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*Regarding the provisions quoted in the response below, as far as possible, hyperlinks to these provisions (in the respective language or, if available, in English) are set out in Document CESR/04-075 for each country.*

#### ***IMPORTANT NOTICE***

*In the interest of transparency and to inform interested parties, CESR has published the following (together the “Tables”):*

- *the Correspondence Tables on the CESR Standards for Investor Protection (Ref. CESR/03-416b to 423b, CESR/03-134/Country);*
- *the Correspondence Tables on the CESR Standards for Alternative Trading Systems (Ref. CESR/03-415b, CESR/03-135/Country);*
- *the Synthesis Tables (Ref. CESR/03-427b and CESR/03-432b);*
- *the List of Alternative Trading Systems currently operating in Member States<sup>1</sup> (Ref. CESR/03-497b);*
- *the explanatory notes and caveats attached to the Tables.*

*The Tables were produced by the Members of CESR<sup>1</sup> within the constraints of and solely for the purposes of the CESR Review Panel process of monitoring the status of implementation of the CESR Standards for Investor Protection<sup>2</sup> and the CESR Standards for Alternative Trading Systems<sup>3</sup> in Member States.*

*The Tables have no legal effect; they do not present any interpretation of, or definitive position on, existing law or regulation in any jurisdiction. The Tables should not be relied upon for any purpose other than the purpose for which they were prepared. In particular, they should not be relied upon as a substitute for, or as guidance on, any aspect of the regulatory system of any Member State or as a defence in supervisory activities or enforcement proceedings; and they cannot be used to restrict competent authorities in taking regulatory or enforcement actions.*

*The information set out in the Tables is the response of each Member’s self-assessment. For this reason, the content of the Tables regarding a particular Member State has been prepared solely by the relevant Member on a best-efforts basis. (In a next step, the CESR Review Panel is going to conduct a common and collective peer exercise in reviewing the responses from all Members.) In case of discrepancy between the tables containing the responses from all CESR Members and the tables containing the individual responses from a particular CESR Member, the latter should be referred to.*

*The Tables provide a “snap shot” and will be up-dated on a regular basis to take account of regulatory developments in Member States. Therefore, they cannot be considered as fully finalised or definitive reflections of regulatory provisions in Member States. The Tables should also be read in light of current and future developments in the formulation of the proposed Directive on Markets in Financial Instruments (“ISD2”) and the future Level 2 implementing measures, and without prejudice to the position of any Member State in those developments.*

*For a more detailed account of the process, methodology and first, interim results, please see the “First Interim Report” by the Review Panel (Ref. CESR/03-414b).*

<sup>1</sup> For reasons of simplicity, the term “Member” in this context refers to all participants in the Review Panel, i.e. CESR Members, CESR Observers, and the Polish securities regulators; this applies to the term “Member State” accordingly.

<sup>2</sup> “A European Regime of Investor Protection - The Harmonization of Conduct of Business Rules” (Ref. CESR/01-014d, April 2002) and “A European Regime of Investor Protection – The Professional and the Counterparty Regimes” (Ref. CESR/02-098b, July 2002).

<sup>3</sup> Ref. CESR/02-086b, July 2002.

**CORRESPONDENCE TABLE ON STANDARDS FOR INVESTOR PROTECTION**  
**(REF. CESR/01-014D AND CESR/02-098B)**

**GERMANY**

**A CONDUCT OF BUSINESS RULES FOR THE “RETAIL REGIME”**

**1. STANDARDS AND RULES OF GENERAL APPLICATION**

**1.1 GENERAL**

Standard /Rule	Implementing authority(ies)	Implementing measure <sup>4</sup>	Comments
<i>1. An investment firm must at all times act honestly, fairly and professionally in accordance with the best interests of its customers and the integrity of the market.</i>	BaFin	Section 31 par. 1 Securities Trading Act (in the following: WpHG)	
<i>2. An investment firm must have and must employ effectively the resources and procedures that are necessary for the proper performance of its business activities, including back-up procedures and systems so as to reasonably ensure that investment services can be provided without interruption.</i>	BaFin	Section 33 par. 1 WpHG Guideline on the details concerning the organisational duties of investment services enterprises pursuant to Section 33 paragraph (1) of the Securities Trading Act (in the following: guideline orga.), Part 2	

<sup>4</sup> Any derogation to the application of the implementing measures should be mentioned.

<i>3. An investment firm must ensure that any persons or entities with which it is undertaking authorisable investment business are authorised to conduct that business by the relevant regulator.</i>	BaFin	Sections 32 and 54 Banking Act	Undertaking business with non-authorised persons or entities would be aiding and abetting
<i>4. Investment firm that outsources functions retains full responsibility for the outsourced activity and must ensure that the providers of such outsourcing are able to perform these functions reliably, professionally and in the best interests of its customers.<sup>5</sup></i>	BaFin	Section 33 par. 2 WpHG Circular on the Outsourcing of operational areas to another enterprise pursuant to section 25a (2) of the Banking Act, Sections 3, 25 et seqq.	

## 1.2. CONFLICTS OF INTEREST AND INDUCEMENTS

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>5. An investment firm must take all reasonable steps to ensure that conflicts of interest between itself and its customers and between one customer and another are identified and then prevented or managed in such a way that the interests of customers are not adversely affected. For these purposes the investment firm must establish an internal independence policy, including Chinese walls as appropriate.</i>	BaFin	Section 33 par. 1 WpHG  Guideline orga., Part 3.3.1.	
7. Where conflicts of interest cannot be reasonably avoided or managed with the internal independence policy, an investment firm must not undertake business with or on behalf of a customer where it has directly or indirectly a conflicting interest, including any such interest arising from intra-group dealings, joint provision of more than one service or other business dealings of the investment firm or any affiliated entity, unless it has previously disclosed to the customer the nature and extent of its interest, either in writing or by telephone and recorded by the firm and the customer has expressly agreed to engage in such business with the investment firm. Where possible, this disclosure must be given at the beginning of the customer relationship; otherwise it must be given prior to the customer entering into any relevant transaction.	Legislator / BaFin	Section 33 par. 1 WpHG  Guideline on the details concerning Sections 31 and 32 of the WpHG relating to the commission business, proprietary trading on behalf of a third party, and agency business of investment services institutions (in the following: guideline), Part E	No legal basis for recording requirements  Proposal for amendment of law will be presented to the ministry of finance

<sup>5</sup> This standard is not intended to interfere with relevant provisions on civil liability, applicable at national level.

<p><i>6. An investment firm, its members of the board, directors, partners, employees and tied-agents may offer or receive inducements only if they can reasonably assist the firm in the provision of services to its customers. Where inducements are received disclosure of such inducements must be made to the customer.</i></p>	BaFin	<p>Disclosure required: Guideline, Part. B.1.2. prohibition not implemented, amendment of guideline needed</p>	
<p>8. Where inducements are permitted an investment firm must act in the best interest of the customer and inform the customer at the beginning of the relationship, which may give rise to conflicts of interest between itself and its customers, about the investment firm's policy on inducements and at least once a year in writing of the relevant details of such inducements.</p>	BaFin	<p>Disclosure required: Guideline, Part. B.1.2. Periodical information not implemented amendment of guideline needed</p>	

### 1.3 COMPLIANCE AND CODE OF CONDUCT

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<p><i>9. An investment firm must take all reasonable measures to ensure that the firm and its members of the board, directors, partners, employees and tied-agents at all time act in accordance with the best interests of its customers and the integrity of the market by establishing and implementing adequate compliance policies and procedures, including an independent compliance function and an internal code of conduct.</i></p>	BaFin	<p>Section 31 par. 1 WpHG Guideline orga, Part 4</p>	
<p>11. The persons responsible for the compliance function must have the necessary expertise, resources, authority and must have full access to all relevant information enabling them to perform their duties. They must perform their monitoring duties independently of all persons and activities subject to their monitoring.</p>	BaFin	<p>Section 33par. 1 WpHG Guideline orga, Part 4.2</p>	<p>Expertise and resources not explicitly mentioned in guideline, but are practice of supervision</p>
<p>12. A summary of the results of the monitoring must be reported to the senior management of the investment firm and to the internal or external auditors. The investment firm must report these results, together with remedies adopted, to the competent authority at least once a year.</p>	BaFin	<p>Section 33 par. 1 WpHG Guideline orga, Part 4.2 Section 36 par. 1 WpHG (annual inspection)</p>	<p>Limited application range (due to reference in Guideline orga. Part 4.2. to Part 3.1.)</p>

<p>13. An investment firm must ensure that the competent authority is informed, without undue delay, of serious breaches of the conduct of business rules. In assessing whether the breaches are serious, an investment firm must take into account the impact on regulatory goals and on the capacity to provide services, their frequency, the damages suffered by customers.</p>	Legislator	Not implemented	<p>No legal basis Proposal for amendment of law will be presented to the ministry of finance</p>
<p>14. The compliance function must: - regularly verify the adequacy of policies and procedures to ensure compliance with the regulations on investment services; - provide advisory assistance and support to the various business areas of the investment firm on problems concerning compliance with the regulations on investment services.</p>	BaFin	Section 33par. 1 WpHG Guideline orga, Part 4.2	<p>Not all details explicitly mentioned in guideline. Limited application range (due to reference in Guideline orga. Part 4.2. to Part 3.1.)</p>
<p><b><i>10. An investment firm must be able to demonstrate that it has not acted in breach of the conduct of business rules and the internal code of conduct and that its organization, policies and procedures facilitate such compliance.</i></b></p>	BaFin	Section 33par. 1 WpHG Guideline orga, Part 4	<p>If this rule means a reversal of the burden of proof, it is not implemented.</p>
<p>15. An investment firm must keep records relevant for the purpose of demonstrating compliance with the conduct of business rules, for a period of five years in order to enable the competent authority to verify compliance with these rules. Tape recording of orders must be kept for a period of one year.</p>	Legislator / BaFin	Not implemented	<p>No legal basis for recording requirements Proposal for amendment of law will be presented to the ministry of finance.</p>
<p>16. An investment firm must keep a register of customer complaints related to the provision of the investment services and the measures taken for their resolution and must regularly verify whether complaints are adequately processed.</p>	BaFin	Guideline orga, Part 2.2	<p>Not all details explicitly mentioned in guideline, but are practice of supervision</p>
<p>17. An investment firm must establish a code of conduct for members of the board, directors, partners, employees and tied-agents. The code of conduct must contain:</p> <ul style="list-style-type: none"> <li>a) the rules and procedure to meet the obligation to protect data of a confidential nature;</li> <li>b) the rules and procedures for carrying out personal transactions involving financial instruments;</li> <li>c) the rules and procedures governing the business relationship with customers in order to ensure that the persons referred to above, in particular where a conflict of interest may arise, always act in the best interests of customers, and that such persons do not take advantage of any confidential information;</li> <li>d) the investment firm's policy on conflicts of interest and inducements.</li> </ul>	BaFin	<p>Section 33par. 1 WpHG Guideline orga, Part 2.2  Amendment of guideline needed</p>	

