



## Circulaire CSSF 23/841

- 1) Application des Orientations de l'Autorité Européenne des Marchés Financiers (« ESMA ») concernant certains aspects relatifs aux exigences de rémunération de la Directive MiFID II (ESMA35-43-3565)
- 2) Abrogation de la Circulaire CSSF 14/585
- 3) Modification de la Circulaire CSSF 07/307

## **Circulaire CSSF 23/841**

### **1) Application des Orientations de l’Autorité Européenne des Marchés Financiers (« ESMA ») concernant certains aspects relatifs aux exigences de rémunération de la Directive MiFID II (ESMA35-43-3565)**

### **2) Abrogation de la Circulaire CSSF 14/585**

### **3) Modification de la Circulaire CSSF 07/307**

Aux entreprises d’investissement, telles que définies au point 9) de l’article 1 de la loi modifiée du 5 avril 1993 relative au secteur financier (« LSF »),  
aux établissements de crédit, tels que définis au point 12) de l’article 1 de la LSF,  
aux sociétés de gestion d’OPCVM, telles que définies au point 31) de l’article 1 de la LSF et  
aux gestionnaires de fonds d’investissement alternatifs tels que définis au point 46) de l’article 1 de la loi du 12 juillet 2013 relative aux gestionnaires de fonds d’investissement alternatifs (« LGFIA »).

Luxembourg, le 13 octobre 2023

Mesdames, Messieurs,

L’objet de la présente circulaire est de porter à votre attention l’application par la CSSF, en sa qualité d’autorité compétente, des Orientations de l’ESMA concernant certains aspects relatifs aux exigences de rémunération de la Directive MiFID II<sup>1</sup> (ESMA35-43-3565) (les « Orientations »), publiées le 3 avril 2023. La CSSF a ainsi intégré ces Orientations dans sa pratique administrative et dans son approche réglementaire en vue de favoriser la convergence en matière de surveillance dans ce domaine au niveau européen.

Toutes les entités inscrites dans le champ d’application de la présente circulaire sont tenues de dûment s’y conformer.

La circulaire CSSF 14/585 relative à la transposition des Orientations de l’ESMA concernant les politiques et pratiques de rémunération (Directive MIF) est abrogée.

L’annexe V à la circulaire CSSF 07/307 est supprimée.

<sup>1</sup> Directive 2014/65/UE du Parlement européen et du Conseil du 15 mai 2014 concernant les marchés d’instruments financiers et modifiant la Directive 2002/92/CE et la Directive 2011/61/UE

## 1. Les Orientations

Les Orientations ont été émises par l'ESMA conformément à l'article 16(1) du Règlement ESMA<sup>2</sup>.

Les Orientations visent à garantir l'application commune, uniforme et cohérente :

- des exigences de rémunération énoncées à l'article 27 du Règlement Délégué MiFID II<sup>3</sup> ;
- des exigences en matière de conflits d'intérêts dans le domaine de la rémunération énoncées aux articles 16, paragraphe 3 et à l'article 23 de la Directive MiFID II, ainsi qu'à l'article 34 du Règlement Délégué MiFID II ; et
- des règles de conduite énoncées à l'article 24, paragraphes 1 et 10, de la Directive MiFID II.

Les Orientations clarifient également les exigences en matière de gouvernance dans le domaine de la rémunération au titre de l'article 9, paragraphe 3, de la Directive MiFID II.

Les Orientations visent à favoriser une plus grande convergence dans l'interprétation et la surveillance des exigences de la Directive MiFID II, d'une part en matière de rémunération, et d'autre part en matière de conflits d'intérêts et de règles de conduite dans le domaine de la rémunération, en mettant l'accent sur un certain nombre de questions importantes et en renforçant ainsi la valeur des normes en vigueur.

En outre, ces Orientations abrogent les Orientations de l'ESMA concernant les politiques et pratiques de rémunération (Directive MIF) (ESMA/2013/606).

