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ANNEX 5

ANNEX

to the

proposal for a Council Decision

**on the position to be adopted, on behalf of the European Union,
within the EEA Joint Committee concerning an amendment to Annex IX
(Financial Services) to the EEA Agreement**

ANNEX 5

DECISION OF THE EEA JOINT COMMITTEE

No

of

amending Annex IX (Financial services) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area (“the EEA Agreement”), and in particular Article 98 thereof,

Whereas:

- (1) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010¹ is to be incorporated into the EEA Agreement.
- (2) Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositories, leverage, transparency and supervision² is to be incorporated into the EEA Agreement.
- (3) Commission Delegated Regulation (EU) No 694/2014 of 17 December 2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers³ is to be incorporated into the EEA Agreement.
- (4) Commission Delegated Regulation (EU) 2015/514 of 18 December 2014 on the information to be provided by competent authorities to the European Securities and Markets Authority pursuant to Article 67(3) of Directive 2011/61/EU of the European Parliament and of the Council⁴ is to be incorporated into the EEA Agreement.
- (5) Commission Implementing Regulation (EU) No 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt in under Directive 2011/61/EU of the European Parliament and of the Council⁵ is to be incorporated into the EEA Agreement.
- (6) Commission Implementing Regulation (EU) No 448/2013 of 15 May 2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM pursuant to Directive 2011/61/EU of the European Parliament and of the Council⁶ is to be incorporated into the EEA Agreement.

¹ OJ L 174, 1.7.2011, p. 1.

² OJ L 83, 22.3.2013, p. 1.

³ OJ L 183, 24.6.2014, p. 18.

⁴ OJ L 82, 27.3.2015, p. 5.

⁵ OJ L 132, 16.5.2013, p. 1.

⁶ OJ L 132, 16.5.2013, p. 3.

- (7) The EU and EEA EFTA Ministers of Finance and Economy underlined, in their conclusions⁷ of 14 October 2014 regarding the incorporation of the EU ESAs Regulations into the EEA Agreement, that, in accordance with the two-pillar structure of the EEA Agreement, the EFTA Surveillance Authority will take decisions addressed to EEA EFTA competent authorities or market operators in the EEA EFTA States, respectively. The EU ESAs will be competent to perform actions of a non-binding nature, such as adoption of recommendations and non-binding mediation, also vis-à-vis EEA EFTA competent authorities and market operators. Action on either side will be preceded by, as appropriate, consultation, coordination, or exchange of information between the EU ESAs and the EFTA Surveillance Authority.
- (8) Directive 2011/61/EU specifies cases in which the European Securities and Markets Authority (ESMA) may temporarily prohibit or restrict certain financial activities, and lays down conditions thereto, in accordance with Article 9(5) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁸. For the purposes of the EEA Agreement, these powers are to be exercised by the EFTA Surveillance Authority as regards the EFTA States, in accordance with point 31i of Annex IX to the EEA Agreement and under the conditions prescribed therein. To ensure integration of ESMA's expertise in the process and consistency between the two pillars of the EEA, such decisions of the EFTA Surveillance Authority will be adopted on the basis of drafts prepared by ESMA. This will preserve key advantages of supervision by a single authority. The Contracting Parties share the understanding that this Decision implements the agreement that was reflected in the conclusions of 14 October 2014.
- (9) Annex IX to the EEA Agreement should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

The following is inserted after point 31bac (Commission Regulation (EC) No 1287/2006) of Annex IX to the EEA Agreement:

‘31bb. **32011 L 0061**: Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:

- (a) Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, the terms “Member State(s)” and “competent authorities” shall be understood to include, in addition to their meaning in the Directive, the EFTA States and their competent authorities, respectively.
- (b) Unless otherwise provided for in this Agreement, the European Securities and Markets Authority (ESMA) and the EFTA Surveillance Authority shall cooperate, exchange information and consult each other for the purposes of the Directive, in particular prior to taking any action.