#### 1.4. COLD CALLING <sup>6</sup>

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>18. For the purpose of protecting customers from undue pressure to enter into a contract, cold calls can only be made to potential customers in accordance with the rules set out below.</i>	Legislator / BaFin	Cold Calling is prohibited competition law  General order pursuant to Section 36 b (1) and (2) of the WpHG concerning advertising by means of cold calling	
19. Cold calls may only be made by persons employed by, or appointed as tied-agent <sup>7</sup> by an investment firm. Responsibility for the competence and activities of such persons rests with the firm.		See 18	See 18
20. An investment firm cold calling customers may do so only between the hours of 9.00 a.m. and 9.00 p.m. Monday to Saturday (local time for the customer) and excluding local national holidays.		See 18	See 18
21. The identity of the person making the cold call, the investment firm on whose behalf the person is acting, and the commercial purpose of the cold call must be explicitly identified at the beginning of any conversation with the consumer. The caller must also make reference to the frozen period (see par. 24) during which orders may not be executed.		See 18	See 18
22. The person making the cold call is also required to establish whether the potential customer wishes the cold call to proceed or not. An investment firm must abide by a request from the customer either to end the cold call and/or not to cold call again.		See 18	See 18
23. An investment firm must not exert undue pressure on a potential customer during the course of a cold call and must be able to demonstrate that this is not the case, for example, by recording any such telephone calls.		See 18	See 18
24. During the period for which the customer benefits from a right of withdrawal from the contract (as determined by Article 4.a of the Distance Marketing Directive), an investment firm shall not execute any customer orders in respect of financial instruments under the contract.		See 18	See 18

<sup>6</sup> These rules are without prejudice to any provisions of EU law governing the means whereby or conditions under which an investment firm or its tied-agent may initiate unsolicited contacts with a prospective customer.

<sup>7</sup> This is without prejudice to the applicability of professional requirements, imposed at national level.

## 2. INFORMATION TO BE PROVIDED TO CUSTOMERS

### 2.1) BASIC REQUIREMENTS

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>25. An investment firm must pay due regard to the information needs of its customers and communicate information to them that is fair, clear, and not misleading.</i>	BaFin	Section 31par. 2 WpHG Guideline, Part B.1 and 2	
27. The firm must ensure that information provided to customers is clear and comprehensible. The content and purpose of the information should be easily understood and key items should be given due prominence. The method of presentation of the information must not disguise, diminish or obscure important warnings or statements.	BaFin	Section 31par. 2 WpHG Guideline, Part B.2 par 3	
<i>26. An investment firm must supply its customers on a timely basis with the information that enables them to make informed investment decisions.</i>	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.2. par 1	
28. In supplying information on a timely basis the investment firm must take into consideration: a) the urgency of the situation and b) the time necessary for a customer to absorb and react to the information provided and c) the terms of business agreed with the customer.	BaFin	Not implemented Amendment of guideline needed	

### 2.2.) MARKETING COMMUNICATIONS<sup>8</sup>

<sup>8</sup> This is without prejudice of EU or national provision requiring authorisation and/or other requirements affecting the provision of marketing services.

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>29. If an investment firm provides information in a marketing communication it must be fair, clear and not misleading.</i>	Legislator / BaFin	Not implemented  BaFin may prohibit certain types of advertising (Section 36b WpHG)  Amendment of guideline and possibly of law needed	
<i>30. The promotional purpose of marketing communications issued by an investment firm must not be disguised.</i>		See 29	
31. The information provided by an investment firm in a marketing communication must be consistent with the information it provides to its customers in the course of the provision of the investment services.		See 29	
32. Any marketing communication must contain at least the information about the investment firm defined in points a) and b) of paragraph 36. In case of a cross border marketing communication, the information provided must in addition state that information about the firm can also be obtained from or through the competent authority of the Member State where the customer resides.		See 29	
33. An investment firm must not use the name of the competent authority in such a way that would indicate endorsement or approval of its services.		See 29	
34. Where a marketing communication refers to a financial instrument or an investment service it must contain at least the information referred to in points a) and d) of paragraph 40.		See 29	

### 2.3) INFORMATION ABOUT THE INVESTMENT FIRM

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>35. Before providing investment services an investment firm must supply adequate information about itself and the services it provides.</i>	BaFin	Section 31par. 2 WpHG Guideline, Part B.1.1.	Information requirements only “on request”
<p>36. An investment firm must provide customers with the following information prior to the commencement of provision of investment services:</p> <ul style="list-style-type: none"> <li>a) the identity of the investment firm, the (financial) group to which the investment firm belongs, its postal address and telephone number;</li> <li>b) the fact that the investment firm is authorised and/or registered and the name of the competent authority that has authorised and/or registered it;</li> <li>c) the functions that the investment firm performs so that the customer is able to assess the scope of the firm’s responsibilities;</li> <li>d) the relevant compensation scheme(s);</li> <li>e) where such a procedure exists, a description of the mechanism(s) for settling disputes between the parties such as an out-of-court complaint and redress mechanism;</li> <li>f) an outline of the firm's policies in relation to conflicts of interest and inducements;</li> <li>g) the languages in which the customer can communicate with the investment firm.</li> </ul>	BaFin	Not implemented, Amendment of guideline needed	

**2.4) INFORMATION ON FINANCIAL INSTRUMENTS AND INVESTMENT SERVICES**

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments

<p><b>37. An investment firm must inform customers of the key features of investment services and financial instruments envisaged, according to the nature of such instruments and services.</b></p>	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.2.	
<p>40. The information provided to customers can be delivered using standard documentation but must include the following as a minimum:</p> <ul style="list-style-type: none"> <li>a) a description of the main characteristics <sup>9</sup> of the instrument/service, including the nature of the financial commitment, whether the instruments involved are traded on a regulated market or not and the risks involved;</li> <li>b) price, including commissions, fees and other charges, relating to the transaction, the instrument or service;</li> <li>c) arrangements for payment and performance;</li> <li>d) details on any cancellation rights or rights of reflection that may apply.</li> </ul>	BaFin	<p>a) and b) Section 31par. 2 WpHG Guideline, Part B.2.2</p> <p>c) and d) contractual agreements can not be considered as “information”</p>	Not all details explicitly mentioned in guideline, but are practice of supervision
<p><b>38. An investment firm must communicate clearly and precisely to the customer all the charges relating to the services or instruments envisaged and how the charges are calculated.</b></p>	BaFin	Section 31par. 2 WpHG Guideline, Part B.1.2.	
<p>41. The information to be disclosed to customers on commissions, charges and fees must contain:</p> <ul style="list-style-type: none"> <li>a) the basis or amount of the charges for transactions, products or services, detailing, where appropriate, the percentage or rate applicable, the frequency with which it is applied, any maximum or fixed minimum fees and, where the commission or fee must be paid in foreign currency, the currency involved;</li> <li>b) if various investment firms are to be involved in a transaction or service, an estimate of the other fees that will be payable.</li> </ul>	BaFin	<p>a) Section 31par. 2 WpHG Guideline, Part B.1.2.</p> <p>b) not implemented, amendment of guideline needed</p>	
<p>42. In order to give a fair and adequate description of the investment service or financial instrument, an investment firm must avoid accentuating the potential benefits of an investment service or financial instrument without also giving a fair indication of the risks.</p>	BaFin	Risk disclosure implemented Section 31par. 2 WpHG Guideline, Part B.2.2.	

<sup>9</sup> If the customer envisages undertaking transactions in derivatives, the information provided must include an explanation of their characteristics (especially the leverage effect, the duration of the contract, the liquidity and volatility of the market), a description of their underlying parameters (e.g. equities/interest rates/currencies), and the method to be used to execute the customer’s transactions (in particular, whether on a regulated market or not).

