

Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (Text with EEA relevance)

CHAPTER III

OPERATING CONDITIONS FOR INVESTMENT FIRMS

SECTION 1

Inducements

Article 26

(Article 19(1) of Directive 2004/39/EC) Inducements

Member States shall ensure that investment firms are not regarded as acting honestly, fairly and professionally in accordance with the best interests of a client if, in relation to the provision of an investment or ancillary service to the client, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:

- (a) a fee, commission or non-monetary benefit paid or provided to or by the client or a person on behalf of the client;
- (b) a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions 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 client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary 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 to the client and not impair compliance with the firm's duty to act in the best interests of the client;
- (c) proper fees which enable or are necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients.

Member States shall permit an investment firm, for the purposes of point (b)(i), to disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form, provided that it undertakes to disclose further details at the request of the client and provided that it honours that undertaking.

SECTION 2

Information to clients and potential clients*Article 27***(Article 19(2) of Directive 2004/39/EC) Conditions with which
information must comply in order to be fair, clear and not misleading**

1 Member States shall require investment firms to ensure that all information they address to, or disseminate in such a way that it is likely to be received by, retail clients or potential retail clients, including marketing communications, satisfies the conditions laid down in paragraphs 2 to 8.

2 The information referred to in paragraph 1 shall include the name of the investment firm.

It shall be accurate and in particular shall not emphasise any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks.

It shall be sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received.

It shall not disguise, diminish or obscure important items, statements or warnings.

3 Where the information compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services, the following conditions shall be satisfied:

- a the comparison must be meaningful and presented in a fair and balanced way;
- b the sources of the information used for the comparison must be specified;
- c the key facts and assumptions used to make the comparison must be included.

4 Where the information contains an indication of past performance of a financial instrument, a financial index or an investment service, the following conditions shall be satisfied:

- a that indication must not be the most prominent feature of the communication;
- b the information must include appropriate performance information which covers the immediately preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided if less than five years, or such longer period as the firm may decide, and in every case that performance information must be based on complete 12-month periods;
- c the reference period and the source of information must be clearly stated;
- d the information must contain a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
- e where the indication relies on figures denominated in a currency other than that of the Member State in which the retail client or potential retail client is resident, the currency must be clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- f where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed.

5 Where the information includes or refers to simulated past performance, it must relate to a financial instrument or a financial index, and the following conditions shall be satisfied:

- a the simulated past performance must be based on the actual past performance of one or more financial instruments or financial indices which are the same as, or underlie, the financial instrument concerned;
- b in respect of the actual past performance referred to in point (a), the conditions set out in points (a) to (c), (e) and (f) of paragraph 4 must be complied with;
- c the information must contain a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.

6 Where the information contains information on future performance, the following conditions shall be satisfied:

- a the information must not be based on or refer to simulated past performance;
- b it must be based on reasonable assumptions supported by objective data;
- c where the information is based on gross performance, the effect of commissions, fees or other charges must be disclosed;
- d it must contain a prominent warning that such forecasts are not a reliable indicator of future performance.

7 Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.

8 The information shall not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the investment firm.

Article 28

(Article 19(3) of Directive 2004/39/EC) Information concerning client categorisation

1 Member States shall ensure that investment firms notify new clients, and existing clients that the investment firm has newly categorised as required by Directive 2004/39/EC, of their categorisation as a retail client, a professional client or an eligible counterparty in accordance with that Directive.

2 Member States shall ensure that investment firms inform clients in a durable medium about any right that client has to request a different categorisation and about any limitations to the level of client protection that it would entail.

3 Member States shall permit investment firms, either on their own initiative or at the request of the client concerned:

- a to treat as a professional or retail client a client that might otherwise be classified as an eligible counterparty pursuant to Article 24(2) of Directive 2004/39/EC;
- b to treat as a retail client a client that is considered as a professional client pursuant to Section I of Annex II to Directive 2004/39/EC.

Article 29

(Article 19(3) of Directive 2004/39/EC) General requirements for information to clients

1 Member States shall require investment firms, in good time before a retail client or potential retail client is bound by any agreement for the provision of investment services or ancillary services or before the provision of those services, whichever is the earlier, to provide that client or potential client with the following information:

- a the terms of any such agreement;
- b the information required by Article 30 relating to that agreement or to those investment or ancillary services.

