



February 2016

UCITS V UPDATE – TIMING REQUIREMENTS

On 1 February 2016, ESMA issued an updated UCITS Q&A to address certain questions relating to the implementation of the UCITS V Directive. This is a welcome development as it sheds light on a number of issues around documentation updates and, subject to any local transposing regulations and guidance issued by the Central Bank, will provide more time for UCITS to address the implementation of UCITS V.

Depository Agreements

One of the challenges of updating existing depository agreements to reflect the new duties and liability of the depository under UCITS V has been the delay in the implementation of the UCITS V delegated acts, which will set out the minimum particulars that need to be included in the written contract with the depository. The draft UCITS V delegated acts, published on 17th December 2015, are expected to come into effect in September / October 2016. According to ESMA, depository contracts should be revised “promptly” in accordance with any transitional arrangements outlined in the UCITS V delegated acts.

UCITS V contains provisions which prescribe the liability of depositaries, to include a strict liability standard in the context of a loss of financial instrument held in custody. If, after 18 March 2016, a depository agreement contains liability provisions inconsistent with the liability provisions under UCITS V, ESMA notes that these provisions will be void and the UCITS V liability provisions will apply instead. The ESMA Q&A goes on to state that the liability provisions

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in existing depositary agreements should be amended to reflect the UCITS V depositary liability provisions when those depositary contracts are revised to comply with the UCITS V delegated acts.

Accordingly, there is no requirement to have an updated depositary agreement in place by 18th March, 2016. Nonetheless, in order to provide for contractual certainty, relevant parties may still consider updating depositary agreements as soon as practicable to reflect the liability provisions of UCITS V. Indeed, certain depositaries are already indicating that they will still strive for the 18th March deadline.

Noting ESMA's advice as outlined in the recent Q&A, the Central Bank has clarified its requirements for updating existing depositary agreements. The Central Bank will not carry out a detailed review of any amendments to depositary agreements to reflect UCITS V and will facilitate a fast track procedure whereby amendments can be filed, subject to receipt of a written certification from the depositary in a format prescribed by the Central Bank.

Prospectus

UCITS V requires the prospectus of a UCITS to include either details of its up-to-date remuneration policy or a summary of the remuneration policy and a statement to the effect that the details of the policy are available by means of a website. Certain disclosures are also required in relation to the depositary.

ESMA has confirmed that, subject to national law requirements, there is no requirement to issue a revised prospectus by 18 March 2016, to take into account the UCITS V amendments. A UCITS may update its prospectus at the next occasion it is revised for another purpose or in any event by 18 March 2017, at the latest.

In the meantime, stakeholders will also need to consider the prospectus disclosures required under Irish domestic legislation, such as the Investor Money Regulations and the Central Bank UCITS Regulations 2015. It may be that prospectus updates required to address the foregoing could automatically trigger a UCITS V update, which would have the unintended consequence of removing the flexibility offered by ESMA. Industry has raised this issue with the Central Bank and guidance is expected shortly.

KIIDS

UCITS are required to complete an annual update of its existing KIIDs. The deadline for the 2016 annual update is fast approaching on 19 February, 2016. UCITS V requires the KIID to include an additional statement in relation to the UCITS' remuneration policy.

ESMA has clarified that, subject to national law requirements, there is no requirement to carry out a further KIID update by 18 March, 2016 to take into account the UCITS V amendments. A UCITS is permitted to update the KIID with the remuneration disclosure at the next annual update after 18 March 2016, or on the first occasion after 18 March 2016, on which the KIID is revised or replaced for another purpose (if the information is available at that point in time).

However, in the meantime, UCITS should make the remuneration arrangements available on a “relevant website” as soon as it becomes available.

Annual Report

UCITS V requires the UCITS annual report to include certain remuneration-related information, to include the following:

- (a) the total amount of remuneration for the financial year, split into fixed and variable remuneration paid by the management company and by the investment company to its staff, and the number of beneficiaries, and where relevant, any amount paid directly by the UCITS itself, including any performance fee;
- (b) the aggregate amount of remuneration broken down by categories of employees or other members of staff; and
- (c) a description of how the remuneration and the benefits have been calculated;

ESMA has clarified that there is no requirement to include the remuneration-related information in any annual report relating to a period that ended before 18 March 2016. For annual reports relating to periods that end on or after 18 March 2016, but before the UCITS has completed its first annual performance period in which it has to comply with the UCITS V remuneration rules, the UCITS should include the remuneration-related information in the report on a “best efforts” basis and, to the extent possible, explain the basis for any omission.

Summary Timelines

Document	Deadline for UCITS V implementation
Depository Agreement	To be revised “promptly” in accordance with any transitional arrangements outlined in the UCITS V delegated acts; in practice, likely to be end Q3 2016, however, parties requiring contractual certainty may wish to update sooner.
Prospectus	The earlier of (i) 18 th March 2017, and (ii) the next occasion the prospectus is revised for any other updates.
KIID	The earlier of (i) the occasion of the 2017 annual KIID update and (ii) the first occasion after 18 March 2016, on which the KIID is revised or replaced for another purpose (if the information is available at that point in time).
Annual Report	Remuneration-related information only required in respect of accounting periods ending after 18 March, 2016.

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