⁷ Council Conclusions on the EU and EEA EFTA Ministers of Finance and Economy, 14178/1/14 REV 1.

⁸ OJ L 331, 15.12.2010, p. 84.

- (c) References to other acts in the Directive shall apply to the extent and in the form that those acts are incorporated into this Agreement.
- (d) References to the powers of ESMA under Article 19 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council in the Directive shall be understood as referring, in the cases provided for in and in accordance with point 31i of this Annex, to the powers of the EFTA Surveillance Authority as regards the EFTA States.
- (e) As regards the EFTA States, Article 4(1)(an) shall read as follows:

“‘securitisation special purpose entities’ means entities whose sole purpose is to carry on a securitisation or securitisations within the meaning defined below, and other activities which are appropriate to accomplish that purpose.

For the purposes of this Directive, ‘securitisation’ means a transaction or scheme whereby an entity that is separate from the originator or insurance or reinsurance undertaking and is created for or serves the purpose of the transaction or scheme issues financing instruments to investors, and one or more of the following takes place:

- (a) an asset or pool of assets, or part thereof, is transferred to an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme, either by the transfer of legal title or beneficial interest of those assets from the originator or through sub-participation;
- (b) the credit risk of an asset or pool of assets, or part thereof, is transferred through the use of credit derivatives, guarantees or any similar mechanism to the investors in the financing instruments issued by an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme;
- (c) insurance risks are transferred from an insurance or reinsurance undertaking to a separate entity that is created for or serves the purpose of the transaction or scheme, whereby the entity fully funds its exposure to such risks through the issuance of financing instruments, and the repayment rights of the investors in those financing instruments are subordinated to the reinsurance obligations of the entity;

Where such financing instruments are issued, they do not represent the payment obligations of the originator, or insurance or reinsurance undertaking;”

- (f) In Article 7(5), the following subparagraph shall be added:

“ESMA shall include in the central public register referred to in the second subparagraph, under the same conditions, information on AIFMs authorised by the competent authorities of an EFTA State under this Directive, AIFs managed and/or marketed in the EEA by such AIFMs and the competent authority for each such AIFM.”

- (g) In Article 9(6) and in Article 21(6)(b), (7) and (17)(b), the words “Union law” shall be replaced by the words “the EEA Agreement”.
- (h) In Article 21(3)(c), as regards the EFTA States, the words “21 July 2011” shall read “the date of entry into force of Decision of the EEA Joint Committee No .../... of ... [this decision]”.
- (i) In Article 43:

- (i) in paragraph 1, the words “of Union law” shall read “applicable pursuant to the EEA Agreement”;
 - (ii) in paragraph 2, as regards the EFTA States, the words “by 22 July 2014” shall read “within eighteen months of the date of entry into force of Decision of the EEA Joint Committee No .../... of ... [this decision]”.
- (j) In Article 47:
- (i) in the second subparagraph of paragraph 1 and in paragraphs 2, 8 and 10, the words “or, as the case may be, the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;
 - (ii) in paragraph 3, the words “, the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;
 - (iii) as regards the EFTA States, in paragraphs 4, 5 and 9, the word “ESMA” shall read “the EFTA Surveillance Authority”;
 - (iv) in paragraph 7, the following subparagraph shall be added:
 “In cases regarding the EFTA States, before preparing a draft in accordance with Article 9(5) of Regulation (EU) No 1095/2010 in view of a decision on the part of the EFTA Surveillance Authority under paragraph 4, ESMA shall consult, where appropriate, the ESRB and other relevant authorities. It shall transmit the observations received to the EFTA Surveillance Authority.”.
- (k) In Article 50, as regards the EFTA States:
- (i) in paragraph 1, the words “, the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;
 - (ii) in the first subparagraph of paragraph 4, the words “, the EFTA Surveillance Authority” shall be inserted after the words “one another”.
- (l) In Article 61, as regards the EFTA States, the words “22 July 2013” and “22 July 2017” shall read “eighteen months after the date of entry into force of Decision of the EEA Joint Committee No .../... of ... [this decision]”.