Les Orientations sont annexées à la présente circulaire et disponibles sur le site Internet de l'ESMA à l'adresse suivante : [Guidelines on certain aspects of the MIFID II remuneration requirements \(europa.eu\)](https://ec.europa.eu/easf/easf-portal/annexes/annexes_en.htm)

## 2. Champ d'application

La présente circulaire s'applique aux :

- entreprises d'investissement, telles que définies au point 9) de l'article 1 de la LSF ;
- établissements de crédit, tels que définis au point 12) de l'article 1, de la LSF, lorsqu'ils fournissent des services et activités d'investissement au sens du point 30) de l'article 1 de la LSF ;
- entreprises d'investissement et établissements de crédit, lorsqu'ils vendent ou conseillent des clients en rapport avec des dépôts structurés au sens du point 7<sup>quater</sup>) de l'article 1 de la LSF ;
- sociétés de gestion d'OPCVM, telles que définies au point 31) de l'article 1 de la LSF, lorsqu'elles fournissent des services d'investissement ou des services auxiliaires tels qu'énumérés à l'article 101(3) de la loi du 17 décembre 2010 concernant les organismes de placement collectif telle que modifiée ;
- gestionnaires de fonds d'investissement alternatifs, tels que définis au point 46) de l'article 1 de la LGFIA, lorsqu'ils fournissent des services de gestion de portefeuille ou des services auxiliaires tels qu'énumérés à l'article 5(4) de la LGFIA.

<sup>2</sup> Règlement (UE) n° 1095/2010 du Parlement européen et du Conseil du 24 novembre 2010 instituant une Autorité européenne de surveillance (Autorité Européenne des Marchés Financiers), modifiant la décision n° 716/2009/CE et abrogeant la décision 2009/77/CE de la Commission

<sup>3</sup> Règlement Délégué (UE) 2017/565 de la Commission du 25 avril 2016 complétant la Directive 2014/65/UE du Parlement européen et du Conseil en ce qui concerne les exigences organisationnelles et les conditions d'exercice applicables aux entreprises d'investissement et la définition de certains termes aux fins de ladite Directive

### **3. Dispositions modificatives, abrogatoires et date d'application**

La présente circulaire s'applique à partir de la date de sa publication et la circulaire CSSF 14/585 est abrogée à la même date. L'annexe V de la circulaire CSSF 07/307 est également supprimée à la même date.

**Claude WAMPACH**  
Directeur

**Marco ZWICK**  
Directeur

**Jean-Pierre FABER**  
Directeur

**Françoise KAUTHEN**  
Directeur

**Claude MARX**  
Directeur général

Annexe                      Guidelines on certain aspects of the MIFID II remuneration requirements

# Guidelines

**On certain aspects of the MIFID II remuneration requirements**

# Table of Contents

- I. Scope..... 2
- II. Legislative references, abbreviations and definitions..... 3
- III. Purpose..... 5
- IV. Compliance and reporting obligations..... 6
- VI. Annex - Illustrative examples of remuneration policies and practices that create conflicts that may be difficult to manage.....15
- VII. Correlation table between the 'new' draft guidelines and the 2013 guidelines .....17

# I. Scope

## Who?

1. These guidelines apply to competent authorities and firms.

## What?

2. These guidelines apply in relation to the remuneration requirements set out in Article 27 of the MiFID II Delegated Regulation as well as, on the one hand, the conflicts of interest requirements set out in Articles 16(3) and 23 of MiFID II and Article 34 of the MiFID II Delegated Regulation in the area of remuneration; and on the other hand, the conduct of business rules set out in Article 24(1) and (10) of MiFID II. In addition, these guidelines clarify the application of the governance requirements in the area of remuneration under Article 9(3) of MiFID II.

## When?

3. These guidelines apply from six months of the date of publication of the guidelines on ESMA's website in all EU official languages.
4. The Guidelines on remuneration policies and practices (MiFID)<sup>1</sup> issued under MiFID I will cease to apply on the same date.

---

<sup>1</sup> ESMA/2023/606.

## II. Legislative references, abbreviations and definitions

### Legislative references

AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/ 2010 <sup>2</sup>
CRR	Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 <sup>3</sup>
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC <sup>4</sup>
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU <sup>5</sup>
MiFID II Delegated Regulation	Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive
UCITS Directive	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

### Abbreviations

ESMA	European Securities and Markets Authority
EU	European Union

### Definitions

---

<sup>2</sup> OJ L 174, 01.07.2011, p.1-73.

<sup>3</sup> OJ L 176, 27.6.2013, p. 1-337.

<sup>4</sup> OJ L 331, 15.12.2010, p. 84.

<sup>5</sup> OJ L 173, 12.06.2014, p. 349.



