&A 1103:** Can the prospectus of an index-tracking UCITS mention both replication methodologies (physical and synthetic replication)?

**Answer 1a:** Yes. If the UCITS intends to use both replication methodologies either at the same time or alternatively, this should be reflected in the prospectus.

**Question 1b Q&A 1105:** Do the provisions on Index-tracking UCITS also apply to UCITS ETFs?

**Answer 1b:** Yes, to the extent that the UCITS ETF is tracking an index or indices.

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### Question 2: UCITS ETF label

Date last updated: 15 March 2013

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**Question 2 Q&A 1104:** In the case of umbrella UCITS, does the requirement to use the label “UCITS ETF” apply to both the umbrella level and the sub-fund level?

**Answer 2:** If all the sub-funds are UCITS ETFs, the labelling requirement applies to the sub-fund level and the UCITS may decide to apply it to the umbrella level as well. However, if not all the sub-funds are UCITS ETFs, the labelling requirement only applies to the relevant sub-funds.

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### Question 3: Secondary market

Date last updated: 11 July 2013

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**Question 3a Q&A 1106:** If a UCITS ETF is open for direct redemption for secondary market investors, what should be the redemption price?

**Answer 3a:** If secondary market investors are given the possibility to redeem directly at the level of the UCITS ETF, the redemption price should be the Net Asset Value (NAV) from which costs may be deducted. According to paragraph 24 of the guidelines the costs of direct redemptions should not be excessive.

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<sup>13</sup> This section mirrors the content of the old Q&A on ESMA’s guidelines on ETFs and other UCITS issues (ESMA/2015/12), which is replaced by the present document.

**Question 3b Q&A 1107:** When the UCITS ETF is open for direct redemptions, should UCITS management companies arrange the redemptions directly with secondary market investor of the UCITS ETF?

**Answer 3b:** In most cases, UCITS ETFs do not have a direct relationship with secondary market investors of UCITS ETFs. Therefore, UCITS management companies are not required to be directly in contact with the secondary market investors of the UCITS ETF but should make sure that appropriate processes are in place in order to allow direct redemptions when needed. In this context, the reference to unit-holders in Article 92 of the UCITS Directive should be understood as including secondary market investors of UCITS ETFs.

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#### **Question 4: Efficient portfolio management techniques**

Date last updated: 15 March 2013

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**Question 4a Q&A 1108:** According to the guidelines, all revenues arising from efficient portfolio management techniques, net of direct and indirect operational costs, should be returned to the UCITS. Does this mean that securities lending agents should not be paid for their services?

**Answer 4a:** No. The guidelines do not prohibit the deduction from gross revenues arising from efficient portfolio management techniques of fees paid to securities lending agents as a normal compensation for their services in the context of such techniques. However, pursuant to paragraph 35 of the guidelines, the annual report of the UCITS should contain details on the revenues arising from efficient portfolio management techniques for the entire reporting period together with the direct and indirect operational costs and fees incurred.

**Question 4b Q&A 1109:** In some jurisdictions, UCITS management companies may also act as securities lending agents. In this case, what information should be provided to investors?

**Answer 4b:** First, pursuant to paragraph 28 of the guidelines, it should be disclosed to investors that the UCITS management company acts a securities lending agent. Also, according to paragraph 35 of the guidelines, the annual report of the UCITS should provide investors with details on the amount of fees paid to the UCITS management company that may be deducted from the gross revenues arising from efficient portfolio management techniques.

**Question 4c Q&A 1110:** According to paragraph 28 of the guidelines, UCITS should disclose the identity of the entity(ies) to which the direct and indirect costs and fees are paid and indicate if these are related parties to the UCITS management company or the depositary. Where should this information be disclosed?

**Answer 4c:** UCITS management companies may disclose this information in the prospectus of the UCITS or in the annual report of the UCITS.

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## Question 5: Financial derivative instruments

Date last updated: 9 January 2015

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**Question 5a Q&A 1112:** When a UCITS enters into an unfunded swap, should the exposure swapped into the UCITS be considered in combination with the assets that are swapped out to assess the compliance with investment limits laid down in Article 52, 53, 54, 55 and 56 of the UCITS Directive?

**Answer 5a:** No. If the UCITS swaps the performance of its assets against the performance of another portfolio of assets, the UCITS should not combine both the assets swapped out and the exposure swapped into the UCITS when assessing the investment limits laid down in Articles 52, 53, 54, 55, 56 of the UCITS Directive because the ultimate exposure of the UCITS is not a combination of the two portfolios.

However, pursuant to paragraphs 36 and 37 of the guidelines, when a UCITS enters into an unfunded swap, both the UCITS' investment portfolio that is swapped out and the portfolio that is swapped into the UCITS should comply with the investment limits laid down in Articles 52, 53, 54, 55 and 56 of the UCITS Directive.

**Question 5b Q&A 1113:** Section XI of the guidelines on financial derivative instruments refers to total return swaps or other financial derivative instruments with similar characteristics. What types of instrument are covered here?

**Answer 5b:** First of all, the purpose of paragraphs 36 and 37 is to clarify that total return swaps should be treated like any other financial derivative instrument. This means that, in accordance with Article 51(3) of the UCITS Directive, the UCITS' investment portfolio as well as the final exposure of the UCITS resulting from the investment in financial derivative instruments should comply with the UCITS investment limits laid down in Articles 52, 53, 54, 55 and 56 of the UCITS Directive.

As far as paragraph 36 is concerned, ESMA's intention is to make sure that the guidelines are not circumvented via the use of financial derivative instruments that are not total return swaps but that have similar characteristics.

**Question 5c Q&A 1114:** What is the scope of application of paragraphs 37, 39 and 40 of the guidelines?

**Answer 5c:** Paragraphs 37, 39 and 40 of the guidelines apply to any financial derivative instrument by which UCITS gain exposure to an asset.

**Question 5d Q&A 1115:** For the purposes of paragraph 39 of the guidelines, would the counterparty to a financial derivative instrument be considered as having discretion over the composition of the underlying of the financial derivative instrument under the following arrangement? The counterparty to the financial derivative instrument can decide on the

composition of the underlying of the financial derivative instrument or the UCITS investment portfolio without the prior consent of the UCITS management company.

**Answer 5d:** Yes, because the counterparty to the financial derivative instrument has discretion over the composition of the underlying of the financial derivative instrument or the UCITS' investment portfolio.

**Question 5e Q&A 1116:** For the purposes of paragraph 39 of the guidelines, would the counterparty to a financial derivative instrument be considered as having discretion over the composition of the underlying of the financial derivative instrument under the following arrangement? The counterparty to the financial derivative instrument offers advice to the UCITS management company on the composition of the underlying of the financial derivative instrument or the UCITS' investment portfolio but any investment decision must be approved by the UCITS management company.

**Answer 5e:** No, provided that the UCITS management company expressly approves any investment decision in advance.

**Question 5f Q&A 1117:** For the purpose of paragraph 39 of the guidelines, would the counterparty to a financial derivative instrument be considered as having discretion over the composition of the underlying assets of the financial derivative instrument under the following arrangement? The role of the counterparty only involves implementing a set of rules and this set of rules is agreed in advance with the UCITS management company and does not allow the exercise of any discretion by the counterparty.

**Answer 5f:** No, in such circumstances the counterparty to the financial derivative instrument will not be considered as having any discretion over the composition of the underlying assets of the financial derivative instrument.

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## Question 6: Collateral management

Date last updated: October 2016

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**Question 6a:** Do the requirements on collateral only apply to the fraction of assets that reduces the counterparty risk of the UCITS to the limit imposed by the UCITS Directive?

**Answer 6a:** No. The requirements on collateral apply to all the assets received in the context of OTC financial derivative transactions and efficient portfolio management (EPM) techniques to cover counterparty risk. This means that assets received in excess (i.e. after the application of haircuts) should also comply with the same requirements.

**Question 6b:** Should re-invested cash collateral comply with the 20% issuer limit of paragraph 43 (e)?

**Answer 6b:** Yes. According to paragraph 44 of the guidelines, re-invested cash collateral should be diversified in accordance with the diversification requirements applicable to non-cash collateral. This means that the 20% issuer limit applies to:

- entities prescribed in Article 50(f) of the UCITS Directive at which UCITS may place cash collateral;
- high-quality government bonds and Short-Term Money Market Funds in which cash collateral may be reinvested;

If UCITS reinvest cash collateral in reverse repo transactions, the reverse repo transactions should comply with sections X and XII of the guidelines on efficient portfolio management techniques and collateral management.

**Question 6c:** Which types of asset do not comply with the requirement of correlation of paragraph 43 (d) of the guidelines?

**Answer 6c:** According to paragraph 43 (d) of the guidelines, collateral received by the UCITS should be issued by an entity that is independent from the counterparty and is expected not to display a high correlation with the performance of the counterparty. Therefore, collateral issued or guaranteed by the counterparty of an OTC financial derivative transaction or EPM technique or by one of its subsidiaries or by a parent company, or more generally by an entity belonging to the same issuer group should not be considered compliant with paragraph 40 (d) of the guidelines.