2 Member States shall require investment firms, in good time before the provision of investment services or ancillary services to retail clients or potential retail clients, to provide the information required under Articles 30 to 33.

3 Member States shall require investment firms to provide professional clients with the information referred to in Article 32(5) and (6) in good time before the provision of the service concerned.

4 The information referred to in paragraphs 1 to 3 shall be provided in a durable medium or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

5 By way of exception to paragraphs 1 and 2, Member States shall permit investment firms, in the following circumstances, to provide the information required under paragraph 1 to a retail client immediately after that client is bound by any agreement for the provision of investment services or ancillary services, and the information required under paragraph 2 immediately after starting to provide the service:

- a the firm was unable to comply with the time limits specified in paragraphs 1 and 2 because, at the request of the client, the agreement was concluded using a means of distance communication which prevents the firm from providing the information in accordance with paragraph 1 or 2;
- b in any case where Article 3(3) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC⁽¹⁾ does not otherwise apply, the investment firm complies with the requirements of that Article in relation to the retail client or potential retail client, as if that client or potential client were a 'consumer' and the investment firm were a 'supplier' within the meaning of that Directive.

6 Member State shall ensure that investment firms notify a client in good time about any material change to the information provided under Articles 30 to 33 which is relevant to a service that the firm is providing to that client. That notification shall be given in a durable medium if the information to which it relates is given in a durable medium.

7 Member States shall require investment firms to ensure that information contained in a marketing communication is consistent with any information the firm provides to clients in the course of carrying on investment and ancillary services.

8 Member States shall ensure that, where a marketing communication contains an offer or invitation of the following nature and specifies the manner of response or includes a form by

which any response may be made, it includes such of the information referred to in Articles 30 to 33 as is relevant to that offer or invitation:

- a an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service with any person who responds to the communication;
- b an invitation to any person who responds to the communication to make an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service.

However, the first subparagraph shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the potential retail client must refer to another document or documents, which, alone or in combination, contain that information.

Article 30

(first indent of Article 19(3) of Directive 2004/39/EC) Information about the investment firm and its services for retail clients and potential retail clients

1 Member States shall require investment firms to provide retail clients or potential retail clients with the following general information, where relevant:

- a the name and address of the investment firm, and the contact details necessary to enable clients to communicate effectively with the firm;
- b the languages in which the client may communicate with the investment firm, and receive documents and other information from the firm;
- c the methods of communication to be used between the investment firm and the client including, where relevant, those for the sending and reception of orders;
- d a statement of the fact that the investment firm is authorised and the name and contact address of the competent authority that has authorised it;
- e where the investment firm is acting through a tied agent, a statement of this fact specifying the Member State in which that agent is registered;
- f the nature, frequency and timing of the reports on the performance of the service to be provided by the investment firm to the client in accordance with Article 19(8) of Directive 2004/39/EC;
- g if the investment firm holds client financial instruments or client funds, a summary description of the steps which it takes to ensure their protection, including summary details of any relevant investor compensation or deposit guarantee scheme which applies to the firm by virtue of its activities in a Member State;
- h a description, which may be provided in summary form, of the conflicts of interest policy maintained by the firm in accordance with Article 22;
- i at any time that the client requests it, further details of that conflicts of interest policy in a durable medium or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

2 Member States shall ensure that, when providing the service of portfolio management, investment firms establish an appropriate method of evaluation and comparison such as a meaningful benchmark, based on the investment objectives of the client and the types of financial instruments included in the client portfolio, so as to enable the client for whom the service is provided to assess the firm's performance.

3 Member States shall require that where investment firms propose to provide portfolio management services to a retail client or potential retail client, they provide the client, in addition

to the information required under paragraph 1, with such of the following information as is applicable:

- a information on the method and frequency of valuation of the financial instruments in the client portfolio;
- b details of any delegation of the discretionary management of all or part of the financial instruments or funds in the client portfolio;
- c a specification of any benchmark against which the performance of the client portfolio will be compared;
- d the types of financial instrument that may be included in the client portfolio and types of transaction that may be carried out in such instruments, including any limits;
- e the management objectives, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion.