5. Unless otherwise specified, terms used in MiFID II and the MiFID II Delegated Regulation have the same meaning in these guidelines.

6. In addition, for the purposes of these guidelines, the following definitions apply:

firms	investment firms (as defined in Article 4(1)(1) of MiFID II), credit institutions (as defined in Article 4(1)(1) of the CRR) when providing investment services and activities within the meaning of Article 4(1)(2) of MiFID II, investment firms and credit institutions when selling or advising clients on structured deposits, UCITS management companies and external Alternative Investment Fund Managers (AIFMs) (as defined in Article 5(1)(a) of the AIFMD) when providing the investment services or non-core services listed in Article 6(3) of the UCITS Directive and Article 6(4) of the AIFMD
quantitative criteria	primarily numeric or financial data that is used to determine the remuneration of a relevant person (e.g. value of instruments sold, sales volumes, establishment of targets for sales or new clients, etc.)
qualitative criteria	primarily criteria other than quantitative criteria. It can also refer to numeric or financial data used to assess the quality of the relevant person's performance and/or service to the client e.g. return on the client's investment, very low number of complaints over a large timescale, etc

### **III. Purpose**

7. These guidelines are based on Article 16(1) of the ESMA Regulation. The purpose of these guidelines is to ensure the common, uniform and consistent application of the MiFID II remuneration requirements set out in Article 27 of the MiFID II Delegated Regulation as well as, on the one hand, the conflicts of interest requirements set out in Articles 16(3) and 23 of MiFID II and Article 34 of the MiFID II Delegated Regulation in the area of remuneration; and on the other hand, the conduct of business rules set out in Article 24(1) and (10) of MiFID II. In addition, these guidelines clarify the application of the governance requirements in the area of remuneration under Article 9(3) of MIFID II.
8. ESMA expects these guidelines to promote greater convergence in the interpretation of, and supervisory approaches to, the MiFID II remuneration requirements as well as the MiFID II conflicts of interest and conduct of business requirements in the area of remuneration by emphasising a number of important issues, and thereby enhancing the value of existing standards. By helping to ensure that firms comply with regulatory standards, ESMA anticipates a corresponding strengthening of investor protection.
9. Guidelines do not reflect absolute obligations. For this reason, the word 'should' is often used. However, the words 'shall', 'must' or 'required to' are used when describing a MiFID II or MiFID II Delegated Regulation requirement.

## **IV. Compliance and reporting obligations**

### **Status of the guidelines**

10. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with these guidelines.
11. Competent authorities to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

### **Reporting requirements**

12. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.
13. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.
14. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.
15. Financial market participants are not required to report whether they comply with these guidelines.

## V. Guidelines on certain aspects of the MiFID II remuneration requirements

### V.I. DESIGN OF REMUNERATION POLICIES AND PRACTICES

#### **Relevant legislation: Articles 16(3), 23 and 24(10) of MiFID II as well as Articles 27 and 34 of the MiFID II Delegated Regulation**

##### *Guideline 1*

16. When designing remuneration policies and practices in accordance with the requirements under Article 27 of the MiFID II Delegated Regulation and, especially, where remuneration comprises variable components, firms should define appropriate criteria to align the interests of the relevant persons and of the firms with that of the clients. Such criteria aligning the interests of the relevant persons and of the firms with that of the clients should allow the firms to assess the performance of relevant persons.
17. In order to do so and in accordance with Article 27(4) of the MiFID II Delegated Regulation, firms shall consider qualitative criteria that encourage the relevant persons to act in the best interests of the client. Examples of appropriate qualitative criteria include compliance with regulatory requirements such as conduct of business rules (in particular, the review of the suitability of instruments sold by relevant persons to clients, if relevant) and internal procedures, fair treatment of clients and client satisfaction.
18. Qualitative criteria used by firms in their remuneration policies and practices should be sufficiently and clearly defined and documented to ensure that they are not being used to indirectly reintroduce quantitative commercial criteria that may create conflicts of interests or incentives that may lead relevant persons to favour their own interests or their firm's interests to the potential detriment of any client. For instance, if a firm uses client satisfaction as a qualitative criterion in the determination of the variable remuneration of relevant persons, it should be clear from the remuneration policy how the firm will be measuring staff performance in this respect with the remuneration policy indicating what data will be used, any thresholds applicable, etc. so as to avoid creating a vague criterion that may be used by the firm to, instead, reward sales or pressure sales staff to sell certain products (although the remuneration policy would not be indicating such quantitative commercial criteria as performance indicators).
19. Regarding quantitative criteria, firms should ensure to take into account criteria that do not create conflicts of interests or incentives that may lead relevant persons to favour their own interests or their firm's interests to the potential detriment of any client. For example, firms may assign sales objectives to staff provided that such commercial objectives do not create an incentive for sales staff to recommend only certain products to the detriment of clients' best interest (for instance, group products or those that are more lucrative to the firm or group) and that any remaining conflicts of interests are properly mitigated through the use of other equally weighted criteria such as staff's performance regarding suitability requirements or clients' satisfaction.

