

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 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

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- 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.

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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

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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.

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