**Question 6d:** Are tripartite agreements for collateral management in the context of efficient portfolio management techniques and OTC financial derivative transactions forbidden by paragraph 40(g) of the guidelines?

**Answer 6d:** No. Tripartite agreements are possible under paragraph 40(g) as long as there is no title transfer and the collateral is held by a third party custodian subject to prudential supervision and that is unrelated to the provider of the collateral.

**Question 6e:** When there is transfer of title, can the collateral be held by a custodian that is not the depositary of the UCITS?

**Answer 6e:** Yes, but only if the UCITS' depositary has delegated the custody of the collateral to a sub-custodian and the depositary remains liable if the collateral is lost by the sub-custodian.

**Question 6f:** Paragraph 43(e) refers to “a basket of collateral with a maximum exposure to a given issuer of 20% of its net asset value”. Does this diversification requirement refer to the basket of collateral or to the net asset value of the UCITS?

**Answer 6f:** The diversification refers to the net asset value of the UCITS. Therefore, collateral received should be diversified so that exposure to any issuer does not exceed 20% of the net asset value of the UCITS. This means that where the amount of collateral received by a UCITS does not exceed 20% of its net asset value, the collateral can be issued by a single issuer.

**Question 6g:** In the case of government bonds, can the 20% limit be deemed to apply to each different issue of bonds of the same issuer?

**Answer 6g:** No. The limit applies to the issuers and not to the issue. Accordingly, exposure to any one government issuer, or any individual issuer, is limited to 20% of the net asset value of the UCITS.

**Question 6h:** Do the ESMA guidelines require that counterparty risk exposures be aggregated across both financial derivative instruments and efficient portfolio management techniques?

**Answer 6h:** Yes. According to paragraph 41 of the ESMA guidelines, both exposures should be combined when calculating the counterparty risk limits of Article 52 of the UCITS Directive.

**Question 6i:** Are government bonds exempt from the provisions laid down in paragraphs 43(a) and paragraphs 43 (e) of the guidelines?

**Answer 6i:** No, paragraphs 43(a) and 43 (e) apply to all types of collateral received by the UCITS in the context of over-the-counter financial derivative transactions and efficient portfolio management techniques.

**Question 6j:** Can cash collateral received by UCITS in the context of EPM techniques or OTC financial derivative transactions be used by UCITS for clearing obligations under EMIR?

**Answer 6j:** No. Cash collateral received by UCITS can only be placed or invested in the assets listed in paragraph 43(j) of the guidelines.

**Question 6k:** When assessing the diversification of the collateral, should re-invested cash collateral be aggregated with non-cash collateral?

**Answer 6k:** Yes. UCITS should aggregate non-cash collateral and re-invested cash collateral when assessing the diversification requirements of collateral received by UCITS.

**Question 6l:** According to paragraph 43(g), where there is title transfer, the collateral received should be held by the depositary of the UCITS. Where there is title transfer and where the

provider is also the depositary of the UCITS, should the collateral be held by the depositary of the UCITS?

**Answer 6l:** Yes. However, the depositary should have functionally and hierarchically separated the performance of its depositary tasks from its activity of collateral provider vis-à-vis the UCITS in order to address potential conflicts of interest.

**Question 6m:** When UCITS reinvest cash collateral, should the reinvested cash collateral be taken into account for the calculation of the issuer concentration limits laid down in the UCITS Directive?

**Answer 6m:** Yes, in accordance with paragraph 2 of Box 27 of the guidelines on Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS (Ref. CESR/10-788) the reinvested cash collateral should be taken into account for the calculation of the investment restrictions applicable to UCITS. For example, this means that if a UCITS has already placed 10% of its assets on deposits with a given issuer, it should not reinvest cash collateral for more than 10% of its assets in deposits with the same issuer in order to comply with the 20% limit of Article 52(1)(b) of the UCITS Directive.

In addition, the reinvested cash collateral has to comply with the diversification requirement laid down in paragraph 44 of the ESMA guidelines on ETFs and other UCITS issues.

**Question 6n:** When a UCITS reinvests cash collateral in short-term money market funds pursuant to paragraph 43 (j) of the guidelines, should the short-term money market funds comply with the requirements of Article 50(1)(e)(iv) of the UCITS Directive (i.e. the short-term money market funds should not invest more than 10% of their assets in aggregate in other money market funds)?

**Answer 6n:** Yes, the requirement of Article 50(1)(e)(iv) of the UCITS Directive also applies to short-term money market funds in which UCITS may reinvest cash collateral.

**Question 6o [last update 12 October 2016]:** A UCITS has a clause in its fund rules limiting investment in units of other funds to 10%, in line with Article 50(1)(e)(iv) of the UCITS Directive. If, in accordance with paragraph 43 of the ESMA Guidelines on ETFs and other UCITS issues, this fund re-invests cash collateral in short-term money market funds, should this investment be included in the calculation when calculating the 10% limit?

**Answer 6o:** Yes. Investment of cash collateral in short-term money market funds should be treated in the same way as any other investment made by the UCITS in units of other UCITS or other collective investment undertakings and should be compliant with all the requirements of the UCITS Directive.



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## Question 7: Financial indices

Date last updated: 24 March 2014

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**Question 7a:** Do the guidelines on financial indices also apply to UCITS that only use financial indices as performance benchmark?

**Answer 7a:** No. The guidelines on financial indices apply only to UCITS that are using any indices for investment purposes.

**Question 7b:** Do the guidelines on financial indices apply only to index-tracking UCITS?

**Answer 7b:** No, the guidelines on financial indices apply to any UCITS investing in financial indices and not only to index-tracking UCITS. This means that the guidelines on ETFs and other UCITS issues take precedence over the guidelines on eligible assets issued by CESR in 2008 (Ref. CESR/07-044b) and that UCITS should not invest even a small amount of their assets in financial indices that do not comply with paragraphs 48 to 61 of the guidelines.

**Question 7c:** Paragraph 56 of the guidelines recommends that all levels of an index should be subject to transparency requirements. What does this mean?

**Answer 7c:** This means that if a financial index is comprised of other financial indices, the transparency requirements also apply to the underlying indices.

**Question 7d:** According to the guidelines, index components' weightings should be published after each re-balancing on a retrospective basis. What is the timetable for such publication?

**Answer 7d:** Weightings of index components should be published before the next rebalancing of the index. For example, if an index rebalances on a monthly basis, information on the weightings of the index components should be provided as soon as possible after the rebalancing but within one month of the rebalancing.

**Question 7e:** Paragraph 54 of the guidelines prohibits investment in financial indices which rebalance on an intra-day or daily basis but notes that technical adjustments made to financial indices (such as leveraged indices) according to publicly available criteria should not be considered as rebalancing in the context of the guidelines. What is meant by "technical adjustments"?

**Answer 7e:** Technical adjustments in the context of the guidelines are adjustments which:

- are based solely on algorithmic non-subjective frameworks;
- are generally published on an ex-ante basis;
- draw on publicly available criteria (or data); and



- do not rely on the judgement of the index-provider, for example, indices which follow mechanical rebalancing formulae.

**Question 7f:** Are financial indices of indices permitted?

**Answer 7f:** Yes.

**Question 7g:** Should underlying financial indices composing financial indices in which UCITS invest comply with the guidelines on financial indices?

**Answer 7g:** Underlying financial indices should comply with section XIII of the guidelines except paragraphs 48, 49, 50 and 53 of the guidelines. This means that underlying financial indices do not need to satisfy the diversification requirements laid down in Article 9 of the Eligible Assets Directive.

However, to fulfil the guidelines of paragraphs 53, UCITS that invest in indices of indices should take into account the rebalancing frequency of the underlying indices.

**Question 7h:** Paragraph 61 of the guidelines recommends that financial indices in which UCITS invest should be subject to independent valuation. Does this mean that UCITS should not invest in financial indices for which the valuation is performed by the index provider itself?

**Answer 7h:** No. If the valuation is performed by an entity independent from the index provider, the criterion of independent valuation is considered to be fulfilled. However, UCITS can invest in financial indices for which the valuation is performed by the index provider, insofar as the unit in charge of the valuation of the index is functionally independent from the unit responsible for the design of the index and the UCITS itself carries out its own due diligence. Also, the remuneration of the staff responsible for the valuation of the index should not be linked to the performance of the financial index.

**Question 7i:** According to paragraph 59 of the guidelines, UCITS should not invest in financial indices whose methodologies permit retrospective changes to previously published index values ('backfilling'). Does this provision cover calculation mistakes?

**Answer 7i:** No. Calculation mistakes are not covered by paragraph 59 of the guidelines.

**Question 7j:** According to paragraph 55 of the guidelines, UCITS should not invest in financial indices for which the full calculation methodology to, inter alia, enable investors to replicate the financial index, is not disclosed by the index provider. Such information should be easily accessible, free of charge. What is meant by disclosed, easily accessible and free of charge in the context of the guidelines?

**Answer 7j:** The information to be disclosed and provided must be publicly available to investors and prospective investors, and published in such a way that direct access to this information is possible. Such information may be so accessed, for example, as a direct publication or via a source which directly links to a public website or other public forum which is not password protected, encrypted or in any way hinders or impedes immediate and direct access.