Article 31

(second indent of Article 19(3) of Directive 2004/39/ EC) Information about financial instruments

1 Member States shall require investment firms to provide clients or potential clients with a general description of the nature and risks of financial instruments, taking into account, in particular, the client's categorisation as either a retail client or a professional client. That description must explain the nature of the specific type of instrument concerned, as well as the risks particular to that specific type of instrument in sufficient detail to enable the client to take investment decisions on an informed basis.

2 The description of risks shall include, where relevant to the specific type of instrument concerned and the status and level of knowledge of the client, the following elements:

- a the risks associated with that type of financial instrument including an explanation of leverage and its effects and the risk of losing the entire investment;
- b the volatility of the price of such instruments and any limitations on the available market for such instruments;
- c the fact that an investor might assume, as a result of transactions in such instruments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the instruments;
- d any margin requirements or similar obligations, applicable to instruments of that type.

Member States may specify the precise terms, or the contents, of the description of risks required under this paragraph.

3 If an investment firm provides a retail client or potential retail client with information about a financial instrument that is the subject of a current offer to the public and a prospectus has been published in connection with that offer in accordance with Directive 2003/71/EC, that firm shall inform the client or potential client where that prospectus is made available to the public.

4 Where the risks associated with a financial instrument composed of two or more different financial instruments or services are likely to be greater than the risks associated with any of the components, the investment firm shall provide an adequate description of the components of that instrument and the way in which its interaction increases the risks.

5 In the case of financial instruments that incorporate a guarantee by a third party, the information about the guarantee shall include sufficient detail about the guarantor and the

guarantee to enable the retail client or potential retail client to make a fair assessment of the guarantee.

Article 32

(first indent of Article 19(3) of Directive 2004/39/EC) Information requirements concerning safeguarding of client financial instruments or client funds

1 Member States shall ensure that, where investment firms hold financial instruments or funds belonging to retail clients, they provide those retail clients or potential retail clients with such of the information specified in paragraphs 2 to 7 as is relevant.

2 The investment firm shall inform the retail client or potential retail client where the financial instruments or funds of that client may be held by a third party on behalf of the investment firm and of the responsibility of the investment firm under the applicable national law for any acts or omissions of the third party and the consequences for the client of the insolvency of the third party.

3 Where financial instruments of the retail client or potential retail client may, if permitted by national law, be held in an omnibus account by a third party, the investment firm shall inform the client of this fact and shall provide a prominent warning of the resulting risks.

4 The investment firm shall inform the retail client or potential retail client where it is not possible under national law for client financial instruments held with a third party to be separately identifiable from the proprietary financial instruments of that third party or of the investment firm and shall provide a prominent warning of the resulting risks.

5 The investment firm shall inform the client or potential client where accounts that contain financial instruments or funds belonging to that client or potential client are or will be subject to the law of a jurisdiction other than that of a Member State and shall indicate that the rights of the client or potential client relating to those financial instruments or funds may differ accordingly.

6 An investment firm shall inform the client about the existence and the terms of any security interest or lien which the firm has or may have over the client's financial instruments or funds, or any right of set-off it holds in relation to those instruments or funds. Where applicable, it shall also inform the client of the fact that a depository may have a security interest or lien over, or right of set-off in relation to those instruments or funds.

7 An investment firm, before entering into securities financing transactions in relation to financial instruments held by it on behalf of a retail client, or before otherwise using such financial instruments for its own account or the account of another client, shall in good time before the use of those instruments provide the retail client, in a durable medium, with clear, full and accurate information on the obligations and responsibilities of the investment firm with respect to the use of those financial instruments, including the terms for their restitution, and on the risks involved.

*Article 33***(fourth indent of Article 19(3) of Directive 2004/39/
EC) Information about costs and associated charges**

Member States shall require investment firms to provide their retail clients and potential retail clients with information on costs and associated charges that includes such of the following elements as are relevant:

- (a) the total price to be paid by the client in connection with the financial instrument or the investment service or ancillary service, including all related fees, commissions, charges and expenses, and all taxes payable via the investment firm or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the client can verify it;
- (b) where any part of the total price referred to in point (a) is to be paid in or represents an amount of foreign currency, an indication of the currency involved and the applicable currency conversion rates and costs;
- (c) notice of the possibility that other costs, including taxes, related to transactions in connection with the financial instrument or the investment service may arise for the client that are not paid via the investment firm or imposed by it;
- (d) the arrangements for payment or other performance.

