

# Q&A

QUESTION ID:

405

REGULATION REFERENCE:

Guidelines on classification of own funds

ARTICLE:

72, 76

STATUS:

Final

DATE OF SUBMISSION

31 Jul 2015

## Question

We have some doubts regarding the application of mutatis mutandis in Guideline 10 para. 1.44 and Guideline 11 para. 1.51, referring back to Guideline 5, para. 1.27.

We understand that all own fund items should not include features which may cause insolvency or accelerate the process of the undertaking becoming insolvent, but we think that not all of the elements described in Guideline 5 para. 1.27 covering Tier 1 items are equally applicable to Tier 2 and Tier 3 items.

For example, Tier 2 and Tier 3 subordinated liabilities will be treated as liabilities, however according to para. 1.27 (b) this is not permitted

## EIOPA answer

Having reviewed Guidelines 10 and 11, EIOPA agrees that the mutatis mutandis drafting is not in fact appropriate and does not provide clarity.

EIOPA agrees that for Tier 2 and Tier 3 items paragraph 1.27 (b) of Guideline 5 is not appropriate, as such items may be treated as liabilities. It is also important to clarify that since undertakings are not required to have full flexibility over

distributions on Tier 2 and Tier 3 items, as well as the fact that for Tier 2 and Tier 3 items distributions need to be deferred rather than cancelled upon non-compliance with the capital requirements, the application of points (a) and (d) of paragraph 1.27 also require clarification.

In order to try to provide immediate clarification on this issue, EIOPA has included below revised versions of paragraphs 1.44 and 1.51 setting out how the Guideline should be read for Tier 2 and Tier 3 items. EIOPA will amend this part of the Guidelines in due course.

#### New paragraph 1.44

In the case of an item referred to in Article 72(a)(iii), (iv) and (b) of Commission Delegated Regulation 2015/35, undertakings should consider features which may cause insolvency or accelerate the process of the undertaking becoming insolvent as including:

- (a) in the event of a distribution being deferred due to non-compliance with the SCR or the distribution would lead to such non-compliance, the holder of the own-fund item is in a position to petition for the winding-up of the issuer;
- (b) the terms of the contractual arrangement governing the own-fund item specify circumstances or conditions which, if met, would require the initiation of insolvency or any other procedure which would prejudice the continuance of the undertaking or its business as a going concern;
- (c) the holder of the security relating to an own-fund item may, as a result of a distribution being deferred due to non-compliance with the SCR or the

distribution would lead to such non-compliance, be granted the ability to cause full or partial payment of the amount invested, or to demand penalties or any other compensation that could result in a decrease of own funds.

#### New paragraph 1.51

In the case of an item referred to in Article 76(a)(i), (ii) and (b) of Commission Delegated Regulation 2015/35, undertakings should consider features which may cause insolvency or accelerate the process of the undertaking becoming insolvent as including:

(a) in the event of a distribution being deferred due to non-compliance with the MCR or the distribution would lead to such non-compliance, the holder of the own-fund item is in a position to petition for the winding-up of the issuer;

(b) the terms of the contractual arrangement governing the own-fund item specify circumstances or conditions which, if met, would require the initiation of insolvency or any other procedure which would prejudice the continuance of the undertaking or its business as a going concern;

(c) the holder of the security relating to an own-fund item may, as a result of a distribution being deferred due to non-compliance with the MCR or the distribution would lead to such non-compliance, be granted the ability to cause full or partial payment of the amount invested, or to demand penalties or any other compensation that could result in a decrease of own funds.