31bba. **32013 R 0231**: Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositories, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1).

The provisions of the Delegated Regulation shall, for the purposes of this Agreement, be read with the following adaptations:

- (a) Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, references to “EU” or “Union” Member States and competent authorities shall be understood to include, in addition to their meaning in the Delegated Regulation, the EFTA States and their competent authorities, respectively.
- (b) In Articles 15, 84, 86 and 99, the words “Union law” shall be replaced by the words “the EEA Agreement”.
- (c) In Article 55, as regards the EFTA States, the words “1 January 2011” shall read “the date of entry into force of Decision of the EEA Joint Committee No .../... of ... [this decision]” and the words “31 December 2014” shall read

“twelve months after the date of entry into force of Decision of the EEA Joint Committee No .../... of ... [this decision]”.

- (d) In Article 114(3), the words “Union legislation” shall be replaced by the words “legislation applicable pursuant to the EEA Agreement”.

31bbb. **32013 R 0447**: Commission Implementing Regulation (EU) No 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt in under Directive 2011/61/EU of the European Parliament and of the Council (OJ L 132, 16.5.2013, p. 1).

31bbc. **32013 R 0448**: Commission Implementing Regulation (EU) No 448/2013 of 15 May 2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM pursuant to Directive 2011/61/EU of the European Parliament and of the Council (OJ L 132, 16.5.2013, p. 3).

The provisions of the Implementing Regulation shall, for the purposes of this Agreement, be read with the following adaptation:

Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, the terms “Member State(s)” and “competent authorities” shall be understood to include, in addition to their meaning in the Implementing Regulation, the EFTA States and their competent authorities, respectively.

31bbd. **32014 R 0694**: Commission Delegated Regulation (EU) No 694/2014 of 17 December 2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers (OJ L 183, 24.6.2014, p. 18).

31bbe. **32015 R 0514**: Commission Delegated Regulation (EU) 2015/514 of 18 December 2014 on the information to be provided by competent authorities to the European Securities and Markets Authority pursuant to Article 67(3) of Directive 2011/61/EU of the European Parliament and of the Council (OJ L 82, 27.3.2015, p. 5).

The provisions of the Delegated Regulation shall, for the purposes of this Agreement, be read with the following adaptation:

Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, the terms “Member State(s)” and “competent authorities” shall be understood to include, in addition to their meaning in the Delegated Regulation, the EFTA States and their competent authorities, respectively.

Article 2

Annex IX to the EEA Agreement shall be amended as follows:

1. The following is added in points 30 (Directive 2009/65/EC of the European Parliament and of the Council), 31eb (Regulation (EC) No 1060/2009 of the European Parliament and of the Council) and 31i (Regulation (EU) No 1095/2010 of the European Parliament and of the Council):

‘, as amended by:

- **32011 L 0061**: Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 (OJ L 174, 1.7.2011, p. 1).’

2. The following indent is added in point 31d (Directive 2003/41/EC of the European Parliament and of the Council):

‘ - **32011 L 0061**: Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 (OJ L 174, 1.7.2011, p. 1).’

Article 3

The texts of Directive 2011/61/EU and Delegated Regulations (EU) No 231/2013, (EU) No 694/2014 and (EU) 2015/514 and Implementing Regulations (EU) No 447/2013 and (EU) No 448/2013 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 4

This Decision shall enter into force on [...], provided that all the notifications under Article 103(1) of the EEA Agreement have been made*, or on the day of the entry into force of Decision of the EEA Joint Committee No .../... of ...⁹ [incorporating the ESMA Regulation (EU) No 1095/2010], whichever is the later.

Article 5

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, .

*For the EEA Joint Committee
The President*

*The Secretaries
to the EEA Joint Committee*

* [No constitutional requirements indicated.] [Constitutional requirements indicated.]
⁹ OJ L ...