20. The weights attributed to the criteria used to determine the remuneration should not be such that they render some of the criteria, especially qualitative ones, insignificant or that they give others, especially quantitative commercial ones, too much significance.
21. When designing remuneration policies and practices in accordance with the requirements under Article 27 of the MiFID II Delegated Regulation, firms should consider all relevant factors such as, but not limited to, the role performed by relevant persons, the type of products offered, and the methods of distribution (e.g. advised or non-advised, face-to-face or through telecommunications/electronic communications) in order to prevent potential conduct of business and conflict of interest risks from adversely affecting the interests of their clients and to ensure that the firm adequately manages any related residual risk.
22. Without prejudice to the requirement in the second subparagraph of Article 27(4) of the MiFID II Delegated Regulation, the remuneration policies and practices in place should allow the operation of a flexible policy on variable remuneration, including, where relevant, the possibility to pay no variable remuneration at all.<sup>6</sup>
23. Regarding variable remuneration, firms should avoid setting performance targets that may incentivise the relevant persons to adopt behaviours focused on short-term gains to meet the relevant thresholds such as “all or nothing targets” when those might create a conflict of interest or impair clients’ interests. Firms should favour remuneration policies and practices in which the variable part of the remuneration paid out is calculated and awarded on a linear basis or where the variable part depends on several performance targets set at different levels and giving rights to different amounts or, preferably, different rates of variable remuneration.
24. When designing and implementing their remuneration policies, firms should take into account possible conflicts of interests or risks of impairing clients’ interests stemming from cross-selling objectives imposed on relevant persons. For instance, specific attention should be paid to situations where relevant persons would be encouraged to make the grant of better conditions under a mortgage loan to a client dependent on the condition that this client buys a specific financial instrument which is part of the relevant persons’ sales objectives.
25. In light of the broad definition of remuneration provided in the MiFID II Delegated Regulation, firms’ remuneration policies and practices should also ensure that the criteria used to assess wage increases and promotions comply with the MiFID II remuneration requirements. For instance, firms’ career progression management systems should not be used to reintroduce quantitative commercial criteria upon which may depend relevant persons’ career advancement and having an impact on their (fixed and/or variable) remuneration if this may create conflicts of interests that may encourage such relevant persons to act against the interests of their firms’ clients.
26. Without prejudice to the general principles of national contract or labour law, firms should consider including ex-post adjustment criteria of the variable remuneration in their

---

<sup>6</sup> When determining the remuneration for tied agents, firms may take the tied agents’ special status (usually as self-employed commercial agents) and the respective national specificities into consideration.

remuneration policies and practices in order to further discourage relevant persons to disregard client's interests or favour their own interests (for instance, by investing in products with higher short term returns but presenting more risks in the long term or not suitable to the client's investment horizon) in order to attain short-term performance objectives. Ex-post adjustment criteria should allow firms to further align the interests of the firm and of relevant persons with that of clients by adjusting variable remuneration if a case of misconduct appears after the remuneration has been awarded or paid-out. For such criteria to be effective, firms should consider, depending on the nature, scale and complexity of their activities, including in their remuneration policies and practices appropriate ex-post adjustment mechanisms such as the application of malus (i.e. the reduction of value of all or part of deferred variable remuneration based on ex-post risk adjustments before it has vested) and clawbacks (i.e. the return of ownership of an amount of variable remuneration paid in the past or which has already vested to the institution under certain conditions).