For the purposes of point (a), the commissions charged by the firm shall be itemised separately in every case.

*Article 34***(second and fourth indent of Article 19(3) of Directive 2004/39/
EC) Information drawn up in accordance with Directive 85/611/EEC**

1 Member States shall ensure that in respect of units in a collective investment undertaking covered by Directive 85/611/EEC, a simplified prospectus complying with Article 28 of that Directive is regarded as appropriate information for the purposes of the second indent of Article 19(3) of Directive 2004/39/EC.

2 Member States shall ensure that in respect of units in a collective investment undertaking covered by Directive 85/611/EEC, a simplified prospectus complying with Article 28 of that Directive is regarded as appropriate information for the purposes of the fourth indent of Article 19(3) of Directive 2004/39/EC with respect to the costs and associated charges related to the UCITS itself, including the exit and entry commissions.

SECTION 3

Assessment of suitability and appropriateness

Article 35

(Article 19(4) of Directive 2004/39/EC) Assessment of suitability

1 Member States shall ensure that investment firms obtain from clients or potential clients such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:

- a it meets the investment objectives of the client in question;
- b it is such that the client is able financially to bear any related investment risks consistent with his investment objectives;
- c it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

2 Where an investment firm provides an investment service to a professional client it shall be entitled to assume that, in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge for the purposes of paragraph 1(c).

Where that investment service consists in the provision of investment advice to a professional client covered by Section 1 of Annex II to Directive 2004/39/EC, the investment firm shall be entitled to assume for the purposes of paragraph 1(b) that the client is able financially to bear any related investment risks consistent with the investment objectives of that client.

3 The information regarding the financial situation of the client or potential client shall include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

4 The information regarding the investment objectives of the client or potential client shall include, where relevant, information on the length of time for which the client wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

5 Where, when providing the investment service of investment advice or portfolio management, an investment firm does not obtain the information required under Article 19(4) of Directive 2004/39/EC, the firm shall not recommend investment services or financial instruments to the client or potential client.

Article 36

(Article 19(5) of Directive 2004/39/EC) Assessment of appropriateness

Member States shall require investment firms, when assessing whether an investment service as referred to in Article 19(5) of Directive 2004/39/EC is appropriate for a client, to determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded.

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For those purposes, an investment firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client.

Article 37

(Article 19(4) and (5) of Directive 2004/39/EC) Provisions common to the assessment of suitability or appropriateness

1 Member States shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:

- a the types of service, transaction and financial instrument with which the client is familiar;
- b the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;
- c the level of education, and profession or relevant former profession of the client or potential client.

2 An investment firm shall not encourage a client or potential client not to provide information required for the purposes of Article 19(4) and (5) of Directive 2004/39/EC.

3 An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

Article 38

(first indent of Article 19(6) of Directive 2004/39/ EC) Provision of services in non-complex instruments

A financial instrument which is not specified in the first indent of Article 19(6) of Directive 2004/39/EC shall be considered as non-complex if it satisfies the following criteria:

- (a) it does not fall within Article 4(1)(18)(c) of, or points (4) to (10) of Section C of Annex I to, Directive 2004/39/EC;
- (b) there are frequent opportunities to dispose of, redeem, or otherwise realise that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;
- (c) it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument;
- (d) adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

Article 39

(Article 19(1) and 19(7) of Directive 2004/39/EC) Retail client agreement

Member States shall require an investment firm that provides an investment service other than investment advice to a new retail client for the first time after the date of application of this Directive to enter into a written basic agreement, in paper or another durable medium, with the client setting out the essential rights and obligations of the firm and the client.

The rights and duties of the parties to the agreement may be incorporated by reference to other documents or legal texts.

SECTION 4

Reporting to clients

Article 40

(Article 19(8) of Directive 2004/39/EC) Reporting obligations in respect of execution of orders other than for portfolio management

1 Member States shall ensure that where investment firms have carried out an order, other than for portfolio management, on behalf of a client, they take the following action in respect of that order:

- a the investment firm must promptly provide the client, in a durable medium, with the essential information concerning the execution of that order;
- b in the case of a retail client, the investment firm must send the client a notice in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or, if the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

Point (b) shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the retail client by another person.