**Question 7k:** Paragraph 50 of the guidelines prohibits investment by UCITS in commodity indices that do not consist of different commodities and applies a correlation factor to be considered in this regard. Can UCITS invest in a commodity index for which a particular commodity component does not have 5 years of price history available for the purposes of the correlation observation?

**Answer 7k:** Yes, provided that a similar asset serves as an adequate proxy. The basis for such an asset being considered as an adequate proxy needs to be supported by both qualitative and quantitative data. Those qualitative and quantitative data should be documented by UCITS management companies. The proxy asset cannot constitute more than 3 years of the 5 years of data for the purposes of the calculation. The proxy must be a single commodity (rather than a component of a basket or other amalgam/hybrid product) asset. However, this asset could include a financial index which complies with section XIII of the guidelines.

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## **Question 8: Transitional provisions**

Date last updated: 15 March 2013

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**Question 8a:** From when are the requirements set out in paragraphs 43, 44, 45 and 46 of the guidelines applicable for UCITS existing before the guidelines apply?

**Answer 8a:** UCITS existing before the guidelines apply should comply with the provisions of paragraphs 41, 43, 44, 45 and 46 within 12 months of the date of application of the guidelines. However, pursuant to paragraph 65 of the guidelines, any new reinvestment of cash collateral made by UCITS existing before the guidelines apply should comply with the guidelines immediately.

**Question 8b:** With respect to the tracking error, what type of information should existing UCITS provide for accounting periods that end within 12 months of the date of application of the guidelines if the prospectus has not been amended according to the guidelines?

**Answer 8b:** In this situation, existing UCITS only need to provide information on the realised tracking error; information on the anticipated tracking error and any difference between the two can be reported as from the next accounting period.

**Question 8c:** Are EPM techniques concluded by UCITS before the date of application of the guidelines subject to transitional provisions?

**Answer 8c:** UCITS that exist before the date of application of the guidelines should amend the agreements governing EPM techniques in accordance with Sections X and XII of the guidelines as soon as possible. At the latest, 12 months after the date of application of the guidelines any EPM techniques should comply with the provisions of Section X and XII of the guidelines.

**Question 8d:** Are structured UCITS created after the entry into force of the guidelines and which are compartments of an umbrella UCITS created before the guidelines take effect subject to the grandfathering rule set out in paragraph 64 of the guidelines.

**Answer 8d:** No. The transitional provisions apply to compartments of umbrella UCITS and not to umbrella UCITS themselves.

## Section IV – Notification of UCITS and UCITS management companies; exchange of information between competent authorities<sup>14</sup>

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### Question 1: Notification of new investment compartments

Date last updated: July 2012

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**Question 1a:** Should UCITS that wish to market new investment compartments in a Member State where they are already notified for marketing for other existing investment compartments undertake a new notification procedure via their competent authority?

**Answer 1a:** Yes. According to Article 91(4) of Directive 2009/65/EC, the notification procedure as referred in to Article 93 of that Directive also applies to investment compartments of UCITS.

**Question 1b:** Should UCITS that wish to market several investment compartments of the same UCITS undertake different notification procedures via their competent authority?

**Answer 1b:** No. UCITS can undertake a single notification procedure via their competent authority when they wish to market several investment compartments of the same UCITS in a Member State. Indeed, according to the Annex I of the Commission Regulation 584/2010, UCITS may indicate names of different investment compartments in the notification letter they transmit to their competent authority pursuant to Article 93(1) of Directive 2009/65/EC.

**Question 1c:** If the UCITS attestation transmitted to the competent authority of the home Member State lists all the existing investment compartments of a UCITS, should the UCITS undertake a notification procedure for all the investment compartments it intends to market in a Member State?

**Answer 1c:** Yes. Even if the UCITS attestation lists all the existing investment compartments of a UCITS, the marketing of these investment compartments in a Member State is possible only if the competent authority of the host Member State has been duly notified by the competent authority of the home Member State.

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<sup>14</sup> This section mirrors the content of the old Q&A on Notification of UCITS and exchange of information between competent authorities (ESMA/2012/428), which is replaced by the present document.

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**Question 2: Amendments and updates of documents referred to in Article 93(2) of Directive 2009/65/EC**

Date last updated: July 2012

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**Question 2a:** Should notifications to the competent authorities of the host Member States of amendments to the documents referred to in Article 93(2) of Directive 2009/65/EC (i.e. fund rules or instruments of incorporation, prospectus, latest annual report and half-yearly report by the UCITS) be accompanied by an attestation letter?

**Answer 2a:** No. The attestation letter should only be transmitted to the competent authority of the host Member State by the competent authority of the home Member State at the time of the original notification of marketing.

**Question 2b:** Should notification by the UCITS to the competent authorities of the host Member States of a change in the name of the UCITS or in one of its investment compartments be accompanied by an attestation letter?

**Answer 2b:** No. When UCITS notify the competent authorities of home Member States of a change in the name of the UCITS or in one of its investment compartments, no UCITS attestation should be transmitted.

**Question 2c:** Should a UCITS follow a new notification procedure via its competent authority when it notifies updates of documents referred to in Article 93(2) to competent authorities of host Member States?

**Answer 2c:** No. When UCITS notify updates of documents to the competent authority of the host Member State they should not undertake a new notification procedure via their competent authority.

**Question 2d:** Should all the documents referred in to Article 93(2) of Directive 2009/65/EC be transmitted when UCITS send updates of documents to the competent authorities of the host Member States pursuant to Article 32(2) of Directive 2010/42/EU?

**Answer 2d:** No. Only the documents which have been modified should be transmitted to the competent authority of the host Member State.

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### Question 3: UCITS host Member State's access to documents

Date last updated: July 2012

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**Question 3a:** When a UCITS is notified for the first time for marketing in a Member State, when should the UCITS make available on a website an electronic copy of each document referred to in Article 93(2)?

**Answer 3a:** In order to satisfy the obligation of Article 31(1) of Directive 2010/42/EU, UCITS should make available on a website an electronic copy of each document referred to in Article 93(2) as soon as possible after they receive confirmation from their national competent authorities that the notification of marketing has been transmitted to the competent authority of the host Member State.

**Question 3b:** When complying with the obligation of access to documents as required by Article 31(1) of Directive 2010/42/EU, can UCITS use password-protected documents?

**Answer 3b:** No. The use of password-protected documents by UCITS is not permitted.

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### Question 4: Part A of the notification letter

Date last updated: July 2012

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**Question:** If the UCITS is a self-managed investment company, what information should be provided under the heading 'details of contact person at the management company' in Part A of the notification letter?

**Answer:** If the UCITS is a self-managed investment company, the details of the contact person at the self-managed investment company and the relevant contact information should be provided.

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### Question 5: Exchange of information between competent authorities in the context of establishment of a branch of a UCITS management company

Date last updated: July 2012

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**Question:** In the context of establishment of a branch by a UCITS management company in a different Member State, in which language should competent authorities of home Member States send the relevant information to competent authorities of host Member States?

**Answer:** The information should be sent in a language customary in the sphere of international finance, unless the competent authorities of the UCITS home and host Member States agree to that information being provided in an official language of both Member States.

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### Question 6: Attestation of payment of notification fees

Date last updated: July 2012

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**Question:** Under Part B of the model notification letter set out in Annex I of Regulation 584/2010, the UCITS' host Member State may require evidence of payment of notification fees. How should this evidence of payment be provided?

**Answer:** There should be evidence that the notification fee has been transferred e.g. by a scan of the transfer form. The evidence should be attached to the notification as proof of payment.

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### Question 7: Advance notification of provision of services

Date last updated: April 2017

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**Question:** A UCITS management company wishes to pursue cross-border activities (MiFID services, collective portfolio management of UCITS) by way of the UCITS management company passport (Articles 16 to 21 of the UCITS Directive). Does the management company have to identify a specific UCITS, in respect of which it wants to pursue said activities, in the notification letter?

**Answer:** No. The management company can notify cross-border activities without having to identify a specific UCITS. When the management company, at a later point in time, has identified a UCITS that it wants to manage on a cross-border basis, it has to notify the competent authorities in the home Member State of the UCITS in accordance with Article 20 of the UCITS Directive.

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### Question 8: Advance notice for the marketing of new share classes of UCITS notified for cross-border marketing

Date last updated: December 2021

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**Question 8a Q&A 958:** According to Article 93(8) of the UCITS Directive, in the event of a change to the information in the notification letter submitted in accordance with paragraph 1 of Article 93, or a change regarding share classes to be marketed, the UCITS shall give written notice thereof to the competent authorities of both the UCITS home Member State and the UCITS host Member State at least one month before implementing that change. If a UCITS intends to market a new share class in a host Member State where it has already been notified for marketing, should the UCITS give written notice to the competent authorities of the UCITS home and host Member States, at least one month before the marketing of the new share class starts?

**Answer:** Yes, if a UCITS intends to market a new share class in a Member State where it has already been notified for marketing, the UCITS should give written notice to the competent authorities of both the UCITS home and host Member State, at least one month before the marketing of the new share class starts.

