

ESMA Consultation Paper – Guidelines on certain aspects of the MiFID II compliance function requirements

About NFU

NFU – Nordic Financial Unions is an organization that promotes the interests of the Nordic financial trade unions in Europe. Through a high level of competence and dialogue, NFU contributes to shaping a sustainable financial sector, fundamental for job creation. Currently, NFU represents seven trade unions in the bank, finance and insurance sector in Denmark, Finland, Iceland, Norway and Sweden.

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Consultation Paper replies

Q1: Do you believe that guideline 1 should be further amended and/or supplemented? Please also state the reasons for your answer.

We find that the proposed amendment to guideline 1 is reasonable to the point that most of the current general guideline 1 is incorporated under Paragraph 2 of Article 22(2) in MiFID II Delegated Regulation. However, the phrasing of the proposed amendment suggests overall responsibility of the compliance function to conduct a risk assessment, establish risk-based monitoring programme, set the work programme of the compliance function, allocate the functions resources efficiently, take into account applicable obligations under MiFID II and more. Both MiFID II Delegated Regulation and the ESMA guidelines from 2012 refer to the investment firm as the main carrier of such processes. Specifically, Article 25(1) in MiFID II Delegated Regulation refers to the responsibilities of senior management in the above-mentioned. It is therefore important to highlight that it is the firm's governing body that holds the accountability for and the management of

compliance risk. While the compliance function could have the optimal operational insight, the 'tone from the top', the established dialogue and clear understanding of responsibilities and accountability of senior management in all processes play the ultimate role.

Additionally, we find it positive that a possibility is introduced to establish a review of identified risks also in connection to changes in the regulatory framework. However, we would like to emphasize that the application of this possibility should be proportionate to the regulatory change, its relevance, and its implementation. Regulatory changes come with very short implementation timeframes, which in practice means that new tasks are being added to the current workload of the same compliance staff, leading to increased stress and pressure. If several new regulatory developments are to be implemented, the amount of work done by the compliance team will be strained further.

Ultimately, this possibility is applicable only if enough time, resources and competence development in connection to the specific regulatory change is made available to the compliance staff. Changes in the regulatory framework can come with short implementation timeframes, and in order for solid internal processes and correct following of external procedures to take place, it is highly important that the sufficient training of compliance staff is included as a responsibility to the senior management. When it comes to the inclusion of 'other changes in the firm's structure', we find that this could be further clarified in order to correctly assess the level of responsibility by the compliance function.

Q2: Do you agree with the suggested approach in relation to the compliance function's monitoring obligations? Please also state the reasons for your answer.

We find that it is useful that the scope has been widened to include bigger convergence between MiFID II and delegated acts and/or any national implementing provisions. NFU would like to draw the attention to setting the right balance between ensuring proper monitoring procedures and creating effective processes and documentation requirements. Tipping the balance can lead to too much stress and pressure among employees. Continuous on-site reviews, targeted trade surveillance and interviewing relevant staff and

specifically the addition of the possibility to interview the firm's clients can affect the individual work environment of employees, consumer protection and trust, and bring risks of retaliation.

Q3: Do you believe that further guidance is needed to clarify the compliance function's monitoring obligations?

While the principle of proportionality is suggested to be considered at the back of mind when reading the guidelines, a specific mention in the section on monitoring would strengthen the understanding of the guidelines and the implications for smaller firms, whose staff structure and budget might be too strained to perform the suggested measures and could instead rely on more streamlined processes.

Another clarification is in terms of data management by the compliance function, and specifically in connection to the all customer complaints and related details.

Q4: Do you agree with the addition to paragraph 26?

As mentioned above, the option of interviewing the firm's clients is in need of further clarification. In its current form, we find that there is no clear indication of a process in connection to it, and thus could potentially lead to adverse effect on individual staff, consumer protection and trust.

Q5: Do you agree with the suggested general content of the compliance function reports (paragraph 31 of the guidelines)? Please also state the reasons for your answer.

Q6: Do you agree with the suggested content of the compliance function reports in relation to product governance arrangements (paragraph 32 of the guidelines)? Please also state the reasons for your answer.

In connection to compliance function reports, an important consideration to have in mind is the issue of personal liability of employees, as well as the potential reporting on product related conflict of interest. Conflict of interest policies cover the procedures and measures carried out by the employees, aiding them to act fairly and professionally. Any periodical reviews or addresses should therefore also include trade union representatives, in addition

to senior management. This is to ensure that practical solutions that are functional and implementable are being put in practice.

Product related conflict of interest is important for transparency reasons, to which we agree, but at the same time, conflicts of interest are best mitigated by addressing the issue of excessive sales targets and sales pressure, not by breaching the personal integrity of individual employees with regard to the pay that they receive, for example.

Another element to raise is the need for 'additional reporting lines' - following the financial crisis, the number of regulatory requirements rose significantly, but without a corresponding rise to the number of employees. This, according to NFU's [Coping with Compliance](#) report has led to a work environment filled with stress and pressure, which has its own implications on consumer protection and quality of advice. At the same time, having more reports being made available to senior management does not always mean improving their work, but it can rather be an overflow of data which remains unused.