Points (a) and (b) shall not apply where orders executed on behalf of clients relate to bonds funding mortgage loan agreements with the said clients, in which case the report on the transaction shall be made at the same time as the terms of the mortgage loan are communicated, but no later than one month after the execution of the order.

2 In addition to the requirements under paragraph 1, Member States shall require investment firms to supply the client, on request, with information about the status of his order.

3 Member States shall ensure that, in the case of orders for a retail clients relating to units or shares in a collective investment undertaking which are executed periodically, investment firms either take the action specified in point (b) of paragraph 1 or provide the retail client, at least once every six months, with the information listed in paragraph 4 in respect of those transactions.

4 The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable and, where relevant, in accordance with Table 1 of Annex I to Regulation (EC) No 1287/2006:

- a the reporting firm identification;
- b the name or other designation of the client;
- c the trading day;
- d the trading time;
- e the type of the order;
- f the venue identification;
- g the instrument identification;
- h the buy/sell indicator;
- i the nature of the order if other than buy/sell;
- j the quantity;
- k the unit price;
- l the total consideration;
- m a total sum of the commissions and expenses charged and, where the retail client so requests, an itemised breakdown;
- n the client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the client;
- o if the client's counterparty was the investment firm itself or any person in the investment firm's group or another client of the investment firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading.

For the purposes of point (k), where the order is executed in tranches, the investment firm may supply the client with information about the price of each tranche or the average price. Where the average price is provided, the investment firm shall supply the retail client with information about the price of each tranche upon request.

5 The investment firm may provide the client with the information referred to in paragraph 4 using standard codes if it also provides an explanation of the codes used.

Article 41

(Article 19(8) of Directive 2004/39/EC) Reporting obligations in respect of portfolio management

1 Member States shall require investment firms which provide the service of portfolio management to clients to provide each such client with a periodic statement in a durable medium of the portfolio management activities carried out on behalf of that client unless such a statement is provided by another person.

2 In the case of retail clients, the periodic statement required under paragraph 1 shall include, where relevant, the following information:

- a the name of the investment firm;
- b the name or other designation of the retail client's account;
- c a statement of the contents and the valuation of the portfolio, including details of each financial instrument held, its market value, or fair value if market value is unavailable and the cash balance at the beginning and at the end of the reporting period, and the performance of the portfolio during the reporting period;

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- d the total amount of fees and charges incurred during the reporting period, itemising at least total management fees and total costs associated with execution, and including, where relevant, a statement that a more detailed breakdown will be provided on request;
- e a comparison of performance during the period covered by the statement with the investment performance benchmark (if any) agreed between the investment firm and the client;
- f the total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio;
- g information about other corporate actions giving rights in relation to financial instruments held in the portfolio;
- h for each transaction executed during the period, the information referred to in Article 40(4)(c) to (l) where relevant, unless the client elects to receive information about executed transactions on a transaction-by-transaction basis, in which case paragraph 4 of this Article shall apply.

3 In the case of retail clients, the periodic statement referred to in paragraph 1 shall be provided once every six months, except in the following cases:

- a where the client so requests, the periodic statement must be provided every three months;
- b in cases where paragraph 4 applies, the periodic statement must be provided at least once every 12 months;
- c where the agreement between an investment firm and a retail client for a portfolio management service authorises a leveraged portfolio, the periodic statement must be provided at least once a month.

Investment firms shall inform retail clients that they have the right to make requests for the purposes of point (a).

However, the exception provided for in point (b) shall not apply in the case of transactions in financial instruments covered by Article 4(1)(18)(c) of, or any of points 4 to 10 of Section C in Annex I to, Directive 2004/39/EC.

4 Member States shall require investment firms, in cases where the client elects to receive information about executed transactions on a transaction-by-transaction basis, to provide promptly to the client, on the execution of a transaction by the portfolio manager, the essential information concerning that transaction in a durable medium.

Where the client concerned is a retail client, the investment firm must send him a notice confirming the transaction and containing the information referred to in Article 40(4) no later than the first business day following that execution or, if the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

The second subparagraph shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the retail client by another person.

