

ESMA_QA_2639

Status: Forwarded to EC/Public Consultation/Other

Additional Information

Level 1 Regulation

Undertakings for Collective Investment in Transferable Securities Directive (UCITS) Directive 2009/65/EC

Topic

Disclosures

Subject Matter

Reporting obligation of auditors under Article 106 UCITS Directive

Question

It follows from the first subparagraph of Article 106(1) of the UCITS Directive that any person approved in accordance with Directive 2006/43/EC, performing in a UCITS, or in an undertaking contributing towards its business activity, the statutory audit referred to in Article 51 of Directive 78/660/EEC, Article 37 of Directive 83/349/EEC or Article 73 of this Directive or any other statutory task, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which he has become aware while carrying out that task and which is liable to bring about any of the following: (a) a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of UCITS or

undertakings contributing towards their business activity; (b) the impairment of the continuous functioning of the UCITS or an undertaking contributing towards its business activity; or (c) a refusal to certify the accounts or the expression of reservations.

Further, it follows from the second subparagraph of that Article that that person shall have a duty to report any facts and decisions of which he becomes aware in the course of carrying out a task as described in point (a) in an undertaking having close links resulting from a control relationship with the UCITS or an undertaking contributing towards its business activity, within which he is carrying out that task.

Finally, the following is set out in Article 12(1) of the Audit Regulation (Regulation 537/2014): “Statutory auditors or audit firms shall also have a duty to report any information referred to in points (a) (b) or (c) of the first subparagraph of which they become aware in the course of carrying out the statutory audit of an undertaking having close links with the public-interest entity for which they are also carrying out the statutory audit. For the purposes of this Article, ‘close links’ shall have the meaning assigned to that term in point (38) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council.”

- In cases where a UCITS management company and its parent undertaking do not have the same auditor and are located in different Member States, what are the reporting obligations of the auditor of the parent undertaking towards national competent authorities (in both Member States) in terms of findings concerning the subsidiary that could meet the aforementioned conditions set out in points (a) to (c), e.g. bringing about a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of UCITS or undertakings contributing towards their business activity? More specifically:

- If ‘that person’ expands the reporting obligation in the first sub-paragraph, does that also apply where a UCITS management company and its parent undertaking are located in different Member States?

- If “that person” expands the reporting obligation in the first subparagraph, is the parent company’s auditor required to report to the UCITS management company’s home NCA or to the NCA where the parent company is domiciled?

- How should the notion of ‘undertaking contributing towards its [a UCITS management company’s] business activity’ (as set out in the UCITS Directive) be understood? For instance, can a company, that is not an UCITS management company, under an agreement with an asset management company be considered to be as such a company, if it advises customers to invest in UCITS managed by the UCITS management company?

- How should the notion of ‘close links resulting from a control relationship’ (as set out in the UCITS Directive) between a management company on the one side, and its subsidiary or parent undertaking on the other side, be understood?

- How should the notion of ‘undertaking contributing towards its [a UCITS Management Company’s] business activity’ (as set out in the UCITS Directive) be understood?