Commission Delegated Regulation (EU) 2015/488 of 4 September 2014 amending Delegated Regulation (EU) No 241/2014 as regards own funds requirements for firms based on fixed overheads (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2015/488

of 4 September 2014

amending Delegated Regulation (EU) No 241/2014 as regards own funds requirements for firms based on fixed overheads

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012[(1)], and in particular the third subparagraph of Article 97(4) thereof,

Whereas:

(1) Regulation (EU) No 575/2013 establishes, among other matters, prudential requirements for investment firms in order to ensure that investment firms are safe and sound and comply at all times with the own funds requirements. Own funds requirements established by that Regulation aim to ensure that risks stemming from business activities are covered by a sufficient amount of own funds. According to Article 97 of Regulation (EU) No 575/2013 firms (i.e. investment firms and entities referred to in point (2)(c) of Article 4(1)) can use an alternative method based on fixed costs to calculate the total risk exposure. It is therefore necessary to establish the methodology for calculating fixed overheads and the list of items that would be included in the calculations in order to have a common approach in all Member States.

(2) In order to ensure that firms are able to organise an orderly winding down or restructuring of their activities, they should hold sufficient financial resources to withstand operational expenses over an appropriate period of time. During the winding down or restructuring, a firm still needs to continue its business and be able to absorb losses which are not matched by a sufficient volume of profits, to protect investors. While some costs (such as staff bonuses) may decrease other costs (such as legal expenses) may increase. Considering that not all firms use International Financial Reporting Standards (IFRS) and in order to avoid regulatory arbitrage, it is essential to follow a prudent approach for calculating own funds for firms, whereby changes to the accounting framework are automatically taken into account and cannot be arbitraged by changing the accounting categorisation. In order to more adequately reflect the effect of the variable expenses in the own funds, rules on the own funds of firms should be based on an approach whereby variable costs are deducted from total expenses.

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2015/488. (See end of Document for details)*

(3) Given that firms make use of tied agents and the business carried out through tied agents exposes those firms to risks in the same manner as the business carried out by the firms themselves, appropriate rules on the own funds requirements for firms based on fixed overheads should provide for the inclusion of costs relating to tied agents to reflect those risks. Nevertheless, given that costs related to tied agents have some element of variability but cannot be considered a fully variable cost item but it would be disproportionate to include the full amount of the costs related to tied agents to the own funds requirements, these rules should provide for the inclusion only of a percentage of these costs in the own funds requirements. Further, in order to avoid double-counting of amounts relating to tied agent fees, these rules should provide for the deduction of the fees related to tied agents before the addition of this percentage to the own funds requirements.

(4) Regulation (EU) No 575/2013 provides that competent authorities can make adjustments in own funds requirements where there has been a material change in the business activities of the firm. In order to ensure that competent authorities apply the same conditions across the Union, it is necessary to establish criteria on what constitutes a material change. As firms vary in their size, there are some very small firms or firms in a start-up phase for whom it would be unnecessarily burdensome to impose adjustments in their own funds requirements, given that changes are bound to be frequent for them. Therefore minimum thresholds should be established so that those firms are exempted from the adjustments in own funds requirements if their own funds requirements fall below the threshold.

(5) Commission Delegated Regulation (EU) No 241/2014[(2)] lays down regulatory technical standards for own funds requirements for institutions. This Regulation establishes the methodology for calculating fixed overheads for firms. To ensure coherence and to facilitate a comprehensive view and compact access to all the provisions regarding own funds by persons subject to those obligations, it is desirable to include all regulatory technical standards required by Regulation (EU) No 575/2013 on own funds in a single Regulation. Delegated Regulation (EU) No 241/2014 should therefore be amended accordingly.

(6) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission.

(7) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[(3)]. The European Banking Authority has also consulted the European Securities Markets Authority (ESMA) before submitting the draft technical standards on which this Regulation is based,

HAS ADOPTED THIS REGULATION:

Article 1

In Delegated Regulation (EU) No 241/2014 the following Chapter Va is inserted:

***Changes to legislation:** There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2015/488. (See end of Document for details)*

CHAPTER Va

OWN FUNDS BASED ON FIXED OVERHEADS

Article 34b

Calculation of the eligible capital of at least one quarter of the fixed overheads of the preceding year for the purposes of Article 97(1) of Regulation (EU) No 575/2013

1 For the purposes of this Chapter, "firm" means an entity referred to in point (2)(c) of Article 4(1) of Regulation (EU) No 575/2013 that provides the investment services and activities listed in points (2) and (4) of Section A of Annex I to Directive 2004/39/EC of the European Parliament and of the Council[(4)] or an investment firm.

2 For the purposes of Article 97(1) of Regulation (EU) No 575/2013, firms shall calculate their fixed overheads of the preceding year, using figures resulting from the applicable accounting framework, by subtracting the following items from the total expenses after distribution of profits to shareholders in their most recent audited annual financial statements, or, where audited statements are not available, in annual financial statements validated by national supervisors:

a fully discretionary staff bonuses;

b employees', directors' and partners' shares in profits, to the extent that they are fully discretionary;

c other appropriations of profits and other variable remuneration, to the extent that they are fully discretionary;

d shared commission and fees payable which are directly related to commission and fees receivable, which are included within total revenue, and where the payment of the commission and fees payable is contingent upon the actual receipt of the commission and fees receivable;

e fees, brokerage and other charges paid to clearing houses, exchanges and intermediate brokers for the purposes of executing, registering or clearing transactions;

f fees to tied agents as defined by point 25 of Article 4 of Directive 2004/39/EC, where applicable;

g interest paid to customers on client money;

h non-recurring expenses from non-ordinary activities.

3 Where fixed expenses have been incurred on behalf of the firms by third parties other than tied agents, and these fixed expenses are not already included within the total expenses referred to in paragraph 2, firms shall take either of the following actions:

a where a break-down of the expenses of those third parties is available, firms shall determine the amount of fixed expenses that those third parties have incurred on their behalf and shall add that amount to the figure resulting from paragraph 2;

b where the break-down referred to in point (a) is not available, the firms shall determine the amount of expenses incurred on their behalf by those third parties according to the firms' business plans and shall add that amount to the figure resulting from paragraph 2.

4 Where the firm makes use of tied agents, it shall add an amount equal to 35 % of all the fees related to the tied agents to the figure resulting from paragraph 2.

5 Where the firm's most recent audited financial statements do not reflect a twelve month period, the firm shall divide the result of the calculation of paragraphs 2 to 4 by the number of