Stockholm, 15 October 2019

ESMAs consultation paper re. guidelines on certain aspects of the MiFID II compliance function

1. General comments

The Nordic Securities Association (NSA)[1] welcomes the opportunity to respond to ESMAs consultation paper regarding guidelines on certain aspects of the MiFID II Compliance function. In addition to responding to the specific questions below, we would like to make the following general comments.

The general goal of the Compliance reports is to inform the senior management of new Compliance risks that has emerged during the period and to report on significant findings. To achieve this goal, it is important to ensure that the reporting requirements are both relevant and proportional. The more voluminous the Compliance reports get, the greater is the risk that the senior management will miss important information.

With the above in mind, it is the opinion of the NSA that mandatory reporting requirements which do not actually relate to the work conducted by the Compliance function during the reporting period but are more of a general and static nature (such as organisation etc.), must be avoided. In addition, it should be clarified in the ESMA guidelines that if certain information which was included in the previous Compliance report has not changed, a comment could be made to that effect in the report i.e. instead of repeating the information in each report.

Finally, the NSA would like to underline that Compliance function of investment firms and credit institutions are subject to many different regulations, not only MiFID II. It is therefore important that the requirements on EU-level are aligned as much as possible.

[1] The Nordic Securities Association (NSA) is a Nordic cooperation that works to promote a sound securities market in the Nordic region. The NSA consists of the Danish Securities Dealers Association, Finance Finland, the Norwegian Securities Dealers Association and the Swedish Securities Dealers Association. NSA's public ID number in the Transparency Register is: 622921012417-15.

2. Specific questions

Q1: Do you believe that guideline 1 should be further amended and/or supplemented?

No.

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.

Yes.

The monitoring program is correlated to the overall risk assessment performed by a firm's Compliance function. Paragraph 25 in Guideline 2 especially captures a key element in the effectiveness of the monitoring program by stating the importance of performing on-site inspections on the entities overseen by the firm's Compliance function. In some parts of investment firms, it is beneficial to have a Compliance function physically situated with business, to ensure sufficient oversight.

Moreover, paragraph 28(c) and 29 capture well the essence of minimizing duplication in oversight activities and thus accentuate the importance of coordinating activities within 2LOD and 3LOD.

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

No. The current guidelines are sufficient.

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

We don't share the view that it is the duty of the Compliance function to interview the firm's clients, as their role is more "back office" function. In addition to this, clients may consider interviews as a burden, if service provider contacts them afterwards. This shouldn't be an obligation, only an additional tool for monitoring activities.

Q5: Do you agree with the suggested general content of the compliance function reports (paragraph 32 of the guidelines)? Please also state the reasons for your answer.

The NSA agrees with paragraph 31, including the possibility not to cover all services and activities in the report, provided the reasons for this limitation are clearly stated.

As mentioned under "General comments" it is important to ensure that the reporting requirements are both relevant and proportional. The more voluminous the Compliance reports get, the greater is the risk that the senior management will miss important information.

In order to ensure that the reporting requirements are both relevant and proportionate, *mandatory* reporting requirements which do not actually relate to the work conducted by the Compliance function during the reporting period but are more of a general and static nature (such as organisation, staff etc.), should be avoided.

In fact, more static information such as general structure of Compliance function, methodology for Compliance risk management can be made available in other media to ensure Compliance reports are kept relevant, condensed and action orientated for the receivers. The proportionality principle is

experienced to increase correlation between amount of information contained in the reports and actions to mitigate risks. Hence, the more extensive the reports are the lesser focus there tends to be on key regulatory gaps requiring proper attention.

With this in mind, the NSA believes that it should be clarified in ESMA's guidelines that information relating to organisation of the Compliance function under point 32 (a) first and third bullet as well as (b) first bullet does not have to be included in every report. This could be achieved by clarifying in the guidelines or the feed-back statement that "where relevant" means that if there have been no changes relating to organisation or staff since the last report it is sufficient to state that fact rather than repeating the information.

Under MiFID II, it is not generally the responsibility of the Compliance function to deal with complaints from customers. Instead, the Compliance function should monitor that the Complaints function fulfils its obligations according to applicable rules and regulations. Considering this division of tasks, it may therefore be questioned whether the total number of complaints should really be included as mandatory information in each Compliance report, considering that this information is also included in the report from the Complaints function. In the opinion of the NSA, point 32 c) third bullet should only apply when the Compliance function is also the Complaints function.