Article 42

(Article 19(8) of Directive 2004/39/EC) Additional reporting obligations for portfolio management or contingent liability transactions

Member States shall ensure that where investment firms provide portfolio management transactions for retail clients or operate retail client accounts that include an uncovered

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open position in a contingent liability transaction, they also report to the retail client any losses exceeding any predetermined threshold, agreed between the firm and the client, no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.

Article 43

(Article 19(8) of Directive 2004/39/EC) Statements of client financial instruments or client funds

1 Member States shall require investment firms that hold client financial instruments or client funds to send at least once a year, to each client for whom they hold financial instruments or funds, a statement in a durable medium of those financial instruments or funds unless such a statement has been provided in any other periodic statement.

The first subparagraph shall not apply to a credit institution authorised under Directive 2000/12/EC in respect of deposits within the meaning of that Directive held by that institution.

2 The statement of client assets referred to in paragraph 1 shall include the following information:

- a details of all the financial instruments or funds held by the investment firm for the client at the end of the period covered by the statement;
- b the extent to which any client financial instruments or client funds have been the subject of securities financing transactions;
- c the extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions, and the basis on which that benefit has accrued.

In cases where the portfolio of a client includes the proceeds of one or more unsettled transactions, the information referred to in point (a) may be based either on the trade date or the settlement date, provided that the same basis is applied consistently to all such information in the statement.

3 Member States shall permit investment firms which hold financial instruments or funds and which carry out the service of portfolio management for a client to include the statement of client assets referred to in paragraph 1 in the periodic statement it provides to that client pursuant to Article 41(1).

SECTION 5

Best execution

Article 44

(Articles 21(1) and 19(1) of Directive 2004/39/EC) Best execution criteria

1 Member States shall ensure that, when executing client orders, investment firms take into account the following criteria for determining the relative importance of the factors referred to in Article 21(1) of Directive 2004/39/EC:

- a the characteristics of the client including the categorisation of the client as retail or professional;

- b the characteristics of the client order;
- c the characteristics of financial instruments that are the subject of that order;
- d the characteristics of the execution venues to which that order can be directed.

For the purposes of this Article and Article 46, 'execution venue' means a regulated market, an MTF, a systematic internaliser, or a market maker or other liquidity provider or an entity that performs a similar function in a third country to the functions performed by any of the foregoing.

2 An investment firm satisfies its obligation under Article 21(1) of Directive 2004/39/EC to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order or a specific aspect of an order following specific instructions from the client relating to the order or the specific aspect of the order.

3 Where an investment firm executes an order on behalf of a retail client, the best possible result shall be determined in terms of the total consideration, representing the price of the financial instrument and the costs related to execution, which shall include all expenses incurred by the client which are directly related to the execution of the order, including execution venue fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order.

For the purposes of delivering best execution where there is more than one competing venue to execute an order for a financial instrument, in order to assess and compare the results for the client that would be achieved by executing the order on each of the execution venues listed in the firm's order execution policy that is capable of executing that order, the firm's own commissions and costs for executing the order on each of the eligible execution venues shall be taken into account in that assessment.

4 Member States shall require that investment firms do not structure or charge their commissions in such a way as to discriminate unfairly between execution venues.

5 Before 1 November 2008 the Commission shall present a report to the European Parliament and to the Council on the availability, comparability and consolidation of information concerning the quality of execution of various execution venues.

Article 45

(Article 19(1) of Directive 2004/39/EC) Duty of investment firms carrying out portfolio management and reception and transmission of orders to act in the best interests of the client

1 Member States shall require investment firms, when providing the service of portfolio management, to comply with the obligation under Article 19(1) of Directive 2004/39/EC to act in accordance with the best interests of their clients when placing orders with other entities for execution that result from decisions by the investment firm to deal in financial instruments on behalf of its client.

2 Member States shall require investment firms, when providing the service of reception and transmission of orders, to comply with the obligation under Article 19(1) of Directive 2004/39/EC to act in accordance with the best interests of their clients when transmitting client orders to other entities for execution.

3 Member States shall ensure that, in order to comply with paragraphs 1 or 2, investment firms take the actions mentioned in paragraphs 4 to 6.