43. The fair and adequate description of a compound product must contain all the relevant characteristics of the composite instruments including, for example, the different services involved, the duration of the product, whether the instrument involves credit, the interest due, etc.	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.2.5	
44. The information on financial instruments and investment services must not state or imply that the performance of services or of the investment is guaranteed unless there is a legally enforceable arrangement to meet in full an investor's claim under the guarantee. Sufficient detail about the guarantor and the guarantee must be provided to enable the investor to make a fair assessment of the guarantee.	BaFin	Not implemented Amendment of guideline needed	
45. When information provided refers to a particular tax treatment the investment firm must advise the customer that the tax treatment depends on his personal situation and is subject to change and that he may wish to obtain independent tax advice.	BaFin	Not implemented Amendment of guideline needed	
<b><i>39. If information provided by an investment firm refers either to the past performance or to a forecast of the future performance of a financial instrument or investment service, this information must be relevant to the instrument or service being promoted and the source of the information must be stated.</i></b>	BaFin	Not implemented Amendment of guideline needed	
46. If a reference to historical performance of investment services or financial instruments is made, it must be clearly expressed that the figures refer to the past, and that they may not constitute reliable guidance as to the performance of these services and instruments in the future.	BaFin	Not implemented Covered by fair, clear und not misleading information Amendment of guideline needed	

<p>47. The use of simulated returns is prohibited. If the information refers to actual returns based on past performance:</p> <ul style="list-style-type: none"> <li>a) the reference period must be stated and must not be less than one year;</li> <li>b) where returns relate to more than one year, they must either be reduced to a compound annual rate or stated separately as annual returns;</li> <li>c) where a compound annual return is presented for more than one year, a reference period of five years must be used provided the relevant data are available. If the relevant data are not available over a reference period of five years (e.g. because the financial instrument or the investment portfolio has not existed for such a period), the returns may be measured from the issue date or the date on which the portfolio was established;</li> <li>d) where a benchmark is used to compare returns, it must be identified and its reference period must be relevant, clear and sufficient to provide a fair and balanced indication of performance of the investment service or financial instrument being promoted;</li> <li>e) if the return figures are not denominated in local currency, the currency used must be stated and reference shall be made to the currency risk for the return in local currency;</li> <li>f) the information for the comparison should be based on net performances or if it is based on gross performances commissions, fees or other charges have to be disclosed.</li> </ul>	BaFin	<p>Not implemented</p> <p>Covered by fair, clear und not misleading information</p> <p>Amendment of guideline needed</p>	
<p>48. The relevant provisions on actual returns shall apply to the method of calculating and presenting any future returns. Information on estimated future returns must state that these future returns are forecasts. Such forecasts must in turn be based on objective, realistic assumptions of investment returns.</p>	BaFin	See 47	
<p>49. Any estimate, forecast or promise contained in the information on financial instruments and investment services must be clearly expressed, must state the assumptions on which it is based, must be relevant and must not mislead the customer.</p>	BaFin	See 47	
<p>50. If information provided contains comparisons, the requirement of being fair, clear and not misleading means that the comparisons must:</p> <ul style="list-style-type: none"> <li>a) be based either on data from attributed sources or disclosed assumptions;</li> <li>b) be presented in a fair and balanced way;</li> <li>c) take reasonable steps not to omit any fact that is material to the comparison.</li> </ul>	BaFin	See 47	

**2.5) RISK WARNINGS**

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>51. An investment firm must provide its customers with risk statements that warn of the risks associated with financial instruments and transactions having regard to the customer's knowledge, experience, investment objectives and risk profile.</i>	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.2.	
<p>53. An investment firm must provide its customers with risk warnings as appropriate. Instances where the type of instrument or transaction envisaged makes specific risk warnings necessary include:</p> <ul style="list-style-type: none"> <li>- financial instruments not traded on a regulated market;</li> <li>- transactions in illiquid financial instruments;</li> <li>- leveraged transactions;</li> <li>- financial instruments subject to high volatility in normal market conditions;</li> <li>- securities repurchase agreements or securities lending agreements;</li> <li>- transactions which involve credit, margin payments or the deposit of collateral;</li> <li>- transactions involving foreign exchange risk.</li> </ul>	BaFin	<p>Section 31par. 2 WpHG Guideline, Part B.2.2.1. et seqq.</p> <p>Amendment of guideline needed</p>	
<p>53. The investment firm must also, where necessary, inform the customer of risks associated with:</p> <ol style="list-style-type: none"> <li>a) clearing house protections (e.g. that although the performance of a transaction is sometimes 'guaranteed' by the exchange or clearing house this guarantee will not necessarily protect the customer in the event of default by the investment firm or another counterparty);</li> <li>b) suspension of trading or listing (e.g. that under certain trading conditions it may be impossible to liquidate a position);</li> <li>c) insolvency (e.g. that in the event of default of an investment firm involved with the customer's transaction, positions may be liquidated automatically and actual assets lodged as collateral may be irrecoverable).</li> </ol>			

<i>52. Risk warnings must be given due prominence. They must not be concealed or masked in any way by the wording, design or format of the information provided.</i>	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.2.	
54. Risk warnings about derivatives must disclose that the instrument can be subject to sudden and sharp falls in value. Where the investor may not only lose his entire investment but may also be required to pay more later, he must also be warned about this fact and the possible obligation to provide extra funding.	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.2.4.	

## 2.6. CUSTOMER REPORTING

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
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<p><b>55. An investment firm must ensure that a customer is provided promptly with the essential information concerning the execution of his order.</b></p>	BaFin	Section 31par. 2 WpHG Guideline, Part B.3.6.2.	
<p>58. No later than the first business day following the execution of the transaction or receipt of confirmation of execution by a third party, an investment firm must send to the customer<sup>10</sup>, by fax, mail or electronic means (provided the firm reasonably believes that the customer can store it on a permanent medium), a contract note or confirmation notice which includes the following information:</p> <ul style="list-style-type: none"> <li>a) the name of the firm;</li> <li>b) the name of the customer account;</li> <li>c) the time of execution, if available, or a statement that the time of execution will be supplied on request;</li> <li>d) date of execution;</li> <li>e) the type of transaction; e.g. buy, sell, subscription etc.;</li> <li>f) the market on which the transaction was carried out or the fact that it was carried out off-market;</li> <li>g) the financial instrument and the quantities involved in the transaction;</li> <li>h) the unit price applied and the total consideration;</li> <li>i) whether the customer's counterparty was the investment firm itself or any related party;</li> <li>j) the commissions and expenses charged;</li> <li>k) the time limit and procedure for the settlement of the transaction, e.g. details (name and number) of the bank account and securities account.</li> </ul> <p>If a transaction is not executed within one business day of receipt of the customer order, an investment firm must send a written confirmation of the order to the customer. The confirmation notice must include customer order details, date and time of reception and, where applicable, date and time of transmission.</p>	BaFin	Section 31par. 2 WpHG Guideline, Part B.3.6.2.  Amendment of guideline needed	
<p>59. The investment firm must notify the customer immediately if it refuses to accept or transmit an order. The firm must inform customers as soon as possible if it is unable to transmit their orders.</p>	BaFin	Not implemented, Amendment of guideline needed	

<sup>10</sup> The reference to "send to the customer" includes to a tied-agent, other than the firm, nominated by the customer in writing.

<p><b>56. Where an investment firm has control of, or is holding assets belonging to a customer, it must arrange for proper identification and regular confirmation of such assets to the customer.</b></p>	BaFin	Section 34a WpHG	
<p>60. An investment firm must send to its customer at least once a year or as often as agreed with the customer a statement of all assets held in custody on behalf of each customer. The statement must also:</p> <ul style="list-style-type: none"> <li>a) identify assets which have been pledged to the firm or any third parties as collateral;</li> <li>b) identify assets which have been lent;</li> <li>c) clearly and consistently show movement of assets based on either trade date or settlement date.</li> </ul>	BaFin	<p>Not implemented</p> <p>Partly covered by provisions on custody business</p> <p>Amendment of guideline needed</p>	
<p><b>57. An investment firm that operates customer accounts, which include uncovered open positions, must provide regular statements of such positions.</b></p>	BaFin	<p>Not implemented</p> <p>Partly covered by provisions on custody business</p> <p>Amendment of guideline needed</p>	
<p>61. Where an account includes uncovered open positions<sup>11</sup>, an investment firm must send to its customer a monthly statement, which includes the following:</p> <ul style="list-style-type: none"> <li>a) information about the options contract, e.g. market price, date of exercise, exercise price, as well as any incidental costs connected with the exercise;</li> <li>b) each payment made by the customer as a result of the margin requirements in respect of the open positions and the amount of the unrealised profit or loss attributable to open positions;</li> <li>c) the resulting profit or loss arising from positions closed during the period.</li> </ul>	BaFin	<p>Not implemented,</p> <p>Amendment of guideline</p>	

### **3. THE “KNOW-YOUR-CUSTOMER STANDARD” AND THE DUTY TO CARE**

<sup>11</sup> Examples of uncovered open positions include:

- (1) short positions on cash instruments;
- (2) selling a call option on an investment not held in the portfolio;
- (3) unsettled sales of call options on currency in amounts greater than the portfolio’s holding of that currency in cash or in readily realisable securities denominated in that currency;
- (4) transactions having the effect of ‘selling’ an index to an amount greater than the portfolio’s holdings of designated investments included in that index.

### 3.1 INFORMATION FROM THE CUSTOMER

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<p><i>62. Prior to providing any investment service to a customer for the first time and throughout the business relationship, an investment firm must be in possession of adequate documentation on the identity of the customer, as well as the identity and legal capacity of any representative of the customer.</i></p> <p><i>In addition, prior to providing any investment service the investment firm must seek to obtain from the customer information enabling an investment firm</i></p> <p><i>a. to determine whether the investment services envisaged are appropriate for the customer<sup>12</sup> and</i></p> <p><i>b. to meet any duties owing to the customer in respect of the services to be provided.</i></p>	BaFin	<p>Sections 2 et seqq. Money Laundering Act</p> <p>Section 31par. 2 WpHG</p> <p>Guideline, Part B.2.1.</p>	a) applicable only to advice (footnote doubtful)
<p>63. The “know-your-customer” standard applies to each investment firm having a direct business relationship with the customer with respect to investment services. However, where two or more investment firms are involved in providing an investment service and each has a direct relationship with the customer, an investment firm may rely on the information received from another of such investment firms.</p>	BaFin	<p>Section 31par. 2 WpHG</p> <p>Guideline, Part B.2. par. 2</p>	
<p>64. An investment firm must obtain evidence of the identity of its customers in accordance with national laws and regulations implementing the provisions of Council Directive 91/308 on the prevention of the use of the financial system for the purpose of money laundering. Until such evidence is obtained, an investment firm must not provide any investment services to the customer concerned.</p>	BaFin	Sections 2 et seqq. of Money Laundering Act	

<sup>12</sup> This is not considered to be investment advice according to the definition of the paper.

