

VAB Consultation Statement

ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/26/EU and Directive 2014/65/EU

Question 1: Are subject matter, scope of application, definitions and date of application appropriate and sufficiently clear?

NA

Question 2: Are the changes made in Title II appropriate and sufficiently clear?

NA

Question 3: Are the changes made in Title III appropriate and sufficiently clear?

(1) Regarding Title III, section 8, paragraph 75 of the Guidelines

We propose to delete the newly inserted sentence 2 from paragraph 75.

Alternatively, we recommend that this sentence should be supplemented as follows:

“Other adverse reports with relevant, credible and reliable (e.g. as part of whistleblowing procedures) information, **which have the same significance as information resulting from judicial or administrative procedures or other analogous regulatory investigation,** should also be considered by institutions and competent authorities. **The respective member of the management body should be informed about the existence of such information and he should have the opportunity to comment on it.**”

Reasons:

The newly inserted sentence speaks of "relevant, credible and reliable" information, but does not state what significance this information should have. In order to protect the rights of the member of the management body, it is therefore necessary to make it clear that this information must at least be of a nature comparable to that of information resulting from judicial or administrative procedures or other analogous regulatory investigation.

In addition, it must be made clear that the respective member of the management body must be informed of this so that the respective member is given the opportunity - as in court or official proceedings - to comment on the information and to present any facts that speak for the credibility, sincerity and integrity of this respective member.

(2) Regarding Title III, section 8, paragraph 77 point (e.) of the Guidelines

We propose to delete the newly inserted text from paragraph 77.

Alternatively, we recommend that this sentence should be supplemented as follows:

“e. any other evidence or serious allegation based on relevant, credible and reliable information **which have the same significance as an information resulting from judicial or administrative**

procedures or other analogous regulatory investigation. The respective member of the management body should be informed about the existence of such evidence or information and he should have the opportunity to comment on it.

Reasons:

Since this newly inserted amendment does not contain any statement about the origin and probative significance of the evidence or information either, we recommend the proposed amendment. Regarding the reasons, reference can be made to the above-mentioned explanations regarding Title III, no. 8, paragraph 75 of the Guidelines.

Question 4: Are the requirements in section 12 sufficiently clear; are there additional measures that should be required to ensure that diversity is appropriately taken into account by institutions and that the principle of equal opportunities for all genders is appropriately reflected?

Regarding Title V, section 12, paragraph 102 of the Guidelines

We recommend that sentence 1 and the new sentence 3 of paragraph 102 should be supplemented as follows:

„Institutions should **generally** aim at an appropriate representation of all genders within the management body and ensure that the principle of equal opportunities is respected when selecting members of the management body. Having employee representatives, where required under national law, of the underrepresented gender alone is not sufficient to ensure that the management body in its supervisory function has an appropriate gender balance. **In this respect, the proportionality principle should be considered, i.e. an exception should apply to institutions with a management body of less than four members.**

Reasons:

In principle, we welcome the stipulation that the management body of an institute should be gender equitable. However, the size of the management body and the group aspect should be included in the consideration of gender equality.

Example:

In case of a small subsidiary with a two- or three-member management body, the gender of the management body alone should not be considered, because the group of people concerned is too small in order to achieve meaningful diversity.

We welcome the more far-reaching provisions in paragraphs 107 and 108 and consider them comprehensive and clear. We therefore have no supplementary measures that should be required to ensure that diversity is appropriately taken into account by institutions and that the principle of equal opportunities for all genders is appropriately reflected.

Question 5: Are the changes made in Title VI appropriate and sufficiently clear?

NA

Question 6: Are the changes made in Title VII appropriate and sufficiently clear?

Regarding Title VII, section 20, paragraph 154 point (j.) of the Guidelines

We recommend that the new point (j.) of paragraph 154 should be supplemented as follows

„j. **there are no** reasonable grounds **to** suspect that money laundering or terrorist financing is being or has been committed or attempted or other financial crimes, **and** ~~or~~ there is **not** an increased risk thereof. **In case there are such reasonable grounds, these as well as the handling and the remediation of them should be taken into account**, including following ~~such~~ adverse findings made by the internal or external auditors or competent authorities regarding the adequacy of the institution’s AML/CFT systems and controls.”

Reasons:

The on-going monitoring and re-assessment described in points (a.) to (i.) of paragraph 154 mainly involves checking whether the individual and collective performance of the management body is achieved. For example, it is necessary to regularly check whether the management body makes its decisions in the best interests of the institution (see point (b.)) or whether any performance targets have been set for the management body (see point (f.)). Against this background, the wording whether “there are reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted or other financial crimes, or there is an increased risk thereof” does not fit into the context of this section.

The re-assessment should rather consider the aspect that there are no reasonable grounds and if so, how they were handled and whether they were resolved.

Question 7: Are the changes made in Title VIII appropriate and sufficiently clear?

Regarding Title VIII, section 25, paragraph 196, sentence 1 of the Guidelines

We propose to delete the newly inserted text in sentence 1 from paragraph 196 of the Guidelines.

Alternatively, we recommend that this sentence should be sufficiently supplemented as to describe about what kind of information must be considered.

Reasons:

In this context, we consider that it is not clear what is meant by "other relevant information". For this reason, we would suggest deleting this newly included text or to clearly emphasize what kind of information might be involved here.

Question 8: Are the changes made in Title IX appropriate and sufficiently clear?

NA