27. Ex-post adjustment mechanisms referred to in the previous paragraph should be triggered by relevant events impacting the firm's or relevant persons' compliance with the applicable provisions under MiFID II and its delegated acts aiming at the fair treatment of clients and the quality of services provided to clients. Relevant events impacting the firm's and relevant persons' compliance with applicable regulations should not be limited to those giving rise to supervisory action, fines or sanctions but should take into account confirmed failings or breaches. Ex-post adjustment mechanisms should be applied to the relevant persons who engaged directly in misconduct but firms should also consider whether it would be appropriate to also apply them to a larger group such as to the relevant persons whose responsibilities include the areas where the relevant events crystallised.
28. The application of ex-post adjustment mechanisms should take into account the seriousness of any failings or misconduct impairing clients' interests.
29. In order for ex-post adjustment mechanisms to be meaningful, firms should consider paying the variable remuneration partly upfront and partly deferred, in an appropriate balance between the part paid upfront and the one deferred, and according to an appropriate deferral schedule allowing for the interests of the relevant persons and of the firms to be aligned with the interests of clients.
30. Furthermore, firms should adopt and maintain measures enabling them to effectively identify where the relevant person fails to act in the best interests of the client and to take remedial action.
31. Relevant persons should be clearly informed, at the outset, of the criteria that will be used to determine the amount of their remuneration, the weight attributed to each, the consequences of not meeting one or the other and the steps and timing of their performance reviews. The criteria used by firms to assess the performance of relevant persons should be accessible, understandable and recorded.
32. Firms should avoid creating unnecessarily complex policies and practices (such as combinations of different policies and practices, or multi-faceted or multi-layered schemes, which increase the risk that relevant persons' behaviour will not be driven to act in the best interests of clients, and that any controls in place will not be as effective to identify the risk

of detriment to the client). This may potentially lead to inconsistent approaches and hamper proper knowledge or control of the policies by the compliance function. The Annex to these guidelines sets out illustrative examples of remuneration policies and practices that create risks that may be difficult to manage due to their complexity, and that give strong incentives to sell specific products.

33. Firms should ensure that the organisational measures they adopt regarding the launch of new products or services appropriately take into account their remuneration policies and practices and the risks that these products or services may pose. In particular, before launching a new product, firms should assess whether the remuneration features related to the distribution of that product comply with the firm's remuneration policies and practices and therefore do not pose conduct of business and conflicts of interest risks. This process should be appropriately documented by firms.
34. In order to avoid conflicts of interests with respect to their role in the design and/or overseeing of the remuneration policies and practices of the firm, the design of the remuneration policies and practices applicable to control functions (risk management and internal audit functions, where established)<sup>7</sup>, management body and senior management of the firm should not compromise their objectivity and independence.
35. As such, the remuneration of control functions' staff should be based on function-specific objectives. In addition, the variable part of the remuneration of staff in control functions, if any, should not be linked to quantitative commercial performance of relevant persons whose remuneration they are in charge of designing and/or controlling. Where the remuneration of the control functions' staff includes a component based on the firm's commercial performance (e.g. sales volume), the risk of conflicts of interest may increase and should be properly addressed through the use of appropriate qualitative performance or adjustment criteria.
36. Where firms are permitted to combine internal control functions with operational functions, they nonetheless remain subject to their MiFID II conflicts of interests and conduct of business obligations. As such, the remuneration policies and practices applicable to them should nonetheless permit such internal control functions to remain effective (as provided by Article 22(4) of the MiFID II Delegated Regulation for the compliance function).
37. Firms should also ensure that the structure of the remuneration of members of the management body and of the senior management of the firm, as well as the criteria used to assess performance, should not create conflicts of interest or incentives that may lead members of the management body or senior management of the firm or relevant persons in the firm to favour their own interests or the firm's interests to the potential detriment of any client.
38. The remuneration policies and practices applicable to relevant persons (including copy-traders, where applicable) who are not employees of the firm but nonetheless fall within the scope of the MiFID II remuneration requirements because they are:

---

<sup>7</sup> Article 22(3)(e) of the MiFID II Delegated Regulation applies in respect of the compliance function.

- i) a natural person whose services are placed at the disposal and under the control of the firm or a tied agent of the firm and who is involved in the provision by the firm of investment services and activities<sup>8</sup>; or
- ii) a natural person who is directly involved in the provision of services to the firm or to its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities<sup>9</sup>,

should also comply with the MiFID II remuneration requirements and these guidelines.

#### 39. Examples of good practice:

- a. References used in the calculation of variable remuneration of relevant persons are common across products sold.
- b. In the case of an open-ended investment with no investment term, the remuneration is deferred for a set number of years or until the encashment of the product.