65. An investment firm must seek to obtain information on the customer's knowledge and experience <sup>13</sup> in the investment field, his investment objectives and risk profile, <sup>14</sup> his financial situation/capacity and any trading restrictions applicable to the customer. The extent of the information required will vary according to the standards laid down in paragraph 62, second subparagraph.	BaFin	Section 31par. 2 WpHG Guideline, Part B.2. et seqq.	"trading restrictions" not explicitly covered by guideline.
66. An investment firm shall be entitled to rely on the information provided by the customer, unless it is manifestly inaccurate or incomplete or the firm is aware that the information is inaccurate or incomplete. In this case paragraph 69 applies.	BaFin	Not Implemented Amendment of guideline needed	
67. An investment firm must take reasonable care to keep the customer profile under review, also taking into consideration the development of the relationship between the investment firm and the customer. The customer must be advised that he should inform the investment firm of any major changes affecting his investment objectives, risk profile, financial situation/capacity, trading restrictions, or the identity or capacity of his representative. Should the firm become aware of a major change in the situation previously described by the customer, it must request additional information.	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.1 par. 4	Not all details explicitly mentioned in guideline, but are practice of supervision
68. An investment firm must draw up and implement appropriate written internal policies and procedures to keep and update all documents required for customer identification and profile, as well as records of customer addresses and telephone/fax numbers.	BaFin	Sections 9 (records) and 14 (internal policies ) of Money Laundering Act	
69. An investment firm must warn the customer that any refusal to supply information may adversely affect the ability of the investment firm to act in the best interest of the customer. If a customer refuses to supply information the investment firm must warn him in writing that this may adversely affect the ability of the investment firm to act in his best interest.	Legislator / BaFin	Guideline, Part B.2.1 par. 3 Amendment of guideline needed	No legal basis for written form Proposal for amendment of law will be presented to the ministry of finance Not implemented beyond the application range of the money laundering act

<sup>13</sup> Information on the customer's investment knowledge and experience includes the types of services, transactions and products the customer is familiar with and his trading history, i.e. the nature, volume, frequency and timeframe of his transactions.

<sup>14</sup> Information on the customer's investment objectives and risk profile includes the temporal horizon of the customer's future investments, as well as his preferences regarding risk-taking and recurrent income.

70. The customer should not be invited not to provide information.	BaFin	Section 31par. 2 WpHG Guideline, Part B.2.4.	
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### 3.2 THE INVESTMENT FIRM'S DUTY TO CARE FOR THE CUSTOMER <sup>15</sup>

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>72. When an investment firm provides investment advice to the customer, it must have reasonable grounds to believe, in light of the information disclosed to it by the customer and the information available to it, including the information arising from the customer relationship, that this investment advice is suitable for him. The investment firm must communicate the reasons why the advice is considered to be in the best interest of the customers at the time the advice is given.</i>	BaFin	Section 32 WpHG Guideline, Part E Communication duty not implemented Amendment of guideline needed	
<i>73. Before accepting an order an investment firm must take reasonable care to verify that the order is suitable for the customer in light of the information disclosed to it by the customer and the information available to it, including the information arising from the customer relationship.</i>	BaFin	Section 32 WpHG	Applicable only to advice Relationship between advice and “execution only” should be clarified with regard to suitability check

<sup>15</sup> After having obtained the information from the customer according to chapter 3.1., the extent of an investment firm’s duty to care for the customer depends on the nature of the investment service to be provided: where the service to be provided is a full hand-holding service of transmission or execution of order par. 72-76 apply; where the service to be provided is the pure transmission or execution of orders (This implies that no investment advice is provided and that suitability will not be tested on a transaction-by-transaction-basis) par. 74, 76 and 77 apply.

<p>75. Where an investment firm receives an order regarding a transaction that it considers – in the light of the information disclosed to it by the customer and the information available to it, including the information arising from the customer relationship – not suitable<sup>16</sup> for the customer, it must advise the customer accordingly and provide appropriate information on the transaction, including any necessary risk warning. The investment firm may transmit or execute the order only if the customer nonetheless confirms his intention to proceed with the transaction in writing or by telephone and recorded, and provided that such confirmation contains an explicit reference to the warning received.</p>	<p>Legislator / BaFin</p>	<p>Guideline, Part B.3 par. 2 Guideline, Part B.3.3. par. 1</p>	<p>No legal basis for recording requirement Proposal for amendment of law will be presented to the ministry of finance</p>
<p><b><i>74. An investment firm must take reasonable care to verify that the customer has sufficient financial resources to settle the proposed transaction.</i></b></p>	<p>BaFin</p>	<p>Guideline, Part B.3 par. 2</p>	
<p>76. An investment firm may accept an order without having taken reasonable steps to verify the immediate availability of the funds (securities) necessary for carrying out the related purchase (sale) only if an adequate credit facility has been agreed on beforehand.</p>	<p>BaFin</p>	<p>Guideline, Part B.3 par. 2</p>	<p>Credit facility not explicitly mentioned in guideline, but is practice of supervision</p>

<sup>16</sup> A transaction may be considered unsuitable for a customer, *inter alia*, because of the instrument involved (e.g. derivatives), because of the type of transaction (e.g. sale of options), because of the characteristics of the order (e.g. size or price specifications) or because of the frequency of the customer's trading.

<p>77. Where the service to be provided is the pure transmission or execution of orders (either through a special distribution channel, in individual cases or generally) the customer must be made aware of this fact prior to the transaction taking place for the first time. On the basis of the information obtained from the customer on opening the account, the investment firm will define an appropriate service including investment parameters, i.e. types of instruments, types of transactions and types of orders, and inform the customer accordingly. Where the investment firm receives an order regarding a transaction, which is not in line with the defined investment parameters, it must warn the customer accordingly and provide appropriate information on the transaction, including any necessary risk warning(s). The investment firm may transmit or execute the order only if the customer nonetheless confirms his intention to proceed with the transaction in writing or by telephone and recorded, and provided that such confirmation contains an explicit reference to the warning received.</p>	<p>Legislator / BaFin</p>	<p>Guideline, Part B.2.6.</p> <p>Amendment of guideline needed</p>	<p>No legal basis for recording requirement</p> <p>Proposal for amendment of law will be presented to the ministry of finance</p>
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#### 4. CUSTOMER AGREEMENTS

##### 4.1) BASIC CUSTOMER AGREEMENT

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<p><i>78. Prior to providing any investment service, an investment firm must enter into a signed written agreement with the customer setting out the rights and obligations of the parties, a description of the services to be provided, and all other items of information necessary for the proper understanding and performance of the agreement.</i></p>	<p>Legislator</p>	<p>Not implemented</p>	<p>No legal basis for governing civil law agreements (freedom of contract principle) and written form.</p> <p>Proposal for amendment of law will be presented to the ministry of finance</p>
<p><i>79. The customer agreement must be clear and easily understandable by the customer.</i></p>		<p>See 78</p>	<p>See 78</p>

<p>80. The customer agreement must contain the following items as a minimum:</p> <ul style="list-style-type: none"> <li>a) the identity, postal address and telephone number of each of the parties;</li> <li>b) the names of any persons authorised to represent the customer for the purposes of the agreement, in particular the names of the natural persons authorised to represent the customer who is a legal entity;</li> <li>c) the investment firm's general terms of business for investment services and any particular terms agreed between the parties concerning, e.g. margin requirements or potential obligations where securities may be purchased on credit</li> <li>d) a general description of the investment services, including custody, offered by the investment firm and the types of financial instruments to which such services relate;</li> <li>e) the types of orders and instructions that the customer may place with the investment firm, the medium/media for sending them (e.g. by telephone, E-mail or post) and the alternative medium to be used when normal media are unavailable;</li> <li>f) the information to be given by the investment firm to the customer regarding the performance of services including the medium/media for sending the information and the type, frequency and rapidity of the information to be given e.g. regarding order execution or portfolio evaluation;</li> <li>g) details of the investment firm's fees and prices for investment services, including information on how they are to be calculated, the frequency with which they are to be charged and the manner of payment;</li> <li>h) the name of the competent authority which has authorised the investment firm;</li> <li>i) the law applicable to the contract, as ascertained to the best of the knowledge of the firm or as agreed between the parties;</li> <li>j) the duration of the agreement and the procedures for amending, renewing, terminating or withdrawing from it;</li> <li>k) where such a procedure exists, a description of the mechanism for settling disputes between the parties such as an out-of-court complaint and redress mechanism;</li> <li>l) the actions that the investment firm shall or may take in the event the customer does not honour his obligations (e. g. payment of money due to the investment firm), in particular whether the investment firm is allowed to dispose of any of the customer's assets, the timeframe for doing so and the information to be given to the customer in such circumstances;</li> <li>m) the languages in which the customer can communicate with the investment firm.</li> </ul>		See 78	See 78
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81. Rather than containing all the above items itself, the contract may refer to other documents containing certain of them, e.g. the general terms of business, the types of investment services offered, the types of orders and information to be sent by the parties and the fee schedule, provided that all the contractual documents so referred to are provided to the customer prior to the signing of the contract.		See 78	See 78
82. Where a custody service related to the other services provided by the firm to the customer is provided, either directly by the investment firm party to the contract with the customer or indirectly by another investment firm, the contract must contain at least a brief indication of the rights and obligations of the parties, including the provisions relating to the exercise of voting rights attaching to the securities held.		See 78	See 78
83. The contract must state that any modification of the agreement by the investment firm, e.g. regarding fees, requires the prior notification of the customer, and the contract must provide a sufficient opportunity for the customer to terminate the agreement.		See 78	See 78
84. A copy of the agreement signed by the customer (and any related contractual documents) must be kept by the investment firm for the duration of the customer relationship and for at least five years after the end of the relationship; a copy must be provided to the customer immediately after signing, and at any time subsequently on request.		See 78	See 78