Status: This is the original version (as it was originally adopted).

4 Investment firms shall take all reasonable steps to obtain the best possible result for their clients taking into account the factors referred to in Article 21(1) of Directive 2004/39/EC. The relative importance of these factors shall be determined by reference to the criteria set out in Article 44(1) and, for retail clients, to the requirement under Article 44(3).

An investment firm satisfies its obligations under paragraph 1 or 2, and is not required to take the steps mentioned in this paragraph, to the extent that it follows specific instructions from its client when placing an order with, or transmitting an order to, another entity for execution.

5 Investment firms shall establish and implement a policy to enable them to comply with the obligation in paragraph 4. The policy shall identify, in respect of each class of instruments, the entities with which the orders are placed or to which the investment firm transmits orders for execution. The entities identified must have execution arrangements that enable the investment firm to comply with its obligations under this Article when it places or transmits orders to that entity for execution.

Investment firms shall provide appropriate information to their clients on the policy established in accordance with this paragraph.

6 Investment firms shall monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 5 and, in particular, the execution quality of the entities identified in that policy and, where appropriate, correct any deficiencies.

In addition, investment firms shall review the policy annually. Such a review shall also be carried out whenever a material change occurs that affects the firm's ability to continue to obtain the best possible result for their clients.

7 This Article shall not apply when the investment firm that provides the service of portfolio management and/or reception and transmission of orders also executes the orders received or the decisions to deal on behalf of its client's portfolio. In those cases Article 21 of Directive 2004/39/EC applies.

Article 46

(Article 21(3) and (4) of Directive 2004/39/EC) Execution policy

1 Member States shall ensure that investment firms review annually the execution policy established pursuant to Article 21(2) of Directive 2004/39/EC, as well as their order execution arrangements.

Such a review shall also be carried out whenever a material change occurs that affects the firm's ability to continue to obtain the best possible result for the execution of its client orders on a consistent basis using the venues included in its execution policy.

2 Investment firms shall provide retail clients with the following details on their execution policy in good time prior to the provision of the service:

- a an account of the relative importance the investment firm assigns, in accordance with the criteria specified in Article 44(1), to the factors referred to in Article 21(1) of Directive 2004/39/EC, or the process by which the firm determines the relative importance of those factors;
- b a list of the execution venues on which the firm places significant reliance in meeting its obligation to take all reasonable steps to obtain on a consistent basis the best possible result for the execution of client orders;

- c a clear and prominent warning that any specific instructions from a client may prevent the firm from taking the steps that it has designed and implemented in its execution policy to obtain the best possible result for the execution of those orders in respect of the elements covered by those instructions.

That information shall be provided in a durable medium, or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

SECTION 6

Client order handling

Article 47

(Articles 22(1) and 19(1) of Directive 2004/39/EC) General principles

1 Member States shall require investment firms to satisfy the following conditions when carrying out client orders:

- a they must ensure that orders executed on behalf of clients are promptly and accurately recorded and allocated;
- b they must carry out otherwise comparable client orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise;
- c they must inform a retail client about any material difficulty relevant to the proper carrying out of orders promptly upon becoming aware of the difficulty.

2 Where an investment firm is responsible for overseeing or arranging the settlement of an executed order, it shall take all reasonable steps to ensure that any client financial instruments or client funds received in settlement of that executed order are promptly and correctly delivered to the account of the appropriate client.

3 An investment firm shall not misuse information relating to pending client orders, and shall take all reasonable steps to prevent the misuse of such information by any of its relevant persons.

Article 48

(Articles 22(1) and 19(1) of Directive 2004/39/EC) Aggregation and allocation of orders

1 Member States shall not permit investment firms to carry out a client order or a transaction for own account in aggregation with another client order unless the following conditions are met:

- a it must be unlikely that the aggregation of orders and transactions will work overall to the disadvantage of any client whose order is to be aggregated;
- b it must be disclosed to each client whose order is to be aggregated that the effect of aggregation may work to its disadvantage in relation to a particular order;
- c an order allocation policy must be established and effectively implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders and transactions, including how the volume and price of orders determines allocations and the treatment of partial executions.

Status: This is the original version (as it was originally adopted).

