Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 231/2013

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supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010[(1)], and in particular Article 3(6), Article 4(3), Article 9(9), Article 12(3), Article 14(4), Article 15(5), Article 16(3), Article 17, Article 18(2), Article 19(11), Article 20(7), Article 21(17), Article 22(4), Article 23(6), Article 24(6), Article 25(9), Article 34(2), Article 35(11), Article 36(3), Article 37(15), Article 40(11), Article 42(3) and Article 53(3) thereof,

Having regard to the opinion of the European Central Bank,

Whereas:

(1) Directive 2011/61/EU empowers the Commission to adopt delegated acts specifying, in particular, the rules relating to calculation of the threshold, leverage, operating conditions for Alternative Investment Fund Managers (hereinafter 'AIFMs'), including risk and liquidity management, valuation and delegation, requirements detailing the functions and duties of depositaries of Alternative Investment Funds (hereinafter 'AIFs'), rules on transparency and specific requirements relating to third countries. It is important that all these supplementing rules begin to apply at the same time as Directive 2011/61/EU so that the new requirements imposed on AIFMs can be effectively put into operation. The provisions in this Regulation are closely interrelated, since they deal with the authorisation, ongoing operation and transparency of AIFMs which manage and, as the case may be, or market AIFs in the Union, which are inextricably linked aspects inherent to the taking up and pursuit of the asset management business. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, including investors that are non-Union residents, it is desirable to include all delegated acts required by Directive 2011/61/EU in a single Regulation.

Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) No 231/2013. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(2) It is important to ensure that the objectives of Directive 2011/61/EU are achieved uniformly throughout the Member States, to enhance the integrity of the internal market and offer legal certainty for its participants, including institutional investors, competent authorities and other stakeholders, by adopting a Regulation. The form of a Regulation ensures a coherent framework for all market operators and is the best possible guarantee for a level playing field, uniform conditions of competition and the common appropriate standard of investor protection. Furthermore it ensures the direct applicability of detailed uniform rules concerning the operation of AIFMs, which by their nature are directly applicable and therefore require no further transposition at national level. The recourse to a regulation allows, in addition, to avoid a delayed application of Directive 2011/61/EU in the Member States.

(3) As the Delegated Regulation specifies the tasks and responsibilities of the 'governing body' and of the 'senior management' it is important to clarify the meaning of these terms, in particular the fact that a governing body may be comprised of senior managers. Furthermore, as this Regulation introduces also the term 'supervisory function' the definition of the governing body should make clear that it is the body which comprises the managerial function in case the supervisory and the managerial functions are separated in accordance with national company law. Directive 2011/61/EU requires AIFMs to provide certain information to competent authorities, including the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature. This Regulation clarifies the meaning of special arrangements so that AIFMs know exactly what information they should provide to competent authorities.

(4) Directive 2011/61/EU provides for a lighter regime applicable to those AIFMs who manage portfolios of AIFs whose total assets under management do not exceed the relevant thresholds. It is necessary to specify clearly how the total value of assets under management should be calculated. In this context it is essential to define the steps necessary for calculating the total value of assets, to determine clearly which assets are not included in the calculation, to clarify how the assets acquired through the use of leverage should be valued and to provide rules for handling of cases of cross-holding among AIFs managed by an AIFM.

(5) The total value of assets under management needs to be calculated at least annually and using up-to-date information. The value of assets should therefore be determined in the 12 months preceding the date of calculation of the total value of assets under management and as close as possible to such a date.

(6) To ensure that an AIFM remains eligible to benefit from the lighter regime provided for in Directive 2011/61/EU, it should put in place a procedure making it possible to observe on an ongoing basis the total value of assets under management. The AIFM may consider the types of AIFs under management and the different classes of assets invested in order to assess the likelihood of breaching the threshold or the need for an additional calculation.

(7) Where an AIFM no longer meets the conditions related to the thresholds it should notify its competent authority and apply for an authorisation within 30 calendar days.

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However, where exceeding or falling below the thresholds occurs only occasionally within a given calendar year and such situations are considered as temporary the AIFM should not be obliged to make an application for authorisation. In those cases, the AIFM should inform the competent authority of the breach of the threshold, and explain why it considers such breach to be of a temporary nature. A situation lasting for more than three months cannot be considered as being temporary. When assessing the likelihood of a situation to be temporary, the AIFM should consider anticipated subscription and redemption activity or, where applicable, capital draw-downs and distribution. The AIFM should not use anticipated market movements as part of this assessment.

(8) Data used by AIFMs to calculate the total value of assets under management do not need to be available to the public or to investors. However, competent authorities must be able to verify that the AIFM is correctly calculating and monitoring the total value of assets under management, including the assessment of occasions when the total value of assets under management temporarily exceeds the relevant threshold and should therefore have access to these data on request.

(9) It is important that AIFMs benefiting from the provisions of the lighter regime in Directive 2011/61/EU provide the competent authorities with up-to-date information at the time of registration. Not all types of AIFMs may have updated offering documents reflecting the latest developments related to the AIFs they manage and such AIFMs may find it more practical to specify the required information in a separate document describing the funds' investment strategy. This could be the case of private equity or venture capital funds which often raise money through negotiations with potential investors.

(10) An AIF which holds only equity shares in listed companies should not be regarded as being leveraged as long as the equity shares are not acquired through borrowing. Where the same AIF purchases options on an equity index, it should be regarded as being leveraged, since it has increased the exposure of the AIF to a given investment.

(11) In order to ensure a uniform application of AIFM obligations to grant an objective overview of the leverage used, it is necessary to provide two methods to calculate the leverage. As it results from market studies, the best results can be achieved by combining the so-called 'gross' and 'commitment' methods.

