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COMMISSION DELEGATED REGULATION (EU) .../...

of 11.4.2022

supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards for own funds requirement for investment firms based on fixed overheads

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 13(4) of Regulation (EU) 2019/2033 ('the Regulation') empowers the Commission to adopt, following submission of draft standards by the European Banking Authority (EBA), and in accordance with Articles 10 to 14 of Regulation No (EU) 1093/2010, delegated acts to specify the calculation of the fixed overheads requirement and to define the notion of a material change.

In accordance with Article 10(1) of Regulation No (EU) 1093/2010 establishing the EBA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 13(4) of the Regulation. A consultation paper was published on the EBA internet site on 4 June 2020, and the consultation closed on 4 September 2020. Moreover, the EBA worked in consultation with the European Securities and Markets Authority (ESMA). In addition, it invited the EBA's Banking Stakeholder Group set up in accordance with Article 37 of Regulation No (EU) 1093/2010 to provide advice on the draft technical standards. Together with the draft technical standards, the EBA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with Article 10(1), third subparagraph, of Regulation No (EU) 1093/2010, the EBA has submitted its Impact Assessment, including its analysis of the costs and benefits, related to the draft technical standards submitted to the Commission. This analysis is available at <https://eba.europa.eu/regulation-and-policy/investment-firms/regulatory-technical-standards-prudential-requirements-investment-firms>, pages 60-85 of the Final Draft Regulatory Technical Standards package.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The mandate under Article 13(4) of the Regulation asks the EBA to develop the draft RTS to supplement the calculation of the fixed overhead requirement. In particular, the draft RTS further specify the deductions to be applied for the calculation from the figures resulting from the applicable accounting standards that are the basis for the calculation of the fixed overheads.

Since the mandate is similar to the mandate set out in Article 97(4) of the CRR, these draft RTS are based on the Commission Delegated Regulation (EU) 2015/488, taking into account the broader scope of application and the necessary additional specifications. On a similar basis of that delegated regulation, criteria are introduced specifying the notion of material change in the activity of an investment firm.

Furthermore, the draft RTS clarify the additional items to be deducted from the total expenses by commodity and emission allowance dealers on account of the particularity of the activities conducted by those undertakings.

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THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements for investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014¹, and in particular the fourth subparagraph of Article 13(4) thereof,

Whereas:

- (1) Considering that not all investment firms are required to have audited financial statements, rules specifying own funds requirement for investment firms based on fixed overheads should allow investment firms to calculate fixed overheads requirement also on the basis of non-audited financial statements, where investment firms are not obliged to have audited financial statements. Furthermore, where the audited financial statements do not cover a period of twelve months, a calculation should be performed by the investment firm to produce an equivalent annual amount, in order to ensure consistency with the requirement of Article 13(1) of Regulation (EU) 2019/2033.
- (2) Given that the difference between the gross and net profits with regard to a firm's financial situation are represented by the fixed costs of running the firm's business, the deduction from the total costs of an investment firm of the employees', directors' and partners' shares in profit referred to in Article 13(4) of Regulation (EU) 2019/2033 should be understood to refer to the net profits.
- (3) Moreover, since payment of staff bonuses and other remuneration may be deferred over time and could follow different agreement structures, those staff bonuses and other remuneration should be considered as dependent on net profit where this would have no impact on the firm's capital position, either due to payments having already been made or due to the absence of the obligation of payment in case of absence of net profit.
- (4) Investment firms are to include fixed costs of third parties in the calculation of their total expenses. However, where those costs are not fully incurred on behalf of the investment firms, they should be included up to the amount attributable to the investment firm.

¹ OJ L 314, 5.12.2019, p. 1.

- (5) Not all investment firms use International Financial Reporting Standards and there are differences in the applicable accounting standards in the calculation of the total costs. Elements to be deducted by investment firms from their total expenses used for the calculation of the fixed overheads requirement should be further specified, in addition to those provided in Article 13(4) of Regulation (EU) 2019/2033, in order to ensure comparability in the calculation of the fixed overheads requirement.
- (6) Consistently with the particularity of the business of commodity and emission allowance dealers, expenses related to raw materials should be deducted by commodity and emission allowance dealers from the total expenses used in calculating their fixed overheads requirement.
- (7) In case an investment firm that is a market maker is wound down, it stops providing its market making services and hence no longer incurs the trading fees it normally incurs when providing those services. So those fees should be excluded from the total expenses used to calculate the fixed overheads requirement. At the same time, in case of a wind down, the market maker may continue to have an inventory of securities that it normally uses in its market making activities. If that inventory is liquidated, it would give rise to trading fees that should be included in the total expenses used for calculating the fixed overheads requirement.
- (8) Fixed overheads can evolve at a similar pace as the activities of the investment firm, and in that case should not be considered material changes for the purposes of Article 13(2) of Regulation (EU) 2019/2033. However, there may be circumstances where changes, such as shifts in the business models or mergers and acquisitions, may occur and result in significant variations in the projected fixed overheads. Therefore, rules specifying own funds requirement for investment firms based on fixed overheads should establish objective thresholds based on the projected fixed overheads for the purpose of specifying the notion of material change.
- (9) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission after having consulted the European Securities and Markets Authority.
- (10) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council².