Q7: Do you agree that the information that should be included in the compliance function reports should be proportional to the complexity and level of risks of the financial instruments manufactured and/or distributed by the firm? Do you believe that additional criteria should be taken into account? Please also state the reasons for your answer.

Q8: Do you believe that further guidance is needed to clarify how firms should address the potential conflicts arising from the combination of the complaints management function with the compliance function? What practical solution could be envisaged?

Q9: Do you believe that further topics/areas should be included in the compliance function reports?

Q10: Do you agree with the approach taken for the review of guideline 4? Do you believe that guideline 4 should be amended and/or supplemented further? Please also state the reasons for your answer.

We support the mention of a 'compliance culture' throughout the firm and highlight that it

is important that senior management not only supports it but is accountable for it.

Additionally, companies need to ensure that skills and competence development is made available and taken up by employees continuously, both regarding financial products and services, as well as regulatory developments. This should become part of standing, long-term governance priorities for the company.

NFU strongly supports the idea of remuneration policies and practices that are consistent with and promote sound and effective risk management but believes that remuneration policies and practices should be left to the social partners to decide upon and therefore the compliance function should not be interfering with the way remuneration is set. This is the cornerstone of the Nordic model, and in accordance to Article 153,5 TFEU; Recital 69 of CRD, Recital 10 in Directive 2014/91/EU and Recital 14 in Directive 2010/76/EU.

Focusing on remuneration as such when working with 'organization of the firm in the area of investment services, activities and ancillary services' limits the scope and influence of other important aspects and incentives, such as non-financial incentives linked to sales targets which are closely connected to the employees career paths and personal liability.

Q11: Do you believe that guideline 5 should be amended and/or supplemented further? Please also state the reasons for your answer.

Q12: Do you agree with the creation of a new guideline solely focused on the skills, knowledge, expertise and authority of the compliance function? Please also state the reasons for your answer.

NFU sees the financial sector as a growth-oriented sector that is constantly changed by regulation, technology, consumer needs. Therefore, it is essential that continuous competence and professional development of employees is of high priority. In this process, it is important to ensure that employees' appropriate level of knowledge and competence is balanced and determined based on recognized qualifications or experience, risk taking, and other elements according to the present or aspired position.

According to Article 22 (3)(a), the compliance function as an organizational unit should have the necessary authority, resources, expertise and access to information to be able to

discharge their obligations. The compliance staff should possess the necessary skills and competence and should receive ongoing training – this is of general importance and should be demonstrated not only in the case of appointing a compliance officer.

While it is positive to note the supportive role of senior management indicated in the text in connection to staff and the compliance officer, this role should be strengthened with the mention that it is the senior management that has the accountability for following the rules and regulations, as well as the responsibility for setting the ‘view from the top’ and the orientation to competence development in the company.

Q13: Do you agree with the additions to guideline 6 (formerly part of guideline 5)?

Please kindly consult the answer to Q12.

Q14: Do you believe that guideline 7 should be further amended and/or supplemented? Please also state the reasons for your answer.

Q15: Do you believe that guideline 8 should be further amended and/or supplemented? Please also state the reasons for your answer.

NFU agrees with the independence foreseen with the compliance function. Given the position of the compliance officer, it is important that proper and sound whistleblowing procedures are also established. This would allow for breaches to be reported by employees in a manner that ensures protection, anonymity, integrity and proper procedures are in place.

Q16: Do you believe that guideline 9 should be further amended and/or supplemented? Please also state the reasons for your answer.

Q17: Do you agree that, subject to the proportionality principle, a firm should consider establishing and maintaining a core team of compliance staff whose sole area of responsibility is MiFID II? Please also state the reasons for your answer.

We agree that the compliance function should be as independent as possible, also in

connection to compliance staff not being directly involved in the activities they monitor.

The setup of a core team within the compliance function staff members that will work solely on MiFID II might further lead to a silo view of regulation in general, as implementation of various regulation is simultaneous and ongoing throughout the overall company. This approach could also further increase the stress and pressure within the compliance function, especially if it does not result in extending the compliance team but adding new tasks to the current team. There might be a potential overflow of responsibilities, increased pressure, as well as lack of coordination on other areas of compliance, which go beyond MiFID II, but are still in the domain of the compliance function. With that in mind, we would also highlight the mention in the text that the sole area of responsibility for the core team would be MiFID II compliance – the accountability and responsibility for that in general terms falls on the senior management (Art. 25, MiFID II Delegated Regulation).

Q18: Do you believe that guideline 10 should be further amended and/or supplemented? Please also state the reasons for your answer.

Q19: Do you agree with the amendments made to guideline 11? Please also state the reasons for your answer.

Q20: Do you believe that guideline 11 should be further amended and/or supplemented? Please also state the reasons for your answer.

Q21: Do you agree with the amendments made to guideline 12? Please also state the reasons for your answer.

Q22: Do you believe that guideline 12 should be further amended and/or supplemented? Please also state the reasons for your answer.