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**\*\*\*NEW\*\*\* Question 9: De-notification of marketing arrangements for UCITS**

Date last updated: 13 June 2023

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**Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>15</sup>**

**\*\*\*NEW\*\*\* Question 9 Q&A 1076:** In case there are no investors in a host Member State, do UCITS wishing to de-notify the arrangements previously made for marketing their units have to comply with the obligations set out in Article 93a(1) of the UCITS Directive?

**Answer:** Yes. In case there are no investors in a host Member State, UCITS wishing to de-notify the arrangements previously made for marketing their units, will still have to comply with all the obligations set out in Article 93a(1) of the UCITS Directive, making sure that there are no investors uninformed about the UCITS' market exit, that all marketing is publicly terminated and any marketing arrangements with third parties are terminated or modified to prevent any further marketing of the de-notified UCITS.

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<sup>15</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.



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**\*\*\*NEW\*\*\* Question 10: Scope of activities passported by UCITS management companies**

Date last updated: 13 June 2023

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**Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>16</sup>**

**\*\*\*NEW\*\*\* Question 10 Q&A 1097:** When a management company intends to pursue the activities for which it has been authorised in a host Member State, either directly or through a branch, may that management company passport in that host Member State only the administration or marketing functions referred to in Annex II of the UCITS Directive, without also passporting investment management functions?

**Answer:** No. The UCITS passporting regime is linked to the management of UCITS by UCITS management companies on a cross-border basis. Pursuant to Articles 5 and 6 of the UCITS Directive, UCITS management companies are authorised to manage collective investment undertakings and to perform the activities referred to in Annex II to the UCITS Directive. Pursuant to Article 17(2), point (b), and Article 18(1), point (b), of the UCITS Directive, a UCITS management company intending to manage UCITS established in another Member State, either directly or through the creation of a branch in another Member State, shall communicate to the competent authorities of its home Member State a program of operations referring to the services it intends to provide. That requirement cannot be interpreted otherwise than referring to investment management foremost, whereas auxiliary services remain as such auxiliary and are to be performed only in relation to the management of a UCITS.

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<sup>16</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

## Section V – Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS<sup>17</sup>

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### Question 1: Hedging strategies

Date last updated: July 2012

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**Question 1a:** Can the following strategy be qualified as a hedging strategy as defined in CESR's guidelines?

A portfolio management practice which only aims to reduce the interest rate risk of a corporate bond portfolio by entering into a short position on bond future contracts (or an interest rate swap) in the same currency and with a similar interest rate duration. Note that in this case the portfolio credit risk would remain un-hedged.

**Answer 1a:** Yes. This strategy could be considered as a hedging arrangement as defined in CESR's guidelines as it is in line with the example set out in paragraph 33(a) of the guidelines.

**Question 1b:** Can the following strategy be qualified as a hedging strategy as defined in CESR's guidelines?

A portfolio management practice which aims to reduce the credit risk of a corporate or government bond portfolio through purchased Credit Default Swaps (CDS). Note that in this case the portfolio interest rate risk would remain un-hedged.

**Answer 1b:** Yes, but only if the corporate or government bond and the purchased CDS relate to the same issuer.

**Question 1c:** When calculating the global exposure according to the Commitment Approach, can UCITS that invest in other funds make use of hedging arrangements?

**Answer 1c:** According to Box 8 of CESR's guidelines, for the purpose of calculating global exposure under the Commitment Approach, hedging arrangements may only be taken into account if they relate to the same asset class. Therefore, hedging arrangements for UCITS funds of funds are possible provided that the management company of the investing UCITS has full knowledge of the underlying investments of the target funds.

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<sup>17</sup> This section mirrors the content of the old Q&A on Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS (ESMA/2013/1950), which is replaced by the present document.

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## Question 2: Disclosure of leverage by UCITS

Date last updated: July 2012

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**Question 2a:** For UCITS using VaR to calculate global exposure, can the required disclosure of leverage be made on a net basis i.e. leverage calculated after netting/hedging arrangements are taken into account?

**Answer 2a:** No. In accordance with Boxes 24 and 25 of CESR's guidelines, leverage should be calculated as the sum of the notionals of the derivatives used.

**Question 2b:** Could UCITS using the VaR approach to calculate global exposure disclose leverage based on the Commitment Approach?

**Answer 2b:** Yes. However, the leverage should be disclosed based on both the 'sum of the notionals' as provided by CESR's guidelines and the Commitment Approach.

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## Question 3: Concentration rules

Date last updated: July 2012

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**Question:** Article 54 of Directive 2009/65/EC permits competent authorities to authorise UCITS to invest up to 100% of their assets in transferable securities issued by certain issuers e.g. sovereigns. In such cases the UCITS must hold securities from at least six different issues and securities from any single issue shall not exceed 30% of its total assets.

Should this diversification rule apply on the basis of the net assets of the UCITS or on a gross basis?

**Answer:** The 100% diversification limit of Article 54 should be applied on the net assets (i.e. exposure to assets referred to in this article is limited to 100% of the net asset value) as all investment restrictions applicable to UCITS, including the diversification limits of Article 54, have to be applied with reference to their net assets and because any exposure beyond 100% to a sovereign issuer cannot be considered as 'equivalent protection' with regard to Article 52.

Furthermore, it is explicitly clarified that any exposure taken to assets referred to in Article 54, including through derivatives (e.g. bond future contracts such as Euro. Bund Future, 10 Year US T-Note future) and any efficient portfolio management techniques (e.g. reinvestment of cash collateral) must be included when calculating the limit of 100% according to Article 54.

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#### Question 4: Calculation of global exposure for fund of funds

Date last updated: July 2012

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**Question:** Is the look-through approach compulsory for the calculation of global exposure when UCITS invest in other funds?

**Answer:** No. For the purpose of calculating global exposure, a look-through approach is not compulsory when UCITS invest in other funds. As an alternative, UCITS may treat the NAV of the target fund as an equity and use it as a substitute in the calculation of global exposure, in particular when the VaR Approach is used.

This method may only be used if the risk management function can prove and document that this approach does not lead to an inaccurate picture of the fund of funds. In addition, UCITS fund of funds structures have to comply with all due diligence and risk management requirements laid down in the UCITS framework (Directive 2009/65/EC, Directive 2010/43/EU and the CESR guidelines on Risk Management principles for UCITS<sup>18</sup>). Finally, the method chosen by the UCITS should be disclosed in the prospectus.

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#### Question 5: Calculation of counterparty risk for exchange-traded derivatives and centrally-cleared OTC transactions

Date last updated: December 2013

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**Question:** How should UCITS calculate their counterparty risk for exchange-traded derivatives and OTC transactions that are centrally cleared under the European Market Infrastructure Regulation (EMIR)?

**Answer:** When calculating the counterparty risk for exchange-traded derivatives and OTC transactions that are centrally cleared, UCITS should look at the clearing model used to determine the existence of counterparty risk and, if any, where the counterparty risk is located. When analysing the clearing model used, UCITS should have regard to the existence of segregation arrangements of the assets and the treatment of claims on these assets in the event of bankruptcy of the clearing member or central counterparty.<sup>19</sup>

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<sup>18</sup> CESR guidelines on Risk Management principles for UCITS – Ref. CESR/09-178, [https://www.esma.europa.eu/sites/default/files/library/2015/11/09\\_178.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/09_178.pdf)

<sup>19</sup> Since this question was last updated, ESMA has issued an opinion to the European institutions on the Impact of Regulation 648/2012 on Articles 50(1)(g) (iii) and 52 and of Directive 2009/65/EC for over-the-counter financial derivative transactions that are centrally cleared ([ESMA/2015/880](https://www.esma.europa.eu/sites/default/files/library/2015/11/09_880.pdf))

## Section VI – Impact of Regulation (EU) 648/2012 (EMIR)<sup>20</sup> on the UCITS Directive

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### Question 1: Valuation of OTC derivatives

Date last updated: July 2016

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**Question [last update 19 July 2016]:** For OTC financial derivative transactions that are centrally cleared and subject to the reporting obligation of EMIR, can UCITS management companies rely on the valuation provided by the central counterparty (CCP)?

**Answer:** No. The UCITS framework requires UCITS management companies to have in place a process for accurate and independent verification of the value of the OTC financial derivative transactions, even if they are centrally cleared. The valuation provided by the CCP can only serve as a point of reference for the verification performed by the UCITS management company. Nevertheless, the UCITS management company should be able to justify any deviation from the valuation provided by the CCP.

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### Question 2: Application to UCITS of the exemption for intra-group transactions under EMIR

Date last updated: 24 May 2017

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**Question:** Where a UCITS is subject to the clearing obligation of Article 4(1) of EMIR, can it make use of the exemption for intragroup transactions (Article 4(2) of EMIR)?

**Answer:** ESMA is of the view that in the case of UCITS the exemption for intragroup transactions should be construed narrowly, and that in most cases it will not be possible for the exemption to be used. A UCITS can only make use of the exemption for intragroup transactions if it has been established to form part of the same group (as defined in Article 2(16) of EMIR) as the counterparty to the OTC derivative contract and if it fulfils all the criteria for intragroup transactions set out in Article 3(2)(a)(i)-(iv), (b), or (d) of EMIR.

