

15<sup>th</sup> October 2019

## **ESMA Consultation Paper. Guidelines on certain aspects of the MiFID II compliance function requirements**

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### **INTRODUCTION**

The Spanish Banking Association (AEB) shares the purpose of these guidelines, to clarify the application of certain aspects of the MiFID II compliance function requirements in order to ensure the common, uniform and consistent application of Article 16 of MiFID II, Article 22 of the MiFID II Delegated Regulation, and specified related provisions (including articles 21(1) (d) and (e), 25(2) and (3), 26(3) and (7), 27(3) and 31 MiFID II Delegated Regulation as well as articles 9(6) and (7) and 10(6) and (8) of the MiFID II Delegated Directive).

As a general comment, we would like to stress the need to align the ESMA and EBA guidelines on the Compliance function. In this sense, MiFID II is not complete. In particular regarding independence requirements and management of customer complaints. Both impact the governance and organizational structure of the entities but securities and prudential supervisors (CNMV and Banco de España in Spain) have different interpretations and points of view sometimes difficult to reconcile.

### **Guidelines on certain aspects of the MiFID II compliance function requirements – Questions**

#### **Guideline 1 – Compliance risk assessment**

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

#### **Guideline 2 – Monitoring obligations of 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.**

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

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

AEB considers it important to preserve the second-line of defense character of the compliance function, avoiding the assignation of first-line business responsibilities. In this sense, and even if its expressed as an optionality, we believe paragraph 26c of guideline 2 attaches the undue duty of interviewing the firm's clients to the compliance function, while the role should be the oversight of such interviews' results carried out by business areas. In this sense, we do not consider reasonable for the compliance department, with control functions, to conduct these interviews with clients.

Compliance, for the development of its functions, draws on the surveys that the Bank conducts to clients: they review the content the surveys to check if there is something to add, and their results are sources for controls (as well as other sources such as clients complaints); But we do not believe it is appropriate that the clients interviews are developed by this department. This kind of measures, from a control department could be perceived as highly invasive for clients.

### **Guideline 3 – Reporting obligations of the compliance function**

**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.**

**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.**

In relation to section of the report covering product governance report, the content in Guidelines is a very complete and sufficient report, so we would ask that the Final Guidelines do not include any more obligation than those contained in this draft; and in no case contradict the current product governance guidelines.

As previously said, AEB considers it important to preserve the second-line of defense character of the compliance function, avoiding the assignation of first-line business responsibilities.

When it comes to product governance, the compliance function obligations should be the ones established in article 9.7 Delegated Directive, namely, monitoring the development and periodic review of product governance arrangements in order to detect any risk of failure by the firm to comply with the obligations set out in MiFID II. The abovementioned obligations does not comprise an active role in the elaboration of the firm's product governance requirements. In this sense, we believe the word "elaboration" should be deleted from paragraph 33a of guideline 3 to ensure that the decisions of the compliance function are taken independently from the influence of other business units.

The proposed wording of paragraph 33.c) implies such level of granularity of the information to be reported to the Management Body that might not meet the proportionality principle.

We consider that the degree of detailed information about some topics (e.g. the number and nature of the products; the distribution strategy or their [positive] target market) could be commensurated with the complexity and risk of the products and the type of the clients.

**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.**

Some of minimum proportionality drivers could be as follows:

- The type of the clients (retail versus professional),
- The nature of the sales (mass-offer versus ad hoc sales)
- The investment service provided
- The innovative feature of the product/service

**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?**

There seems to be an inescapable conflict of interest whenever the same organizational unit combines (i) the compliance function and (ii) the complaints-handling department. The independence of the two functions are key factors in order to comply with the monitoring and reporting duties of the compliance function.

Nevertheless, it is necessary to ensure effective communication between the compliance function and the complaints-handling department because complaints are key risk indicators of conduct behaviour with clients.

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

#### **Guideline 4 – Advisory and assistance obligations of the compliance function**

**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.**

#### **Guideline 5 – Effectiveness of the compliance function**

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

#### **Guideline 6 – Skills, knowledge, expertise and authority of the compliance function**

**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.**

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

Regarding the connection between the regulatory compliance function with the remaining control functions (risk control and internal and external audits), there are forums in the entities in which all the control areas are present (e.g. in the Internal Compliance Committees), so that collaboration and communication does exist in the normal operation of the entity. Said that, in no case should the obligation to formalize some kind of agreement be imposed, since the only thing it would add is more bureaucratic burden to the already existing collaborative relationships between the different control areas.

Regarding the approval process by NCA, the approach should not be inconsistent with what is required to other control functions.

#### **Guideline 7 - Permanence of the compliance function**

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

In the event that the compliance officer is absent, flexible arrangements are taken so the Compliance function does not stop, being his or her immediate tasks and responsibilities carried out by team members, or may he/she be contacted by electronic devices for urgencies. The demand for setting up written procedures on how these arrangements are taken introduce bureaucracy, and point out the CCO as special when compared to other relevant deputies (COO, CIO, CFO, CRO...)

#### **Guideline 8 – Independence of the compliance function**

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

#### **Guideline 9 – Proportionality with regard to the effectiveness of the compliance function**

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

**Guideline 10 – Combining the compliance function with other internal control functions**

**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.**

AEB agrees that a certain degree of specialization among the compliance staff members is an inherent trait of the function, but the suggestion set out in paragraph 78 of guideline 10 of establishing and maintaining a core team within them whose sole area of responsibility is MiFID II compliance, could be prejudicial to the multidisciplinary character expected from a compliance function. We believe it is positive for staff members of the compliance function to maintain a global vision of the different regulations affecting the entity, not to miss synergies and cross impacts and to be able to re-focus to different areas when needed.

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

Regarding the establishing and maintaining a core team within the compliance function staff members whose sole area of responsibility is MiFID compliance, for the reasons mentioned in Q17 and taking into account that MiFID regulations are closely related to other standards and that the creation of such a limited team may lose the general vision of the regulatory framework and the entity's business model, we would propose to delete this paragraph.

**Guideline 11 – Outsourcing of the compliance function**

**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.**

**Guideline 12 – Review of the compliance function by competent authorities**

**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.**