#### 40. Examples of poor practice:

- a. A firm has started offering advisers specific additional remuneration to encourage clients to apply for new fund products in which the firm has a specific interest. This often involves the relevant person having to suggest that their clients sell products that they would otherwise recommend they retain so they can invest in these new products.
- b. Managers and employees receive a large bonus linked to a specific product. As a result, the firm's advisors recommend this specific product irrespective of the suitability of this product for the clients addressed.<sup>10</sup> Warnings from the risk manager are ignored because the investment products generate high returns for the firm. When the risks that had been identified occur, the products have already been sold and the bonuses have already been paid out.
- c. The variable component of the total remuneration is based only on volumes sold, and increases the relevant person's focus on short-term gains rather than the client's best interest.
- d. Relevant persons engage in frequent buying and selling of financial instruments in a client's portfolio in order to earn additional remuneration without considering the suitability of this activity for the client. Likewise, rather than considering the suitability of a product for a client, relevant persons focus on the sale of products that have a short investment term in order to earn remuneration from re-investing the product after the short term.
- e. Regulatory breaches under MiFID II and its delegated acts that impair clients' interests are identified by the competent authority supervising the firm but no financial sanctions are imposed on the firm as non-compliance has since been remedied. The firm decides

---

<sup>8</sup> Article 2(1)(c) of the MiFID II Delegated Regulation.

<sup>9</sup> Article 2(1)(d) of the MiFID II Delegated Regulation.

<sup>10</sup> In that case, the firm would also breach applicable suitability requirements.



to allocate the maximum fixed and variable remuneration for the year to its board members on the basis that the other criteria were met, thereby not drawing the consequences of the firm's non-compliance with its regulatory obligations and its board members' role in it.

## V.II. GOVERNANCE

### **Relevant legislation: Article 9(3) of MiFID II and Article 27(3) of the MiFID II Delegated Regulation**

#### *Guideline 2*

41. In addition to the periodic review of their written remuneration policy<sup>11</sup>, firms should also review it upon any relevant and significant amendment to their business activities or structure. Where the review reveals that the remuneration policy does not operate as intended or that there is a residual risk of detriment to the firm's clients stemming from it (crystallised or not), the remuneration policy should be amended in a timely and efficient manner.
42. Proper documentation on the remuneration policy as well as the decision-making process and procedures that lead to its approval or amendment should be maintained in a clear and transparent manner and made available to the management body and senior management as well as other control functions involved in the design, monitoring and/or review of the remuneration policy and procedures.
43. Firms should ensure that the compliance function has access to all relevant documents and information enabling it to discharge its responsibilities in accordance with Article 22(3)(a) regarding the remuneration policies and practices relating to relevant persons, including members of the management body and senior management, in a proper and independent manner.
44. Firms should also ensure that their management body, after taking advice from the compliance function, approves any significant amendment made to the remuneration policy of the firm.
45. Depending on the size of the firm and complexity of its business model and of the investment services and activities provided, the review of the remuneration policy may also require the involvement of other control functions (such as the risk management and/or internal audit functions) to ensure that appropriate performance and risk adjustment criteria are used.
46. Senior management is responsible and should retain the ultimate responsibility for the day-to-day implementation of the remuneration policy and the monitoring of compliance risks related to the policy.

---

<sup>11</sup> In accordance with Article 9(3) of MiFID II and Article 27(3) of the MiFID II Delegated Regulation.

47. Firms should ensure that they have appropriate and transparent reporting lines in place across the firm or group to assist in escalating issues involving risks of non-compliance with the MiFID II remuneration, conflicts of interest and conduct of business requirements.