Article 3(2)(a)(iii) of EMIR requires both counterparties to be included in the same consolidation on a full basis. In addition, they have to be subject to appropriate centralised risk evaluation, measurement and control procedures, as well as fulfil other specific requirements set out in Article 3(2) of EMIR.

An exemption to the clearing obligation based on Article 4(2) of EMIR can only be granted after a thorough case-by-case assessment, which will have to take into account whether the UCITS has been established to form part of the same group as the counterparty to the OTC derivative

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<sup>20</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("European Markets Infrastructure Regulation")

contract and whether the UCITS fulfils all the criteria set out in Article 3(2)(a), (b), or (d) of EMIR.

Where a UCITS is granted an intragroup exemption for the clearing obligation, it follows that the UCITS will not be considered a distinct entity and will not be treated separately for other purposes under EMIR either, in particular for the purpose of the bilateral margining thresholds calculation. Therefore, the aggregate month-end average notional amount referred in Article 28(1) of Commission Delegated Regulation (EU) 2016/2251 shall be calculated at the group level (including the relevant UCITS).

## Section VII – Impact of Regulation (EU) 2015/2365 (SFTR)<sup>21</sup> on the UCITS Directive

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### Question 1: Commencement of reporting under SFTR

Date last updated: October 2016

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**Question 1a [last update 12 October 2016]:** Article 13 of Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, requires UCITS management companies, UCITS investment companies, and AIFMs to provide information to investors on the use made of SFTs and total return swaps in the annual report of each UCITS/AIF under management, as well as in each half-yearly report for UCITS. As Article 13 applies from 13 January 2017, which report should be the first to include this disclosure?

**Answer:** The information should be included in the next annual or half-yearly report to be published after 13 January 2017 which may relate to a reporting period beginning before that date.

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### Question 2: Periodic reporting under Article 13 of SFTR for UCITS and AIFs

Date last updated: 5 October 2017

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**Question 2a [last update 5 October 2017]:** Pursuant to Article 13 of SFTR, UCITS management companies, UCITS investment companies, and AIFMs (“UCITS/AIF managers”) shall inform investors on the use they make of SFTs and total return swaps in annual (UCITS and AIFs) and half-yearly (UCITS only) reports. The information on SFTs and total return swaps shall include the data provided for in Section A of the Annex to SFTR.

Should this data be reported as aggregate data (with respect to the whole of the reporting period) or based on a snapshot (taken at the end of the reporting period)?

**Answer:** The table below explains how each data item in Section A of the Annex to the SFTR should be reported. All data items should be reported as a snapshot, with the exception of the following:

- Data on reuse of collateral
    - o Cash collateral reinvestment returns to the collective investment undertaking.
  - Data on return and cost for each type of SFTs and total return swaps
    - o broken down between the collective investment undertaking, the manager of the collective investment undertaking and third parties (e.g. agent lender) in
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<sup>21</sup> Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012



absolute terms and as a percentage of overall returns generated by that type of SFTs and total return swaps

For each of the data items firms should not artificially alter their practices in a way that would lead to the reporting being misleading.

The guidance provided by this Q&A is without prejudice to further work that ESMA intends to carry out in relation to the disclosure obligations for UCITS and AIFs under SFTR.

Heading	Sub-item	How to report
Global data	The amount of securities and commodities on loan as a proportion of total lendable assets defined as excluding cash and cash equivalents	Snapshot
	The amount of assets engaged in each type of SFTs and total return swaps expressed as an absolute amount (in the collective investment undertaking's currency) and as a proportion of the collective investment undertaking's assets under management (AUM).	Snapshot
Concentration data	Ten largest collateral issuers across all SFTs and total return swaps (break down of volumes of the collateral securities and commodities received per issuer's name);	Snapshot
	Top 10 counterparties of each type of SFTs and total return swaps separately (Name of counterparty and gross volume of outstanding transactions).	Snapshot
Aggregate transaction data for each type of SFTs and total return	Type and quality of collateral;	Snapshot

swaps separately to be broken down according to the below categories		
	Maturity tenor of the collateral broken down in the following maturity buckets: less than one day, one day to one week, one week to one month, one to three months, three months to one year, above one year, open maturity;	Snapshot. All outstanding/existing collateral at the end of the reporting period should be aggregated according to their maturity tenor. That aggregation should be broken down in the mentioned maturity buckets.
	Currency of the collateral;	Snapshot. Currency of the existing collateral at the end of the reporting period.
	Maturity tenor of the SFTs and total return swaps broken down in the following maturity buckets: less than one day, one day to one week, one week to one month, one to three months, three months to one year, above one year, open transactions;	Snapshot. All outstanding/existing SFTs at the end of the reporting period should be aggregated according to their maturity tenor. That aggregation should be broken down in the mentioned maturity buckets.
	Country in which the counterparties are established;	Snapshot. Country where the counterparties of existing SFTs as of the end of the reporting period are established.
	Settlement and clearing (e.g., tri-party, Central Counterparty, bilateral).	Snapshot
Data on reuse of collateral	Share of collateral received that is reused, compared to the maximum amount specified in the prospectus or in the disclosure to investors;	Snapshot

	Cash collateral reinvestment returns to the collective investment undertaking.	See explanation below table
Safekeeping of collateral received by the collective investment undertaking as part of SFTs and total return swaps	Number and names of custodians and the amount of collateral assets safe-kept by each of the custodians	Snapshot
Safekeeping of collateral granted by the collective investment undertaking as part of SFTs and total return swaps	The proportion of collateral held in segregated accounts or in pooled accounts, or in any other accounts	Snapshot
Data on return and cost for each type of SFTs and total return swaps	broken down between the collective investment undertaking, the manager of the collective investment undertaking and third parties (e.g. agent lender) in absolute terms and as a percentage of overall returns generated by that type of SFTs and total return swaps	See explanation below table

Regarding the field “Cash collateral reinvestment returns to the collective investment undertaking”, during the year the fund receives a certain amount of cash as collateral for SFTs which is invested and produces a return. All SFTs have a given duration (normally short term) and there may be several SFTs that are carried out on a number of occasions with repeated investments and divestments of cash. Due to the possible concatenation of the operations, there may be a certain amount of cash collateral which is constantly invested for the whole year and produces a return. One interpretation is that the SFTR requires managers to disclose at least the overall sum of the returns earned by the fund from all the investment operations made during the year with cash collateral. This sum may only be an income flow that covers the whole year and therefore the distinction between aggregate vs snapshot (i.e. flow vs stock data) is not meaningful, because it could be calculated in only one way. One alternative would be to state that this is “aggregate” by definition. Another alternative would be to require the disclosure of the cash collateral investment return, calculated as the sum of the cash flows received for the investment of SFTs cash collateral over the yearly average amount of cash collateral investments.

The same reasoning applies to the field “Data on return and cost for each type of SFTs and total return swaps/broken down between the collective investment undertaking, the manager of the collective investment undertaking and third parties (e.g. agent lender) in absolute terms and as a percentage of overall returns generated by that type of SFTs and total return swaps”. The manager has to sum the inflows and outflows generated by all the operations during the year and disclose the two total amounts; again, there appears to be only one way to calculate the data required and the disclosure of rate of returns (gross and net of cost) could be required if deemed more appropriate.

## Section VIII – Independence of management boards and supervisory functions

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### Question 1: Group links, independence and cooling-off periods

Date last updated: July 2017

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**Question:** Where a group link exists for the purpose of Article 24 of the Commission Delegated Regulation (EU) 2016/438 (“UCITS V Level 2”), does a person who served in the management body or supervisory body of an entity within the group or was otherwise employed by such an entity fulfil the independence requirement under Article 24(2) of the UCITS V Level 2 where the person has ceased any function within the entity?

**Answer:** A person who served in the management body or supervisory body of an entity or was otherwise employed by such an entity should be deemed to fulfil the independence requirement only after an appropriate cooling-off period following the termination of his/her relationship with the relevant entity. That period should start from the final payment of any outstanding remuneration due to him/her which entails a margin of discretion from the entity (e.g. in case of any portion of variable remuneration which is deferred and still subject to contraction, including through malus or clawback arrangements) and is linked to his/her previous employment or other relationship with that entity. Non-discretionary outstanding payments from the entity to the person should not be taken into account for this purpose.

Without prejudice to any requirements established under the relevant national corporate governance rules or codes, the cooling-off period should be proportionate to the length of the employment or other relationship that the individual had with any of the companies within the group and to the type of functions performed within such company(ies).

## Section IX – Remuneration

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### Question 1: Application of disclosure requirements on remuneration to delegates

Date last updated: May 2018

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**Question 1 [last update 25 May 2018]:** Do the remuneration-related disclosure requirements under Article 69(3)(a) of the UCITS Directive also apply to the staff of the delegate of a management company to whom investment management functions (including risk management) have been delegated?

