

European Securities and Markets Authority
103 rue de Grenelle
75007 Paris
France
www.esma.europa.eu

Chris Barnard
Germany

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- **Your Ref: Comment letter on Consultation Paper**
- **Guidelines on certain aspects of the MiFID compliance function requirements**

Dear Sir,

Thank you for giving us the opportunity to comment on your Consultation Paper 2011/446 on Guidelines on certain aspects of the MiFID compliance function requirements. I will first make some general comments, and then discuss some more detailed points.

The financial crisis has highlighted the need for investment firms to implement a more “comprehensive and pro-active compliance strategy”, to improve compliance monitoring and to strengthen and institutionalise compliance reporting within investment firms and between firms and regulators. This is of increasing importance given the pace of regulatory change which is challenging compliance functions and their capabilities. I agree that the compliance function should therefore have a more prominent role within investment firms.

Duties of the compliance function

I agree that the main responsibilities of the compliance function include compliance risk assessment and monitoring, reporting and advisory obligations. I would strongly advise that its duties should also include identifying and reporting to senior management on current and potential conflicts of interest within the firm, and establishing procedures for the resolution of such conflicts of interest. I suggest that this is within the responsibility of the compliance function. This is not explicitly stated in the Consultation Paper, which mentions conflicts of interest mainly in the context of the compliance function itself.

I would also add that the compliance function has a strong role to protect the interests of customers, not just in legal, ethical or regulatory terms, but also regarding internal rules, standards, processes, culture and guidelines. The Consultation Paper does not really discuss the role of the compliance function in relation to customers, apart from mentioning that it has “a role in overseeing the operation of the complaints process”¹.

Answers to specific questions raised by ESMA

Q1: Do you agree that investment firms should ensure that, where the compliance function takes a risk-based approach, any comprehensive risk assessment is performed to determine the focus and the scope of the monitoring, reporting and advisory activities of the compliance function? Please also state the reasons for your answers.

I agree with this. The compliance function has been too reactive in the past, often dealing with regulatory issues and risks that have already occurred. It will have to be more proactive and risk-based in the future, and focus on areas of high regulatory risk. This represents a move towards a more risk sensitive and advisory role in order to ensure a timely compliance with regulatory, business and customer expectations.

Q2: Please provide your comments (with reasons) on any or all aspects of this guideline on the monitoring obligations of the compliance function.

Q3: Please provide your comments (with reasons) on any or all aspects of this guideline on reporting obligations of the compliance function.

Q4: Please provide your comments (with reasons) on any or all aspects of this guideline on the advisory obligations of the compliance function.

Q5: Please provide your comments (with reasons) on any or all aspects of this guideline on the effectiveness of the compliance function.

I agree with these common sense guidelines on the monitoring, reporting and advisory obligations of the compliance function, and on its effectiveness.

Q6: Do you agree that, in order to ensure that the compliance function performs its tasks and responsibilities on an ongoing permanent basis, investment firms should provide:

- (i) adequate stand-in arrangements for the responsibilities of the compliance officer which apply when the compliance officer is absent; and
- (ii) arrangements to ensure that the responsibilities of the compliance function are performed on an ongoing basis?

Please also state the reasons for your answers.

I agree with this. This is basic risk management.

¹ See Paragraph 18 of the Consultation paper.

Q7: Do you agree that investment firms should ensure that the compliance function holds a position in the organisational structure that ensures that the compliance officer and other compliance function staff are independent when performing their tasks? Please also state the reasons for your answer.

Yes, I strongly agree with the importance of independence of the compliance function. The compliance function should be able to act in a detached manner and be free of pressures, conflicts of interest or encumbrances that could (unreasonably) limit and / or modify its work and / or advice. This also requires that the compliance function has a clear mandate which is combined with an understanding of senior management's expectations.

Q8: Do you agree that investment firms should ensure that the organisation of the compliance function guarantees that the compliance officer's daily decisions are taken independently from any influence of the business units and that the compliance officer is appointed and replaced by senior management only?

Yes, I agree with this. I would only additionally recommend that wording should be added to Paragraph 45 concerning any change in the head of the compliance function that would require the new head to consult with its immediate predecessor in order to discover if there were any professional reasons not to accept the appointment. The new head should be required to contact the supervisory authority, should this be the case.

Q9: Please provide your comments (with reasons) on any or all aspects of this guideline on Article 6(3) exemptions.

I agree with the guideline on Article 6(3) exemptions.

Q10: Please provide your comments (with reasons) on any or all aspects of this guideline on combining the compliance function with other functions.

I broadly agree with this guideline. I would only add that internally recruited compliance staff should not monitor compliance for activities for which they have had previous responsibility before a sufficiently long "cooling off" period has elapsed.

Q11: Please provide your comments (with reasons) on any or all aspects of this guideline on outsourcing of the compliance function.

I broadly agree with this guideline. However, I would suggest some minimum standards for outsourcing of the compliance function (and other functions), on the following main areas:

- outsourcing should ideally improve operational efficiency;*
- it should not increase operational risk;*
- it should not hinder effective supervision by regulators.*

Q12: Do you agree that competent authorities should also review, as part of the ongoing supervisory process, whether measures implemented by investment firms for the compliance function are adequate, and whether the compliance function fulfils its responsibilities appropriately? Please also state the reasons for your answer.

Please note that the comments expressed herein are solely my personal views

I am not convinced that this level of detail is appropriate in the context of the compliance function. I believe that this is covered generally under Article 7 of MiFID.

Q13: Do you agree that competent authorities should also assess whether amendments to the organisation of the compliance function are required due to changes in the scope of the business model of the investment firm, and where such amendments are necessary, monitor whether these amendments have been implemented?

I accept that this does have some merit in the context of major changes in the scope of the business model of the investment firm.

Yours faithfully

C.R.B.

Chris Barnard