**4.2) CUSTOMER AGREEMENT INVOLVING TRADING IN DERIVATIVES**

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
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<p><b>85. Prior to providing the services of reception/transmission and/or execution of orders involving derivatives, a customer agreement containing the relevant provisions of the basic customer agreement as well as certain additional provisions specific to trading in derivatives must be signed between the parties.</b></p>		See 78	See 78
<p>86. In addition to the relevant items of the basic customer agreement, where the firm provides services involving derivatives, the customer agreement must contain:</p> <ul style="list-style-type: none"> <li>- the type(s) of instruments and transactions envisaged,</li> <li>- the obligations of the investment firm with respect to the transactions envisaged, in particular its reporting and notice obligations to the customer,</li> <li>- the obligations of the customer with respect to the transactions envisaged, in particular his financial commitments toward the investment firm and the time allowed for honouring such commitments,</li> <li>- an appropriate warning calling to the customer's attention the risks involved in the transactions envisaged.</li> </ul>		See 78	See 78
<p>87. The contract must mention the types of transactions envisaged, in particular whether the customer intends to undertake transactions giving rise to contingent liabilities, the types of instruments envisaged, in particular whether they are traded on a regulated market or not, and it must refer to the documentation on such instruments provided by the investment firm to the customer for information purposes.</p>		See 78	See 78
<p>88. The contract must provide for the immediate confirmation of derivatives transactions and the immediate notice to the customer of his payment obligations as they arise, as well as the procedures to be used for such confirmation and notice.</p>		See 78	See 78
<p>89. The contract, or the documentation referred to in the contract, must provide adequate information on any margin requirements or similar obligations, regardless of the source of such rules and requirements, e.g. an exchange or clearing house, or the investment firm itself. This document must indicate how margin will be calculated and charged, the assets (cash, securities, etc.) accepted as margin, the frequency of margin calls and the timetable for the delivery or payment of margin by the customer to the investment firm. The contract must require immediate notification to the customer of any change in margin rules.</p>		See 78	See 78

90. The warning given to the customer should reflect the transactions envisaged, in particular where potential losses may exceed the amounts invested, as well as the experience, knowledge and financial situation/capacity of the customer or type of customer involved, and should be given due prominence in the contract.		See 78	See 78
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**5.- DEALING REQUIREMENTS**

**5.1) RECEPTION AND TRANSMISSION OF CUSTOMER ORDERS**

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>91. An investment firm must record and process customer orders in accordance with the customer's instructions and in such a way as to facilitate best execution.</i>	BaFin	Section 34 WpHG	
93. An investment firm must ensure that, prior to their transmission for execution, orders given by customers are clear and precise and include the following: a) the name of the customer and of any person acting on his behalf, b) the date and time of the order, c) the financial instrument to be traded, d) the size of the order, e) the nature of the order, e.g., subscription, buy, sell, exercise etc., f) any other relevant details and particular instructions from the customer for the order to be properly transmitted and executed, e.g. limit orders, validity period and market of execution; g) the account for which the order has to be executed.	BaFin	Section 34 WpHG	
94. An investment firm must record orders immediately, documenting and verifying all relevant items of proper execution.	BaFin	Section 34 WpHG	

95. An investment firm must keep a record of telephone orders on magnetic tape or an equivalent medium. Investment firms must duly inform the customer that the conversation will be recorded.	Legislator	Not implemented	No legal basis Proposal for amendment of law will be presented to the ministry of finance
96. Before transmitting orders on behalf of several beneficiaries on an aggregated basis, an investment firm must pre-assign such orders in order to ensure that they can identify and match the orders with the relevant customer at any time.	BaFin	Guideline, Part B.3.5 par. 2	
97. An investment firm must transmit orders promptly and sequentially and must take all reasonable care to transmit orders in a way to facilitate their best execution, taking into account all relevant details of the process of transmission, e.g. the size and characteristics of the order.	BaFin	Guideline, Part B.3.3.	
<b><i>92. An investment firm must ensure that the firm and its members of the board, directors, partners, employees and tied-agents do not use the information they possess on customers orders to the disadvantage of customers' interest.</i></b>	BaFin	Section 32 WpHG	
98. An investment firm must take all reasonable steps to refrain from transmitting orders for its own account or the account of its members of the board, directors, partners, employees and tied-agents before those of customers in identical or better conditions than the latter ("front running").	BaFin	Guideline, Part B.3.1. Guideline, Part B.3.5. par. 3	
99. An investment firm, which aggregates orders, must pre-assign such orders prior to transmitting them.	BaFin	Guideline, Part B.3.5.	
100. An investment firm may transmit orders for its own account and for its customers account on an aggregated basis when it is clearly in accordance with the best interest of the customer and provided that the best execution standard is respected.	BaFin	Guideline, Part B.3.1.	Guideline, Part B.3.5 (instead of B.3.1.)
101. In the case of orders in connection with public offers of securities, an investment firm may transmit such orders provided that they offer the relevant prospectus to the customer or informs the customer where it is available.	BaFin	Not implemented, Amendment of guideline needed	

5.2) EXECUTION OF ORDERS

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<p><i>102. An investment firm must take all care to obtain the best possible result for the customer with reference to price, costs born by the customer, size, nature of the transactions, time of reception of order, speed and likelihood of execution and trading venue taking into account the state of the relevant market(s). The relevant market(s) shall be deemed to be the market(s) offering the most favourable trading conditions also in terms of transparency, liquidity and clearing and settlement arrangements in connection with the envisaged transaction. If the investment firm executes in another trading venue, it must be able to demonstrate to the customer that this was done in accordance with his best interest.</i></p>	BaFin	Guideline, Part B.3.3.	Required implementation details of “best execution” should be clarified
<p>104. An investment firm acting as principal in relation to a customer order must inform the customer accordingly beforehand and must be in a position to justify the price at which the transaction is executed, with reference to the prices and volumes in the relevant market(s), where appropriate, or the presumed value determined on the basis of objective elements, e.g. mark-to-market.</p>	BaFin	Guideline, Part B.3.3. par. 6	
<p>105. An investment firm must take all reasonable steps to refrain from executing orders for its own account or the account of its members of the board, directors, partners, employees and tied-agents before those of customers in identical or better conditions than the latter (“front running”).</p>	BaFin	Section 32 WpHG	
<p><i>103. An investment firm must ensure that orders are executed in accordance with the instructions from the customer.</i></p>	BaFin	Guideline, Part B.3.3.	
<p>106. An investment firm must execute orders promptly and sequentially, unless the characteristics of the order and/or prevailing market conditions make this impossible or require otherwise in the interest of the customer.</p>	BaFin	Guideline, Part B.3.3.	

107. Customer orders may be matched internally only if such offsetting is clearly in accordance with the best interest of the customers involved and provided that the best execution standard is respected.	BaFin	Guideline, Part B.3.3. par. 6	Internal matching means acting as principle “ <a href="#">internalisation</a> ” is proprietary trading.  If relation to market price is not sufficient, further requirements for implementation should be clarified
108. If an investment firm aggregates orders, it must pre-assign such orders prior to executing them.	BaFin	Guideline, Part B.3.5. par. 2	
109. The price received or paid by the customer shall be identified separately from the fees and costs to the customer.	BaFin	Guideline, Part B.3.6.2. par. 3 Not implemented for acting as principal	
110. An investment firm must inform customers of relevant risks or impediments for the proper execution of the orders. If, due to market conditions, or for any other reason, an order cannot be executed according to the instructions given by the customer, an investment firm must ensure that the customer is duly informed as soon as possible.	BaFin	Guideline, Part B.2.2. et seqq.  Amendment of guideline needed	

### 5.3) POST- EXECUTION OF ORDERS

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<i>111. An investment firm must ensure the proper and speedy recording, allocation and distribution of executed transactions.</i>	BaFin	Guideline, Part B.3.6.1.	
113. An investment firm must record the essential elements of transactions, including those carried out for its own account, immediately after their execution. An investment firm must record in an analogous manner the orders they give and the transactions they carry out for the purpose of remedying errors made in recording, transmitting or executing orders.	BaFin	Guideline, Part B.3.6.1.  Recording of remedying errors not implemented  Amendment of guideline needed	

114. An investment firm must ensure that once a transaction is executed it is promptly allocated to the account of the relevant customer(s).	BaFin	Guideline, Part B.3.6.2.	
<i>112. Where orders for own and customer accounts have been aggregated, the investment firm must not allocate the related trades in any way that is detrimental to any customer. If such an aggregated order is only partially executed, allocation to customers must take priority over allocation to the investment firm.</i>	BaFin	Guideline, Part B.3.5.	
115. Where an order has been executed in several tranches, the investment firm must inform the customer about the price of execution of each tranche, unless the customer requests an average price. If customer orders have been aggregated and such an aggregated order has been partially executed, the investment firm must allocate the related trade on a proportional basis, unless the firm has a different allocation policy and the customers involved have been informed accordingly prior to the execution. An investment firm must have procedures in place to prevent that reallocation of principal transactions executed along with customers transactions on an aggregated basis give unfair preference to the investment firm or to any of its customers for whom it deals.	BaFin	Guideline, Part B.3.6.2. Guideline, Part B.3.5. Amendment of guideline needed	

## **6. INDIVIDUAL DISCRETIONARY PORTFOLIO MANAGEMENT**

In addition to the foregoing standards and rules, additional provisions apply to the service of individual portfolio management.

