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# Commission Implementing Regulation (EU) 2015/499 of 24 March 2015 laying down implementing technical standards with regard to the procedures to be used for granting supervisory approval for the use of ancillary own-fund items in accordance with Directive 2009/138/EC of the European Parliament and of the Council (Text with EEA relevance)

## COMMISSION IMPLEMENTING REGULATION (EU) 2015/499

## of 24 March 2015

## laying down implementing technical standards with regard to the procedures to be used for granting supervisory approval for the use of ancillary own-fund items in accordance with Directive 2009/138/EC of the European Parliament and of the Council

## (Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2009/138/EC of 25 November 2009 of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[1], and in particular Article 92(3) thereof,

Whereas:

(1) Insurance and reinsurance undertakings should prepare applications for approval of ancillary own-fund items on a prudent and realistic basis.

(2) The application for an ancillary own-fund item is a strategic decision for risk management and capital planning purposes. Based on the ultimate responsibility of the administrative, management or supervisory body for compliance as set out in Article 40 of Directive 2009/138/EC, its involvement in the decision-making process on the application should be carefully considered.

(3) The insurance or reinsurance undertaking should include all relevant facts necessary for an assessment by the supervisory authority, including an assessment by the insurance or reinsurance undertaking of how the item would meet the criteria for an ancillary own-fund item and, on being called up, for classification as a basic own-fund item so that the supervisory authority can make timely decisions based on appropriate evidence.

(4) The information to be included by an insurance or reinsurance undertaking in its application should be specified to ensure a consistent basis for decision-making by the supervisory authority.

(5) Due to interdependencies between different approval applications under Directive 2009/138/EC, when applying for approval of an ancillary own-fund item the insurance or reinsurance undertaking should inform the supervisory authority of other applications concerning the items in Article 308a(1) of Directive 2009/138/EC, which are currently

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ongoing or foreseen within the next 6 months. Such requirement is necessary to ensure supervisory assessments are based on transparent and unbiased information.

(6) The ability for supervisory authorities and insurance and reinsurance undertakings to assess the status of a group of counterparties as though it were a single counterparty is considered to be particularly relevant where a mutual or mutual-type undertaking has a large number of homogeneous non-corporate members from whom it can make a call for supplementary contributions.

(7) The ancillary own funds approval process envisages ongoing communication between the supervisory authorities and insurance and reinsurance undertakings. That includes communication before a formal application is submitted to the supervisory authority and after an application has been approved, through the supervisory review process. Such ongoing communication is necessary to ensure that supervisory assessments are based on relevant and up-to-date information.

(8) When the supervisory authority receives notification from an insurance or reinsurance undertaking that there has been a reduction in the loss-absorbency of an approved ancillary own-fund item, the supervisory authority should revise downward the approved amount or withdraw its approval of the method in order to ensure that it is consistent with that reduced loss-absorbency.

(9) Article 226 of Directive 2009/138/EC permits a group of insurance or reinsurance undertakings to apply for ancillary own-fund item approval in respect of an intermediate insurance holding company or an intermediate mixed financial holding company. In those cases, the same rules should apply to the intermediate insurance holding company or the intermediate mixed financial holding company as though it were an insurance or reinsurance undertaking. This should also apply where a group is headed by an insurance holding company or a mixed financial holding company in accordance with Article 235 of Directive 2009/138/EC.

(10) This Regulation is based on the draft implementing technical standards submitted by the European Insurance and Occupational Pensions Authority to the Commission.

(11) The European Insurance and Occupational Pensions Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Insurance and Reinsurance Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council[(2)].

(12) In order to enhance legal certainty about the supervisory regime during the phasing-in period provided for in Article 308a of Directive 2009/138/EC, which will start on 1 April 2015, it is important to ensure that this Regulation enters into force as soon as possible, on the day after that of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

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*Article 1*

**General features of the application**

1 An insurance or reinsurance undertaking shall submit a written application for approval of each ancillary own-fund item to the supervisory authority.

2 The application shall be submitted in one of the official languages of the Member State in which the insurance or reinsurance undertaking has its head office, or in a language that has been agreed upon with the supervisory authority.

3 The application shall consist of a cover letter and supporting evidence.

*Article 2*

**Cover letter**

The insurance or reinsurance undertaking shall submit a cover letter. That cover letter shall confirm all of the following:

(a) any legal or contractual terms governing the ancillary own-fund item or any connected arrangement are unambiguous and clearly defined;

(b) the amount ascribed to the ancillary own-fund item in the application complies with Article 90(2) of Directive 2009/138/EC;

(c) the economic substance of the ancillary own-fund item, including how the item provides basic own funds once called up, has been fully reflected in the application;

(d) taking into account likely future developments as well as the circumstances at the date of the application, the insurance or reinsurance undertaking considers that the ancillary own-fund item complies with the criteria for the classification of own funds;

(e) no facts have been omitted which if known by the supervisory authority could influence its decision regarding whether to approve an ancillary own-fund item, the amount for which approval of an item shall be granted, or the time period for which approval of a calculation method shall apply.

The cover letter shall also list other applications submitted by the insurance or reinsurance undertaking or currently foreseen within the next 6 months for approval of any items listed in Article 308a(1) of Directive 2009/138/EC, together with corresponding application dates.