2 Member States shall ensure that where an investment firm aggregates an order with one or more other client orders and the aggregated order is partially executed, it allocates the related trades in accordance with its order allocation policy.

Article 49

(Articles 22(1) and 19(1) of Directive 2004/39/ EC) Aggregation and allocation of transactions for own account

1 Member States shall ensure that investment firms which have aggregated transactions for own account with one or more client orders do not allocate the related trades in a way that is detrimental to a client.

2 Member States shall require that, where an investment firm aggregates a client order with a transaction for own account and the aggregated order is partially executed, it allocates the related trades to the client in priority to the firm.

However, if the firm is able to demonstrate on reasonable grounds that without the combination it would not have been able to carry out the order on such advantageous terms, or at all, it may allocate the transaction for own account proportionally, in accordance with its order allocation policy referred to in Article 48(1)(c).

3 Member States shall require investment firms, as part of the order allocation policy referred to in Article 48(1)(c), to put in place procedures designed to prevent the reallocation, in a way that is detrimental to the client, of transactions for own account which are executed in combination with client orders.

SECTION 7

Eligible counterparties

Article 50

(Article 24(3) of Directive 2004/39/EC) Eligible counterparties

1 Member States may recognise an undertaking as an eligible counterparty if that undertaking falls within a category of clients who are to be considered professional clients in accordance with paragraphs 1, 2 and 3 of Section I of Annex II to Directive 2004/39/EC, excluding any category which is explicitly mentioned in Article 24(2) of that Directive.

On request, Member States may also recognise as eligible counterparties undertakings which fall within a category of clients who are to be considered professional clients in accordance with Section II of Annex II to Directive 2004/39/EC. In such cases, however, the undertaking concerned shall be recognised as an eligible counterparty only in respect of the services or transactions for which it could be treated as a professional client.

2 Where, pursuant to the second subparagraph of Article 24(2) of Directive 2004/39/EC, an eligible counterparty requests treatment as a client whose business with an investment firm is subject to Articles 19, 21 and 22 of that Directive, but does not expressly request treatment as a retail client, and the investment firm agrees to that request, the firm shall treat that eligible counterparty as a professional client.

However, where that eligible counterparty expressly requests treatment as a retail client, the provisions in respect of requests of non-professional treatment specified in the second, third and fourth sub-paragraphs of Section I of Annex II to Directive 2004/39/EC shall apply.

SECTION 8

Record-keeping

Article 51

(Article 13(6) of Directive 2004/39(EC) Retention of records

1 Member States shall require investment firms to retain all the records required under Directive 2004/39/EC and its implementing measures for a period of at least five years.

Additionally, records which set out the respective rights and obligations of the investment firm and the client under an agreement to provide services, or the terms on which the firm provides services to the client, shall be retained for at least the duration of the relationship with the client.

However, competent authorities may, in exceptional circumstances, require investment firms to retain any or all of those records for such longer period as is justified by the nature of the instrument or transaction, if that is necessary to enable the authority to exercise its supervisory functions under Directive 2004/39/EC.

Following the termination of the authorisation of an investment firm, Member States or competent authorities may require the firm to retain records for the outstanding term of the five year period required under the first subparagraph.

2 The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

- a the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;
- b it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
- c it must not be possible for the records otherwise to be manipulated or altered.

3 The competent authority of each Member State shall draw up and maintain a list of the minimum records investment firms are required to keep under Directive 2004/39/EC and its implementing measures.

4 Record-keeping obligations under Directive 2004/39/EC and in this Directive are without prejudice to the right of Member States to impose obligations on investment firms relating to the recording of telephone conversations or electronic communications involving client orders.

5 Before 31 December 2009 the Commission shall, in the light of discussions with the Committee of European Securities Regulators, report to the European Parliament and the Council on the continued appropriateness of the provisions of paragraph 4.

SECTION 9

Defined terms for the purposes of Directive 2004/39/EC*Article 52***(Article 4(1)(4) of Directive 2004/39/EC) Investment advice**

For the purposes of the definition of ‘investment advice’ in Article 4(1)(4) of Directive 2004/39/EC, a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.

That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:

- (a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;
- (b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.

(1) [OJ L 271, 9.10.2002, p. 16.](#)