### **6.1. CUSTOMER AGREEMENTS FOR DISCRETIONARY PORTFOLIO MANAGEMENT**

<b>Standard /Rule</b>	<b>Implementing authority(ies)</b>	<b>Implementing measure</b>	<b>Comments</b>

<p><b>116. Prior to the provision of any discretionary portfolio management service, a customer agreement containing the relevant provisions of the basic customer agreement mentioned above, as well as certain additional provisions specific to portfolio management must be signed between the parties.</b></p>	Legislator	Not implemented	<p>No legal basis for governing civil law agreements (freedom of contract principle) and written form.</p> <p>Proposal for amendment of law will be presented to the ministry of finance</p>
<p>118. Instead of the items referred to in paragraph 80.e) , the customer agreement must contain:</p> <ul style="list-style-type: none"> <li>a) the management objective(s) and any specific constraints on discretionary management,</li> <li>b) the types of financial instruments that may be included within the portfolio and the types of transactions that may be carried out in such instruments, including any related limits.</li> </ul> <p>In addition to the above, the customer agreement must contain:</p> <ul style="list-style-type: none"> <li>c) without prejudice of paragraph 121, the benchmark against which performance will be compared,</li> <li>d) the basis on which the instruments are to be assessed at the date of valuation,</li> <li>e) details regarding the delegation of the management function where this is permitted.</li> </ul>		See 116	See 116
<p>119. The contract must indicate the objectives and the level of risk agreed upon, and any particular constraints on discretionary management resulting from the customer's personal circumstances as referred to in paragraph 62 or his request to exclude certain types of investments (certain business sectors for example).</p>		See 116	See 116
<p>120. If an investment firm is mandated to invest in any of the following types of instruments or to undertake any of the following types of transactions, the contract must state so explicitly and provide adequate information on the scope of the investment firm's discretionary authority regarding these instruments and transactions:</p> <ul style="list-style-type: none"> <li>- financial instruments not traded on a regulated market,</li> <li>- illiquid or highly volatile financial instruments,</li> <li>- leveraged transactions,</li> <li>- securities repurchase agreements or securities lending agreements,</li> <li>- transactions involving credit, margin payments or deposit of collateral,</li> <li>- transactions involving foreign exchange risk.</li> </ul>		See 116	See 116

<p>121. For information purposes with respect to the customer, the contract must indicate an appropriate benchmark, based on financial indicators produced by third parties and in common use, that is consistent with management objectives and against which the future results are to be compared. Where it is not feasible to establish such a benchmark in view of specific customer objectives, this must be stated clearly in the contract and an alternative measure of performance must be indicated.</p>		See 116	See 116
<p>122. The contract must state whether the financial instruments are to be valued at bid/ask or offer or mid-market price, including any relevant currency exchange rates, and, where relevant, by reference to indicators such as yield curves or other pricing models or the methodology to be used to value unlisted equities.</p>		See 116	See 116
<p>123. The contract must define a specific reporting requirement in the event of losses, defined as a marked-to-market decrease in the value of the portfolio as compared to the value of the portfolio as stated in the most recent periodic report (after neutralisation of any contributions or withdrawals). The contract must set a percentage threshold and a time period to warn the customer accordingly.</p>		See 116	See 116
<p>124. If the contract provides for a variable management fee based on the performance of the management service, the method of calculation must be clearly defined in the contract.</p>		See 116	See 116
<p>125. The contract must provide:</p> <ul style="list-style-type: none"> <li>- that the customer may terminate the agreement with immediate effect, subject only to the completion of all transactions already commenced and the time necessary to liquidate the portfolio where this is required by the customer;</li> <li>- that the investment firm may terminate the agreement subject to a two-week notice, provided however that where the portfolio cannot be liquidated (where required by the customer) within this timeframe, the agreement may be extended for the necessary additional period, and provided that where the customer so agrees after being informed of the firm's intention to terminate, the agreement may be terminated in the timeframe agreed between the parties.</li> </ul> <p>In both cases, the termination must take place on terms that are fair and reasonable for both parties.</p>		See 116	See 116
<p><b><i>117. Where the conditions for delegating management of the portfolio are met and the contract allows the investment firm to delegate this function, the contract must state that the delegator retains full responsibility for the protection of the customer's interests.</i></b></p>		See 116	See 116

<p>126. If an investment firm is mandated to delegate management of any or all of the customer's assets, this must be stated in the contract and adequate information must be supplied in this regard, both to the customer and to the competent authority. The contract must also provide that the customer will be informed prior to any significant change regarding delegation of portfolio management.</p>		<p>Section 45 of Circular on the Outsourcing of operational areas to another enterprise pursuant to section 25a (2) of the Banking Act</p> <p>Regarding contractual duties see 116</p>	
<p>127. An investment firm may delegate the portfolio management function to another investment firm only if such delegatee firm is authorised in its home country to provide portfolio management services on an individual basis and is qualified and capable of undertaking the function in question. The mandate shall not prevent the effectiveness of supervision over the delegator, and in particular, it must not prevent the delegator from acting in the best interests of its customers. In no case the investment firm may delegate its functions to the extent that it becomes a letter box entity. Furthermore, it may so delegate to a non-EEA investment firm so authorised in its home country only if an appropriate formal arrangement between regulators enables them to exchange material information concerning both cross-border delegations and the delegatee.</p>	<p>BaFin</p>	<p>Sections 12 et seqq., 22 et seqq., 33 et seqq. and 46 of Circular on the Outsourcing of operational areas to another enterprise pursuant to section 25a (2) of the Banking Act</p>	

<p>128. The delegation agreement, in writing:</p> <ul style="list-style-type: none"> <li>a) must be revocable with immediate effect by the delegator;</li> <li>b) must provide for sufficient notice to be given to the delegator by the delegatee of termination of the agreement;</li> <li>c) must be in conformity with the indications contained in the customer agreement with the delegator;</li> <li>d) must require, where the execution of transactions is not subject to the prior consent of the delegator, the delegatee to observe the investment guidelines, including investment allocation criteria, laid down from time to time by the delegator;</li> <li>e) must be formulated so as to avoid conflicts of interest between the delegator and the delegatee;</li> <li>f) must provide for the delegator to receive a continuous flow of information on the transactions carried out by the delegatee permitting it to monitor effectively at any time the activity of the delegatee and to reconstruct the assets under management belonging to each customer of the delegator.</li> </ul>	Legislator / BaFin	<p>See 127</p> <p>Regarding contractual duties see 116</p>	<p>No legal basis for written form</p> <p>Proposal for amendment of law will be presented to the ministry of finance</p>
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## 6.2 PERIODIC INFORMATION

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
<p><i>129. An investment firm must send periodic statements to its portfolio management customers so as to enable them to assess the performance of the service.</i></p>	BaFin	<p>Not implemented</p> <p>Guideline for portfolio management will be drafted</p>	

<p>130. Periodic statements for portfolio management customers must contain:</p> <ul style="list-style-type: none"> <li>a) a statement of the contents and valuation of the portfolio, including details of each investment held, its market value and the performance of the portfolio and the cash balance, at the beginning and at the end of the reporting period;</li> <li>b) a management report on the strategy implemented (to be provided at least yearly);</li> <li>c) the total amount of fees and charges incurred during the period and an indication of their nature;</li> <li>d) information on any remuneration received from a third party and details of its calculation basis;</li> <li>e) the total amount of dividends, interest and other payments received during the period.</li> </ul>	BaFin	See 129	
<p>131. If the basis for valuing any of the assets in the portfolio has changed with respect to the methods described in the portfolio management agreement, these changes must be indicated in the statement along with their impact on profits and/or losses.</p>		See 129	
<p>132. Periodic statements must include full information on any remuneration received by the investment firm or the manager from a third party that is attributable to services performed for the customer by the manager of the portfolio.</p>		See 129	
<p>133. In case the customer has elected – in derogation to rule 58 - not to receive information on each transaction in due course carried out by the portfolio manager, the periodic statement containing details of each transaction must be provided at least every three months. Where the details of each transaction are notified after each transaction to the customer, the periodic statement may be provided only every six months.</p>		See 129	
<p>134. Where the contract authorises a leveraged portfolio, the customer must receive a periodic statement at least once a month, including an assessment of the risks.</p>		See 129	

### 6.3. MANAGEMENT REQUIREMENTS

Standard /Rule	Implementing authority(ies)	Implementing measure	Comments
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<p><b>135. An investment firm must take all reasonable steps necessary to ensure the independence of the portfolio management function and mitigate the risk of customers' interests being harmed by any conflict of interest, in particular by providing for the strict separation of functions within the investment firm and its group.</b></p>	BaFin	Section 33par. 1 WpHG Guideline orga, Part 3.3.1.	
<p>138. The structure of the investment firm, its policies and procedures must seek to ensure the independence of the portfolio management function.</p>	BaFin	Section 33par. 1 WpHG Guideline orga, Part 3.3.1.	
<p><b>136. An investment firm must define investment strategies for its portfolio management services and carry out transactions in accordance with such strategies, taking into account the terms of the customer agreement.</b></p>	BaFin	Not implemented See 129	
<p>139. The investment firm must maintain records of its investment strategies, as well as the analyses and forecasts underlying them.</p>	BaFin	Not implemented See 129	No legal basis for recording requirements Proposal for amendment of law will be presented to the ministry of finance
<p><b>137. The transactions carried out by the portfolio manager, both individually and as a whole, must be exclusively motivated by the interests of the customer and in accordance with agreed management objectives.</b></p>	BaFin	Guideline Part B.3. par. 2 Guideline Part B.3.3. par. 1 (analogous application for portfolio management)	
<p>140. The investment firm must ensure that its orders are executed as efficiently as possible and in particular that:</p> <ul style="list-style-type: none"> <li>a) orders issued are immediately recorded by the firm;</li> <li>b) transactions executed are recorded and the portfolios affected are adjusted as quickly as possible;</li> <li>c) the portfolios affected and the relevant amounts are determined, or objectively determinable, no later than the time at which the order is issued and cannot be changed, except for the purposes of rectifying an error, after the execution of the order, regardless of whether the order relates to one or more accounts.</li> </ul>		<ul style="list-style-type: none"> <li>a.) Section 34 WpHG</li> <li>b.) Section 34 WpHG, Guideline Part B.3.6.1.</li> <li>c.) Guideline Part B.3.5.</li> </ul> <p>(Guideline with analogous application for portfolio management)</p>	