### **V.III. CONTROLLING RISKS RELATED TO REMUNERATION POLICIES AND PRACTICES**

#### **Relevant legislation: Articles 9(3) of MiFID II and Article 27(3) of the MiFID II Delegated Regulation**

##### *Guideline 3*

48. Firms should set up adequate controls to assess compliance with their remuneration policies and practices and to ensure that these deliver the intended outcomes. The controls should be implemented throughout the firm and be subject to periodic review. Such controls should include assessing the quality of the service provided to the client - for example, monitoring calls for telephone sales, sampling of advice and client portfolios provided to check suitability or going through other client documentation on a periodic basis.
49. To carry out such controls in an effective and risk-based manner, firms should use a wide range of information on business quality monitoring and sales patterns, including trend and root-cause analysis, to identify areas of increased risk and to support a risk-based approach to sales monitoring, with particular focus on high performing relevant persons (regarding sales for instance).
50. Firms should ensure that the results of such analyses and controls are clearly documented and reported to senior management together with proposals for corrective action, if necessary. The compliance function should also assist senior management in monitoring effectively the compliance risks related to the remuneration policy of the firm (based also on the ex-post controls conducted in line with this guideline). Where potential or actual client detriment might arise as a result of specific features in remuneration policies and practices, firms should take appropriate steps to manage potential conduct of business and conflict of interest risks by reviewing and/or amending these specific features, and set up appropriate controls and reporting mechanisms for taking appropriate action to mitigate potential conduct of business and conflict of interest risks.
51. When outsourcing the provision of investment services, firms should have in mind the best interests of the client. Where a firm is seeking to use another firm for the provision of services it should check that the other firm's remuneration policies and practices follow an approach consistent with these guidelines. In addition, firms should avoid setting overly complicated outsourcing or distribution structures (including through the use of tied agents) where the remuneration policies or practices applicable to such structures make it difficult for the firm to monitor the compliance risks with these guidelines and with the conflicts of interest and conduct of business policies and procedures in the area of remuneration or increase the risk of detriment to clients' interests.
52. Firms should make sure to assess, on a regular basis, whether the information management tools they use adequately capture the qualitative data required to determine the variable remuneration they pay to relevant persons.

53. Examples of good practice:

- a. In order to assess whether its incentive schemes are appropriate, a firm undertakes a programme of contacting a sample of clients shortly after the completion of a sale involving a face-to-face sales process where it is not able to monitor recorded telephone sales conversations, so as to test if the salesperson has acted honestly, fairly and professionally in accordance with the best interests of the client.
- b. Top earners and performers are recognised as being potentially higher risk and, as a result, additional scrutiny is given to them; and information such as previous compliance results, complaints or cancellation data is used to direct compliance checking. The outputs have an impact on the design/review of the remuneration policy and practices.

54. Example of poor practice:

- a. A firm mainly relies on quantitative commercial data as the criteria for assessing variable remuneration.
- b. Senior management has set various strategic goals for the firm to be reached in a certain year. All goals seem to focus solely on financial or commercial aspects without taking into account the potential detriment to the firm's clients. The remuneration policy will be in line with these strategic goals and will therefore have a strong short-term financial and commercial focus.
- c. Despite the care taken in designing and assessing remuneration policies and practices, some policies and practices still lead to client detriment, creating risks that need to be identified and mitigated.
- d. To distribute its products, a firm relies on a multi-level sales network consisting solely of personnel or third-party distributors which are remunerated according to the volume of transactions of the clients captured directly by themselves, and their ranking in the sales structure of the firm, with a leverage effect depending on the number of distribution levels below and the number of distributors in each level.<sup>12</sup> Such sales structures, combined with the remuneration policies and practices described in the foregoing, may make it difficult for the firm to monitor the compliance risks with these guidelines for each level (especially the most remote) and the whole structure.

55. The Annex to these guidelines includes illustrative examples of remuneration policies and practices that would create strong incentives to sell specific products and for which firms would therefore have difficulties demonstrating compliance with the MiFID requirements. The conduct of business and conflict of interest risks related to such examples should be taken into account by firms when designing and implementing their remuneration policies and practices.

---

<sup>12</sup> In such sales structures, multi-level groups of individuals are coordinated by another individual called "supervisor" or "manager" who is in charge of the support, training, coordination and supervision of the structure. These supervisors or managers are also tasked with the recruiting of other individuals.