HAS ADOPTED THIS REGULATION:

Article 1
Calculation of the fixed overheads requirement

1. For the purposes of Article 13(1) of Regulation (EU) 2019/2033, the ‘figures resulting from the applicable accounting framework’ shall refer to figures of an investment firm’s most recent audited annual financial statements after distribution of profits or annual financial statements where investment firms are not obliged to have audited financial statements.

² Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

2. Where the investment firm's most recent audited financial statements do not reflect a twelve-month period, the investment firm shall divide the amounts included in those statements by the number of months that are reflected in those financial statements and shall subsequently multiply the result by twelve, so as to produce an equivalent annual amount.
3. For the purposes of Article 13(4), first subparagraph, point (b), of Regulation (EU) 2019/2033, employees', directors' and partners' shares in profits shall be calculated on the basis of the net profits.
4. For the purposes of Article 13(4), first subparagraph, point (a), of Regulation (EU) 2019/2033, staff bonuses and other remuneration shall be considered to depend on the net profit of the investment firm in the respective year where both of the following conditions are met:
 - (a) the staff bonuses or other remuneration to be deducted have already been paid to employees in the year preceding the year of payment, or the payment of the staff bonuses or other remuneration to employees will have no impact on the firm's capital position in the year of payment;
 - (b) with respect to the current year and future years, the firm is not obliged to award or allocate further bonuses or other payments in the form of remuneration unless it makes a net profit in that year.
5. Where third parties, including tied agents, incurred fixed expenses, on behalf of the investment firms, that are not already included within the total expenses in the annual financial statements referred to in paragraph 1, those fixed expenses shall be added to the total expenses of the investment firm. Where a breakdown of the third party's expenses is available, an investment firm shall add to the figure representing the total expenses only the share of those fixed expenses applicable to the investment firm. Where such a breakdown is not available, an investment firm shall add to the figure representing the total expenses only its share of the third party's expenses as it results from the business plan of the investment firm.
6. In addition to the items for deduction referred to in Article 13(4) of Regulation (EU) 2019/2033, the following items shall also be deducted from the total expenses, where they are included under total expenses in accordance with the relevant accounting framework:
 - (a) fees, brokerage and other charges paid to central counterparties, exchanges and other trading venues and intermediate brokers for the purposes of executing, registering or clearing transactions, only where they are directly passed on and charged to customers. Those shall not include fees and other charges necessary to maintain membership or otherwise meet loss-sharing financial obligations to central counterparties, exchanges and other trading venues;
 - (b) interest paid to customers on client money, where there is no obligation of any kind to pay such interest;
 - (c) expenditures from taxes where they fall due in relation to the annual profits of the investment firm;
 - (d) losses from trading on own account in financial instruments;
 - (e) payments related to contract-based profit and loss transfer agreements according to which the investment firm is obliged to transfer, following the

preparation of its annual financial statements, its annual result to the parent undertaking;

- (f) payments into a fund for general banking risk in accordance with Article 26(1), point (f), of Regulation (EU) 575/2013 of the European Parliament and of the Council³;
- (g) expenses related to items that have already been deducted from own funds in accordance with Article 36(1) of Regulation (EU) 575/2013.

In addition to the items listed in the first subparagraph, market makers, as defined in Article 4(1), point (7), of Directive 2014/65/EU of the European Parliament and of the Council⁴, may also deduct the following amount (A):

$A = B - 4 \times C$, where:

B = trading fees paid by the market maker for transactions for which the market maker provides market-making activities (yearly amount), where those fees have not directly been passed on and charged to customers;

C = trading fees that would be incurred to sell a portfolio of securities equivalent to the largest end-of-day inventory of securities, held by the market maker for market-making purposes, over the preceding year.

Article 2

Calculation of the fixed overheads requirement for commodity and emission allowance dealers

Commodity and emission allowance dealers may deduct expenditure on raw materials in connection with an investment firm trading in derivatives of the underlying commodity.

Article 3

The notion of material change

A material change referred to in Article 13(2) of Regulation (EU) 2019/2033 shall be considered to have occurred where either of the following conditions are met:

- (a) a change, either in the form of an increase or in the form of a decrease, in the business activity of the firm results in a change of 30% or greater in the firm's projected fixed overheads of the current year;
- (b) a change, either in the form of an increase or in the form of a decrease, in the business activity of the firm results in changes in the firm's own funds requirements based on projected fixed overheads of the current year equal to or greater than EUR 2 million.

³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

Article 4
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11.4.2022

For the Commission
The President
Ursula VON DER LEYEN