## B. CONDUCT OF BUSINESS RULES FOR THE “PROFESSIONAL REGIME”

### 1. STANDARDS OF GENERAL APPLICATION

#### 1.1 GENERAL

Standard	Implementing authority(ies)	Implementing measure	Comments
<i>1. An investment firm must at all times act honestly, fairly and professionally in accordance with the best interests of its customers and the integrity of the market.</i>	BaFin	Professional regime will be implemented once revised ISD is issued	Currently: Basically, rules of conduct are applicable to professional customers, but the professional nature of the customer can be taken into account See Section 31 par. 2 WpHG (“if so requested”)
<i>2. An investment firm must have and must employ effectively the resources and procedures that are necessary for the proper performance of its business activities, including back-up procedures and systems so as to reasonably ensure that investment services can be provided without interruption.</i>		See 1	See 1
<i>3. An investment firm must ensure that any persons or entities with which it is undertaking authorisable investment business are authorised to conduct that business by the relevant regulator.</i>		See 1	See 1
<i>4. Investment firm that outsources functions retains full responsibility for the outsourced activity and must ensure that the providers of such outsourcing are able to perform these functions reliably, professionally and in the best interests of its customers.<sup>17</sup>.</i>		See 1	See 1

#### 1.2. CONFLICTS OF INTEREST AND INDUCEMENTS

<sup>17</sup> This standard is not intended to interfere with relevant provisions on civil liability, applicable at national level.

Standard	Implementing authority(ies)	Implementing measure	Comments
<p><i>5. An investment firm must take all reasonable steps to ensure that conflicts of interest between itself and its customers and between one customer and another are identified and then prevented or managed in such a way that the interests of customers are not adversely affected. For these purposes the investment firm must establish an internal independence policy, including Chinese walls as appropriate. Where conflicts of interest cannot be reasonably avoided or managed with the internal independence policy, the conflict of interest must be disclosed to the customer.</i></p>		See 1	See 1
<p><i>6. An investment firm, its members of the board, directors, partners, employees and tied-agents may offer or receive inducements only if they can reasonably assist the firm in the provision of services to its customers. Where inducements are received disclosure of such inducements must be made to the customer on his request.</i></p>		See 1	See 1

### 1.3 COMPLIANCE AND CODE OF CONDUCT

Standard	Implementing authority(ies)	Implementing measure	Comments
<p><i>7. An investment firm must take all reasonable measures to ensure that the firm and its members of the board, directors, partners, employees and tied-agents at all time act in accordance with the best interests of its customers and the integrity of the market by establishing and implementing adequate compliance policies and procedures, including an independent compliance function and an internal code of conduct..</i></p>		See 1	See 1
<p><i>8. An investment firm must be able to demonstrate that it has not acted in breach of the conduct of business rules and the internal code of conduct and that its organization, policies and procedures facilitate such compliance.</i></p>		See 1	See 1

<p><i>9. The persons responsible for the compliance function must have the necessary expertise, resources, authority and must have full access to all relevant information enabling them to perform their duties. They must perform their monitoring duties independently of all persons and activities subject to their monitoring.</i></p>		See 1	See 1
<p><i>10. A summary of the results of the monitoring must be reported to the senior management of the investment firm and to the internal or external auditors. The investment firm must report these results, together with remedies adopted, to the competent authority at least once a year.</i></p>		See 1	See 1
<p><i>11. An investment firm must ensure that the competent authority is informed, without undue delay, of serious breaches of the conduct of business rules. In assessing whether the breaches are serious, an investment firm must take into account the impact on regulatory goals and on the capacity to provide services, their frequency, the damages suffered by customers.</i></p>		See 1	See 1
<p><i>12. The compliance function must:</i>  - <i>regularly verify the adequacy of policies and procedures to ensure compliance with the regulations on investment services;</i>  - <i>provide advisory assistance and support to the various business areas of the investment firm on problems concerning compliance with the regulations on investment services.</i></p>		See 1	See 1
<p><i>13. An investment firm must keep records relevant for the purpose of demonstrating compliance with the conduct of business rules, for a period of five years in order to enable the competent authority to verify compliance with these rules. Tape recording of orders must be kept for a period of one year.</i></p>		See 1	See 1
<p><i>14. An investment firm must keep a register of customer complaints related to the provision of the investment services and the measures taken for their resolution and must regularly verify whether complaints are adequately processed.</i></p>		See 1	See 1
<p><i>15. An investment firm must establish a code of conduct for members of the board, directors, partners, employees and tied-agents. The code of conduct must contain:</i>  <i>a) The rules and procedure to meet the obligation to protect data of a confidential nature;</i>  <i>b) the rules and procedures for carrying out personal transactions involving financial instruments;</i>  <i>c) the rules and procedures governing the business relationship with customers in order to ensure that the persons referred to above, in particular where a conflict of interest may arise, always act in the best interests of customers, and that such persons do not take advantage of any confidential information;</i>  <i>d) the investment firm's policy on conflicts of interest and inducements.</i></p>		See 1	See 1

**2. INFORMATION TO BE PROVIDED TO CUSTOMERS**

Standard	Implementing authority(ies)	Implementing measure	Comments
<i>16. An investment firm must pay due regard to the information needs of its customers and communicate information to them that is fair, clear, and not misleading.</i>		See 1	See 1
<i>17. If an investment firm provides information in a marketing communications it must be fair, clear and not misleading.</i>		See 1	See 1
<i>18. An investment firm must ensure that a customer is provided promptly with the essential information concerning the execution of his order.</i>		See 1	See 1
<i>19. Where an investment firm has control of, or is holding assets belonging to a customer, it must arrange for proper identification and regular confirmation of such assets to the customer.</i>		See 1	See 1
<i>20. An investment firm that operates customer accounts, which include uncovered open positions, must provide regular statements of such positions.</i>		See 1	See 1

**3. THE “KNOW-YOUR-CUSTOMER STANDARD” AND THE DUTY TO CARE**

Standard	Implementing authority(ies)	Implementing measure	Comments
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<p><i>21. Prior to providing any investment service to a customer for the first time and throughout the business relationship, an investment firm must be in possession of adequate documentation of the identity of the customer, as well as the identity and legal capacity of any representative of the customer. In addition, prior to providing any investment service the investment firm must seek to obtain from the customer information enabling an investment firm a) to determine whether the investment services envisaged are appropriate for the customer and b) to meet any duties owing to the customer in respect of the services to be provided.</i></p>		See 1	See 1
<p><i>22. When an investment firm provides investment advice to the customer, it must have reasonable grounds to believe, in light of the information disclosed to it by the customer and the information available to it, including the information from the customer relationship, that this investment advice is suitable for him.</i></p>		See 1	See 1

#### 4. CUSTOMER AGREEMENTS

Standard	Implementing authority(ies)	Implementing measure	Comments
<p><i>23. Prior to providing any investment service, an investment firm must enter into a signed written agreement with the customer setting out the rights and obligations of the parties.</i></p>		See 1	See 1

#### 5.- DEALING REQUIREMENTS

##### 5.1) RECEPTION AND TRANSMISSION OF CUSTOMER ORDERS

Standard	Implementing authority(ies)	Implementing measure	Comments
<p><i>24. An investment firm must record and process customer orders in accordance with the customer's instructions and in such a way as to facilitate best execution.</i></p>		See 1	See 1

<i>25. An investment firm must ensure that the firm and its members of the board, directors, partners, employees and tied-agents do not use the information they possess on customers orders to the disadvantage of customers' interest.</i>		See 1	See 1
<i>26. An investment firm must record orders immediately, documenting and verifying all relevant items of proper execution.</i>		See 1	See 1
<i>27. An investment firm must keep a record of telephone orders on magnetic tape or an equivalent medium. Investment firms must duly inform the customer that the conversation will be recorded.</i>		See 1	See 1

## 5.2) EXECUTION OF ORDERS

Standard	Implementing authority(ies)	Implementing measure	Comments
<i>28. An investment firm must take all care to obtain the best possible result for the customer with reference to price, costs born by the customer, size, nature of the transactions, time of reception of order, speed and likelihood of execution and trading venue taking into account the state of the relevant market(s). The relevant market(s) shall be deemed to be the market(s) offering the most favourable trading conditions also in terms of transparency, liquidity and clearing and settlement arrangements in connection with the envisaged transaction. If the investment firm executes in another trading venue, it must be able to demonstrate to the customer that this was done in accordance with his best interest.</i>		See 1	See 1
<i>29. An investment firm acting as principal in relation to a customer order must inform the customer accordingly beforehand and must be in a position to justify the price at which the transaction is executed, with reference to the prices and volumes in the relevant market(s), where appropriate, or the presumed value determined on the basis of objective elements, e.g. mark-to-market.</i>		See 1	See 1
<i>30. An investment firm must ensure that orders are executed in accordance with the instructions from the customer.</i>		See 1	See 1

<i>31. An investment firm takes reasonable steps to refrain from executing orders for its own account or the account of its members of the board, directors, partners, employees and tied-agents before those of customers in identical or better conditions than the latter ("front running").</i>		See 1	See 1
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### 5.3) POST- EXECUTION OF ORDERS

Standard	Implementing authority(ies)	Implementing measure	Comments
<i>32. An investment firm must ensure the proper and speedy recording, allocation and distribution of executed transactions.</i>		See 1	See 1
<i>33. Where orders for own and customers accounts have been aggregated, the investment firm must not allocate the related trades in any way that is detrimental to any customer. If such an aggregated order is only partially executed, allocation to customers must take priority over allocation to the investment firm.</i>		See 1	See 1

### 6. INDIVIDUAL DISCRETIONARY PORTFOLIO MANAGEMENT

In addition to the foregoing standards and rules, additional provisions apply to the service of individual portfolio management.