**Answer:** Yes. In line with the approach followed under the UCITS Remuneration Guidelines<sup>22</sup>, management companies can ensure compliance in one of the following two ways:

- i) where the delegate is subject to regulatory requirements on remuneration disclosure for its staff to whom investment management (including risk management) activities have been delegated that are equally as effective as those under Article 69(3)(a) of the UCITS Directive, the management company should use the information disclosed by the delegate for the purposes of fulfilling its obligations under Article 69(3)(a) of the UCITS Directive; or
- ii) in other cases, appropriate contractual arrangements should be put in place with the delegate allowing the management company to receive (and disclose in the annual report for the relevant UCITS that it manages) at least information on the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the management company, the investment company and, where relevant the UCITS itself to the identified staff of the delegate – and number of beneficiaries, and, where relevant, performance fee – which is linked to the delegated portfolio. This means that the disclosure should be done on a prorated basis for the part of the UCITS' assets which are managed by the identified staff within the delegate.

In both situations set out above, the disclosure may be provided on an aggregate basis i.e. by means of a total amount for all the delegates of the management company in relation to the relevant UCITS.

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<sup>22</sup> See paragraph 16 of the UCITS Remuneration Guidelines.

## Section X – Depositary

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### Question 1: Depositaries as counterparties in a transaction of assets that they hold in custody

Date last updated: July 2018

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**Question:** According to Article 22(7) of the UCITS Directive the depositary (or any third party to which the custody function has been delegated) shall not reuse the assets they hold in custody for their own account. Does this provision imply that a depositary (or a delegated third party) should never act as counterparties in a transaction of assets that they hold in custody (including, but not limited to, transfer, pledge, sale and lending of those assets)?

**Answer:** No. A depositary (or a delegated third party) should be able to act as counterparties in a transaction of assets that they hold in custody, provided that (i) the four conditions under Article 22(7)(a) to (d) of the UCITS Directive are complied with, and (ii) conflicts of interest are properly managed and (iii) the transaction is conducted on an arm-length basis.

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### Question 2: Distinction between depositary tasks and mere supporting tasks

Date last updated: June 2019

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**Question 2:** The UCITS Directive sets out strict restrictions under which depositaries are allowed to delegate the safekeeping of assets of UCITS, whereas the delegation of depositary functions pursuant to Article 22(3) and (4) of the UCITS Directive (i.e. monitoring of the cash flow and oversight functions) is not permitted. Recital 42 of the AIFMD states that “delegation of supporting tasks that are linked to its depositary tasks, such as administrative or technical functions performed by the depositary as a part of its depositary tasks, is not subject to the specific limitations and requirements set out in the AIFMD”. Does this principle also apply to UCITS depositaries and if so, what are ‘supporting tasks that are linked to depositary tasks such as administrative or technical functions performed as part of the depositary tasks’ and under which conditions would it be possible to entrust third parties with such tasks?

**Answer 2:** The answer refers to supporting tasks linked to the depositary tasks, such as administrative or technical functions performed as part of the depositary tasks, only. Supporting tasks that are linked to depositary tasks such as administrative or technical functions performed as part of the depositary tasks listed under Article 22(3) and (4) of the UCITS Directive could be entrusted to third parties where all of the following conditions are met:

- i. the execution of the tasks does not involve any discretionary judgement or interpretation by the third party in relation to the depositary functions;
- ii. the execution of the tasks does not require specific expertise in regard to the depositary function; and
- iii. the tasks are standardised and pre-defined.



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### Question 3: Depositary tasks entrusted to third parties

Date last updated: June 2019

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**Question 3:** May depositaries entrust third parties with the performance of tasks that would give them the ability to transfer assets belonging to UCITS?

**Answer 3:** Yes, where depositaries entrust tasks to third parties and give them the ability to transfer assets belonging to UCITS without requiring the intervention of the depositary, these arrangements are subject to the delegation requirements set out in Article 22a(2) of the UCITS Directive.

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### Question 4: Performance of depositary functions where there are branches in other Member States

Date last updated: June 2019

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**Question 4:** Where the depositary of a UCITS is a branch and the head office is established in a Member State other than the home Member State of the UCITS, to which extent may the branch allocate its depositary functions (e.g. custody) to its head office in compliance with the establishment requirement set out in Article 23(1) of the UCITS Directive?

**Answer 4:** The internal allocation of functions between the head office and the branches of a depositary shall not lead to situations that may represent a circumvention of the establishment requirement under Article 23(1) of the UCITS Directive. Therefore, the operational infrastructure and internal governance system of such branches must be adequate to carry out depositary functions autonomously from its head office and ensure compliance with national rules implementing the UCITS Directive.

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### Question 5: Supervision of depositary functions in case of branches in other Member States

Date last updated: June 2019

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**Question 5:** Where depositary functions are performed by a branch established in the home Member State of a UCITS other than the home Member State of the depositary's head office, who is responsible for supervising the activities of the branch relating to depositary functions? Is it the competent authority of the Member State where the depositary's head office is established or the competent authority of the Member State where the branch is established?

**Answer 5:** The UCITS Directive, the CRD and the MiFID II do not grant any passport for depositary activities in relation to UCITS. Hence, branches located in the home Member State of the UCITS other than the home Member State of the depositary's head office may also be subject to local authorisation in order to perform depositaries activities in relation to UCITS. Therefore, the competent authority of the Member State where the branch is established should be responsible for supervising the activities of the branch with regard to depositary functions in relation to UCITS. This includes the supervision of the allocation of depositary

functions from the branch to its head office or vice versa to avoid any possible circumvention of the establishment requirement under Article 23(1) of the UCITS Directive.

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**Question 6: Delegation by a depositary to another legal entity belonging to the same group**

Date last updated: June 2019

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**Question 6:** Where a depositary delegates some of its functions to another legal entity which belongs to the same group, should this be considered a delegation for the purposes of the application of the depositary delegation rules under Article 22a of the UCITS Directive?

**Answer 6:** Yes. Legal entities within the same group of a depositary should be considered 'third parties' for the purpose of the depositary delegation rules under Article 22a of the UCITS Directive.

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**Question 7: Reconciliation frequency for funds trading on a daily basis**

Date last updated: July 2022

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**Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>23</sup>**

**Question 7a Q&A 959:** According to Article 89(1)(c) of Commission Delegated Regulation (EU) No 231/2013 as modified by Commission Delegated Regulation (EU) 2018/1618 and Article 13(1)(c) of Commission Delegated Regulation (EU) 2016/438 as modified by Commission Delegated Regulation (EU) 2018/1619 reconciliations are conducted as frequently as necessary between the depositary's internal accounts and records and those of any third party to whom safekeeping has been delegated. What does this mean for an AIF or UCITS with a weekly dealing frequency which trades on a daily basis?

**Answer 7a:** The reconciliation frequency depends not only on the dealing frequency of the relevant AIF or UCITS, but also on any trade which occurs even outside the dealing frequency. Therefore, if an AIF or UCITS with a weekly dealing frequency trades on a daily basis, daily reconciliations are required.

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<sup>23</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

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## Question 8: Reconciliations with tri-party collateral managers

Date last updated: July 2022

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**Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>24</sup>**

**Question 8a Q&A 960:** According to Article 89(1)(c) of Commission Delegated Regulation (EU) No 231/2013 as modified by Commission Delegated Regulation (EU) 2018/1618 and Article 13(1)(c) of Commission Delegated Regulation (EU) 2016/438 as modified by Commission Delegated Regulation (EU) 2018/1619 reconciliations are conducted as frequently as necessary between the depositary's internal accounts and records and those of any third party to whom safekeeping has been delegated. What does this mean in case of use of a tri-party collateral manager, which is not the depositary?

**Answer 8a:** In this case the tri-party collateral manager is appointed by the asset manager in accordance with Article 20 of Directive 2011/61/EU or in accordance with Article 13 of Directive 2009/65/EC; it also needs to be the delegate of the depositary in accordance with Article 21(11) of Directive 2011/61/EU or in accordance with Article 22a(2) of Directive 2009/65/EC. The tri-party collateral manager is required to transmit the end-of-day positions on a fund-by-fund basis or, if applicable, on a compartment-by-compartment basis. The information provided allows the depositary to record the end-of-day positions and allows it to comply with the provisions (a) of Article 98(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1618) and in particular point (ii) thereof, and (b) with the provisions under Article 15(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1619), and in particular point (ii) thereof. Thus, the information provided allows the depositary (for both Regulations) to verify that the quantity of the identified financial instruments recorded in the financial instruments accounts opened in its books matches the quantity of the identified financial instruments held in custody by the third party.

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<sup>24</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

## Section XI – ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

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### Question 1: Crystallisation of performance fees

Date last updated: March 2021

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**Question 1a Q&A 961:** Based on paragraphs 40<sup>25</sup> and 41<sup>26</sup> of the guidelines on performance fees in UCITS and certain types of AIFs (“Guidelines on performance fees”), should performance fees be paid only at the end of the performance reference period of 5 years?

**Answer 1a:** No. The Guidelines on performance fees do not prevent to pay performance fees during the performance reference period of 5 years and/or in the first years of a fund's existence, in case the fund has not existed for 5 years.