*Article 3*

**Supporting evidence regarding the amount or method**

The application submitted by the insurance or reinsurance undertaking shall seek approval of a specified monetary amount for an ancillary own-fund item or a method to determine the amount of an ancillary own-fund item.

Where the insurance or reinsurance undertaking seeks approval of a specified monetary amount, the application shall include an explanation of the calculation of the amount,

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based on prudent and realistic assumptions in accordance with Article 90(2) of Directive 2009/138/EC.

Where the insurance or reinsurance undertaking seeks approval of a calculation method, it shall provide the following information:

(a) an explanation of the method and how it reflects the loss-absorbency of the ancillary own-fund item;

(b) a description of any assumptions upon which the method relies and how these assumptions are prudent and realistic;

(c) the item's expected initial amount that has been calculated in accordance with the method and a justification of that amount;

(d) an explanation of the validation processes the insurance or reinsurance undertaking will implement to ensure that the results of the method continue to reflect the loss-absorbing capacity of the item on an ongoing basis.

*Article 4*

**Supporting evidence regarding the criteria for approval**

The supporting evidence shall contain sufficient information to allow the supervisory authority to assess whether the application complies with the criteria determined in Article 90 of Directive 2009/138/EC and Articles 62 to 65 of Commission Delegated Regulation (EU) 2015/35[(3)]. It shall contain at least the information described in the second to seventh paragraphs of this Article.

The insurance or reinsurance undertaking shall provide information regarding the nature of ancillary own-fund item and the loss absorbing capacity of the basic own-fund item into which the ancillary own-fund item converts on being called up, including the following:

(a) the item's legal or contractual terms, together with the terms of any connected arrangement and evidence that the counterparty has entered into, or will enter into, the contract and any connected arrangement;

(b) evidence that the contract and any connected arrangements are legally binding and enforceable in all relevant jurisdictions, based on a legal opinion;

(c) the period during which the contract is in effect and, if different, the period during which the insurance or reinsurance undertaking may call upon the item;

(d) confirmation that the ancillary own-fund item, once that item has been called up and paid in, would display all of the features of a basic own-fund item classified in Tier 1 in accordance with Article 71 of Delegated Regulation (EU) 2015/35, or all of the features of a basic own-fund item classified in Tier 2 in accordance with Article 73 of the Delegated Regulation (EU) 2015/35;

(e) confirmation that the item's contractual terms do not contain any provision which might create a disincentive for the insurance or reinsurance undertaking to call upon the item to absorb losses or place any constraint upon its ability to be callable on demand;

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(f) confirmation that the ancillary own-fund item or its benefits would only be available to the insurance or reinsurance undertaking and would not be transferrable or assignable to any other party, or be able to be encumbered in any other way;

(g) any factors which restrict the conditions under which the insurance or reinsurance undertaking might seek to call upon the item, including but not limited to conditions of stress specific to the insurance and reinsurance undertaking or wider market stress;

(h) whether the insurance or reinsurance undertaking has, or in the future may have, any obligation to, or any expectation or understanding that it will pay funds or provide any other benefit to the counterparty or to a third party in connection with the item, other than in the event of repayment of a basic own-fund item which would satisfy the features in Article 71(1)(h), and Article 73(1)(d) of Delegated Regulation (EU) 2015/35;

(i) a copy of the medium term capital management plan including how the item will contribute to the insurance or reinsurance undertaking's existing capital structure, and how the item might enable the insurance or reinsurance undertaking to meet its existing or future capital requirements.

Except where Article 63(6) of the Delegated Regulation (EU) 2015/35 applies and the status of a group of counterparties may be assessed as though it were a single counterparty, the insurance or reinsurance undertaking shall provide information regarding the status of each counterparty including the following:

(a) the names and a description of each counterparty, including the nature of any relationship between the insurance or reinsurance undertaking and the counterparty;

(b) an assessment of the risk of default of the counterparties in order to support the assessment by the supervisory authority specified in Article 63(2) of the Delegated Regulation (EU) 2015/35;

(c) an assessment of the liquidity position of the counterparties in order to support the assessment by the supervisory authority specified in Article 63(3) of Delegated Regulation (EU) 2015/35;

(d) an assessment of the counterparties' willingness to pay in order to support the supervisory assessment specified in Article 63(4) of the Delegated Regulation (EU) 2015/35;

(e) a description of the range of circumstances in which the insurance or reinsurance undertaking might seek to call upon the item including current expectations as to when the item might be called prior to or at the point of non-compliance with the Solvency Capital Requirement or Minimum Capital Requirement;

(f) information on any other factors relevant to the status of the counterparties to support the assessment by the supervisory authority specified in Article 63(5) of Delegated Regulation (EU) 2015/35.

Where the counterparties are treated as a group of counterparties in accordance with Article 63(6) of Delegated Regulation (EU) 2015/35, the information in points (a) to (f) of the third paragraph shall be provided in respect of the group of counterparties.

Where the counterparty is a member of the same group or subgroup as the insurance or reinsurance undertaking by virtue of Article 213 of Directive 2009/138/EC and has commitments under ancillary own-fund items to different entities within the group, the information in points (b) to (f) of the third paragraph shall include evidence of the ability