## **VI. Annex - Illustrative examples of remuneration policies and practices that create conflicts that may be difficult to manage**

1. Certain remuneration features (for example, the basis of pay, running performance-based competitions for relevant persons) involve higher risk of potential damage to clients than others (specifically those that include features which may have been designed to affect the behaviour of relevant persons, especially the sales force). Examples of high-risk remuneration policies and practices that will generally be difficult to manage, and where it would be difficult for a firm to demonstrate compliance with MiFID II, include:
  2. Incentives that might influence relevant persons to sell, or 'push', one product or category of product rather than another or to make unnecessary/unsuitable acquisitions or sales for the investor: especially situations where a firm launches a new product or pushes a specific product (e.g. the product of the month or "in-house products") and incentivises relevant persons to sell that specific product. Where the incentive is different for different types of products, there is a high risk that relevant persons will favour selling the product that results in higher remuneration instead of another product without appropriate regard to what is in the client's best interests.
    - a. Example: A firm has remuneration policies and practices linked to individual product sales where the relevant person receives different levels of incentives depending on the specific product or category of products they sell.
    - b. Example: A firm has remuneration policies and practices linked to individual product sales, where the relevant person receives the same level of incentive across a range of products. However, at certain limited times, to coincide with promotional or marketing activity, the firm increases the incentive paid on the sales of certain products.
    - c. Example: Incentives that might influence relevant persons (who may be remunerated solely by commission, for example) to sell unit trusts rather than investment trusts – where both products may be equally suitable for clients - because sales of unit trusts pay substantially higher commissions.
3. Inappropriate requirements that affect whether incentives are paid: remuneration policies and practices which include, say, a requirement to achieve a quota of minimum sales levels across a range of products in order to earn any bonus at all is likely to be incompatible with the duty to act in the best interests of the client. Conditions which must be met before an incentive will be paid may influence relevant persons to sell inappropriately. For example, where no bonus can be earned on sales unless a minimum target is met for each of several different product types, this may impact on whether suitable products are recommended. Another example is where a reduction is made to a bonus or incentive payments earned because a secondary target or threshold has not been met.
  - a. Example: A firm has relevant persons who sell a range of products that meet different client needs, and the product range is split into three 'buckets' based on the type of client need. Relevant persons can accrue incentive payments for each product sold,

however at the end of each monthly period no incentive payment is made if they have not reached at least 50% of the sales target set for each 'bucket'.

- b. Example: A firm sells products with a range of optional 'add-on' features. The relevant person receives incentive payments for all sales, with an additional payment if the client purchases an add-on feature. However, at the end of each monthly period no incentive payment is made if they have not achieved a penetration rate of at least 50% of products sold with an add-on feature.
4. Variable salaries where the arrangements vary base pay (up or down) for relevant persons based on performance against sales targets: in such cases, the relevant person's entire salary can become – in effect – variable remuneration.
    - a. Example: A firm will reduce a relevant person's basic salary substantially if he or she does not meet specific sales targets. There is therefore a risk that he or she will make inappropriate sales to avoid this outcome. Equally, relevant persons may be strongly motivated to sell by the prospect of increasing basic salary and associated benefits.
  5. Remuneration policies and practices which create a disproportionate return for marginal sales: where relevant persons need to achieve a minimum level of sales before incentive payments can be earned, or incentives are increased, the risk is increased. Another example would be schemes that include 'accelerators' where crossing a threshold increases the proportion of bonus earned. In some cases, incentives are payable retrospectively based on all sales rather than just those above a threshold, potentially creating significant incentives for relevant persons to sell particular products in particular circumstances.
    - a. Example: A firm makes accelerated incentive payments to relevant persons for each product sold during a quarterly period as follows:
      - 0-80% of target no payments
      - 80-90% of target 50€ per sale
      - 91-100% of target 75€ per sale
      - 101-120% of target 100€ per sale
      - >120% of target 125€ per sale

This example can also apply where the relevant person receives an increasing share of commission or income generated.

- b. Example: A firm has the same accelerated scale as the firm in the foregoing example, but the increase in payments per sale is applied retrospectively to all sales in the quarter, e.g. on passing 91% of target the incentive payments accrued to date at the rate of €50 per sale are increased to €75 per sale. This creates a series of 'cliff edge' points, where one additional sale required to reach a higher target band causes a disproportionate increase in the incentive payment.

## VII. Correlation table between the ‘new’ draft guidelines and the 2013 guidelines

New Guidelines	2013 guidelines
<b>Design of remuneration policies and practices</b> Guideline 1	<b>V.I Governance and design of remuneration policies and practices in the context of the MiFID conduct of business and conflicts of interest requirements</b>
<b>Governance</b> Guideline 2	
<b>Controlling risks that remuneration policies and practices create</b> Guideline 3	<b>V.II. Controlling risks that remuneration policies and practices create</b>
n/a	<b>V.III. Guideline on competent authorities’ supervision and enforcement of remuneration policies and practices</b>