By way of example, if on the crystallisation date of the fund (e.g. at the end of the second year of existence of the fund), the fund has overperformed the reference indicator and there is a positive accrual of performance fees those can be paid. In this case, the accrual will be crystallised in the payment of the performance fees to the management company.

On the contrary, if on the crystallisation date of the fund (e.g. at the end of the third year of existence of the fund) the fund has underperformed the reference indicator and as a consequence there are no accrued performance fees, this underperformance is brought forward for the purpose of the calculation of performance fees the following year. In this way, compensation of negative performances is ensured over the years during a reference period of 5 years.

#### Example:

- Crystallisation date: end of the second year of existence of the fund

Performance of the fund: 10%

Performance of the reference indicator: 5%

Overperformance: 5%

Performance fees can be paid to the management company

- Crystallisation date: end of the second year of existence of the fund

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<sup>25</sup> Paragraph 40) of the Guidelines on performance fees states that “In case the fund employs a performance fee model based on a benchmark index, it should be ensured that any underperformance of the fund compared to the benchmark is clawed back before any performance fee becomes payable. To this purpose, the length of the performance reference period, if this is shorter than the whole life of the fund, should be set equal to at least 5 years.”

<sup>26</sup> Paragraph 41) of the Guidelines on performance fees states that “Where a fund utilises a HWM model, a performance fee should be payable only where, during the performance reference period, the new HWM exceeds the last HWM. The starting point to be considered in the calculations should be the initial offering price per share. For the HWM model, in case the performance reference period is shorter than the whole life of the fund, the performance reference period should be set equal to at least five years on a rolling basis. In this case, performance fee may only be claimed if the outperformance exceeds any underperformances during the previous five years and performance fees should not crystallise more than once a year”.

Performance of the fund: 10%  
Performance of the reference indicator: 10%  
Overperformance: 0%  
No crystallisation of performance fees

- Crystallisation date: end of the third year of existence of the fund

Performance of the fund: 5%  
Performance of the reference indicator: 10%  
Underperformance: -5% (this underperformance should be taken into account in the subsequent calculation of performance fees)  
Not only performance fees cannot be paid but the underperformance of -5% should be brought forward to the following year and clawed back before any performance fee can be paid (see below)

- Crystallisation date: end of the fourth year of existence of the fund

Performance of the fund: 8%  
Performance of the reference indicator: 5%  
Overperformance: 3%  
Underperformance from year 3: -5%  
Global net performance: -2%  
Not only performance fees cannot be paid but the underperformance of -2% should be brought forward to the following year and clawed back before any performance fee can be paid

This should not prevent NCAs to require funds to apply stricter rules (e.g. to crystallise fees only after 5 years or to apply reference periods longer than 5 years), bearing in mind that any specific provision applying at national level in addition to the provisions set out in the guidelines should not jeopardise the rules regarding funds' cross border distribution<sup>27</sup> and the split of competences between the home and host competent authority<sup>28</sup> to this regard.

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## Question 2: Timeline of the application of the performance reference period

Date last updated: March 2021

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**Question 2a Q&A 962:** Paragraphs 40)<sup>29</sup> and 41)<sup>30</sup> of the Guidelines on performance fees recommend that the length of the performance reference period<sup>31</sup> (if this is shorter than the whole life of the fund) should be set equal to at least 5 years. How should the performance reference period be set for the first time in light of the application date of the guidelines?

**Answer 2a:** Managers of any funds already compliant with paragraphs 40) and 41) of the Guidelines on performance fees before the application date of the guidelines should look at the past 5 years/whole life of the fund for the purpose of setting the performance reference

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<sup>27</sup> See Chapter XI of the UCITS Directive.

<sup>28</sup> See Chapter XII of the UCITS Directive.

<sup>29</sup> See footnote 19.

<sup>30</sup> See footnote 20.

<sup>31</sup> This is defined as "the time horizon over which the performance is measured and compared with that of the reference indicator, at the end of which the mechanism for the compensation for past underperformance (or negative performance) can be reset".

period (i.e. they should not reset the performance reference period after the application date of the guidelines).

In all the other cases, managers should apply the performance reference period starting from the beginning of the financial year following 6 months from the application date of the Guidelines (i.e. the performance reference period should start at the beginning of the financial year following 5 July 2021; by way of example, if the financial year of the fund starts on 1 September 2021, the period 1 September 2021 – 1 September 2022 should be considered as the first year of the performance reference period).

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### Question 3: Performance reference period for the benchmark model

Date last updated: May 2022

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**Question 3a Q&A 963:** Based on paragraph 40<sup>32</sup> of the Guidelines on performance fees, how should the performance reference period<sup>33</sup> for the benchmark model<sup>34</sup> be set?

**Answer 3a:** Paragraph 40) of the guidelines recommends that:

- i. any underperformance of the fund compared to the benchmark index should be clawed back before any performance fee becomes payable; and
- ii. the length of the performance reference period, if this is shorter than the whole life of the fund, should be set equal to at least 5 years.

In order to comply with the above recommendations, it should be ensured that any underperformance is brought forward for a minimum period of 5 years before a performance fee becomes payable, i.e. fund managers should look back at the past 5 years for the purpose of compensating underperformances.

In case the fund has overperformed the benchmark index, the fund manager should be able to crystallise performance fees.

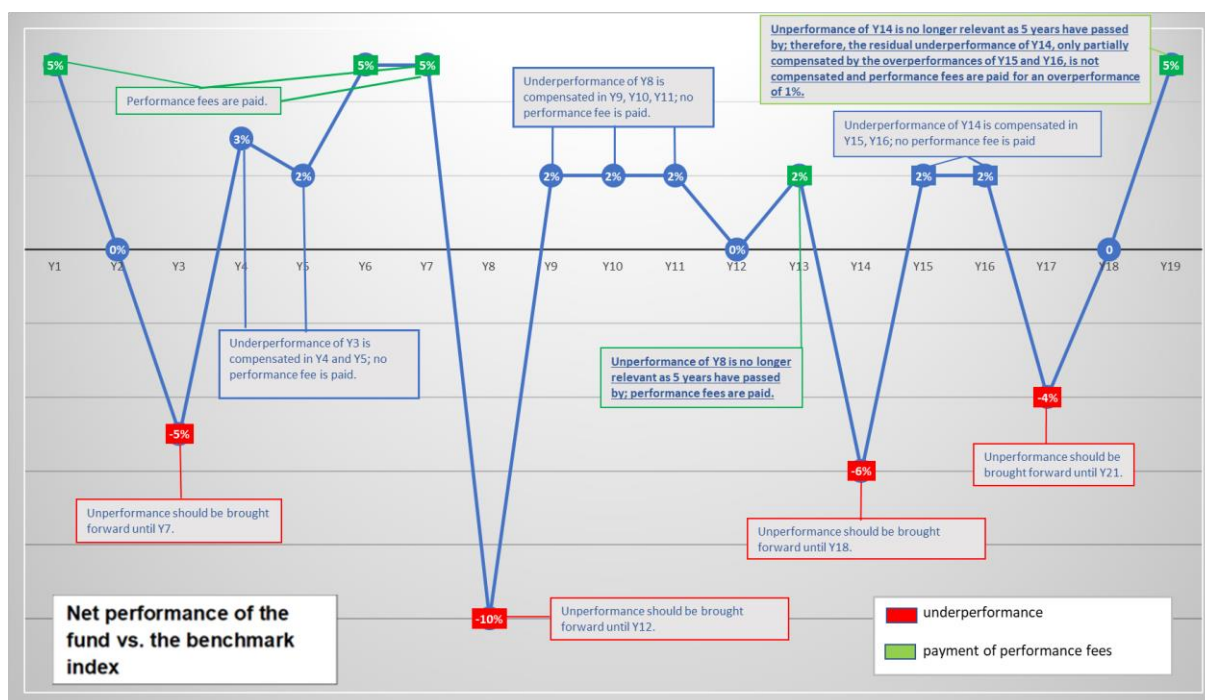
The following example illustrates the principles above (please note that the two tables below relate to the same example, the first one illustrated through a graphical representation, while the second one displayed in numerical terms):

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<sup>32</sup> See footnote 19.

<sup>33</sup> See footnote 25.

<sup>34</sup> This is defined as a performance fee model whereby the performance fees may only be charged on the basis of outperforming the reference market index. See the definitions Section of the Guidelines on performance fees.



	Net performance	Underperformance to be compensated in the following year	Payment of performance fees
Y1	5%	0%	YES
Y2	0%	0%	NO
Y3	-5%	-5%	NO
Y4	3%	-2%	NO
Y5	2%	0%	NO
Y6	5%	0%	YES
Y7	5%	0%	YES
Y8	-10%	-10%	NO
Y9	2%	-8%	NO
Y10	2%	-6%	NO
Y11	2%	-4%	NO
Y12	0%	0% <sup>35</sup>	NO
Y13	2%	0%	YES
Y14	-6%	-6%	NO
Y15	2%	-4%	NO
Y16	2%	-2%	NO
Y17	-4%	-6%	NO

<sup>35</sup> The underperformance of Y12 to be taken forward to the following year (Y13) is 0% (and not -4%) in light of the fact that the residual underperformance coming from Y8 that was not yet compensated (-4%) is no longer relevant as the 5-year period has elapsed (the underperformance of Y8 is compensated until Y12).