Q6: Do you agree with the suggested content of the compliance function reports in relation to product governance arrangements (paragraph 33 of the guidelines)? Please also state the reasons for your answer.

The NSA considers that the proposed requirements regarding the contents of the Compliance reports in respect of product governance arrangements is far too detailed. We propose that ESMA revisits these requirements to make them more relevant and proportionate.

First of all, as mentioned under our response to Q 5, mandatory reporting requirements which do not actually relate to the work conducted by the Compliance function during the reporting period but are more of a general and static nature (such as organisation, staff etc.), should be avoided. There is no need to include general information on the Compliance function's role in the product governance process in every quarterly report. (point 33 a).

Secondly, there is no need to repeat the monitoring obligations in guideline 33. This follows from article 22 Delegated Act as well as guideline 32.

As regards the reporting on financial instruments (point 33 c), the NSA strongly advices against a requirement to report on ISIN level. This would be far too detailed information for the senior management to receive - for a large investment firm such information could easily amount to over hundred pages. In order to ensure that the content of the report is relevant, the focus should be to describe the *new types* of instruments which have been produced during the period (or significantly amended). Information on financial instrument must be able to be presented on an aggregated level.

More clarification is needed relating to the list of distributors in point 33 c third bullet. In line with what is stated above, the reporting requirements should focus on how new products are distributed as well as any new distribution agreements which the firms have entered into during the period. For the avoidance of doubt, ESMA should also clarify in the feedback statement that investment firms are not required to list all the trading venues and SIs which trade in the financial instrument in question (as this is not something the firm always has knowledge about/control over). This is particular important point for instruments such as shares, bonds and exchange traded derivatives.

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 that 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.

Yes. As mentioned under "general comments", it is important that the information is relevant and proportionate. As regards non-complex and standardized instruments, it should be possible to report on a higher level than for complex instruments. The NSA notes that a similar approach is taken in the Guidelines on Product Governance.

In addition, in line with the comment under Q 6, only new or amended instruments should be reported. It would not be proportionate to include every financial instrument produced or distributed by the firm in every report, i.e. per ISIN. For larger firms such lists could amount to be more than a hundred pages and the information is of very little use for the senior management.

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?

No. In the opinion of NSA, this is a governance issue and not a reporting issue. Conflicts of interest that arise when the Compliance function is also the Complaints function should be handled when deciding on the organization of the firm. This is not a matter for the Compliance report.

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

No, as mentioned under "General comments" as well as under Q6 and Q 7, the NSA is concerned that the Compliance reports are getting too detailed and long. Instead of adding additional items to be reported, it is important to take measures to ensure that the reports remain relevant and proportionate. General or static information which has not changed should not need to be repeated in every report and references to previous reports should be allowed.

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.

Yes. No more amendments/supplements to guideline 4 are required.

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

No more amendments/supplements to guideline 5 are required. In fact, to have effective communication lines with other control functions is evident and it may be questioned if it is necessary to include this in the guidelines.

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.

We have no objections.

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

We have no objections.

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

No more amendments/supplements to guideline 7 are required.

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

No more amendments/supplements to guideline 8 are required.

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

No more amendments/supplements to guideline 9 are required.

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.

In NSA's opinion, the requirement for the "sole area" to be MiFID II is too stringent and difficult to comply with in practice. A better and more reasonable requirement would be to require that the "main area" should be MiFID II. However, the NSA would like to underline that it is very important that this requirement is made subject to the proportionality principle since it will be difficult for many smaller firms to comply with.

It should be noted that depending on the scope and magnitude of services offered by credit institutions and investment firms, MiFID II applies across a variety of business areas. Combined with some business areas being under multiple regulatory regimes, it is not recommended to solely focus on MiFID II but rather to ensure sufficient risk coverage across applicable regulatory regimes.

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

No more amendments/supplements to guideline 10 are required.

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

We have no objections.

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

No more amendments/supplements to guideline 11 are required.

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

The NSA would like further clarification by ESMA as to the legal implications of “good practices” in supporting text to Guideline 12, such as the obligation for NCAs to license or approve Compliance officers following an assessment of the qualifications of the Compliance officer in paragraphs 90-92)

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

No more amendments/supplements to guideline 12 are required.