Commission Delegated Regulation (EU) 2018/1619 of 12 July 2018 amending Delegated Regulation (EU) 2016/438 as regards safe-keeping duties of depositaries (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2018/1619

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amending Delegated Regulation (EU) 2016/438 as regards safe-keeping duties of depositaries

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[(1)], and in particular Article 26b thereof,

Whereas:

(1) As a result of differing national securities and insolvency laws, which are not harmonised at the Union level, there is a divergence in the level of protection for financial instruments held in custody for undertakings for collective investment in transferable securities ('UCITS') clients from insolvency risks. In seeking to ensure strong client asset protection as provided for under Directive 2009/65/EC, while accommodating more robust national law requirements in relation to those non-harmonised areas, it is necessary to clarify the obligations relating to the safe-keeping of assets laid down in the Directive 2009/65/EC.

(2) Currently, competent authorities and industry apply the asset segregation requirements laid down in Commission Delegated Regulation (EU) 2016/438[(2)] differently. While depositaries, which are at the first level in a custody chain, have the obligation to provide an individual account to hold financial instruments for each UCITS client, it is necessary to clarify that where the custody function is delegated to a third party, the latter should be able to hold assets of one depositary's clients, including the assets for UCITS and Alternative Investment Funds ('AIFs'), in an omnibus account. This omnibus account should always exclude the proprietary assets of the depositary and the third party's proprietary assets as well as assets belonging to other clients of the third party. Correspondingly, in cases where custody function is further delegated, the sub-custodian should be able to hold assets of the delegating custodian's clients in an omnibus account. This omnibus account should always exclude the sub-custodian's proprietary assets and proprietary assets of the delegating custodian as well as assets belonging to other clients of the sub-custodian. This is necessary in order to achieve a healthy balance between the market efficiency and investor protection.

(3) In order to minimise the risk of loss of assets held in omnibus financial instruments accounts provided by third parties, to whom the custody function has been delegated, the frequency of reconciliations between the financial securities accounts and the records of the depositary of a UCITS client and the third party or between the third parties, where the custody function has been delegated further down the custody chain, should ensure a timely transmission of the relevant information to the depositary. Moreover, the frequency of those reconciliations should depend on any movement in that omnibus account, including transactions relating to the assets belonging to other clients of the depositary that are kept in the same omnibus account as the UCITS' assets.

(4) The depositary should be able to continue to carry out its duties effectively where the custody of assets belonging to its UCITS clients is delegated to a third party. It is therefore necessary to require that the depositary maintains a record in the financial instruments account it has opened in the name of a UCITS or in the name of the management company acting on behalf of the UCITS showing that the assets kept in custody by a third party belong to that particular UCITS.

(5) To strengthen the depositaries' standing in relation to third parties to whom the custody of assets is delegated, that relationship should be documented by a written delegation contract. That contract should allow the depositary to take all the necessary steps for ensuring that the assets kept in custody are properly safeguarded and the third party complies at all times with the delegation contract and the requirements of Directive 2009/65/EC and Delegated Regulation (EU) 2016/438. Furthermore, the depositary and the third party should formally agree whether the third party is allowed to further delegate the custody functions. In that instance, the contract between the delegating third party and the third party to whom the custody functions are further delegated should be subject to the rights and obligations which are equivalent to those established between the depositary and the delegating third party.

(6) In order to enable the depositary to fulfil its functions it is necessary to strengthen depositaries' oversight over third parties, regardless of whether they are located inside or outside the Union. It should be required that depositaries verify whether financial instruments of UCITS are correctly recorded in the books of those third parties. The records kept by third parties should be sufficiently accurate in order to be able to identify the nature, location and ownership of the asset. To facilitate effective fulfilment of the depositaries' duties, third parties should provide them with a statement on any change affecting the assets held in custody for depositaries' UCITS clients.

(7) In order to improve the clarity and legal certainty of Delegated Regulation (EU) 2016/438, it is necessary to amend certain internal references which are incorrect. Delegated Regulation (EU) 2016/438 should therefore be amended accordingly.

(8) In order to allow depositaries time to adapt to these new requirements, the date of application should be deferred for 18 months after publication of this Regulation in the *Official Journal of the European Union*.

(9) The measures introduced by this Regulation are in accordance with the opinion of the European Securities and Markets Authority[3].

(10) The measures introduced by this Regulation are in accordance with the opinion of the expert group of the European Securities Committee.

(11) Delegated Regulation (EU) 2016/438 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) 2016/438 is amended as follows:

(1) Article 13 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) point (c) is replaced by the following:

(c) 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 in accordance with Article 22a of Directive 2009/65/EC.;

(ii) the following second subparagraph is added:

In relation to point (c) of the first subparagraph, the frequency of the reconciliations shall be determined on the basis of the following:

(a) the normal trading activity of the UCITS;

(b) any trade occurring outside the normal trading activity;

(c) any trade occurring on behalf of any other client whose assets are held by the third party in the same financial instruments account as the assets of the UCITS.;

(b) paragraph 2 is replaced by the following:

2. Where a depositary has delegated its safekeeping functions, with regard to assets held in custody, to a third party in accordance with Article 22a of Directive 2009/65/EC, it shall remain subject to the requirements of points (a) to (e) of paragraph 1. The depositary shall also ensure that the third party complies with the requirements of points (b) to (g) of paragraph 1;;

(2) in Article 15, the following paragraph 2a is inserted:

2a. A contract by which the depositary appoints a third party to hold assets of that depositary's UCITS clients in custody, shall contain at least the following provisions:

a a guarantee of the depositary's right to information, inspection, and access to the relevant records and financial instruments accounts of the third party holding assets in custody to enable the depositary to fulfil its oversight and due diligence obligations and in particular allow the depositary to:

(i) identify all entities within the custody chain;

(ii) verify that the quantity of the identified financial instruments recorded in the financial instruments accounts opened in the depositary's books in the name of the UCITS or in the name of the