(12) In order to receive appropriate information for monitoring systemic risks and to gain a complete picture of the use of leverage by the AIFM, information about the exposure of an AIF should be provided to competent authorities and investors both on a gross and on a commitment method basis and all AIFMs should therefore calculate exposure using both the gross and the commitment method. The gross method gives the overall exposure of the AIF whereas the commitment method gives insight in the hedging and netting techniques used by the manager; therefore both methods shall be seen in conjunction. Specifically, the degree to which overall exposure differs between the gross method and the commitment method may provide useful information. If necessary to ensure that any increase of the exposure of AIFs is adequately reflected the Commission may adopt additional delegated acts on an additional and optional method for the calculation of leverage.

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(13) When calculating the exposure, all positions of the AIF should initially be included, including short and long assets and liabilities, borrowings, derivative instruments and any other method increasing the exposure where the risks and rewards of assets or liabilities are with the AIF, and all other positions that make up the net asset value.

(14) Borrowing arrangements entered into by the AIF should be excluded if they are temporary in nature and relate to and are fully covered by capital commitments from investors. Revolving credit facilities should not be considered being temporary in nature.

(15) In addition to calculating exposure using the gross method, all AIFMs should calculate exposure using the commitment method. According to the commitment method financial derivative instruments should be converted into equivalent positions in the underlying asset. However, if an AIF invests in certain derivatives in order to off-set the market risk of other assets in which the AIF is invested, under certain conditions, those derivatives should not be converted into an equivalent position in the underlying assets as the exposures of the two investments balance one another. That should be the case where, for instance, an AIF portfolio invests in a certain index and holds a derivative instrument which swaps the performance of that index with the performance of a different index, that should be equivalent to holding exposure to the second index in the portfolio and therefore the AIF's net asset value would not depend on the performance of the first index.

(16) When calculating exposure according to the commitment method, derivatives which fulfil the criteria set out in this Regulation do not provide any incremental exposure. Thus, if the AIF invests in index future contracts and holds a cash position equal to the total underlying market value of future contracts, this would be equivalent to directly investing in index shares and therefore the index future contract should not be taken into account for the purpose of calculating the exposure of the AIF.

(17) When calculating exposure according to the commitment method, AIFMs should be allowed to consider hedging and netting arrangements provided they fulfil the criteria relating to the commitment method.

(18) The requirement that netting arrangements refer to the same underlying asset should be interpreted strictly so that assets which the AIFM considers as equivalent or highly correlated, such as different share classes or bonds issued by the same issuer, should not be considered as identical for the purposes of netting arrangements. The definition of netting arrangements aims to ensure that only those trades which offset the risks linked to other trades, leaving no material residual risk, are taken into account. Combinations of trades which aim to generate a return, however small, by reducing some risks while keeping others should not be considered as netting arrangements, as with arbitrage investment strategies which aim to generate a return by taking advantage of pricing discrepancies between derivative instruments with the same underlying but different maturities.

(19) A portfolio management practice which aims to reduce the duration risk by combining an investment in a long-dated bond with an interest rate swap or to reduce the duration

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of an AIF bond portfolio by concluding a short position on bond future contracts representative of the interest rate risk of the portfolio (duration hedging) should be considered as a hedging arrangement provided that it complies with the hedging criteria.

(20) A portfolio management practice, which aims to offset the significant risks linked to an investment in a well diversified portfolio of shares by taking a short position on a stock market index future, where the composition of the equity portfolio is very close to that of the stock market index and its return highly correlated to that of the stock market index and where the short position on the stock market index future allows an unquestionable reduction of the general market risk related to the equity portfolio and the specific risk is insignificant, such as a beta-hedging of a well-diversified equity portfolio where the specific risk is considered to be insignificant, should be considered as complying with the hedging criteria.

(21) A portfolio management practice which aims to offset the risk linked to an investment in a fixed interest rate bond by combining a long position on a credit default swap and an interest rate swap which swaps that fixed interest rate with an interest rate equal to an appropriate money market reference rate plus a spread should be considered as a hedging arrangement where all the hedging criteria of the commitment method are in principle complied with.

(22) A portfolio management practice which aims to offset the risk of a given share by taking a short position through a derivative contract on a share that is different to but strongly correlated with that first share should not be considered as complying with the hedging criteria. Although such a strategy relies on taking opposite positions on the same asset class, it does not hedge the specific risk linked to the investment in a certain share. Therefore, it should not be considered as a hedging arrangement as laid down in the criteria related to the commitment method.

(23) A portfolio management practice which aims to keep the alpha of a basket of shares (comprising a limited number of shares) by combining the investment in that basket of shares with a beta-adjusted short position on a future on a stock market index should not be considered as complying with the hedging criteria. Such a strategy does not aim to offset the significant risks linked to the investment in that basket of shares but to offset the beta (market risk) of that investment and keep the alpha. The alpha component of the basket of shares may dominate over the beta component and as such lead to losses at the level of the AIF. For that reason, it should not be considered as a hedging arrangement.

(24) A merger arbitrage strategy is a strategy that combines a short position on a stock with a long position on another stock. Such a strategy aims to hedge the beta (market risk) of the positions and generate a return linked to the relative performance of both stocks. Similarly, the alpha component of the basket of shares may dominate over the beta component and as such lead to losses at the level of the AIF. It should not be considered as a hedging arrangement as laid down in the criteria related to the commitment method.

(25) A strategy, which aims to hedge a long position in a stock or bond with purchased credit protection on the same issuer, relates to two different asset classes and therefore should not be considered as a hedging arrangement.