Standard	Implementing authority(ies)	Implementing measure	Comments
<i>34. Prior to the provision of any discretionary portfolio management service, a customer agreement containing the relevant provisions of the basic customer agreement mentioned above, as well as certain additional provisions specific to portfolio management must be signed between the parties.</i>		See 1	See 1
<i>35. An investment firm must take all reasonable steps necessary to ensure the independence of the portfolio management function and mitigate the risk of customers' interests being harmed by any conflict of interest, in particular by providing for the strict separation of functions within the investment firm and its group.</i>		See 1	See 1

<p><i>36. An investment firm must send periodic statements to its portfolio management customers so as to enable them to assess the performance of the service.</i></p>		See 1	See 1
<p><i>37. The investment firm must ensure that its orders are executed as efficiently as possible and in particular that:</i></p> <ul style="list-style-type: none"> <li><i>a) orders issued are immediately recorded by the firm;</i></li> <li><i>b) transactions executed are recorded and the portfolios affected are adjusted as quickly as possible;</i></li> <li><i>c) the portfolios affected and the relevant amounts are determined, or objectively determinable, no later than the time at which the order is issued and cannot be changed, except for the purposes of rectifying an error, after the execution of the order, regardless of whether the order relates to one or more accounts.</i></li> </ul>		See 1	See 1

**C. CORE STANDARDS FOR THE “COUNTERPARTY RELATIONSHIP”**

**1. The “counterparty relationship”**

Standard	Implementing authority(ies)	Implementing measure	Comments
<p>A « counterparty relationship » is typical of trading between investment firms and banks within themselves or with other entities which are not holding themselves out as providers of investment services but are market participants directly active in the financial market for proprietary trading. It is characterised by the absence of a “client relationship” (i.e. without any provision of service). In particular, it covers the following situations:</p> <ul style="list-style-type: none"> <li>- transactions executed in regulated markets or other trading venues (which do not give rise to any provision of investment service to the customer) between any member admitted to trade in these markets;</li> <li>- transactions executed directly (over-the-counter) between investment firms or credit institutions, authorised to provide the service of dealing, and dealing either as principal or as agent;</li> <li>- transactions executed directly (over-the-counter) between investment firms or credit institutions and other authorised or regulated financial intermediaries, including non-ISD firms, such as commodity dealers, insurance companies, but not including collective investment schemes and management companies of such schemes, pension funds and management companies of such funds.</li> </ul>		counterparty regime will be implemented once revised ISD is issued	<p>Currently:</p> <p>Basically, rules of conduct are applicable to professional customers, but the professional nature of the customer can be taken into account</p> <p>See Section 31 par. 2 WpHG (“if so requested”)</p>
<p>CESR Members are free to allow companies to be treated as “counterparties” and to define the appropriate quantitative thresholds. In case of cross-border business, if the company is located in a jurisdiction where the “counterparty regime” is not applicable to companies, the professional regime will apply to that relationship.</p>		See 1	See 1
<p>Transactions entered into by these entities and effected through the offices of an authorised intermediary would be, by default, subject to the « professional regime ». Only those transactions undertaken by these entities for which they are direct “counterparties” and for which a specific choice to enter into a “counterparty relationship” has been made, are liable to operate subject to such a regime.</p>		See 1	See 1

The entities meeting one of the above mentioned criteria and willing to enter into a « counterparty relationship » have to reciprocally confirm in the contract that the transaction is executed under a « counterparty relationship ». This confirmation may be given in master agreements, where applicable to a series of transactions of the same nature.		See 1	See 1
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### 1. The “counterparty regime”

Standard	Implementing authority(ies)	Implementing measure	Comments
<i>The firm must at all times act honestly, fairly and professionally in accordance with the integrity of the market.</i>		See 1	See 1
<i>The firm must have and must employ effectively the resources and procedures that are necessary for the proper performance of its business activities.</i>		See 1	See 1
<i>The firm must establish an independent compliance function, aimed at ensuring that its directors, partners, employees and agents behave in accordance with the integrity of the market.</i>		See 1	See 1
<i>Executive directors/senior management must take reasonable measures to ensure that the firm establishes and implements adequate compliance policies and procedures.</i>		See 1	See 1
<i>The firm must be able to demonstrate that it has not acted in breach of standards of market integrity and that its organisation, policies and procedures facilitate such compliance.</i>		See 1	See 1
<i>The firm must keep records of all transactions executed for a period of five years.</i>		See 1	See 1
<i>The firm must keep record of telephone conversations concerning the transactions executed on a counterparty relationship.</i>		See 1	See 1

<i>The firm must adopt and take all reasonable steps to ensure compliance with an appropriate internal code of conduct.</i>		See 1	See 1
<i>The information provided in a marketing communications must be clear and not misleading.</i>		See 1	See 1

**D. CRITERIA FOR DEFINING PROFESSIONAL INVESTORS**

Professional investors are those who may be deemed to possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks they incur.

**1. Categories of investors who are considered to be professionals**

<b>Standard</b>	<b>Implementing authority(ies)</b>	<b>Implementing measure</b>	<b>Comments</b>
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<p>10. a) Entities which are required to be authorised or regulated to operate in the financial markets.</p> <p>The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a European Directive, entities authorised or regulated by a Member State without reference to a European Directive, and entities authorised or regulated by a non-Member State:</p> <ul style="list-style-type: none"> <li>• Credit institutions</li> <li>• Investment firms</li> <li>• Other authorised or regulated financial institutions</li> <li>• Insurance companies</li> <li>• Collective investment schemes and management companies of such schemes</li> <li>• Pension funds and management companies of such funds</li> </ul> <p>Commodity dealers.</p>		See 1	See 1
<p>b) Large companies <sup>(18)</sup> and other institutional investors:</p> <ul style="list-style-type: none"> <li>• large companies and partnerships meeting two of the following size requirements on a company basis: <ul style="list-style-type: none"> <li>• balance sheet total : EUR 20.000.000,</li> <li>• net turnover : EUR 40.000.000,</li> <li>• own funds: EUR 2.000.000.</li> </ul> </li> <li>• Other institutional investors whose corporate purpose is to invest in financial instruments.</li> </ul>		See 1	See 1
<p>National and regional governments, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.</p>		See 1	See 1

<sup>(18)</sup> Whilst CESR acknowledges that issuers of listed financial instruments, i.e. entities whose securities (equity instruments or other) are traded on a regulated market (within the meaning of article 1.13 of the ISD), should be treated as professional investors, Members are free to implement the categorisation of these issuers in line with the thresholds applicable to large companies and partnerships.

<p>11. The entities mentioned in §10 are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the customer of an investment firm is a company or a partnership referred to in §10, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the firm, the customer is deemed to be professional investor, and will be treated as such unless the firm and the customer agree otherwise. The firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.</p>		See 1	See 1
<p>12. It is the responsibility of the client considered to be a professional investor to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.</p>		See 1	See 1
<p>13. This higher level of protection will be provided when an investor who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime. Such agreement should specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction.</p>		See 1	See 1

**2. Categories of investors who may be treated as professionals on request**

**2.1. Identification criteria**

Standard	Implementing authority(ies)	Implementing measure	Comments
<p>14. The members of CESR consider that investors other than those mentioned in § 10, including public sector bodies <sup>(19)</sup> and private individual investors, may also be allowed to waive some of the protections afforded by the conduct of business rules. Investment firms should therefore be allowed to treat any of the above investors as professionals provided the relevant criteria and procedure mentioned below are fulfilled. These investors should not, however, be presumed to possess market knowledge and experience comparable to that of the categories listed in §10.</p>		See 1	See 1
<p>15. Any such waiver of the protection afforded by the standard conduct of business regime shall be considered valid only if an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved.</p> <p>The fitness test applied to managers and directors of entities licensed under European Directives in the financial field could be regarded as an example of the assessment of expertise and knowledge. In the case of small entities, the person subject to the above assessment should be the person authorised to carry out transactions on behalf of the entity.</p>		See 1	See 1
<p>16. In the course of the above assessment, as a minimum, two of the following criteria should be satisfied:</p> <ul style="list-style-type: none"> <li>• The investor has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;</li> <li>• The size of the investor's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds 0,5 million Euro;</li> </ul> <p>The investor works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.</p>		See 1	See 1

<sup>(19)</sup> It should be noted that public sector bodies are subject to specific regulations that might prevent them from entering into certain types of transactions or opting for the professional conduct of business regime.

2.2. Procedure

Standard	Implementing authority(ies)	Implementing measure	Comments
<p>17. The investors defined above may waive the benefit of the detailed rules of conduct only where the following procedure is followed:</p> <p>a) they must state in writing to the investment firm that they wish to be treated as a professional investor, either generally or in respect of a particular investment service or transaction, or type of transaction or product;</p> <p>b) the investment firm must give them a clear written warning of the protections and investor compensation rights they may lose;</p> <p>c) they must state in writing, in a separate document from the contract, that they are aware of the consequences of losing such protections.</p>		See 1	See 1
<p>18. Before deciding to accept any request for waiver, investment firms must be required to take all reasonable steps to ensure that the client requesting to be treated as a professional investor meets the relevant requirements stated in Section II.1 above.</p> <p>However, if investors have already been categorised as professionals under parameters and procedures similar to those above, it is not intended that their relationships with investment firms should be affected by any new rules adopted pursuant to this paper.</p>		See 1	See 1
<p>19. Firms must implement appropriate written internal policies and procedures to categorise investors.</p> <p>Professional investors are responsible for keeping the firm informed about any change, which could affect their current categorisation. Should the investment firm become aware however that the investor no longer fulfils the initial conditions, which made him eligible for a professional treatment, the investment firm must take appropriate action.</p>		See 1	See 1