Y18	0%	-4% <sup>36</sup>	NO
Y19	5%	0%	YES

The following are additional examples aimed at further clarifying the mechanism of compensation of underperformances:

- i. in the case the net performance of the fund in Y18 was equal to 2% (instead of 0%), the underperformance to be carried forward to the following year (Y19) would be equal to -4%. This is in light of the fact that during Y18, the underperformance of -2% coming from Y14 should still be compensated and, in addition to that, the performance of -4% coming from Y17 should be brought forward to the following year.
- ii. in the case the net performance of the fund in Y18 was equal to 5% (instead of 0%), the underperformance to be carried forward to the following year (Y19) would be equal to -1%. This is in light of the fact that the residual underperformance coming from Y17 that was not yet compensated (-1%) should be brought forward to the following year (Y19).
- iii. in the case the net performance of the fund in Y18 was equal to 7% (instead of 0%), the net performance of the fund would compensate the underperformance of -6% coming from Y17. The positive accrual of performance fees for the 1% difference would therefore be crystallised in the payment of the performance fees to the management company. There would be no underperformance to be carried forward to Y19.

This is in line with the principle in the guidelines that underperformance in a given year (e.g. Y14) should still be compensated during a period which includes the fifth year following that underperformance (Y18), while not be brought forward to the sixth year (Y19).

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#### Question 4: Performance reference period in case of funds' mergers

Date last updated: May 2021

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**Question 4a Q&A 964:** How should the performance reference period<sup>37</sup> be set in case of a merger where the receiving UCITS is a newly established fund with no performance history and it is in effect a continuation of the merging UCITS?

**Answer 4a:** In order to ensure that the merger is not conducted with the aim of resetting the performance reference period, in the case of a merger where the receiving UCITS is a newly established fund with no performance history and the competent authority of the receiving UCITS assesses that the merger does not substantially change the UCITS' investment policy,

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<sup>36</sup> The underperformance of Y18 to be taken forward to the following year (Y19) is 4% (and not -6%) in light of the fact that the residual underperformance coming from Y14 that was not yet compensated (-2%) is no longer relevant as the 5-year period has elapsed (the underperformance of Y14 is compensated until Y18).

<sup>37</sup> See footnote 25.

the performance reference period of the merging UCITS should continue applying in the receiving UCITS.

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### Question 5: Application of the guidelines to funds with multiple portfolio managers

Date last updated: July 2021

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**Question 5a Q&A 965:** In case the authorised management company has delegated the portfolio management function to different delegated portfolio managers, would it be admissible to pay a performance fee to those delegated portfolio managers who have overperformed during the performance reference period, despite a global underperformance of the fund during the same performance reference period?

#### Answer 5a:

No. Based on paragraph 37 of the guidelines, performance fees:

- should be paid only where positive performance has been accrued during the performance reference period;
- could be paid in case the fund has overperformed the reference benchmark but had a negative performance.

The above also applies in case of delegation by the authorised management company to different delegated portfolio managers. Therefore, in case of a global underperformance of the fund, performance fees should not be paid to those delegated portfolio managers who have overperformed.

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### Question 6: Crystallisation of performance fees in case of the creation of a new UCITS/compartiment/share class in the course of the financial year

Date last updated: July 2021

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**Question 6a Q&A 966:** In case of creation of a new compartment/share class in an existing UCITS in the course of its financial year or in case of creation of a new UCITS, can performance fees be crystallised after less than 12 months from the date of creation of such a new UCITS/compartiment/share class?

**Answer 6a:** No. Performance fees, if any, should be crystallised after at least 12 months from the creation of a new UCITS/compartiment/share class. Moreover, paragraph 35 of the guidelines foresees that the crystallisation date should be the same for all share classes of a fund that levies a performance fee.

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## Question 7: Performance reference period for the hurdle rate model

Date last updated: May 2022

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**Question 7a Q&A 967:** Paragraphs 40<sup>38</sup> and 41<sup>39</sup> of the Guidelines on performance fees recommend that the length of the performance reference period (if this is shorter than the whole life of the fund) should be set equal to at least 5 years. Is this requirement applicable to the hurdle rate model?

**Answer 7a:** Yes, as paragraph 42 of the guidelines<sup>40</sup> clarifies that the only exception to the application of the 5-year performance reference period is “*the fulcrum fee model and other models which provide for a symmetrical fee structure*”.

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<sup>38</sup> See footnote 19.

<sup>39</sup> See footnote 20.

<sup>40</sup> Paragraph 42 of the Guidelines states that “The performance reference period should not apply to the fulcrum fee model and other models which provide for a symmetrical fee structure, as in these models the level of the performance fee increases or decreases proportionately with the investment performance of the fund”.

## Section XII – Costs and fees

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### Question 1: Fee rebate arrangements<sup>41</sup>

Date last updated: November 2021

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**Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>42</sup>**

**Question 1a Q&A 968:** Do you agree that:

- (i) restrictions under Article 29 of the Commission Directive 2010/43/EU<sup>43</sup> shall not be applicable to a rebate arrangement, if management companies pay these rebates from their own resources (payment vis-à-vis an individual investor)?
- (ii) management companies may pay fees from their own resources to separate investors (e.g. by concluding side letters with institutional investors, which buy investment fund units on behalf of their clients), where management companies prevent undue costs being charged to the UCITS and its unit-holders?

**Answer 1a:** No.

Article 29 of Commission Directive 2010/43/EU lays down strict conditions for fees or commissions paid or received to/from a third party in relation to the activity of investment management and administration of the UCITS. Those conditions ensure that management companies act honestly, fairly and professionally. In particular, they ensure UCITS best interests, investors' fair treatment and the transparency of UCITS operations.

Management fee discount arrangements entail payments to certain investors based on the fees charged by the UCITS management companies to remunerate investment management and/or administration activities. As such, they should be analysed as payments for the activity of the investment management and administration of the UCITS. Therefore, management

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<sup>41</sup> Question related to Articles 22 and 29 Directive 2010/43/EU (UCITS level 2)

<sup>42</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

<sup>43</sup> Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (OJ L 176, 10.7.2010, p. 42).

companies shall ensure that the conditions laid down in Article 29(1)(b) of Commission Directive 2010/43/EU are satisfied:

- “(i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the UCITS in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant service;
- (ii) the payment of the fee or commission, or the provision of the non-monetary benefit must be designed to enhance the quality of the relevant service and not impair compliance with the management company’s duty to act in the best interests of the UCITS;”

It follows from the above that, in particular:

- (a) those arrangements should be transparent and meet the conditions laid down in Article 29(1)(b) of Commission Directive 2010/43/EU;
- (b) management companies should demonstrate that:
  - (i) these arrangements will “enhance the quality of the relevant service” for the UCITS. That requirement refers to the quality of the UCITS services to the benefit of all investors and not only to investors who benefit from those arrangements;
  - (ii) those arrangements will “not impair compliance with the management company’s duty to act in the best interests of the UCITS”. In particular, Article 22 of Commission Directive 2010/43/EU sets out rules related to the “Duty to act in the best interests of UCITS and their unit-holders”. Under that Article, management companies are bound to treat all unit-holders fairly, act in the best interest of the unit-holders and to refrain from placing the interest of any group of unit-holders above others. Therefore, management companies should be able to justify that all investors pay their fair share in the funds functioning (taking into account management fee discount) and the UCITS cost structure. Those arrangements should not have a negative impact on other investors.

Upon national competent authorities’ request, management companies should be able to provide accurate and documented justifications.

## Section XIII – Delegation

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### Question 1: Responsibility to ensure compliance with the rules governing marketing communications

Date last updated: July 2022

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**Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>44</sup>**

**Question 1a Q&A 969:** When the marketing of an AIF or a UCITS is not performed by the AIFM or UCITS management company but by a third party distributor, does the responsibility for ensuring that marketing communications comply with the requirements set out in Article 4(1) of Regulation (EU) 2019/1156 lie with the AIFM or the UCITS management company where there is a contractual relationship between the AIFM or the UCITS management company and the third party distributor? Conversely, does the responsibility for ensuring that marketing communications comply with the requirements set out in Article 4(1) of Regulation (EU) 2019/1156 still lie with the AIFM or the UCITS management company in case there is no contractual relationship with the third party distributor?

**Answer 1a:** Marketing is one of the functions included in the management of funds, and therefore subject to the provisions on delegation (Article 13 of Directive 2009/65/EC and Article 20 of Directive 2011/61/EU), which themselves govern the conditions for that delegation under the principle of full responsibility of fund managers.

Article 1 of Regulation (EU) 2019/1156 specifies that the aim of this Regulation is to establish uniform rules on the publication of national provisions concerning marketing requirements for collective investment undertakings and on marketing communications addressed to investors. These requirements are laid down in Article 4 of this Regulation, and are further clarified in ESMA Guidelines.

Fund managers are responsible for the compliance with Article 4 of Regulation (EU) 2019/1156, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third party distributor (whether it is contractual or not).

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<sup>44</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.